

**JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS: A CASE FOR  
DIALOGIC APPROACH IN CRAFTING APPROPRIATE JUDICIAL REMEDIES**

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By:

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God is the almighty foundation of this work!

## **DEDICATION**

This academic piece is dedicated to my mother Anjelina Odago Miyawa, for her hard work and toil over the years to bring me up together with my brothers over the years. This piece vindicates the backbreaking and pain that your life underwent to raise six boys and three girls with a bareness of hand. Today, I marvel in the fruits of your strength. I know I have taken after you in all possible respects and that gives me courage and desire to replicate your achievements in the foreseeable future. Erokamo Nyosumo

## **ABBREVIATIONS AND ACRONYMS**

AG	Attorney General
CC	Constitutional Court
CCC	Constitutional Court of Colombia
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDP	Internally Displaced Persons
KLR	Kenya Law Reports
NGO	Non-governmental Organization
SCR	Supreme Court Reports
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UN	United Nations
CESCR	Committee on Economic Social and Cultural Rights

**LIST OF CONSTITUTIONS AND OTHER STATUTES**

Canadian Charter on Rights and Freedoms, Part I of the Constitution Act, 1985

Constitution of Canada, Constitution Act, 1982

Constitution of Colombia, 1991

Constitution of Federal Republic of Nigeria, 1999

Constitution of India, 1950

Constitution of Kenya, 2010

Constitution of the Republic of South Africa, 1996

National Building Regulations and Standards Act, 103 of 1977.

## INTERNATIONAL INSTRUMENTS

Committee on Economic, Social and Cultural Rights, General Comment 3, *The nature of state parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 at 14 (2003)

International Covenant on Civil and Political Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 23 March 1976

International Covenant on Economic, Social and Cultural Rights, adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966 at New York, came into force on 3 January 1976

Limburg Principles of Implementation of the International Covenant on Economic, Social and Cultural Rights, 8 January 1987 UN Document E/CN.4/1987/17

Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Fifty-eighth session, E/CN.4/2002/57, 12 February 2002

Report of Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/2004/44, dated 15 March 2004

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, adopted by a group of experts at Maastricht, 22 – 26 January 1997

The Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A (III)) (UDHR) art 5

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*Mitu Bell Welfare Society versus the Attorney General & 2 others* High Court Petition Number 164 of 2011

### B. Other jurisdictions

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*Doucet-Boudreau versus A-G (Nova Scotia)* [2003] 3 SCR 3

*Little Sister Book versus Canada* [2000] 2 SCR 1120

*M versus H* [1999] 2 SCR 3

*Mahe versus Alberta* (1990) 68 D.L.R (4th) 69

*R versus Hall* [2002] SCC 64

*R versus Mills* [1999] 3 SCR 668

*Sauve versus Canada (No 2)* [2002] SCR 68;

*Vriend versus Alberta* [1998] 1 SCR 493

#### ii. South Africa

*City of Cape Town versus Rudolph* 2004(5) SA 39(C)

*City of Johannesburg versus Rand Properties (Pty) Ltd & Others* 2006 6 BCLR 728

*Fose versus Minister of Safety of Home Affairs* 2000(3) SA 936(CC)

*Minister of Health and Others versus Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (CC) (S.Afr.).

*S versus Mhlungu* 1995 3 SA 867(CC), 1995 7 BCLR (CC)

*S versus Z and 23 similar cases* 2004 (4) BCLR 419 (E)

*Soobramoney versus Minister of Health, Kwazulu-Natal* 1998(1) SA 765 (CC) at 776.

*Soobramoney versus Minister of Health, Kwazulu-Natal* 1998(1) SA 765 (CC) at 776.

*Treatment Action Campaign versus Minister of Health and Others*, 2002(4) BCLR 356 (A)

**iii. Colombia**

*Tutela Judgment* T-025/04

*Tutela Judgment* T-153/98

*Tutela Judgment* T-760/08

**iv. Uganda**

*Centre for Health Human Rights and Development (CEHURD) and 3 Others versus Attorney General*, Constitutional Petition No. 16 of 2011



## **ABSTRACT**

The thesis offers dialogic approach as an appropriate tool for crafting appropriate judicial remedies for socio-economic rights violations. The central argument in the study is that salient characteristics of socio-economic rights make their enforcement complex and controversial, thus presenting judiciaries with much more practical and conceptual challenges. As cross-jurisdictional inquiry show, these challenges, drawn extensively from separation of powers, have been shown to possess the potential of impeding protection and realization of social justice through the judicial mechanism. It is recognized that some of these rights exert much more affirmative obligation on the state and require resources for their implementation. For this reason, their violations require the courts to dispense distributive justice aimed at remedying social situations of larger sections of society not represented before the court. It is argued that the Constitution of Kenya has vested the courts with much more powers, including but not limited to rights protection and effectuating social justice that article 43 underlies. Since article 43 rights entail some level of executive and legislative action; to wit programmes, policy formulation, resources allocation, budgetary spending, it is contended that a judicial review of these actions must take into account and respect the demarcated roles that other domains of power enjoy in a constitutional democracy. The study thus proceeds from a standpoint that collaborative and partnership engagement between the three arms of government on social policy-based claims is imperative as an intermediate pathway for avoiding the supremacy frictions between the judiciary, parliament and the executive that may characterize their enforcement. Dialogic approach in crafting remedial measures for needs-based claims is strongly advocated for adoption by Kenyan courts. With an underpinning constitutional basis, dialogue is justified as a mechanism for creating additional forum for multi-actors engagement on social welfare matters, strengthened by specialized skills that civil society and advocacy groups may inject in a participatory process sanctioned by court.

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## **CHAPTER ONE: INTRODUCTION**

### **1.1 Background of the Study**

Kenya prides itself today as having joined the ranks of countries with a modern and progressive constitution. The Constitution of Kenya, 2010 (hereinafter the Constitution) has been lauded as ‘progressive’, ‘historic’ and ‘revolutionary’ for the manner in which it has reconfigured the public sphere and laid much pre-eminence ‘on the Bill of Rights as one of the tools and vehicles through which society is to be transformed’<sup>1</sup>. The imprint of human rights is a predominant pillar etched throughout its legalistic text.<sup>2</sup> In the reconfiguration of public sphere, the 2010 Constitution is viewed on the one part, as an embodiment of a raft of constitutional mechanisms, methodologies and framework for a balanced and accountable creation, distribution, regulation and exercise of public power,<sup>3</sup> and on the other, its preoccupation with the individuals and communities<sup>4</sup> is seen in its unique formulation of the entrenched rights and freedoms.<sup>5</sup>

Article 43 entrenches a majority of what is known in constitutional parlance as socioeconomic rights<sup>6</sup>. In broad perspectives, entrenchment of such brand of rights in newly enacted constitutions

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<sup>1</sup> Japheth Biegon and Godfrey Musila, “Introduction: Socio-economic Rights as One Promise of a New Constitutional Era” in Japheth Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, (2012), 3.

<sup>2</sup> Jackton B. Ojwang, *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (Nairobi: Strathmore University Press, 2013),36

<sup>3</sup> Article 1

<sup>4</sup> Article 19(2)

<sup>5</sup> It is provided in Article 21 that “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”; and “the Bill of Rights applies to all law and binds all State organs and all persons”

<sup>6</sup> It provides thus:

43(1) Every person has the right to

- (a) the highest attainable standards of health, which includes the right to healthcare services, including reproductive healthcare.
- (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;

such as Kenya's signifies a marked distinction from the eighteenth century constitutional design, for example, the American Constitution which has deep roots in classical liberal tradition predominantly fixated with conferring and regulation of public authority<sup>7</sup>. Unlike most constitutions before the early twentieth-century which protected civil and political liberties without any emphasis on human social conditions of living<sup>8</sup>, contemporary trend is distinctly variable, with international instruments, and countable constitutions aiming to guarantee and protect social conditions.<sup>9</sup> Therefore, while the orthodoxy and preoccupation of liberalism centered on legitimizing and controlling the spheres of governmental authority, a practice which appears to have been in vogue at the time, on the contrary, constitutionalisation of the concept of welfare rights manifest a rather different conception of the role of government- as that of redistribution of goods and services for the wellbeing of all<sup>10</sup>. The Constitution of Kenya inclines towards this objective of protecting social welfare rights as a factor for advancing social justice.

Several causative factors may be offered to explain the eminence and centrality that socio-economic rights are accorded in any given jurisdictional setup.<sup>11</sup> According to Kristy Maclean, the increase in enlightened discourse of rights at the international platform advocating the need for a secure and

- 
- (d) to clean and safe water in adequate quantities;
  - (e) to social security; and
  - (f) to education.

(2) A person shall not be denied emergency medical treatment

(3) The state shall provide appropriate social security to persons who are unable to support themselves and their dependants.

<sup>7</sup> Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" University of Chicago Law School, John N. Olin Law Working Paper NO. 124, 2D series, (2004 ),2

<sup>8</sup> Kirsty MacLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria: Pretoria University Law Press, 2009), 1.

<sup>9</sup>Ibid.

<sup>10</sup> Roberto Gargella et al, "Courts, Rights and Social Transformation: Concluding Reflections" in Roberto Gargella et al (eds) *Courts and Social Transformation in New Democracies: An institutional Voice for the Poor?* (2006), 255-257

<sup>11</sup> Malcom Langford, "The Justiciability of Social Rights: From Practice to Theory" in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008), 9.

stable supply of social welfare commodities was prompted by diverse contextual social and political exigencies.<sup>12</sup> These are social oriented factors, such as the role of lawyers, concerted human rights advocacy and other social movement efforts in litigating human rights cases, which prompted social change in countries such as South Africa and Latin America.<sup>13</sup> Secondly, positive judicial reaction to these rights was a response to massive governance dysfunction in countries from India, South Africa, and the United States to Colombia which catalyzed revolutionizing jurisprudence.<sup>14</sup> Thirdly, it is explained that the general customary practice of human rights litigation across the globe coupled with a robust judicial review for civil and political rights in most jurisdictions made it easier for the initiation of ‘newer rights’.<sup>15</sup> A fourth element explaining either receptiveness or hostility to socioeconomic rights is the attendant importance and ethical considerations that the society may bestow social rights within human rights discourse.<sup>16</sup>

The formal inclusion of these rights in constitutions of various countries is traced back to the early twentieth century in the constitution of First French Republic, the Mexican Constitution of 1917, Soviet Constitutions and the 1919 constitution of the Weimar Republic in Germany in which these rights appeared as positive rights.<sup>17</sup> These early constitutional models inspired attentiveness of Spain, Chile, Peru, Romania and the then Kingdom of Serb-Croatia which later designed their

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<sup>12</sup>Kristy Maclean (note 8 above)1

<sup>13</sup>Malcom Langford (note 11 above)10

<sup>14</sup> Ibid. It should be noted, as Langford observes at page 9 that this explanation on adjudication of social rights claims is not sufficient in light of divergent judicial pronouncements on the same rights, even though the countries may have similar constitutional texts. Socio-economic rights remain a complex issue- as we are yet to see- and many formidable challenges exist in all states.

<sup>15</sup> Ibid. pp. 10

<sup>16</sup> Ibid. pp. 10-11

<sup>17</sup> Japheth Biegon, quoting from J Moreno “ The International Covenant on Economic, Social and Cultural Rights” in F Gomez & K de Feyler (eds) *International Protection of Human Rights: Achievements and Challenges* (2006) 154, 156 appearing in Japheth Biegon, “The inclusion of Socio-Economic Rights in the 2010 Constitution: Conceptual and Practical Issues” in Japheth Biegon and Godfrey Musila (eds): *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, Vol. 10, (2011),26.



constitutions drawing from these influences.<sup>18</sup> It is however the post-World War II human rights experiences and the ideological warfare of the Cold War that became a significant determinant of the future trajectory and architecture of human rights in various constitutional and other legal instruments. As will be seen later in this thesis, the adoption of Universal Declaration of Human Rights<sup>19</sup> as a comprehensive compendium of human rights and its consequential division into civil and political rights and socio-economic rights as two different classifications of rights was emulated in Western European constitutions, a number of Latin American constitutions and many post-colonial constitutions.<sup>20</sup>

Biegon notes that after the end of Cold War, entrenchment of these rights in national constitutions has been embraced as a worthy project, whereby their inclusion has taken three clear-cut formats: as justiciable rights, as non-justiciable directive principles of state policy, and both as directive principles of state policy and as justiciable rights embedded in the constitution.<sup>21</sup> Kenya's is a brand of justiciable socio-economic rights amenable to judicial enforcement in which appropriate remedies can be fashioned to relieve breaches.

The Constitution of Kenya, 2010 guarantees to individuals, at state expense, access to and provision of a whole gamut of social goods relating to healthcare, housing, food, water, social security and education.<sup>22</sup> The entrenchment of these social welfare initiatives as state obligation<sup>23</sup> and as rights of individuals presupposes a constitutional aspiration to address the vulnerabilities and inequality

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<sup>18</sup> Ibid.

<sup>19</sup> Universal Declaration of Human Rights G.A Res. 217A, at 71, UN GAOR, 3d Sess., 1<sup>st</sup> Plen. Mtng., UN Doc A/810(Dec 10, 1948) (hereinafter UDHR)

<sup>20</sup> Langford( note 11 above) 7

<sup>21</sup> Biegon (note 17 above) 26.

<sup>22</sup> See note 6 above.

<sup>23</sup> See Article 21 of the Constitution.

of individuals and groups, perpetuated over time by patterns of social and political exclusion.<sup>24</sup> Biegon observes that the report to Constitution of Kenya Review Commission<sup>25</sup> demonstrated the historical vulnerability, poverty and social injustices endured by Kenyans over time and, which informed and necessitated broad-based constitutional mechanisms of redress. The state would therefore, in fulfilling this prescribed constitutional duty, be expected to come up with programmes, measures and initiatives, whether policy or legislative, which by their very nature bring about resource allocation and expenditures to fulfil the needs of vulnerable groups and communities.

In sum, an objective analysis holds that the 2010 Constitution solemnized the essential vision of redressing social inequality, eradicating marginalization and instituting egalitarian ethos among the Kenyan social strata through constitutional imperatives imposing on the state an obligation to observe, protect, promote and fulfil socio-economic rights<sup>26</sup>; and instilling enforcement, in instances of breach, through judicial mechanisms.<sup>27</sup> The state's obligation and judicial remedies are explained in detail in the succeeding sections.

This constitutionally transformative role envisaged for the Kenyan courts in reviewing<sup>28</sup> resource allocation and scrutinizing social programmes of state is a cause for this academic research on

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<sup>24</sup> Biegon (note 17 above) 34

<sup>25</sup> The Constitution of Kenya Review Commission was a body constituted in to review the 1969 constitution that had undergone numerous amendments.

<sup>26</sup> See article 21 which provides that it is an obligation of the state to ensure the realization of these rights, by taking legislative and other measures.

<sup>27</sup> Articles 23 (1) and (3) and 165 of the Constitution.

<sup>28</sup> For purposes of this study, the term 'review' or 'judicial review' as used in socio-economic rights jurisprudence and literature refers to the general process of constitutional adjudication, interpretation and remedying of constitutional defects of social policy by the courts as understood by academic articles of *inter alia* M. Langford, C. Mbzira, Kent Roach, C. Bateup, G. Musila, M. Tushnet, R. Dixon cited variously throughout this text. Throughout this text therefore, judicial review is conceptually different from its regular meaning as a procedural mechanism by which courts redress ultra vires administrative actions of public bodies and render the conventional orders of certiorari, mandamus or prohibition.

probable judicial responses and reaction with which these newfound roles will be received and handled.

## 1.2 Statement of the Problem

Kenya has joined its African counterpart South Africa with an assortment of justiciable socio-economic rights. Justiciability of these rights is not without constitutional underpinning. Under article 165 of the Constitution of Kenya, the High Court is vested with first and original authority to determine whether any of the rights or fundamental freedoms in the Bill of Rights, socio-economic rights being an integral component thereof, has been denied, violated, infringed or threatened. Given that **some** socio-economic claims such as the provision of affordable healthcare or construction of low-cost housing for the poor requires budgetary allocation, resource spending and execution of some form of programmatic actions by the government, the courts' determination of questions of non-conformity to human rights standards of such policies would imply that they would have to flex their authority in assessing executive and legislative decisions on resource distribution and policy choices (the polycentric nature of socio-economic claims).<sup>29</sup> In this sense, Kenyan courts are being invited to intervene in resource-based policy matters whereby court decisions would impel positive action, enforce or review some measure of spending on the state, a role considered to be significantly 'inconsistent with a generally-accepted understanding of judicial review'.<sup>30</sup> It is this broad scope of constitutional adjudication over resource allocation and distribution which spur fears that the constitutional re-ordering has thrust the Kenyan judiciary into new adjudicatory territory hitherto unknown to our legal system. The challenges are long-drawn. One can point to several grounds on which this apprehension is premised.

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<sup>29</sup> See Lon Fuller, "The Forms and Limits of Adjudication" 92 *Harvard Law Review* (1978), 353 arguing that socio-economic rights are inappropriate for judicial enforcement due to their polycentric nature.

<sup>30</sup> Eric C. Christiansen, "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson From South Africa" 13 *UCLA J. INT'L L & FOR. AFF* (2008), 404

In his seminal article, Biegon concedes that indeed there are ‘a web of difficult doctrinal and practical issues’ around the notion of justiciability which no doubt the Kenyan judiciary is poised to confront.<sup>31</sup> These include such ‘contrived questions as to the proper role of courts in enforcing such rights’, ‘how that role can be performed without upsetting the notions of separation of powers’, concerns of the ‘precise normative character of the rights enshrined in article 43 of the Constitution’ and what appropriate judicial remedies may relieve violation of socio-economic rights enshrined therein.<sup>32</sup>

This study, however, narrows its focus only to the question of judicial enforcement of socio-economic rights by specifically looking at how effectively the courts can fashion appropriate remedies to redress such claims. The study observes that our courts would have to grapple with doctrinal and practical complexities and nuances surrounding socio-economic rights adjudication as has been in other jurisdictions. This is because there are complex issues entailed in these novel rights, coupled with the challenges that confront courts, in particular the question of separation of powers, spawned by the fact that some of these rights implicate social policy and budgetary issues that ordinarily fall to the province of the executive and legislature, thus raising concerns as to how courts’ remedial exercises should be tailored to respect the autonomy of these two branches while advancing the values of social justice that the Constitution commits to.

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<sup>31</sup> Biegon (note 17 above )26

<sup>32</sup> Ibid.

Godfrey Musila observes that Kenya is now a constitutional democracy which has vested in the judiciary a ‘much more preeminent role’ and an ‘unenviable’ task of ensuring that other political branches commit to and stay within their constitutional remit.<sup>33</sup> In his view, this exposes and thrusts the judiciary on a confrontational pathway with the executive and parliament.<sup>34</sup> In particular, socio-economic rights issues being matters with resource implications, according to Musila, ‘when adjudicated by judges in a constitutional context of separation of powers may imply that judges are making policy choices’ thus stoking controversies regarding the stretching contours of judicial authority in adjudication.<sup>35</sup> A supporting view, based on the South African context is found in the work of Kent Roach and Geoff Budlender. They recognize that court sanctioned reliefs that obliges the government to initiate certain positive measures are complex remedial issues that ignite fractious power dynamics in a democracy.<sup>36</sup>

In the view of some scholars, judicial enforcement of such rights are unwelcome and fraught with practical difficulties owing to ‘democratic legitimacy’ reservations and ‘judicial competence’ issues, all which reflect the doctrinal aspect of separation of powers.<sup>37</sup> In the context of socio-economic claims enforcement, democratic legitimacy concerns ask how the judiciary, an unelected and unaccountable appendage of the government can alter formulated policy aims of popularly elected governments. Judicial competence concerns questions the practicability of courts as

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<sup>33</sup> Godfrey Musila, “Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution” in Japheth Biegon and Godfrey Musila (eds): *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and opportunities for Kenya*, Vol. 10 (2011), 66.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Kent Roach and Geoff Budlender, “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable” 5 *South African Law Journal* (2005), 326

<sup>37</sup> Henry J. Steiner et al, *International Human Rights in Context: Law, Politics, Morals* (2008, 3<sup>rd</sup> ed.), 263-358

appropriate arena for ventilating and resolving grievances of victims of social welfare policy failings.

Kent Roach, a Canadian scholar has propounded this theme with convincing clarity in his assertion that a dominant cause of hostility towards these rights is the inherent difficulty of finding suitable remedies.<sup>38</sup> According to his postulation, civil and political rights and private law matters make use of conventional remedies such as injunctions or declarations that are not best suited for socio-economic rights litigation.<sup>39</sup> Challenges in this regard, he posits, are rooted in and may be explained by three rigidities inherent in what he calls ‘the received remedial tradition’.<sup>40</sup>

Roach’s basic insights conceive of the nature of socio-economic rights as necessitating more complex remedies that entail positive governmental action as opposed to civil and political rights enforced by ‘backward looking compensatory remedies’.<sup>41</sup> In a second sense, there are also difficult strains between achieving corrective justice for the individual before the court as opposed to distributive justice for larger groups not before the court. A third tension relates to the problematic dynamics of fashioning corrective remedies to instantly relive grievances of victims, in the first part, and on the second, an initiation by the court of a protracted and uncertain remedial process that instigate reforms of governmental beauracracic systems.<sup>42</sup>

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<sup>38</sup> Kent Roach, “The Challenges of Crafting Remedies for Violation of Socio-Economic Rights” in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008), 46.

<sup>39</sup> *ibid*

<sup>40</sup> *ibid*

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

The problem of study is stated thus: In the judicial enforcement of socio-economic rights with positive obligations in Kenya, crafting appropriate remedies to redress violations or breaches would require new approaches so as to realize the goals and values that the Constitution of Kenya, 2010 explicitly contemplates. Aided by comparative examples, this study shows that dialogic approach to adjudication is an appropriate and tested technique for crafting suitable remedies.

### **1.3 Justification of the Study**

A review of recent High Court decisions reveals the attempts Kenyan courts are making in grasping the normative character of these novel rights. It is instructive to note that there are a number of socio-economic rights cases that have been decided prior and after the promulgation of the new Constitution. In a majority of these cases, the remedies that the courts have granted are the usual traditional remedies of injunctions, declarations or compensation redressing only the grievances of the claimants who sought judicial recourse. These recent judicial trends have tended to sidestep the broader conceptual boundaries and nuances within which social rights-based claims ought to be adjudicated and enforced.<sup>43</sup> The need for a broad-based perspective is made necessary by three isolated factors, which, though, may not be exclusive to socio-economic rights but prominently impact on their implementation. These factors includes the nature of peculiar obligations some of these rights impose on the state (positive obligations),<sup>44</sup> even though it is now agreed that all rights

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<sup>43</sup> Japheth Biegon (note 17 above), 32

<sup>44</sup> For a distinction between positive and negative obligations imposed by socio-economic and civil and political rights respectively see Cass R. Sunstein (note 7 above),1, Kristy McLean (note 8 above )97; Craig Scott and Patrick Macklem (infra), 45-52. The difference, in so far as the panoply of these arguments is concerned is that civil and political rights are said to be negative (states are expected to restrain from violation of these rights), while socio-economic rights are positive (the state is required to undertake some affirmative measures for their realization). Response to these assumptions have also been offered by the same authors, suggesting that such a conceptual distinction may not be so finely tuned to represent the state of all rights.

impose both positive and negative duties;<sup>45</sup> the kind of justice that their enforcement seeks to perpetuate (distributive justice)<sup>46</sup> and the modes of remedies suitable for their redress (structural remedies).<sup>47</sup> A clarification that ought to be made is that since all rights benefit the individual, socio-economic rights are by no means a special category of rights, much as they are new rights in our legal regime, their enforcement, it is conceded, would require more far-reaching affirmative state action as compared with civil and political rights,<sup>48</sup> therefore the duty to *fulfill* is entailed to a greater degree.<sup>49</sup> Conceivably, this is what informs the difficulty of their enforcement when compared to civil and political rights.

Ordinarily, the poverty, social vulnerability or abject conditions of life that persons, groups and communities may endure more often than not result either from total neglect or systemic dysfunction of governmental policy and programmes. A court of justice called upon to vindicate the rights of victims of poor, neglectful or discriminatory government policies ought to approach the adjudication of those particular claims with broad-mindedness and enlightened view of the purpose and effectiveness of the remedies for the immediate as well as possible future breaches<sup>50</sup>. The court's mindset also ought to perceive the singularity of the claim before it merely as a tip of the iceberg, a symptomatic representation of the adverse effects of massive welfare policy failure

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<sup>45</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980), 51-60.

<sup>46</sup> Christopher Mbazira, *Litigating Socio-economic rights in South Africa: A choice Between Corrective and Distributive Justice*, (Pretoria: Pretoria University Law Press, 2009), 103-121. See also Biegon (note 17 above), 49-50

<sup>47</sup> See Kent Roach (note 38 above), 49. Structural remedies are court reliefs aimed at eliminating government's beauracritic and organizational dysfunction that cause violations of rights. Its feature is that courts retain the role of overseeing performance and fulfilment of its order. It is not an instantaneous remedy but an iterative approach in engaging with the parties. See Mbazira, *ibid.* at p. 176.

<sup>48</sup> Pierre De Vos 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution' *South African Journal on Human Rights* (1997)71.

<sup>49</sup> Henry Shue (note 45 above).

<sup>50</sup> Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution*, (Juta, Claremont, 2010), 129.



on sections of the society, which if left unchecked would still generate other like claims.<sup>51</sup> This is the notion of distributive justice concomitantly aligned with structural remedies suitable for socio-economic rights that Kenyan courts may not be accustomed to due to their recent entrenchment. A predisposition on the part of the judges to these twin notions of distributive justice and structural reliefs is conspicuously lacking in all but one decided socio-economic case in Kenya.

*Mitu Bell Welfare Society versus the Attorney General & 2 others*<sup>52</sup> is a groundbreaking case in which the remedial powers of the court appear to have been exercised with creativity and innovation, perhaps informed by the rigidities inherent in the received remedial tradition now in use by the Kenyan courts. The case involved eviction of residents and demolition of houses informally built on a private piece of land. Justice Mumbi Ngugi authoritatively declared that the state was aware, or should have been aware well before the promulgation of the Constitution, of its obligation, as now enunciated in Article 21 and 43, to observe, respect, protect, promote and fulfil the social and economic rights of citizens. The judge made an order requiring the respondents, the Attorney General of the Government of Kenya being one of them, to report back to court within 60 days to apprise the court of state policies and programmes on provision of shelter and access to housing for the marginalized groups such as residents of informal and slum settlements and required other groups, including civil society and other stakeholders to be involved in the deliberations of resolving the dispute in the matter. In this matter, the court is seen as having instigated some formalized collaborative engagement; a sense of dialogue between government, affected groups and civil society in which the court allows the parties to suggest suitable remedies to redress perceived structural infirmities of a government policy on housing and eviction. It appears the judge

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<sup>51</sup> See generally Kent Roach (note 38 above), 46-58.

<sup>52</sup> High Court Petition Number 164 of 2011

was aware that resolution of the central issue before the court would implicate and necessitate reforms of government beauracratc systems, thus simple injunctive reliefs, however conceptualised, would prove unreliable. It also seems likely the judge was cognizant that the matter had greater implications not only for the claimants before her but also for ‘the marginalized groups such as residents of informal and slum settlements who are victims of frequent evictions but are not parties to the suit in court’. Thus in ordering the parties to ‘report back to court’ after sixty days to apprise court of the outcome of collaborative deliberations, the judge’s targeted approach was towards the collectivity of the groups and communities outside the purview of the claim before the court, and that the penultimate outcome would rectify deficiencies of the housing policy to accord with constitutional standards in the interest of wider sections of the society. A perusal of the court file revealed that the Attorney General, due to logistical challenges had not filed the documents as ordered and the matter was to be mentioned on a further date to ascertain compliance.

The decision in *Mathew Okwanda versus Minister of Health and Medical Services & 3 others*<sup>53</sup> represents a severe drawback as to how human rights claims generally, and social rights in particular ought to be examined in the new constitutional dispensation. Coming after the *Mitu Bell* decision, the presiding judge Justice David Majanja narrowed his determination on a litigation technicality rather than a purposive approach required in human rights claims. In that case, the petitioner was a 68 year old suffering from a life threatening terminal disease, benign hypertrophy, which calls for special medical attention. In need of urgent medical attention, the petitioner moved court to enforce his fundamental rights and freedoms under article 43 of the Constitution. The court made reference to substantive provisions of international legal instruments on the right to health. In dismissing the

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<sup>53</sup> (2013)eKLR

claim and granting no relief to the petitioner, the court appreciated the obligation to observe, respect, protect, promote and fulfil imposed by article 21 of the Constitution and relied on the case of *Soobramoney versus Minister of Health (Kwazulu Natal)*<sup>54</sup> to find that the state had not failed in its constitutional obligation in regard to provision of health services since there were measures in place deployed by the government for access to medical services.

In what may be seen as a casual approach, the court abdicated its constitutionally assigned mandate by failing to address core issues relating to socio-economic rights on grounds that they were not canvassed at the trial. The court ought to have interrogated the ‘minimum core obligation’ of the government as regards provision of health or the ‘reasonableness’ of the measures taken by the government for ‘progressive realization’ of the duty for the highest attainable standards of health.<sup>55</sup> The court demonstrated a misapprehension, if not a complete lack of understanding of article 20 (5) of the Constitution which requires the court to assess the state’s allocation of resources and provides three key pillars on which such assessment is predicated.

An earlier case of *John Kabui Mwai and 3 others versus Kenya National Examinations Council & Others* in which the unsettling dilemma of overreach of judicial function was encapsulated in the words of the court thus:-

**“Socio-economic rights are by their nature ideologically loaded. The realization of these rights involves the making of ideological challenges which, among others, impact**

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<sup>54</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998(1) SA 765 (CC) at 776.

<sup>55</sup> The minimum core and the reasonableness are twin standards that municipal and regional judicial bodies have engaged with to test compliance with state obligations towards socio-economic rights. In South Africa the Constitutional Court has preferred the reasonableness approach as a tool to gauge the state’s compliance with socio-economic obligations. Most regional bodies have preferred the minimum core approach.

**on the nature of the country's economic systems. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.**"<sup>56</sup>

In *Charo wa Yaa versus Jama Abdi Noor & 4 others*<sup>57</sup> a case challenging the eviction of squatters from private land, the High Court ruled that the right to housing 'is not a final product for direct dispensation, but is an inspirational right'.<sup>58</sup> This case is a demonstration of the hazy grasp, on the part of some judicial officers, of the normative character of these rights as well as the place of the judiciary in their enforcement. The case depicts a confounding lack of grounding and basic insights on social rights jurisprudence.

However, after the promulgation of the 2010 Constitution, emerging jurisprudence from the High Court shows the early steps the judiciary has made in grappling with these new rights. This study on the contrary notes that a majority of the decisions have dealt majorly with socio-economic rights with negative implications, whereby courts orders have been used to restrain continuous or intended breach of particular rights. *Mitu Bell* has appreciated the positive dimensions of article 43 claims which require that courts view these rights through the glass prism of distributive justice as opposed to corrective justice. Few months later, the High Court in *Satrose Ayuma & Others versus The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others*<sup>59</sup> adopted

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<sup>56</sup> Petition No. 15 of 2011 (2011) eKLR.

<sup>57</sup> High Court of Kenya at Mombasa, Miscellaneous Civil Appeal No. 8 of 2011 (unreported)

<sup>58</sup> Ibid.

<sup>59</sup> Nairobi, High Court Petition No. 65 of 2010 eKLR.

the *Mitu Bell's* model of crafting remedies.<sup>60</sup> This was a case brought by staff of Kenya Railways Corporation challenging their intended eviction from the tenanted premises in Muthurwa Estate, Nairobi. The petition was filed by ten petitioners representing beneficiaries of a retirement benefit scheme of Kenya Railways Corporation and on behalf of three hundred and sixty nine other tenants and occupiers of the suit premises *inter alia*. The occupied premises belonged to the Kenya Railways Corporation which managed other social amenities enjoyed by residents living on the premises. Sometime in 2010, Kenya Railway Corporation put up adverts in the newspapers giving intention of setting up of new investment opportunities on the land such as shopping malls, offices, high class apartments. Consequently the Kenya Railway Corporation disconnected water, sewerage services, demolished the fences and gave notice of imminent demolitions to the petitioners. The petitioners moved the High Court and obtained orders restraining the Respondents from demolishing any of their houses or evicting or terminating their leases or tenancies. The matter was later heard to conclusion by Justice Lenaola who in a judgment dated 30<sup>th</sup> August 2013 concluded that the manner of evictions of the Petitioners from the residential premises violated their right to accessible and adequate housing, sanitation and the right to human dignity.<sup>61</sup> In crafting appropriate remedies to relieve the breaches, the judge directed the Attorney General to file in court within ninety days an affidavit giving details of existing or planned state policies and legal framework on forced evictions and demolitions. The judge also directed the Attorney General to file another affidavit within ninety days from the date of judgment appraising the court of the measures the government had put in place towards its duty to provide housing.<sup>62</sup> Furthermore, the judge ordered

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<sup>60</sup> See para. 111

<sup>61</sup> See para. 107 & 111

<sup>62</sup> Ibid para. 111

the parties, within twenty one days, to convene a meeting to discuss and design a programme of eviction of petitioners that takes into account certain prescribed guidelines.<sup>63</sup>

These highlighted case-law serve as a synopsis, dependably depicting the judiciary's embryonic grapple with socio-economic rights contests in the period after promulgation of the new Constitution. The works of Musila<sup>64</sup>, Biegon<sup>65</sup> and Kaguongo<sup>66</sup> and other relevant scholarly literature do support the view that enforcement of socio-economic rights in Kenya will be riddled with complex practical problems not explicitly envisaged in the Constitution. The crux of argumentation advanced is that socio-economic rights are new rights in our legal regime, imposing both positive and negative obligations, some are resource dependent and with budgetary implications, and therefore fundamentally different in enforcement from the now familiar civil and political rights which Kenyan courts are accustomed to. For this novelty, as scholars point out and as decisions of foreign courts now show, their adjudication ought to be approached differently for the reason that courts would be making orders that reorganizes governmental programmes on provision of welfare goods, thus igniting misgivings rooted in separation of powers objections. When, therefore judicial remedial powers of the Kenyan courts is a subject of discussion as is in this study, the foregoing concerns of competence illuminates the debate, providing guidelines along which recommendations can be proffered.

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<sup>63</sup> The guidelines on evictions are highlighted in paragraph 83 of the judgment.

<sup>64</sup> See note 33

<sup>65</sup> See generally Biegon (note 17 above)

<sup>66</sup> Waruguru Kaguongo, 'Reflections on the Complexities in Adjudicating Socio-economic Rights from the Perspective of Resource Allocation and Budgetary Issues' in *Japheth Biegon and Godfrey Musila(eds): Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, Vol. 10(2011),89-104

This study aims to dissect the challenges posed by and immanent in judicial enforcement of social rights claims in Kenya. By drawing from scholarship and precedents of other jurisdictions, it thus seeks to advance for adoption by Kenyan judiciary *dialogue* as an approach to neutralizing challenges to fashioning useful remedies for socio-economic rights. In an empirical study of the patterns of approaches by courts in developing world to socio-economic rights adjudication, conducted by Daniel Brinks and Varun Gauri, the authors conclude that courts are by far efficacious ‘when they act in dialogue with political, bureaucratic, and civil society actors’.<sup>67</sup>

This study explains that dialogic approach in formulating remedial measures is the best tool for confronting the problematic dynamics of separation of powers highlighted above. *Dialogue* as conceived under this study differs from its literal meaning. It is a technical term that connotes a process by which a court of law, in structural suits, entertains an exchange and discussion between litigants on how best to redress a human rights inconsistency of state policy or action.<sup>68</sup> Dialogic remedies presupposes that in the process of formulating best possible ways to secure compliance with court orders, courts must actively involve other authorities in remedy selection, in a setting that favours debate, exchange and negotiation that occurs at different stages.<sup>69</sup> The court first finds that there is a constitutional default on the part of government for provision of social rights. It then allows the government to suggest and to implement the remedies within a particular period, under court’s supervision, affording it the flexibility to select a variety of sound options to comply with the orders.

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<sup>67</sup> See Daniel M. Brinks and Varun Gauri, “A New Policy Landscape: Legalising Social and Economic Rights in the Developing World” in Gauri, Varun and Brinks Daniel (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge: Cambridge University Press, 2008), 306.

<sup>68</sup> Kent Roach, ‘Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience’ 40 *Texas International Law Journal* (2005)539-540.

<sup>69</sup> Daniel Brinks (note 67 above)322

The study takes the position that dialogic judicial review has a constitutional underpinning in the juridical formulation of article 20(5) of the Constitution, and two, dialogic remedies are implicitly anchored on the concept of ‘appropriate reliefs’ premised on article 23(3). As a pragmatic embrace of dialogic judicial review in socio-economic rights cases, Article 20(5) practically recognizes that crafting appropriate reliefs to redress socio-economic claims must involve a deference to and an incorporation of input of other political branches vested with positive policy actions.

#### **1.4 Objectives of the Study**

The study is guided by the following objectives:-

- i. To assess the existing scholarly literature on socio-economic rights enforcement as background information upon which to draw lessons and provide a compass for the new Kenyan legal order in light of its most re-enacted social welfare goals.
- ii. To ascertain how best the Kenyan judiciary, in the exercise of its constitutional mandate of rights protection can navigate through or obviate the practical complexities and challenges clouding the judicial enforcement of socio-economic rights.
- iii. To ascertain whether there are most effective and appropriate remedial measures open for adoption by the Kenyan courts in the enforcement of socio-economic rights in light of the potential limits of legitimacy and competence.
- iv. To propose and recommend dialogue as an intermediate approach to the judicial enforcement of socio-economic rights and as a preferable model to counter and neutralize specific obstacles in the political process.



### 1.5 Research Questions

- i. Given the nature of socio-economic rights, what practical and conceptual difficulties exist for their judicial enforcement in Kenya?
- ii. Does the Constitution of Kenya, 2010 recognize these challenges and in what manner does it contemplate to tackle and address them?
- iii. Given the redistributive nature of adjudicatory claims of socio-economic rights, how much stronger can the court's approach be taking into account the potential limits on judicial competence and legitimacy?
- iv. Is a commitment to a *dialogic approach* the most desirable model and a means to avoiding the potential limits and challenges on the judicial remedial powers regarding distribution of social goods in Kenya's constitutional democracy?
- v. What is the role of *dialogue* as a means to avoiding potential limits on judicial remedial powers and what challenges can be envisaged under the Constitution with regard to socio-economic rights access and enforcement mechanisms?

### 1.6 Research Hypotheses

The study is guided by the following assumptions:-

- a. Socio-economic rights claims present complex adjudicatory problems and practical limitations to courts in the context of separation of powers.
- b. In socio-economic rights claims remedies crafted out of dialogic relationships between courts and other arms of the government bear the promise of appropriately neutralizing all the intrinsic challenges.

## 1.7 Theoretical Framework

Many theories have been propounded concerning rights-based judicial review. These theories are concerned with the rationale, scope and determinative competencies of adjudicative judicial organs in human rights adjudication; and are geared to address specific concerns of democratic deficit and institutional capacities of courts reviewing socio-economic rights in a given context. Depending on the perspective and philosophical orientation of an individual, the advanced theories either supports the view of rights based review or refutes any justification for doing so based on value judgments. *Majoritarianism*<sup>70</sup> challenges principled judicial review of executive decisions on concerns of democracy, while the theory of *judicial restraint*; urging resort to cautiousness and limitation of judges' powers in their interpretive roles in sharp contrast to *judicial activism* as an interpretation and adjudication mode that allows judges to temper their personal views about public policy, among other factors, to guide their decisions in breaking away with the notions of *stare decisis* and precedent.<sup>71</sup>

This study however adopts *transformative constitutionalism* as the most appropriate theory that informs debate regarding enforcement of socio-economic rights in Kenya. Transformative constitutionalism as a technique of adjudication, according to Karl Klare, accords judges some sort of law-making authority.<sup>72</sup> He defines transformative constitutionalism as “a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political

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<sup>70</sup> See generally Alexander M. Bickel, *The Least Dangerous Branch, The Supreme Court at the Bar of Politics*, 2<sup>nd</sup> ed (New Haven: Yale University Press, 1986), 16-23, 235.

<sup>71</sup> See Canon, *A Framework for the Analysis off Judicial Activism*, in *Supreme Court Activism and Restraint* (S. Halpern & C. Lamb ed. 1982).

<sup>72</sup> Karl Klare ‘ Legal Culture and Transformative Constitutionalism’ *14 South African Journal of Human Rights* (1998), 146-188

and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”<sup>73</sup> Writing in the context of South Africa’s new constitutional order in 1998, which he christened as “postliberal” Constitution, Karl Klare conceives of transformative constitutionalism as an adjudicatory method that bears the potential for comprehensive egalitarian social reforms.<sup>74</sup> A commitment to transformative constitutionalism, in his view, would ‘induce highly egalitarian, caring, multicultural community, in a democratic environment, through processes predicated on law’.<sup>75</sup> Klare counsels that this endeavor calls for two things. One, a post-‘liberal reading of the Constitution’ with a prerequisite rethink of the character and place of lawyers, and secondly, an extensive transformation of our mindsets regarding interpretive exercises.

A post-liberal comprehension of the constitution, according to Klare finds a justification and different meaning from a liberal understanding of the US Constitution owing to ‘its social, redistributive, caring, positive, horizontal, participatory, multicultural and self-consciousness about its historical setting, transformative role and mission’.<sup>76</sup>

The South African constitution is an instrument sensitive and committed to social transformation and reconstruction.<sup>77</sup> In many ways, the constitutional architecture of, and ideals imbued in socio-economic rights of Kenya mirror the South African model, dubbed a transformative constitution; for the reason that its primary concern is to stimulate ‘a fundamental change in unjust, economic and social relations in South Africa’.<sup>78</sup>

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<sup>73</sup> Ibid. pp. 150

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> p., 153

<sup>77</sup> See Sandra Liebenberg, ‘Needs, Rights and Transformation: Adjudicating Social Rights’, 17 Stellenbosch Law Review 5 (2006), 3.

<sup>78</sup> Ibid,

The theory of *transformative constitutionalism* has assumed prominent traction in that county's social rights jurisprudence with courts as the leading agents deepening transformative ideals and potentials of socio-economic rights under the constitution.<sup>79</sup> Basically, the notion of transformative constitutionalism requires and advocates new conceptions, mindsets and methodologies in the judicial roles to promote a culture of democracy, the rule of law and social transformation. The study takes a clear position that the mechanism of dialogue is an essential element of, and a tool for validating transformative ideals that the Constitution embodies. Therefore the authoritative call by scholars for new conceptions and deeper introspection about law and its dynamics consistent with the constitution's transformative agenda<sup>80</sup> makes dialogic approach to judicial review a better fit to adjudicative processes where courts are agents of transformation in the new Kenyan society.

### **1.8 Literature Review**

There are a number of scholarly works on socio-economic rights, majority of which tend to focus on "justiciability" as a prominent jurisprudential aspect undergirding these rights; demonstrating that socio-economic rights claims can be redressed by the judicial branch of government. In this regard, scholars have brought to the fore cross-jurisdictional precedents and emerging trends in the treatment of these rights. These writings have edified our understanding of the concept of socio-economic rights, the demarcation of the roles in the adjudication and modes of enforcement devised by courts. Particularly lacking is a more focused and targeted scholarly address on the question of

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<sup>79</sup> Ibid. See also Linda Stewart, *infra*.

<sup>80</sup> (Karl Klare, note 72 above) 156

how courts can fashion practical and best suited judicial remedies for socio-economic rights claims. This is the core of this study.

The work of Scott and Macklem<sup>81</sup> fondly referred to as “Ropes of Sand”, in great detail addresses the historical evolution and development of international human rights of which socio-economic is part. In this seminal article dedicated to the debate that preceded the negotiation for the post-apartheid South African constitution, the authors emphasizes the importance of including social rights in the South African constitution making a concrete case against the legitimacy concerns of judicial review of socio-economic rights and further discrediting misgivings of institutional capacity of the judiciary to adjudicate these rights. By using a comparative study of India and jurisprudence of international human rights instruments, this earlier work concludes by demonstrating the judiciary’s ability to safeguard social rights interests and recommends model institutional designs for achieving the constitutional aspiration of social justice.

On the question of justiciability of socio-economic rights, Cass R. Sunstein began the polarizing and charged debate for the non-inclusion of positive rights in post-communist Eastern European states terming them as “chaotic catalogue of abstractions”, and “a large mistake, possibly a disaster”. His challenge conceives of these rights as absurd, with a potential to destabilize the smooth ebb and flow of market forces and undermining the classical liberal objective of civil and political rights protection.<sup>82</sup> But Sunstein’s doubts appear in no isolation. Ellen Wiles’s *Aspirational*

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<sup>81</sup> Craig Scott & Patrick Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees?’ 141 *University of Pennsylvania Law Review* (1992) 1-148.

<sup>82</sup> Cass R. Sunstein, ‘Against Positive Rights: Why Social and economic rights don’t belong in the new constitutions of post-communist Europe’, as reproduced in Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press, 2006) 1739.

*Principles or Enforceable rights? The future for socio-economic Rights in National Law*<sup>83</sup> is an exposition articulating the conceptual and practical barriers that apparently dog enforceability of socio-economic rights. Simultaneously, Wiles identifies and proposes general practical ways of overcoming these challenges but does not mention dialogue. Michael Langford, Aoife Nolan and Bruce Porter summarizes “conceptual” and “experiential” perspectives on the concept of justiciability, exposing categorization, legitimacy and capacity as concerns regarding social rights adjudication.<sup>84</sup> This appraisal reviews several contextual experiences that debunks the concerns about the justiciability of socio-economic rights as unfounded.<sup>85</sup> Sandra Liebenberg’s<sup>86</sup> reflections on the South African judicial experiences in enforcing socio-economic rights; S. Muralidhar’s<sup>87</sup> exposition of India’s innovative judicialism; Magdalene Sepulveda<sup>88</sup> highlights the significant jurisprudence generated by Colombia’s Constitutional Court in socio-economic rights recognition and Octavio Luiz Motta Ferraz relies on the Brazilian jurisprudence to demonstrate the role of courts in socio economic rights adjudication.<sup>89</sup>

Objection to socio-economic rights, as pointed out by Scott and Macklem are based on the conservative view of judicial incapacity to review decisions of government touching on resource distribution. This opposition to justiciability of socio-economic rights is founded in democratic

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<sup>83</sup> 22 American University International Law Review, (2006-2007) pp. 35-64

<sup>84</sup> Aoife Nolan, B. Porter & Michael Langford, “Justiciability of Social and Economic Rights: An updated appraisal”, *Center for Human Rights and Global Justice Working Paper Number 15, 2007*.

<sup>85</sup> See also Langford, note 11 above.

<sup>86</sup> Sandra Liebenberg, ‘South Africa: Adjudicating Social Rights Under a Transformative Constitution’ in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008), 975-101

<sup>87</sup> S. Muralidhar, ‘India: The Expectations and Challenges of Judicial Enforcement of Social Rights’ in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008)102-143

<sup>88</sup> Magdalena Sepulveda, ‘Colombia: The Constitutional Court’s Role in Addressing Social Justice’ in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008)144-162

<sup>89</sup> ‘Harming the Poor through Social Rights Litigation’ *Texas Law Review*, Vol. 89 (2011)1643-1668

objections to adjudication of rights akin to the views of Jeremy Waldron in his paper titled: “*The Core of the Case Against Judicial Review*”.<sup>90</sup> In this paper, Waldron centrally argues that courts are by no means superior protectors of rights than democratic legislatures and that judicial review is innately illegitimate. Jeremy is himself making a case, in support of Alexander Bickel’s attack against judicial review summarized in the phrase of “counter-majoritarianism.”<sup>91</sup> These objections further the familiar opposition to and unease with the judiciary’s power to enforce social policy agenda on conceptual grounds that it ill-consorts with the doctrine of separation of powers.

Peter Hogg and Allison Bushell first responded in “Charter Dialogue” to this debate of democratic illegitimacy of rights-based review, in their exposition of Charter Dialogue, arguing that the advanced theory of ‘majoritarianism’ appears exaggerated.<sup>92</sup> They believe that in the Canadian regime of inter-institutional relationships, the finality of the legislature’s word seen in legislative sequels that follow Supreme Court of Canada’s invalidation of laws represents dialogue in which the legislature on the other end of the continuum completes the conversational streak. Their empirical study serves to affirm unconventional reality that the Supreme Court of Canada has no ultimate word in constitutional meaning of rights. For Hogg and Bushell, courts and legislatures enter into a relationship “of dialogue whenever a judicial decision is open to legislative reversal, modification, or avoidance” by the legislative arm of government.<sup>93</sup> Their thesis demonstrates the circumstances where legislatures, in response to court decisions on Charter rights, have changed laws to accord with the Constitution of Canada as prescribed by the courts in a manner that still

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<sup>90</sup> Jeremy Waldron, ‘The Core of the Case Against Judicial Review’, 115 *Yale Law Journal* (2006), 1346-1406 at pp. 1346.

<sup>91</sup> Alexander Bickel (note 70 above)16

<sup>92</sup> Peter W. Hogg and Allison Bushell “The *Charter* dialogue between courts and legislatures (or perhaps the Charter of Rights isn’t such a bad thing after all)” 35 *Osgoode Hall Law Journal* (1997)75-124

<sup>93</sup> *Ibid.* p.105.

achieves the legislative intent.<sup>94</sup> The same authors, with the addition of Wade K. Wright in “*Dialogue Revisited-Or “Much Ado About Metaphors”*” maintain the dialogue theory of rights review and the standpoint that judicial review in Canada lacks strong form judicial review.<sup>95</sup> The theory of dialogue has since then been in constitutional discourse with much pre-eminence being given to this concept.<sup>96</sup> What has so far been theorized defines dialogue as the interactive relationships between courts and other domains of power in a tripartite system of government on matters of fundamental rights.<sup>97</sup> Kent Roach has offered five different forms of dialogues which he does believe do not comprehensively define its legal meaning.<sup>98</sup>

Mark Tushnet offers “strong and weak forms”<sup>99</sup> of judicial review as pragmatic yardsticks for breaking the contending themes of judicial and legislative supremacy on the interpretive meaning of rights. In adjudicating constitutional rights cases, Tushnet proposes, as a weak form of judicial review, that ‘a democratic experimentalist’<sup>100</sup> court be flexible in fashioning its judgment as the peculiarities and context of the case may permit. He postulates that a democratic experimentalist court begins this exercise by first giving the rights in question their substantive meaning before embarking on a finding and an order directing the executive or the legislature to institute some form of sound alternatives aimed at fulfilling the prescribed constitutional guarantees.<sup>101</sup> The court then

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<sup>94</sup> Ibid 78-79

<sup>95</sup> Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, “Charter Dialogue Revisited-Or “Much Ado About Metaphors” 45 *Osgoode Hall Law Journal* (2007)

<sup>96</sup> See for example Kent Roach, ‘Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience’ 40 *Texas International Law Journal* (2005), 537-538

<sup>97</sup> Christine A. Bateup, ‘The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue’ (2005). New York University Public Law and Legal Theory Working Papers. Paper 11 at 1. Available at [http://lsr.nellco.org/nyu\\_plltwp/11](http://lsr.nellco.org/nyu_plltwp/11) accessed on 12th November, 2013.

<sup>98</sup> Kent Roach (note 96 above) 537-576.

<sup>99</sup> Mark Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights-And Democracy-based Worries’, *Wake Forest Law Journal* (2003), 813-838

<sup>100</sup> Ibid., 822

<sup>101</sup> pp. 822-823



examines the progress of this process, and, where it appears to the court that circumstances necessitate other better options or a flexibility to accommodate more suitable executive or legislative proposals, a democratic experimentalist court would revise its judgment to consort with the constitutional prescriptions. This is the supervisory stage of dialogic remedies that this study would bring to light. Tushnet concludes that susceptibility of a court's judgment to constant revision makes it a weak version of judicial adjudication, a most attractive way out of misgivings by those who believe in the coercive and finality of court's judgment.<sup>102</sup>

In consonance with the dialogue theory espoused by Tushnet, Rosalind Dixon proposes the creation of dialogue about socio-economic rights as a most attractive strategy of cooperation between courts and legislatures in obviating worries of judicial incapacity or legitimacy by arguing for 'constitutional dialogue'.<sup>103</sup> Dixon's account suggests that enforcement of socio-economic rights with positive obligations requires courts to employ dialogue as a flexible mechanism of neutralizing impediments ingrained in the political processes termed 'blind spots' or 'burdens of inertia'.<sup>104</sup> It is suggested that whatever approach to be adopted by courts: weak rights versus strong remedies<sup>105</sup> (where a court defines the rights with generality, ascribing no meaning to a given right but uses coercive remedies to relieve the breach) or strong rights versus weak remedies (a court lays out a clear and distinct meaning of a particular right in normative terms but offers the government some leeway in implementing its orders) depends on the context and circumstances of a given country.<sup>106</sup>

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<sup>102</sup> pp. 823

<sup>103</sup> Rosalind Dixon, 'Creating Dialogue about Socio-economic Rights: Strong Form versus Weak Form Judicial Review revisited' 5 *International Journal of Constitutional Law* I\*CON (2007), 393.

<sup>104</sup> See p. 394

<sup>105</sup> See p. 392.

<sup>106</sup> See p.393.

Waruguru Kaguongo<sup>107</sup> shares the sensibility of dialogue as a way of responding to the separation of powers dilemma and claims of democratic deficit that may arise in Kenya's socio-economic rights review. In Kaguongo's account, the dialogue methodology allows the courts to intervene on decisions of other state organs but exercises deference in matters beyond its capacity. Kaguongo's article appears to adopt the weak form of judicial review, propounded by Tushnet as applied by Dixon in his analysis of the South African socio-economic cases. To Kaguongo, like Dixon, courts need the decisional flexibility when executing their adjudicatory duties by affording other governmental organs leeway to act on judicial verdicts in their chosen way in consonance with judicial standards set in respective court decisions. Kaguongo charges that a relationship where the judiciary and other arms of government engage in inclusive deliberations present higher prospects of efficacy of court's remedial measures.

This study seeks to advance the creation of dialogue at the remedial stage of adjudication. Much of the literature reviewed here are concerned with constitutional dialogue in enforcing rights generally while the dialogue advanced in this study focuses on remedial dialogues for enforcement of socio-economic rights. The works of Dixon, Kaguongo and Kent Roach highlighted above are useful guidelines in laying a theoretical and conceptual background for understanding the generality of dialogic approach when applied in remedying socio-economic rights claims. For an explanation of how dialogue practically plays out in a given context, César Rodríguez Garavito's *Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America*<sup>108</sup> offers a three-stage approach of its modalities: substantive, remedy and monitoring stages as discussed in chapter five. This work makes a strong case for and describes dialogic activism that has occurred

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<sup>107</sup> See generally Waruguru Kaguongo (note 66 above), 104-106

<sup>108</sup> 89 Texas Law Review (2010-2011)1669

in Colombia in one particular case since 2004 where the Constitutional Court after delivering its judgment in 2004, finding an unconstitutional state of affairs, embarked on a monitoring process of the government's implementation process of its orders. In the dialogic activism proposed by Cesar, courts first finds a breach of a particular right then allows the government to propose remedies in a participatory process in which relevant stakeholders, parties and relevant agencies of the government are enlisted to deliberate on how to address vulnerable social conditions of victims. Of particular interest is the court's admission of civil society to the deliberative processes. This is because these bodies often inject relevant expertise in evaluating the propriety and reasonability of policy options that the government may propose. Cesar's model is a suitable form of dialogic approach that this study adopts and proposes that the Kenyan judiciary be inducted to.

Godfrey Musila reviews broad themes in *Testing Two Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution*.<sup>109</sup>

The underlying objective of Musila's work is to test two standards of approaches that have been adopted elsewhere in measuring compliance with socio-economic rights obligations.<sup>110</sup> The two approaches identified are the minimum core content obligation and the reasonableness test. Aside, altogether from standards of approach, Musila's account is incisive for its discussion of the underpinning theoretical and philosophical elements that, in his view, should inform rights-based judicial review of socio-economic rights. It is, however the two-pronged standards of ascertaining compliance that illuminates the debate of judicialization of socio-economic rights.

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<sup>109</sup> See note 33 above

<sup>110</sup> Ibid. pp. 72

Musila's work is also seminal in so far as it commences debate, in the Kenyan context, of the need for rational consciousness to the idea of *transformative constitutionalism*. Musila is emphatic that the 2010 Constitution is a transformative constitution; a virtue embodied in the constitution's central feature of mandating the state to intervene in the advancement of equality, human dignity and social justice. It is reckoned that Karl Klare's<sup>111</sup> ideal of achieving significant and widespread social change through law-enabled processes to a great extent influences Musila's recognition of socio-economic rights as the powerful device of achieving social justice for the historically marginalized groups in Kenya. Klare believes that transformative constitutionalism is a social good, which in the context of interpretation of a post-liberal constitution of South Africa should engender a high-level of egalitarianism.<sup>112</sup> He chastises the legal fraternity, as a whole, judges and lawyers included, and calls upon them to awaken to a recognition of the need to incline to the ideal of social transformation through interpretive adjudication without necessarily relinquishing the norms and expectations of their professional roles. This is a befitting theme for the Kenyan constitutional adjudication terrain, which this study adopts.

## **1.9 Research Methodology**

The study was library-based and involved analysis and review of relevant secondary material on socio-economic rights. In this regard, the research entails exploration of secondary materials including books, articles, journals, constitutions, statutes and other relevant literature, published globally on the subject of socio-economic rights. Other secondary data relied on include caselaw

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

from court decisions of various jurisdictions as compiled and reported by various entities. The study will basically analyze the Constitution of Kenya among others and their relevant provisions touching on the role of the judiciary, the Bill of Rights and its enforcement to assess whether dialogue as an approach to fashioning remedies for social rights claims has a constitutional basis.

Most of the materials required for the study are available on the internet and shall be accessed through, google scholar, law journals, and relevant websites. However, additional materials were sourced from other agencies including Non-governmental Organizations, Katiba Institute, University of Nairobi School of Law Library, High Court and Supreme Court of Kenya Libraries.

#### **1.10 Limitation and Scope of the Study**

This study seeks to inquire whether there are existent criteria governing the exercise of judicial remedial power regarding socio-economic rights. In doing so, the study reviews scholarly literature and judicial precedents from local and international jurisdictions on the subject. The constitutions of various countries, especially provisions regarding entrenchment of socio-economic rights have been studied as guidelines for the research. Together with judicial precedents reported in various media, the research focused on the evaluation of these materials as reported, recognizing the shortcomings of secondary information as relayed by others. Articles and books reviewed, similarly are not primary materials and too suffer from the possibility of distortion in the presentation of information and material. Secondly, taking into account that this thesis is concerned only with judicial enforcement of socio-economic rights by narrowly focusing only on the applicability of dialogue as an approach to fashioning effective remedies, valuable and important concepts on social

rights jurisprudence generally, and that may enrich a reader's understanding of broader issues of the subject were not be covered. This is another limitation of the study.

A third limitation is the scope of dialogic approach that this study sets out to advance. It is instructive to note that the scope of dialogic approach conceptualised in this study does not conflate other model theories that anticipate dialogue not only to play out between the judiciary and the political branches but to encompass a broader spectrum of other actors including other courts, the legal profession, law schools, Parliament, and the public at large.<sup>113</sup> The dialogic approach conceived in this study anticipates engagement relationship between the executive, the legislature and the courts together with parties to a claim that the court may at any stage of litigation admit. This study is thus limited only to the latter form of dialogue thus ignoring a broader perspective of dialogue which is vital for a wholesome comprehension of the concept of dialogue in judicial review. This narrow choice appropriately makes it easier to focus the study on only the relevance of dialogue in crafting remedies for socio-economic rights rather than engage broader scope which may convolute the thesis.

### **1.11 Chapter Breakdown**

Chapter one is the first part containing the introductory material regarding the choice of this topic of study. It contains the statement of the problem, justification theoretical framework, literature review, scope and limitation of the study.

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<sup>113</sup> See *S versus Mhlungu* 1995 3 SA 867(CC), 1995 7 BCLR (CC) para 129

Chapter two traces the historical origins and gives an account of how and why legally enforceable socio-economic rights have not been widely embraced in most constitutions and why their enforcement is perceived to be fraught with challenges. As a background part, it briefly introduces the acrimonious philosophical debate that greeted integration of socio-economic rights in the international law regime. It then highlights the efforts that have so far gone into clarifying the content, scope and meaning of violations of socio-economic rights. Chapter three juxtaposes the perceived challenges with the Kenyan context and agrees that indeed finding appropriate remedies for socio-economic rights would present Kenyan courts with difficulties that requires novel approaches to adjudication. The study argues that for Kenyan courts, challenges for fashioning appropriate remedies are of two manifestations- principled and practical all rooted in the doctrine of separation of powers. The chapter lays out the constitutional framework on litigation and remedies for socio-economic rights and takes the view that the transformative potential of the Constitution founds a justification for new and innovative judicial approaches to rights review. It identifies and affirmatively proposes **dialogue** between Kenyan courts, the legislature and executive as an expedient mechanism with the potential to surmount the two identified challenges rooted in the political obstacles.

Chapter four is a comparative inquiry meant to depict the trends of dialogic remedies in other jurisdictions. In placing reliance on jurisprudence from other jurisdictions, the study demonstrates that difficulties and concerns attendant to granting effective remedies for positive rights have either been lessened or circumvented by creative and innovative remedial measures devised by competent judicial bodies consciously tailored to overcome challenges posed by concerns of democratic deficit and policentricity of social rights review. As the first African case with enforceable socio-economic

rights, South Africa is chosen for the textual congruence of the constitutionally recognized socio-economic rights and review regime to Kenya's. This similarity can be seen in the commonality of their histories redolent with a fervent struggle for social, economic and political emancipation, a history that inspires and stimulates their constitutional commitment to transformative constitutionalism as an inescapable ideal for realizing the goals of social justice and substantive equality. Canada depicts a preference for dialogue as an attractive strategy in responding to democratic legitimacy concerns of judicial review of the Charter. In Canada dialogue is a midway course between the excesses of judicial and legislative supremacy. Columbia provides an enriching guidance of pros and cons inherent in dialogic approach to crafting remedies for socio-economic rights. Its choice, for this study, is due to the fact of the existence of practical occurrence of dialogue between the Constitutional Court, the government and relevant state agencies as well as stakeholder participation in public policy decisions aimed at correcting systemic flaws.

Chapter discusses the origination of dialogue in constitutional law generally and then traces its applicability to socio-economic rights. The chapter explains why the preference for dialogue is an essential device for overcoming separation of powers challenges to judicial decision-making on social claims. The study argues that dialogue is a weak-form judicial review and a preferable model given that it embraces *dialogue* as an apt and appropriate approach for breaking the separation of powers dilemma when crafting remedies for enforcement of socio-economic rights. The chapter explores the concept of dialogic review where rights entail positive obligations for the state. By this dialogue, the chapter explains ways in which there can be meaningful engagement between the judiciary and other arms of government. The chapter underscores the relevance to be attached by the Kenyan judiciary, to this idea of dialogic approach as a pragmatic way of inducing



responsiveness and inclusivity in the enforcement of socio-economic rights interests. The scholarly literature on review in this chapter expounds on the advantages and limitations of using dialogue in Kenya. The chapter also enquires whether there are underpinning constitutional basis for deployment of the device of dialogue in adjudication of socio-economic rights. Chapter six then concludes the study with brief recommendations and way forward for initiating the idea of dialogue in our judicial adjudication. The Chapter sums up the findings in the preceding chapters and explain how they are relevant and effective in the formulation of an appropriate judicial remedial measures to vindicate socio-economic rights claims.

## CHAPTER TWO

### LEGAL NATURE OF SOCIO-ECONOMIC RIGHTS: PERSPECTIVES FROM INTERNATIONAL LAW

#### 2.1 Peripheral Regard in International Law

The growth and recognition of legally enforceable socio-economic rights has not been a widely embraced phenomenon in most contemporary constitutions, with statistics showing that only a paltry number of countries have enacted these social rights in their constitutional texts.<sup>114</sup> This is because of historical preconceptions that witnessed socio-economic rights being treated skeptically as compared with civil and political rights. Civil and political rights have been viewed as imposing ‘negative’ duties, restraining the state from infringing on certain entitlements, socio-economic rights are ‘positive’ in nature, inviting certain positive governmental actions.<sup>115</sup> Civil and political rights have consequently been deemed judicially enforceable since they are specific, involve cut-and-dried cases, their remedies only implicate stoppage of infringing action by government, while socio-economic rights are programmatic, involving long term strategic governmental action therefore not susceptible to judicial intervention.<sup>116</sup> This kind of clustering of rights into two groups is the reason for general antipathy toward socio-economic rights and the cause for some nations recognizing these rights either in aspirational and non-rights forms<sup>117</sup>, or as directive principles of

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<sup>114</sup> Wiles (note 83 above) 35. Wiles observes the marginality in the textual constitutionalisation of socio-economic rights in a scattering number of countries. He cites examples Finish, Guyanese, Hungarian, Namibian, Portuguese, Slovak and South African constitutions as examples. The Constitution of Kenya, 2010 is yet a newer example. See also Cass R. Sunstein, “Why does the American Constitution lack social and economic rights?” *Public Law and Legal Theory Working Paper No. 36*, January, 2003 for proposition that ‘not every modern constitution creates rights of this sort; such rights are entirely absent from a number of contemporary constitutions.’

<sup>115</sup> Eric C. Christiansen, ‘Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court’ 38 *Columbia Human Rights Law Review*, (2007) pp. 345.

<sup>116</sup> *ibid*

<sup>117</sup> Article 41 of the Constitution of Switzerland providing that ‘the Confederation and the cantons seek to ensure’ particular rights

state policy<sup>118</sup> or omitting them altogether. It is also the basis for suggestions, which have now been falsified, that socio-economic rights are vague, imprecise positive rights therefore judicially unenforceable.

## 2.2 Clarifying Core Concepts in Socio-economic Rights Practice

Over the past several years the United Nations Committee on Economic Social and Cultural Rights (UNCESCR) through its General Comments, other international agencies, jurists, judicial decisions and scholars have played an active role to reverse these misconceptions and to deepen receptivity to socio-economic rights jurisprudence; particularly in proving that socio-economic rights are not profoundly dissimilar to civil and political rights.<sup>119</sup> Most significantly, much heightened activity has been spent on considering and expounding the nature and scope of obligations of state parties to International Covenant on Economic Social and Cultural Rights,<sup>120</sup> scope of violations and appropriate responses and remedies; all in proof that the historical categorization of civil and political rights and socio-economic rights as distinct rights is false.<sup>121</sup> These devoted efforts have contributed, to some extent in clarifying, even though they haven't completely quelled the debate

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<sup>118</sup> See Constitution of India, Part IV, article 38, 39, 41-48A. Other constitutions replicating this practice includes Nigeria, Ireland, and Papua New Guinea.

<sup>119</sup> The works of CESCR includes the General Comments 3 and 9, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights adopted 10 December, 2008 GA Res A/RES/63/117. CESCR Statement, "An Evaluation of the Obligation to take steps to the Maximum under an Optional Protocol to the Covenant" 10 May 2007 E/C 12/2007/1. Jurists and scholars have argued convincingly to falsify the categorization of rights. There several judicial decisions from South Africa, India, Brazil, Colombia that have adjudicated and circumvented this distinction. International agencies efforts resulted into Limburg Principles of Implementation of the International Covenant on Economic, Social and Cultural Rights, 1987 UN Document E/CN. 4/1987/17 and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights 1997. (Hereinafter Limburg Principles and Maastricht Guidelines respectively).

<sup>120</sup> Adopted 16<sup>th</sup> December, 1966, 993 U.N.T.S. 3 (entered into force on 3<sup>rd</sup> January, 1976)(hereinafter ICESCR)

<sup>121</sup> Cees Flinterman, *Three Generations of Human Rights* in J Berting et al (eds) *Human Rights in Pluralist World: Individuals and Collectivities* (1990), 76 (arguing that whatever has been termed as generations of human rights have evolved simultaneously in similar ways). See also Mbazira (note 43 above), 23 arguing that both sets of rights are significant to the individual in equal measure.

and controversy on the practical difficulties inherent in the judicial enforcement of socio-economic rights.

### 2.2.1 Obligation to Respect, Protect and Fulfil

The emerging jurisprudence of the UNCESCR through its General Comments, The Limburg Principles<sup>122</sup>, Maastricht guidelines<sup>123</sup> and domestic jurisdictions have been key in clarifying certain important aspects necessary for understanding socio-economic rights infringement and the corresponding remedies for enforcement.<sup>124</sup> To begin with, it is now agreed that all rights impose both positive and negative obligations<sup>125</sup> described in an accepted three-pronged tripology of the duties of states, namely: the obligations to *respect*, *protect* and *fulfill*.<sup>126</sup> The focus has therefore been altered, to shift the dichotomy to the nature of state obligation rather than a positive-negative division of rights,<sup>127</sup> since, as the argument goes, it is the obligation of the state towards these rights which may be of negative or positive dimension but not the specific right itself. Thus it is now generally accepted that every right encompasses aspects of positive or negative duties, even socio-economic rights may impose negative duties, likewise civil and political rights may impose on the state positive obligations, for example implementing electoral process by putting in place institutions and relevant logistical materials. Nonetheless, it is observed that for the most part, the

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<sup>122</sup> See note 114 above.

<sup>123</sup> See note 114 above.

<sup>124</sup> Iles Koch, "The Justiciability of Indivisible Rights" 72 *Nordic Journal of International Law* (2003), 3, 15.

<sup>125</sup> See H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1990) (but first published in 1980), 51-60 where it is propounded that all rights (he calls them basic rights) entail both positive and negative obligations with three kinds of obligation: 'the duty to avoid depriving', the 'duty to protect from deprivation' and the 'duty to aid the deprived'. See further supportive terminological reference of the duties by Asbjorn Eide, "Economic, Social and Cultural Rights As Human Rights" in A Eide, C Krause and A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* Second Revised Edition (1995), 21-40

<sup>126</sup> See Victor Dankwa, Cees Flinterman and Scott Leckie, "Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights" 20 *Human Rights Quarterly* (1998), 705-730.

<sup>127</sup> Biegon (note 17 above), 21.

state's violation of socioeconomic rights emerges from failure to take positive steps, as social injustices often are a result of state inaction rather than action.<sup>128</sup> For this reason, socio-economic rights are accepted as imposing much more positive action on the state, with a more prominent duty to fulfill.

The obligation to *respect* implies that states ought to restrain from any actions that may constrain an individual from enjoying or limiting the individual's capacity to realize those rights 'thus the right to housing is violated if the State engages in arbitrary forced evictions'.<sup>129</sup> The duty to *protect* requires the state to prevent infringement of rights from third parties, for instance any possible harm to the society posed by individuals and non-state actors, and to provide access to remedial measures to victims of rights denial, to prevent future infringements.<sup>130</sup> The obligation to *fulfill* is a duty on the states to take affirmative steps towards actual enjoyment of the rights by the individuals. The duty to promote, regarded as a component of the obligation to fulfill is a recent addition, requiring the state to create awareness and sensitization among the people on their rights.<sup>131</sup> Entailed in the totality of these obligations are two obligations: of *conduct* and *result*; whereby the obligation of conduct mandates the state to deploy action-oriented programmes to realize the enjoyment of a given right; whereas the obligation of result 'requires states to achieve specific targets to satisfy a detailed substantive standard'.<sup>132</sup>

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<sup>128</sup> Victor Abramovich 'Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies' 2 *SUR – International Journal on Human Rights* (2005), 183.

<sup>129</sup> Maastricht Guideline 6 at p. 4.

<sup>130</sup> Victor Dankwa et al (note 126 above), 20.

<sup>131</sup> Maastricht Guideline 6 at p. 4.

<sup>132</sup> *Ibid.*

### 2.2.2 Minimum Core Obligation

The Committee on Economic, Social and Cultural Rights has proffered definitions of the nature, scope and content of most socio-economic rights through its General Comments to clear uncertainty regarding the normative framework of interpretation and enforcement. The ‘*minimum core obligation*’ has been interpreted to mean that states have an ‘obligation to ensure the satisfaction of, at the very least minimum essential levels of each of’ these rights,<sup>133</sup> and to direct all their available resources to fulfil the minimum core. The Committee has observed 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’.<sup>134</sup> It is taken that this obligation imposes a threshold minimum level below which rights provision should not go, an essential ingredient of a right without which a right is rendered nugatory and life put to jeopardy.<sup>135</sup> This concept suggests that there are gradations of fulfillment of a right, beginning with the minimum to the maximum gradation of fulfillment, however the minimum degree must first be attained before a far-reaching realization of the right.<sup>136</sup> For a state to justify a failure on its part to meet the minimum core obligation on account of resource constraints, it must demonstrate its prioritization of use of the available resources at its disposal to meet its minimum obligation.<sup>137</sup> Where a state alleges that the resources are ‘demonstrably inadequate’ there is still a duty to ensure ‘the widest possible

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<sup>133</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 10, of the Covenant)*, 14 December 1990, E/1991/23, available at: <http://www.refworld.org/docid/4538838e10.html> [accessed 30 January 2014] (hereinafter General Comment)

<sup>134</sup> *Ibid.*

<sup>135</sup> G van Bueren, “Alleviating poverty through the Constitution Court” 15 *South African Journal on Human Rights* (1999), 57.

<sup>136</sup> J Chowdhury, “Judicial Adherence to Minimum Core Approach to Socio-Economic Rights- A Comparative Perspective” 1 *Cornell Law School Inter- University Graduate Papers*, paper 27. Available at [http://scholarship.law.cornell.edu/lps\\_clapcp/27](http://scholarship.law.cornell.edu/lps_clapcp/27) (accessed on 3 January 2014)

<sup>137</sup> General Comment 3 para 10.

enjoyment of the relevant rights under the prevailing circumstances'.<sup>138</sup> Thus, it has been emphasized that the minimum core is to be met regardless of the availability of state's resources or any other encumbering factors,<sup>139</sup> however of note is that resource capacities of states in fulfillment of these rights is recognized.

### 2.2.3 Availability of Resources

Article 2 (1) of the ICESCR aptly acknowledges that achievement of rights encompassed therein can only be within the resource capacity of a state and obliges them to fulfill their duties to the maximum of their available resources.<sup>140</sup> The term '*available resources*' has been defined as 'those resources within a State and those available from the international community through international cooperation and assistance'.<sup>141</sup> The word resources therefore constitutes material resources from both the public and private spheres as well as from the international community via cooperation or multilateralism.<sup>142</sup> These may be financial, human, technological natural or information resources.

Even though none of the instruments have defined what is meant by 'maximum available resources', it is clear that the state has an obligation to achieve the realization of the rights within its ability. Proof of this requires the state to show that 'it is taking steps' and concurrently 'making full use of resources at its disposal'.<sup>143</sup> The CESCR has prescribed certain indicators for gauging

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<sup>138</sup> General Comment 3, para 11.

<sup>139</sup> Maastricht Guideline 9 p.5.

<sup>140</sup> Article 2(1) provides: "Each State party to the present Covenant undertakes to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including adoption of legislative measures."

<sup>141</sup> Limburg Principles, 26.

<sup>142</sup> Philip Alston, "The Nature and Scope of State Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights" 9 *Human Rights Quarterly* (1987), 156, 177-180.

<sup>143</sup> Waruguru Kaguongo (note 66 above), 92.

whether a state is acting within the purview of maximum available resources to achieve its human rights obligation. The strategies adopted include using indices to evaluate state spending on codified rights in comparison to other expenditures; making comparison on expenditure on a particular right in two different countries of similar development achievements; analyzing consumption efficiency of budgeted resources and an evaluation of economic indicators such as GDP to gauge the amount of state spending on welfare programmes.<sup>144</sup> In a recent deliberation, the CESCR has stated that in considering a communication of a state's failure to fulfill the maximum available resources obligation under the Optional Protocol, it will examine what measures the state has effectively taken, whether legislative or otherwise to ascertain whether they are reasonable or adequate, taking into account certain factors such as the extent to which the taken measures are deliberate, concrete and targeted to the fulfilment of socio-economic rights, whether a state party exercised its discretion in a non-discriminatory manner, whether allocation of resources conforms to international human rights standards inter alia.<sup>145</sup>

The Committee also acknowledges that a state may take retrogressive measures that undermines fulfillment of its obligation in this regard due to resource constraints. In such a scenario before excusing the default of the state, the Committee would use an overarching country to country methodology of assessment that takes into account the country's level of development, the severity of the breach, in particular whether the situation involves the enjoyment of the minimum core content of a right, the country's current economic situation, other rivaling claims on the country's

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<sup>144</sup> For a discussion on strategies of evaluating state compliance with the obligation to use maximum available resources, see Magdalene Sepulveda, *The Nature of Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003), 313 and Mathew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1998), 137.

<sup>145</sup> CESCR Statement (note 132 above) para. 8.



resource bank, whether a country has opted for low cost options and whether cooperation and assistance has been sought or rejected from the international community for purposes of implementing the rights.<sup>146</sup> It must be noted that resource shortage cannot excuse a state of certain minimum obligations to implement socio-economic rights.<sup>147</sup>

#### **2.2.4 Progressive Realization**

The Committee has also taken note that '*progressive realization*' entails a recognition that full realization of all rights is a gradual process to be undertaken over time.<sup>148</sup> States are accorded a margin of discretion to select modalities of implementation, however this does not detract from the state's duty to fulfil some rights immediately and others as soon as possible.<sup>149</sup> It means that though states are bound by same legal obligations, the progressivity of a measure may differ from state to state depending on the varying cultural, religious, developmental and historical circumstances. In the Committee's view, the leverage accorded is in keeping with the practical exigencies of the world in confronting the challenges involved in providing socio-economic rights to individuals of a country. The states are however expected to move expeditiously and effectively as possible and to refrain from any unjustified retrogressive measures that circumstances may not allow, for instance relying on religious inclinations as a scapegoat for derogating from or limiting the rights.<sup>150</sup>

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<sup>146</sup> CESCR Statement, para. 10.

<sup>147</sup> Maastricht Guideline 10.

<sup>148</sup> General Comment 3, para 9.

<sup>149</sup> Maastricht Guideline 8 p. 5.

<sup>150</sup> Victor Dankwa et al (note 126 above) 22.

### 2.3 Application ICESCR in Domestic Law

Municipal courts have engaged these doctrines of international law to give interpretive meaning to state obligations, the concept of violation and enforcement in respect of these rights. They have relied on these either as tests or standards to ascertain whether governmental policy actions complained of are constitutionally valid. The ‘minimum core content’ and ‘reasonableness’ have for instance been subject of controversy as a tool for judicial decision making in social rights claims in South Africa in *Grootboom*<sup>151</sup>, *Treatment Action Campaign*<sup>152</sup> and *Khosa*<sup>153</sup> where the Constitutional Court preferred the reasonableness modality over minimum core in assessing the state’s compliance with affirmative obligations in respect of socio-economic claims.<sup>154</sup> The Court gave reasons for this preference: the problem of ascertaining what would constitute the state’s minimum core obligation in light of the multifarious needs of diverse groups, a fact which incompatibly fits into the roles and jurisdiction of the courts; the lack of information and data with which the Court could assess the content of the minimum core in respect of a particular right and its potential to exacerbate separation of powers concerns. Reasonableness as a methodology of approach in assessing state obligations was defined by the Constitutional Court, which suggested that in reviewing positive socio-economic claims, the central question that the Court asks is whether the means chosen are reasonably capable of realization of socio-economic rights in question’.<sup>155</sup> The Constitutional Court’s approach has been termed as deferential, leaving the government a

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<sup>151</sup> Government of the Republic of South Africa versus Grootboom 2001 1 SA 46(CC)

<sup>152</sup> Minister of Health versus Treatment Action Campaign 2002 5 SA 721 (CC)

<sup>153</sup> Khosa versus Minister of Social Development 2004 6 SA 505 (CC)

<sup>154</sup> For a detailed discussion on why the Constitutional Court of South Africa has preferred reasonability test over minimum content as standards of review of state obligation see an analysis by Musila( note 33 above), 77.

<sup>155</sup> See *Grootboom*, para 41.

margin of discretion relating to the specific policy choices adopted to give effect to socio-economic rights'.<sup>156</sup>

These are some of the instances in which domestic courts have applied these nuanced concepts to individual cases of rights breaches. It is noteworthy that these attempts and approaches have not completely solved the practical problems associated with judicial enforcement of socio-economic claims. Most recently in the discussions of the United Nations for establishing an optional protocol to the ICESCR, negativity and ambivalence to a complaints mechanism were still apparent. During the negotiations for an optional protocol, the US, Australia and the UK insisted that socio-economic rights are not only justiciable, but also expressed their reservations regarding a complaints and adjudication procedure on grounds that the same would amount to unwelcome meddling into governments' autonomy on socio-economic policy.<sup>157</sup> More particularly, the US argued that unlike under ICCPR, the ICESCR does not contemplate that states would provide legal reliefs.<sup>158</sup> This argument was spurned and rejected by NGOs and other states which argued in favour of a comprehensive and effective remedies for socio-economic rights.<sup>159</sup>

Hence it is beyond doubt that the question of the extent of creating institutional mechanisms for adjudication and enforcement of socio-economic rights, delineating the standing of courts in adjudicating those rights, and how to structure relationships between these adjudicatory bodies and

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<sup>156</sup> See Sandra Liebenberg, "Socio-economic Rights: Revisiting the Reasonableness/Minimum Core Debate" in S Woolman and M Bishop Constitutional Conversations (2008), 305.

<sup>157</sup> Aoife Nolan et al (note 84 above), 2

<sup>158</sup> Ibid. p. 3.

<sup>159</sup> Ibid.

other elected domains of public power remains a stark challenge to crafting remedies for socio-economic rights.<sup>160</sup>

## **2.4 General Objections to Judicial Enforcement in a Constitutional Context**

Notwithstanding the emphatic espousal of views that socio-economic rights are not profoundly distinct from civil and political rights, it is an acknowledged fact that judicial enforcement of such rights would confront numerous challenges at the domestic level. Amply described in the intellectual antagonisms of social welfare rights proponents and opponents, these are challenges relating to the doctrine of separation of powers and have been broken into two classifications: *democratic legitimacy* and *institutional competence* concerns.<sup>161</sup>

### **2.4.1 Legitimacy Dimension**

Legitimacy arguments cite the inappropriateness, drawn from majoritarian<sup>162</sup> objections, of affording the arduous tasks of adjudicating and determining social policy aims to an unelected group of judges. This, critics argue, inculcates a culture of judicial incursion into the policy and budgetary turfs of the legislature.<sup>163</sup> This legitimacy objection asks two deserving questions: the prudence of empowering the judiciary, one, to override the popular will as expressed through legislative enactments<sup>164</sup>, and, two, to coerce government to undertake ‘affirmative action’.<sup>165</sup> Christiansen likens this scenario of crafting judicial remedy for social rights cases as a usurpation

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<sup>160</sup> As above.

<sup>161</sup> See Mbazira (note 46 above) 16. See also Christiansen, supra note 115 above, pp. 345

<sup>162</sup> For a distrust for judicial review based on majoritarian conceptual inclinations see Marius Pieterse, ‘Coming to Terms with Judicial Enforcement of Socio-economic Rights’ *20 South African Journal on Human Rights* (2004) 390.

<sup>163</sup> Mbazira (note 46 above) 27

<sup>164</sup> Scott and Macklem (note 81 above) 22

<sup>165</sup> Mbazira (note 46 above) 19

of the legislature's traditional role of creating policy and the executive's action of implementing programmes.<sup>166</sup> Such an arrangement, it is argued, 'would necessarily and impermissibly intrude on the province of the legislative branch- most glaringly when a court overrides a legislative act regarding social welfare and asserts a different course of action for the state.'<sup>167</sup> These are perspectives of representative democracy that hold that the popularly elected leaders bear the legitimate mandate from the people to steer and achieve collective aspirations on their behalf. Any intrusion by an unrepresentative body such as courts is viewed as democratically illegitimate.

Counteractive viewpoints have been offered to discredit this line of objections. The first response is that courts do not by their pronouncements re-allocate or re-prioritize budgets. In more ways than one, this is normally the end result and not the intention of adjudication of socio-economic claims. On assumptions that judicial intervention on social policy is counter-majoritarian, it is urged that perceptions towards separation of powers doctrine need to change to reflect the evolved roles of courts in the protection and enforcement of fundamental rights and liberties.<sup>168</sup> In its review role, the judiciary protects individual liberties and instills constitutional accountability of all constitutional organs. This, it is argued, is upholding the supremacy of the constitution without necessarily offending the constitutional balance of powers. The judiciary demands that the other organs justify their policy choices and actions, and to overrule them where they fail to satisfy constitutional values and human rights standards imposed by the constitution.<sup>169</sup> Since the state

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<sup>166</sup> Christiansen (note 115 above)348

<sup>167</sup> Ibid.

<sup>168</sup> Mbazira (note 46 above) 35

<sup>169</sup> Etienne Mureinik, "A bridge to where? Introduction to the Interim Bill of Rights" 10 South African Human Rights Journal (1994) 31

enjoys much powers relative to the subjects, it becomes necessary that the judiciary provides the necessary counterbalance to check that power and hold the wielders accountable.

In yet another counterargument, it is contended that courts do not always underestimate the special expertise and skills that the executive or legislature possess in respect of a particular policy issue. Court interventions do appreciate that the solutions adopted may not always be tried and tested to withstand the dynamics of social problems.<sup>170</sup> A given policy action may fail to cater for certain aspects that were not earlier contemplated at its origination stage.<sup>171</sup> These are the aspects that give rise to structural suits. Courts do not therefore act to countermand executive or legislative affirmative actions on their own motion. They are often instigated to act in circumstances of legislative deficiency or executive inaction. In such structural reform cases, court always act to realign policy, executive action or a law to bring it into conformity with the constitution and to remedy existing social problems.<sup>172</sup> Courts that act in this manner do not intrude into other roles but act in dialogue with the other branches on how to contribute its skills in solving a particular problem.<sup>173</sup>

#### **2.4.2 Institutional Competence Objections**

These objections appear in two rubrics. There is the procedural limitation which relates to the court's capacity to handle, comprehend and review such extensive complex information relating to a particular social phenomenon. There is also the remedy problem with its two dimensions. The

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<sup>170</sup> Mbazira (note 46 above) 39

<sup>171</sup> Scott and Macklem (note 81 above) 37

<sup>172</sup> S Sturm 'A normative theory of public law remedies'<sup>79</sup> *Georgetown Law Journal* (1991) 1387-1388.

<sup>173</sup> Mbazira (note 46 above) 39

first dimensions exposes the difficulty of how courts can fashion remedies for the individual before the court and groups not before the court.<sup>174</sup> It is contended that the individualized claim before the court is narrowly focused and with limited scope therefore presenting a severe challenge on how courts can fashion a given remedy expected to vindicate the rights and conditions of groups not before the court.<sup>175</sup> The argument emphasizes that socio-economic rights violation more often than not affect larger sections of the society with individuals only implicated as members of that group.<sup>176</sup> As such, the critics see socio-economic rights actions more often as entailing an individual claim for redress.<sup>177</sup> They maintain that when granting remedies to relive such violations a judge's targeted approach of one individual before him and not similarly situated circumstances involving larger groups may be an ill-suited remedial engagement.<sup>178</sup> In this sense, a presiding judge is said to possess no capacity to master the institutional sophistication to make decisions of the kind required by social policy.

To discredit these misgivings of institutional incapacity based on lack of information, expanded *locus standi* provisions in a given constitution may enable courts to enjoin to proceedings parties with relevant technical knowhow and expertise in a particular field. Parties such as *amicus curiae*, interested rights-advocacy groups may inject the sophisticated technical aspects of a given phenomenon that even claimants and respondents may not access.<sup>179</sup> For example in *Satrose Ayuma* Professor Yash Pal Ghai, a renowned constitutional law expert and Priscila Nyokabi of

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<sup>174</sup> Kent Roach (note 38 above)9-10

<sup>175</sup> Christiansen (note 115 above)349-350

<sup>176</sup> Ibid. pp. 350

<sup>177</sup> Daniel Brinks and Varun Gauri (note 67 above), 305.

<sup>178</sup> Lon Fuller (note 29 above) 364-380 (fuller argues that the lack of participation of persons who may be affected by polycentric decisions of courts make them unsuitable for adjudication. Polycentric decisions are those matters which have implications and affect large sections of society often not represented in court.)

<sup>179</sup> Mbazira (note 46 above) 41

Kituo Cha Sheria, a human rights and advocacy lobby, acting in the public interest brought the petition jointly with other claimants under article 22(2)(c).<sup>180</sup>

Secondly, even though courts may not possess a variety of information sources as compared to parliament and the executive, the conduct of litigation through adducing of evidence and the adversarial nature of adjudication in some jurisdictions obliges parties to present all relevant information in a given field.<sup>181</sup> In this regard, the court's problem solving techniques of presiding over submissions on contended issues allows for relating constitutional values to discrete individual cases of rights violations.<sup>182</sup> Essentially, this means that courts are able to reconcile rights in theoretical form with their practical dimensions that may only silently appear on paper in policy forms but lack practical application.

Technical shortcomings on courts' competence on social policy may also be neutralized by innovative adjudication techniques such as structural interdicts or dialogic judicialism depending on what a given jurisdiction may opt for. South Africa has chosen the route of structural interdicts which has witnessed courts decisions strengthened by expert input, exercise of supervisory jurisdiction, monitoring committees, stakeholder participation. Additionally, as chapter five demonstrates, courts may also engage the legislature and the executive, by enlisting their participation in an adjudicatory process in which social policy claimants seek to reform systemic violations occasioned by institutional dysfunction or legislative deficiencies. This is what is called

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<sup>180</sup> Satrose Ayuma, para. 6

<sup>181</sup> Abraham Chayes, "The Role of the Judge in Public Law Litigation" 89 Harvard Law Review (1979) 1308

<sup>182</sup> Scott & Macklem (note 81 above) 38



dialogic judicialism that enhances the capacities of judges on matters in which they may not possess the technical knowhow.

On the doubts of crafting remedies to cover significant sections of the society as an unsuitable adjudicatory exercise for judges given that only individualized claims are brought before courts, it is accepted that most decisions of courts today recognize polycentrism of claims that implicate diverse interests.<sup>183</sup> Under the human rights obligation to protect courts have since responded to policentricity of socio-economic actions by inclining towards distributive justice as a suitable model for protecting rights-based interests not subject of court action. It is argued that Fuller's objection to socio-economic rights review based on polycentrism of decisions is informed by notions of corrective justice that has lost sway in contemporary public law legal actions.<sup>184</sup>

## **Conclusion**

This chapter has outlined the core concepts necessary for understanding socio-economic rights in general. Under this section it has been shown why socio-economic rights enforcement and adjudication received scant treatment in international law and how these objections have been juxtaposed to national jurisdictions. To clarify that socio-economic rights exist at par with other rights, the chapter has delved into clarifying such concepts as obligations embodied in these rights, standard of approach for review under international law and the concept of violation of socio-economic rights. It has been shown that national jurisdictions have engaged and put to practical use some of these concepts so as to give meaning and relevance to these rights. it is also demonstrated

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<sup>183</sup> See TAC para 38 in where the constitutional Court is cautious of the unsuitability of decisions that may trigger far-reaching social repercussion for the community. See also *Satrose Ayuma* where (note above) where Justice Lenaola recognizes that a housing claim transcends individual petitioners bearing upon groups and persons not before the Court.

<sup>184</sup> Mbazira (note 46 above) 48

that obligations entailed by these rights, what roles courts and other tribunals can play in their enforcement have now been clarified in the successive General Comments from the United Nations Committee on the Economic, Social and Cultural rights, the Limburg Principles, Maastricht Guidelines and other scholarly works. In spite of all these sustained efforts at clarifying and giving meaning to obligations entailed in these rights, the chapter observes the persistence of objections to enforcement of these rights and the counterarguments offered to refute such notions. The next chapter discusses Kenya's remedial regime in enforcing socio-economic rights.

## CHAPTER THREE

### ASSESSMENT OF SOCIO-ECONOMIC RIGHTS REMEDIAL REGIME UNDER THE CONSTITUTION OF KENYA, 2010

#### 3.1 Status of Socio-economic Rights during Constitutional Review

The enactment of legally enforceable socio-economic rights during the constitutional review in Kenya elicited no ideological storm akin to the post-apartheid South African constitutional negotiations or that witnessed at the international fora.<sup>185</sup> Three reasons may explain this reality. One, it may seem to have been a unanimous commitment on behalf of all stakeholders to entrench definable moral commitments of our nation's ideals. Secondly, the fact that all draft constitutions contain socio-economic rights that conferred on courts adjudicatory jurisdiction lends credence to claims that socio-economic rights had gained currency in the international platform as justiciable rights.<sup>186</sup> A third factor asserts that concerns about justiciability of socio-economic rights were accorded peripheral attention as weightier political power play issues dominated the debate.<sup>187</sup> Hence, the debate as to whether socio-economic rights are susceptible to judicial enforcement is mute in Kenya, thanks to the various constitutional provisions on the wider powers of courts in respect to enforcement of fundamental rights and freedoms of individuals. The question to be asked is how and whether constitutional protection and court adjudication will bear upon and produce desired results of social justice as a value that the Constitution underpins. Providing a concrete answer to this question requires an evaluation of the protected rights and modalities of enforcement that the Constitution envisages.

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<sup>185</sup> Christopher Mbazira, 'The Judicial Enforcement of the Right to the Highest Attainable Standards of Health under the Constitution of Kenya' in Japheth Biegon and Godfrey Musila (ed) *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya*, Vol. 10, (2012),130.

<sup>186</sup> Ibid

<sup>187</sup> Ibid.

### 3.2 Rights Recognized under the Constitution and their Obligations

The rights recognized under the Constitution are the right to the highest attainable standards of health, which includes the rights to the highest attainable healthcare, including reproductive health;<sup>188</sup> the right to accessible and adequate housing, and to reasonable standards of sanitation;<sup>189</sup> the right to be free from hunger, and to have adequate food of acceptable quality;<sup>190</sup> to clean and safe water in adequate quantities;<sup>191</sup> to social security;<sup>192</sup> and to education.<sup>193</sup>

The implementation and realization of these rights is a duty of the state. Under Article 21(1) of the Constitution ‘it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights’. It implies that these rights impose certain obligations on the government and its agencies. At the international level, the meaning of these duties have been expounded and are now well settled. Except for the obligation to observe and promote which are terminological additions to the Constitution, it is now well accepted-that all human rights impose three types of duties: the duty to respect, the duty to protect and the duty to fulfill.<sup>194</sup>

As explained in chapter two, the duty to *respect* is a negative one, and requires the state to keep away from interfering with individuals’ enjoyment or ability to enjoy or satisfy the rights, for example the state has a duty not to evict persons arbitrarily from their dwelling.<sup>195</sup> The duty to

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<sup>188</sup> Article 43(a)

<sup>189</sup> Article 43(b)

<sup>190</sup> Article 43(c)

<sup>191</sup> Article 43(d)

<sup>192</sup> Article 43 (e)

<sup>193</sup> Article 43(f)

<sup>194</sup> Henry Shue (note 45 above) 53.

<sup>195</sup> Maastricht Guideline 6.

*protect* is an important role of the state in regulating the behavior of private persons, acting under their own autonomy, from violating these rights.<sup>196</sup> The essence of this duty is that violations of rights of individuals or infliction of harms to society arising from third parties ought to be subverted or averted by the state. Thus failure to ensure employers' conformity to labour standards may be tantamount to a violation of the right to work or just and favourable conditions of work.<sup>197</sup>

The obligation to *fulfill* requires the state to institute 'legislative, administrative, budgetary, judicial and other measures' to realize the rights.<sup>198</sup> Implicit in this duty therefore is the positive nature of obligations to be assumed by dint of constitutional provision, with emphasis that a failure to take positive measures by the state entails a violation of socio-economic rights.<sup>199</sup> On this duty, the African Commission on Human and People's Rights has clarified that this obligation is affirmative and therefore with regard to socio-economic rights may entail 'the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security)'.<sup>200</sup> While the Constitution does not define what the obligation to observe precisely mean, the duty to promote has been taken to be a subset of the obligation to fulfill.<sup>201</sup>

The other condition for implementation of the rights is the duty of the state to 'take legislative, policy and other measures' to achieve 'progressive realization' of article 43 rights.<sup>202</sup> The Constitution appreciates that achievement of obligations imposed by article 43 rights, especially

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<sup>196</sup> Victor Dankwa et al (note 126 above) 20.

<sup>197</sup> Maastricht Guideline 6.

<sup>198</sup> Ibid.

<sup>199</sup> Victor Dankwa et al (note 126 above) 21.

<sup>200</sup> Social and Economic Rights Action & the Centre for Economic and Social Rights versus Nigeria (African Commission on Human and People's Rights, Communication No. 155/96) para. 47.

<sup>201</sup> Musila (note 33 above) 68-69.

<sup>202</sup> Article 21(2)

the obligation to fulfill, requires some level of deliberate and conscious measures by the state. Legislation, policy or other measures that the government adopts are therefore necessary, even indispensable as frameworks within which positive governmental action may be rolled out.<sup>203</sup> Apart from legislation and policy which are not the exclusive means through which to achieve rights obligations, the term ‘other measures’ in the Constitution has been interpreted as envisaging the provision of judicial remedies as one of the ways of promoting the rights.<sup>204</sup> Other measures that may be adopted to render effective the rights obligations include administrative, financial, educational and social measures.<sup>205</sup>

These measures that the state may adopt, for purposes of achieving the obligations in respect of the rights, are subject to ‘progressive realization’. The implication of this in a constitutional context is that the obligations embodied in social welfare rights may not be instantaneously achieved, since, as has been demonstrated, some require strategic and concrete action oriented measures such as planning, spending, setting of standards, all of which require an amount of time.<sup>206</sup> This provision is thus a pragmatic recognition of the exigencies attendant to the obligation of result that requires the state to achieve specific socio-economic targets.

Further the Constitution recognizes that progressive realization of socio-economic rights requires some level of resource spending and a role played by government in such allocations. Thus under article 20 (5), when adjudicating socio-economic claims, if the state alleges a lack or scarcity of resources as a reason for its failure to satisfy socio-economic rights obligations, a court is to be

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<sup>203</sup> General Comment No. 3 para. 3

<sup>204</sup> General Comment No. 3 para. 5. Also Limburg Principles 18, 19 and 20.

<sup>205</sup> CESCR Statement para. 3.

<sup>206</sup> General Comment No. 3 para. 9.

guided by certain outlined principles.<sup>207</sup> With regard to the first principle, under article 20(5) (a) it is expected that the state may raise an excuse for not meeting its socio-economic rights obligation, particularly the obligation to fulfill such as financial spending on healthcare to ensure accessible healthcare for all, on grounds of resource constraints. The Constitution places the onus of proving such a constraint on the state to show that resources are not available. The rationale behind this constitutional edict appears to be that the state is compelled to put forth before court all relevant information as appertains to policy agenda, information which is otherwise unavailable to the ordinary person who may wish to advance a cause before the court. On the part of a petitioner, all he has to prove is that his rights have been violated consequent to which the state is to prove contrary the allegations.

Article 20(5) (b) of the Constitution prescribes a duty on the state to ensure the widest possible enjoyment of a right among members of the public and to take cognizance of the vulnerable members or individuals when allocating resources. Implied in this provision is a requirement that courts uphold decisions of the state organs that meet these specified criteria and to provide remedies in sync with such governmental decisions. This provision's focus on the vulnerable groups takes into account the notion of distributive justice in adjudication of socio-economic rights where courts issue structural remedies to redress systemic deficiencies that affects society in general as opposed

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<sup>207</sup> Article 20 (5) provides thus:

*In applying any right under article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or any other authority shall be guided by the following-*

*(a) it is the responsibility of the state to show that the resources are not available.*

*(b) in allocating resources the court 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; and*

*(c) the court, tribunal or any other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.*

to corrective justice where individual claim is redressed. The purport of this provision is that courts will have to view socio-economic claims through the lenses of collective action rather than individual claim.<sup>208</sup> For instance in *TAC* and *Khosa* the Constitutional Court of South Africa gave orders that resulted in provision of antiretroviral treatment and social security respectively to benefit not only the claimants but significant sections of the society.<sup>209</sup>

According to the third principle under article 20(5)(c), the court may not interfere with a decision of a state organ concerning the allocation of available resources solely on grounds that it would have come to a different conclusion. This provision recognizes the court's power of review over decisions of state organs on resource allocation. However, in assessing resource allocation, the court is not to invalidate the government's action plans merely on account that it harbours a different opinion. It recognizes that the government has a legitimate role in selecting a viable criteria of resource distribution and to demonstrate to court in an engagement forum the rationality of criteria upon which it has determined resource allocation.

Properly conceived therefore, article 43 rights envisages that the state shall take some positive programme oriented action to satisfy the obligations that underlie these novel rights. In this sense, the state is constitutionally impelled to provide to the people basic essentials of life, at least progressively, within the confines of its resource capacity. The Constitution therefore envisages a role for the government to socially transform Kenyan society through the instrumentality of values that underlie socio-economic rights such as social justice, equality, dignity and care for

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<sup>208</sup> Kaguongo (note 66 above), 96.

<sup>209</sup> See *TAC* para. 721 and *Khosa* para. 505



marginalized communities.<sup>210</sup> These rights provide ‘a potent tool and framework for social intervention by the government to achieve’ constitutional imperative of substantive justice.<sup>211</sup>

### **3.3 Judicial Enforcement and Remedies under the Constitution**

The Constitution has empowered the judiciary with broad rights-based review and remedial powers over all actions and inactions of the state, including, for instance social welfare initiatives that a government may use to distribute social goods to the most in need and marginalized. Under Article 165(3) (b) the High Court has powers to review action or inaction of the state and rectify offending government policies that may infringe on rights. Under this power, the High Court has original jurisdiction to restrain eviction of slum dwellers and order compensation to the victims so as remedy abridged right to housing.<sup>212</sup> Similarly, the court is conferred a power to injunct a secondary school admission program and order the government to conduct a fair admission that doesn’t discriminate against deserving students based on their previous conditions of learning thus protecting one’s right to education under article 43(1)(f).<sup>213</sup> The High Court also has powers to determine whether any law,<sup>214</sup> or any action by any person done under any law or the Constitution, including, commission or omission by the government or any person<sup>215</sup> accords with the constitutional standards or meets rights obligation under the Constitution. Pursuant to this provision, the Court has determined unconstitutional and a violation of right to housing the authority conferred on the City Council of Nairobi under the Physical Planning Act and Local Government Act to plan and control development, when applied in demolishing residential dwelling of people erected on road

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<sup>210</sup> Musila(note 33 above) 59

<sup>211</sup> Ibid.

<sup>212</sup> Musa Mohammed Dagane and Others versus AG and Others Constitutional Petition No. 56 of 2009-Embu.

<sup>213</sup> John Kabui and Others versus Kenya National Examinations Council and Others (2011) eKLR.

<sup>214</sup> Article 165 (3)(d)(i)

<sup>215</sup> Article 165 (3)(d)(ii)

reserves.<sup>216</sup> These powers of review over executive or legislative actions makes the High Court the dominant force of counterbalance in the tripartite arrangement of government.

Together with these broad powers, wider remedial powers are provided in Article 23(3) of the Constitution which enumerates unlimited reliefs that courts may grant when reviewing state action or inaction said to be inconsistent with human rights principles.<sup>217</sup> The reliefs are unlimited in the wording of that provision which states that the ‘court may grant appropriate relief’.

The High Court, and indeed any other court seized of rights violation dispute, may, under article 23(3) grant “appropriate relief” including a declaration of rights;<sup>218</sup> an injunction;<sup>219</sup> a conservatory order;<sup>220</sup> a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;<sup>221</sup> an order of compensation<sup>222</sup> and an order of judicial review.<sup>223</sup> These are traditional remedies, which, in Kenya’s constitutional history have been forms of common law monological and coercive remedies that courts have deployed to relieve civil and political rights breaches. Unlike civil and political rights or private law for which a measure of effectiveness may be attributed, for some socio-economic rights, it may be quite unclear to objectively conclude that those adversarial remedies would appropriately instill their enforcement, taking into account that these are collective claims for social welfare that Kenyan courts lack an orientation to. As discussed in this study, scholars,

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<sup>216</sup> Susan Waithera Kariuki and 4 others versus Town Clerk, Nairobi City Council and 2 Others (2011) eKLR

<sup>217</sup> The reliefs in article 23(1) includes a declaration of rights, compensation, an injunction, a conservatory order, a declaration of invalidity of any law and an order for judicial review.

<sup>218</sup> Article 23(3)(a)

<sup>219</sup> Ibid,(b)

<sup>220</sup> Ibid(c)

<sup>221</sup> Ibid. (d)

<sup>222</sup> Ibid(e)

<sup>223</sup> Ibid(f)

and indeed judicial practice demonstrate beyond doubt the inadequacies and unsuitability of adversarial remedies to redress state action that requires that a court mandates the government to take some programmatic action to ensure, for instance, its obligation to fulfill are satisfied.

The concept of ‘appropriate relief’ denotes the Constitution’s cognizance of the fact that exceptional circumstances may arise compelling the granting of reliefs beyond the ones expressly provided, even though no precise or implied definition to the term ‘appropriate relief’ has been ascribed. Given this lack of definition, the courts would have to exercise interpretive discretion or restraint to ascertain what in substantive form may constitute an appropriate relief, in the peculiar context of a given socio-economic rights claim on which there is unanimity of thoughts that courts will have to confront considerable constraints when finding meaningful remedial measures for their fulfillment. This constitutional edict of ‘appropriate relief’ has given judges a discretionary leverage to be innovative and imaginative<sup>224</sup> to navigate through adjudicatory difficulties associated with intrusion into the political and administrative realms of other democratic institutions. Such a generous provision also gives room for manouvre to judges to scrutinize human rights consistency of social policy while confronting the challenge of political will by the executive to comply with court orders on resource allocation; a leverage exploited to craft remedies that respect autonomy of other institutional organs and ensures the efficacy of courts orders.

### **3.4 Practical and Pragmatic Considerations of Judicial Enforcement**

The Constitution embodies values, aspirations and social entitlements that are by their nature not self-executing. Practically, they are to be protected and implemented through administrative action, policy programmes, legislative superintendence (roles performed by the executive through

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<sup>224</sup> Musila (note 33 above) 70.

legislation) and other collaborative efforts of other bodies such as civil society agitation, human rights institutions; with the judicial processes and channels invoked, more often as a last resort where these organs have failed. Arguably, judicial enforcement of social welfare entitlements is not the most efficacious mechanism of realizing the constitutional vision of social justice, in comparison to the other legal and non-legal processes.

Judicial mechanism is perceived, much more as an enhancement to other legal and non-legal processes; a vitality demonstrated in several respects:- it assists in providing remedies to discrete rights violations; threat of judicial action influences government responses to rights situation; empowers other non-judicial processes such as NGOs and activists; and reinforces a constitutional commitment to social change.<sup>225</sup> Judicial intervention is for this reason not an exclusive means but a supplemental process to other administrative and legislative action for realizing sustained human rights protection. What such a role portends is that courts act to inject the language of rights into policy making and add another platform for debate.<sup>226</sup>

This leads to an inquiry of the circumstances under which individuals or groups may bring a court action to demand social services. Public interest litigation is catalyzed by two factors: failure of institutional policy framework on which needs-based rights are anchored; and the appearance of courts as viable channels capable of indicting institutional failures of providing essentials for those in need.<sup>227</sup> But translating the concept of rights to practical benefit via the judicial process is fraught with many challenges. It is generally recognized that enforcing social welfare entitlements lies in

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<sup>225</sup> Eric C Christiansen, "Using Constitutional Adjudication to Remedy Socio-economic Injustice: Comparative Lesson from South Africa" *13 UCLA J.INT'L L & FOR. AFF* (2009),400.

<sup>226</sup> Daniel Brinks and Varun Gauri (note 67 above), 345.

<sup>227</sup> As above at p.306.

the unaffordability of legal services, often not within the reach of most individuals, as legal redress may only be a choice for those with financial muscle.

The second challenge inheres in the individuality of claims before the court. As Brinks and Gauri explain, litigation of social welfare claims present courts with the individual problem, addressing only the narrow scope of grievances as presented by those who can afford costs of litigation.<sup>228</sup> However, social welfare litigation needs a different approach since the enforcement of such rights has an impact not only on a particular individual claimant but a wider section of the society making ‘it far harder to secure and realize a collective than an individual remedy’.<sup>229</sup> The third problem relates to receptivity of courts towards these rights. In countries where courts are unreceptive to these rights, the rates of invocation of judicial intervention remains relatively low, since as observed practice shows, the attitudes of judges is a key factor determinative of the reach, recognition and enforcement of social welfare rights.

Apart altogether from the challenges that may confront the pursuit of a social welfare claim at the judicial forum, there is yet another dimension to litigation which may explain when and why courts may support some socio-economic claims and not others. These dimensions are depicted from Gauri and Brinks’ analytical research on developing countries courts’ mixed reactions to judicialization and induction of these novel category of rights.

One identifiable factor is the legal tradition or culture influencing the demarcated boundaries of litigation. For example the rules of standing (*locus standi*) may limit the accessibility of courts from

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<sup>228</sup> Daniel Brinks and Varun Gauri (note 67 above), 305.

<sup>229</sup> Ibid.

certain actors such as the civil society.<sup>230</sup> Where the rules of standing are generous, it becomes easy to bring a collective socio-economic action before the courts. Article 22 (2) of the Constitution of Kenya has softened this procedural stricture, and now, unlike before, in addition to any person acting in their own interest, persons acting on behalf of others, in the interest of a group or class, a person acting in the public interest or association acting on behalf of its members has the right to institute actions in court to enforce fundamental rights. In India, innovative approaches of the Supreme Court saw the induction into the legal regime of the idea of public interest litigation which has given impetus to the judicialization of the rights of poor.<sup>231</sup>

Receptivity of judges to specific socio-economic claims also helps explain why courts prefer some rights to others.<sup>232</sup> For instance the philosophical predisposition of a judge may make her prefer certain conceptual inclinations as to the proper role of courts in rights protection or constitutional interpretation generally. As ingredients delicately sieved at the appointment process, a judge may take a particular jurisprudential bent depending on social, political and philosophical orientation. While at the bench this may explain why some may be activist, apolitical or political; pro-socio-economic rights or demonstrate a hostility thereto.

Textual constitutional design coupled with judicial attitudes in certain instances may also explain why there has been varying approaches by courts in various jurisdictions. In Nigeria where the rights are protected as non-justiciable directive principles of state policy, the rights have received marginal attention whereas in Brazil, aggressive enforcement of the right to health is attributed to

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<sup>230</sup> Daniel M. Brinks (note 67 above)314

<sup>231</sup> S. Muralidhar (note 87 above), 106.

<sup>232</sup> See note 230 above p.315

precise constitutional provisions. What is baffling however is that express constitutionalisation of rights is not a sure factor that perpetuates rights protection. India is a jurisdiction without any express constitutional commitment to socio-economic rights protection like Nigeria, but the Supreme Court has frequently invoked its predominant powers of constitutional interpretation to incorporate non-justiciable rights to health and or education into the right to life<sup>233</sup> whereas Nigerian courts have determined that socio-economic rights are non-justiciable by dint of the Constitution. This is what is called the language of rights protection where some rights may be protected in robust language as compared to others. Example given is the South African Constitution, where the provision on the right to health is more generous, providing that the state must take reasonable legislative and other measures to achieve progressive realization of the right whereas only higher education is subject to progressivity test while basic education provision is without any conditions.<sup>234</sup>

Relative weakness or strength of court to other political organs also influences the approach courts may take when dealing with socio-economic rights. Weak judicial systems may not wish to antagonize the political institutions since they have no force of their own to implement decisions or take a role better performed by other bodies. For example in Indonesia the courts are relatively weak as compared to other actors. In South Africa the Constitutional Court has been criticized, despite its robust jurisprudence for failing to produce significant impact on the lives of the poor.<sup>235</sup>

The criticism is that the Court failed to supervise the implementation of its orders in the *Grootboom*

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<sup>233</sup> See also the case of *Francis Coralie v. The Administrator* (1981)2 SCR 516.

<sup>234</sup> Article 27(2) of the Constitution of the Republic of South Africa provides that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization while on the right to education article 29(1) provides that “Everyone has the right (a) to a basic education, including adult education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible”

<sup>235</sup> Mia Swart, “Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor” *21 South African Journal of Human Rights* (2005), 215.

case, and relegated this role to national commission on human rights.<sup>236</sup> This restrained approach of the Court appears to have been informed by a fear to antagonize other political actors such as the executive. This trend was replicated in *TAC* where the Court declined to issue a structural interdict on grounds that the government has always obeyed and implemented its orders and as such a structural interdict would be unnecessary, the Court thereby warning itself against usurpation of powers conferred on the executive.<sup>237</sup>

The last point that suggests why courts may engage with claims with varying attitudes is the existence of a policy framework on which social welfare benefits claims may be anchored. Such a framework affects the interpretation, outcome and implementation measures that courts may adopt. Different kinds of cases may arise depending on whether a policy framework exists for implementation of a right or not, and the courts in intervening finds it practicable to review existing social programs instituted by the government.<sup>238</sup> The situation is different in instances of absence of groundwork parameters on which courts may assess particular claims to social services.

### **3.5 Contextual Problems Inherent in the Judicial Exercise of Remedial Powers**

The commitment to social justice, equality and human dignity is central to the transformative goals and visions of the Constitution. This commitment would considerably inform judicial adjudication of social policy contests when individuals and groups would move courts to demand social services such as provision of water, healthcare, education and adequate food supplies. This anticipated scenario would inevitably elicit jurisprudential questions as to how courts would embrace such a

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<sup>236</sup> Ibid.

<sup>237</sup> *TAC* para 129.

<sup>238</sup> *Gauri and Briks* (note 67 above), 318.



transformative agenda in an environment in which social policy objectives have been the domain of the legislature and the executive, but which the new constitutional reconfiguration requires the them to be an adjudicator and protector.

Scholars have continuously projected the apprehensions regarding problematic situations that provision of remedies and enforcement of socio-economic rights would confront in the bridge-gap period from the old to the new Constitution of Kenya, 2010 and in the foreseeable future.<sup>239</sup> Finding remedies for socio-economic rights breaches is often considered to be fraught with challenges arising from separation of powers dilemma, which are both of practical and conceptual dimensions.

Musila explains the intricacies that social policy may exert not only on the courts but to other governmental social policy agencies.<sup>240</sup> Apart from the institutional competence and legitimacy concerns as traditional objections to socio-economic rights review, he additionally identifies the exigencies of vulnerable groups as a portent challenge to Kenyan courts. He recommends that judges be imaginative and pragmatic in order to keep ablaze the transformative project of the Constitution.<sup>241</sup> To him, the transformative Constitution has altered traditional significations of the notion of separation of powers by empowering the judiciary to be the sentinel of constitutionalism by inter alia checking the executive and legislature and insures that they remain faithful to their constitutional remit. When, therefore, this oversight mandate is exercised in respect of social policy matters in which resource expenditure and budgetary planning are implicated, inevitably there would be views that unwelcome judicialization of politics has been sanctioned. The dilemma for

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<sup>239</sup>Musila (note 33 above)70; Kaguongo (note above 66); Mbazira (note 132)132 and Biegon (note 17 above)40-52

<sup>240</sup>Musila (note 33 above)

<sup>241</sup> Musila(note 33 above), 65-70

the judges may be how to go about adjudicating executive's administrative actions on social policy without suffocating the separation of powers equilibrium.<sup>242</sup>

This is the concern of efficacy and observance of court decisions in a political environment; a factor that influences responsiveness to court orders. As a matter of observed practice, courts are more receptive to claims that can be remedied with no much intervention of state structures.<sup>243</sup> On the contrary, judicial apathy is preminent to adjudicatory engagements that excite indifferent attitudes from state institutions. In *TAC* the Constitutional Court lamented the ill-fitness of courts to determine disputes that impact greatly on socio-economic consequences of the society given the 'restrained and focused role for the Courts, to require the state to take measures to meet its constitutional obligations'<sup>244</sup> and left it open-ended for the government to determine appropriate ways through which it would make anti-retroviral treatment to those in need. In the Kenyan context, it is expected that vulnerable individuals and groups would stake out constitutional petitions to demand that the government be compelled to relieve their socio-economic conditions by providing essential services. Claims of this nature would burden the courts with laborious examination of the existing legislation or policy infrastructure to ascertain their consistency with human rights obligations. For instance, the court would make a clear finding whether an existing programme of supply of piped water meets the test of progressive realization or whether the institutional capacity of healthcare of the government fulfills the obligation of result. A court may find the existing institutional capacity for healthcare as falling far short of the obligation to fulfill, thus may make an order compelling the government to furnish resources and to expeditiously implement policy to

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<sup>242</sup> Ibid.

<sup>243</sup> Daniel Brinks and Varun Gauri (note 67 above), 320-321.

<sup>244</sup> Para. 129.

achieve constitutional obligations. Constitutionally, the court will be acting within its demarcated authority, politically this may be an illegitimate incursion into policy issues which are a preserve of the government and parliament.

Put to proper perspective, the problematic dimension of this adjudication is underpinned by the institutional interrelationship between the government and the judiciary. Naturally, courts expect their judgment to be obeyed and depend on the executive to implement their orders. The situation is somewhat different where the government becomes subject of court action. Efficacy of court orders becomes dependent on the relative strength of the judiciary in comparison to other political institutions. Where the judiciary is weak, and there is a lacking political will from the government, disregard of court orders may be the norm, subverting the pursuit of social justice at the judicial fora. It is a critical factor that may explain judges' apathy to socio-economic claims, especially in a jurisdiction where the executive arm is domineering and stronger relative to the judicial organ.

Still at a practical level, courts involved in socio-economic rights review in Kenya would face practical difficulties relating to fashioning meaningful remedial orders to ensure reasonable provision of welfare needs. This is a view spawned by inadequacies and shortcomings of conventional remedies now in use by courts for civil and political rights or private law; an understanding that terms the 'received remedial tradition' as ill-suited for socio-economic rights claims.<sup>245</sup> It explains that traditional remedies for civil and political rights or private claims such as injunctions, declarations or damages are simple, restitutive, corrective or compensatory remedies

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<sup>245</sup> Kent Roach (note 38 above),9-10. See article 23(3) that lists these traditional remedies that a court may grant for breach of fundamental rights and freedoms under the Bill of Rights.

often engaging a particular individual and instant claim before the court.<sup>246</sup> Contrariwise, socio-economic remedies are complex in nature, when sanctioned by court, they compel the government or its relevant agencies to initiate certain resource-extensive actions to provide services.<sup>247</sup> This has been termed distributive justice which when granted by the courts targets to reform governmental systems dealing with public welfare initiatives. It is different from corrective justice which aims only to relieve the grievances, compensate a claimant and restore him to his situation before the breach occurred.

Explaining article 23(3) remedies' effectiveness for civil and political rights as against socio-economic rights, Mbazira reiterates the intrinsic complexity in crafting distributive remedies for vindicating socio-economic injustices endured by groups or large sections of the society.<sup>248</sup> He concludes that the values of equitable resource distribution, social justice and protections of marginalized communities implicitly underpinned by the Constitution's ideal for distributive justice may be unattainable by ordinary use and application of article 23(3) remedial measures.<sup>249</sup> He urges that courts ought to 'forge new tools and shape innovative remedies' as a means of ensuring effective response to socio-economic claims.<sup>250</sup> It is this advocacy for new tools and innovative approaches that makes a clear case for resort to dialogic remedies as opposed to usual remedies of article 23(3).

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<sup>246</sup> Ibid.

<sup>247</sup> P.10

<sup>248</sup> Mbazira (note 46 above),49-50

<sup>249</sup> Ibid,

<sup>250</sup> Ibid, relying on the dictum in *Fose v Minister of Safety & Security* 1997(3) SA 786 (CC) paragraph 69.

Principled misgivings for judicial enforcement of socio-economic rights perceive judges as ‘unaccountable to the electorate’ since they are appointed individuals unsuitable to give directions on social policy and resource distribution agenda.<sup>251</sup> Judges are moreover viewed as unable to access requisite information relevant for determining socio-economic claims before them. Further, it is charged that they lack skillful knowhow to help them competently resolve resource distribution controversies. For that reason the outcome of their adjudication would put to question the legitimacy of remedial measures they may grant.<sup>252</sup> These conceptual doubts are spurred by fears that only the executive have capacity to formulate programmatic interventions or resource allocation and implementation strategies; a fete that judges, because of a limitation on their technical capacity may not tenably achieve.<sup>253</sup> But the counterarguments dispelling this logic holds that courts always work within the confines of a given policy framework, redressing its deficiencies and do not create new policy, rather they review them to ascertain that certain bypassed interests are protected.<sup>254</sup>

It is by no means difficult to see how the judiciary has been plunged into politics of resource distribution through social policy adjudicatory processes. What this adjudication portends is that in cases where affirmative state action is necessary, the judiciary would be dispensing distributive justice that reform systemic plans of the government. Remedies granted by courts in form of orders would have the consequence of significantly altering government initiatives, or impacting variably the object of legislation.<sup>255</sup> The challenge that this kind of adjudication entails for the Kenyan judiciary, in a departure from the conventional remedial measures, in a transformative constitutional

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<sup>251</sup> Kaguongo (note 66 above),102

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Gauri and Brinks (note 67 above), 345.

<sup>255</sup> Ibid.

framework, is how to question government social policy plans and subsequently find, from a judicial platform, a form of distributive remedy that targets larger groups in a society without igniting tensions between these arms of government. Courts, in the usual tendency to issue general orders presuming that the government will comply would potentially be undermined by overt political power play impediments such as an executive that may be unobligated to follow commands from other quarters, or, a parliament that, in defense of its autonomy may be reluctant to act according to a judicial instruction. This research therefore shows that courts cannot act unilaterally, when they do, the impact of their decisions would most likely be marginal, and may not obtain much support. On the contrary, courts that engage in partnership with other political actors are less likely to meet political obstacles in the compliance with its orders.

### **3.6 Recent Judicial Practice Exemplifying Complexity in Enforcement**

Since the promulgation of a new constitution in Kenya, judicial attitude and receptivity to these rights have been mixed and disjointed. Though there are only countable socio-economic rights cases determined by the courts since the enactment of a new constitution, some judicial decisions reveal a remarkable development in understanding these novel rights. Sadly, in some cases courts have been totally oblivious, even ignorant of the normative nature of these rights. *Charo wa Yaa*<sup>256</sup> case above depicts a confounding lack of insights and grasp of the place of the judiciary in general, and the role of a judge in particular in how to conceive and redress socio-economic injustices that vulnerable groups have historically endured as a result of anomalous government socio-economic policies. On the contrary however, *John Kabui*<sup>257</sup> case demonstrates a significant mindset shift concerning newfound judicial roles in perpetuating social justice and equality. The court took

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<sup>256</sup> See note 37 above

<sup>257</sup> See note 36 above

cognizance of the judicial intrusion into the politics of resource distribution as a potential challenge to the ideals of social justice and substantive equality. The court accepted the transformative potential of socio-economic rights in translating the past socio-economic deprivations into a society of equal and equitable resource distribution. In what may appear to be a weak form of judicial review, the court took recognition of the legitimacy concerns and highlighted the need for according a public body a leeway to accomplish its constitutional obligations.

*Mitu Bell*<sup>258</sup> is a trail-blazing case in which the High Court responded to the separation of powers question and complexity of dispensing distributive justice with an impressive sleight of hand. In what may be seen as a *dialogic approach* in crafting remedies for socio-economic rights breaches, the court was consciously aware of the tripartite scheme of governance in Kenya, and how best to craft an effective judicial remedy that safely navigates its fine power balance. In that case Justice Mumbi Ngugi analysed the case of the evicted squatters and found the government to be in breach of its obligation under article 21 and 43 of the Constitution.<sup>259</sup> Instead of making the coercive declaratory orders that have been a commonplace tool in rights enforcement in Kenya, the judge was ingenious and opted for a dialogic approach. The judge did not make final orders but required the respondents, among them the Attorney General to report back to court, by way of affidavit, within sixty days, apprising the court of the existent government policies and programmes on housing and pertinent to slum dwellers and vulnerable groups.<sup>260</sup> The court also directed that civil society groups with expertise in housing and who were not party to the suit be incorporated, subject to consensus by the parties, and together with the claimant be furnished with the report on

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<sup>258</sup> See note 34 above

<sup>259</sup> Ibid. at paragraph 78.

<sup>260</sup> Ibid. paragraph 79

contemporary government programmes and policy on housing. Third, the court ordered the parties to negotiate amongst themselves in consultation with relevant state agencies on how to arrive at a compromise of redressing the petitioner's grievances of unlawful eviction. The fourth order of court required the parties to report back to court within ninety days from 11<sup>th</sup> April, 2013 on the progress made towards resolving the petitioner's problems.<sup>261</sup>

In following *Mitu Bell's* approach, *Sartrose Ayuma* appreciated the policentricity of socio-economic claims by being cognizant of the plight of other segments of society who may be affected by a government policy on evictions. The judges targeted approach was thus not on the claimants but victims who occasionally or may in future be subjected to similar adverse state action of violation of housing rights. Moreover, the court's advice to the Attorney General to consider amendments to the Water Services Act, 2002 shows how courts provide additional fora for suggesting solutions to existing social policy deficiencies. The court reminds the government of its constitutional obligations, identifies flaws in legislation but leaves it open-ended for the government and parliament to enact such changes. By giving the government an opportunity to report back to court with existing or planned policy action and legal framework on evictions and accessible housing, the court is beginning a process of examination of the state's policies compliance with human rights obligations. The court leaves it to the government, to devise ways of providing social goods to the public. By such an approach the court appears to have been mindful of the demarcated boundaries for exercise of public power between the two arms of government. The reporting back mechanism means that the court's engagement with the parties is an iterative

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<sup>261</sup> Ibid.



process in total disregard of *functus officio* doctrine by which judges are precluded from further engaging a matter once a judgment has been granted.

For judges oriented to monologic judicial review in which remedies are part of a coercive and authoritative law, and in which judgment vindicates only the rights of an individual claimant, and marks the end of a litigation process, adjudication of positive socio-economic claims will present unsettling challenges, inviting dialogical approaches where remedies are a result of a conversational process targeting large groups of disadvantaged individuals, the judgment makes the case no *functus officio* and may be amended from time to time to accommodate divergent options suitable to a given circumstance. This is the conceptual divide exemplified by the decision of Justice Majanja in *Mathew Okwanda*<sup>262</sup> case in contradistinction to its precursor the *Mitu Bell* and *Satrose Ayuma* decisions. How then can Kenyan courts confront these issues that exact unprecedented political legitimacy problems? Does the dialogic approach employed by *Mitu Bell* represent a suitable commitment and a practical mechanism of avoiding democratic legitimacy challenges to judicial remedial powers regarding distributive justice in Kenya?

### **3.7 Confronting the Challenges by use of Dialogue in a Transformative Constitutional Framework**

Confronting the above challenges to judicial enforcement of socio-economic rights requires a proper understanding of the 2010 Constitution as a transformative charter. The Constitution has been touted as transformative due, in large part to the novelties that underpin its various

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<sup>262</sup> See note 35 above

provisions.<sup>263</sup> These salient attributes include the national values and principles encompassing inter alia (human dignity, social justice, equality, and democracy), devolution, the centrality of human rights and fundamental freedoms, protection of marginalized communities and finally the structural reconfiguration of institutions of governance. In particular, enactment of socio-economic rights as legally enforceable catalogue of rights implicitly and explicitly underscore the social transformative project of the Constitution, the dream of molding an egalitarian Kenyan society based on human dignity, social justice and substantive equality.<sup>264</sup>

Explaining and applying this concept in its pioneer tone after South Africa enacted a new constitution, Karl Klare defines transformative constitutionalism as: ‘a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but 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. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law’.<sup>265</sup>

To induce large-scale social change in Kenya by use of law as a device, socio-economic rights adjudication would have to embrace this theme of transformative constitutionalism. It behooves judges to understand their roles not merely as passive adjudicators but as agents of social reform in

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<sup>263</sup> See Musila (note 33 above). For a comprehensive account of the concept of transformative constitutionalism, see also Justice Pius Langa prestige Lecture given at Stellenbosch University on 9<sup>th</sup> October, 2006. See also Advisory Opinion Reference No. 2 of 2013 Sup Ct. para. 51

<sup>264</sup> Ibid.

<sup>265</sup> Karl Klare ( note 72 above)150

a political environment, with a constitutionally sanctioned role of determining competing visions of a new Kenyan society in which law and politics exert some influence.

In a transformative constitutional set-up, the roles of the higher courts have been reformulated, vesting in them unprecedented responsibilities.<sup>266</sup> These new responsibilities demand that judges be consciously aware of the ‘politics of law’<sup>267</sup>. The judges should acknowledge that the ideal of social transformation imposes a repertoire of responsibilities that go beyond adjudication. Essentially, for the social transformative agenda to be accomplished, conceptual divides between law and politics must be dismantled.<sup>268</sup> A recognition of this fact thus makes clear that a judge’s personal and political values and sensibilities cannot be excluded from interpretive adjudication processes more so when politics of resource distribution are subject of court processes. This is affirmed by a recent Ugandan court decision which stated that ‘the political question doctrine’ by which courts refuse to rule on certain questions because they are the preserve of political branches is not tenable.<sup>269</sup> To this end ‘creative and innovative’ approaches by the judiciary on matters of distributive justice, confined and founded on the law, ought to be emphasized if the transformative project of the Constitution is to remain on a sustained trajectory.

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<sup>266</sup> The unprecedented responsibilities in this sense means new adjudicatory matters such as determining the reasonability of a governmental policy agenda, or evaluating financial allocation for particular social initiatives, viz finances for TB drugs, hunger eradication funds e.t.c. These duties, without a doubt have never been subject of determination in Kenya’s judicial history; and further no cognizable remedies compelling or re-ordering government plans of expenditure have been witnessed in Kenya. However the cases of Mitu Bell Welfare society (note 34 above) and Mathew Okwanda (note 35 above) depicts these new adjudicatory matters on which the courts have been called upon to determine and proffer remedial measures.

<sup>267</sup> For this phrase of ‘politics of law’, see Pius Langa’s Prestige Lecture delivered at Stellenbosch University on 9<sup>th</sup> October, 2006.

<sup>268</sup> Ibid.

<sup>269</sup> Centre for Health Human Rights and Development (CEHURD) and 3 Others versus Attorney General, Constitutional Petition no 16 of 2011.

This study suggests that dialogic judicialism is a creative and innovative tool with the potential of judicially advancing social justice as a value that the transformative Constitution underpins. Dialogic orders have a higher potential of compliance than unilateral instantaneous orders. **Dialogue** is a process in which the court gives room for discursive and conversational exchange with parties to a suit (in socio-economic rights respondents are always agencies of government) in a bid to formulate the most workable and agreeable remedies to a particular case or solutions to a particular problem.<sup>270</sup> This approach prefers that the court does not offer final remedies, it leaves open-ended its decision so that parties can iteratively negotiate and amend their joint solutions to accommodate either party's concerns to achieve optimum compliance. The court encourages the government to reflect upon its judgment, permitting it some latitude to devise appropriate measures that honours court's set targets. The government reports to, and the court exercises supervisory jurisdiction, on progress of achievement, or obstacles impeding implementation of negotiated plans.

Unlike common law tradition of coercive finality of judgment that requires unqualified obedience from parties to a litigation process, dialogic judicial review recognizes that a judgment is not a final part of adjudication but the beginning of a process in which the court is open to engagement on alternatives, options and best strategies to secure fulfillment of rights embodied under the Bill of Rights.<sup>271</sup> A dialogic understanding of justice implies that a court promotes interchange with the political branches in whose domain comprehensive-reform programmes emanate.<sup>272</sup> In enforcing socio-economic rights in a constitutional democracy such as Kenya, courts would therefore not be usurping the decision-making-authority of more majoritarian policy-making and implementing

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<sup>270</sup> See Daniel Brinks and Varun Gauri (note 67 above), 322, 323

<sup>271</sup> Kent Roach, 'Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience' 40 *Texas International Law Journal* (2005) 537-576 at 553.

<sup>272</sup> *Ibid.*

bodies. Remedies crafted out of conversational dialogue with the courts appreciates that the government always has varied options for fulfilling social welfare obligations. Any adjudicatory outcome must therefore be reflective of this imperative, and acknowledge the usefulness of dialogue in promoting partnerships between courts and governments in producing systemic reforms that foreclose likelihood of future violations.<sup>273</sup> Dialogic judicialism hence make courts the ‘additional’, and not the ‘exclusive’ fora for deliberations of social welfare.<sup>274</sup>

### **3.8 Conclusion**

This chapter has identified the constitutional protection of socio-economic rights, including the powers that courts wield in their enforcement and the remedies that are available to persons and groups who may be victims of violations or denial of rights. Under this chapter, associated practical dilemma and doctrinal challenges that enforcement of these rights may face in Kenya’s constitutional context have been clarified. This section also explains why and when courts would engage with some socio-economic rights and not others based on a statistical research of certain identified countries. The chapter suggests synoptically that though real challenges to Kenya’s visionary objective of an egalitarian society exist, these may however be neutralized by dialogic remedial measures that courts adopt in an environment of transformative constitutionalism. *Mitu Bell* and *Satrose Ayuma* are suggested as models from which future enforcement of socio-economic rights may be steered. The next chapter discusses how courts and tribunals in other jurisdictions have dialogically dealt with challenges to finding appropriate remedies to socio-economic rights claims

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<sup>273</sup> Ibid.

<sup>274</sup> Daniel Brinks and Varun Gauri (note 67 above) 343.

## CHAPTER FOUR

### THE PRACTICE OF DIALOGIC JUDICIAL REVIEW IN OTHER COMPARATIVE JURISDICTIONS

#### 4.1 South Africa

The 1996 Constitution<sup>275</sup> of the Republic of South Africa provides a comprehensive set of socio-economic rights<sup>276</sup>, simultaneously identifies the state's obligation in respect thereof and empowers the court with wider discretionary remedial powers.<sup>277</sup> Under section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.<sup>278</sup> The state is imposed a duty, under section 7 (2) to 'respect, protect, promote and fulfill' these rights.

The remedial powers of the South African courts are provided for under Chapter 8 empowering the Courts to remedy and enforce rights. Under section 172 (1) (a) a court deciding a constitutional matter 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its consistency.' Such declaratory reliefs may be a declaration of invalidity or general declaratory orders. Moreover, the court may make 'any order that is just and equitable' under section 172(1) (b).<sup>279</sup> It is to be noted that the most common reliefs- declarations, prohibitory and

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<sup>275</sup> The Constitution of the Republic of South Africa Act, 1996.

<sup>276</sup> Among others, section 26 (right to housing) 27(healthcare, food, water, social security) and 29 (education) protect socio-economic rights.

<sup>277</sup> See section 38 of the Constitution for a list of persons who can move the court in instances of rights violations.

<sup>278</sup> See also section 8(2) for the proposition that the Bill of Rights binds all persons, whether natural or juristic, to the extent that it is applicable.

<sup>279</sup> Section 172(1)(b) states thus:-

1. When deciding a constitutional matter within its power, a court-

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

mandatory orders have often been used in South Africa for rights violations, however their suitability has often remained in doubt regarding socio-economic rights.<sup>280</sup> Their inappropriateness has been acknowledged in the South African context where courts are an integral part of transformation seeking to redress grave inequities and imbalances perpetuated by apartheid era. Alive to this fact courts have tended to exploit the utility of discretion granted under the purview of ‘just and appropriate remedies’ to grant new and creative remedies.<sup>281</sup>

The Constitution of South Africa encapsulates concisely the objective of social transformation.<sup>282</sup> The transformative potential of socio-economic rights in the post-apartheid South Africa has been a vehemently articulated theme in that country’s legal scholarship.<sup>283</sup> Liebenberg, a leading South African scholar on social rights jurisprudence has suggested that the virtues of social justice should ‘be at the core of interpretation of rights claims as an ingredient of social transformation based on defined constitutional values’.<sup>284</sup>

Similarly the concept has also profoundly influenced South African judicial conception about social justice and transformation when interpreting rights-based claims in which the need for ‘innovative

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<sup>280</sup> Mitra Ebadolahi, ‘Notes: Using Structural Interdicts and The South African Human Rights Commission to achieve Judicial Enforcement of Economic and Social Rights in South Africa’, *New York University Law Review*, Vol. 83 1565-1606 (2008)1590.

<sup>281</sup> Ibid.

<sup>282</sup> See the Preamble where it states that the Constitution is aimed at healing the divisions of the past, establishing a society based on democratic values, social justice and fundamental rights, improving the quality of life of all citizens in the Republic.

<sup>283</sup> See Linda Stewart, ‘Adjudicating Socio-economic Rights Under A transformative Constitution’ *Penn State International Law Review*, Vol. 28: 3, 487-412 (2010) 488. See also Sandra Liebenberg, ‘Needs, Rights and Transformation: Adjudicating Social Rights’, 17 *Stellenbosch Law Review* (2006)5; Rosalind Dickson (note 98 above)392

<sup>284</sup> Sandra Liebenberg (note 283 above) 6.

remedies'<sup>285</sup> has consistently been pursued.<sup>286</sup> The Constitutional Court of South Africa (hereinafter the Constitutional Court) in the view of Ackerman J put accent on this sensibility of transformative remedies, founded on the notion of just and equitable remedies, in the following excerpt:

**In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.<sup>287</sup>**

On a number of occasions that the Constitutional Court has dealt with socio-economic rights, the dilemma of appropriate and effective remedy under section 172 has always been a significant predicament. *Soobramoney* is an earlier case in which the Constitutional Court's dissatisfaction with encroachment into the other organs' rational decisional purview was manifestly at play, with the Court observing that 'a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.<sup>288</sup>

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<sup>285</sup> Kent Roach and Geoff Budlender (note 36 above) 328.

<sup>286</sup> See *Du Plessis and Others versus De Klerk and Another* 1996 (3) SA 850 (CC), paragraph 157, *Rates Action Group versus City of Cape Town* 2004 (12) BCLR 1328 (C) at paragraph 100

<sup>287</sup> *Fose v Minister of Safety of Home Affairs* 2000(3) SA 936(CC)

<sup>288</sup> *Soobramoney versus Minister of Health, Kwazulu-Natal* 1998(1) SA 765 (CC) at 776.



#### 4.1.1 Structural Interdicts

Aware of tensions inherent in the constitutional political power balance, informed by the reality of governmental resource constraints; and taking cognizance of the vested liberal remedial powers under the Constitution, South Africa's courts' approaches in reviewed case-law demonstrate pragmatic, nay, innovative responses in crafting appropriate and effective remedies in socio-economic rights cases.<sup>289</sup> One particular remedy used in South Africa is the *structural interdict* as a tool of dialogue for boosting effectiveness of socio-economic rights remedies that courts may grant.<sup>290</sup> The need for parties to report back to court, termed *ex post jurisdiction* is essential in holding the government accountable.<sup>291</sup>

Structural interdict occurs where the process of rectification of violation of rights is supervised or monitored by the court.<sup>292</sup> Five characteristics are salient to structural interdicts: (a) the court first establishes the breach of a right by the government, (b) and then directs the government to fulfil its duties under the constitution subsequent to which (c) it is required to prepare and present to court on a specified date, detailed situation report, by way of affidavits, giving an account of its preferred

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<sup>289</sup> Lilian Chenwi, 'A new Approach to Remedies in Socio-economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others', 2 *Constitutional Court Review* (2009)371.

<sup>290</sup> Rosalind Dixon (note 103 above) 413.

<sup>291</sup> Mitra Ebadolahi, 'Notes: Using Structural Interdicts and The South African Human Rights Commission to achieve Judicial Enforcement of Economic and Social Rights in South Africa', *New York University Law Review*, Vol. 83 1565-1606 (2008)1591.

<sup>292</sup> *Ibid.* at 1591 quoting Ian Currie and Johan de Waal, Remedies, in THE BILL OF RIGHTS HANDBOOK (Ian Currie & John de Waal eds., 5<sup>th</sup> ed. 2005)

modality and timeline of remedying the rights breaches in issue.<sup>293</sup> (d) The court then assesses, in a hearing process involving participation of all parties, the proposals against the outlined yardsticks of the Constitution.<sup>294</sup> This may take place at different phased-out periods to allow monitoring or supervision of contingent factors affecting compliance.<sup>295</sup> (e) At the last step, a final order incorporating all the proposed plans and any expedient necessary court amendments is given.<sup>296</sup> Any failure to observe compliance with these orders invites contempt of court proceedings.<sup>297</sup>

The case of *Government of the Republic of South Africa v Grootboom*<sup>298</sup> demonstrates the High Court's use of this remedy of structural interdict. Irene Grootboom and nine hundred others were residents in an informal area called Wallacedene. Due to appalling conditions of life in the area, they moved out and occupied a private land in Cape Town. The owner of the private land got an order evicting Grootboom and her neighbors from the land. In the process their personal effects and temporary dwelling were demolished. They then made a request, in vain, to the Cape municipality to honour its obligation under section 26(2) and 28(1) (c) to provide them with temporary accommodation. Grootboom, on behalf of others moved the High Court against the provincial and local authorities. The High Court established that the government was under an obligation, which it was in breach of, under section 28(1) (c) to provide basic shelter to children who had been rendered homeless alongside their parents. By extension, the municipality was also in breach of an obligation to provide shelter to the parents of the children. This implied an obligation to provide, 'tents, portable latrines and a regular supply of water.'<sup>299</sup> The trial judge made an order declaring

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<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> 2000(11)BCLR 1169(CC) (S.A)(hereinafter Grootboom)

<sup>299</sup> Ibid. paras. 25-26.

the obligations of the respondents, and ordered them within three months to report to the court on the implementation of the order. The court also gave a mandatory order, in the interim period for construction of temporary accommodation for the children and to one parent of each child.<sup>300</sup> The government appealed to the Constitutional Court. However on the day of the hearing, the government made an offer of alternative accommodation to ameliorate the existing destitute situation of the litigants, which they accepted. The matter nonetheless proceeded to full judgment. Final judgment of the Constitutional Court was finally given concurring and upholding the High Court's declaration of rights, described the nature of state's obligation arising from the right to housing, and held that the state was in breach of those obligations. As a result of the alternative offer of accommodation provided by the government, the court made no other order or any indication of a reasonable timeframe within which the government would have satisfied the order.

The Constitutional Court on appeal arising from the High Court was presented with yet another remedial challenge on accessibility of an HIV/AIDS drug in *Minister of Health v Treatment Action Campaign (TAC)*.<sup>301</sup> In this case the High Court had made a supervisory order or structural interdict that imposed on the government a duty to take certain steps and report to court on progress.<sup>302</sup> The issue raised in the matter was that the government design to confine access of nevirapine (a drug that study had shown to significantly reduce the risk of mother-to child transmission of HIV) only to the piloted areas of study, was contended to be a violation of the right to access healthcare services under section 27(1) of the Constitution. The court found the government programme of limiting access of drugs to pilot sites to be unreasonable noting that most public hospitals had

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<sup>300</sup> Ibid. paras. 28-33.

<sup>301</sup> *Minister of Health and Others versus Treatment Action Campaign and Others*, 2002 (10) BCLR 1033 (CC) (S.Afr.).

<sup>302</sup> *Treatment Action Campaign versus Minister of Health and Others*, 2002(4) BCLR 356 (A)

capacity for the provision of nevirapine and that the government had not advanced a compelling reason for denying those hospitals the flexibility to do so in appropriate cases. More specifically, it was found that the government refusal to avail nevirapine to the public health sector where doctors had prescribed its use was unreasonable. Judge Botha in the High Court ordered the government to develop an effective, comprehensive and progressive national programme aimed at preventing mother to child transmission and to report back to court within three months on steps they had taken to develop and implement that plan.<sup>303</sup>

On appeal the Constitutional Court recognized the limits on its remedial powers against an organ of the state, emphasizing that ‘where there is a breach of socio-economic rights, the court is under a duty to grant effective relief, regard being had to the right in issue and the nature of infringement, where, if necessary, supervisory jurisdiction could be exercised’.<sup>304</sup> The following paragraph is instructive in that it demonstrates the rational basis for flexibility of court’s exercise of remedial powers:-

South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise these powers depends on the circumstances of each particular case. Here, due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may-and if need be must- use their wide powers to make orders that affect policy as well as legislation.<sup>305</sup>

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<sup>303</sup> Ibid, paras 85-87

<sup>304</sup> See note 168 above at paras. 106

<sup>305</sup> Ibid, paragraph 113.

The Constitutional Court adopted the High Court's decision to remove restriction on access to the nevirapine drug.<sup>306</sup> It granted a mandatory order setting out what the government was required to do in the circumstances. The Constitutional Court ordered the government to remove all restrictions preventing nevirapine from being made available for purposes of reducing the risk of mother-to-child transmission of HIV and also directed the government to take certain steps to facilitate and expedite the use of nevirapine. The drug was to be available for this purpose at hospitals and clinics when in the judgment of attending medical practitioner acting in consultation with the medical superintendent of the facility it was medically indicated. Services of counsellors were also to be provided at public hospitals aside from the training and research centers designated by government. The Court however allowed the government room for flexibility to determine its own mode of remedying the constitutional defect by stating that its orders did not preclude 'government from adapting its policy in a manner consistent with the Constitution if equally appropriate better methods became available to it for the prevention of mother-to-child transmission of HIV'.<sup>307</sup> The Constitutional Court, unlike the High Court, did not require the government to report back to the court on the steps initiated to comply with the order.

In *S v Zuma and 23 similar cases*<sup>308</sup>, an amicus curiae in the matter urged court to make an order that two government departments make a report to court on the existing situation and plans to remedy constitutional breach of juvenile offenders' rights who had been in custody for protracted periods of time. The court therefore noted in writing that parties had agreed to file reports and

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<sup>306</sup> See paragraphs 135, order 3 (a)(b)

<sup>307</sup> Ibid. para.135.

<sup>308</sup> *S versus Z and 23 similar cases* 2004 (4) BCLR 419 (E)

postponed the matter till a different date for consideration of the reports to be filed by government.<sup>309</sup>

A case for dialogue by way of structural interdict is found in another case of eviction dispute between the City of Cape Town and a group of individuals.<sup>310</sup> After considering the case and the merits of a structural interdict, the High Court remarked that ‘a declaration, standing alone, would not suffice, given that in the recent past(referring to *TAC*) it has not induced any level of compliance, therefore it was necessary that a new approach be adopted’.<sup>311</sup> The court cited the attitude and recent breaches by the City of orders of the Constitutional Court as an instance necessitating a structural interdict as a necessary, appropriate, just and equitable order. The Court highlighted how the City was in breach of the Constitution, made an order compelling it to rectify the breaches and ordered it to report back to the court on the steps taken and future measures that would satisfy the court’s order.

#### **4.1.2 Meaningful Engagement**

*Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*<sup>312</sup> is a case in which the Constitutional Court issued an interim order requiring parties to engage with each other meaningfully and report back to the Court on progress. Meaningful engagement presented in this case differs and goes beyond supervisory remedies.

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<sup>309</sup> Delivering an opinion, Plasket J, highlighted the importance of such an order stating: “I would venture to suggest that, as the structural interdict is particularly suited to a society committed, as ours is, to the values of ‘accountability, responsiveness and openness’ in a system of democratic governance. In this case it would be appropriate because the subject matter of this litigation is the core business of the courts, the effective implementation of the sentences imposed on juvenile offenders. In addition, the superior courts are the upper guardians of minors. That too would serve as strong justification for the assumption of a supervisory jurisdiction in a case such as this.”

<sup>310</sup> *City of Cape Town versus Rudolph* 2004(5) SA 39(C)

<sup>311</sup> *Ibid.*

<sup>312</sup> 2008 5 BCLR 475 (CC)

This was a case challenging the City of Johannesburg's policy of demolishing residences termed as 'bad' buildings for safety and health reasons after it developed some robust improvement policies to transform Johannesburg into a modern-world class attractive City. A statutory legislation was enacted to enforce this aspiration.<sup>313</sup> Under the Act, local authorities would issue notices of eviction to owners of premises deemed unsafe to any person. Olivia case involved individuals challenging notice of vacation served against them by the City of Johannesburg.<sup>314</sup> The High Court found the City's housing programme was in breach of the constitutional and statutory obligations, and ordered the City to develop and implement a comprehensive and coordinated programme to deal with the housing problem.

On appeal the Supreme Court of Appeal found otherwise and ruled in favour of the City based on the fact that the enabling piece of legislation permitted eviction of residents living in unsafe and unhealthy buildings. An appeal was preferred to the Constitutional Court challenging the Supreme Court of Appeal's order granting their eviction. An interim application was seeking to restrain any eviction by the City. Accordingly, the Constitutional Court issued an interim order in the matter compelling the parties to meaningfully engage amongst themselves in a bid to iron out their differences. The order that the Court gave is reproduced as follows:

*1) The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the*

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<sup>313</sup> National Building Regulations and Standards Act, 103 OF 1977.

<sup>314</sup> City of Johannesburg versus Rand Properties (Pty) Ltd & Others 2006 6 BCLR 728

*Constitution, the constitutional and statutory duties of the municipality and the rights and duties of citizens concerned.*

*(2) The City of Johannesburg and the applicants must also engage with each other in an effort to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable.*

*(3) The City of Johannesburg and the applicants must file affidavits before this Court on or before 3 October 2007 reporting on the results of the engagement between the parties as at 27 September 2007.*

*(4) Account will be taken of the contents of the affidavits in the preparation of the judgment in this matter for the issuing of further directions, should this become necessary.<sup>315</sup>*

The Court observed that it would be inappropriate to issue eviction orders against the appellants without giving meaningful engagement a chance.<sup>316</sup> Among other things, the parties came to an agreement containing interim measures with the City agreeing to provide essential utilities in the interim period, securing the safety of the building and providing the occupiers with alternative accommodation within the identified parts of the City. This agreement was finally adopted as part of Court's records.

The Constitutional Court can in this instance be seen to have employed the utility of meaningful engagement as an aspect of dialogue inducing acceptance to its remedial measures elaborating this

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<sup>315</sup> See Olivia case (note 178 above) Interim order dated 30 August 2007.

<sup>316</sup> Ibid. note 178 above, para. 22.



in its final judgment.<sup>317</sup> Thus in South Africa, the need for meaningful engagement enables the satisfaction of the constitutional obligation, on the part of a relevant agency, to provide requisite social services to deserving groups in a participatory and sustainable manner in the fulfilment of the social objectives of the Constitution.

## 4.2 Canada

Adjudicative judicial review in Canada has elaborately recognized judicial review as a model of dialogue between courts and legislatures.<sup>318</sup> The Supreme Court of Canada has referred to judicial review as a form of dialogue in many cases.<sup>319</sup> The Canadian Charter of Rights and Freedoms of 1982 is an instrument with distinctive provisions for legislative limitations and derogations on rights that in turn promote a vibrant dialogue between Canadian courts and legislatures.<sup>320</sup> This has been called constitutional dialogue.<sup>321</sup> However, of great concern to this study is the remedial dialogue which occurs in instances where court decisions generate orders that bear implications for the legislature, government and their policy agenda, allowing them room to choose a variety of plausible response mechanisms. This form of dialogue cites the use of suspended or delayed declarations of invalidity and supervisory jurisdiction as opportunities that yield ground for dialogue between courts and governments.

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<sup>317</sup> Lilian Chenwi (note 289 above) 379.

<sup>318</sup> Kent Roach, 'Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience,' *Texas International Law Journal* (2005) Vol. 40, 539; P Hogg and Allison A Bushel (note 67 above).

<sup>319</sup> See eg *Vriend versus Alberta* [1998] 1 SCR 493; *M v H* [1999] 2 SCR 3; *Corbiere v Canada* [1999] 2 SCR 203; *R v Mills* [1999] 3 SCR 668; *Little Sister Book v Canada* [2000] 2 SCR 1120; *R v Hall* [2002] SCC 64; *Sauve v Canada (No 2)* [2002] SCR 68; *Doucet-Boudreau v A-G (Nova Scotia)* [2003] 3 SCR 3.

<sup>320</sup> See generally Alison A. Bushel and Peter W. Hogg (note 92 above)

<sup>321</sup> See section 1 and 33 of the Charter of Rights and Freedoms.

#### 4.2.1 Suspended or Declaratory Invalidity with Supervisory Jurisdiction

The case of *Reference re Manitoba Language Rights*,<sup>322</sup> was a Supreme Court decision where the Province of Manitoba's action of failing to enact and publish its laws in both English and French as mandatorily required by the Constitution was challenged. The Court found that all the unilingual Acts of Manitoba Parliament were of no force and effect and thus declared them invalid. The Supreme Court noted however that such invalidation would create an anomalous legal situation to the public thus jeopardizing the essential value of the rule of law for organized co-existence of the society. The court expressed this view, highlighting the dilemma faced by unconstitutionality of a positive law and decided to give effect to the laws temporarily despite the unconstitutionality. The Court found it 'necessary, in order to preserve the rule of law, to deem temporarily valid and effective the Acts of the Manitoba Legislature, which would be currently in force were it not for their constitutional defect'. This temporal validity was to 'run from the date of this judgment to the expiry of the minimum period necessary for translation, re-enactment, printing and publishing'.<sup>323</sup>

The Supreme Court later exercised supervisory jurisdiction over this particular case for over a decade and issued several follow-up judgments when new information became available until all the unilingual laws of Manitoba were translated into both languages.<sup>324</sup>

The remedy of suspended declaration has been used as a dialogic device whereby the Supreme Court allowed the legislature to choose a range of options to remedy a constitutional breach. In *Corbiere v Canada (Minister of India & National Affairs)*<sup>325</sup> the court suspended a declaration of

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<sup>322</sup> (1992) 1 S.C.R 721

<sup>323</sup> *Ibid.*, 724

<sup>324</sup> See *Reference re Manitoba Language Rights*, (1992) 1 S.C.R 212; *Reference re Manitoba Language Rights*, (1990) 3 S.C.R 1417; *Reference re Manitoba Language Rights*, (1985) 2 S.C.R. 347.

<sup>325</sup> (1999) 2 S.C.R 203

invalidity for eighteen months after finding that existing federal legislation violated the rights of Aboriginal people living off reserve, in the words of Justice L'Heureux-Dube:

...the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Quebec*, (1998) 2 S.C.R 217, at para. 68: “ a functioning democracy requires a continuous process of discussion.” The principle of democracy underlies the Constitution and the Charter, and is one of the important factors guiding the exercise of a court’s remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur... The remedies granted under the Charter should, in appropriate cases, encourage and facilitate the inclusion in that dialogue of groups particularly affected by legislation.<sup>326</sup>

This case presents new approaches to effective remedies that allows dialogue to occur between courts, legislatures and civil society, whereby courts do not render final remedies but prompts other parties to take into account its judgment and then makes rational decision on a variety of appropriate options or means to comply with the judgment.<sup>327</sup> This provides the government with ample opportunity and necessary resources to select the precise means by which to bring its action into compliance with the Constitution.

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<sup>326</sup> Ibid, para. 116.

<sup>327</sup> Kent Roach (note 318 above) 547

The suitability of delayed or suspended declarations of invalidity has been of value to enforcing socio-economic rights in Canada. The case of *Schachter v Canada*<sup>328</sup> where the Supreme Court was cautiously aware of the disastrous ramifications of annulling a social benefits programme that was alleged to be under-inclusive. The Court stated that it is usually desirable to strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void- a method appropriate where the striking down of a provision poses a potential danger to the public.<sup>329</sup> The rationale was explained that such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements.

The need to give governments leeway to craft responses to remedy situations of constitutional deficiencies has further been amplified. Chief Justice Dickson explained the elements of this approach of flexibility to government to select better-placed institutional mechanisms to meet their constitutional obligations.<sup>330</sup> This view is strengthened by Justice La Forest observations writing his judgement in *Eldridge v British Columbia (Attorney General)*.<sup>331</sup> He observed that the government had the potential to select a favourable option to redress the disability needs of people in ways and means that were not dictated by the court. The court also used suspended declaration in this matter until six months when the order would take effect. This approach by the Supreme Court took cognisance of the advancement of the court's use of jurisprudence of suspended declaration of invalidity. In this case the British

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<sup>328</sup> (1992) 2 S.C.R. 679,

<sup>329</sup> Ibid. pp.679

<sup>330</sup> See *Mahe versus Alberta* (1990) 68 D.L.R (4th) 69.

<sup>331</sup> (1997) 3 S.C.R 1120, 1252-53

Columbia government complied with the judgment by introducing some sign language interpreters within six months and other services a few months later.<sup>332</sup>

#### **4.2.2 Mandatory Injunctions with Supervisory Jurisdiction**

In *Doucet-Boudreau v Nova Scotia (Minister of Education)*<sup>333</sup> a minority rights case the Supreme Court of Nova Scotia found that a delay to build French language schools for francophone minorities in Nova Scotia violated the claimants minority language educational rights protected under section 23 of the Charter of Rights and Freedom. Justice LeBlanc of the Supreme Court of Nova Scotia ruled that the government had an obligation to construct French schools or provide programs for minority French speaking Nova Scotians and mandated the government to construct the schools within a set deadline and to report on progress of compliance.

The matter went to the Court of Appeal which rejected this approach and faulted the trial judge for retaining jurisdiction after he was *functus officio*. The Supreme Court of Canada in a 5-4 appeal upheld the trial judge's decision. The majority observed that the courts have approached Charter with a "generous and expansive interpretation and not a narrow, technical, or legalistic one" to which the concept of 'just and appropriate remedies' under section 24(1) could be applied. The court expressed that section 24 can "evolve to meet the challenges and circumstances of those cases" and can have "novel and creative features...tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach must remain flexible and responsive to the needs of a given case."<sup>334</sup> The Court was also cautious that such remedies would not be tantamount to interference with government but termed the aspect

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<sup>332</sup><sup>332</sup> See Kent Roach and Geoff Budlender (note 36 above) 338.

<sup>333</sup> (2003) 3 S.C.R 3

<sup>334</sup> Paragraph 59

of reporting as a legitimate response to concerns about delay by government and the assimilation of the francophone minority.

The important elements of dialogue in *Doucet-Boudreau* are seen in the way the trial judge retained residual jurisdiction in the matter to provide a platform for negotiation among the parties on the complexities that attend to remedies and how to respond to contingencies of unforeseeable circumstances.<sup>335</sup> This approach reflects a willingness by the judge to be flexible and to recognize that different plans may satisfy the requirements of the court's order and the Constitution.<sup>336</sup>

### 4.3 Colombia

Since 1991 when Colombia enacted a new and progressive constitution that entrusts its safeguard to the Constitutional Court the country has had robust jurisprudence in protection of socio-economic rights; achieved through judicial review of the country's laws and specific judicial decisions of the Constitutional Court.<sup>337</sup> Article 1 of the Constitution establishes Colombia as a social state (*estado social*), 'based on respect for human dignity, on the work and the solidarity of the individuals who belong to it, and the predominance of the general interest'. The Constitutional Court has relied on these provisions to found its protection of socio-economic rights, through the writ of protection of fundamental rights (*tutela action*).<sup>338</sup> Any person may file a writ of protection before any court or

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<sup>335</sup> Ibid, paras.15-16.

<sup>336</sup> Kent Roach and Geoff Budlender ( note 36 above) 337

<sup>337</sup> Magdalena Sepulveda, 'Colombia: The Constitutional Court's Role in Addressing Social Injustice' in Malcom Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Constitutional Law* (Cambridge: Cambridge University Press, 2008) 144

<sup>338</sup> Ibid. (Sepulveda notes that there are other modalities of seizure of courts for protection of fundamental rights such as constitutional judicial review recognized under article 241.3 and *actio popularis* for protection of collective rights under article 88)

tribunal which are then transmitted to the Constitutional Court for adoption or review.<sup>339</sup> The reversal of any order or judgment by the Constitutional Court binds all lower courts or tribunals.<sup>340</sup>

There are no specific remedies provided under the Constitution for *tutela* decisions, except article 86 which empowers a judge to order any authority to take some prescribed action or to cease from doing something. This provision, according to Sepúlveda, vests in the judges a discretion to enforce rights using any measures that may be appropriate.<sup>341</sup> The Court has used the concept of unconstitutional state of affairs in socio-economic rights to determine the existence of systemic and widespread rights breaches and issued focused redress that transcend the parties to the *tutela* proceedings.

A beginning point for what in Colombia is called *dialogic activism*<sup>342</sup> in socio-economic rights is the case of T-025 of 2004.<sup>343</sup> The Colombian Constitutional Court in January 2004 consolidated the constitutional grievances (*tutelas*) raised by 1,150 displaced families and handed down its most auspicious judgment whose implementation it supervised for a protracted period of time. The Court declared the existence of an unconstitutional state of affairs in the situation of the displaced population. This decision was provoked by inadequacy of allocated funds and an apparent constitutional deficiency in legislation meant to protect and implement a range of rights. To remedy the complaints of all countrywide scattered internally displaced families the court ordered a number

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<sup>339</sup> Article 241.9 of the Colombian Constitution.

<sup>340</sup> See section 2.2

<sup>341</sup> Magdalena Sepulveda (note 144 above) 146

<sup>342</sup> For this concept of dialogic activism see Cesar Rodriguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socio-economic Rights in Latin America,' 89 *Texas Law Review* (2010-2011) 1688.

<sup>343</sup> T-025/04 available at [http://www.brookings.edu/~media/Projects/idp/Colombia\\_T%20025\\_2004.PDF](http://www.brookings.edu/~media/Projects/idp/Colombia_T%20025_2004.PDF) accessed on 9<sup>th</sup> September, 2013.

of structural measures that stretched over a lengthy implementation and follow-up period that continues today.<sup>344</sup>

The order of court directed several government agencies<sup>345</sup> to alleviate the unconstitutional state of affairs of the IDPs by allocating sufficient financial resources and to take certain measures within prescribed limits of time to guarantee them some basic rights. The Court directed that the organizations that represent the displaced communities be given an opportunity to participate in an effective manner in the adoption of measures and to be regularly informed of all pertinent advances made therein. Moreover, to ensure compliance with its orders by the different authorities, the court directed that the judgment be communicated to the Public Ombudsman and the General Controller of the Nation (Procurador General de la Nación), so that they could, ‘within their spheres of jurisdiction, carry out a follow-up of the implementation of (the) judgment, and oversee the activities of the authorities’.<sup>346</sup>

In respect of monitoring, T-025 is a model of participatory dialogue standing exemplarily from other decisions. The Court delivered its judgment in 2004, however by 2011 it was still conducting subsequent monitoring assessments of its implementation and had held twenty one public hearings with governmental and NGO agencies to inform, discuss and evaluate the outcomes of the government’s actions.<sup>347</sup>

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<sup>344</sup> Cesar Rodriguez-Garavito (note 108 above) 1688

<sup>345</sup> These include Director of Social Solidarity Network, National Council for Comprehensive Assistance to the Populations Displaced by Violence, Minister of Public Finance, Minister of Interior and Justice, Director of the National Planning Department.

<sup>346</sup> See paragraph 10.2.9

<sup>347</sup> See Cesar Rodriguez-Garavito (note 324 above) 1694. See also Evidence and Lessons from Latin America: Judicial Reviews: An Innovative Mechanism to Enforce Human Rights in Latin America available at <http://www.fundar.org.mx/mexico/pdf/BriefJudicialReviewsInnovativeMechanismstoEnforceHumanRights.pdf> accessed on 12th September, 2013.



Analytically, the Court's order recognizes that for existence of an unconstitutional state of affairs in which large sections of the society is affected, it is prudent to induce collaboration and undertaking of coordinated efforts among the various government agencies to remedy the situation and comply with the enunciated rights and principles of the Constitution.<sup>348</sup>

Cesar Rodriguez has taken a keen study of dialogic activism emerging from the Constitutional Court's decisions in structural cases- particularly on enhancement of impact judgments on socio-economic rights.<sup>349</sup> He looks at the court's decisions in *T-025*, *T-153*<sup>350</sup> and *T-760*.<sup>351</sup> *T-153* involved several prisoners who filed *tutela* actions against appalling detention conditions. The Court declared an unconstitutional state of affairs and ordered the Ministry of Justice to build more prisons. The court also made orders touching on the administrative and budgetary matters of the relevant agencies. It however failed to specify any follow-up or monitoring mechanism to ensure compliance. In *T-760*, a departure from *T-153*'s approach, the Court ordered a restructuring of the country's healthcare system and began an ambitious monitoring process of ensuring that the government addresses systemic deficiencies and impediments in the administration of the healthcare sector.<sup>352</sup>

Recognizing the drawbacks of separation of powers objections and the necessity to realize efficacy of court judgment on socio-economic rights, the Constitutional Court is alive to two related factors

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<sup>348</sup> Sepulveda (note 144 above) 149.

<sup>349</sup> See generally (note 243 above)

<sup>350</sup> T-153/98 available at [http://oami.europa.eu/ows/rw/resource/documents/CTM/case-law/jj080153\\_en.pdf](http://oami.europa.eu/ows/rw/resource/documents/CTM/case-law/jj080153_en.pdf) accessed on 9th September, 2013.

<sup>351</sup> T-760/08 available at [http://www.escr-net.org/usr\\_doc/English\\_summary\\_T-760.pdf](http://www.escr-net.org/usr_doc/English_summary_T-760.pdf) accessed on 9th September, 2013.

<sup>352</sup> See Rodriguez-Garavito (note 108 above) 1675.

that characterize its judicial activism- the kind of orders and court's monitoring modalities.<sup>353</sup> The salience of Colombian dialogue is seen in the orders that set targets with guidelines on implementation, timelines and progress reports that bind government agencies.

The monitoring modalities include participatory follow-up in the form of public hearings, monitoring procedures, welcoming NGOs and administrative bureaucracies to submit relevant information and to take part in court sponsored conference deliberations.<sup>354</sup> There are greater efficiencies in this kind of dialogic approach: monitoring procedures leaves it to the government agency to explore choices and make final decisions; wide ranging participation by other stakeholders such as NGOs limits potential for resistance by vested interests which may be direct beneficiaries of status quo; and multifaceted participation and consultation with other sectors help shortcomings of courts in comprehending complex socio-economic issues.

### **3.3 Conclusion**

This chapter has highlighted occurrence of forms of dialogue in three selected jurisdictions. It summaries how the South African *structural interdict* and the concept of meaningful engagement have been used to obviate challenges associated with socio-economic rights enforcement at the judicial forum. The Canadian remedial dialogue of suspended declaration of invalidity coupled with supervisory jurisdiction marks a creative approach for giving meaning to rights fashioned out a classical liberal Constitution. The chapter has also introduced the application of what in Colombia is known as dialogic activism in which the Constitutional Court has for a majority of cases favoured

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<sup>353</sup> Ibid, pp. 1676.

<sup>354</sup> Ibid. see also text accompanying note 246 above.

participatory and collaborative engagement with all relevant agencies to redress socio-economic denials. The next chapter discusses in detail the meaning, theory, limitations and potentials of dialogic approach in crafting meaningful remedies for socio-economic rights.

## CHAPTER FIVE

### **DIALOGIC REMEDIAL MEASURES: MEANING, THEORY AND PROSPECTS FOR THE KENYAN JUDICIARY IN THE NEW CONSTITUTIONAL ORDER**

#### **5.1 Meaning of Dialogue**

Dialogue connotes collaborative engagement and partnership between courts and other political domains of power to promote democratic deliberation on public affairs.<sup>355</sup> These sources of authority in the public sphere include the legislative arm and the executive with its multifarious agencies. In constitutional law, dialogue theory emphasizes that the judiciary has no domination on constitutional interpretation and meaning. This conception holds that in constitutional review, the judicial process stimulates collaboration among the other wielders of public power and promote deliberative mechanisms to neutralize the counter-majoritarian difficulty. This chapter theorizes the dialogue that occurs between courts, governments and other legitimate actors concerning remedies in constitutional claims. It traces the history of dialogue, lays out the practical modalities of its use under the Constitution and discusses its strength and weaknesses when employed as a model for socio-economic rights enforcement.

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<sup>355</sup> Rodriguez Garavito (note 108 above) 1688; see also Christine A. Bateup (note 92 above) 1

## 5.2 Origins and Theory of Dialogue

Most recently there has emerged legal-political philosophy debates dedicated to attacking judicial review as being incompatible with democracy.<sup>356</sup> One such debate which has pulled considerable attention<sup>357</sup> in law reviews is a discourse propounded by Jeremy Waldron's article fiercely discrediting the appropriateness, in a democracy, of relegating the legislature, a popular expression of the people's will, to a status of subservience to the judiciary.<sup>358</sup> Waldron's is a criticism and opposition to judicial review of legislation grounded on two premises. First, he argues that courts are no better protectors of rights than democratic legislatures.<sup>359</sup> Second, he conceives of judicial review as an endeavour inherently illegitimate notwithstanding its outcome in rights protection.<sup>360</sup> Jeremy was himself making a case, in support of Alexander Bickel's *counter-majoritarian* philosophical predisposition attacking judicial review as standing in tension with democratic practice.<sup>361</sup> Principally, these objections to legitimacy of judicial review are provoked by a disenchantment with reposing in unelected and unaccountable judges such powers to strike down laws which are the handiwork of duly elected representatives of the people.<sup>362</sup>

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<sup>356</sup> See Richard H. Fallon Jr. 'The Core of an Uneasy Case for Judicial Review' 121 Harvard Law Review (2008) 1694 citing various books that highlight this concern such as Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) (arguing for a fundamental rethink of the role of courts in a democracy) and Mark Tushnet, *Taking the Constitution Away from the Courts* (1999) (essentially suggesting total abolition of judicial review).

<sup>357</sup> Ibid.

<sup>358</sup> Jeremy Waldron (note 90 above) 1348-1349

<sup>359</sup> Ibid., pp.1353

<sup>360</sup> Ibid.

<sup>361</sup> Alexander M. Bickel (note 70 above) at 16-17 as quoted by Jeremy Waldron, *supra* note 64 at 1349, "Judicial review is a counter-majoritarian force in our system... When the Supreme Court declares unconstitutional a legislative act... it thwarts the will of representatives of the actual people of the here and now..."

<sup>362</sup> P W Hogg and Alison A Bushel (note 92 above) 77. See also Jeremy Waldron (note 64 above) 1353.

These nuanced objections have provoked a flurry of responses in support of judicial review as a legitimate democratic exercise.<sup>363</sup> Peter W. Hogg and Allison A. Bushell have since ingeniously responded to these objections with a different dimensional theory of *dialogue* about constitutional review, contending that majoritarian objection to judicial review is overstated.<sup>364</sup> Their discourse, based on an empirical study of Canadian rights review, surmises that the Canadian judicial practice of an exchange between courts and legislatures in the meaning and interpretation of Charter rights is an exemplification of dialogue, a compromise path between legislative and judicial supremacy, in which both the two institutions have co-extensive roles on rights protection.<sup>365</sup>

In Canada, certain structural features of the Constitution gives courts powers to invalidate laws which are inconsistent with the Charter, but the legislature may respond by modifying, reversing or avoiding the effect of the Supreme Court's declaration of invalidity under section 1 and 33 of the Charter. Such is the premise for Hogg and Bushell to conclude that 'judicial review is not a veto over the politics of the nation but the beginning of a dialogue about rights' between courts and legislatures on how optimally the two can summon the constitutional guarantees to the collective benefit of the society.<sup>366</sup> In their perception, courts and legislatures enter into a relationship of dialogue "where a judicial decision is open to legislative reversal, modification, or avoidance".<sup>367</sup>

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<sup>363</sup> Richard H. Fallon (note 338 above) at 1694 '*...Professor Fallon concedes arguendo that, as Professor Waldron argues, courts are no better than legislatures at defining rights correctly, but maintains that the crucial question is not whether courts or legislatures are less likely to err, but which kinds of errors are most important to avoid — those that result in rights being overprotected or those that result in rights being infringed. Insofar as judicial review can be designed to prevent errors in just one direction, involving failures to protect rights adequately, then judicial review may be supportable even if courts are no better than legislatures at identifying rights correctly...*' See also Frank B. Cross, 'Institutions and Enforcement of the Bill of Rights,' *85 Cornell Law Review* (2000)1529, 1576.

<sup>364</sup> P W Hogg and Alison A Bushel (note 92 above) 105

<sup>365</sup> Rosalind Dixon, 'The Supreme Court of Canada: Charter Dialogue, and Deference', University of Chicago Law School Public Law and Legal Theory Working Paper No. 284, November 2009, available at <http://www.uchicago.edu/academics/publiclaw/index.html> at page 3 accessed on 6th June, 2013.

<sup>366</sup> Peter W. Hogg and Allison A. Bushel (note 92 above)105

<sup>367</sup> *Ibid.* pp.79.

Their exposition demonstrates the circumstances where provincial legislatures, in response to court decisions on Charter rights, have changed legislations in Canada to accord with the constitution as prescribed by the court, or modified such court preferences all together.<sup>368</sup>

The theory of dialogue has since thereafter been in discussion and application, and has gained prominence in contemporary legal thinking and judicial realms in some parts of the world.<sup>369</sup> This growth of attention to the idea of judicial review adopting dialogic modalities has been triggered by its presumed possibility to address separation of powers objections regarding judicial review.<sup>370</sup> A number of scholars support the creation of dialogue about socio-economic rights enforcement in countering obstacles inherent in the political processes.<sup>371</sup>

### 5.3 Dialogic Judicialism and Separation of Powers

Mark Tushnet's analysis of South Africa's Constitutional Court's handling of *Grootboom* offers a dialogic approach, a technique least likely to generate strong political opposition, which he advocates should be adopted by courts if they are to be democratically experimentalist.<sup>372</sup> In adjudicating constitutional rights cases, Tushnet proposes, that a court experiments the

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<sup>368</sup> Ibid 78-79. See also Peter Hogg, Allison A. Bushell Thornton & Wade K. Wright, "Charter Dialogue Revisited-Or "Much Ado About Metaphors" 45 *Osgoode Hall Law Journal* (2007)2

<sup>369</sup> Kent Roach (note 271 above) 537 giving an account of the use and recognition of dialogue in judicial decisions of Canada and practice in other countries such as the UK, New Zealand, Israel e.t.c.

<sup>370</sup> Christine A. Bateup, 'The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue' *New York University Public Law and Legal Theory Working Papers. Paper 11* available at [http://isr.nellco.org/nyu\\_plltwp/11](http://isr.nellco.org/nyu_plltwp/11) at page 1 accessed on 23<sup>rd</sup> September, 2013.

<sup>371</sup> Rosalind Dixon, (note 70 above) 393; Mark Tushnet, 'Reflections on Judicial Enforcement of Social and Economic Rights in the Twenty-First Century' 4 *NUJS Law Review* 177 (2011) 183; Sandra Liebenberg (note 51 above at 36); Marius Pieterse *infra*, at pp. 333-349

<sup>372</sup> See Mark Tushnet, 'Social Welfare Rights and the Forms of Judicial Review' available <http://www.politics.as.nyu/docs/IO/4742/tushnet.pdf> at page 5, 26 accessed on 24<sup>th</sup> September, 2013; see also Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights-And Democracy-based Worries', *Wake Forest Law Journal* (2003) p. 814 (for the contention 'that weak form systems hold out the promise of protecting liberal rights in a form that reduces the risk of wrongful interference with democratic self-governance')

effectiveness of its intervention by being flexible in fashioning its judgment, which it may modify from time to time as the peculiarities and context of the case may permit. The peculiarities include *inter alia* policy infrastructure, resource availability, victim conditions. A democratic experimentalist court begins this exercise, according to Tushnet, by its general and abstract layout of the normative principles of rights. In constitutional litigation this is the stage at which the court makes its pronouncement as to the constitutionality of policies/action sought to be impugned or complained of. The court then embarks on a finding and an order directing the executive or the legislature to commence and execute more reasonable alternatives aimed at fulfilling the prescribed constitutional guarantees.<sup>373</sup> The court then examines the progress of this process, and, where it appears to the court that circumstances necessitate other better options or a flexibility to accommodate more suitable executive or legislative proposals, a democratic experimentalist court would accordingly revise its judgment to consort with those plans that meet constitutional prescriptions.<sup>374</sup> Amenity of a court's judgment to willful amendment is what Tushnet calls a 'weak-form' version of judicial review, a preferable way out of misgivings of constitutionalists accustomed to strong-form judicial review.<sup>375</sup>

In Kenya Waruguru Kaguongo shares the receptivity to and vision of dialogue as a weak form of judicial review in responding to separation of powers dilemma and claims of democratic deficit.<sup>376</sup>

In her account, dialogue methodology allows the courts not to have a conclusive decisional authority but to provoke further engagements with other state organs on issues that affect the

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<sup>373</sup> Ibid. p. 822-823

<sup>374</sup> Ibid at 823

<sup>375</sup> Ibid.

<sup>376</sup> Waruguru Kaguongo (note 66 above)104-105



society.<sup>377</sup> Courts need to exercise flexibility when exercising their mandate of review by affording other governmental organs leeway to act on judicial decisions in their own way by making or amending laws or creating policy initiatives in harmony with judicial standards set in respective court decisions. This relationship of engagement between the judiciary and other arms of government makes it opportune for courts to surmount political obstacles to enforcement of socio-economic rights conceived of in this study as separation of powers.<sup>378</sup>

To rehash arguments already made, separation of powers dilemma tend to question ‘the capacity of judges to deal with polycentric, value-laden, policy questions in disputes involving the government, and also on the legitimacy of having unelected courts mandate goods and services that are not provided by the democratically elected branches of government’.<sup>379</sup> Enforcement of affirmative rights duties against the state, it is argued, greatly undermines the democratic outlay of government and the people’s popular will and wish to shape and achieve their collective aspirations.<sup>380</sup> The supposition of this contention holds that citizens can best collectively align their policy preference and programmes through voting in a political process.<sup>381</sup> Pragmatically, the political avenue of voting and representation affords needs-based claimants an opportunity to publicly debate and participate directly in social agenda proposed by the government.<sup>382</sup> Courts enforcing social welfare claims in a democracy are thus seen to be enjoying extended authority over and at the expense of the political and administrative state units, it is argued, in a sense re-designating decision-making authority as regards rights, from the government and parliament to the courts.<sup>383</sup>

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<sup>377</sup> Ibid. p.104

<sup>378</sup> Ibid. p.105

<sup>379</sup> Lawrence G. Sager, “Thin Constitutions and the Good Society” *69 Fordham Law Review* (2001) 1989-90

<sup>380</sup> David M. Beatty’ *Ultimate Rule of Law*

<sup>381</sup> Diana T. Meyers, “Human Rights in Pre-Affluent Societies” *31 The Philosophical Quarterly* (1981), 140.

<sup>382</sup> Ibid.

<sup>383</sup> Tate and Vallinder, *The Global expansion of Judicial Power* (New York: New York University Press, 1995), 13.

Another concern spawned by political considerations tends to question the scope of adjudicating social welfare disputes, a role that some activist judges may partake of to direct expenditure and resource spending from a judicial platform. This is what some scholars view as newfound levels of judicial activism, of creating new frontiers for judicial incursion into the realms of social change agenda that may put the judiciary on a confrontational pathway with the political branches in whose purview democratic transformation conventionally reposes. Social change, it is reckoned, is a legitimate aspiration that the electorate through their duly elected representatives undertake once the instruments of governmental power have been assumed in a contested political process.

Dialogic conception of rights enforcement answers these concerns, explaining that courts do not substitute their own opinion for those of the legislature or government. Rather courts add additional democratic fora for policy deliberation.<sup>384</sup> In any event, courts need not strictly be characterized as ‘unaccountable’ or ‘countermajoritarian’, they do not exist in a democratic vacuum, and to a large extent they too are responsive and subject to public perceptions and depend on governments to perform their functions.

In a dialogic understanding, a legislative enactment may be tempered with certain failures emanating from law making or implementation processes, such as proper perspectives on rights-offending features, lack of inclusiveness of a policy for those in need, a failure of legislation to be responsive to needs of a community that makes it imperative for government institutions and courts to mitigate conjunctively.<sup>385</sup> Dialogic approaches in remedying such deficiencies provide room for

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<sup>384</sup> Daniel Brinks and Varun Gauri (note 67 above), 343.

<sup>385</sup> Rosalind Dixon, (note 103 above), 402-405(Dixon calls the legislative blind spots and burdens of inertia)

incorporation of unexplored ideas, perspectives and balances in the political process.<sup>386</sup> Thus courts do not usurp or antagonize other democratic domains of power, but work in concert with them to attain entrenched constitutional ideals.<sup>387</sup>

Giving the government leeway to propose measures or solutions towards fulfilling constitutional obligations is a way through which the court respects and defers to the executive's proficiency in policy choices and implementation. The participatory approach to adjudication whereby courts entertain specialized input and expert opinions from NGOs and other advocacy groups on nuanced questions of policy eliminates all concerns relating to unsuitability of judges to determine resource expenditure due to a lack of information or training. The specialized agencies that participate in an ongoing negotiation on structural solutions inject expert knowledge and skills useful to court in midwifing the monitoring process, enhances recognition of socio-economic rights in policy planning by government, strengthens 'state institutional capacities' regarding such policy issues, promotes public participation to issues of governance and engenders a collaborative quest for sophisticated dimensions of structural socio-economic claims.<sup>388</sup>

In sum when a dialogic understanding of judicial roles is applied to crafting meaningful remedies for socio-economic rights in Kenya, it cannot appear as a far-fetched and unfounded idea. Indeed legal scholarship as well as judicial practice in other jurisdictions and *Mitu Bell* of Kenya assertively depict dialogue as a newfangled tool suitable for surmounting political concerns and competence

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<sup>386</sup> Ibid. p. 407.

<sup>387</sup> Daniel Brinks and Varun Gauri (note 67 above) 343.

<sup>388</sup> Cessar Rodriguez Garavito (note 108 above), 1676.

objections to judicial intervention on redistributive policies of the government. The next part outlines the undergirding constitutional justification for use of dialogue in Kenya.

#### **5.4 Undergirding Constitutional Foundation for Resort to Dialogue**

The broad remedial powers of courts contemplated under article 23(3) of the Constitution of Kenya, 2010 is the first constitutional justification for dialogue. Article 23(3) is uniquely formulated to broaden the scope of remedies available to courts beyond the ones under-listed. The constructive meaning of the word ‘including’ as used in the Constitution implies that the list of remedies is not exhaustible or limited to the ones expressly enunciated. Arguably, the Constitution implicitly contemplates other unspecified remedies for rights violation aside from declaration of rights, an injunction, a conservatory order, and a declaration of invalidity of a law, compensation and orders of judicial review. This broad constitutional provision lays a basis for the search for sound remedial measures transcending the entrenched ones, but embedded on the constitutional value of promoting human rights and fundamental freedoms.<sup>389</sup> A remedial measure that furthers the advancement of entrenched rights or freedoms, would pass the test of constitutionality if it relies on an approach that implements and furthers the declared objects.

Still on article 23(3), the concept of ‘appropriate relief’ has been explained and expanded in other jurisdictions to mean that a court must deploy creativity and innovation to enforce the values and norms that the Constitution embodies. This concept is a replica of section 38 of the Constitution of South Africa which provides that ‘a court may grant appropriate remedy including a declaration of rights’. Section 172(1) (b) enhances the broad remedial powers of South African courts by its

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<sup>389</sup> The precepts of article 20(3) (b) is that a court applying the Bill of Rights must see to it that it adopts an interpretation that most favours the enforcement of a fundamental rights or freedom.

provision that a court determining ‘a constitutional matter may make any order that is just and equitable’. The Constitutional Court in *Fose v Minister of Safety and Security*<sup>390</sup> has explained in clear terms that ‘an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.’<sup>391</sup> To realize this goal, it was emphasized, ‘the courts must forge new tools and shape innovative remedies’.<sup>392</sup> This dictum took into account the transformative nature of values and norms that the South African constitution entrenches- of which socio-economic rights is part. As highlighted elsewhere, scholars have vehemently articulated the imperative of new and innovative approaches to constitutional interpretation to deepen the realization of constitutional values of social justice and substantive equality.<sup>393</sup> Particularly, Dikgang Moseneke has argued that ‘creative jurisprudence of equality coupled with substantive interpretation of the content of socio-economic rights should restore social justice as a premier foundational value of our constitutional democracy.’<sup>394</sup> The argument advanced here is that creative and pragmatic interpretive approaches must attune to and be justified within the constitutional contours.<sup>395</sup> Kaguongo notes that though the courts are vested with powers to grant appropriate reliefs, the court’s selection of a particular remedy is a fact-dependent exercise predicated on the nature of the claim, the corresponding duties and the state’s response measures.<sup>396</sup>

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<sup>390</sup> *Fose versus Minister of Safety & Security* (note 148 above)

<sup>391</sup> *Ibid.* at paragraph 69.

<sup>392</sup> *Ibid.*

<sup>393</sup> See Dikgang Moseneke, ‘Transformative Adjudication,’ *South African Human Rights Journal* (2002)314. See also Karl Klare (note 46 above) 150. See also Sandra Liebenberg (note 51 above)3

<sup>394</sup> Dikgang Moseneke (note 274 above).

<sup>395</sup> Musila (note 33 above)60

<sup>396</sup> Waruguru Kaguongo(note 66 above)107

A third footstool for dialogic judicial review, specifically for socio-economic rights is article 20(5). This provision presupposes that in the enforcement of socio-economic rights, invariably the sole agent with the autonomy and that would be called upon to answer to questions relating to resource-dependent socio-economic programmes is the state.<sup>397</sup> The novelty of this provision ostensibly makes the state accountable to the judiciary with regard to resource-dependent welfare programmes. Under Article 20(5) (a) the state is under an obligation to demonstrate to court that resources are not available. To my mind this an interactive phase of adjudication. This is an open invitation to dialogue between courts and government in social rights adjudication. The court speaks to the legislative and executive organs in reviewing legislation or decisions of government to accomplish their constitutional rectitude.

Furthermore, article 20(5) (c) supposes that where the state alleges inadequacy of resources to meet outlined welfare initiatives, it must explain such a deficiency to court, which are then evaluated against the yardsticks of progressivity required by article 21(2). Such a constitutional precept demands that in assessing resource allocation, the court is not to invalidate the structural programmes merely on account that it would have reached a different conclusion. In other words, the court is not to impose its own opinion on the government. It recognizes that the government has a legitimate role in remedy selection process and to explain the same to court in an engagement forum the rationality of criteria upon which it has determined resource allocation. However, the court must ensure the state is meeting its obligations. The interpretive meaning of this provision is that the court can interfere with resource allocation decisions on other grounds, including the fact

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<sup>397</sup> See article 21(1) makes it a fundamental duty of the state and every organ to respect, observe, protect, promote and fulfill socio-economic rights. Article 21(2) spells out to the state the duty to take legislative, policy and other measures to achieve progressive realization of the rights. See also article 21(3) regarding state duty to marginalize and vulnerable members of the society.

that the decision fails to take care of vulnerable and marginalized individuals and groups. Dialogue thus also serves the purpose of ensuring that minimum obligations are being met and that vulnerable groups are covered. In line with progressivity, the minimum for meeting state obligations in respect of any socio-economic rights is: i) have a reasonable policy and plan that can lead to progressive realization (qualitatively but also quantitatively) and ii) the most vulnerable are covered by the plan or policy.

These four elements are clear indication of how the Constitution has dwarfed monologic judicial review as an inherited legal tradition, heralding in its place newfound constitutional dialogic strategy for redress of socio-economic rights claims.

### **5.5 Procedural Modalities for Application of Dialogic Remedies**

Dialogic remedies for socio-economic rights enforcement, according to this study, emanate from a participatory process in which the government suggests to court possible and rationally considered structural reliefs to meet concretely defined constitutional guarantees within a defined period of time. The application of dialogue in judicial review involves three distinct stages: the rights declaration stage; the remedy proposal stage and the monitoring/supervision stage.<sup>398</sup>

The rights declaration stage is the first stage of redressing a claim before the court. Here, the court establishes whether any right/s has been infringed and the degree of its infringement. The court

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<sup>398</sup> Cesar Rodriguez-Garavito (note 108 above) 1691; these three stages have also been identified by Mark Tushnet (note 71 above) 822-823. See also Mark Tushnet (note 372 above) 22-23.

finds that a government policy complained of fails to meet rights obligations and makes a strong declaration of the content of the right and the manner of its infringement.

The next step involves the court directing the government officials to initiate some action and commence programmes that bear the promise of structurally alleviating or reforming the situation of rights violation. The court is precluded from developing and directing these remedies independently in a monological fashion. The government is afforded some decisional latitude to proffer plans for reforming its socio-economic policies and systems that perpetuate institutional violations. The court evaluates these plans on offer and assesses their suitability and viability for solving structural problems and achieving systemic reforms.<sup>399</sup> Dialogic decisions allows implementation of the government's preferred remedial choices to run for defined periods of time.<sup>400</sup> This preference acknowledges the inadequacies of the instantaneous nature of received remedial tradition in alleviating systemic violations inherent in public institutions. Implementation of public bureaucracy reform unquestionably requires time and resources expenditure.<sup>401</sup> Given the lethargy that may arise on the part of government in effecting directions from a third arm of government, the court must set specific timelines for implementation of its orders.

The monitoring process is a critical pillar on which structural remedies are anchored. This forum allows actors and parties involved to discuss, over set deadlines, the alternative structural choices which have been proposed by the government and adopted by the court.<sup>402</sup> It also entails reporting back to court on the progress made in compliance with the judgment. Parties to the suit may present

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<sup>399</sup> Mbazira (note 46 above)177

<sup>400</sup> Ibid.

<sup>401</sup> Ibid.

<sup>402</sup> Mark Tushnet (note 372 above)24



complaints, observations or suggestions on bottlenecks that may impede implementation process. This oversight allows the court to supervise its decisions, and, may for purposes of inculcating higher degree of compliance issue any necessary orders or directions as circumstances may necessitate.<sup>403</sup> This court-instigated monitoring mechanism may enlist participation of other parties or institutions not directly involved in the litigation such as civil society groups.<sup>404</sup>

What has been highlighted above are the defining features of dialogue at the remedial stage of adjudication. As examples of the three distinct jurisdictions show, remedial dialogues may take any form, depending on the circumstances and the peculiarity of the case at hand. South Africa has employed the use structural interdict with supervisory jurisdiction. Canada similarly exercises supervisory jurisdiction over implementation of its remedial orders while in Colombia a declaration of unconstitutional state of affairs is rectified through Constitutional Court's sanctioned collaborative engagements between relevant government agencies and public hearings conducted by the Court.

What emerges from this study are certain key commonalities attendant to any given remedies that a court may grant. In summary these, are: ascertainment by court of the existence of rights breach occasioned by institutional arrangement or omission (declaration stage); involving the government in defining and suggesting to court broad-based institutional remedies for implementation (remedies stage). These are then subjected to court monitoring procedures or the supervisory jurisdiction conducted over a period of time (monitoring). No matter the form of remedies that a

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<sup>403</sup> Ibid. see also Mbazira (note 46 above)181

<sup>404</sup> Ibid.

court may grant, for it to be characterized as dialogue the above three elements must be its defining feature.

## **5.6 Why the Preference for Dialogic Remedies**

A preference for dialogue in socio-economic rights interpretation and enforcement is justified by two identified factors: the need to overcome democratic deficit and institutional capacity concerns. It is a conceptual recognition that collaborative engagement between competing sources of authority on public affairs neutralizes legitimacy and separation of powers tensions regarding judicial review.<sup>405</sup> Dialogic processes of adjudication allows the executive to proffer measures and standards on how to fulfill its constitutional obligations. Courts therefore respect the legitimate democratic authority of the government.

Dialogue as a model of participatory democracy enhances the institutional competence of the judiciary in solving complex problems arising from social policy deficiencies.<sup>406</sup> There is always a perceived limitation and a lack of technical knowhow of courts to comprehend and proffer meaningful reliefs to sophisticated facets of human maladies, due to a lack of information and training of judges.<sup>407</sup> Dialogic judicialism controverts this notion. By resorting to dialogue, courts do engage with government institutions concerned with a particular social phenomenon, an array of actors with sufficient grounding and experiences such as community leaders, academic experts,

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<sup>405</sup> Kent Roach (note 271 above)550

<sup>406</sup> Marius Pieterse, 'On 'dialogue', 'translation' and 'voice' in Stu Woolman and Michael Bishop (eds) *Constitutional Conversations* (Pretoria: Pretoria University Law Press 2008), 333-334

<sup>407</sup> Cesar Rodriguez-Garavito (note 108 above) 1696.

international human rights agencies and NGOs- to provide expert information and solutions to systemic failures that courts acting independently may not best attain.<sup>408</sup>

Dialogic remedies such as a structural interdict is a mechanism of circumventing the shortcomings of traditional remedies in responding to structural weaknesses of public institutions that perpetuate rights violations.<sup>409</sup> Mbazira posits that conventional remedies are ill-suited to eliminate public infirmities whose reform ‘requires negotiation, dialogue, ex parte communications and broad participation of parties not liable for the violation’.<sup>410</sup> A related justification he points out, is that for efficacious realization of entrenched constitutional values, there is need for altering the institutional arrangements of government bureaucracies.<sup>411</sup>

Structural remedies are also suitable for addressing systemic violations at their roots rather than diagnosing their impact. When courts require government to suggest social policy plans and supervises their implementation, past injustices are remedied and possible future harms are averted by the running of court monitored-policy measures, albeit for periodic timeframes.<sup>412</sup> To explain this point, it is important to note that remedies for socio-economic rights are distributive in nature and always focus on averting systemic weaknesses likely to occur in future.<sup>413</sup> As opposed to traditional remedies concerned with correcting harms suffered by an individual, dialogic remedies redress systemic weaknesses or structural deficiencies that impact on claims of wider sections of the society not before the court.<sup>414</sup>

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<sup>408</sup> Ibid.

<sup>409</sup> Mbazira (note 46 above)177

<sup>410</sup> Ibid.

<sup>411</sup> Ibid.

<sup>412</sup> Ibid. pp. 178.

<sup>413</sup> Kent Roach(note 38 above) 46

<sup>414</sup> Kaguongo (note 66 above)96

Flexibility of structural interdicts makes it a preferable remedy in structural suits.<sup>415</sup> It allows for a revision of the remedy without necessarily instituting a fresh suit. In addition, flexibility allows for accommodation of emergent dynamics of a situation during ongoing supervision. This is instrumental in avoiding the ugly spectre of contempt of court proceedings where fulfillment of an order has either become impossible or unattainable. Its flexibility also allows the executive or parliament to determine an appropriate remedy to respond to highlighted systemic deficiencies of a programme or a piece of legislation.<sup>416</sup>

Retention of jurisdiction over an ongoing implementation of court orders enables an aggrieved party to ventilate grievances, or seek clarification from the court regarding prescriptions of the orders.<sup>417</sup> In addition, some see supervisory jurisdiction as suitable to mandatory orders with imprecise terms which makes them difficult for the defendant to comprehend. The continued involvement of the court in a matter creates room for new facts to be presented to convince the court that better and expedient alternatives have since become available.

There is also a proposition that dialogic remedies bear the potential of higher degree of impact on socio-economic rights enforcement than monologic remedies. The reasoning is that dialogic remedies are better placed to address political resistance and institutional capacity concerns as practical impediments to structural decisions of courts.<sup>418</sup> It is noted that structural injunctions

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<sup>415</sup> Mbazira (note 46 above) 180.

<sup>416</sup> Ibid.

<sup>417</sup> Ibid. pp. 181.

<sup>418</sup> Cesar Rodriguez-Garavito (note 108 above) 1695

normally generate resistance from sectors with vested interests.<sup>419</sup> A participatory approach that allows stakeholder and civil society engagements in the monitoring process helps the court to overcome obstacles erected by political elements.<sup>420</sup> The incorporation of groups such as NGOs and primary organizations provides the essential countervailing force against those vested interests.<sup>421</sup> The court therefore obviates unnecessary political confrontation germane to inconvenient judicial re-ordering of budgetary allocations and resource distribution, both mandates being within the realm of elected politicians.

The sum of these reasons and more make a cogent case for adoption of dialogue as an approach to crafting remedies for relieving infringement of article 43 of the Constitution. As contemporary scholarship and judicial practice show, enforcement of socio-economic rights is an exercise fraught with practical and conceptual challenges emanating from political obstacles and fears of incapacity of judges over complex social policy matters. This study, in conclusion affirmatively proposes that in adjudication of socio-economic rights, dialogue offers an intermediate approach for circumventing these obstacles identified obstacles.

## **5.7 Weaknesses Drawn from Separation of Powers**

The one major weakness of dialogue is that some may consider it as an unlikely way of judging. A judgment, in the received tradition of common law is an authoritative judicial pronouncement with the force of law. Any weakening of such a judicial device may be unwelcome, in a political system where general expectations do not anticipate that judgments begin another arduous process of

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<sup>419</sup> Ibid.

<sup>420</sup> Ibid.

<sup>421</sup> Ibid.

conversation as opposed to obedience. As Mark Tushnet points out, dialogue as a weak form of judicial review may thus be unsuitable to political systems with weak executive and legislative accountability and responsiveness.<sup>422</sup> Political systems that are stronger relative to judicial institutions may emasculate judicial voices on socio-economic policy. Pursuit of vindication of rights of the vulnerable and marginalized may be rendered ineffective and courts may no longer be said to be the robust bastions for effectuating social justice in such a jurisdiction.

The other related problem is the likelihood of nominal cooperation by the executive or parliament with court initiated dialogic process on reforming large-scale government systems. In Kenya particularly, the office of the Attorney General is the proper party in all suits in which the government is involved. It is expected that the court initiated structural reforms will be spearheaded by that office, coordinating activities and collating relevant information from relevant government agencies to be presented before the court. It is also expected that the state law office will spearhead drafting and parliament will fast-track passage of enabling laws to anchor social policy initiatives of the government. Lethargy coupled with a busy legislative calendar, and feet dragging arising from red tape of government systems and procedures may undermine achievement of set deadlines and progress reports that parties are expected to submit to court after given time intervals. In sum these institutional logjams may undermine induction, receptivity and effectiveness of dialogic judicialism as a new approach to adjudication in Kenya.

It is instructive to note that compliance with court orders is pegged on political support and voluntary observance.<sup>423</sup> The executive may be recalcitrant and defiant of any efforts by courts to

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<sup>422</sup> Mark Tushnet, *New Forms of Judicial Review* (note 372 above), 831.

<sup>423</sup> Christine A. Bateup (note 97 above)12

secure its participation in a negotiation on how it should conduct its policies. Courts may find it problematic to monitor recalcitrant institutions' compliance with its orders given that contempt proceedings may as well not achieve a desired end of willful participation of the government. The bigger problem is that courts do not have the coercive force of their own to compel participation of the government in its engagement, since the very government possess all the coercive institutions to instill law and order. Furthermore, courts are vested with peripheral strengths and lack any effective recourse compared to the political branches which can easily engage the mechanism of removing unwanted judges in situations of bitter frictions. However in situations where there are strong civil society actors, strong publicity campaigns that such a situation may elicit may exert some moral suasion on the government to act.

In a context specific situation of Kenya's political power play, the case for dialogic judicialism may also run into erected barriers of political opposition that view court sanctioned policy programmes as sidestepping the more representative platforms of engagement. In a country with high political polarity, where political competition centers on control of resources, judges who begin a process of probing resource allocation and redistribution may be viewed as being activist, antithetically assuming roles that belong to politicians. This growing reach of judicial powers to police the other branches will therefore be rejected by the political elite.<sup>424</sup> Already, there have been instances of blatant defiance of court orders by both parliament and the executive, prompting the chief justice and the Law Society of Kenya to warn of anarchy if the trend continues.<sup>425</sup>

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<sup>424</sup> See for example *Judicial Service Commission versus The Speaker of the National Assembly & the A.G* Petition No. 518 of 2014 (the case challenges parliament's authority over the judicial service commission on internal matters relating to the judiciary. The dispute involved parliament disregarding court orders restraining it or its committee from further discussing any matters relating to the JSC. Parliament disregarded the order and recommended to the president to constitute a commission to remove JSC members. The court then issued further order restraining the commission of inquiry from conducting any hearing on the removal of JSC members)

<sup>425</sup> See Daily Nation, 19<sup>th</sup> February 2014(page 4)

The challenge that resort to dialogic adjudication may face from judges relates to its novelty and uniqueness. Kenyan judges are used to issuing judgments and orders which are anticipated to be obeyed. Once a judgment has been handed down, the judge becomes *functus officio* and is precluded from opening up the same matter except in few instances of request for review. Judges do not expect their decisions to open up new fronts of negotiation with parties to a suit. The traditional approach is that a court pronounces itself only once, the instantaneous orders must be complied with, and any grievances harboured can only be addressed by way of appeal. This is a procedural straight jacket imposed by common law tradition and procedural rules of court practice. Because there is yet to be a shift and evolution of legal principles and rules to alter these old-fashioned conceptions of making judgments, dialogic judicialism may face opposition even from amongst members of the bench who are expected to champion it.

Another bottleneck is the perennial case backlog that courts in Kenya do confront. Judges are already overwhelmed by the increasing number of cases that find their way into the courts.<sup>426</sup> Dialogic engagements, especially the monitoring phase require reporting back and active supervision. These are protracted exercises that exert profound pressure on the courts' clogged diaries. Overseeing implementation of structural reforms in a given rights case may see the life of a case stretch into several months or even years.<sup>427</sup> In an environment in which courts are inundated by existing individual claims for justice, creating further time-consuming workload for judges may impair the entire system of administration of justice in Kenya.

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<sup>426</sup> See State of the Judiciary and Administration of Justice Annual Report, 2012/2013 available at <http://www.judiciary.go.ke/portal/launch-of-state-of-the-judiciary-and-the-administration-of-justice-annual-report-2012-2013.html>, accessed on 19<sup>th</sup> February, 2013.

<sup>427</sup> See for example the Colombian case of *T-025*



## **5.8 Conclusion**

This chapter has offered a conceptual meaning of dialogue in a constitutional context. In essence, this section has brought to the fore collaboration, partnership, engagement or flexibility and three other features (declaration, remedies and monitoring) as the salient and inextricable attributes that characterize a dialogic adjudicatory process. It has explained how the mechanism of dialogue between courts and other state organs may occur to ensure efficacious reach and realization of the guarantees contained in article 43. The chapter has also elucidated the history, rationale and why a preference for dialogue may be necessary to counter the practical challenges of separation of powers. Several advantages explain a preference for dialogic remedies over the traditional monologic adjudication. The chapter has also illustrated several challenges that dialogic approach may face in the Kenyan legal regime. Explaining the underpinning constitutional basis for resort to dialogic judicial review, this section has identified article 20(5) and 23(3) of the Constitution as provisions on which dialogue is predicated. It is therefore concluded that in crafting remedies for socio-economic rights dialogue as a weak form of judicial review dovetails properly into the Constitution's transformative ideals of deepening social justice and substantive equality in a way that diminishes the dangers of unwelcome intrusion into the flow of democratic self-governance. The next chapter contains an appraisal of each and every chapter and general recommendations for the study.

## **CHAPTER SIX**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 Introduction**

This chapter contains the conclusion deduced from the study and the recommendations on the new approach to crafting remedies for socio-economic rights with positive obligations. It will also analyze the hypothesis in line with findings of the study and demonstrate whether the objectives have been achieved.

#### **6.2 Conclusions**

It was the declared objective of this study to assess the existing literature as background information on which to draw lessons and provide a compass for the Kenyan legal order on how effectively remedies for affirmative socio-economic claims can be crafted. The study also purposed to assess whether there are best optional ways of navigating the practical complexities that impedes judicial enforcement of some socio-economic rights. In this regard, the study deemed it vital that an appropriate and effective approach be recommended for adoption by the Kenyan judiciary. Dialogue, at the very beginning was identified as an intermediate approach to judicial enforcement of some needs-based claims in Kenya.

These objectives were to be achieved by answering questions as to whether there are practical and conceptual problems that would beset judicial enforcement of socio-economic rights in Kenya; whether the Constitution recognizes these challenges and the manner it anticipates to deal with them; the relative strength or weakness of court's approach in responding to these complexities;

whether a commitment to a dialogic approach in adjudication bears the promise of neutralizing the challenges to the constitutional goals of egalitarianism.

In chapter two, the study reveals that practical and conceptual challenges to judicial enforcement of some socio-economic rights is not an isolated fact but a historical phenomenon drawing from the international politics of law that exist to this very day. Chapter two has summarized the historical evolution of socio-economic rights and the controversies that inexorably attended their receptivity at the international fora. Under the same chapter, it has been illustrated the international law input that have clarified certain core concepts for understanding the nature of violation of socio-economic rights. The upshot of this chapter is that conservative views that regarded social rights as vague contributed greatly to ambivalence and negativity towards their judicial enforcement. Chapter three reinforces the existence of complex adjudicatory problems and limitations that may buffet socio-economic claims in Kenya in the new constitutional dispensation. Like at the international forum, chapter three observes that the challenge to crafting meaningful remedies emanates from practical and doctrinal aspects of separation of powers. It highlights the political and other factors that may favour receptivity of social welfare claims in any given jurisdiction. Kenyan judicial decisions and scholarly contributions were highlighted to depict these challenges. After identifying where the problem lies, this chapter makes a central proposition that indeed the antidote for overcoming these practical and doctrinal drawbacks ought to be found in the approach adopted by *Mitu Bell* and *Satrose Ayuma* decisions. These decisions are identified as pacesetters in Kenya's socio-economic rights remedial regime in so far as they embrace a creative approach of dialogue that hitherto had not been in use in Kenya. A preference for this approach is selected as an ideal for deepening the transformative potential of the Constitution of Kenya, 2010. *Mitu Bell*, according to this study

embodies the attributes of a revolutionized judicial thinking capable of bringing social transformation in Kenya. Chapter four is a cross-jurisdictional inquiry manifesting the practical use of dialogue in other jurisdictions. It answers the question as to whether there are benchmarks or precedents that exist elsewhere for emulation by Kenya in overcoming obstacles that impede the constitutional goal of social justice and equality. Indeed as examples of Canada, Columbia and South Africa exhibit, impressive and flexible judicial approaches exist as yardsticks that Kenyan remedial regime can adopt. Chapter five debates the origins, meaning, constitutional basis, procedural modalities and the advantages of dialogic remedies as a tool for dispensing distributive justice. This chapter has mapped out an overview of the concept and operation of dialogue as an approach to crafting effective remedies that consort well with contrived political blockages. At the core of this section is a strong illustration of dialogic judicialism as an appropriate device for judicial decision-making in Kenya to overcome potential practicality impediments that initiation of social-welfare claims may face in the take-off stage of our constitutional order.

This study has succeeded in proving the two hypotheses. One, it has shown that in Kenya, litigating and finding effective remedies for claims that require resource spending and budgetary alterations by the government would be an exercise fraught with practical difficulties rooted in the political layout of Kenya's scheme of governance. For instance, the study has highlighted the views of Kenyan, regional and renowned experts in social rights jurisprudence to paint a picture of problems yet to be confronted by the courts in tackling demands by vulnerable individuals and groups who would seek vindication of their rights in the judicial forums. Second, the study has demonstrated that a dialogic approach, such as *Mitu Bell's* where the court gives room for negotiation and exchange between victims of socio-economic injustices and the government or its relevant agencies

is a preferable way of responding to the practicality and conceptual challenges. *Mitu Bell* itself is not an exclusive Kenyan invention. Its jurisprudence appears, to a large extent to have been inspired by the Colombian dialogue mechanism in the case of *T-025*. Comparative approach on this subject has given useful guidelines and practical dynamics that informed an inquiry into the viability of dialogic judicialism. From a comparative perspective it is clear that dialogic approach to adjudication employs engagement and partnership of all relevant state agencies as well as the participation of civil society groups in quest for a sound judicial solution on systemic socio-economic rights situations. The court exercises supervisory jurisdiction over the implementation of social programmes that the government, in a forum with the participants, proposes as the most expedient measures to accomplish constitutional obligations. This aspect of monitoring or supervision is the common thread that joins *T-025* and *Mitu Bell*.

The study notes however that proceedings of *Mitu Bell* case are still ongoing and the matter is still active in the High Court at Milimani. It is pointed out that the order that the court issued was just a first ruling of the court upon a finding that the government was in breach of the rights of the petitioners. A perusal of the court record shows that after ninety days from the date of the court's judgment, parties went to court to apprise the judge of progress made in compliance with the Court's orders but a representative from the Attorney General's office requested for more time to obtain the relevant materials from government departments. The requirement to report back to court on progress of compliance with court's orders is a manifestation of dialogue at the instigation of court. Like South Africa's structural interdict, the court retains authority on a matter, after ruling or judgment to supervise implementation of its orders. *Mitu Bell* took this approach by ordering parties to appear in court after ninety days to assess the progress made. Since it adopts the Colombian

dialogue, subsequent hearings would be conducted in the matter to enable the presiding judge monitor the implementation of its orders.

### **6.3 Recommendations**

The study recommends that there be a mental shift to and a preference for *dialogue* as an approach suitable for fashioning meaningful and effective remedies where socio-economic claims may require affirmative state action to be sanctioned by court. The *Mitu Bell* decision is an impressive case showing how the courts can sanction a process in which the relevant government agency is allowed some level of decisional leverage to formulate systemic remedial measures, in a discussion and conversational forum with the victims of social policy deficiencies at the behest of court. This case shows the three stage approach as discussed in chapter five i.e the declaration, remedies and the monitoring. In that decision, Justice Mumbi first established the existence of rights breaches by the defendants in the case and made a declaration to that effect. Once such a breach of the rights to housing by slum dwellers was established, the judge directed the government to furnish court with plans, current and future, on how it intended to remedy the vulnerability grievances of the evicted slum dwellers. The parties were allowed a ninety-day window period to discuss and come to a compromise on how an active matter subject of litigation could amicably be resolved with court's supervision.

Most importantly, the *Mitu Bell* and *Satrose Ayuma* decisions shows how ingeniously the courts can collaborate with the government to reform state programmes and systems that fall short of constitutional obligations on social rights protection without necessarily bulldozing its opinion on such matters. This allows courts to live up to its constitutional mandate of instilling the

constitutional rectitude of actions of all public bodies but at the same time allows them their democratic autonomy in resource distribution. In a transformative constitutional setup, such a role for the judiciary is key. It is key in the sense that judges are able to navigate through intricate political decisions without upsetting the political branches while retaining, albeit unobtrusively an assertive final authority on such questions.

It is an observation of this study that resort to or a preference for dialogic judicial adjudication is not an abstract academic proposition. Article 20 (5) and 23 (3) are the provisions of the Constitution that either implicitly and explicitly embrace dialogue as an approach to crafting appropriate reliefs. Article 20(5) is an express recognition of dialogue between the courts and the government in respect of constitutional obligations of socio-economic rights. Article 23(3) concept of ‘appropriate remedies’ opens an avenue through which the court can justify a means it may adopt to vindicate the vulnerabilities of marginalized groups. Judges are therefore strengthened in the use of dialogue by the express textual provisions and spirit of the 2010 Constitution.

However implementing this new approach to litigating needs-based claims requires some law, rules or procedural practice directions. The Chief Justice has the powers under article 22(3) to make practice rules or directions to guide the enforcement of fundamental rights and freedoms. Already, the Chief Justice has promulgated the aforesaid rules, which though do not address some procedural dimensions envisaged by dialogic judicialism.<sup>428</sup> For the courts to meaningfully enforce article 43 rights that may require structural remedial measures, there ought to be some well-tailored procedural mechanism to govern monitoring, supervision, continuous reporting by parties and

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<sup>428</sup> The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

solving questions of *functus officio*. The rules should also be amended to provide for ‘Monitoring Committees’ consisting of parties to the case and other interested parties admitted by the Court with a role of implementing collectively agreed court decisions.

The Chief Justice may do so by coming up with relevant practice directions. The monitoring rule should allow the court to appoint a monitoring committee consisting of representatives of the petitioners or their representatives, amicus curiae with relevant expertise such as civil societies, advocacy groups, and scholars admitted in the case from the beginning or at any point of request, the Attorney General’s representative, and representatives from the affected policy organs of the government. The directions should accord a presiding judge discretion to determine modalities of engagement, time period of negotiations, and timeframe for reporting back. The court should also be accorded power to summon any government official to appear and provide any relevant data or information that is necessary for arriving at a decision. Below is a sample of practice directions that the Chief Justice may come up with to regulate the carrying out of dialogic remedies.

**REPUBLIC OF KENYA**

**HIGH COURT PRACTICE DIRECTIONS FOR ENFORCEMENT OF RIGHTS  
CONTAINED IN ARTICLE 43 OF THE CONSTITUTION OF KENYA, 2010.**

**IN EXERCISE of the powers conferred by Rule 36 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which make provision for issuance of practice directions to ensure better carrying out of the aforesaid rules, and in light of articles 21, 22(3), 23(3) of the Constitution to ensure effectiveness in the enforcement of rights under article 43, the Chief Justice makes the following practice directions:-**

- 1. At any time during the proceedings or after delivery of judgment the Court may call parties to a negotiation and discussion for purposes of finding a collaborative and mutually agreed ways of rectifying the offending status of rights occasioned by the acts or omission of the state complained of.**



- 2. During the negotiation and discussion the Court may allow the parties to make practical suggestions and recommendations to achieve the objects in 1 above taking into account the principle that it is a responsibility of the state to take measures to satisfy the obligations imposed by article 43 of the Constitution.**
- 3. The Court shall adopt and issue in form of an order, the recommendations or suggestions of the parties, and where necessary may make any just and appropriate amendments to ensure the greatest compliance.**
- 4. The aforesaid order of Court shall consist of a detailed report consisting of resolutions by all members, agreed courses of actions, processes and modalities of implementation of the agreed issues and time guidelines within which the agreed action programmes are to be effected and achieved.**
- 5. The Court may before or after delivering a judgment constitute a Monitoring Committee (hereinafter the Committee) consisting of such number of persons appointed by Court from among the parties including amicus curiae, interested parties and representatives from the relevant agencies of government that the Court may deem necessary to appear.**
- 6. The Committee shall monitor and supervise the implementation of the collectively agreed orders of the Court.**
- 7. The Committee shall convene meetings from time to time aimed at deliberating on the issues or set facts as may be necessary or directed by the Court.**
- 8. The Court shall fix a date for the Committee to report back to appraise the court on progress made in the implementation of the orders.**
- 9. The Court shall consult all the parties on the status of collective discussion and shall give directions accordingly taking into account the concerns of all the Committee members.**
- 10. The Court may compel any person or government organ to produce any relevant information, data or material necessary for examining the issues in controversy.**
- 11. The Court may direct the relevant government agency to implement the agreed course of action within a prescribed timeline as set by Court or consensus among the Committee members.**
- 12. Any party may apply to Court during the implementation process to make any subsequent orders in the interest of justice and for purposes of amicable and expeditious disposal of the matter in issue.**

**Dated this            day of            February, 2014.**

**HON. DR. WILLY MUTUNGA  
THE HONOURABLE CHIEF JUSTICE AND PRESIDENT OF THE  
SUPREME COURT OF KENYA**

This study recommends that the entire legal profession: lawyers, judges, jurists and judicial staff be trained so as to introduce and equip them with an incisive and insightful grasp of how to deal with enforcement challenges to article 43 rights. This is because socio-economic rights are new creatures of the Constitution whose adjudication is not ordinary to many practitioners and judicial officers. The few cases highlighted makes clear that most judges are yet to comprehend the normative meaning, obligations and remedies for enforcing those rights. This is however not to say that all judges are not conversant with social rights jurisprudence. Indeed as *Mitu Bell*, *Kabui* and *Satrose Ayuma* cases show, some judicial officers are now abreast with social rights jurisprudence and are making conscious efforts in developing and furthering that jurisprudence. The study is however informed by an apprehension that a larger majority of Kenyan legal fraternity are unaccustomed or oriented to the nuances and subtleties of social rights jurisprudence. The study thus recommends that training and continuous legal education on socio-economic rights be given a priority to enhance capacity of judges and lawyers as agents of administration of justice.

To further this initiative of training and education, the current programmes of continuous legal education run by the Law Society of Kenya (LSK) can be utilized as platforms to carry out the trainings. Experts and renowned scholars are invited to give insights to and expose both members of the bench and the bar on the importance and practical modalities for dialogic approach in adjudication of needs-based claims. Training manuals may also be crafted by the judiciary and LSK to enhance sensitization on this novel approach.

To ensure that socio-economic rights education and sensitization receives much recognition in Kenya, there is need for review of curriculum for pre-bar training and education. University curriculum should be reviewed to introduce students to core concepts of socio-economic rights as a core unit of study and not merely as a topic in human rights law course. This is because socio-economic rights takes a central place as constitutional as constitutional ideals through which social justice is to be achieved in Kenya's new constitutional order. The curriculum for post bar training should also identify continuous training needs on socio-economic rights.

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