
Presented To: Dr. Godfrey Musila

November 2014
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## CHAPTER 1

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DECLARATION

I, RINTARI ESTHER KINYA, do hereby declare that this original work and has not been submitted and is not currently being submitted for a degree in any other University.

Signed: __________________________

RINTARI ESTHER KINYA

This Thesis is submitted for examination with my approval as University Supervisor:

Signed: __________________________

Dr. GODFREY MUSILA,

LECTURER

Dated at Nairobi this....Z.... day of ....... NOVEMBER ....... 2014
DEDICATION

To my daughter Nkatha, who provided the inspiration necessary for me to complete this research and also sacrificed immensely along the way.
ACKNOWLEDGEMENTS

I am grateful to the School of Law University of Nairobi Parklands Campus for allowing me to be part of the 2011/2012 Master of Laws (LLM) Class, which experience has been priceless and has provided me with great opportunities.

This research would not have been possible without the input of my Supervisor Dr. Godfrey Musila whose feedback and comments were instrumental and for which I am truly grateful. I would also want to specially thank and acknowledge Ms. Rose Ayugi and Dr. Celestine Musembi with whom I started this paper as supervisors for their input in reading and correcting this research, making it the complete work that it is today.

I would like to thank my colleagues at the University of Nairobi Master of Laws class 2011/2012 and especially my friend Veronica with whom I took this journey for the moral support and encouragement, it would have been a lonely journey without her.

I am also grateful to my parents Kibiti and Nancy Rintari and siblings Evans, Pauline and Dan who have believed in me and always encouraged me to keep going. Special thanks to my husband Festus who took it all in stride and helped me a great deal throughout the academic year and without whose support, patience and guidance this study would not have been completed.

Most of all, to my Heavenly Father; Who continues to amaze me with His mercies all glory belongs to You.
ABSTRACT

This research addresses the implementation of economic, social and cultural rights in particular the right to adequate housing under the constitution of Kenya 2010. Although economic, social and cultural rights are guaranteed in the constitution, the entrenchment of these rights alone does not guarantee an automatic improvement in the standard of living for the people of Kenya.

The state through the relevant governmental agencies has to take steps towards the full realisation of the SERs and in particular housing rights that are the focus of this paper, in a manner that allows the provisions of the Constitution to be enforced resulting in tangible gains for the people and especially the most vulnerable.

This paper analyses the implementation of progressive realisation of the right to adequate housing in Kenya about five years after the promulgation of the constitution including the challenges faced by the state in attempting to progressively realise this right and to provide housing the Kenyan people.

In an attempt to establish the meaning and content of the concept (progressive realization) that underpins the implementation of socio-economic rights under the Constitution of Kenya 2010, the study reviews South Africa’s jurisprudence on progressive realisation of housing rights and arrives at various conclusions before making recommendations on how to sustain the progress attained thus far and expand opportunities for realization of the right to housing in Kenya.
LIST OF ABBREVIATIONS

ACHPR- African Commission on Human and People’s Rights

CESCR- Committee on Economic Social and Cultural Rights

CERD- Convention on Elimination of Racial Discrimination

CKRC- Constitution of Kenya Review Commission

CRC- Convention on the Rights of a Child

CPR- Civil Political Rights

HRC- Human Rights Committee

ICCPR- International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic, Social and Cultural Rights

IDP- Internally Displaced Persons

ILO- International Labour Organisation

KAA- Kenya Airports Authority

KENSUP- Kenya Slum Upgrading Programme

KISIP- Kenya Informal Settlement Improvement Programme

KNCHR- Kenya National Commission on Human Rights
NCIC- National Cohesion and Integration Commission

NGEC- National Gender and Equality Commission

NLP- National Land Policy

NRF- National Resettlement Fund

PEV- Post Election Violence

 PIE – Prevention of Illegal Eviction from and unlawful occupation of Land Act, South Africa

PWD- Persons Living With Disabilities

SACC- South African Constitutional Court

SCA- Supreme Court of Appeal, South Africa

SER- Social Economic Rights

TRU- Temporary Residential Units

UDHR- Universal Declaration of Human Rights

UN-United Nations

UN-HABITAT- United Nations Human Settlements Programme

WHO- World Health Organisation
CASE LAW

KENYA

1. Paul Mwangi Kimani & 20 Others v Attorney General and 3 Others (High Court Nairobi Miscellaneous Application 1366 of 2005).
2. Charo wa Yaa v Jama Abdi Noor & 4 Others (High Court Mombasa, Miscellaneous Civil Application 8 of 2001 Unreported)
3. Satrose Ayuma & 11 Others v Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 Others (Constitutional Petition 65 of 2010)
4. Susan Waithera Kariuki & 4 Others v Town Clerk Nairobi City Council & 2 Others (Constitutional Petition 66 of 2010)
5. Mitu Bell Welfare Society v Attorney General & 2 Others (Constitutional Petition 164 of 2011, Unreported)
6. Ibrahim Songor Osman v Attorney General (High Court Constitutional petition 2 of 2011)
7. John Kabui Mwai and 3 others v Kenya National Examinations Council & Others (Petition No. 15 of 2011)

SOUTH AFRICA

3. Louis Khosa and others v Minister of social development CCT 12/03 (2004) 6 SA 505 CC
5. Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v the City of Johannesburg and Others 2008 (3) SA 208 (CC)
6. Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing, Western Cape [2009] ZACC 16.
CHAPTER 1

1.1 INTRODUCTION

The importance of Economic, Social and Cultural rights cannot be overstated. Poverty and exclusion lie behind many of the security threats that we continue to face both within and across borders and thus place at risk the promotion and protection of all human rights.

Louise Arbour, United Nations High Commissioner for Human Rights, Geneva, 14th January 2005

Human rights are claims that accrue to all human beings by virtue of being humans, they inhere in humanity1. They were initially classified in three categories; first generation rights that comprised Civil and Political Rights (CPRs), second generation rights that are economic, social and cultural Rights (SERs), and finally third generation rights that are otherwise referred to as group or solidarity rights2.

The Universal Declaration of Human Rights (UDHR)3, though not a binding document, was the first formal international recognition of human rights and it is regarded as the basis for the human rights movement4. It contains provisions for both CPRs and SERs5 but these were later codified in two separate Covenants; the International Covenant on Civil and Political Rights (ICCPR)6 and the International Covenant on Economic Social and Cultural Rights (ICESCR).7

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1 Maurice Cranston, 'Human Beings Real and Supposed' in D Raphael (ed), Political Theory and Rights of Man (1967) 43, 49–53
3 Adopted by the United Nations General Assembly in 1948
4 Supra note 2 page 16
5 Article 22 of the UDHR
6 Adopted by the United Nations General Assembly Resolution 2200 A (XXI) of 16th December 1966
7 Ibid
In addition to the UDHR, there were earlier instruments that recognized the SERs among them the Declaration of Philadelphia in 1944, that created the International Labour Organization (ILO) under which ILO workers’ rights were developed. These instruments provided for; material and spiritual well-being, economic security and equal opportunities for men and women. Later, in 1946 the World Health Organization (WHO) recognized and advocated for the enjoyment of the highest attainable standard of health as one of the fundamental rights. The UDHR recognized the right to housing, health, social security and workers’ rights among other SERs.

For a long time, civil and political rights were viewed as superior to economic, social and cultural rights but this notion has since been abandoned due to the acceptance of equality of rights regardless of class they are "universal, indivisible, interdependent and interrelated". Further, for one to be said to have a dignified life they have to be guaranteed all the rights. Therefore, in this regard it can be said that the enjoyment of CPRs depends on access to SERs and vice versa.

The Constitution of Kenya 2010 places an obligation on the state to progressively realize the SERs, which is the same standard of implementation that is set out in the ICESCR. This obligation requires the state to put in place measures, to be accomplished in stages bearing in mind the resources available to the state for the implementation of SERs.

More recently, the trend has been the inclusion of SERs into binding documents such as constitutions, national laws and binding international instruments. Some of the treaties and covenants that include provisions on SERs are; the African Charter on Human and Peoples’ Rights, The European Social Charter and the Additional Protocol to the American Covenant on Human Rights. This trend is also reflected in the decisions of international treaty bodies formed under various treaties, including the African Commission on Human and Peoples Rights (ACHPR) that has enforced SERs.

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8 Vienna Declaration and Programme of Action, 1993 para 5
9 Supra note 2 at page 20
10 Supra note 2 page 23
11 Adopted by state parties on 21st October 1986
12 Adopted by Council of Europe on 3rd May 1996, and entered into force on 16th July 1996
In responding to the socio-economic needs of their people, various nations have included SERs in their constitutions including Kenya and South Africa that has been said to contain the more elaborate provisions as compared to other jurisdictions since it provides for among other rights; the right to health, housing, food, water, social security and education. Others countries include Canada, Burundi and Rwanda that only provide for some of the rights.

South Africa has a constitution that provides for a capacious bill of rights especially with regard to SERs. This, according to Langa CJ, has been attributed to the inequalities occasioned by apartheid that brought about the need for provision of facilities and services to bridge the gap created in order to bring about equality, human dignity and social justice.

This inclusion of SERs in the Constitution of Kenya 2010 in the Bill of Rights has earned it various titles, among them; it has been described as being revolutionary and with the capacity to transform the lives of Kenyans. To ensure that it is not just a commendable document on paper its provisions have to be implemented in order to breathe life into the provisions on SERs.

The obligations of states in respect of SERs are contained in the CESCR General Comment no. 3 that elaborates in detail the nature of the obligations of states. It was preceded by the Limburg Principles and the Maastricht Guidelines both of which are discussed in this paper to create a general understanding of the obligations of states regarding socio-economic rights.

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1 Constitution of Kenya 2010 Article (43)
2 South African Constitution S(26) (27) and (29)
3 Supra note 2 page 27
4 Section 23
5 Supra note 2 paragraph 3
7 D Brand, Introduction to Socio-economic rights in South Africa (2005)
The Limburg principles\textsuperscript{21} have been analyzed by some authors as one of the significant advances in legal reasoning on conceptualization and monitoring procedures relating to the Covenant\textsuperscript{22}. It is noteworthy that the principles were also considered aptly important for inclusion in the 1991 Encyclopedia of Human Rights, which replicated them in full\textsuperscript{23}, further the principles have been adopted as an official United Nations document\textsuperscript{24}. The acceptance and importance of these principles in the interpretation of the obligations of states under the ICESCR cannot be overemphasized.

The Limburg principles comprise a total of 103 principles the most notable of these being; obligation of the state to begin taking steps immediately\textsuperscript{25}; justiciability of rights\textsuperscript{26}; right to minimum subsistence and the use of available resources\textsuperscript{27}; the obligation of non-discrimination\textsuperscript{28}; and violations of the Covenant\textsuperscript{29}. The Limburg Principles on the implementation of the ICESCR also contain important points on progressive realisation. The Principles state that "progressive realisation cannot be interpreted under any circumstance to imply that the states have the right to defer indefinitely efforts to ensure full realisation". This in effect means that states are required to begin immediately to take steps to fulfill their obligations under the Covenant.

The 1997 Maastricht guidelines\textsuperscript{30} build on the 1987 Limburg principles on the implementation of the ICESCR and have to be read together with the Limburg Principles\textsuperscript{31}. The Maastricht Principles


\textsuperscript{24} UN Doc. E/CN.4/1987/17

\textsuperscript{25} Principle 16

\textsuperscript{26} Principles 8, 17, 18 and 19

\textsuperscript{27} Principles 23-28

\textsuperscript{28} Principles 35-41

\textsuperscript{29} Principles 70-73


guidelines focus on the significance of an approach anchored on a violations approach in order to strengthen the monitoring of the ICESCR\textsuperscript{32}. This was especially because of the widespread inequality the world over, which signifies the denial of peoples' economic, social and cultural rights on a massive scale\textsuperscript{33}. According to the Maastricht Guidelines, the burden is on the state to show that it is making quantifiable progress towards the full realisation of socio-economic rights. The state cannot use 'progressive realisation' as an alleged reason for non-compliance nor as a justification for derogations or limitations of rights of its people.

The CESCR in its General Comment 3\textsuperscript{34} and as will be discussed in greater detail in chapter 2 of this research, and which has been said to have been hugely inspired by the Limburg principles and the Maastricht guidelines, expounded the nature of state parties' obligations regarding social economic rights. Kenya is a signatory of the ICESCR and therefore voluntarily committed to honor the obligations set out therein. The obligations of the state in this regard is to take steps, both as an individual state and in collaboration with other states to the maximum of its available resources with a view to achieving progressively the full realization of the rights provided for in the covenant.

1.2 STATEMENT OF THE PROBLEM

Kenya is a jurisdiction in transition following the inclusion of SERs in the 2010 constitution that is a clear departure from the independence constitution that largely provided for civil and political rights. Kenya's independence constitution was silent on socio-economic rights which could be attributed to the colonial masters need to safeguard the interests of the settler community but they were not keen to address the plight of the natives who were living in abject


poverty with no access to socio-economic rights\textsuperscript{35}. Upon independence, the new crop of leaders inherited and strengthened colonial laws and policies resulting in further entrenchment of gross inequality, poverty and social injustice for the native population\textsuperscript{36}. This state of affairs resulted in an agitation for legal reforms which culminated in the promulgation of a new constitution in 2010 that includes a broad range of socio-economic rights\textsuperscript{37}.

The entrenchment of these rights alone in the constitution in 2010 does not guarantee an automatic improvement in the standard of living for the people of Kenya. The state through the relevant governmental agencies has to take steps towards the realisation of the SERs, in a manner that allows the provisions of the Constitution to be implemented resulting in tangible gains for the people and especially the most vulnerable.

The implementation of the provisions of the Constitution on SERs generally can only be measured against the compliance or non-compliance with the obligation of states to progressively realize positive SERs of their citizens. Kenya promulgated a new constitution in 2010 that provides for socio-economic rights and further for the obligation of the state to progressively realise socio-economic rights.

The state through the relevant governmental agencies has made certain steps in compliance with this obligation to progressively realise SERs under the constitution. Although the steps taken so far are commendable the state continues to grapple with certain challenges in the implementation of the constitutional and international law obligation to progressively realise SERs.

This paper discusses the concept of progressive realization in comparative perspective. In this regard, it reviews South Africa’s jurisprudence on progressive realisation of SERs and in particular housing rights and makes recommendations on how to sustain progress attained thus far and expand opportunities for realization of SERs, and housing rights in particular.

\textsuperscript{35} Opiata Odindo, Litigation and housing rights in Kenya, in John Squires, Malcolm Langford and Bret Thiele (eds), The Road to a Remedy: Current issues in litigation of Economic, Social and Cultural Rights, University of South Wales Press, 2005. p 155

\textsuperscript{36} Yash Ghai, Constitutions and Governance in Africa, in Sammy Adelman and Abdul Pahwala , Law and Crisis in the Third World, Hanszell Publishers (1993) 51 at 64

\textsuperscript{37} Article 43 of the constitution of Kenya 2010

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1.3 LITERATURE REVIEW

There has been a lot of scholarly writing and material in the area of SERs both in the international and domestic arena touching on a variety of subjects. Some of the scholarly works in this regard include subjects such as; the development of economic, social and cultural rights in comparison with civil, political rights and the nature of obligations in respect of these rights. There is also wide ranging scholarly material on topical issues specific to individual economic, social and cultural topics such as the right to the highest attainable standard of health, the right to water and the right to education among other socio economic rights.

Research has also been conducted on the implementation and enforcement of SERs in constitution generally in various jurisdictions, the implementation of the SERs in South Africa. Closer home there has been literature on diverse topics on the implementation of the Constitution of Kenya 2010 and little material specific to progressive realisation SERs in the constitution. The most notable of these being the Kenyan Section of the International Commission of Jurists (ICJ-Kenya) Judiciary Watch Report 2010 that focuses on various aspects of the implementation of SERs in the constitution.

39 Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty second session, 2000)
40 Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty ninth session, 2003)
44 J Biegon & GM Musila (note 2 above)
45 ibid
There are also scholarly writings on the minimum core content and the reasonableness standards. Courts have in certain countries engaged in socio-economic adjudication in order to improve the standards of living of people. The standards the courts apply in socio-economic adjudication may to a large extent determine how far the rights are translated from paper rights into tangible gains. The concept of core of rights is not unique to SERs and it connotes the set of specific individual entitlements that constitute the right. This standard has been used to attempt to establish legal minimum content of SERs that are largely indeterminate.

This standard can be traced back to the Limburg Principles that particularly require the state parties to guarantee respect for the minimum standards for all notwithstanding the resources available at the state’s disposal. The CESCR in recognition of this developed the minimum core approach to establish the minimum standards that were to be achieved by all states regardless of the economic situation. It is the non-negotiable foundation of a right which is entitled to all human beings irrespective of their context or circumstances. The standard also suggests that people denied access to basic SERs are denied the chance to live dignified lives.

The minimum core content has received both support from various authors who maintain there is need to define the parameters of the minimum core of each right as it enables the citizen to identify and be able to claim these entitlements from the state that has an obligation to meet them and the failure to meet these obligations results in violation of the state’s obligation.

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48 Principle 25
49 "Each state has accepted legal obligation and agrees that under all circumstances, including periods of scarcity of resources the requirement to adhere to the obligations stand." Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline Nos. 9 and 10, Human Rights Quarterly 20, no.3 (August 1998), at 717
50 supra note 43
51 Pierre de Vos, Substantive Equality After Grootboom: The Emergence of Social and Economic Context as a guiding Value in Equality Jurisprudence, 2001 Acta Juridica 52, 64
The standard has also received criticism from various writers for various reasons among them; the creation of an essential core minimum of a right threatens the broader goals of SERs\textsuperscript{54} or feigns a determinacy that is otherwise non-existent\textsuperscript{55}, the interpretation could lead to a situation that an individual and especially the most vulnerable in society could be sacrificed to an amorphous general good\textsuperscript{56}, it tends to focus on the developing countries ignoring affluent countries and is otherwise context intensive\textsuperscript{57} as will be delved into more detail in subsequent chapters of this paper.

The other standard alluded to is the reasonableness standard that was developed by the South African Constitutional Court (SACC) which standard examines to what extent the government is in compliance with its obligations under the constitution in respect of SERs. The reasonableness standard has its origins in the works of Prof. Etienne Mureinik who besides making a persuasive case for the inclusion of the SERs in the Constitution argued that the state has a duty to its citizens to make an honest and reasonable effort to realise their SERs and he suggested judicial review for the measure of governmental action.\textsuperscript{58} The government is required to justify the means chosen to realise SERs\textsuperscript{59}

This standard particularly checks the reasonableness of the measures adopted by the state and its agencies to realise positive obligation in respect of SERs set out in the South African Constitution. The issue that court was grappling with at the time was how the courts could adjudicate over issues relating to positive obligation of state to fulfill incorporated in the constitution\textsuperscript{60} at the same time upholding separation of powers. The reasonableness standard has been acclaimed\textsuperscript{61} for being a flexible and realistic standard that takes into account individual

\textsuperscript{55} Brigit Toebes, The right to health in Economic Social And Cultural Rights: A Text Book, 169, 176 (Asbjorn Eide, Catarina Krause & Allen Rosas eds, 2ded 2001)
\textsuperscript{56} Craig Scott and Philip Alston, Adjudicating Constitution Priorities in a Transnational Context: A comment on Soobramoney’s Legacy and Grootboom’s promise, 16 SAJHR 206 (2000)
\textsuperscript{58} E. Mureinik, “Beyond a charter of luxuries: Economic rights in the constitution”, 8 SAJHR (1992)464,474
\textsuperscript{59} E. Mureinik, A Bridge to Where? Introducing the Interim Bill of Rights, 10 SAJHR (1994) 31,32
\textsuperscript{60} Constitution of South Africa sections 26 and 27
circumstances and particularly emphasizing on the most vulnerable\textsuperscript{62}, as a tool to combat substantive inequality\textsuperscript{63} and whose elements act as a checklist for governmental action or inaction because the government is required to indicate which specific legislative and policy measures it has taken to meet its obligations under the constitution.

Like the minimum core content approach has been subject of negative observations among them arguments that it is vague based on the fact that what is reasonable in a certain context may not necessarily be reasonable in another, it is dependent on the circumstances and it also does not provide the minimum core obligations element.

Despite the existence of wide ranging material on the subject of SERs there is scarce literature on Kenya and particularly the analysis of the principle of progressive realisation of housing rights in light of the constitution of Kenya 2010 with an aim of putting forth recommendations on how best the principle can be interpreted by the judiciary and implemented by the state to realise maximum gains for the Kenyan people.

1.4 JUSTIFICATION FOR THE STUDY

The study aims at contributing to the developing jurisprudence on SERs post the Constitution of Kenya 2010. Little scholarly work has been done on SERs in Kenya and particularly on the progressive realisation of the right to adequate housing in post the 2010 constitution of Kenya.

Thus this study is not only timely but also seeks to contribute to the understanding of the SERs under the new constitutional dispensation. It will specifically deal with the principle of progressive realisation in Kenya particularly of housing rights culminating in recommendations on what steps the state through the relevant governmental agencies can take towards the full realisation of housing rights as a means for realization of the promise of better quality of life for the Kenyan people.


\textsuperscript{63} P. De Vos, Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness, 17 SAJHR (2001) 272
1.5 THEORETICAL FRAMEWORK

Many theories otherwise known as theories of justice have been advanced to justify and classify human rights. These theories set out and defend some general principles governing the basic structure of society in regard to its impact on the life prospects of and the enjoyment of primary goods by individuals.

As a theoretical framework, this research deploys two theories: John Finnis’ interests theory and Rawls theories of justice, with particular reference to distributive justice. John Finnis’ interests theory centers on what constitutes a valuable and worthwhile life and he makes the proposition that human rights are justifiable on the grounds of their instrumental value for securing the conditions necessary for human well-being. On the other hand, John Rawls’ Political liberalism makes a case for the existence of socio-economic rights and that they deserve to be taken as seriously as civil and political rights.

John Finnis interests theory reformulates modern theory of natural law and identifies certain fundamental interests, or what Finnis terms ‘basic forms of human good’, as providing the basis for human rights. According to Finnis, these are the essential prerequisites for human well-being and, as such, serve to justify our claims to the corresponding rights and all the seven basic human goods are equally fundamental because of their nature and intrinsic value that they are capable of being referred to as the most important at different points in time.

Socio-economic rights have for decades, been treated differently from civil and political rights and have often been regarded as ‘mere aspirations or second class rights’ not deserving of the status of human rights. This has since changed as they are recognised now as human rights in a

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65 John Finnis, Natural Law and Natural Rights, Oxford:Clarendon Press. 1980. n. 14 at 86-89., These are: life and its capacity for development; the acquisition of knowledge, as an end in itself; play, as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness, the capacity for intelligent and reasonable thought processes; and finally, religion, or the capacity for spiritual experience.

66 B C Nirmal, Natural law, human rights and justice: Some reflections on Finnis’ natural law theory.
number of international human rights instruments\textsuperscript{67} due to the acceptance of equality of rights regardless of class they are 'universal, indivisible, interdependent and interrelated'\textsuperscript{68}. It is generally accepted in modern day international law, that for one to be said to have a dignified life they have to be guaranteed both SERs and CPRs\textsuperscript{69} which notion is in line with Finnis theory that human rights and in this case SERs are a pre-condition for human well-being.

For its part, John Rawls's political liberalism, which was initially presented in \textit{A Theory of Justice} and developed as a comprehensive theory on human rights,\textsuperscript{70} has shaped contemporary political philosophy. It proposes a theory in support of human rights and is particularly relevant to socio-economic rights. Rawls theory of justice differs from some theories of justice such as that proposed by Robert Nozick's \textit{theory of historical entitlement}, that give the impression of being hostile to socio-economic rights.\textsuperscript{71}

\textit{Political Liberalism} that is an update of his \textit{Theory of Justice} makes an argument for two principles of justice for institutions, the first taking priority over the second which means that no violation of basic liberties is justified in order to bring about greater socio-economic equality. The first principle states that each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. This paper disagrees with Rawls classification of rights and the argument he makes that civil-political rights are more superior to socio-economic rights. The paper subscribes to the idea that finds expression in international law that there is equality of rights regardless of 'class' or 'generation', and that they are 'universal, indivisible, interdependent and interrelated'\textsuperscript{72}.

\textsuperscript{67} Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Today, they are also protected in many other documents, including national constitutions, for example, the South African Constitution (Act 108 of 1996) and that of Kenya

\textsuperscript{68} Vienna Declaration and Programme of Action, 1993 para 5

\textsuperscript{69} Supra note 2 at page 20

\textsuperscript{70} John Rawls, professor of philosophy at Harvard University, provided a signal contribution to the development of contractarian political philosophy with the publication of \textit{A Theory of Justice} (1971). Writing in the spirit of John Locke, Jean-Jacques Rousseau, and Immanuel Kant, especially the latter, Rawls attempted to work out the implications of 'justice as fairness' and to show the inadequacy of a rival view of justice, that of the maximization of the good in society, which was sanctioned by classical utilitarianism.

\textsuperscript{71} Robert Nozick, \textit{Anarchy, state and Utopia} (Oxford: Basil Blackwell, 1974, p.238

\textsuperscript{72} Vienna Declaration and Programme of Action, 1993 para 5
The second principle otherwise referred to as "the difference principle" and which this study emphasizes is of particular relevance to the notion 'progressive realisation' states that social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society. Rawls repeatedly emphasizes that the difference principle is a principle of mutual benefit. It is not supposed to benefit exclusively the worst-off but eventually everybody in society.73

Rawls theory is based on a presumption that scarcity, including the scarcity of material resources is a fact of life and which is central to the question of justice.74 This theory provides for justification for allocation and distribution of scarce resources and it provides a general medium for considering and reconciling competing claims.75 The implication of this scarcity of resources in relation to human demands is that there is need to prioritize and balance the demands in order to meet the needs of the most vulnerable. According to Rawls, all social primary goods including liberty and opportunity, income and wealth and so on are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored in society.

Rawls' conception of distributive justice resonates with modern day international law and in particular the ICESCR which advocates for progressive realisation which requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints.76 Progressive realisation then requires a state to strive towards the realisation and improved enjoyment of SERs for its people to the maximum extent possible in the circumstances regardless of scarcity of resources.77 A state's performance in terms of the progressive realisation under the ICESCR thus depends on,78

73 Rawls's discussions in A Theory of Justice 87-89 and 68-72 suggest that "benefit" is understood in a very broad sense. He also seems to assume that if the bad off improve their situation, society as a whole does better, thereby also benefiting the well off, which suggests collective rather than distributive benefit. For the discussion on possible challenges to this aspect of Rawls's egalitarian theory, see Cohen 1997, Lloyd and Daniels 2003.
74 David Hume, A treatise of Human Nature, second edition ed. L.A. S
75 Supra note 62 at page 5
76 General Comment No 13 par 45;
77 Lilian Chenwi, Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance, (2013) 46(3) De Jure 742-769
among other things, both the actual socio-economic rights people enjoy at a given moment as well as the society’s capacity of fulfilment in terms of the resources available to the state.

The ICESCR, Constitution of the Republic of South Africa, as well as that of Kenya are some of the human rights instruments which recognize that socioeconomic rights have to be realized over time and the progress towards full realisation is dependent on the availability of resources. National constitutions such as those of Kenya requires judicial officers adjudicating socio-economic claims to be guided by among other principles whether the interests of the most vulnerable are considered in relevant state policies, particularly those relating to allocation of resources in a determination of whether or not the state has complied with its obligation to progressively realise SERs. For its part, the Constitution of South Africa of 1996 has provisions requiring among other things, affirmative action policies to take into account the most vulnerable in society and guarantee the provision of their socio-economic rights.

Under the ICESCR, the state parties are required to do more than refrain from taking retrogressive measures. Where available resources are demonstrably inadequate, the obligation remains for a state to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances, and further that progressive realisation requires special measures be taken by the state party in respect of the vulnerable members of society who must be protected by the adoption of relatively low cost programmes. This approach is underpinned by Rawlsian ideas of distributive justice.

78 Article 20(5)(b)
79 which advocates for the enjoyment of rights of vulnerable groups in an equitable way. Chapter 2 of The Bill of Rights specifically prohibits direct and indirect discrimination, by the state or an individual, against anyone on the basis of race, gender, sex, etc. and it constitutes a Constitutional violation of a person’s right.
80 The CESCR in its General Comment No 5 on Persons with Disabilities UN doc E/1995/22 (1994) par 9 progressive realisation requires that special measures for vulnerable and disadvantaged groups need to be put in place. States are required to do more than abstain from taking measures that might have a negative impact on the enjoyment of their rights. The obligation on the state is to take positive action to reduce structural inequality and to give appropriate preferential treatment to vulnerable and marginalised groups. Positive action includes specially tailored measures or additional resource allocation for these groups.
81 General Comment No 3 par 11.
82 Ibid para 2
1.6 HYPOTHESES

The study adopts the following hypotheses:

- The implementation of SERs and in particular housing rights under the Constitution of Kenya 2010 depends on compliance or non-compliance with the obligation to progressively realize the rights set out therein.

- South Africa provides valuable lessons on progressive realisation of SERs and particularly housing rights that Kenya can adopt in the implementation of SERs and their full realisation.

1.7 RESEARCH OBJECTIVES

The central objective of this study is to analyze the obligation of the state to progressively realise SERs entrenched in the Constitution of Kenya 2010 with a keen focus on the right to housing and to recommend proposals of better implementation of the provisions of the Constitution that will offer the greatest potential for the progressive realisation of SERs.

With respect to specific objectives, this study aims to-

a. Analyze the obligation of state set out in both international law and the Constitution of Kenya 2010, to progressively realize SERs.

b. Compare the progressive realisation of SERs in Kenya and South Africa; in particular analyze the progressive realisation of the right to housing drawing from case-law from both jurisdictions.

c. Recommend measures that may be employed by the Kenya in ensuring compliance with the obligation of the states to progressively realize SERs and towards the full realisation of SERs.
1.8 RESEARCH QUESTIONS

This study seeks to answer the following questions:

1. What are the obligations of the state in respect of SERs?

2. How has South Africa implemented SERs and particularly the obligation to progressively realize SERs to housing set out in the South African Constitution?

3. How has Kenya implemented SERs and particularly the obligation to progressively realize SERs and particularly in respect of housing rights under the 2010 Constitution?

4. What lessons can Kenya learn from South Africa towards the fulfillment of the obligation of the state to progressively realize housing rights?

1.9 RESEARCH METHODOLOGY

This study was conducted by reference to both primary and secondary data which were collected with the aim of collating relevant information on SERs and especially the progressive realisation of the right to adequate housing in Kenya and South Africa. It will be based on review and analysis of literature relevant to the area of study.

Primary sources such as international law instruments in the area of economic, social and cultural rights such as the ICESCR, General Comments of both the CESC R and the Human Rights Committee (HRC) and closer home national constitutions of both Kenya and South Africa and case law emanating from both these jurisdictions have been reviewed and relied on to draw lessons and valuable approaches in the analysis of the implementation and interpretation of SERs.
The secondary data was mainly collected from the University of Nairobi library at the School of Law, from which I read relevant materials including; legal books, articles, academic commentaries, journals and previous studies done on SERs. To supplement the material obtained in the library, I utilized the internet to access articles, commentaries and reports on SERs in Kenya and South Africa.

1.10 CHAPTERIZATION

This paper is divided into five chapters, each of which discusses a specific aspect of the realisation of SERs. The following is a breakdown of the chapters including a brief summary of what issues are discussed in the chapters. Chapter 1 is the introductory chapter, which contains the statement of the problem, the conceptual framework, the literature review, the conceptual framework as well as the scope and the limitation of the study. Chapter 2 discusses the obligations of states under the ICESCR and particularly the obligation to progressively realise SERs provided under the covenant. This is aimed at creating a general understanding of the obligations of the state as it will be a critical aspect in the subsequent discussions of the progressive realisation of housing rights in Kenya and South Africa. For its part, chapter 3 discusses progressive realisation of housing rights in South Africa, a jurisdiction considered to have made commendable steps in the implementation of SERs. Chapter 4 considers progressive realisation of housing rights in Kenya and in comparative perspective. It compares the progressive realisation of housing rights in Kenya and South Africa drawing from emerging jurisprudence from the High Court of Kenya. Chapter 5, the concluding chapter, sums up the discussions in the preceding chapters and makes recommendations on lessons that can be drawn from South Africa as well as Kenya with regard to the progressive realisation of housing rights with a view to informing implementation of the right to housing and SERs in general in Kenya.

1.11 LIMITATIONS OF THE STUDY

The main methodological limitation of this study was the inability to conduct interviews and questionnaires as intended the reason informing this position was that as the project was self-funded the availability of funds that would have enabled a wider scope of research. Also there
was insufficient data on the non-compliance of the state with its obligation to progressively realise the right to adequate housing as incidences of violations are largely undocumented.
CHAPTER 2: AN OVERVIEW OF THE CONCEPT OF PROGRESSIVE REALISATION

This chapter discusses in detail the international law principle of progressive realisation of SERs generally and particularly with regard to the right to housing drawing largely from the CESCR General Comment number 3. It adopts a thematic approach in an attempt to bring out the essential elements of the concept of progressive realisation to create a clear understanding of the concept. This thematic approach will be applied to discuss progressive realisation in the context of Kenya and South Africa in the subsequent chapters.

2.1 WHAT IS PROGRESSIVE REALISATION? THE CONCEPT IN GENERAL UNDER THE ICESCR

Article 2(1) of the ICESCR states that:

Each state party to the 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 achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means, including particularly the adoption of legislative measures.  

The CESCR which is tasked with monitoring state party’s compliance with their obligations under the covenant has emphasized that Article 2(1) above is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all other provisions of the Covenant as it describes the nature of the general legal obligations to be undertaken by the state parties to the Covenant.  

83 Similar provisions on progressive realisation are set out in Article (4) of the Convention on the Rights of the Child; Article 4(2) of the Convention on the Rights of Persons with Disabilities; and Article 26 of the American Convention on Human Rights.

The obligation of states parties reflects that adequate resources are a critical condition for the realisation of SERs. The phrase "to the maximum of available resources" allows for a difference in the implementation of the Covenant among countries in the nature and extent of SER policies, programs and services. The notion of progressive realisation reflects the nature of states obligations in respect of SERs, in so far as the level of a country's economic development determines the level of its obligations in respect of any of the rights of the Covenant. This introduces a flexibility mechanism which implies that the obligation of states parties vary from one state party to another and that even in respect to a state party some of its obligations may vary over time.

Progressive realisation then requires a state to strive towards the realisation and improved enjoyment of SERs for its people to the maximum extent possible in the circumstances even in the face of scarcity of resources. This then means that the obligation of state parties goes beyond providing access to the minimum levels of each of the rights. The states performance in terms of achieving progressive realisation of the SERs would depend on the actual SERs enjoyed by its people at a particular time as well as the societies capacity to fulfill the SERs taking into account the resources available at the State's disposal among other factors.

In attempting to elaborate comprehensively the concept of progressive realisation this paper emphasizes three issues, firstly, there has to be immediate and tangible progress towards the realisation of the rights and although progressive realisation allows the state party room for flexibility in the enforcement of SERs it does not provide a green light to drag its feet. The principle of progressive realisation cannot be interpreted as implying that states defer efforts to ensure progressive realisation of SERs but are instead required to immediately put in place

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88 Supra note 75 at 755
measures aimed at fulfilling their obligations under the Covenant. In the context of the ICESCR, each state party has an obligation to take steps towards progressive realisation within a reasonably short time after entry into force of the Covenant for the state in question. Related to the issue of flexibility is that the state is also obligated to take measures that are flexible so as to adapt to its changing circumstances.

Secondly, a state party cannot purport to take deliberate retrogressive measures. There is an immediate obligation on the state to ensure constant improvement in the realisation of SERs and retrogressive measures are not permissible under the Covenant and if taken they have to be justified by reference to the totality of rights. The obligation requires that state parties take more steps even where people already have access to SERs to improve the nature and quality of services to which people have access.

Thirdly, progressive realisation requires that special measures be taken by the state party in respect of the vulnerable and marginalized or disadvantaged groups in society which measures as was disused in the theoretical framework are underpinned by the Rawlsian theory of distributive justice. The state parties are required to do more than refrain from taking retrogressive measures. It is expected to put in place affirmative action programs to reduce structural inequalities and to give appropriate differential treatment to these groups.

2.2. IMMEDIATE OBLIGATIONS OF STATES IN RESPECT OF SERs

State parties of the ICESCR besides the duty to progressively realise SERs, have immediate obligations regarding the covenant including to avoid discrimination in access to these rights, prioritize minimum core obligations and to ensure that no unjustified retrogressive measures are taken.

90 Limburg Principles on the implementation of the ICESCR. UN Doc E/cn4/1987/17 Annex paragraph 21.
92 Sandra Liebenberg, Social Economic Rights Adjudication under a Transformative Constitution. (2010) at page 188.
2.2.1 Non Discrimination

The fundamental rights to equality and non-discrimination are not unique to the ICESCR and are at the heart of human rights law and are enshrined in all major international and regional human rights treaties\(^9^4\) and have been said to be part of customary international law\(^9^5\). Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights\(^9^6\).

The principle of non-discrimination in the guarantee of economic and social rights is spelled out in the ICESCR, at article 2(2) and it requires equality in both allocation and distribution of resources. This provision in particular requires that SERs are available to all people without discrimination\(^9^7\) regardless of the individual’s race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status\(^9^8\). It is the obligation of the state party to “guarantee” that Covenant rights will be exercised without discrimination of any kind, and that any form of discrimination must be eliminated both formally\(^9^9\) and substantively\(^1^0^0\).

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\(^{9^4}\) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); Convention relating to the Status of Refugees; Convention relating to the Status of Stateless Persons; Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); Convention on the Rights of Persons with Disabilities (CRPD), while other treaties require the elimination of discrimination in specific fields, such as employment and education. (ILO Convention No. 111, Discrimination in Respect of Employment and Occupation; UNESCO Convention against Discrimination in Education.)


\(^{9^7}\) Article 2(2) of the International Covenant on Economic, Social and Cultural Rights.

\(^{9^8}\) The preamble, Articles 1(3) and 55 of the UN Charter and Article 2(1) of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights.

\(^{9^9}\) Requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status.

\(^{1^0^0}\) Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive. States parties may be, and in some cases are, under an obligation to adopt special measures or affirmative action to suppress conditions that perpetuate discrimination.
In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated\(^{101}\). These measures include formulation of legislation that addresses and seeks to remedy historical and systematic discrimination, putting in place policies and plans aimed at eliminating discrimination among others. Temporary special measures are provided for under a number of international human rights treaties for the purpose of redressing disadvantage faced by certain vulnerable groups\(^{102}\).

Such measures are not considered discriminatory within the terms of the various conventions including the ICESCR in respect of which the CESCR in its General Comment No. 16, paragraph 15, explains that temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as other members of the society. Further that, in so far as these measures are necessary to redress discrimination and are terminated when equality is achieved, such differentiation is legitimate and justifiable\(^{103}\).

2.2.2 The use of the maximum available resources.

Article 2.1 of the ICESCR obligates each state party to take steps, individually and through international assistance and co-operation\(^{104}\), especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights by all appropriate means, including particularly the adoption of legislative measures\(^{105}\).

\(^{101}\) Supra note 93

\(^{102}\) For example CEDAW, article 4 allows for the adoption of temporary special measures that are ‘aimed at accelerating de facto equality between men and women’ (see also the Convention on the Elimination of Racial Discrimination, article 1 (4) and the Convention on the Rights of Persons with Disabilities, article 5).

\(^{103}\) CESCR General Comment No. 16 para 15

\(^{104}\) Similarly in Para 26 of Part II of Limburg Principles provides. ‘Its available resources’ refers to both the resources within a State and those available from the International community through international co-operations and assistance.

\(^{105}\) Robert E. Robertson, "Measuring State compliance with the obligation to devote the 'maximum available resources' to realising economic, social and cultural rights" in Human Rights Quarterly, vol. 16, No. 4 396-496
The CECSR has stated that in assessing whether a state has discharged its obligations consideration has to be had to the resource constraints of the country concerned. But for a state to be able to attribute its failure to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposal to meet its core minimum obligations. Even where the resources are inadequate the obligation to ensure realisation of the rights still stands. Unavailability of resources as has been alluded to elsewhere in this paper, cannot justify inaction by a state party. Even in cases of scarcity the state should ensure the widest possible enjoyment of SERs in the circumstances.

2.2.3 Non retrogressive measures

In the words of Magdalena Sepulveda, UN’s Independent Expert on Human Rights and Extreme Poverty a deliberate retrogressive measure refers to any measure that implies a step back in the level of protection accorded to the rights in the ICESCR as a consequence of an intentional decision by the State. This includes an unjustified reduction in public expenditures devoted to implementation of Covenant rights in the absence of adequate compensatory measures aimed at protecting the affected individuals.

State parties to the ICESCR are obligated to ensure that no deliberate retrogressive measures are taken in respect of SERs. Whilst it is possible for states to justify taking a step backward, the onus is on the state to make that case and to show that the measure in question has been taken

(No\ober, 1994), pp. 693- 694.

106 General Comment No. 3 (n 66 above) para 10.

107 Paras 10 and 11 of General Comment No. 3 (n 66 above).

108 Principles 25 to 28 of the Limburg Principles state: "25. States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all; 26. 'Its available resources' refers to both the resources within a State and those available from the international community through international cooperation and assistance; 27. In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources; 28. In the use of the available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services."

109 UN, CESR, Statement by the Committee: An evaluation of the obligation to take steps to the maximum available resources under an Optional Protocol to the covenant, E/C12/2007/11 Paragraph 3

after the most careful consideration of all alternatives and is duly justified by reference to the totality of the state's obligations under the Convention\textsuperscript{111}. This enables the CESCR to make a distinction between inability and unwillingness of a state party to avoid retrogressive measures, which is a distinction the CESCR has on numerous occasions identified as essential\textsuperscript{112}.

Even in the face of scarcity of resources or public revenue limitations a state party must marshal the maximum available resources to ensure that full implementation of economic and social rights is progressively realized in the short and long term. States have a specific and continuing obligation to move towards their full implementation.

Having done so, the state forms the opinion that it was duly justified having reference to the totality of the rights provided for in the covenant and in the context of the full use of the state party's maximum available resources. More importantly, the states parties are required to protect the marginalized members of society by adopting relatively low cost targeted programs\textsuperscript{113}.

2.2.4. Minimum core obligations

The CESCR has defined the minimum core obligations of SERs as at least the minimum essential levels of each of the rights\textsuperscript{114}. Further, it is the contention of the CESCR that a state party in which any significant number of individuals or sections of its population is deprived of the essential elements of the SERs is \textit{prima facie} in contravention of its obligations under the covenant\textsuperscript{115}. When a State claims that it has failed to realise minimum essential levels of economic, social and cultural rights it must be able to show that it has allocated all available

\begin{thebibliography}{10}
\bibitem{111} ibid
\bibitem{113} United Nations, CESCR General Comment 15
\bibitem{114} UN CESCR, General Comment 3: Limburg Principles on the implementation of the ICESCR. E/chr4/1987/17.
\bibitem{115} ibid paragraph 10
\end{thebibliography}
resources towards the realisation of these rights, and particularly towards the realisation of the minimum core content\textsuperscript{116}.

In cases where the State does suffer from demonstrable resource constraints, caused by whatever reason, including economic adjustment, the state should still implement measures to ensure the minimum essential levels of each right to members of vulnerable and disadvantaged groups, particularly by prioritizing them in all interventions\textsuperscript{117}. While the obligation to realise the minimum core content of the rights means that the state should prioritize the realisation of the rights for the poorest and most vulnerable in society it does not remove the obligation to progressively realise the rights for all individuals\textsuperscript{118}.

2.3 Qualitative and Quantitative aspects of progressive realisation.

There is widespread recognition among experts, scholars and advocates of SERs that the obligation to progressively realize these rights ‘to the maximum of a state’s available resources’ is at the center of their realization\textsuperscript{119}. As has been discussed in the previous section, progressive realisation entails both immediate and non-immediate obligations on the part of the state. Primary focus has been on various immediate obligations related to this set of rights, which are not dependent on resource availability\textsuperscript{120},\textsuperscript{121}.

Nonetheless, it is the actual enjoyment of the rights and the implementation of the principle of progressive realisation that would address the full realisation of SERs by addressing issues of resource availability and public policy that have a huge impact on the realization of ESC rights\textsuperscript{121}. The point being made here is that SERs are the vehicle for transformation of society.

\textsuperscript{116} The Maastricht Guidelines, above n.22, para. 13 and 15(e).

\textsuperscript{117} UN CESCR, General Comment 3, above n. 15, para. 10-12.

\textsuperscript{118} Ibid para 11

\textsuperscript{119} As Philip Alston and Gerard Quinn point out, the concept of progressive achievement is the ‘lynchpin’ of the International Covenant on Economic, Social, and Cultural Rights.

\textsuperscript{120} This approach was formulated by Audrey Chapman as a ‘violations approach ‘for monitoring ESC rights (see Chapman A., A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly 18.1 (1996) 23-66)

and it is the progressive realisation of the rights by the state that determines the pace at which the transformation of society takes place.

Having effective tools to monitor compliance of any state with these obligations in concrete situations, is essential to give real meaning to these rights for many people who are deprived of the most basic needs. This is bearing in mind that many governments may invoke the concept of progressive realization to explain why they have not made sufficient progress or have taken retrogressive measures in realizing SERs.

The enjoyment and guarantee of SERs and the level of compliance by government of its obligations must be periodically monitored to assess progress in the realization of the right. This assessment often takes the form of qualitative and quantitative measurements, called indicators. Without appropriate tools to assess the standard of progressive realization, it would be virtually impossible to determine the validity of such arguments by the state.

2.3.1 Qualitative aspects of progressive realisation.

Under international law, states are required to take steps “with a view to achieving progressively the full realization” of economic and social rights “to the maximum of their available resources”. Under this head there is need to ensure that there is change in implementation of government from initially ensuring access to SERs, then fulfillment and towards continuous qualitative improvement. This is bearing in mind that the full enjoyment of economic and social rights which is the end-goal of progressive realisation.

Progressive realisation of SERs can be measured in qualitative terms in the sense that one could opt to assess or monitor, how much the standards of living of people have improved or deteriorated over time. For example in an assessment of the quality of housing for a certain group of people such as IDPs over a period of time, the quality would be said to have improved if the members of the group had previously been homeless, and in one year of homelessness the

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12 Indicators are defined as "statistical data which attempts to provide or 'indicate' (usually based on some form of numerical qualifications) the prevailing circumstances at a given place at a given point in time." Danilo Turk, The Realization of Economic, Social and Cultural Rights, July 1990 (Progress Report), UN Doc. E/CN.4/Sub.2/1990/19.
The state has provided temporary shelter and has put in place policies to ensure that the IDPs have permanent housing within a particular period of time.

13.2 Quantitative aspects of progressive realisation.

The quantitative aspect of progressive realisation is best explained as data that has numerical significance that is, it can be quantified. Essentially, quantitative aspects of progressive realization consider raw numbers. To illustrate, if 10 years ago there were 5 million people in line to be provided with housing, the question would be how many have been delivered in a year, and based on that rate establish how much longer it will take to meet existing needs, taking into consideration economic factors, resources available to the state and so on.

Quantitative tools can play a crucial role in holding governments accountable for policies and practices which lead to avoidable deprivations, thus breaching their human rights obligations. Such tools could help assess whether high levels of deprivations or inequalities in the respect of SERs, perpetuated or aggravated by specific actions or omissions of state policy123.

2.4 PROGRESSIVE REALISATION OF THE RIGHT TO ADEQUATE HOUSING UNDER INTERNATIONAL LAW

In its analysis of the principle of progressive realisation of SERs, this paper focuses on the right to adequate housing. This is due to the fact that there is more material on the right as compared to other SERs provided for in the constitution of Kenya 2010, which makes the right to housing a good example for the analysis of the principle of progressive realisation in Kenya that is the focus of this research.

123 The “Maastricht Guidelines on Violations of Economic, Social and Cultural Rights” state: “Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations,” (MAASTRICHT GUIDELINES, 1997)
Kenya by virtue of being a state party to the covenant is bound by the obligations as set out in the ICESCR and elaborated by the CESCR in its General Comments and which are binding on all state parties to the Covenant. This stems from the fact Article 2(6) of the Constitution provides that treaties and covenants ratified form part of our laws. According to Kenya’s state report to the Human Rights Committee, Article 2(6) of the Constitution particularly provides the basis for the direct application of treaties and covenants ratified by Kenya. And as such it would be proper to conclude that this is the official government position regarding the status of international instruments and covenants that Kenya has ratified.

The right to adequate housing is enshrined in several international human rights instruments. It is not a new development to the human rights regime and has for a long time been considered as an integral aspect of human dignity and general well-being of the person. It is included in various instruments among these; the UDHR, the ICESCR, among others.

The right to adequate housing has been discussed in detail in the General Comment No.4 by the CESCR that is the body mandated under the ICESCR to monitor states parties’ implementation of the right to housing. The Committee has in the General Comment number 4 stated that the right to adequate housing should not be interpreted in a narrow or restrictive sense. As opposed to merely having a roof over one’s head, the right to adequate housing should be construed to include a place to live that is guaranteed peace, security and dignity. In this regard the committee has identified seven key components which comprise the right to

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124 Also see Zipporah Wambua Mathara Bankruptcy cause 19 of 2010
Http://kenyalaw.org/Downloads_free_cases/77605.pdf (last accessed on 2/2/2014)

125 Human Rights Committee 105th session 9th -27th July 2012 item 7 of the provisional agenda consideration of reports submitted by state parties under Article 40 of the covenant CCPR/C/KEN/Q/3/Add.1
126 Universal Declaration of Human Rights Article 25
127 Article 11(1) ICESCR
129 United Nations Committee on Economic, Social and Cultural Rights, 13th December 1991, General Comment 4: The Right to Adequate Housing (Article 11(1)).
130 Ibid at paragraph 7
131 Ibid; similarly both the Commission on Human Settlements and the Global Strategy for shelter for the year 2000 stated that adequate shelter means, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost.
adequate housing and these are; legal security of tenure, availability of services, materials, facilities and infrastructure; affordability, habitability, accessibility, location and cultural adequacy.\textsuperscript{112}

The right to housing has been described as an essential component of the right to an adequate standard of living\textsuperscript{133}. In this Resolution, the Commission called on state parties to the ICESCR to among other things; give full effect to the housing rights including through development of policies by the relevant arms of government, and international assistance and cooperation giving particular attention to the less fortunate in society as well as women and children and to security of tenure\textsuperscript{134}.

This paper argues that it is only by obtaining a clear and holistic picture of the status of housing rights that policy makers, planners in different governmental agencies, advocates, and other stakeholders can identify the challenges and devise appropriate solutions and begin to give full effect of housing rights. In order to get this holistic picture, there is need to employ a monitoring and evaluation system that outlines a set of housing right indicators by which the right to housing can be quantified, measured and evaluated\textsuperscript{135}. These will in turn help a state to measure its compliance with the compliance with its obligation to progressively realise housing rights and implementation of housing rights.

2.4.1 Housing rights indicators.

United Nations Human Settlements Programme (UN-HABITAT) suggests a set of indicators to monitor the full and progressive realisation of the human right to adequate housing\textsuperscript{136}. It contends that, despite the complex challenges towards the full realisation of the right to adequate

\textsuperscript{112} ibid


\textsuperscript{134} ibid


\textsuperscript{136} ibid
The creation of a set of housing rights indicators will prove a valuable tool in the implementation of housing rights by states. The following are the proposed indicators as developed by the UN-HABITAT:

1) Adequacy of Housing

The right to adequate housing is enshrined in Article 25(1) of the UDHR and Article 11(1) of the ICESCR. The General Comment Number 4 identifies seven essential elements that comprise the right to adequate housing and which are discussed in detail below.

(i) Legal Security of tenure

The Committee describes legal security of tenure as the legal framework or legislative regime within which individuals or groups are protected in respect of their use of the land or residential property and generally to the extent that those with security of tenure are protected against arbitrary forced eviction or expropriation of property except in exceptional circumstances, and only by means of a known and agreed legal procedure such as compulsory acquisition.

(ii) Availability of services, materials, facilities and infrastructure.

According to the CESCR, in order for housing rights to be said to be adequate, it must provide for safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

(iii) Affordability.

The requirement of affordability denotes that personal or household financial costs associated with housing should be at a level that doesn’t threaten or compromise the attainment of other

137 Supra note 120
138 Supra note 124
basic needs. Further, there should be policies to provide for low income or subsidized housing for the poor or those in need of assistance which meets the threshold of adequate housing.

(iv) Habitability

Adequate housing should provide its occupants with adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease. This is to say that, for housing to be classified as adequate it has to provide both comfort and health to its occupants.

(v) Accessibility

This is especially in respect of persons that are disadvantaged such as; the elderly, persons with disabilities, victims of natural disasters among other vulnerable groups. These categories of persons should be specially considered and prioritized by law and policies due to their special needs.

(vi) Location

According to the CESC R adequate housing should be located in an area that allows people to access employment options, healthcare services, schools, childcare centers, and be away from pollution as well as environmental hazards.

b. Scale and scope of forced evictions.

According to the United Nations Commission on Human Rights, forced evictions constitute gross violation of human rights, in particular the right to adequate housing. The General Comment number 7 provides that forced evictions are prima facie incompatible with the

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requirements of the ICESCR and can only be justified in the most exceptional circumstances and in accordance with the provisions of the law.

t. Scale and Scope of Homelessness

Homeless persons are classified as the vulnerable in a society because lack of housing represents the violation of fundamental human right to an adequate standard of living. Squatters are often considered a particular segment of homeless population as they occupy land without what is considered to be legal title to the land or dwelling unit.

d. The Rights to Non-Discrimination and Equality

The right to non-discrimination has been articulated in several international human rights instruments. Article 2(2) of the ICESCR obligates the state parties to guarantee that the rights under the Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. Further, Article 3 provides for non-discrimination on the basis of sex, and obligates states parties to undertake equal right of enjoyment of all rights under the Covenant.

e. National Legal Protection.

The UN-HABITAT further provides that for housing rights to be protected they have to be codified and enshrined in national law. Article 2(1) of the ICESCR, provides that each state party undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of the available resources, with a view of achieving progressively the full realisation of the rights under the Covenant by all means, including particularly the adoption of legislative measures.

141 ibid
National legislations may cover certain aspects including; housing laws, rent and rent restriction legislation including housing person’s laws, landlord tenant laws, and security of tenure legislations, civil and criminal codes. Land use laws, planning laws and regulations, building codes and standards, laws relating to inheritance rights for women, land acquisition rights and non-discrimination laws among others to guarantee the protection of the housing rights of its people.

In addition to the protection of housing rights through providing for specific aspects of the housing rights by codification through legislation, there is need to ensure due process and appropriate legal remedies which guarantee aggrieved persons access to avenues of effective legal recourse. These will ensure the people are shielded from violations such as forced evictions and discrimination.

f. Acceptance of international standards.

The acceptance of international standards is evidenced by the ratification of international instruments by a state which binds a state to comply with the obligations set out in the specific instruments.

The ratification of the international instrument demonstrates the commitment of a state party to protect housing rights. Under the ICESCR are obligated to submit periodic reports to the CESCRO to enable monitoring of the status of housing rights. The compliance by a state with its obligations under the Covenant including the timely submission of periodic reports is evidence of willingness to comply with obligations under international law. Kenya has ratified the following relevant treaties in addition to the (ICESCR) that envisage the right housing and these are, the International Convention on Elimination of Racial Discrimination (CERD)

142 (Art. 5(e)(iii))
143 Art. 27(3)
People's Rights (ACHPR)\(^{144}\) and the Protocol to African Charter on Human and People's Rights on the Rights of Women in Africa\(^{145}\) among others.

**Conclusion**

The ICESCR is the main international law instrument on socio-economic rights and it sets out the general obligations of state parties in respect of SERs. This chapter discusses these obligations to create a general understanding of socio-economic rights and to set the context of the discussion of the principle of progressive realisation of SERs in both Kenya and South Africa in the subsequent chapters of this research.

\(^{144}\) Following a decision by the African Commission on Human and People's Rights in the case of SERAC v Nigeria, the African Charter is now understood to include a right to housing.

\(^{145}\) Article 16.
PROGRESSIVE REALISATION OF THE RIGHT TO ADEQUATE HOUSING IN SOUTH AFRICA

3.1 An Introduction to Social Economic Rights under the Constitution of South Africa

Kenya’s and South Africa’s constitution have been said to be incredibly similar as they contain more elaborate provisions compared to other jurisdictions since they provide for a broad range of SERs including the right to health, housing, food, water, social security and education. Kenya’s Bill of Rights has heavily borrowed from the South African Constitution which makes their experience in the implementation of SERs vital, as socio-economic rights are novel in our Constitution.

An analysis of the state of affairs prior to the enactment of the constitution is important in understanding the background of socio-economic rights and how the courts have dealt with the issues they are faced with for adjudication. South Africa, before their 1996 constitution was a highly unequal society due to the historical injustices brought about by apartheid and colonialism. The black and white people were highly disparate with the blacks suffering deprivation of basic social amenities and systematic derogation of rights including SERs to the black majority of the country. The struggle for liberation emphasized access to basic services as one of the key aspirations for liberated South Africa; it was adopted by the African National Congress as the South African Bill of rights for the Africans and later the Freedom Charter it

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146 Constitution of Kenya 2010 Article (43)
147 South African Constitution Sections (26) (27) and (29)
148 Supra note 2 page 27 paragraph 2
150 Ibid
pushed for among other things; the right to vote, equal opportunities in education and national resources\textsuperscript{152}

The constitution of South Africa\textsuperscript{153} provides for: access to land\textsuperscript{154}, adequate housing\textsuperscript{155}, health care services, sufficient food and water and social security and social assistance\textsuperscript{156}, children’s right to basic nutrition, shelter, basic healthcare services and social services\textsuperscript{157}, education\textsuperscript{158} as well as right to an environment not harmful to health and well-being.\textsuperscript{159} These provisions are as a tool for empowering the poor and disadvantaged in society as well as societal transformation and a means to deliver on or preserve social welfare\textsuperscript{160}. Access to SERs has been linked to development, which is said to be among other things the realization of all human rights and wholesome development in all spheres of life.

The nature of the government’s duties under the constitution are delineated in sections 26(2) and 27(2) of the Constitution and these provisions compel government to take reasonable legislative and other measures, within the limitations of available resources, to progressively realise these rights. At the international level, obligations to realise socio-economic rights are defined by the ICESCR which is the major treaty on this subject and which has been discussed in detail in Chapter 2 of this research. Though South Africa has not ratified this treaty the obligations describes are relevant to South Africa because of the similarity between this treaty and the South African Constitution\textsuperscript{161}. South Africa has become an international role model by including socio-economic rights as enforceable rights in its Constitution, and having an increasing record of enforcing these rights in South African courts.

\textsuperscript{152} H Klug, 'Historical background' In M Chaskalson et al (eds) Constitutional law in South Africa (1998) 2-11
\textsuperscript{153} Act no. 108 of 1996
\textsuperscript{154} Constitution of South Africa section 25 (5)
\textsuperscript{155} Ibid section 26 (1)
\textsuperscript{156} Ibid section 27 (1)
\textsuperscript{157} Ibid section 28 (1)(c)
\textsuperscript{158} Ibid section 29(1)
\textsuperscript{159} Ibid section 24 (a)
\textsuperscript{160} Gargarella R et al, 'Courts and social transformation in new democracies: An institutional voice for the poor?' (2006) at 255
\textsuperscript{161} Travaux Préparatoires Panel of constitutional experts: Memorandum on ' socio-economic rights' (5 February 1996) page 6
3.1.1 Obligations of the state in relation to SERs under the constitution of South Africa

2. Take reasonable legislative and other measures

The South African Constitutional Court (SACC), which is the highest court in constitutional matters, interpreted the duty of the state to take reasonable measures in the case Government of the Republic of South Africa v Grootboom. The SACC in this case stated that a reasonable government programme ought to; (i) clearly allocate responsibilities and tasks between the three spheres of government (national, provincial and local), in consultation with each other (ii) must be balanced and flexible taking account of short, medium and long-term needs of the people including those persons in desperate and immediate need, (iii) ensure that appropriate financial and human resources are available to implement SERs, (iv) reasonably conceived and implemented in that the state must execute well directed policies and programmes, and ensure sufficient financial, human and other resources are allocated, (v) the programmes contents must be made known to the intended beneficiaries in line with constitutional values of accountability and openness.

b. Maximum use of available resources

The phrase ‘within available resources’ in the constitution of South Africa, mirrors that of the ICESCR which requires that states realise socio-economic rights to the maximum extent afforded by their available resources. In addition, the obligation also requires the government employing the resources diligently and allocating them where they are required most especially by the most vulnerable members of the society.

c. Progressive realisation

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162 Government of the Republic of South Africa v Grootboom (2001) 1 SA 46 (CC)
163 Ibid para 39
164 Ibid para 43
165 Ibid para 39
166 Ibid para 42
167 Ibid para 44
Like the phrase “within available resources”, the principle of “progressive realisation” under the constitution of South Africa is also similar to provisions of the ICESCR on progressive realisation that have been discussed in detail in Chapter 2 of this paper. The Constitutional Court has held that the understanding and meaning of the phrase “progressive realisation”, as contained in General Comment No 3, accords with the context in which the concept is used in the South African Constitution, and thus bears the same meaning. The phrases recognize that it may not be possible for the government to realise the rights immediately, but this does not mean that the state should neglect its obligations. Instead, the government should begin to take steps immediately to realise the rights, followed with measures intended to steadily improve the quality of socio-economic goods and services.

As Liebenberg observes, even where people already have access to socio-economic rights, progressive realisation places a duty on the state to improve the nature and the quality of the services to which people have access. The government should employ more resources towards realizing the rights and improve in quality and reach more people over time.

d. Equality and non-discrimination

The Constitution of South Africa defines equality to include “the full and equal enjoyment of all rights and freedoms”. It further provides that the State may take steps to protect or advance individuals or groups that have been disadvantaged by unfair discrimination with the aim of promoting the achievement of equality. Therefore, advancing real equality can only be achieved if the State takes positive steps to ensure that vulnerable and disadvantaged groups enjoy meaningful access to socio-economic rights.
In addition to the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination (the Equality Act)\textsuperscript{173} of South Africa aims to do away with social and economic inequalities, especially those rooted in apartheid, colonialism and patriarchy and thus plays an integral role in realizing socio-economic rights. It prohibits discrimination on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth\textsuperscript{174}. And like the constitution, it provides that it is not unfair discrimination to take steps to protect and advance the rights of individuals or groups of people who have been disadvantaged by unfair discrimination.

\section*{Minimum core obligations}

The issue of whether socio-economic rights in sections 26 and 27 of the Constitution impose minimum core obligations on the State is a very controversial one in South Africa. The minimum core obligation as discussed in chapter 2, refers to the duty of the Government to provide the basic essential levels of each of the socioeconomic rights for all its people\textsuperscript{175}. The Constitutional Court has been asked in two cases to decide whether the socio-economic rights in the Bill of Rights impose minimum core obligations on the State.

In the \textit{Grootboom case}, it was argued that the minimum core obligation for the right of access to adequate housing would mean that everyone is entitled to some basic shelter, including shelter for children. In the \textit{TAC case} it was argued that the minimum core obligation for the right of access to health care would mean that everyone is entitled to receive nevirapine, including pregnant women living with HIV and their newborn babies\textsuperscript{176}.

The SACC in both cases rejected the minimum core argument stating that; the drafting and language of the socio-economic rights provisions in the constitution of South Africa did not

\textsuperscript{173} Act 4 of 2000  
\textsuperscript{174} ibid  
\textsuperscript{175} The CESCR developed the minimum core obligation in interpreting the positive obligations of the State to realise socio-economic rights under the ICESCR (General Comment No. 3, paragraph 10)  
\textsuperscript{176} (2002) 5 SA 721 (CC)
support the idea that these rights impose a minimum core duty on the State and that it would be
difficult to determine a ‘core’, as rights varied a lot and needs were diverse.\textsuperscript{177}

12 The right to adequate housing in South Africa

Section 26 of the constitution of South Africa provides that:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available
resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an
order of court made after considering all the relevant circumstances. No legislation may
permit arbitrary evictions.

The right to adequate housing is intrinsically bound up with a number of other cross-cutting
rights including the rights to public participation, equality, human dignity, and just
administrative action, access to information and access to justice as well as socio economic
goods and amenities. In the Grootboom case, the SACC said that the right “to have access to”
adequate housing means more than bricks and mortar.\textsuperscript{178} Taken together, these rights and socio
amenities are meant to alleviate poverty, reduce inequality and improve the quality of people’s
lives.\textsuperscript{179}

“To have access to” means that the Government must facilitate access to or create an enabling
environment for everyone to access the right. It does not mean though that the Government must
provide shelter on demand and the state should adopt range of different strategies, including
finance, land and infrastructure, can contribute to realizing the right.\textsuperscript{180} These measures could
include; removing barriers in the way of people getting access to the rights, empowering people

\textsuperscript{177} TAC Case para 35, Grootboom para 14
\textsuperscript{178} Grootboom para 14
\textsuperscript{179} Kate Tissington, Review of housing policy and development in South Africa since 1994, Socio-economic rights
institute of South Africa, 2010
\textsuperscript{180} Supra note 178
and community organizations to be able to provide the service themselves as well as adopting
genial measures to assist vulnerable and disadvantaged groups to have access to the rights
among others.

3. Analysis of the principle of Progressive Realisation of the Right to Adequate
Housing from Selected Case Law from the South African Constitutional Court

The constitution of South Africa provides for the SERs as justiciable, therefore they are to be
adjudicated upon by the courts and in the case of South Africa, the Constitutional Court that is
the highest court in all constitutional courts in South Africa and is the authoritative interpreter of
the constitution and whose interpretation is binding on all state organs\textsuperscript{181}. The inclusion of socio-econonic rights as justiciable rights indicates that the Constitution envisages an important role
for the judiciary in their enforcement. The South African Constitutional Court prides itself in the
development of the ‘reasonableness’ standard that is an administrative model of review\textsuperscript{182} that has
been used in the interpretation of various cases on positive SERs\textsuperscript{183}.

A number of landmark cases have reached the Constitutional Court in which the right to housing
has been tested. This paper examines the jurisprudence from the SACC on the right to housing,
looking specifically at the Constitutional Court’s evolving jurisprudence on socio-economic
rights is reviewed through the leading cases on these rights including; Grootboom, PE
Municipality, Olivia Road, Joe Slovo and Abahlali, to gauge the SACC’s interpretation and
implementation of the housing policy. These cases have all dealt essentially with negative
infringements of the right to housing or with evictions.

1. Government of the Republic of South Africa v Grootboom

The case of Grootboom has become a landmark socio-economic rights case and the first
significant case brought before the SACC in terms of section 26 of the South African

\footnotesize{\textsuperscript{181} Constitution of the republic of South Africa, Articles 165 (2) and 165 (5)}


\footnotesize{\textsuperscript{183} Require positive action on the part of the government}
Constitution. The case began with the eviction of 900 people from a piece of privately-owned land. After the eviction, the affected parties built makeshift shelters on a sports field. The group through their lawyer wrote to the Oostenberg Municipality demanding temporary shelter during a period of bad weather arguing that section 26 of the Constitution obliged the municipality to comply with the request but the municipality declined to do so.

The community resulted to the High Court and made an urgent application in the Cape High Court to force the state to take action. The High Court, ordered the state to provide temporary shelter to all the children in the affected community and at least one of each of their parents. The affected parties in this case then appealed to the SACC. By the time the SACC handed down judgment in 2000, the parties had reached a settlement agreement, which alleviated the immediate plight of the community. This left the Constitutional Court to pronounce on the general obligations of the state in relation to the right of access to adequate housing. In substance, the Court found that the state had no direct obligation to provide a specific set of goods on demand to inadequately housed individuals. Rather, the state’s positive obligation under section 26 of the Constitution was to adopt and implement a reasonable policy, within its available resources, which would ensure access to adequate housing over time.

The Court concluded that, in failing to make reasonable provision for people with ‘no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations,’ the housing policy implemented in the Cape Metropolitan area did not adequately give effect to the positive obligations placed on the state by section 26 of the Constitution. The court in the Grootboom judgment obliged the state, within its available resources, to provide temporary shelter for those who had been evicted or faced imminent eviction and who could not find alternative shelter with their own resources. Thus, the Court avoided the idea that section 26 could give rise to a right to housing on demand.

186 Grootboom para 2-3
187 Grootboom para 11
188 Ibid., para 99.
According to Stuart Wilson, the state took into account this interpretation of the judgment when it adopted Chapter 12 of the National Housing Code in 2004, laying the basis for housing assistance in emergency circumstances. Under it, municipalities could apply for funding from provincial governments to implement emergency housing programmes. The policy lists a broad range of emergency housing situations, including persons who are evicted or threatened with imminent eviction from land or from unsafe buildings. Grootboom thus gave rise to a right to emergency housing and a means for its enforcement, at least through the application of the Emergency Housing Policy.

The Grootboom judgment revealed the Constitutional Court’s thinking on socio-economic rights enforcement and highlighted its developing stance on ‘progressive realisation’ and minimum core obligations. This perspective on ‘progressive realisation’ contrasts with the idea of a ‘minimum core obligation’ as endorsed by the CESCR. Interpreting section 26 as a ‘minimum core obligation’ would oblige the state to ensure that everyone had access to at least a basic level of housing.

In this conception, the state would have to gradually improve the quality of goods and services to which people had access until it achieved full realisation of the rights. The Court’s major objection has been that groups are differently situated and their socio-economic needs vary according to their different contexts. The judgment in Grootboom, however emphasized that, a reasonable government programme must provide for those in urgent need and living in ‘intolerable conditions’ even as the state took steps towards the full realisation of the rights.

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The Emergency Housing Policy, as it has become known, was adopted in terms of section 3(4)(g) of the Housing Act 107 of 1997.

According to Sandra Liebenberg, the Court interprets ‘progressive realisation’ to mean the dismantling of a range of legal, administrative, operational and financial obstacles that impede access to socio-economic rights. It also entails, in the author’s view, the expansion of such access to a larger and broader range of people over time.

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Grootboom, para 52. Cited in Liebenberg, Liebenberg, note 90, pp. 187-188
Both of these cases deal primarily with the state’s obligation to ‘meaningfully engage’ with those facing eviction to ascertain if they will be rendered homeless by an eviction. While *Port Elizabeth Municipality v Various Occupiers* addresses the obligation of state institutions to engage meaningfully prior to taking a decision to institute eviction proceedings, *Olivia Road* expands on the nature and meaning of this obligation of state.

In *Olivia Road*, the Court’s decision concerned an eviction application by the City of Johannesburg to evict over 300 people occupying two ‘condemned buildings’ in the inner city. The application was brought to the Johannesburg High Court in terms of section 12(4) (b) of the National Building Regulations and Building Standards Act, the Health Act, and the city’s fire by-laws. The city sought an order to evict the occupiers on the grounds that the buildings were unfit for human habitation, dangerous and unhygienic. Evicting the occupiers would in their opinion promote public health and safety.

The occupiers succeeded in challenging the application in the High Court on two main grounds: that the respondent’s right of access to adequate housing would be infringed if the eviction order were to be granted; and that the City had failed to meet its positive obligations to achieve progressive realisation of the right of access to adequate housing.

The court also issued a declaratory order regarding the applicant’s failure to comply with its constitutional obligations, obliging the municipality not to evict the respondents until it had

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195 2005 (1) SA 217 (CC).
196 2008 (3) SA 208 (CC).
197 Kirsty Mclean, (fn. 148), p. 150.
198 Act 103 of 1997 (NBRA).
199 Act 63 of 1977.
200 in section 26(1) of the constitution of South Africa.
201 *Olivia Road*, paras 10-15. The respondents also opposed the application on the grounds that the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ought to be applicable to the eviction of the respondents; that the applicant had infringed the respondents’ rights to just administrative action in failing to afford them a hearing prior to taking a decision to evict them; and that section 12 of the NBRA was unconstitutional.
developed a pragmatic, constructive and coherent programme to deal with the predicament that the respondents had to endure.' The order declared that the City’s housing programme failed to comply with its constitutional and statutory obligations and that it had failed to provide suitable relief for people in the inner city in a crisis situation or otherwise in desperate need of accommodation. The order further declared that the City had failed to give adequate priority and resources to people in the inner city in such circumstances. The court further directed the City “to devise and implement within its available resources a comprehensive and coordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.”

The City appealed to the Supreme Court of Appeal (SCA), which reversed the decision. The SCA found that the deprivation of unsafe housing did not amount to an infringement of the right of access to adequate housing. Rather, it held that the eviction itself triggered an obligation on the City to provide emergency basic shelter to those who found themselves in a crisis situation. The SCA ordered the eviction, but further ordered the City to provide housing assistance in terms of the Emergency Housing Programme set out in Chapter 12 of the National Housing Code.

The case went finally to the Constitutional Court, whose different approach focused on the decision-making process of state institutions prior to taking a decision to evict. The Court required the City to meaningfully engage with the occupiers prior to taking such a decision. The City’s failure to engage meaningfully with the occupiers formed the basis of the Court’s substantive finding and the remedy it awarded.

The SACC ordered the parties to engage with one another two days after the hearing in an attempt to reach a settlement over the issues raised on appeal and on ways to improve the safety of the buildings in the interim. This negotiation process took place and the parties presented a settlement agreement to the Court for its endorsement. The settlement committed the City to

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202 City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007 1 SA 78 (W), para 67.
203 Ibid, para 46.
204 The Emergency Housing Programme was established in order to give effect to the obligation elucidated by the Constitutional Court in the Grootboom decision, which found that the state’s policy was unconstitutional to the extent that it failed to cater for those in desperate need
205 Kirsty Mclean, (fn 148), p. 149.
providing two buildings in the inner city for the occupiers as well as providing interim services to the buildings.

The obligation on state institutions to engage meaningfully prior to taking a decision to evict adds a significant requirement to the list set out in *Grootboom* for reasonable state action. This obligation may have prefigured in the Court’s decision in *PE Municipality*, also in the context of engaging in consultation with affected persons threatened with eviction, but *Olivia Road* fleshes it out more fully. Thus, this Constitutional Court decision is important and far-reaching, and has proved helpful in subsequent eviction cases throughout the country.

c. *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing*

Shortly after the *Olivia Road* judgment, the *Joe Slovo* case came before the SACC. This case involved an application by Thubelisha Homes, a national housing Parastatal, for the relocation of approximately 4000 households from the Joe Slovo informal settlement to make way for a national housing project. The Cape High Court had ordered the eviction of the occupiers according to a timetable provided by the Court, and required the state to report back every two months on the implementation of the order and the provision of permanent housing to those evicted. The High Court did not regard the case as an issue of mass eviction. Rather, it considered the eviction a strategic move to relocate the affected people, which would not result in homelessness because of the state’s obligation to provide alternative accommodation.

The Joe Slovo residents brought an appeal to the Constitutional Court against the decision of the High Court. The Court was asked to consider whether the respondents had made a case for the eviction of the applicants in terms of the PIE Act, which required a determination as to whether, at the time the eviction proceedings were launched, the applicants were ‘unlawful occupiers’ in terms of the Act. The court thoroughly investigated the related question of whether the residents

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206 Liebenberg, note 90, pp. 286-289
207 *PE Municipality*, paras 39-43.
208 Lilian Chenwi and Kate Tissington, “‘Sacrificial lambs’ in the quest to eradicate informal settlements: The plight of Joe Slovo residents”, ESR Review, 10.3 (September 2009), p. 18.
had tacit or express consent to occupy the land. The second issue for the Court’s consideration concerned whether the eviction would be consistent with the obligation of the government to facilitate progressive realisation of the right of access to adequate housing.

The Court’s judgment underscored the obligation of the state to provide alternative adequate accommodation should it evict a settled community and to engage meaningfully with the affected individuals. Further, despite its misgivings on the quality of the engagement between the state and the residents around the project, the Court went ahead to sanction the eviction. It took this position despite its own precedent that courts should be reluctant to grant an eviction order where meaningful engagement had not taken place (see *Olivia Road* and *PE Municipality*). The Court endorsed the decision to relocate the community to temporary residential units (TRUs) in Delft or other appropriate locations, annexing a relocation timetable to its judgment that detailed the dates by which households would be moved. An interesting aspect of the Court’s order is the detail in which it specified the quality and nature of the temporary housing to be provided, including the provision of services and facilities.

While the Court acknowledged the difficulty of balancing competing interests, it failed to properly assess the reasonableness of the government’s policy choices, displaying a particularly deferential attitude to the government. It allowed the government to evict a relatively large community to make way for a project that did not include proper consultation or the provision of affordable housing for the intended beneficiaries. Furthermore, the project failed to identify clearly the roles and responsibilities of the different spheres of government as required in *Grootboom*, an observation highlighted by the Auditor-General’s special audit report on the development.

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209 Justice O’Regan in the majority judgment used the following as justifications for the decision to order the eviction: that the N2 Gateway project is ‘One of the first attempts at a housing development in terms of the new housing policy... given the huge numbers of people living in inadequate or makeshift housing in Cape Town (and indeed many of our municipalities), and given the fact that this is a pilot project, it is not surprising that it has not been implemented without controversy’; that there was some consultation with residents, however lacking; and that other inadequately housed people stood to benefit from the project and had already co-operated with the respondents in the hope that their co-operation would expedite their receiving permanent housing. Joe Slovo, paras 302-303.

On the face of it, the Joe Slovo judgment was clearly flawed. It showed extreme deference to government housing policy even when it was implemented wrongly and without proper consultation and engagement. However, despite the Constitutional Court’s order for an eviction, it indirectly gave weight to a number of important factors related to the right to adequate housing, including the provision of electricity, water and sanitation as well as transport to schools, clinics and places of work in relation to the temporary housing.


More recently, the Constitutional Court adjudicated over *Abahlali* case, which was a judicial challenge to the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act\(^{211}\) by the Durban-based shack dweller movement Abahlali baseMjondolo (AbM). The purposes of the Act were: the progressive elimination of slums, measures for the prevention of the re-emergence of slums and the upgrading and control of existing slums. But while the Slums Act aimed to eliminate slums in KwaZulu-Natal, it ended up enabling evictions to occur without meaningful engagement.

In the *Abahlali* case, the Constitutional Court heard arguments relating to section 16 of the Slums Act\(^ {211}\). The applicants argued that section 16 violated section 26(2) of the Constitution in three ways: it precluded meaningful engagement between municipalities and unlawful occupiers; it violated the principle that evictions should be a measure of last resort; and it undermined the precarious tenure of unlawful occupiers by allowing the eviction proceedings to begin without reference to the procedural safeguards contained in the PIE Act. The Court ruled that section 16 of the Act was unconstitutional and invalid, as it gave too much power to the provincial Member of the Executive Council (MEC) and seriously undermined the protections in section 26(2) of the Constitution read with other housing legislation.

\(^{211}\) Act no. 6 of 2007

\(^{211}\) This section states that a municipality must start proceedings for the eviction of unlawful occupiers if the owner or person in charge of the land fails to do so within the time period prescribed by the provincial Member of the Executive Council (MEC) for local government, housing and traditional affairs. Initially, the applicants in the case unsuccessfully challenged the constitutionality of this section in the Durban High Court
In its judgment the found that, ‘Section 16 cannot be reconciled with the National Housing Act and the National Housing Code, both of which have been passed to give effect to section 26(2) of the Constitution’. It also held that the MEC’s power to issue a notice as envisioned in section 16 is ‘overbroad and irrational’ further found that section 16 could not be interpreted in a way that promoted the ostensible objectives of eliminating and preventing slums and providing adequate housing.

Key findings from the Abahali judgment include the decision that if engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful. Another important finding was that proper engagement includes taking into consideration the needs of those who will be affected, the possibility of upgrading the area in situ and the provision of alternative accommodation where necessary. The Constitutional Court stated that, ‘No evictions in terms of the PIE Act should occur until the results of the proper engagement process are known’, affirming eviction or relocation as a last resort only after in situ upgrading has been considered.

Summary of key findings from the featured cases

The SACC has pronounced on a number of housing-related cases during its tenure, with a number of important findings on the negative and positive obligations around the right to adequate housing. These findings include:

1. A reasonable government programme should take into account both the short, medium term and must provide for those in urgent need and living in ‘intolerable conditions’ - Grootboom; and must clearly allocate responsibilities and tasks between the three spheres of government including the local governments.

2. The state is under an obligation to ‘meaningfully engage’ with those facing eviction to ascertain if they will be rendered homeless by an eviction and to determine what

213 Abahali case (paragraphs 69 and 120).
alternative accommodation can be provided. State institutions are obliged to engage meaningfully prior to taking a decision to institute eviction proceedings.

3. If engagement takes place after there has been a decision to institute eviction proceedings, it cannot be genuine or meaningful and proper engagement unless it includes taking into consideration the needs of those who will be affected, the possibility of upgrading the area *in situ* and the provision of alternative accommodation where necessary.

4. No evictions in terms of the PIE Act should occur until the results of the proper engagement process are known — *Olivia Road, Abahlali*; Courts will be reluctant to order an eviction if homelessness will result.

5. The Constitutional Court is reluctant to pronounce directly on the constitutionality of government housing policy particularly in relation to permanent housing but in *Olivia Road* ordered that the occupiers and the state engage in consultation over an appropriate solution to the eviction, which more specifically relate to the consequences of the eviction which would be homelessness for the occupiers;

6. The Court may order that temporary relocation units comply with certain specifications. In *Joe Slovo*, the Court specified that the units had to be at least 24m² in size; be serviced with tarred roads; be individually numbered for identification purposes; be supplied with electricity through a prepaid electricity meter; be situated within reasonable proximity of a communal ablution facility; make reasonable provision for toilet facilities, which may be communal, with waterborne sewerage; and make reasonable provision for fresh water, which may be communal;

7. The pronouncement of the SACC in these cases often has had policy and budgetary implications for the state. While this judicial role in monitoring socio-economic accountability is welcomed by many, it has been criticized particularly by government
officials and those academics and development practitioners who do not believe that the courts are an appropriate mechanism to address socio-economic policy issues.
CHAPTER 4

PROGRESSIVE REALISATION OF THE RIGHT TO ADEQUATE HOUSING UNDER THE CONSTITUTION OF KENYA 2010

This chapter discusses the progressive realisation of housing rights in Kenya under the Constitution of Kenya 2010. It compares the implementation of the right to adequate housing as is provided in the constitution of South Africa as well as the jurisprudence of the South African Constitutional Court that was discussed in chapter 3 of this paper to the implementation of the right to housing under the constitution of Kenya.

In its analysis of the principle of progressive realisation in Kenya, this chapter adopts the thematic approach set out in chapter 2 of this paper. By analysis of decided cases, it assesses the strides made so far and addresses challenges faced by the state towards the full realisation of SERs and in particular providing housing for the people of Kenya.

4.1 SOCIAL ECONOMIC RIGHTS UNDER THE CONSTITUTION OF KENYA 2010

4.1.1 Constitutional provisions on socio-economic rights

The Constitution of Kenya 2010 incorporates SERs in the Bill of Rights that is set out in Chapter 4 of the Constitution and which is a clear departure from the repealed constitution which provided exclusively for CPRs. The judiciary and in particular the High Court, is mandated with interpreting and enforcing the Bill of Rights, including the economic, social and cultural rights.

Article 43 of the constitution provides for economic and social rights and it provides in article 43(1) that;

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214 See section 70 to 83 of the Repealed Constitution of Kenya.

215 Kenya constitution Article 165
"Every person has the right – (a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and, (f) to education".

The constitution further in article 43(2) prohibits the denial of emergency medical treatment; and article 43(3) requires the State to provide social security to persons who are unable to support themselves and their dependents.

Article 21(2) of the Constitution espouses the principle of progressive realisation that is the central issue of discussion in this paper. The constitution obligates the state to take legislative, policy and other measures to achieve progressive realisation of the SERs provided under Article 43. Other provisions on SERs in the constitution include a number of other rights classically defined as SERs but are not linked expressly to the principle of progressive realisation of rights and these are; workers' rights to: fair remuneration; reasonable working conditions; form, join or participate in the activities and programmes of a trade union; and go on strike.

The constitution also provides for special protection for special groups such as children and persons with disabilities. The constitution under Article 53(1), provides for children's rights to free and compulsory education as well as basic nutrition, shelter and healthcare. In relation to persons with disabilities, Article 54 (2) provides that: “the State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

Lastly, Article 24, provides for the grounds for exercising the legitimate limitation of rights. The main condition is that a limitation of rights can only be constitutional if it is effected by a law, which has been interpreted as ‘a law of general application’ It provides that rights can be limited

\[^{114}\text{Article 21 deals with the implementation of rights and fundamental freedoms and sub-article 2 requires the State to "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43".}\]

\[^{117}\text{Article 41 (2)}\]
only in accordance with the law, and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Article 24(2) further provides safeguards where a limitation is contained in legislation and it provides that such limitation is not valid unless it specifically expresses the intention to limit a particular right in a clear and specific manner, as well as the nature and extent of that limitation.218

4.1.2 The role of courts under the constitution of Kenya 2010

The Constitution deems SERs as justiciable.219 Justiciability entails three related factors: first, a claim based on the infringement of a clear, subjective right; secondly, the claim must be capable of being resolved by a judicial body or a body with judicial characteristics; and, thirdly, the judicial body should be able to remedy the violation if it positively determines a violation of the subjective right in question.220 Justiciability is affirmed by article 23 as read with article 165 of the Constitution, which gives jurisdiction to the High Court to hear and determine applications for the violation of rights and to redress such violations through the adoption of effective remedies.

Similarly, the justiciability of SERs in the South African Constitution as was alluded to in chapter 3 was affirmed by the South African Constitutional Court (SACC) in the First Certification decision where the Court held that SERs could, at a minimum, be negatively protected from improper invasion221. The justiciability of the entrenched SERs has also been affirmed by the Kenyan Courts in several cases including Mitu-Bell Welfare Society v Attorney General222 and Ibrahim Songor Osman v Attorney General223.

218 The Constitution of Kenya a 24(2) (a)-(b).
220 Ibid
221 Re Certification of the Constitution of the Republic of South Africa (First Certification case) 1996 1 BCLR 1253 (CC) para 78.
222 High Court of Kenya at Nairobi Petition No 164 of 2011 20-21;
223 High Court Constitutional Petition No 2 of 2011 7
In interpreting Article 43 of the constitution, the high court is required under Article 20(5) in cases that the government claims inadequacy of resources, to consider among others the following factors; that the state has shown that resources are not available; the state has considered the most vulnerable in its allocation of resources. This is not the only clause on vulnerable groups; there is a strong focus on vulnerable and marginalized groups throughout the Constitution and particularly the Bill of Rights. In this regard, Article 21(3) provides that: all State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.

4.2 THE RIGHT TO ADEQUATE HOUSING UNDER THE CONSTITUTION OF KENYA

The obligations of the state under the constitution are similar to those of state parties set out in the ICESCR and discussed in detail in chapter 2 of this research. In the discussion of progressive realisation of SERs in the constitution of Kenya and under international law, this paper focuses on the implementation of the right to adequate housing drawing examples from emerging jurisprudence from the High Court of Kenya.

Section 43 (1) (b) of the Constitution of Kenya provides that every person has the right to “accessible and adequate housing and reasonable standard of sanitation.” The Constitution obligates the government to realise the SERs in the Bill of Rights including the right to adequate housing in a progressive manner. Justice Mumbi Ngugi in the Mitu-Bell case emphasized the obligation of the state to progressively realise SERs in the constitution of Kenya 2010, as follows:

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25 Article 21(2) as read with Article 20(5)
“the argument that social and economic rights cannot be claimed at this point, two years after the promulgation of the Constitution also ignores the fact that no provision of the Constitution is intended to wait until the State feels it is ready to meet its constitutional obligations. Article 21 and 43 require that there should be progressive realisation of social and economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realisation of these rights. Granted, also, that these rights are progressive in nature, but there is a constitutional obligation on the state, when confronted with a matter such as this, to go beyond the standard objection. Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of social economic rights, and what policies if any, it has put in place to ensure that the rights are realized progressively and how the Petitioners in this case fit into its policies and plans.”

The international law concept of progressive realisation constitutes recognition that full realisation of all economic, social and cultural rights will not generally be achieved over a short period of time. It is a necessary flexibility device reflecting the realities of the real world and the difficulties of ensuring full realisation of SERs, and it must be read in light of the overall objective of the ICESCR, which is to establish clear obligations of States parties in respect to full realisation of the rights in question.

4.3 AN ANALYSIS OF THE STATUS OF THE IMPLEMENTATION OF THE RIGHT TO ADEQUATE HOUSING IN KENYA

Article 43 (1) (b) of the Constitution as has been alluded to in section 4.2 of this paper recognizes every person’s right to accessible and adequate housing. Provision of adequate housing is an essential component in reaching the country’s full development potential. Nonetheless it is regrettable that despite government efforts, demand still outstrips supply thereby making housing expensive and inaccessible to many Kenyans.

Despite the promise of better provision of the right to housing, quality housing remains largely unavailable to the low-income segment of the urban population, which comprises the vast majority of urban dwellers. The Ministry of Housing estimates that the need for new urban housing currently stands at 150,000 units annually, and just 20 to 33 per cent of this demand is being met by the government and the private sector.\(^2\)\(^2\)\(^7\) Currently, 80 per cent of new housing supply meets the needs of middle to high income households, yet the greatest demand is among the lower-middle and low-income households.\(^2\)\(^7\)\(^8\)

This section analyses the status of progressive realisation of the right to adequate housing drawing from the constitution of Kenya, international law as set out in the ICESCR and emerging case law from the High Court of Kenya. It highlights specific areas of concern and which need to be addressed by the government as it looks to progressively realise the right to adequate housing for the people of Kenya.

2. **Forced Evictions**

Forced evictions have remained a key challenge in regard to the implementation of the right to housing in Kenya. International law has clearly spelt out that forced evictions are a violation of the provisions of the ICESCR. In its General Comment No. 7, the Committee on Economic, Social and Cultural Rights has pointed out that forced evictions constitute a prima facie violation of the right to adequate housing\(^2\)\(^2\)\(^9\). The Committee stated that forced evictions “can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”\(^2\)\(^3\)\(^0\) Further in the same General Comment No. 7, the Committee also urges states to take all relevant measures, using all available resources, to resettle those affected by forced evictions\(^2\)\(^3\)\(^1\). It recommends that states should put in place legislation to guide how and

\(^{227}\) See Simplified Version of Existing Housing Sector Incentives, Ministry of Housing, May 2011, p.2.

\(^{228}\) According to a Kenya Demographic and Health Survey 2008-2009, the majority of Kenyans, about 55 per cent, are under 19 years old and most are unemployed and/or dependent on other people.

\(^{229}\) General Comment number 7 para 1

\(^{230}\) Paragraph 18 of General Comment No. 7 The Right to Adequate Housing (Art.11.1): Forced Evictions. 20/05/97 Committee on Economic, Social and Cultural Rights, Office of the High Commissioner on Human Rights.

\(^{231}\) General Comment number 7 para 9
under what circumstances forced evictions are carried out; and must continually explore ways of minimizing the need for forced evictions232.

In Kenya, forced evictions are still common, and are carried out in most cases by governmental agencies, local authorities and private developers there is no specific legislation on how and when forced evictions should take place. Currently, the laws that relate to housing do not have any provisions on forced evictions and it is only the National Land Policy (NLP) that has specific policy targets relating to forced evictions specifically providing for the need for legislation to curb forced evictions in the country and this is not enough, there is need to put in place legislation to specifically address the issue of forced evictions.

In particular, there is need to enact into law the Draft Evictions and Resettlement Procedures Bill of 2012 which is aimed at the establishment of a legal framework, including guidelines, for forced evictions that are carried out in accordance with the Constitution and conform to internationally acceptable standards and to provide for protection against inhumane and unlawful evictions. As the Evictions and Resettlement Procedures Bill remains in draft form, most forced evictions in Kenya are usually carried out inhumanely as there are no procedural safeguards in place to govern the process of evictions.

Affected persons are in most cases not adequately consulted and do not receive adequate and reasonable notice of impending evictions and are rather ambushed. The victims of these evictions have sought recourse in the courts after evictions and it is encouraging that progressive jurisprudence has begun to emerge with respect to the right to housing especially on forced evictions233. Finally, in terms of monitoring, the lack of accurate and reliable data on forced evictions continues to be a major challenge in monitoring the right to housing in Kenya.

232 Ibid
233 See the cases of Satrose Ayuma and Others Vs The Registered Trustees of the Kenya Railway Staff Benefits Scheme and others ( High Court Petition No. 65 of 2010) and Susan Waithera and others Vs The Town Clerk, Nairobi City Council and others ( High Court Petition No. 66 of 2010) (Unpublished)
The high court has adjudicated over a number of cases on forced evictions. Among these is the case of Charo wa Yaa v Jama Abdi Noor & 4 others, which the applicants sought an injunctive order against the respondents' including a private developer, the Mombasa municipal council and the Attorney General from forcefully evicting them without providing alternative land or accommodation in contravention of Article 43(1) (b) of the constitution.

In this case the court declined to embrace a progressive interpretation of the right to adequate housing stating that it was non-justiciable and that the right to adequate was not a product for dispensation but an aspirational right thus failed to apply itself to the determination of the socio-economic rights in question. The findings of the court in this case could be attributed partly to the fact that the advocates did not couch the claim as a SERs claim, but rather as an eviction case in which SERs were referred to only in passing. This in effect watered down the transformative potential of the constitution in providing requisite protection to the poor, marginalized and vulnerable groups faced with the real threat of homelessness.

At the preliminary stage of the eviction case of Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others "The Muthurwa case", the court was faced with an interlocutory application on the contravention of Articles 2(5), 43(1)(b) and 53(1)(c) of the Constitution and international law. In the preliminary ruling the court granted the applicants an interim injunction against the eviction, Musinga J, highlighted the importance of the recognition and protection of human rights and fundamental freedoms by the Constitution is to “preserve the dignity of the individuals and communities and to promote social justice and the realisation of the potential of human beings”. Further the Judge pointed out that the Constitution should be construed in a way that “advances the rule of law, and the human

References:
234 High Court Mombasa, Miscellaneous Civil Application no. 8 of 2011 unreported
236 Petition No.65 of 2010 on the Interlocutory Application
237 Article 11 of the ICESCR, Article 27 of the CRC and Article 26 of the CRPD
238 Date of Ruling: 17 February 2011, The Ruling was in regard to interim conservatory orders sought prior to the hearing of the Petition. The Petition was eventually heard and the Judgment is analyzed in this paper as the Muthurwa judgment on merits

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rights and fundamental freedoms in the bill of rights; permits development of the law; and contributes to good governance.\(^{239}\)

In addition, the Court noted the absence of appropriate legal guidelines to guide courts in relation to housing rights and forced evictions, Kenya not having adopted an evictions guideline.\(^{240}\) To fill this legal lacuna, the Court resorted to international and comparative law for standards to enable it to effect the requisite balance.\(^{241}\) It relied extensively on CESCR General Comments Number 4 and 7 to understand the content as well as obligations of the State in relation to the right to housing, acknowledging that even though the Applicants had to move from the property at some point, their eviction must be undertaken in a humane manner.\(^{242}\)

In the case of *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others*\(^{243}\) which concerned the demolition of houses and threatened eviction of the Applicants from their homes, which were in informal settlements, on the ground that the houses were built on road reserves. The first respondent’s defense was that it had no mandate and capacity to allocate land to, or to resettle, the homeless.\(^{244}\) The court adjudicating over the issue of alternative housing and relying on the South African *President of the Republic of South Africa and Another v Modderklip Boerdery (pty) Ltd*\(^{245}\) stated that the government had an obligation to provide alternative accommodation to evicted persons and to carry out the eviction in a humane manner.

One of the most important housing cases to date that has dealt with the issue of forced evictions in the context of the right to housing under Kenya’s new Constitution is the *Muthurwa case*. In his determination of the case on merits, Justice Lenaola acknowledged that the first respondent was the registered owner of the suit property and had the intention of demolishing the Estate to

\(^{239}\) Constitution of Kenya Article 259.

\(^{240}\) Muthurwa case, page 20-22.

\(^{241}\) Muthurwa case, page 28. The Court noted the need for the State to comprehensively put in place measures to address forced evictions, especially through the adoption of clear policy and legal guidelines, at 32.

\(^{242}\) Muthurwa case page 28

\(^{243}\) Constitutional Petition 66 of 2010

\(^{244}\) Waithera case pages 1-5

\(^{245}\) (CCT20/04)(2205) ZACC 5
put up modern residential and commercial buildings\textsuperscript{246}. Taking these into account, the Judge affirmed that the crux of the case was forced eviction and synthesized the issues to be determined as: whether the first respondent was entitled to evict the petitioners from the Estate, and if such eviction/threatened eviction violated or would violate the fundamental rights of the petitioners\textsuperscript{247}.

The Court then contended that in order to determine the issues raised in the petition, it had to balance the right of the first respondent to property \textit{vis-à-vis} the housing rights of the petitioners. The Court then delved into an analysis of the nature of the right to housing as entrenched in the Constitution of Kenya, 2010 taking into account the provisions of international and regional legal instruments\textsuperscript{248}. Taking the above principles into account, the Court proceeded to analyse the jurisprudence emanating from the CESCR, especially the Committee’s General Comments Numbers 4 and 7, acknowledging that these General Comments are crucial in clarifying the nature, content and scope of the right to housing and the obligations arising thereon\textsuperscript{249}. The Court, relying on General Comment Number 4, thus affirmed the importance of a broad interpretation of the right to adequate housing as the “as the right to live somewhere in security, peace and dignity”\textsuperscript{250}.

Further, on the need for a broad interpretation of the right to accessible and adequate housing, the Court adopted the interpretation fashioned by the South African Constitutional Court in the \textit{Grootboom} case as follows\textsuperscript{251}:

\textit{“Housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, and there must be a dwelling”}.

\textsuperscript{246} Muthurwa case para 51
\textsuperscript{247} supra
\textsuperscript{248} Muthurwa case paragraph 60 f
\textsuperscript{249} Muthurwa case paragraph 68
\textsuperscript{250} Muthurwa case para 70
\textsuperscript{251} Grootboom Para 35
In this context, the Court held that the right to housing in Article 43 of the Constitution should be read to ensure access to adequate housing to all Kenyans irrespective of their income or access to economic resources\(^\text{252}\).

In assessing the adequacy of housing, the Court asserted that recourse must be had to the seven components of the right to housing, as elaborated in General Comment Number 4 which are: legal security of tenure to guarantee protection against forced eviction, harassment and other threats; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location in a place that guarantees access to employment options, health care services, schools, child care centers and other social amenities; and cultural adequacy.

In criticizing the prevalent practice of forced evictions in Kenya by both public and private entities, the Court in the *Muthurwa case* affirmed that the protection from forced evictions forms an integral part of the right to accessible and adequate housing as entrenched in the Constitution of Kenya, 2010\(^\text{253}\). Relying on CESCR General Comment Number 7 on forced evictions, the Court reiterated the importance of the right to housing in the enjoyment of other interrelated rights, noting that forced evictions violated other rights such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions\(^\text{254}\). The Court adopted the interpretation of forced eviction as enumerated in General Comment Number 7 as: the permanent removal against their will of individuals, families and or communities from the homes which they occupy without the provisions of, and access to) appropriate forms of legal or other protection\(^\text{255}\).

Due to the lack of a national legislation on forced evictions, the Court in the *Muthurwa case* further relied on the UN Basic Principles and Guidelines on Development based Eviction and Displacement (2007)\(^\text{256}\), emphasizing that evictions must only be carried out as a measure of last resort, must be authorised by law, must be carried out in accordance with international human rights law, must only be undertaken for the purpose of promoting the general welfare, must

\(^{252}\) *Muthurwa* case para 74  
\(^{253}\) *Muthurwa* case paragraphs 74-78  
\(^{254}\) *Muthurwa* case para 76  
\(^{255}\) ibid  
ensure that a fair compensation is paid, and must not result in homelessness or render individuals vulnerable to the violations of other fundamental rights. Should a decision be made that evictions are unavoidable; the Court affirmed that there must be procedural safeguards put in place to ensure that the evictions are carried out under conditions that are respectful of human dignity. The procedural safeguards are supposed to be put in place prior to evictions, during evictions and after evictions.

Further to reliance on the UN Principles and Guidelines on Evictions, the Court also relied on the jurisprudence of the African Commission on Human and Peoples Rights in the SERAC Case, where the African Commission stated as follows:

Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include; providing for adequate procedural safeguards as well as a proper consideration by the Courts of whether, the eviction or demolition is just and equitable in the light of all relevant circumstances.

In Ibrahim Songor Osman v Attorney General, the court gave guidelines for evictions as follows: In the words of Justice Muchelule:

“...Under article 43 (of the Constitution), the Petitioners were entitled to the fundamental rights to accessible and adequate housing, and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education. Under article 47 the Petitioners were entitled to be given written reasons regarding these evictions. What this means is that, prior to these evictions the Petitioners had to be consulted and provided with adequate and reasonable notice. Adequate information on the reasons of the proposed evictions and the alternative purpose for which the land was to be used had to be indicated. This information was to be given in obedience of article 35 which

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257 Muthurwa case paragraphs 79-82
258 Muthurwa case para 84
259 Serac Case para 63
260 High Court Constitutional Petition No 2 of 2011
guarantees the right to information. The evictions were then supposed to be carried out in the manner that respected human dignity, right to life and the security of the affected. The ICESCR imposes an additional obligation upon governments that no form of discrimination is involved in any eviction nor should any eviction render persons homeless or vulnerable to other human rights violations where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available...

b. Priority for marginalized groups and the most vulnerable sections of population

Both international human rights law and the Kenyan Constitution call for a special focus and attention to vulnerable groups in the realization of the right to housing as well as other rights. The constitution of Kenya provides at Articles 21(3) and 20(5) for the prioritization of marginalized groups in respect of SERs.

Article 21(3) of the constitution of Kenya states that:

“All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including women, older members of society, and persons with disabilities, children, and youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.”

For its part Article 20(5) provides for considerations that must be taken into account by courts in the determination of resource allocation by the state if the court is faced with a claim by the state that it does not have adequate resources to implement any right under Article 43. One of these considerations is that the state has to show that even in the scarcity of resources it gave priority to ensuring the widest possible enjoyment of the right in question and particularly the needs of vulnerable groups.

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61 At pages 8-9.
62 Constitution of Kenya, Article 20(5)(b)
In its General Comment No. 4, the CESCR recommends that states must take the necessary steps to ensure that vulnerable or disadvantaged groups are given priority consideration in gaining access to adequate housing and related resources. Children, the elderly, people with disabilities (PWDs), people living with HIV/AIDS, the terminally and mentally ill and victims of natural disasters including internally displaced persons (IDPs) are among the groups identified as vulnerable or disadvantaged by the Committee.

The court in its adjudication of cases on the right to adequate housing has addressed the issue of vulnerable and marginalized groups. One such case is the Mitu-Bell case in which the court affirmed that economic and social rights in Article 43 of the Constitution entailed the obligation of the State and all its agents to observe, the houses of the Petitioners, the Respondents were in violations of these obligations, especially the obligation to refrain from interfering with the enjoyment of fundamental rights. The Mitu-Bell case also found a violation of the rights of vulnerable groups such as children, the elderly and persons with disability in contravention of Articles 53 and 56 of the Constitution, as the demolition of homes, school and other infrastructure in the village impacted negatively on these vulnerable and marginalized groups.

Mitu-Bell is innovative because it is the first time that a Kenyan court has adopted a structural interdict. The interdict is an order of the court requiring the person to whom it is directed to do or to refrain from doing a particular thing. It is essentially a remedy for violations of human rights in terms of which the court makes an order to remain seized of a matter once a determination is made on legal obligations and in essence, supervise the implementation of its own order by the relevant party. The application of structural interdict is expected to have a big impact in the lives of the poor since the courts have a way of monitoring the enforcement of its orders.
The court in the *Muthurwa case* pointed out that one of the factors the court should consider before authorizing forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. Justice Lenaola further stated that a court should be reluctant to grant an eviction or demolition order against relatively settled right to human dignity, and asserted the importance of the right to human dignity in interpreting the right to adequate housing\(^{267}\).

In order to ensure the rights these groups of people are affectively protected, policy and legal frameworks for housing should specifically consider their special housing needs. Kenya has in place a National Housing Policy which outlines several objectives in this regard. First, it provides that the state ensure that it eliminates all legal and customary barriers that hinder women’s equal access and control of land and finance. Second, it provides that the state must facilitate greater access to housing finance to vulnerable groups and take steps to assist economically vulnerable groups in housing improvement and/or production. More specifically, it mandates the state to facilitate the development of credit institutions that can provide shelter financing to women, PWDs and IDPs. Thirdly, the policy also urges the state to upgrade slums and informal settlements and develop more homes for the elderly in addition to PWD-friendly dwellings.

c. **Non-discrimination in the enjoyment of the right to housing.**

The principles of “non-discrimination and protection of the marginalized” are part of the national values as per the Kenyan constitution. It thus follows that, there is an immediate obligation on the state to identify, review and repeal existing discriminatory norms.

Article 27 of the constitution provides for equality and freedom from discrimination. It provides for equality before the law, for men and women in all spheres, non-discrimination on grounds of race, sex, pregnancy, marital status, health status, ethnicity, religion, belief, culture, dress, language and birth. Further, Article 27 provides for the obligation of the state to take legislative and other measures including affirmative action programmes aimed at correcting past

\(^{267}\) Ibid
discrimination\textsuperscript{268}. In addition to Article 27, Article 10 (2)(b) of the Constitution which espouses national values and principles provides that human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized must be borne in mind in governance.

In the case of \textit{John Kabui Mwai and 3 others v Kenya National Examinations Council & Others}\textsuperscript{269}, the high court adjudicated over a case on the contravention of equality and non-discrimination as provided in articles 27(4) & 43 (f) of the constitution\textsuperscript{270}. In this case the private schools instituted the case citing discrimination of pupils from private schools in the ministry’s guidelines provided a formula, based on a quota, for determining the number of candidates to be placed in national schools from private or public institutions. The then Minister for Education explained that its rationale was based on the fact that in 2010 Private schools had registered 14.41% of the KCSE candidates compared to 85.59% registered in public schools.

Using the formula, the Minister announced that out of the 4,517 places available in national schools, he would avail 1,224 to private schools.\textsuperscript{271}

The court stated that the Ministry of education’s policy removed merit as the only criterion for admission to national schools and stated that access would further be limited by a set quota calculated as a percentage of the total number of candidates who sit for KCPE each year. While the policy was discriminatory in that it sought to treat candidates differently, the discrimination was not unfair\textsuperscript{272}. The candidates from public schools seeking to join Form One were inferior compared to those from private schools because of resource constraints in public schools. As a result, if merit were the only criterion for admission into national schools, candidates from private schools would take most of the 4,517 places available\textsuperscript{273}. This was the basis of the decision by the Minister to temper merit with equity. The previous policy which was based on merit alone had resulted in unfairness and prejudice to the candidates from public schools. The

\textsuperscript{268} Constitution of Kenya Article 27(6)
\textsuperscript{269} Nairobi Petition No. 15 of 2011 [2011] eKLR
\textsuperscript{270} Kabui case page 2
\textsuperscript{271} Kabui case page 4
\textsuperscript{272} Kabui case page 9
\textsuperscript{273} Kabui case page 11
Minister had put in place these affirmative action measures to right this wrong and was so empowered under article 27(6) of the Constitution.

Non-discrimination and equality are also provided for in international law as was discussed in detail in chapter 2. Article 2(2) of ICESCR prohibits housing discrimination, providing that all the rights in the Covenant, including the right to adequate housing, should be exercised without discrimination on any kind of grounds. In its General Comment No. 4, the CESCR has pointed out that housing discrimination not only affects the enjoyment of SERs but might also curtail the enjoyment of a range of CPRs such as the right to freedom of movement and residence.

In its General Comment No. 7\textsuperscript{274}, the Committee asserts that full realization requires states to ensure that there are legal remedies available to challenge allegations of any housing discrimination, including discrimination in the allocation and availability of access to housing or illegal practices by landlords that might amount to housing discrimination\textsuperscript{275}. The National Housing policy does not single out discrimination as an issue but it sets out groups of disadvantaged groups that should be given priority consideration in accessing adequate housing.

\textbf{d. Prohibition of deliberately retrogressive measures}

General Comment Number 3 of the CESCR obligates states to ensure that the rights under the ICESCR are progressively realized. It points out that deliberately retrogressive measures are prohibited and that if they are taken they should be after most careful consideration and would require to be fully justified in reference to the totality of rights provided for in the ICESCR and in the context of the use of the maximum available resources\textsuperscript{276}.

It is important to note that the prohibition of non-retrogressive measures partly entails non-interference with the existing enjoyment of the rights including forced evictions and demolition of houses who had access to housing. In Kenya an example of retrogressive measures taken by


\textsuperscript{275} Ibid para 10

\textsuperscript{276} Paragraph 9 of the General Comment Number 3
the state with regards to housing is the resultant homelessness and displacement resulting from
the “security operation” in the Mount Elgon area to bring down the Sabaot Land Defence Force
(SLDF) which is an armed guerilla militia in 2005 to resist government attempts to evict
squatters in the Chebyuk area of Mt. Elgon district.277

The root of the violence according to the Human Rights Watch in Mt. Elgon lies in a land
conflict that has been going on for several decades, starting in the 1960s when the government
evicted thousands of Mt. Elgon residents from a forested area that was to be gazetted as a game
reserve. Some of those affected were resettled but never received title to their land, while others
remained landless.278 An effort to reallocate land initiated by the government in 2005, which
would have reduced the land holdings of some members of the Sabaot sub-clan, led to the
insurgency activities by the SLDF, which had already begun training several years earlier after
the issue of land redistribution arose during the 2002 elections.279 To date, the conflict has not
been resolved to the satisfaction of many residents of Mt. Elgon, raising the specter of future
violence particularly if the culprits of the 2006-2008 violence continue to benefit from impunity.

The challenge in an attempt in analyzing the retrogressive measures that may have been taken by
the government is the unavailability of data, baseline surveys and documentation and which
information would be useful in monitoring of the steps taken in respect of progressive realisation
of the right to adequate housing in Kenya.

e. Meaningful participation and engagement in the decision making process.

In its General Comment Number 42780 the CESCR recommends that state parties take steps to
ensure that as possible get an opportunity to participate in the housing strategy. It in particular
advocates for the consideration of the views of the most vulnerable. The Constitution of Kenya

277 Human Rights Watch, All the men have gone: War crimes in Kenya’s Mt. Elgon Conflict, July 2008
278 Ibid p. 34
279 Ibid p. 3
280 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to
http://www.refworld.org/docid/47a7079a1.html [accessed 19 August 2014]
Article 10(2) specifically provides for public participation in governance and decision making on the local and national levels.

Odongo and Musila have in their paper stated that the court, in the Mitu Bell case perhaps partly as a way of managing its relationship with the executive within the context of separation of powers while asserting procedural rights of victims to participate in important decisions that affect them and the court’s role to guarantee constitutionality of government policy and action, also introduced in Kenyan constitutional adjudication the ideas of dialogue and meaningful engagement devised by the South African Constitutional Court. In this case the court ordered the Attorney General to consult with the victims of the eviction in the process of devising a settlement plan.

The Muthurwa case, was decided along similar lines as Mitu Bell in terms of the requirement of meaningful participation and engagement in the decision making process. The court in this case was of the opinion that the person being evicted should participate fully in decision making process, especially where resettlement, compensation and restitution are being considered.

f. Legislative and policy measures and review of relevant legislation

The Human Rights Committee (HRC) in its General Comment Number 3 states that legislative measures are key in a state’s efforts towards the realization of housing rights and it may in some cases be indispensable. Legal measures may include the translation of the ICESCR rights into domestic legislation either through Constitutional Recognition as was done in the case of Kenya or by passing specific forms of legislation.

The CESCR noted in its General Comment Number 4 should not be designed to benefit already advantaged groups over the less disadvantaged or at their expense. It is noteworthy that

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281 G Odongo and G M Musila (supra note 220) p. 20
283 Paragraph 3 of the General Comment
284 Supra note 184 para 11
although Kenya initially ratified the ICESCR in 1972, the right to housing only became part of the Bill of Rights with the promulgation of the Constitution of Kenya 2010.

Besides the constitution, there is also other legislation on housing in Kenya. Specifically the Building Societies Act\textsuperscript{285}, the Housing Act\textsuperscript{286}, and the Sectional Properties Act\textsuperscript{287} which provide the legal bases for financing and ownership arrangements for housing. The second set of laws includes the Rent Restriction Act\textsuperscript{288} and the Landlords and Tenants Act,\textsuperscript{289} both of which regulate relations between landlords and tenants. The provisions on the right to housing are further bolstered by the entrenched right to property\textsuperscript{290} and land rights\textsuperscript{291}.

Since the promulgation of the new constitution, the government has taken some important steps to fulfil the realization of the right to housing and although these are laudable there are gaps that need to be filled in the implementation of SERs. One of the challenges that needs to be addressed is the non-conformity of certain legislation with the constitution. Article 19(1) of the constitution provides that all SER policies formulated must conform to the Bill of Rights, hence all housing laws and policies have to be aligned to the constitution. In seeking to align the National Housing Policy with the constitutional right to adequate housing, the Ministry of Housing has proposed far-reaching changes to the Housing Act, which predated the Constitution of Kenya, 2010.

The proposed changes have however; have not adequately addressed the issue of devolution with regard to the realization of the right to housing as there is still a lot of emphasis given to a national housing authority, while the constitution is now clear that the responsibility for housing

\textsuperscript{285} Cap 489
\textsuperscript{286} Cap 117
\textsuperscript{287} Cap 286A
\textsuperscript{288} CAP 296
\textsuperscript{289} CAP 301
\textsuperscript{290} The Constitution of Kenya, 2010, Article 40 which guarantees the right of people, individually or in association with others, to acquire and own property in any part of Kenya as well as further guaranteeing against arbitrary deprivation of property and the payment of just, prompt and equitable compensation in instances of compulsory acquisition by the State.
\textsuperscript{291} See The Constitution of Kenya, 2010, Part five, especially Article 60(1) which provides for equitable access to land, the security of land tenure, as well as the elimination of gender discrimination in law, customs and practices related to land, among others. Part five further requires, in Article 68(c) for parliament to enact legislation protecting matrimonial property, especially the matrimonial home, in instances of divorce as well as protecting dependants and spouses of a deceased person having an interest in land.
delivery will be shared by both the national and the county governments. It is important that such anomalies are corrected before the proposed law is finally passed.

The Ministry has also developed a framework of incentives to encourage households and the private sector to invest in affordable, quality housing. Various tax incentives are now available for people planning to take out housing loans or to start home ownership savings plans. Further, as part of Vision 2030, Kenya has also been undertaking large-scale infrastructure developments, marked especially by extensive road construction in various towns. It has also stepped up programmes to address the housing supply deficit and to improve urban settlements through programmes such as the Kenya Slum Upgrading Programme (KENSUP) and Kenya Informal Settlement Improvement Programme (KISIP). To its credit, the government has also developed the National Social Protection Policy that provides a framework for allocating welfare support to the poorest and most vulnerable citizens, such as the homeless, parliament has also passed the Social Assistance Act, and under it there is a provision for grants to organization, group or body of citizens for the purpose of providing assistance to persons in need or likely to become in need including: orphans, vulnerable children, poor elderly persons, persons living with disabilities and chronic illnesses, as well widows and widowers among others.

While these are positive, encouraging developments, there is more to be done to fulfil the right to adequate housing, the current legislation on the right to housing does not specifically provide for prohibition of discrimination in housing, provision for emergency accommodation and the procedure of carrying out evictions in Kenya. In addition to these gaps in legislation there is need to amend the existing laws in light of the constitution and to bring it in conformity with the spirit of Constitution.

The High court has expressed similar sentiments on the need for policy and legislation in line with the constitution. In the case of Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi

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293 Social Assistance Act (No 24 of 2013)
294 Ibid section 17 (1)
295 Constitution of Kenya Article 19(1)
The court appealed to the government to formulate a housing policy which should include appropriate guidelines on forced evictions and displacement from informal settlements and expressed the view that such a policy and the guidelines ought to draw from the requirements under the ICESCR.

In the *Muthurwa* case, the Court noted the absence of appropriate legal guidelines to guide courts in relation to housing rights and forced evictions, Kenya not having adopted an evictions guideline the court recommended that government formulates an eviction policy. Similarly in the case of *Susan Waithera Kariuki* the court in its judgment called on the State to expeditiously put in place the requisite legislative, policy and programmatic framework which sufficiently catered for the short, medium and long-term housing needs of everyone, but that responded specifically to the special needs of the most vulnerable and marginalized people living in crisis situations, such as the applicants.

In addition to the absence of a clear eviction policy, there is still no clear strategy to address rapid urbanization, which has led to the mushrooming of crowded, insecure, informal settlements that are in dire need of infrastructure such as electricity, water and sanitation services, refuse collection and roads. Efforts to implement the NLP have been rather slow, contributing to the continuing problem of lack of access to land and security of tenure for the poor.

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296 Constitutional Petition 66 of 2010
297 At page 9-10
299 *Susan Waithera* case 16-17
300 Some 32.3 per cent live in urban areas and another 67.7 per cent live in rural areas (Republic of Kenya, 2010 National Population and Housing Census). According to a UN-Habitat 2008 study, some 60 to 80 per cent of residents in Kenya’s largest urban centres, Kisumu, Mombasa and Nairobi, live in informal settlements. The study notes that 60 per cent of Nairobi’s population lives in informal settlements but their homes occupy only five per cent of the total land area in Nairobi and its environs. The Ministry of Lands estimates that 50 per cent of Kenyans will live in urban areas by the year 2050 (Republic of Kenya National Spatial Plan, p.4).
301 Case in point, the government acknowledges that 70 per cent of informal settlement residents in Nairobi are compelled to buy water from water vendors. See Republic of Kenya, First Annual Progress Report on the Implementation of the First Medium Term Plan (2008-2012) of Kenyan Vision 2030, p. 114.
g. Provision for emergency accommodation

The CESCR in its General Comment number 4 recommends that the provision of emergency accommodation as one of the elements of the minimum core standard of the right to housing. Similar sentiments were expressed by the SACC in the Grootboom case that is discussed in detail in chapter 3 of this research. The SACC explained that the ICESCR obligates state parties to demonstrate the availability of reasonable programme to provide emergency accommodation and housing relief to the vulnerable.

The need to put in place the emergency accommodation programme was particularly evident following the post-election violence (PEV) that resulted in large numbers of people displaced from their homes and left in need of emergency accommodation. The government of Kenya due to inadequate and insufficient planning had to partner with humanitarian and development agencies to provide temporary shelter and financial assistance to those affected.

In its concluding observations on Kenya after the PEV, the CESCR was of the view that the financial assistance provided to IDPs under the National Resettlement Fund (NRF) was inadequate and further recommended that the government of Kenya had a responsibility to provide adequate financial assistance for the resettlement of IDPs and to cater for their reintegration in society and for those not yet resettled provision of adequate housing and employment.

It is noteworthy that in addition to the obligation of the state to provide emergency accommodation for the vulnerable, the obligation extends in the event of evictions and displacements for the state to provide alternative accommodation for the victims of the evictions. The High Court has adjudicated over a number of eviction cases in which the victims have approached the court to seek among other remedies an order for the state to provide alternative accommodation.

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302 Supra note 184
303 Grootboom paragraph 43
304 Concluding Observations of the CESCR un document (E/C.12/KEN/1) November 2008
The High Court was faced with the question of provision of emergency alternative accommodation in the case of *Ibrahim Songor Osman v Attorney General* which entailed an application by a group of 1,122 people who had been forcefully evicted from an un-alienated public land that they had been occupying since the 1940s. The Petitioners approached the Court citing a violation of both civil and political rights as well as economic, social and cultural rights contained in the Constitution of Kenya 2010, especially the right to life under Article 26(1) and (3), the right to human dignity under Article 28 and 29, the right to information under Article 35(1), the right to property under Article 40, the right to housing, food, water and health as contained in Article 43(1) as well as the right to fair administrative action under Article 47.

They sought a permanent injunction restraining the Respondents from evicting them in future, a mandatory injunction ordering the Respondents to provide them with suitable and permanent alternative land, shelter or accommodation, and an order for general, aggravated and exemplary damages. The suit was undefended and the court granted the petitioners the substantive remedies as requested by the Petitioners, ordering the Respondents by a mandatory injunction to return the Petitioners to the land from which they were evicted, to reconstruct for them reasonable residences or houses with all the requisite social amenities to be mutually agreed upon by all the parties, and a permanent injunction was granted restraining the respondents from forcefully evicting the Petitioners in future as well as damages.

The government has now provided durable solutions in the form of permanent resettlement to nearly all displaced households based on the sentiments expressed by Special Rapporteur on the Human Rights of Displaced Persons expressed satisfaction with the “important steps taken...to address internal displacement, including the development of a draft IDPs policy and draft IDPs bill, and the establishment of an institutional focal point on internal displacement”.

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305 Similarly see the case of Musa Mohammed Dagane & others v Attorney General Constitutional Petition 56 of 2009
306 *Ibrahim Sangor case pages 4-6*
307 *Ibrahim Sangor case pages 8-11*
In particular, the efforts of the Protection Working Group on Internal Displacement, which brings together the Kenya government, development partners, humanitarian organizations and other civil society groups, has been instrumental to the success of the resettlement of households displaced by the post-election violence in Kenya\(^{310}\).

Despite the government efforts at resettlement of the IDPs following the PEV, it is yet to formulate a policy or programme to address emergency cases where people are rendered homeless and people who find themselves for various reasons in need of accommodation and this has been left for charitable organizations. As far as the provision of emergency housing is concerned that state is in contravention of its obligations under the ICESCR as it is yet to put in place measures to address emergency accommodation.

**h. Existence of a national housing strategy/plan**

General Comment Number 4 of the CESCR provides that state parties have an obligation to adopt a national housing strategy which provides for among other things; objectives for the development of shelter conditions, resources available to meet the goals of the state and the most cost effective way of utilizing the resources, sets out the parties responsible for the implementation as well as the timeframe within which the measures are to be implemented\(^{311}\).

In this regard Kenya adopted Sessional paper No. 3 in 2004 on the National Housing Policy which set outs out the roadmap for the provision of housing in Kenya and provides for among other objectives of the state, the progressive realization realisation of the right to adequate housing for all. The National Housing Policy predated the Constitution that was promulgated in 2010 thus the Policy needs to be aligned with the provisions of the Constitution as well as be in conformity with the ICESCR.

\(^{310}\) The PWGiD designs and coordinates the implementation of solutions of resolving the challenge of internal displacement in Kenya. It comprises Government agencies in PWGiD: Ministry of State for Special Programmes, KNCHR, NCIC, Provincial Administration, and State Law Office. And Other non-governmental agencies among them Article 19, CLAN, DRC, GIZ, Helpage International, IOM, IDMC, IRC, JRS, Kenya Red Cross Society KHRC, Kituo Cha Sheria, NCCK, NCGD, NDOC, NRC, Oxfam, RCK, SC-UK, South Consult, USAID, UNAIDS, UNICEF, UNFPA, UNHCR, UNOCHA, World Vision and Zinduka Africa

\(^{311}\) Paragraph 12 of the General Comment Number 4
In addition to realignment of the National Housing Policy to the provisions of the constitution, this paper recommends the adoption of the elements of a reasonable government strategy or policy that were developed by the SACC into our housing policy. The South African Constitutional Court in TAC and Grootboom cases explained the elements of comprising a reasonable national strategy; plan or policy and which are alluded to in detail in Chapter 3 of this research. The SACC in these cases stated that a reasonable government programme ought to; (i) clearly allocate responsibilities and tasks between the three spheres of government (national, provincial and local), in consultation with each other; (ii) must be balanced and flexible taking account of short, medium and long-term needs of the people including those persons in desperate and immediate need; (iii) ensure that appropriate financial and human resources are available to implement SERs; (iv) reasonably conceived and implemented in that the state must execute well directed policies and programmes, and ensure sufficient financial, human and other resources are allocated; (v) the programmes contents must be made known to the intended beneficiaries in line with constitutional values of accountability and openness.

Conclusion

The Constitution of Kenya, the ICESCR as well as emerging jurisprudence following adjudication of SER cases in Kenya discussed in this chapter show that despite the commendable steps taken there are still gaps that need to be filled by the states in respect of provision of adequate housing.

312 Grootboom para 39
313 Ibid para 43
314 Ibid para 39
315 Ibid para 42
CHAPTER 5

PROGRESSIVE REALIZATION OF HOUSING RIGHTS IN KENYA, PIPE DREAM OR REALITY? LESSONS FROM SOUTH AFRICA

5.1 Findings

Overall, this study concludes that Kenya has taken some commendable and important steps that portray a commitment to discharge its obligation to progressively realize the right to housing under both national and international law but these can be enhanced by adopting some practices from South Africa’s implementation of SERs.

From the analysis of both the South African and Kenyan jurisprudence on SERs and in particular the progressive realization of the right to adequate housing in chapters 3 and 4 respectively this paper makes the following findings;

a. There is need to define what “adequate housing” entails in the context of the Kenyan situation so as to be enable policy makers, planners in different governmental agencies and other stakeholders to identify the challenges and devise appropriate solutions and begin to give full effect of housing rights.

b. There are gaps in the existing legislation on housing in Kenya as has been noted in chapter 4. These include the lack of a legislation to govern evictions in Kenya as well as a policy on slum upgrading and prevention policy. In addition to these gaps in legislation there is need to amend the existing laws to bring them in conformity with the letter and spirit of Constitution.

c. The Constitution of Kenya 2010 provides for a devolved system of government in which there are both the county and national levels of government with various roles to play. The provision of housing is a shared competence between the national and county governments under the new constitutional dispensation. County governments should be
sufficiently empowered to be able to develop and implement appropriate policies and legislation for the provision of basic services including the prioritization of fulfillment of the right to adequate housing for the most needy in their areas of jurisdiction to complement the efforts of the national government in provision of adequate housing.

d. In addition to the High Court that is mandated with the adjudication of complaints emanating from claims on the violation of the Bill of rights there is need for other bodies including government agencies, constitutional commissions as well as non-governmental organizations to match the efforts of the judiciary in ensuring that the right to adequate housing is realized for all.

e. There is a lack of reliable data on the status of progressive realization of the right to adequate housing in Kenya and which information must be kept by the government and availed to the public in the interest of measuring progressive realization. This is a serious inhibitor for effective planning as it means that there is a high probability that such planning does not occur on a statistically informed basis.

5.2 Recommendations.

a. Defining “adequate housing”

Although formulating a definition of ‘adequate housing’ is no easy feat, what constitutes adequate housing depends on the specific context and circumstances of households and individuals, and their needs and priorities. As has been discussed in chapter 3, and as per Groothoom, while adequate housing concerns more than providing shelter from the elements, it is difficult or impossible to define the term exactly. Further, a homogenous definition does not apply although some essential principles may be common across cases.\textsuperscript{116}

\textsuperscript{116} The Constitutional Court has rejected the ‘minimum core’ component of socio-economic rights. By including housing in Joe Slovo, however, it did prescribe in detail the form of the temporary alternative accommodation to be provided by the state to those evicted. While this is desirable in that the prescription includes some minimum requirements, including access to water, sanitation and electricity, the location of the TRA, the socio-economic disruption caused by such a mass relocation and the severely lacking ‘sustainable human settlements’ aspect of the N2 Gateway project is cause for concern as it illustrates a fundamental disjuncture between policy and practice with
South Africa has adopted a matrix developed by the UN-HABITAT to assess the right to adequate housing in terms of the following key criteria: adequacy of location; adequacy of shelter; affordability (in terms of upfront and ongoing costs); adequacy of services (water, sanitation, energy supply, etc.); adequacy of space; physical security; security of tenure and accessibility or availability. Kenya does not have in place a monitoring system for the right to housing and could adopt some of the indicators set out by South Africa and UN HABITAT in developing a monitoring system to cater for the particular circumstances of the Kenyan people.

b. Role of county governments

In terms of implementation of government policy, South Africa has assigned a greater role to local government in the housing delivery process. This is because municipalities were seen to be closer to the people and better able to respond to housing demand more effectively. In Kenya, particularly under the current constitution, county governments assume concurrent responsibility for planning and development of housing programmes with the national government in their areas of jurisdiction through a greater devolution of responsibility and resources to them. It is envisioned that the county governments will proactively take up their housing responsibilities given clear guidelines and resourcing from the national sphere. It is necessary, in practice, to clarify further the allocation of these functions.

The national government should consider working with the county governments to develop a model for comprehensively addressing the issue of the eradication of informal settlements slums and phasing out the existing informal settlements with adequate housing through internationally acceptable procedures. In South Africa, The National Housing Programme for Housing Assistance in Emergency Housing Circumstances was developed to provide for temporary relief to people in urban and rural areas who found themselves in emergencies (as discussed in regard to informal settlements. See Kate Tissington, “Joe Slovo residents let down by court”, Pambazuka News (25 June 2009).


318 Constitution of Kenya 2010, Article 174 (f)(h)
Grootboom). This assistance takes the form of grants to municipalities and in our case the assistance can be channeled through county governments to enable them to respond rapidly to emergencies through the provision of land, social amenities and shelter. In this regard, county governments, should be sufficiently empowered to develop and implement appropriate policies and legislation for the provision of basic services including the protection as well as prioritization of fulfilment of the right to adequate housing for the most needy.

In addition to realizing the basic levels of SERs in Kenya, the county as well as the national governments have to address both the qualitative and quantitative aspects of progressive realisation that will entail measures that go beyond emergency cases. These would include progressively facilitating access based on decreasing need as well as creating a conducive environment to enhance affordability of housing.

c. Legislative and policy measures

Regarding development of housing legislation and policy measures, the national government should ensure that proposed amendments to the Housing Act 2009 are harmonized with the constitutional responsibilities of county governments in the realization of adequate housing and in particular the role of the National Housing Corporation should be radically reviewed to bring it in line with the devolved system of government. Similarly, the National Housing Policy should also be revised to ensure that it conforms to the constitutional provisions. The Eviction and Resettlement Procedure Bill and Community Land Bill should be passed and implemented without further delay while the Slum Upgrading and Prevention Policy should be finalized, adopted and implemented.

d. Adjudication of complaints

In South Africa, there are various avenues for adjudication of complaints apart from recourse to court. Everyone has a right to take complaints to bodies like the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE) when their socioeconomic rights are violated. These bodies advocate and lobby for better service delivery,
effective policies and laws that will improve the lives of the people. It is noteworthy that the SAHRC was charged by the SACC with monitoring the implementation of the decision in *Grootboom* before it adopted stronger remedies such as the structural interdict when the state did not move with haste to remedy the SERs violations in subsequent cases which placed the court itself in a supervisory role. The Judiciary therefore has to be careful in relation to what role is assigned to constitutional commissions in the implementation of SERs to ensure the commission has capacity to fulfill the mandate. Despite the challenges faced the SAHRC has made a massive contribution to realization of SERs.

The constitution of Kenya provides the high court as the avenue for adjudication of disputes regarding the Bill of Rights. Although the role of the high court in this regard cannot be overemphasized there is need for other bodies including both governmental and non-governmental organizations to complement role of the judiciary. The government through constitutional commissions such as the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC) and the National Cohesion and Integration Commission (NCIC) should consider initiating programmes aimed at assessing the extent to which the government has put in place measures towards the full realization of SERs as well as any violations of the right to adequate housing as well as other SERs in Kenya and possibly document their findings to enable the government in planning.

e. Public participation in governance

As has been emphasized by the SACC in the case of *Abahlali*, and various cases emanating from the High Court of Kenya and the Constitution of Kenya that public participation is key in governance. In the progressive realisation of housing rights, the state is under an obligation to ‘meaningfully engage’ with those facing eviction to ascertain if they will be rendered homeless by an eviction and to determine what alternative accommodation can be provided.

As was stated by the SACC in the *De Solvo* case, for participation to be meaningful, participants require access to information, to be empowered to make informed decisions and to be engaged in high-level types of issues and implementation concerns. In its judgment the SACC ordered the
housing authorities to engage the community in meaningful participation. It must be emphasized that access to information is critical if the public is to adequately engage the government on questions of the progressive realisation of rights as well as to participate in decisions about various aspects of their lives. In Kenya, the court in the Mitu Bell case, adopted this approach, requiring the Attorney General to consult and engage meaningfully with those evicted to find solutions to their housing concerns. Although the government lodged an appeal from the decision, meaningful engagement is now firmly part of our SERs jurisprudence as the requirement of meaningful participation has been endorsed in several cases decided after Mitu Bell.

f. Data Validity and Reliability

There is a lack of reliable data which must be availed in the interest of measuring progressive realisation. This is a serious inhibitor for effective planning as it means that there is a high probability that such planning occurs without a statistically informed basis. On its part, the state needs to put in place a dependable system or process for the sustainable production of sufficient and good quality data to enable monitor the progressive realisation of housing rights and socio-economic rights in general.

g. The Role of Non-governmental and civil society organisations

Non-governmental organisations, civil society organisations (CSOs) and community-based organisations play a key role in advancing socio-economic rights which should be encouraged. In Kenya, CSOs such as Kituo cha Sheria, Kituo Cha Katiba and Akiba Uhaki among others have so far been involved actively in litigating SERs, particularly the right to adequate housing. These organisations use different strategies, for example taking up cases on behalf of victims (public interest litigation), public exposure of violations, monitoring, advocacy, education, public awareness, social mobilization, research and training to promote and advance socioeconomic rights.
4.2 Conclusion

The promulgation of a new Constitution in 2010 and the entrenchment therein of justiciable economic and social rights, the role of courts in the protection and promotion of socio-economic rights in the new constitutional dispensation, elicited hopes of a transformed Kenya. Almost five years since the promulgation of the constitution, progress is apparent towards the protection of economic and social rights, with some courts showing more propensity for an enhanced awareness of issues and approaches required to facilitate the realisation of economic and social rights as fundamental rights despite the challenges encountered by the state in taking steps towards the full realisation of SERs.

It is important to note that the awareness, enthusiasm and progressive jurisprudence emerging from the courts on SERs is unmatched by commitment on the part of the political branches of government. This is one major contrast that can be drawn between South Africa and Kenya. In South Africa, the ANC assumed power with the promise, and expectation from citizens that they would deliver social goods after Apartheid and which promise was translated into the provision of housing under the RDP programme which has reportedly delivered over a million houses to the poor since 1994. The call to both the executive and legislative arms to formulation not just housing but SER policies in general have not been heeded to. This paper makes modest proposals that if adopted could see the state fast track its efforts towards the full realisation of the right to adequate housing and socio-economic rights in general.
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