

**JUDICIAL ENFORCEMENT OF THE RIGHT TO HEALTH UNDER THE NEW  
CONSTITUTION OF KENYA**

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SCHOOL OF LAW**

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**DECLARATION**

I, **EVANS AYIEMA MBICHA**, do declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

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I dedicate this work my wife and children. You are a source of great inspiration.

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## ACRONYMS

ACPHR	African Commission on Peoples and Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic Social and Cultural Rights
CoK	Constitution of Kenya
CRC	Convention on the Rights of Children
CRPD	Convention on the Rights of People with Disabilities
DPSP	Directive Principles of State Policy
ICESCR	International Covenant on Economic Social and Cultural Rights of 1966
PANTHER	Participation, Accountability, Non-Discrimination, Transparency, Human Dignity, Equality and Rule of Law
UDHR	Universal Declaration of Human Rights of 1948
UN	United Nations
UNGA	United Nations General Assembly
WHO	World Health Organisation

## **LIST OF LEGAL INSTRUMENTS**

### **Kenya**

1. Government of Kenya, Constitution of the Republic of Kenya, 2010.
2. Government of Kenya, HIV and AIDS Prevention and Control Act Cap 246A.
3. Government of Kenya, Malaria Prevention Act Cap246.
4. Government of Kenya, Cancer Prevention and Control Act Cap 246B.

### **International Instruments**

1. The United Nations Committee on Economic, Social and Cultural Rights, General Comment 12, 1999.
2. United Nations General Assembly, International Covenant on Economic, Social and Cultural Rights, 1966.
3. The United Nations, United Nations Charter, 1945.
4. The United Nations General Assembly, Universal Declaration of Human Rights, 1948.
5. The United Nations General Assembly, International Covenant on Civil and Political Rights, 1966
6. World Health Organisation, WHO Constitution, 1945
7. Organization of African Unity, African Charter on Human and Peoples' Rights, 1981

## LIST OF CITED CASES

### Kenyan Cases

1. *Kabui Mwai and 3 others v Kenya National Examinations Council & Others* Petition No. 15 of 2011 [2011] eKLR.
2. *Kenya Society for the Mentally Handicapped v Attorney General and Others* Nairobi Petition No. 155A of 2011 (Unreported).
3. *Mathew Okwanda v Minister of Health and Medical Services and 3 others* [2013] eKLR.
4. *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*, Petition No. 133 of 2013.
5. *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported).
6. *P.A.O and two others v Attorney General* [2012] e KLR
7. *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* [2011] eKLR.

### African Commission on Human and Peoples Rights Cases

1. *Free Legal Assistance Group v Zaire* ACHR Communication No. 25/89 (1995).
2. *International Pen and Others (on behalf of Ken SaroWiwa) v Nigeria* 2000) AHLR 212 (ACHPR 1998).

3. *Social and Economic Rights Action Centre and Another v Nigeria Communication 155/96, (2001) AHRLR 60 (ACHPR 2001).*

### **South African Cases**

1. *Government of the Republic of South Africa v Grootboom and Others 2000 11 BCLR 1169 (CC).*
2. *Minister of Health v Treatment Action Campaign 2001 (10) BCLR 1033 (CC).*
3. *Soobramoney v Minister of Health Kwa Zulu Natal [1998] 1 SA 765 (CC).*

### **Other Jurisdictions Cases**

1. *Cruz del Valle Bermudez v Ministry of Health and Social Action Petition No.15/789.*
2. *Paschim Banga Khet Majoor Samity v State of West Bengal (1996) 4 SCC 37*
3. *Peoples Union for Civil Liberties v Union of India Petition Civil No. 196/2001.*
4. *Puhorit and Moore v The Gambia ACHR Communication 241/2000*

## ABSTRACT

The right to health is a fundamental human right recognized under international human rights law. The recognition of the right to health aims at protecting the most vulnerable in the society. Proper health care is needed for the survival of the human being. Its recognition is an essential component of development, vital to a nation's economic growth and internal stability.

The 2010 Constitution of Kenya (CoK) has for the first time recognized socio-economic rights under Article 43. The right to health has also been recognized together with other socio-economic rights. The High Court of Kenya has been granted the authority to uphold and enforce the bill of rights.

Despite its recognition in the CoK judicial enforcement of the right to health has faced numerous challenges. Some of the key challenges include the normative interpretation of the right to health and the choice between the minimum content core approach developed by Committee on Economic, Social and Cultural Rights (CESCR) and the reasonableness test approach developed by the South African Constitutional Court; the balancing between making decision that touch on allocation of resources and respecting the doctrine of separation of powers; and finally drafting an appropriate remedy when the right to health has been infringed and how to monitor the implementation. Kenyan Court has had to grapple with these challenges in adjudicating the right to health.

This research analyses the constitutional protection of the right to health in Kenya. It interrogates the key decisions that have been made in regard to the judicial enforcement of the right to health and other key socio-economic rights under article 43 of CoK. It discusses the key practical challenges that the courts face in enforcing the right to health. Finally it discusses

recommendations upon which if integrated will promote the judicial enforcement of the right to health.

This study aims at providing scholarly literature on the judicial enforcement of the right to health in Kenya. This literature through the recommendations addressed will provide the Kenyan courts with a guide to follow when addressing the practical challenges facing the adjudication of the right to health. It also proposes adoption of the minimum core content approach to ensure citizens access the basic essential of health services in Kenya.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 Background to the Study

The recognition of socio-economic rights as enforceable rights is a remarkable step towards their litigation. Socio-economic rights have been recognized in various international human rights treaties and documents,<sup>1</sup> and national constitution as enforceable human rights.<sup>2</sup> Constitutionalization of socio-economic rights is usually done in the following ways: inclusion of socio-economic rights as justiciable rights; as non-justiciable directive principles of state policy; and both as DPSP and as justiciable rights.<sup>3</sup> Inclusion of socio-economic rights in national constitution as justiciable rights is the strongest protection of socio-economic rights.<sup>4</sup> Countries that have constitutionalized socio-economic rights include Brazil, Argentina, Colombia, and Hungary amongst others.<sup>5</sup> In Africa Kenya and South Africa are the only

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<sup>1</sup>At the international level socio-economic rights have been recognized under the 1948 Universal Declaration of Human Rights, 1966 International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of Child, Convention on the Rights of Persons with Disabilities, Convention on the Elimination of All Forms of Discrimination Against Women and Convention on Migrant Workers. At the regional level, 1981 African Charter on Human and People's Rights, European Social Charter and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" also recognizes socio-economic rights.

<sup>2</sup>At the national level, national constitutions have also recognized explicitly certain socio-economic rights or acknowledge other basic right that includes socio-economic rights.

<sup>3</sup>Japhet Biegon, 'The Inclusion of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical Issues' in Japhet Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* (10<sup>th</sup> Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

<sup>4</sup>Diane A. Desierto, 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' (2009) 11 *Asian-Pacific Law & Policy Journal* 114.

<sup>5</sup>Ibid.

countries which have explicitly recognized a number of socio-economic rights within their constitutions.<sup>6</sup>

In countries where justiciability of socio-economic rights still hold sway, they include them as DPSP as important objectives for inclusion in the constitution but they are not subject to judicial adjudication.<sup>7</sup> They are included in the constitution only to guide the executive or legislature in performing their functions or the judiciary in interpreting the Constitution or other laws. India, Lesotho, Nigeria, Papua New Guinea, Sierra Leone and Sudan are some the countries who have included socio-economic rights in their constitutions as DPSP.<sup>8</sup> Other countries have taken a hybrid approach, where some socio-economic rights are expressly listed as justiciable while others are considered DPSP. This approach has been adopted in Uganda, Ethiopia, Ghana and Ireland.<sup>9</sup>

Socio-economic rights were recognized for the first time as right to a standard of living in the 1948 Universal Declaration of Human Right (UDHR).<sup>10</sup> Article 25 of UDHR provides that:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

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<sup>6</sup> Biegon (n 3).

<sup>7</sup> Shivani Verma, 'Justiciability of Economic, Social and Cultural Rights: Relevant Case Law' [2005] The International Council on Human Rights Policy.

<sup>8</sup> Biegon (n 3) 29.

<sup>9</sup> Ibid.

<sup>10</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR) art 25.



Translating the UDHR into a binding instrument was faced with strong objections with regard to judicial enforcement of socio-economic rights which saw its split into two conventions: the International Convention on Civil and Political Rights (ICCPR)<sup>11</sup> and the International Convention on Economic, Social and Cultural Rights (ICESCR).<sup>12</sup>

During the negotiation of ICESCR several objections were advanced to support the argument that socio-economic rights were not amenable to judicial enforcement.<sup>13</sup> These objections have been grouped into two by Mbazira: legitimacy based and institutional based objections.<sup>14</sup> Legitimacy based objectors contest that: socio-economic rights are not rights so properly called because they do not derive from the inherent nature of human beings; they lack the essential characteristic of universality which is an indispensable quality of human rights; and they lack the essential quality of absolutism which is a characteristic of all rights to the extent that their realization is resource-dependent; and finally that they are vague.<sup>15</sup> The institutional competence based objections challenge the capacity or competence of the courts to deal with issues of social justice. They argue that distribution of social goods is the exclusive reserve of the legislature and the executive arms of the government and that judicial decisions relating to socio-economic rights are bound to affect a wide range of people outside the universe of the judicial process.<sup>16</sup>

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<sup>11</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).

<sup>12</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force on 3 January 1976) UNGA Res 2200A (XXI).

<sup>13</sup> Aryer Neir, 'Social Economic Rights: A Critique' (2006) 13 Human Rights Brief, American University Washington College of Law.

<sup>14</sup> Christopher Mbazira, *Litigating Socio-economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria University Law Press 2009).

<sup>15</sup> Jotham Okome Orwa, 'Litigating Socio-economic Rights in Domestic Courts: The Kenyan Experience' (Colloquium on the African Charter on Human and Peoples Rights, Cape Town South Africa, November 2012).

<sup>16</sup> Japhet Biegon, 'The Inclusion of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical Issues' in Japhet Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* (10<sup>th</sup> Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

These challenges affect the realization of socio-economic rights. Countries tend to strongly recognize and protect civil and political rights than socio-economic rights. Most countries have constitutionalized civil and political rights, while the constitutionalization of socio-economic rights is still debatable. Some countries therefore have recognized certain socio-economic rights in their constitutions but not all of them.

The right to health is a socio-economic right recognized under international human rights law. It is recognized as right to standard of living under Article 25 of the UDHR. Article 12 of ICESCR requires states to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The right to health is also protected in a number of treaties which include: the Convention on the Rights of Child (CRC);<sup>17</sup> the Convention on the Rights of Persons with Disabilities (CRPD);<sup>18</sup> and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>19</sup>. At the regional level the right to health has been protected by the African Charter on Human and Peoples Rights (ACHPR).<sup>20</sup> ACHPR under Article 16 guarantees every individual the right to enjoy the best attainable state of physical and mental health.

According to the Merriam-Webster dictionary, health is the level of functional or metabolic efficiency of a living being.<sup>21</sup> In humans, it is the general condition of a person's mind, body and

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<sup>17</sup> Convention on the Rights of Child (adopted 20 November 1989, entered into force on 2 September 1990) UN Doc. A/44/25.

<sup>18</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force on 30 March 2007) UN Doc A/67/281.

<sup>19</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force on 3 September 1981) UN Doc A/59/38.

<sup>20</sup> African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982)..

<sup>21</sup> Merriam- Webster. [Dictionary - "Health"](#), accessed 1<sup>st</sup> November 2013.

spirit, usually meaning to be free from illness, injury or pain.<sup>22</sup> The constitution of World Health Organization (WHO) has defined health as a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.<sup>23</sup>

The Republic of Kenya has for the first time recognized socio-economic rights under article 43 of its constitution. It has explicitly recognized the right to the highest standard of health, which includes the right to health care services, including reproductive health care. Most developing countries including Kenya recognize that good health is a prerequisite to socio-economic development.<sup>24</sup>

Since independence, the government of Kenya has designed and implemented policies and legislations aimed at promoting access to modern health care.<sup>25</sup> Unfortunately, provision of adequate health has been compromised by a number of factors, including poor governance and corruption. According to Kenya Anti-Corruption Commission, ‘corruption affects all health systems, whether public or private, whether by embezzlement from health budgets or bribes extorted at the point of health services delivery, the effect is enormous and the burden falls disproportionately on the citizens especially the poor’.<sup>26</sup> Overall, corruption reduces the resources effectively available for health, lowers the quality, equity and effectiveness of healthcare services, decreases the volume and increases the cost of providing services.<sup>27</sup>

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<sup>22</sup>Ibid.

<sup>23</sup>World Health Organization Constitution(adopted 22 July 1946, entered into force on 7 April 1948)

<sup>24</sup> For example the Constitution of Kenya 2010, article 43, HIV and AIDS Prevention and Control Act Cap 246A, Malaria Prevention Act Cap246,Cancer Prevention and Control Act Cap 246B,among others.

<sup>25</sup> Ibid.

<sup>26</sup> KACC, ‘Sectoral Perspectives on Corruption in Kenya: The Case of the Public Health Care Delivery’ <[www.eacc.go.ke/docs/health-report.pdf](http://www.eacc.go.ke/docs/health-report.pdf)> accessed 15th March 2013.

<sup>27</sup> Ibid.

The right to health aims at protecting the most vulnerable in society to access the basic medical care. However in reality this is not the case. The most vulnerable especially those in informal settlements lack access to quality health care. This has been contributed by poverty and financial constraints. It has led a high rate of mortality and morbidity. Lack of access to health services should therefore be addressed through human rights based approach.

Article 43 (1) of CoK provides that ‘every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care as well as emergency medical treatment’. For the provisions of Article 43 to be fully realized, other articles must be invoked, and these articles include; article 21 which requires state to take legislative policies and other measures to achieve the progressive realization of the rights guaranteed under Article 43.<sup>28</sup> The government is obliged to facilitate the realization of the right to health. Where resource constraints exist it is upon the state to prove the unavailability of resources.<sup>29</sup>

Every individual has the right to enjoy the right to health and be treated equally. Article 27 of CoK guarantees equality and freedom from discrimination, and the full and equal `enjoyment of all rights and fundamental freedoms. Access to medical services should be enjoyed in spite of an individual’s economic status, culture or gender. In the case of *P.A.O and two others v Attorney General* the Court held that, the fundamental right to life, human dignity and health as protected and envisaged by Articles 26(1), 28 and 43(1) of the Constitution encompasses access to affordable and essential drugs and medicines including generic drugs and any legislation that

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<sup>28</sup>The Constitution of Kenya 2010, article 21(2).

<sup>29</sup>Constitution of Kenya, article 20(5) (a).

tries to limit these rights will not suffice.<sup>30</sup> Despite this recognition there exists a wide disparity between the poor and the well off with respect to access to health care services. Judicial enforcement is an avenue through which the right to health can be enforced. It ensures that violations of the right to health are addressed and victims redressed. The implementation of the right to health should adopt a human rights based approach ensuring that the PANTHER principles are upheld.<sup>31</sup>

This research project analyses the constitutional recognition of the right to health under the CoK and its implementation. It analyses the concept of the right to health and the core elements attached to it. It focuses on the judicial enforcement of the right to health and discusses the key judicial decisions that have been made in regard to its judicial enforcement in Kenya and draws heavily from other jurisdictions. It also discusses the challenges that the Kenyan courts have faced in enforcing the right to health. These challenges include: the normative interpretation of the right to health and the choice between adopting the normative core content approach or the reasonableness approach developed by the South African Constitutional Court; drafting of appropriate remedy when the right to health has been infringed and; balancing between making of decisions that touch on the allocation of resources and the doctrine of separation of powers. At the end of research recommendations will be forwarded on how the right to health under the new CoK can be implemented and enjoyed fully by individuals especially the vulnerable.

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<sup>30</sup> [2012] eKLR.

<sup>31</sup> PANTHER is an acronym that stands for participation, accountability, non-discrimination, transparency, human dignity, equality and rule of law.

## 1.2 Statement of the Problem

The CoK expressly recognizes the right to health under article 43. It also highlights government responsibilities in realizing it. Article 21 for instance states that, it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Further that the State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of socio-economic rights which include the right to health. The constitution imposes this duty to other actors as well. Article 21(3) requires public officers to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities. This includes the right to access health care services.<sup>32</sup>

The principle of “progressive realization” shows a central aspect of States’ obligations to socio-economic rights under international human rights treaties. It has been well elaborated in General Comment 3 paragraph 9.<sup>33</sup> States are required to take appropriate measures towards the full realization of socio-economic rights to the maximum of their available resources.<sup>34</sup> The stress on reference to “resource availability” reflects a recognition that the realization of these rights can be hampered by a lack of resources and can be achieved only over a period of time.<sup>35</sup> The ICESCR requires states at their core obligation to take appropriate measures towards the full realization of socio-economic rights to the maximum of their available resources. Lack of

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<sup>32</sup> Constitution of Kenya, Article 21(3).

<sup>33</sup> CESCR General Comment No. 3 (Fifth Session, 1990), *The Nature of States Parties Obligations (art. 2, para 1 of the Covenant)*, UN.doc. E/1991/23, para 9.

<sup>34</sup> ICESCR, Article 2 (1).

<sup>35</sup> Japhet Biegon and Godfrey Musila (eds) *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* (10<sup>th</sup> Series of ICJ Kenya’s Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

resources cannot justify inaction or indefinite postponement of measures to implement these rights.

Kenyan courts have not acted with vigor to ensure realization of the fundamental right to health. This was clear in the case of *Mathew Okwanda v Minister of Health and Medical Services and 3 others (Okwanda Case)* where the court stated that:

it is not unreasonable for the petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions. These, however, are matters of policy which the State is expected to address in light of its clear constitutional obligations.<sup>36</sup>

In the absence of a focused dispute for resolution by the court, the court is reluctant to act.<sup>37</sup> In other jurisdictions however, one proposed way of avoiding ad hoc decisions stemming from qualifying human rights is employing an exercise of balancing. Balancing as a method of constitutional interpretation is invoked in various national jurisdictions to address conflict of values and interests.

The court when referring to the case of *John Kabui Mwai and 3 others v Kenya National Examinations Council & Others (John Kabui Case)*, stated that:

The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely

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<sup>36</sup> [2013] eKLR.

<sup>37</sup> Ibid.

guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resource.<sup>38</sup>

In adjudicating any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by certain principles, which include the responsibility of the State to show that the resources are not available.<sup>39</sup> The scope, content and nature of State obligations under Article 12 of the ICESCR have been elaborated by the Committee on Economic, Social and Cultural Rights (CESCR), which defines the right to health as, a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The General Comment 14 recognizes that the right to health is closely related to the economic rights and is dependent on the realization of the other rights including the rights to food, housing, water, work, education, human dignity, life, non-discrimination, equality, prohibition of torture, privacy, access to information and other freedoms.<sup>40</sup>

The High Court of Kenya has been granted the jurisdiction to uphold and enforce the Bill of Rights and grant appropriate relief when the right in question has been infringed.<sup>41</sup> The right to health has for the first time been recognized in the new constitution hence Kenyan courts will borrow heavily from other jurisdictions such as South Africa or India when adjudicating the right to health violations. In adjudicating the right to health, the courts will be faced with various

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<sup>38</sup> Petition No. 15 of 2011.

<sup>39</sup> The Constitution of Kenya, Article 20(5).

<sup>40</sup> General Comment No.14 (Twenty-second session, 2000) *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic, Social and Cultural Rights), UN doc. E/C. 12/2000/4.

<sup>41</sup> Constitution of Kenya, Article 23.



challenges including normative interpretation of the right to health, drafting an appropriate remedy and ensuring it respects the doctrine of separation of powers. Availability of resources is another challenge that the courts will face in the progressive realization of the right to health.

The problem arising in the judicial enforcement of the right to health is how to counter these challenges and at the same time ensuring that the right to health is realized. The judiciary has to be cautious in pronouncing its judgments. However at the same time it has to ensure that the plights of the most vulnerable in society are recognized.

### 1.3 Theoretical Framework

This study will be based on the human rights theory. The modern human right theory replaced the notion of natural law theory and natural rights theory in the twentieth century.<sup>42</sup> The human rights theory focuses on the protection of human dignity.<sup>43</sup> Human rights possess a number of important characteristics such as being universal, inalienable, legally binding, and based on the inherent dignity and equal worth of all human beings.

The human rights theory guarantees obligations towards the state as the duty bearer in realising the human rights. The State has the obligation to fulfil, respect and protect. The obligation to respect human rights refers to the obligation to refrain from state intervention provided the latter is not admissible under any relevant legal limitations and reservations.<sup>44</sup> The obligation to fulfil human rights refers to the state's obligation to take legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest

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<sup>42</sup> GJ Walters, 'Human Rights Theory and Practice' <https://ustpaul.ca/upload-files/EthicsCentre/HumanRightsTheory&Practice-Walters.pdf> accessed 15 June 2014.

<sup>43</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers 2003).

<sup>44</sup> Ibid.

extent possible.<sup>45</sup> The obligation to protect human rights requires positive state action to avoid human rights violation by private persons.<sup>46</sup>

This study borrows heavily from the human rights theory to ensure that the state protects, fulfils and promotes the enjoyment of the right to health as provided for in the CoK. It focuses on the judicial enforcement of the right to health which is one of the measures state undertakes to fulfil the right to health. Article 21 of the CoK recognizes state obligations towards the implementation rights and fundamental freedoms. It provides that the fundamental duty of the State and every State organ is to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.<sup>47</sup> The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of socio-economic rights guaranteed under article 43 of the CoK.

Amartya Sen,<sup>48</sup> argues that a theory of human rights must address questions such as: what kind of a statement does a declaration of human rights make?; what makes human rights important?; what duties and obligations do human rights generate?; through what forms of actions can human rights be promoted, and in particular whether legislation must be principal, or even a necessary , means of implementation of human rights?; can economic and social rights (the so-called second generation rights) be reasonably included among human rights?; and last but not least, how can proposals of human rights be defended or challenged, and how should their claim to a universal status be assessed, especially in a world with much cultural variation and widely diverse practice? If these questions are affirmed then that constitutes a human right theory.

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Constitution of Kenya, Article 21(1).

<sup>48</sup> Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32,4 Philosophy and Public Affairs 315.

The human right theory generates reasons for action for agents who are in a position to help in promoting or safeguarding of the underlying freedoms.<sup>49</sup> The normative element that constitutes rights is duties.<sup>50</sup> The state which is considered as the duty bearer is obliged to respect fulfil and protect all human rights.<sup>51</sup>

The human rights theory also encapsulates the seven human rights principles. These principles have been referred to as the PANTHER principles. These principles ensure that the realization of human rights is for the benefit of the individuals and protection of their human dignity. This study borrows heavily from these principles. It aims at ensuring that individuals participate and contribute to the realization of the right to health through judicial litigation. The courts should also uphold these principles in ensuring that judicial enforcement of the right to health respects the rule of law and protects human dignity of the litigants.

The state and other stakeholders in protecting and promoting the right to health must be transparent and accountable to the people. The PANTHER principles are therefore the basis of this study. The human rights theory requires states to take steps within their maximum available resources to ensure that human rights are enjoyed by persons within their jurisdiction. Human rights theory encapsulates that each human right has specific content and claims. It is not just an abstract slogan.

## 1.5 Research Objectives

This research seeks to determine four objectives. The first objective is to analyze the concept of the right to health under international human rights law. Second is to analyze the right to health

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<sup>49</sup> Ibid.

<sup>50</sup> R Martin and JW Nickel, 'Recent Work on the Concept of Rights' in CL Ten(ed) *Theories of Rights* (Ashgate Publishing Company 2006).

<sup>51</sup> Nowak (n 44).

under the CoK. Third is to interrogate the judicial enforcement of the right to health. Fourth is to identify the challenges facing the judicial enforcement of the right to health. Finally is to provide mechanisms and measures of realizing the right to health under the CoK.

### **1.6 Research Questions**

This research seeks to answer four key research questions. First, what is the scope and content of the right to health? Secondly, how have the Kenyan Courts adjudicated the right to health? Thirdly, what are the challenges facing judicial enforcement of the right to health? Finally what is the way forward in countering the challenges facing the judicial enforcement of the right to health?

### **1.7 Research Hypothesis**

This research is based on five hypotheses. First, the challenges facing judicial enforcement of the right to health under the CoK include its normative interpretation, drafting of an appropriate remedy and respecting the doctrine of separation of power. Second, The Kenyan Courts in adjudicating the right to health and other socio-economic rights have relied heavily on the reasonableness approach developed by the South African Constitutional Court rather than the minimum content core approach developed by the CESCRC. Third, the implementation of the right to health should adopt a human rights based approach. Fourth, despite the justification of the right to health under the CoK, violations of the right are still rampant. Finally the recognition of the right to health and the CoK accords it legitimacy and justiciability.

## 1.8 Literature Review

Socio-economic rights have been recognized in the CoK for the first time. However there is little scholarly work in Kenya on the implementation of the right to health under the new constitution. There is little scholarly debate on the Bill of Rights in the CoK in regard to implementation of the right to health.

Orwa in his paper, **Litigating Socio-economic Rights in Domestic Courts: The Kenyan Experience**, provides an overview of what the Kenyan Courts have faced when litigating socio-economic rights.<sup>52</sup> He argues that the inclusion of socio-economic rights in the new CoK is very revolutionary and has the capacity to transform Kenya into a country that observes, protects, respects, fulfills and promotes the realization, by a majority of its citizens, of their socio-economic rights. However the realization of socio-economic rights is not underpinned by its inclusion in the constitution. He analyses the difficulties faced in translating socio-economic rights from aspirational goals to fully pledged rights. This paper will be relied on to enrich the literature. Orwa gives an overview of the difficulties experienced in litigation of socio-economic rights in Kenya; however he has not narrowed it to a specific right. This research will focus on the practical challenges facing the judicial enforcement of the right to health under the CoK.

**Mbazira** in analyzing the challenges on the implementation of the right to health under the 2010 constitution, states that the enforcement of the right to health, like all other socio-economic rights, comes with a number of challenges to which Kenya will not be immune.<sup>53</sup> The challenges arise mainly from the difficulties of giving the rights a practical force in context of scarce

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<sup>52</sup> Orwa (n 15).

<sup>53</sup> Christopher Mbazira, 'The Judicial Enforcement of the Right to the Highest Attainable Standard of Health Under the Constitution of Kenya' in Japheth Biegon and Godfrey Musila (eds), *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* ( 10<sup>th</sup> Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

resources especially in situations where some there is assumption that resource allocation is a matter of political organs and not judicial organs.<sup>54</sup> He argues that the right to health is a broad, multifarious and complicated right encompassing a number of elements. On a positive note, however, many of these challenges have been confronted and overcome in a number of jurisdictions. It is therefore important to examine the approaches which various jurisdictions have adopted in enforcing the right and to tease out lessons Kenya can learn.<sup>55</sup> This study therefore does not limit itself to the Kenyan approach in realizing the right to health but draws from other jurisdictions.

According to **Biegon** and **Musila**, a tripartite typology of state responsibility in respect to human rights has been developed and requires that the state must respect protect and fulfil all rights including the right to health.<sup>56</sup> The duty to respect requires the state not to do anything that infringes on the rights of the individual. The duty to protect requires the state to ensure that third parties such as other individuals do not infringe on the rights of other individuals. Finally the duty to fulfill requires the state to take positive measures to ensure that the individual enjoys all rights in practice.<sup>57</sup> A fourth layer of obligation is the duty to *promote*, which requires the state to ensure people are aware or educated of their rights.

Scholars' suspect that state obligations will continually develop as jurisprudence develops, opening up either new types of categories or common principles.<sup>58</sup> This study however will try to trace the effort that the government of Kenya has put in place over the time as well as the future plans in realizing the right to health among its citizens and its failure as well and then attempt

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid

<sup>56</sup> Biegon and Musila (n 35).

<sup>57</sup> Ibid.

<sup>58</sup> Ibid

positive recommendations that can help the government achieve its responsibilities in realizing the right to health.

**Murray** poses critical questions which include: does the right to health binds only the State? Is the right to access to emergency medical treatment subject to the progressive realization limitation and is it enforceable against the State alone? Is the State bound to provide at least a ‘minimum core’ of the Article 43 rights as articulated by the ICESCR?<sup>59</sup> This study will focus on how the state has discharged its obligation to provide at least the minimum content of the right to health. It focuses on how courts in Kenya have interpreted state’s obligations towards the realization of the right to health.

**Musila** asserts that the entire constitutional framework is underpinned by certain fundamental values and principles.<sup>60</sup> There is recognition as well that while there are specific provisions elsewhere in the constitution that regulate specific issues, granting rights, imposing duties, prescribing actions, donating powers and so on, the importance of constitutional values and principles is that they tie everything together and in essence constitute ‘the soul of the constitution’, the guiding light providing a kind of roadmap and justification of the entire constitution.<sup>61</sup>

In analyzing the principle of minimum core obligations and reasonableness, he further states that the consequence is that a litigant could not rely directly on the non-fulfillment of the minimum

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<sup>59</sup> Christina Murray, ‘Kenya’s 2010 Constitution’ <[www.publiclaw.uct.ac.za/usr/public-law/staff/kenyas2010constitution.pdf](http://www.publiclaw.uct.ac.za/usr/public-law/staff/kenyas2010constitution.pdf)> accessed 24 March 2014.

<sup>60</sup> Godfrey Musila, ‘Testing Two Standards of Compliance: A modest Proposal on the Adjudication of Positive Socio-Economic Rights Under the New Constitution’ in Japheth Biegon and Godfrey Musila (eds) ), *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* ( 10<sup>th</sup> Series of ICJ Kenya’s Judiciary Watch Reports Series, Kenyan Section of the ICJ 2013).

<sup>61</sup> Godfrey M Musila, ‘Realizing the transformative promise of the 2010 Constitution and New electoral laws’ in Godfrey M Musila (ed) *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (2013).

core obligation imposed by rights such as housing, health, food, water and social security to secure immediate relief. She could, at most, rely on such an obligation to support her arguments that the measures adopted by the state were unreasonable in the circumstances.

A finding of unreasonableness could, in general not be used to elicit benefits for an individual or a class of individuals. In reviewing positive socio-economic rights claims, the central question that the Court should ask is whether the means chosen are reasonably capable of facilitating the realization of the socio-economic rights in question.<sup>62</sup> This research will therefore pay attention to the interpretation approaches and principles that Kenyan courts consider when deciding on socio-economic rights and mainly the constitutional right to health.

### **1.9 Justification of the Study**

The literature reviewed in this study has demonstrated the importance of socio-economic rights enforcement. It has demonstrated a clear view on the right to health in a democratic society and the need to realize these rights as the foundation of the growth of the country's economy as well as achievement of the Kenya's dream of vision 2030. However there exist gaps in the literature review which necessitate this study. First, there is limited literature on Kenyan constitutional framework on socio-economic rights and mainly right to health care. This limited literature has not covered on whether Kenya discharges its international obligations in the realizations of socio-economic rights. This study therefore aims to cover more on other important sectors and ambitions on the right to health not covered. This study is justified because it not only addresses these challenges but also provides ways of addressing them.

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<sup>62</sup> Musila (n 61).



### **1.10 Research Methodology**

The methodology of this study is based desk review research. It relies on both primary and secondary sources. Some of the sources that informed this study include the Universal Declaration on Human Rights, International Labour Organization, International Convention on Economic, Social and Cultural Rights, African Charter on Human and Peoples Rights, the Constitution of Kenya 2010, the Constitution of the Republic of South Africa, the case law and relevant legislation. Other secondary sources include books, articles, journal publications research papers, electronic sources and other scholarly works that have been published on the various relevant thematic areas. This approach will be used because of the limited resources to carry out field research.

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

In the conduct of this research, a number of limitations have been identified that any reader of this work ought to be alive to. To begin with, the Constitution of Kenya was only promulgated in 2010 (about four years before this study was conducted) this raises a concern whether it may be too early to recommend any amendments to the Constitution.

The study has taken the approach that any recommendations made for amendment to the Constitution are those that an amendment in statutes would not satisfy. Secondly, the study makes recommendations to invoke further debate on resolution of the challenges identified in the legal and institutional framework on implementation of the right to health. Thirdly, the recommendations are made to inform future amendment efforts. The scope of this study will only focus on judicial enforcement of the right to health as a way of implementing it.

## 1.12 Chapter Breakdown

The research consists of five chapters. The first chapter introduces the topic under study. This chapter comprises of an introduction and layout of study. It includes background to the study, statement of the problem, scope of the study, conceptual framework, research objectives and questions, literature review, hypothesis, justification of the study and methodology used in the study.

The second chapter encapsulates the evolution of the right to health in international human rights law. The first part discusses the origin, meaning, theoretical framework and nature of the right to health. It summarizes the evolution of the right to health in international human rights law. The second part discusses the concept of the right to health in international law. This includes the core elements of the right to health and states' obligations towards its realization.

The third discusses judicial enforcement of the right to health under the CoK. It analyses the constitutional provisions of the right to health in Kenya under the Bill of Rights. It interrogates judicial interpretation of the right to health while relating the same to socio-economic rights listed in Article 43 of the CoK.

Chapter four analyses the practical challenges facing judicial enforcement of the right to health. This chapter discusses the challenges Kenyan courts face or may face in adjudicating the right to health. It borrows heavily from other jurisdictions such as South Africa and India and how they have addressed these challenges. The challenges that this chapter discusses includes the normative interpretation of the right to health and the choice between adopting the minimum core approach or the reasonableness approach, drafting of appropriate remedy when the right to

health has been infringed and balancing between making of decisions that touch on the allocation of resources and the doctrine of separation of powers.

Chapter five which is the final chapter gives a summary of the study and recommendation from the study.

## CHAPTER TWO

### CONCEPTUALIZATION OF THE RIGHT TO HEALTH

#### 2.1 Introduction

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (right to health) is a fundamental right recognized under international human rights law. This chapter traces the philosophical foundations of the right to health in international human rights law. It discusses the normative content of the right to health and state obligations towards the realization of the right. The discussions are based on the human rights theory.

#### 2.2 Historical Development of the Right to Health

The right to health emerged along with the rest of contemporary international law in the aftermath of World War II. The development of social economic rights is associated with socialist philosophy that gained prominence in the 19<sup>th</sup> century.<sup>63</sup> All religious traditions offered support to the rights by emphasizing a concern for the poor and oppressed and for those who cannot look after themselves.<sup>64</sup>

Roscoe Pound,<sup>65</sup> pointed out that in the 19<sup>th</sup> century the law was written largely as a record of an increasing recognition of individual rights. In the 20<sup>th</sup> century, however this history should be written in terms of a continually widening recognition of human wants, human demands and

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<sup>63</sup> Henry J. Steiner, Philip Alston and Ryan Goodman (eds), *International Human Rights in Context: Law, Politics and Morals* (3<sup>rd</sup> edn, Oxford University Press 2007).

<sup>64</sup> Ibid.

<sup>65</sup> JW Harris, *Legal Philosophies* (2<sup>nd</sup> edn, Butterworths 1997).

social interests.<sup>66</sup>The approach of Pound and his progeny enlarged the understanding of the scope of human rights and their correlation with demands.

In international law, the most obvious starting-point for socio-economic rights was the establishment of the International Labour Organization (ILO). ILO was established by the Treaty of Versailles in 1919 to abolish the ‘injustice, hardship and privation’ which workers suffered and to guarantee ‘fair and humane conditions of labour’.<sup>67</sup>It was conceived as a response by Western Countries to the ideologies of socialism that arose out of the Russian Revolution.<sup>68</sup> Socio-economic rights therefore emerged to protect individuals especially the poor and to serve as a framework for claiming entitlement from state, which would guarantee individuals a dignified life.<sup>69</sup>

The historical development of the right to health is traced to as far back as 2000 BC when various authorities adopted various measures, including constructing water supply and drainage systems, in order to improve hygiene.<sup>70</sup> The first laws containing health-related provisions go back to the era of industrialization. The Moral Apprentices Act (1802) and Public Health Act (1848) were adopted in the United Kingdom as a means of containing social pressure arising from poor labor conditions.<sup>71</sup>

Cooperation related to what is now called ‘the right to health has its origins in the efforts to develop conventions to prevent the spread of communicable diseases, in particular the adoption

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<sup>66</sup> Jerome J Shestack, ‘The Philosophical Foundations of Human Rights’ in Janusz Symonides, *Human Rights: Concepts and Standards* (Ashgate Dartmouth 2000) 42.

<sup>67</sup> Ibid.

<sup>68</sup> J T Shotwell, ‘The International Labour Organization as an Alternative to Violent Revolution’ (1933) 166 *The Annals of the American Academy of Political and Social Science* 18

<sup>69</sup> Karin Kjellin, ‘Socio-Economic Rights What Relevance in an Era of Globalization?’ (Unpublished Master Thesis International Law, Department of Law Stockholm University 2007).

<sup>70</sup> Ibid.

<sup>71</sup> Dseborah Eade, ‘Preface to Development for Health: Selected articles from Development in Practice, Oxford, UK: Oxfam (UK and Ireland, 1997), 4-5

of sanitary conventions on cholera and the plague.<sup>72</sup> In 1907, the Office International d'Hygiene Publique was established.<sup>73</sup>

In 1945 the United Nations was formed and the need to develop universal standards in the economic and social field was recognized, one of its proclaimed purposes being to solve international problems of an economic social and cultural nature, and the promotion and encouragement of the respect for human rights.<sup>74</sup> The UN Charter expresses several socio-economic goals. For instance it is a goal of the United Nations, in the purpose of avoiding war, to promote social progress and better standards of life in larger freedom and to employ international machinery for the economic and social advancement of all peoples.<sup>75</sup> It is also the mandate of the UN to promote international economic and social cooperation which includes solution to international economic, social, health, and related problems.<sup>76</sup>

In 1945 WHO was established. It is the main authority on implementation of the social human right to health. In 1946, it was articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”.<sup>77</sup> The preamble further states that “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.”<sup>78</sup> The WHO functions include: coordinating international health work; assisting governments in strengthening national health services and related education; initiating campaigns

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<sup>72</sup>Asbjørn Eide, ‘Economic and Social Rights’ in Janusz Symonides, *Human Rights: Concepts and Standards* (Ashgate Dartmouth 2000) 117.

<sup>73</sup> Ibid.

<sup>74</sup> UN Charter.

<sup>75</sup> UN Charter, Preamble.

<sup>76</sup> See UN Charter Chapter IX.

<sup>77</sup> Adopted 22 July 1946 and entered into force 7 April 1948.

<sup>78</sup> Ibid.

to eradicate epidemic, endemic and other diseases; and conducting programmes and projects of health care in many countries of the world.<sup>79</sup>

In 1948, the right to health was recognized under article 25 of UDHR as a right to a standard of living. The right to standard of living included socio-economic rights. Article 25 of UDHR provides that, “Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care...” Although the UDHR is a non-binding instrument as it is a declaration, it is today regarded as the normative foundation of international human rights movement.<sup>80</sup> However the UDHR was not translated into a binding instrument as there were a lot of objections on the judicial enforcement of socio-economic rights.

Those against the inclusion of socio-economic rights argued that unlike the civil and political rights which were enforceable, justifiable and of an “absolute” nature, thus could be implemented immediately; social, economic and cultural rights on the other hand were not of such character and were therefore to be progressively implemented and depended on the availability of resources.<sup>81</sup> This led to its split into two covenants: the ICCPR and ICECSR.

In 1966 the ICESCR was adopted recognized the right of everyone to the enjoyment of the highest attainable standard of physical and mental health under Article 12 as a human right. Article 12 (2) of ICESCR66 provided steps to be taken by the State Parties to achieve full realization of the right to health.<sup>82</sup>

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<sup>79</sup> WHO (n 16).

<sup>80</sup> Biegon (n 3).

<sup>81</sup> Ibid.

<sup>82</sup> These included: the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; the improvement of all aspects of environmental and industrial hygiene; the prevention,

In 2000, the UN Committee on Economic, Social and Cultural Rights (the UN human rights treaty body which monitors States Parties' compliance with the ICESCR) set out its interpretation of the right to health. In 2000 General Comment 14 (GC14) was adopted which interprets the normative content of the right to health.<sup>83</sup> The General Comment sets out extremely broad and wide ranging obligations for signatory States, and has clearly been influenced by health advocates, stating that citizens should not only have a right to 'timely and appropriate healthcare' but also to socio-economic determinants of health such as housing, water and so on.<sup>84</sup>

In 2002, the UN Commission on Human Rights (now replaced by the UN Human Rights Council) appointed a UN Special Rapporteur on the Right to the enjoyment of the highest attainable standard of physical and mental health.<sup>85</sup> He or she is an independent expert tasked with monitoring and reporting on the enjoyment of the right to health globally.<sup>86</sup> The mandate of the special rapporteur on the right to health includes: presenting annual reports to the Human Rights Council and to the General Assembly on the activities and studies undertaken in the view of the implementation of the mandate; to monitor the situation of the right to health throughout the world by identifying general trends related to the right to health and undertaking country visits which provide the Special Rapporteur with a firsthand account on the situation concerning the right to health in a specific country; communicating with States and other concerned parties with regard to alleged cases of violations of the right to health; and promoting the full realization

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treatment and control of epidemic, endemic, occupational and other diseases; and the creation of conditions which would assure to all medical service and medical attention in the event of sickness.

<sup>83</sup>General Comment No. 14 (Twenty-second session, 2000) *The Right to the Highest Attainable Standard of Health* (Article 12 of the International Covenant on Economic Social and Cultural Rights) UN Doc E/C 12/200/4.

<sup>84</sup> Ibid.

<sup>85</sup> Office of the High Commissioner for Human Rights, 'Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' UN Doc E/C 4 Res 31/2002.

<sup>86</sup>Helena Nygren-Krug, 'Health and Human Rights – a Historical Perspective' <<http://www.unspecial.org/UNS673/t24.html>> accessed 12 July 2014.



of the right to health through dialogue with relevant actors by participating in seminars, conferences, expert meetings.<sup>87</sup> At the international level, in addition to CESCR the right to health is also protected in a number of UN international human rights treaties. These include the Convention on the Rights of the Child (CRC),<sup>88</sup> the Convention on the Rights of Persons with Disabilities (CRPD),<sup>89</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>90</sup>

### 2.3 Key Aspects of the Right to Health

The right to health has two major dimensions: first it is a right to access to health services; second, it is a right to a social order which includes obligations of state to take specific measures for the purpose of safeguarding public health.<sup>91</sup> The right to health is also an inclusive right. The CESCR underscores that the right to health is an inclusive right which not only obliges States parties to provide timely and appropriate health care, but also to address the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.<sup>92</sup>

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<sup>87</sup> **United Nations Human Rights**, ‘Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’

<<http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>> accessed 15 November 2014.

<sup>88</sup> Article 24, protects the right of the child to the enjoyment of the highest attainable standard of health and to facilities for treatment of illness and rehabilitation of health.

<sup>89</sup> Article 25, guarantees persons with disabilities the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

<sup>90</sup> Article 12, guarantees women the right to equality in health care and access to services in connection with pregnancy, confinement and post-natal treatment.

<sup>91</sup> Eide (n 62).

<sup>92</sup> General Comment 14 Para 11.

The right to health contains freedoms such as the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment.<sup>93</sup>

## 2.4 Normative Content of the Right to Health

According to CESCR in its General Comment 14 the right to health contains four essential elements. These are availability, accessibility, acceptability and quality. All these essential elements must be fulfilled for one to fully enjoy the right to health. According to Toebes,<sup>94</sup> health is a very broad and subjective concept influenced by a variety of factors including geographical, cultural and socio-economic rights.

### 2.41 Availability.

This implies that functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.<sup>95</sup> These includes the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.<sup>96</sup> The health facilities, goods and services must be within safe physical reach.<sup>97</sup>

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<sup>93</sup>Melik Özden, 'The Right to Health: A Fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions' <<http://www.cetim.ch/en/documents/bro4-sante-A4-an.pdf>> accessed 10 June 2014.

<sup>94</sup>B Toebes, 'The Right to Health' in A Eide et al *Economic and Social Rights: A Textbook* (2001).

<sup>95</sup>General Comment 14 para 12.

<sup>96</sup>Ibid.

<sup>97</sup>Mbazira (n 14).

## 2.42 Accessibility

This implies that health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party.<sup>98</sup> Accessibility has four overlapping dimensions: non-discrimination; physical accessibility; economic accessibility; and information accessibility.

### 2.421 *Non-discrimination*

Discrimination means any distinction, exclusion or restriction made on the basis of various grounds which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms.<sup>99</sup> It implies that health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. These include the access to emergency medical care. This aspect of accessibility treats everyone as equal. Non-discrimination and equality further imply that States must recognize and provide for the differences and specific needs of groups that generally face particular health challenges, such as higher mortality rates or vulnerability to specific diseases.<sup>100</sup>

### 2.422 *Physical accessibility*

It requires health facilities, goods and services to be within safe physical reach of all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities

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<sup>98</sup> Ibid.

<sup>99</sup> Oliver De Schutter, 'Underwriting the Poor: A Global Fund for Social Protection' (Briefing Note 07, 2012).

<sup>100</sup> World Health Organization, 'The Right to Health' Fact Sheet No. 31

<<http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>> accessed 25 August 2014.

and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas.<sup>101</sup>

#### ***2.423 Economic accessibility (affordability):***

It requires health facilities, goods and services to be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.<sup>102</sup>

#### ***2.424 Information accessibility***

Information accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.<sup>103</sup>

#### **2.43 Acceptability.**

All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.<sup>104</sup>

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<sup>101</sup>Mbazira (n 14).

<sup>102</sup> General Comment 14, para 12.

<sup>103</sup> Ibid.

<sup>104</sup> General Comment 14 para 12(c).

## 2.44 Quality.

As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.<sup>105</sup> This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.<sup>106</sup>

## 2.5 States Obligation towards Realization of the Right to Health

### 2.51 Three Types of Obligation

The General Comment 14 imposes three types of obligations to the state: the obligation to respect, fulfil and protect.<sup>107</sup> This typology of state obligations is derived from the work of Henry Shue on basic rights.<sup>108</sup> Henry Shue defined human rights obligations at three levels: the primary level, duty to respect; the secondary level, duty to protect; and the tertiary level, duties to promote and fulfil.<sup>109</sup> Manfred Nowak<sup>110</sup> argues that the human rights theory requires states to respect, fulfill and protect human rights. States therefore have the obligation to respect, fulfill and protect the right to health. An analysis of the right to health on the basis of the tripartite typology of duties demonstrates that the right to health not only gives rise to positive obligations to protect and to fulfil but also embraces negative obligations to respect.

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<sup>105</sup> General Comment 14 para 12 (d).

<sup>106</sup> Mbazira (n 14).

<sup>107</sup> General Comment 14 para 13.

<sup>108</sup> Michael Payne, 'Henry Shue on Basic Rights' (2008) 2 Essay in Philosophy  
<<http://commons.pacificu.edu/cgi/viewcontent.cgi?article=1317&context=eip>> accessed 21<sup>st</sup> July 2014.

<sup>109</sup> Ibid.

<sup>110</sup> Nowak (n 44).

### *2.511 Obligation to Respect*

The obligation to respect is mainly negative in character, in that it obliges the state from directly interfering with the right to health.<sup>111</sup> The obligation to respect human rights refers to the obligation to refrain from state intervention, provided the latter is not admissible under any relevant legal limitations and reservations clauses.<sup>112</sup>

The obligation to respect the right to health requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health.<sup>113</sup> States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.<sup>114</sup> The state must ensure that people enjoy the right to health fully without its interference.

### *2.512 Obligation to Fulfil*

The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.<sup>115</sup> The obligation to fulfill contains obligations to facilitate, provide and promote. The obligation to

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<sup>111</sup>Jacob Mchangama, 'Health as Human Right: The Wrong Prescription' International Policy Network 2009.

<sup>112</sup>Nowak (n 44).

<sup>113</sup> General Comment 14 para 33.

<sup>114</sup> General Comment Para 34.

<sup>115</sup> Nowak (n 44) 48.

fulfil (facilitate) requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health.<sup>116</sup>

States parties are also obliged to fulfil (provide) a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.<sup>117</sup> The obligation to fulfil (promote) the right to health requires States to undertake actions that create, maintain and restore the health of the population.<sup>118</sup> The obligation to promote ensures that the State takes administrative actions that favour the realization of the specific socio-economic rights.<sup>119</sup>

### *2.513 Obligation to Protect*

The obligation to protect requires States to prevent third parties from interfering with the right to health. States should adopt legislation or other measures to ensure that private actors conform with human rights standards when providing health care or other services (such as regulating the composition of food products); control the marketing of medical equipment and medicines by private actors; ensure that privatization does not constitute a threat to the availability, accessibility, acceptability and quality of health-care facilities, goods and services; protect individuals from acts by third parties that may be harmful to their right to health—e.g., prevent women from undergoing harmful traditional practices or third parties from coercing them to do so (by, for example, enacting laws that specifically prohibit female genital mutilation); ensure that third parties do not limit people’s access to health related information and services,

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<sup>116</sup> General Comment 14 para 37.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> G Budlender, ‘Justiciability of the Right to Housing – The South African Experience ‘ in S Leckie (ed) National Perspectives on Housing Rights (2003).

including environmental health; and ensure that health professionals provide care to persons with disabilities with their free and informed consent.<sup>120</sup>

States parties should prevent third parties from violating the right to health in other countries.<sup>121</sup>

When negotiating international or multilateral agreements, States parties should take steps to ensure that these instruments do not have an adverse impact on the right to health.<sup>122</sup> Accordingly the state may be liable for the actions of private individuals and corporations in the health care sector, which may give rise to governments interfering with contractual freedom by requiring private health care providers to pay for medical services not included in insurance schemes.<sup>123</sup>

The special Rapporteur on health has gone even further by stating that pharmaceutical companies may be directly bound by the Covenant despite the fact that the Covenant only binds states and not private companies or individuals.<sup>124</sup>

## 2.52 Progressive Obligations

The duties to progressively realize socio-economic rights were based on the fact that availability of resources is scarce. However States Parties must take steps forward in conformity with the principle of progressive realization. This imposes an obligation to move forward as expeditiously and effectively as possible, individually and through international assistance and co-operation, to the maximum of available resources. In this context, it is important to distinguish the inability from the unwillingness of a State Party to comply with its right to health obligations.<sup>125</sup> More

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<sup>120</sup> Ibid.

<sup>121</sup> General Comment 14 para 35.

<sup>122</sup> Ibid.

<sup>123</sup> WHO Factsheet (n 88).

<sup>124</sup> UNCHR 'Report of the Special Rapporteur on the Right to the Highest Attainable Standard of Health' (2000) UN Doc E/C.12/2000/4.

<sup>125</sup> Waruguru Kaguongo, 'Reflections on the Complexities in Adjudicating Socio-economic Rights from the Perspective of Resource Allocation and Budgetary Issues' in Japhet Biegon and Godfrey Musila (eds), *Judicial*



specifically, article 2 (1) of the ICESCR underlines that States have the obligation to progressively achieve the full realization of the rights under the Covenant. This is an implicit recognition that States have resource constraints and that it necessarily takes time to implement the treaty provisions.

The availability of resources is widely recognized as having an impact on the realization of socio-economic rights. The South African Constitutional Court in defining the term progressive realization in the Grootboom case argued that:

The term ‘progressive realization’ contemplated that the right could not be realized immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realization means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.<sup>126</sup>

General Comment 3 paragraph 9 provides that:

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is

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*Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues* ( 10<sup>th</sup> Series of ICJ Kenya’s Judiciary Watch Reports Series, Kenyan Section of the ICJ 2012).

<sup>126</sup> 2000 (11) BCLR 1169 (CC) para 45.

foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.

States should therefore be able to make use of the available resources to realize the enjoyment of socio-economic rights. Where international assistance is made available, states are under an obligation to use their available resources effectively and to prioritize areas, ensuring that international development aid is utilized towards the progressive realization of socio-economic rights including the right to health.<sup>127</sup> Available resources vary from one state to another and include financial resources, natural resources, human resources, technology and information.<sup>128</sup>

According to the CESCR, in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.<sup>129</sup> Determining what constitutes a State's maximum available resources is not a question of delegating a certain portion of taxes to the fulfillment of economic and social rights, but a question of broader fiscal policy and how the tax system is conceived.<sup>130</sup> In regard to the right to health the state must show that it has used the available resources to enforce the right to health.

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<sup>127</sup>UNCHR 'Report on Observations of the CESCR: Democratic Republic of Congo' (20 November 2009) UN Doc E/C.12/COD/CO/4.

<sup>128</sup> RE Robertson, 'Measuring State Obligations with the Obligation to devote the "Maximum Available Resources" to Realising Economic, Social and Cultural Rights' (1994) 16 Human Rights Quarterly 695.

<sup>129</sup>U.N. Econ. & Soc. Council (ECOSOC), Comm. on Econ., Soc. & Cultural Rights (CESCR), *The Nature of States Parties Obligations*, para.10, U.N. Doc. E/1991/23 (Dec. 14, 1990).

<sup>130</sup> Oliver De Schutter, 'Underwriting the Poor: A Global Fund for Social Protection' (Briefing Note 07, 2012).

## 2.53 Immediate Obligations

While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.

## 2.54 Minimum Core Obligations

According to the General Comment 14, the right to health also has a "core content" referring to the minimum essential level of the right. The minimum core describes the minimum level below which provision of a right should fall. Bueren describes it as the essential elements of the rights without which the right may be rendered useless and basic survival threatened.<sup>131</sup> The State parties to ICESCR have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care.<sup>132</sup>

The CESCR in its General Comment 3,<sup>133</sup> states that a minimum core obligation ensures the satisfaction of, at the very least minimum essential values of the rights incumbent upon each state. The purpose of the minimum core approach is to ensure that irrespective of the available

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<sup>131</sup>G Van Bueren, 'Alleviating Poverty through the Constitution Court' (1999) 15 South African Journal on Human Rights 57.

<sup>132</sup>General Comment 14 para 43.

<sup>133</sup> CESCR, General Comment No. 3 (Fifth Session, 1990), *The nature of States parties obligations (art. 2, para 1 of the Covenant)*, UN.doc E/1991/23.

resources, people have access to the basic needs for the survival. People should therefore be able to access the basic health services.

Another core obligation is the adoption and implementation of a national public health strategy and plan of action.<sup>134</sup> This must address the health concerns of the whole population; be devised, and periodically reviewed, on the basis of a participatory and transparent process; contain indicators and benchmarks by which progress can be closely monitored; and give particular attention to all vulnerable or marginalized groups.

## 2.6 Conclusion

The recognition and development of the right to health under international human rights laws is a positive mark towards its realization. The right to health is broad and complex in its conceptualization. States should aim at protecting, respecting, fulfilling and promoting the right to health. The progressive realization due to availability of resources should not pose as an impediment. The immediate obligations to guarantee the right to health is exercised without discrimination of any kind and the obligation to take steps must be adhered to by states. This includes addressing the historical injustices in the enjoyment of the right to health.

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<sup>134</sup> Ibid.

## CHAPTER THREE

### JUDICIAL ENFORCEMENT OF THE RIGHT TO HEALTH IN THE 2010

#### CONSTITUTION OF KENYA

##### 3.1 Introduction

The promulgation of the constitution of Kenya (CoK) on 27<sup>th</sup> August, 2010 was a major milestone towards the improvement of health standards. Health care is usually provided through diverse public and private mechanisms. However the responsibility of public health are carried out in large measure through policies and programs promulgated, implemented, and enforced by, or with support from the state.<sup>135</sup>

The inclusion of socio-economic rights under Article 43 of the CoK is one of the key features that make the CoK a much-cherished and celebrated document.<sup>136</sup> Implementation of the right to health in Kenya can be through legal, institutional and policy framework. One of the key institutions that promote progressive realization of the right to health under the CoK is the judiciary. A human rights litigator must have access to case law in order to convince the court to apply his or her reasoning in implementation of human rights.<sup>137</sup> A reality that confronts the implementers of the CoK, including courts, is the paucity of literature and lack of clarity on what many of the rights on the Bill of Rights mean, what their content is, the nature of duties entailed

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<sup>135</sup>Jonathan M. Mann and others (eds), *Health and Human Rights* (Routledge 1999).

<sup>136</sup>Biegon (n 3).

<sup>137</sup> Magnus Killander, 'Human Rights: From Recognition to Implementation' in ICJ (Kenyan and Swedish Sections) *Human Rights Litigation and the Domestications of Human Rights Standards in Sub Saharan Africa* (Africa Human Rights and Access to Justice Program volume 2, Kenya Section of the ICJ 2007).

therein and the kind of remedies that can apply under the constitution when rights are breached.<sup>138</sup>

This chapter analyses the constitutional provisions of the right to health in Kenya under the Bill of Rights. While recognizing the legal and policy framework in place that promotes the realization of the right to health, this chapter limits itself to judicial enforcement. It interrogates judicial interpretation of the right to health while relating the same to socio-economic rights listed in Article 43 of the CoK. It analyses the minimum core approach and the reasonableness test approach in adjudicating the right to health and how the Kenyan courts have adopted the two approaches in the interpretation of the right to health.

### **3.2 Right to Health under the 2010 Constitution of Kenya.**

The inclusion of socio-economic rights in national constitution has a long history dating back in the 18<sup>th</sup> century.<sup>139</sup> Although early constitutional reference to socio-economic rights is found in the Constitution of the First French Republic, it was in the Mexican Constitution and in the 1919 Constitution of the Weimer Republic in Germany that socio-economic rights were entrenched as positive rules.<sup>140</sup> Constitutional protection of the right to health gives it the strongest legal protection.<sup>141</sup> In most countries, constitution is the supreme law of the land envisaging the values, morals, aspirations and individuals' contractual obligations with the state. In Africa, Kenya is the second country to include socio-economic rights in its Constitution as a set of

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<sup>138</sup> Ibid.

<sup>139</sup> J Moreno, 'The International Covenant on Economic, Social and Cultural Rights' in F Gomez and K de Feyter (eds) *International Protection of Human Rights: Achievements and Challenges* (2006).

<sup>140</sup> Ibid.

<sup>141</sup> Monica Mbaru, 'The Right to Health: Women's Reproductive and Sexual Rights' in ICJ (Kenyan and Swedish Sections) *Human Rights Litigation and the Domestications of Human Rights Standards in Sub Saharan Africa* (Africa Human Rights and Access to Justice Program volume 2, Kenya Section of the ICJ 2007).

justifiable rights after South Africa.<sup>142</sup> In South Africa the right to health is constitutionally entrenched and justiciable.<sup>143</sup>

The right to health in the CoK is protected together with other socio-economic rights under Article 43.<sup>144</sup> Health care is a fundamental human right indispensable for the enjoyment of many other human rights, in particular the right to food, work, education, housing and water.<sup>145</sup> Article 43(1) (a) recognizes that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.

The judicial enforcement of the right to health has been recognized in various case laws. In the case of *Puhorit and Moore v The Gambia (Puhorit Case)*,<sup>146</sup> the claimants contested the manner in which mental patients in Gambia were handled in detentions conditions that did not guarantee therapy.<sup>147</sup> The African Commission for Human and People's Rights found that the right to health means the highest attainable standard of health linked to all aspects necessary to the realizations of fundamental rights.

In *International Pen and Others (on behalf of Ken Saro Wiwa) v Nigeria*,<sup>148</sup> the African Commission held that the responsibility of a state to ensure the wellbeing of a prisoner heightened due to their susceptible nature and that a denial of medical attention to a prisoner

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<sup>142</sup> Mbazira (n 14).

<sup>143</sup> South Africa Constitution, Article 27(2).

<sup>144</sup> These include the right to: accessible and adequate housing, and to reasonable standards of sanitation; be free from hunger, and to have adequate food of acceptable quality; clean and safe water in adequate quantities; social security; and education.

<sup>145</sup> Margret Vidar, 'The Interrelationships Between the Right to Food and other Human Rights' in Wenche Barth Eide and Uwe Kracht (eds), *Food and Human Rights in Development: Legal and Institutional Dimensions and Selected Topics* ( Volume 1, Intersentia 2005) 144.

<sup>146</sup> Communication 241/2000

<sup>147</sup> The procedure for detention was prescribed under a colonial piece of legislation, the Lunatic Detention Act, under which, upon diagnosis and certification, a person would be detained as lunatic without any procedure for review.

<sup>148</sup> (2000) AHLR 212 (ACHPR 1998).

when critically ill, amounted to a violation of his right to health and life. In *Free Legal Assistance Group v Zaire*,<sup>149</sup> the African Commission found that the failure of the government to provide basic services such as safe drinking water, electricity and medicines amounted to violation of the right to health.

The definition similarity of the right to health in the CoK and General Comment 14; is that the CoK has explicitly provided for the normative content of the right to health by referring to the right to health care services. One of the elements of the right to health is availability, which encompasses the functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party.<sup>150</sup> The CoK has for the first time recognized the protection of reproductive health care as an element of the right to health.<sup>151</sup> The reproductive and sexual rights of women have for a long time been neglected, hence the right to health under the CoK will set a new jurisprudence on the litigation of reproductive health rights.<sup>152</sup>

The CoK under Article 43(2) has also recognized a very important element that no person shall be denied of emergency medical care. The denial of emergency medical care especially amongst the poor is a violation of their right to health. The Indian Supreme Court in the case of *Paschim Banga Khet Majoor Samity v State of West Bengal*<sup>153</sup> found that the government had violated the right to health of the applicant due to the failure of public hospital to extend emergency medical

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<sup>149</sup>Communication No. 25/89 (1995).

<sup>150</sup> General Comment 14 para 12.

<sup>151</sup> Kenya National Human Rights Commission 'Realizing Sexual and Reproductive Health Rights in Kenya: A myth or Reality?' A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya, April 2012.

<sup>152</sup> Though there exist a paucity of jurisprudence on reproductive health rights, they are recognized in a number of international instruments such as Convention on the Elimination of All Forms of Discrimination Against Women and the Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa.

<sup>153</sup> (1996) 4 SCC 37



assistance to the applicant who fell off a train and seriously injured his head. In Africa, most of the poor access their medical services at public health centers as opposed to the wealthy that are able to afford private hospitals and insurance covers.<sup>154</sup>

In Kenya the provision of health services has also been distributed between the National Government and the County Government in order to promote the realization of the right to health. Under the Fourth Schedule of the CoK the National Government is mandated with the adoption of health policies, national referral health facilities and capacity building and technical assistance to counties. The County Government on the other hand promotes County health services.<sup>155</sup>

The CoK also requires the state to take certain measures towards the realization of the right to health. Article 21(1) of CoK requires the state to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. In the case of *Kenya Society for the Mentally Handicapped v Attorney General and Others*,<sup>156</sup> the petitioner brought a case alleging that the economic and social rights of persons with mental disabilities had been violated. The court held that, “the Court’s purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and to a party who comes before the Court”. The court called upon the state to respect, observe, promote and fulfil the fundamental rights and freedoms of individuals.

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<sup>154</sup> Africa Health Dialogue, ‘Will the Poor in Kenya Enjoy the “Right To Health”?’ <<http://africahealth.wordpress.com/2010/11/01/will-the-poor-in-kenya-enjoy-the-%E2%80%9Cright-to-health%E2%80%9D/>> accessed 28 August 2014.

<sup>155</sup> These includes County health facilities and pharmacies; Ambulance services; Promotion of primary health care; Licensing and control selling of food in public places; Veterinary services; Cemeteries, funeral parlours and crematorium; and refuse removal, refuse dumps and solid wastes.

<sup>156</sup> Nairobi Petition No. 155A of 2011 (Unreported).

The State of Kenya has the obligation to ensure that socio-economic rights including the right to health is realized progressively. Article 21 (2) of the CoK requires the state to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43. Article 2 (1) of ICESCR undertakes States due to the constraint of available resources to ensure progressive realization of rights enlisted in the covenant. In the case of *Mitu-Bell Welfare Society v Attorney General & 2 others*,<sup>157</sup> Mumbi Ngugi J. observed that:

The argument that social 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 realization’ of social economic rights, implying that the state must begin to take steps, and I might add is seen to take steps, towards realization 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 the 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.

While the concept of progressive realization applies to all rights under the Covenant, some obligations are of immediate effect, in particular the undertaking to guarantee that all rights are exercised on the basis of non-discrimination and the obligation to take steps towards the

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<sup>157</sup>Nairobi Petition No. 164 of 2011 (Unreported).

realization of the rights, including the right to health, which should be concrete, deliberate and targeted.<sup>158</sup> In this regard, retrogressive measures are not permissible, unless a State can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.

In applying the rights under article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the three principles enlisted in the CoK. These principles have been articulated under Article 20(5) of the CoK. The first principle requires that it is the responsibility of the State to show that the resources are not available. Second in allocating the resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. Finally the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of resources solely on the basis that it would have reached a different conclusion.

The Kenyan courts in adjudicating cases on the violation of rights envisaged under Article 43 have relied on the three principles under Article 20(5). In the case of *Michael Mutinda Mutemi v Permanent Secretary, Ministry of Education & 2 others*,<sup>159</sup> the petitioner claimed that the government had failed to grant his son the right to education as stipulated under Article 43(1) and Article 53 (1) (d) of the Constitution. The Respondents argued that the Government was doing its best to meet its obligations as stipulated in Article 43 of the Constitution which deals with socio-economic rights and in doing so it had set up a bursary fund at the national and constituency level for needy students. The Judge in refuting this claim held that:

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<sup>158</sup> WHO (n 87).

<sup>159</sup> Petition No. 133 of 2013.

Sadly, the Respondents have failed to demonstrate concrete policy measures, guidelines and the progress made by the Government towards the realization of economic rights and particularly the right to education. While I would like to believe that there must be a Department within the Education Ministry which handles cases of needy students, the Government must be seen to take firm steps in achieving the right to education generally and I say so cognizant of the fact that there is a policy dubbed “*the free primary education*” programme which does not cover secondary education. That fact notwithstanding, it is important and fundamental that the Government demonstrates its political and financial commitment in that regard and the actions taken towards the progressive realization of the right to education in a holistic manner.<sup>160</sup>

Judge Isaac Lenaola went ahead to state that ‘this judgment therefore be a wakeup call to the Respondents that Article 43 of the Constitution does not sit there like a defected football player who has lost a match. It is indeed alive and has started the run towards full realization as opposed to a slow shuffle in the name of progressive realization’.<sup>161</sup>

Article 20 (5) (b) of CoK has been applied by Courts to ensure that the government in allocating resources gives priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals. In the case of *John Kabui case*,<sup>162</sup> the High Court had to determine whether a government education policy restricting the number of pupils from private primary schools who could join national high schools was discriminatory and in violation of their right to education under Article 43(1)(f) of CoK.

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid para 21.

<sup>162</sup> [2011] eKLR.

The decision in this case dealt with protection of the vulnerable in enjoying their right to education. The same reasoning can be applied when adjudicating violation of the right to health in order to ensure that the poor and the most vulnerable in society enjoy their right to health. The court in affirming the need to protect the most vulnerable in society held:

The inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitutions transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources

In South Africa in its first case relating to socio-economic rights, *Soobramoney v Minister of Health Kwa Zulu Natal (Soobramoney Case)*,<sup>163</sup> the South African Constitutional Court interrogated the question of the right to access to health care and emergency treatment. The court was called upon to determine whether the health rights in section 27 of the South African Constitution entitled a chronically ill man in the final stages of renal failure to an order obliging a public hospital to admit him to renal dialysis programme of the hospital. According to the guidelines for the programme the applicant was unqualified.

The court in its judgment noted that the Ministry of Health had conclusively proved that there were no funds available to provide patients such as the applicant with the necessary treatment. The court also observed that if the overall health budget was substantially increased to fund all

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<sup>163</sup>[1998] 1 SA 765 (CC).

health care programmes this would diminish the resources available for the State to meet other social needs. The court accepted the State's claim that it did not have adequate resources to meet the medical needs of the applicant.

In the case of *Mathew Okwanda V Minister of Health and Medical Services & 3 others (Okwanda Case)*,<sup>164</sup> the petitioner had been diagnosed with diabetes mellitus, and claimed that he was in dire need of urgent medical attention and he sought the assistance of the court to enforce fundamental rights and freedoms under Article 43 of the Constitution which protected social and economic rights. The High Court argued that even where rights are to be progressively achieved, the State has an obligation to show that at least it had taken some concrete measures or was taking conscious steps to actualize and protect the rights in question.

Similarly the Constitutional Court of South Africa in the case of *Minister of Health v Treatment Action Campaign*<sup>165</sup> noted that although its orders in enforcing socio-economic rights claims may have budgetary implications, the state has to manage its limited resources in order to address all claims from citizens. Although courts lack the direct influence over policy and budgeting for socio-economic rights due to the doctrine of separation of powers, they however have an influence on how resources can be used for realizing socio-economic rights.<sup>166</sup>

The adjudication of the right to health is also subjected to international provisions. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution.<sup>167</sup>

Kenya has ratified the ICCPR, ICESCR and ACHPR. The Africa Charter on Human and People's Rights (ACHPR) guarantees every individual the right to enjoy the best attainable state

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<sup>164</sup> Petition 94 of 2012

<sup>165</sup> 2001 (10) BCLR 1033 (CC), para 38.

<sup>166</sup> K Creamer, 'The Implications of Socio-Economic Rights', in S Liebenberg and K Pillay (eds) *Socio-Economic Rights in South Africa-A Resource Book* (2002).

<sup>167</sup> Article 2 (6) Constitution of Kenya, 2010.

of physical and mental health.<sup>168</sup> The Charter requires States to take necessary measures to protect the people's health and to ensure that they receive medical attention when sick. In order to discharge its duties under international law, the State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.<sup>169</sup>

Claims based on violation of the right to health have also been addressed by international and regional human rights bodies whose decisions Kenyan courts may rely on. In the case of *Social and Economic Rights Action Centre and Another v Nigeria (SERAC)*,<sup>170</sup> the African Human Rights Commission found out that the duty to protect the right from interference by third parties was enunciated and Nigeria was found to have failed to protect its citizen's rights from the actions of third parties. According to the Commission the right to health required the government to desist from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the Ogoni people.<sup>171</sup>

In Kenya in the case of *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme (Satrose)*,<sup>172</sup> where residents had been evicted from their homes, the court referred to international law and foreign laws. In explaining its decision the court stated that:

Due to dearth of locally formulated eviction policies and guidelines, the court has to consider the guidelines adopted by other countries whose Constitutions provide their

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<sup>168</sup>Article 16 African Charter on Human and Peoples Rights.

<sup>169</sup>Article 21(4) Constitution of Kenya, 2010.

<sup>170</sup>Communication 155/96, (2001) AHRLR 60 (ACHPR 2001).

<sup>171</sup>F Coomans, 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' 52 *International and Comparative Law Quarterly* 749.

<sup>172</sup>[2011] eKLR.

people the right to accessible and adequate housing like South Africa. The court will also consider the United Nations (UN) basic principles and guidelines.

### 3.3 Judicial Enforcement of the Right to Health under the new Constitution of Kenya.

The right to health can be easily enforced and generate real benefits for people basing on the right configuration of political will, public opinion and judicial resolve.<sup>173</sup> Enforcement of human rights means claiming an infringement of a subjective right before a body resembling a court to obtain redress or remedial order for violation.<sup>174</sup> Enforcement of rights depend on factors such as the normative content of the right the jurisdiction of the courts, appropriate forum for such enforcement, *locus standi* of the claimants, and the application of the relevant rules to guide such claims.<sup>175</sup>

The willingness of the political branches to accept judicial decisions is also a key consideration to ensure that the right to health is realized. In order to enforce the right to health under the CoK the judiciary must take on an active role in ensuring that the State respects, observes, promotes and fulfills the right to health. The judiciary also has a supervisory role on the legislature to ensure that any law enacted is not inconsistent with the CoK and does not have a negative impact on the realization of the rights stipulated under Article 43.

The role of the judiciary is to protect rule of law, the constitution and human rights.<sup>176</sup> When the judiciary makes equitable decisions, those decisions set a valuable precedent for the future

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<sup>173</sup> 'Using the Law to Improve Access to Treatments' (2002) 7 (2/30 Canadian HIV/AIDS and Law Review 88.

<sup>174</sup> F Viljoen, 'Justiciability of Socio-economic and Cultural Rights: Experiences and Problems' (Unpublished paper, Centre of Human Rights, University of Pretoria).

<sup>175</sup> Lucyline Nkatha Murungi, 'The Right to Education under the Constitution of Kenya: Scope and Prospects for Enforcement' in Biegon and Musila (n 3) 240.

<sup>176</sup> J Patrick White, 'Warren Court Under Attack: the Role of Judiciary in a Democratic Society' (1959) 19 Maryland Law Review 180



resolution of disputes between individuals or between the State and individuals. The judicial process emanating there from provides for the effective implementation of the law, protection of the rights of individuals and groups and sets a standard for the subsequent equitable enforcement of the law.<sup>177</sup> Human rights are one of the national values and principles of governance in Kenya.<sup>178</sup> The protection of human rights as stipulated in the CoK is vital for the development of the country. Courts are an avenue where justice is availed. Courts should therefore be accessed by any individual whose rights have been violated and infringed.

The authority to uphold and enforce the Bill of Rights is a preserve of the High Court of Kenya. The CoK grants the High Court the jurisdiction in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.<sup>179</sup> Under the old constitution, judicial enforcement of human rights was weak, and at some point, the judiciary was itself one of the state machinery that perpetrated human rights violations.<sup>180</sup>

The new CoK provides a new opportunity and tools for judicial enforcement of socio-economic rights in Kenya. Judges can not dismiss socio-economic rights under the CoK as aspirational, neither can they abdicate such rights because of the challenges that such an exercise entails.<sup>181</sup> Some of the challenges that the courts face in enforcement of the right to health include interpretation on the normative content, how to craft an appropriate remedy, balancing the

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<<http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1707&context=mlr>> accessed 1 September 2014.

<sup>177</sup>Fahed Abul-Ethem, 'The Role of the Judiciary in the Protection of Human Rights and Development: A Middle Eastern' (2002) 26 Fordham International Law Journal 760.

<sup>178</sup>Constitution of Kenya, Article 10(2).

<sup>179</sup>Constitution of Kenya. Article 23.

<sup>180</sup>Biegon and Musila (n 35).

<sup>181</sup> Ibid.

doctrine of separation of powers and which approach to adopt between the minimum core approach and the reasonableness test.<sup>182</sup>

The CoK guarantees every Kenyan citizen the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.<sup>183</sup> Every Kenyan whether as an individual or collectively, has a *locus standi* before a judicial or quasi-judicial forum to claim a redress for violation of the right to health.<sup>184</sup> The old constitution had a restricted *locus standi*. The Courts based locus standi on the premise of common law which required a person to be directly affected for him to bring a cause of action.<sup>185</sup> The new constitution has brought a new impetus as anyone can bring forth a human right violation before the court whether affected directly or indirectly.

The court in adjudicating rights related cases can grant appropriate relief including: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24.<sup>186</sup> The courts in adjudicating social economic rights under the CoK 2010 have faced the challenge of crafting the *appropriate* remedy. In the case of a violation of the right to health, such remedies may not be appropriate and the court has to go an extra mile in been innovative of the remedies granted.

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<sup>182</sup> Ibid.

<sup>183</sup> Constitution of Kenya, Article 22.

<sup>184</sup> These includes a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of , a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.

<sup>185</sup> Luyali, 'Impact of Restricted Locus Standi on Access to Justice' <<https://www.kenyaplex.com/resources/2039-impact-of-unrestricted-locus-standi-on-access-to-justice.aspx>> accessed 15 August 2014.

<sup>186</sup> Article 23 (3), Constitution of Kenya.

According to CESCR a state will fail to discharge its obligation under the ICESCR if a number of individuals are deprived of essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.<sup>187</sup> The remedy sought and granted is crucial to the effective enforcement of the right to health. In the *Grootboom* case, the court granted a declaratory order that required the state to act to meet the obligation imposed on it vide section 26(2) of the South African Constitution.<sup>188</sup>

The inclusion of the right to health in Article 43 of the CoK and the vesting of powers of the High Court to entertain claims regarding violations of the rights enlisted in the Bill of Rights establishes the justiciability of socio-economic rights beyond any doubt.<sup>189</sup> Justiciability of socio-economic rights is one of the biggest challenges facing their judicial enforcement socio-economic rights. Biegon in his article argues that courts in Kenya in adjudicating socio-economic rights would have to engage with a web of difficult doctrinal issues around the notion of justiciability of socio-economic rights.<sup>190</sup> This includes the role of the courts in enforcing such rights without upsetting the doctrine of separation of powers. The CoK provides that in applying socio-economic rights where the State claims not to have enough resources to implement the right, the court or tribunal may not interfere with a decision by a State organ concerning the allocation of resources solely on the basis that it would have reached a different conclusion.<sup>191</sup>

The CoK of Kenya has expressly provided for justification of socio-economic rights by providing that the Bill of Rights is an integral part of Kenya's democratic state and is the

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<sup>187</sup> CESCR, General Comment No. 3 (Fifth Session, 1990), *The nature of States parties obligations (art. 2, para 1 of the Covenant)*, UN.doc E/1991/23.

<sup>188</sup> *Grootboom* para 96.

<sup>189</sup> Musila (n 61).

<sup>190</sup> Biegon (n 3).

<sup>191</sup> Constitution of Kenya 2010, Article 20 (c).

framework for social, economic and cultural policies.<sup>192</sup> This is aimed at strengthening adjudication of such rights. The court in applying a provision of the Bill of Rights shall also adopt the interpretation that most favours the enforcement of a right or a fundamental freedom.<sup>193</sup>

### **3.4 Conclusion**

The Kenyan judiciary is well positioned and should embrace the opportunity to contribute to the growing jurisprudence. The Bill of Rights in the 2010 CoK has provided a framework upon which if well followed can lead to effective adjudication of the right to health. The adjudication of the right to health furthers the spirit of the CoK. Although the judicial enforcement of the right to health faces a myriad of challenges, these challenges can be addressed within the ambit of the CoK.

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<sup>192</sup>Constitution of Kenya 2010, Article 19 (1).

<sup>193</sup> Constitution of Kenya 2010, Article 20 (3, b).

## CHAPTER FOUR

### PRACTICAL CHALLENGES FACING JUDICIAL ENFORCEMENT OF THE RIGHT TO HEALTH: LESSONS FOR KENYA

#### 4.1 Introduction

It has been argued that courts of law lack the capacity to adjudicate over socio-economic rights disputes for the following reasons: first, because the courts lack the technical skills to deal with such disputes; second, because it is alleged that courts of law lack the necessary resources that would enable them to adequately handle such disputes; third, that adjudication of socioeconomic rights require courts of law to deal with political matters that should be reserved for the legislative and execute arms of government; and finally ,that resolution of social, economic and cultural disputes raise problems of polycentricism that cannot be adequately handled by courts of law.<sup>194</sup>

This chapter discusses the challenges Kenyan courts face or may face in adjudicating the right to health. It borrows heavily from other jurisdictions such as South Africa and India. The challenges that this chapter will discuss includes the normative interpretation of the right to health and the choice between adopting the minimum core approach or the reasonableness approach, drafting of appropriate remedy when the right to health has been infringed and balancing between making of decisions that touch on the allocation of resources and the doctrine of separation of powers.

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<sup>194</sup>Arwa (n 15).

## 4.2 Interpretation of the Right to Health.

In order to identify violations of the right to health, courts must determine its normative content and corresponding state obligations which are articulated in General Comment 14. Article 43 of the CoK does not provide an explicit normative content of the right to health,<sup>195</sup> although Article 21 of CoK provides states obligation towards the implementation of rights and fundamental freedoms. The state obligations includes taking legislative, policy and other measures including the setting of standards to achieve the progressive realization of the right to health. In interpreting the right to health the High Court of Kenya faces the challenge of defining the specific content of the right to health and choosing which approach to adopt between the minimum core approach and the reasonableness approach.

In interpreting socio-economic rights two standards have been adopted: the minimum core content approach developed by the CESCR,<sup>196</sup> and the reasonableness approach developed the South African Constitutional Court.<sup>197</sup> Musila,<sup>198</sup> gives a number of factors that may be proposed in guiding the adoption of an interpretation approach in respect of economic and social claims by the Kenyan courts: first, due to the indeterminacy of socio-economic rights, whether or not the approach adopted provide determinacy of the rights will be a major consideration in assessing the choice or adaptation of their applicability; second, the choice of approach should be able to provide meaning to what constitutes progressive realization of socio-economic rights in order that state obligations can be realized; third, the overall strategy to adopt in the adjudication will

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<sup>195</sup> It however provides that the right to health includes the right to health care services including reproductive health. This is not exhaustive. It may be interpreted by courts to include other determinants of the right to health.

<sup>196</sup> General Comment No. 3 (n 171).

<sup>197</sup> Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 ZaöRV 167.

<sup>198</sup> Musila (n 61).

warrant some reflections by the court ; and finally the interpretive approach adopted must be such that it allows the courts to manage their delicate relationship with the political branches.

In whether to adopt the minimum core content approach or the reasonableness approach the Kenyan courts will either adopt one or fuse the two in order to reach the needed end results depending on the facts surrounding the case. State has a positive obligation to realize the minimum level of enjoyment of the right to health.<sup>199</sup> The courts therefore have to address the issue of whether the state has fulfilled its minimum core obligations in ensuring that individuals enjoy essential primary health care.

The minimum core content approach specifies the minimum essential elements that the state must provide gives the state a better standard with which to monitor implementation and provides better protection of socio-economic rights generally and basis needs for the vulnerable groups in society.<sup>200</sup> The courts have to assess whether the state has fulfilled its minimum core obligation to provide essential or basic needs taking into account the resources constraints.<sup>201</sup> The minimum core content approach ensures that irrespective of resources people have the basic needs for survival.<sup>202</sup>

Basic needs are essential for a bearable life. In regard to the right to health the state has to ensure it provides essential primary health care.<sup>203</sup> Young suggests three ways of approaching the minimum content core approach. First she proposes the essence approach by situating minimum

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<sup>199</sup>Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in Coomans F (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006).

<sup>200</sup>Musila (n 61) 85.

<sup>201</sup>General Comment No. 3 para 10.

<sup>202</sup> D Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence' (2003) 19 South African Journal of Human Rights 13.

<sup>203</sup> Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 13 Yale Journal of International Law 113.

content of a right in the protection of liberal values such a human dignity, equality and freedom; second, is the consensus approach situating the minimum core in the minimum consensus surrounding socio-economic rights and; third, the obligation approach prescribing the minimum content to a right in light of the obligations attached to it.<sup>204</sup>

The Kenyan courts have not adopted such an approach as envisaged by Young. The Human Rights Committee extended the application of the right to life to the preventive health and food contexts, by requiring the adoption of positive measures to protect life through the elimination of disease epidemics and malnutrition.<sup>205</sup> Some critics of the minimum content core approach argue that is appropriate in litigation of individual socio-economic rights.<sup>206</sup>

While the South African Constitutional Court has rejected the concept of minimum core content approach and adopted a reasonableness test approach in the case law of other countries the minimum core content has been recognized in other jurisdictions. In India in the case of *People's Union for Civil Liberties v Union of India* the Supreme Court of India identified the minimum core of the right to food and succeeded in quantifying what constitutes such a core to be provided to vulnerable groups.<sup>207</sup> The minimum content core approach to the right to health will provide determinacy to the right and give substance to the minimum core legal obligations.

In the Venezuelan case *Cruz del Valle Bermudez v. Ministry of Health and Social Action*, the Supreme Court considered whether those with HIV/AIDS had the right to receive the necessary medicines without charge and, identifying a positive duty of prevention at the core of the right to

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<sup>204</sup> Ibid.

<sup>205</sup> Ibid.

<sup>206</sup> Karin Lehmann, 'In Defense of the Constitutional Court: Litigating Social Economic Rights and the Myth of the Minimum Core' (2006) 22 American University International Law Review 163.

<sup>207</sup> Margit Tveiten, 'Justiciability of Socio-Economic Rights: Reflections on Norwegian and South African Debate and Experience in Wenche Barth Eide and UweKracht (eds) *Food and Human Rights in Development: Legal and Institutional Dimensions and Selected Topics* (Volume 1, Intersentia 2005).



health, it ordered the Ministry to conduct an effective study into the minimum needs of those with HIV/AIDS to be presented for consideration in the government's next budget.<sup>208</sup>

The adoption of the reasonableness test allows the court to avoid intruding into realm of other political branches and therefore upholding the doctrine of separation of powers. The CoK article 20 (5) (c) retaliates the respect of separation of powers. Musila argues that the text in this article adopts a differential language used in the formulation of the reasonableness approach by the South African Constitutional Court, and it would be clear that the reasonableness test is now constitutionalized in Kenya.<sup>209</sup> In *Grootboom case*, the South African Constitutional Court held that:

A court considering reasonableness will not enquire whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirements of reasonableness. Once it is shown that the measures do so, this requirement is met.

Despite adopting the reasonableness approach critics of the South African Constitution Court argue that the court had the opportunity to act as a more effective agent of social change but it missed the point.<sup>210</sup> They argue that the court had been represented with the opportunity to give concrete meaning to individual socio-economic rights by identifying the minimum core of each

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<sup>208</sup>Asha P James, 'The Forgotten Rights : The Case for the Legal Enforcement of Socio-Economic Rights in UK National Law' <[http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW\\_SE\\_rights.pdf](http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLAW_SE_rights.pdf)> accessed 16 September 2014.

<sup>209</sup>Musila (n 61) 86.

<sup>210</sup>Kjelin (n 60).

right.<sup>211</sup> If the South African Court had adopted the minimum content core approach the executive would have a clear understanding of its constitutional requirement in regard to progressive social delivery and individuals would find it easier to hold the executive accountable for its failure to deliver their most pressing needs.<sup>212</sup> In the *TAC Case* the South African Government's argument against a fast and country-wide roll-out of the nevirapine drug was less related to cost implications than a mistrust of the efficacy of the medicine and its producers.

The courts in Kenya when interpreting the right to health will be faced with the challenge of the approach to adopt. However the approach adopted must ensure that it aims at protecting and promoting the right to health. Whether adopting the minimum content core approach which ensures that citizens enjoy the essential primary health care or the reasonableness test which ensures that the courts does not intrude into the territory of the political branches, the end result of the court's decision should be to recognize and protect the right to health. Article 19 of CoK provides that the purpose of protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. This is what the courts should aim at. Where it is necessary it can fuse both the approaches.

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<sup>211</sup>Audrey Chapman, 'Core Obligations Related to the Right to Health and their Relevance for South Africa' in Danie Brand and Sage Russel (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

<sup>212</sup> Ibid.

#### 4.3 Balancing Allocation of Resources and the Doctrine of Separation of Powers

It is argued that elevating socio-economic rights to a status of legal enforceability would threaten the traditional notions of democracy and separation of powers as socio-economic issues constitute core of political policy: the realm of elected representatives rather than an unelected judiciary.<sup>213</sup> The doctrine of separation of powers as expounded by Montesquieu a French theorist in his great work *De L'Esprit des Lois* (1748) argued for a strict separation of the legislature, the executive or administration and the judiciary in order to protect the liberty of the individual.<sup>214</sup> However there is no universally accepted system of separation of powers, countries have therefore adopted the principle of appropriate checks and balances to ensure that each arm of government discharges its duties fully.<sup>215</sup> This gives the judiciary the powers to interrogate other arms of government in promoting and protection of socio-economic rights without intruding into their constitutional realm.

Implementation of socio-economic rights unlike political and civil rights involves allocation of resources.<sup>216</sup> Critiques of this ascertain that enforcement of political and civil rights also has economic ratification.<sup>217</sup> However even though enforcement of civil and political rights may involve economic ratifications, they do not involve a broad redistribution of society's resources or its economic burdens. Redistribution of society's resources is the ambit of the legislature and executive. It is argued that core socio-economic issues such as nutrition, education, health,

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<sup>213</sup> David M. Beatty, 'The Last Generation: When Rights Lose Their Meaning' in David M Beatty *Human Rights And Judicial Review: A Comparative Perspective* (1994)

<sup>214</sup> David Pollard, Neil Parpworth and David Hughes, *Constitutional and Administrative Law: Text with Materials* (4<sup>th</sup>edn, Oxford University Press 2007) 45.

<sup>215</sup> K O'Regan, 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 PER/PELJ 120.

<sup>216</sup> Neier (n 13).

<sup>217</sup> *Ibid.* Neier argues that if one believes in a person's right to a fair trial and that person has to have a counsel, there is going to be a cost in providing counsel for those who can't afford it.

housing, income and social security are already covered by welfare state provision and by regular law in developed countries, it is suggested that the entrenchment of new enforceable rights is unnecessary, and would in fact be detrimental, because it eats into valuable public resources and creates an extra workload for an already-overstretched judiciary.<sup>218</sup>

However even if courts would make positive decisions on how allocation of resources should be distributed, such choices are difficult to make. Resources are scarce and choosing between who should get the limited resources is not easy. Neir gives an example three patients one needing a kidney transplant to save her life, the other needing a heart-bypass operation and another needs a life-long anti-retroviral therapy.<sup>219</sup> All these are life saving measures but they are expensive and because court lacks the resources to execute it will depend on the political good will of the executive and parliament. The courts may also face the challenge of balancing between the need of basic health care for everyone and where individual health care needs may be equivalent to providing primary health care for a thousand people.

The Kenyan courts in adjudicating the right to health will variably be invited to review states allocation of resources and to issue positive orders, an exercise that will inevitably encroach into the sphere of the executive and legislative arms of government.<sup>220</sup> Article 20(5) (c) of CoK is very clear that the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of resources, solely on the basis that it would have reached a different conclusion.

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<sup>218</sup> Ellen Willes, 'Aspirational Principles or Enforceable Rights: the Future of Socio-Economic Rights in National Law' (2007) 22 *AM. U. INT'L L. REV.* 35.

<sup>219</sup> *Ibid.*

<sup>220</sup> Biegon and Musila (n 35).

The executive is the policy making body. Where the executive has allocated resources for various programmes the court does not have the power to interfere with the decision of the executive on the allocation of resources solely on the basis that it would have reached different decision. Although the CoK have granted the High Court the jurisdiction to determine whether any law or anything done under the authority of the constitution is inconsistent or in contravention of the CoK, judges in adjudication the right to health tend to shy away from interfering with resources allocation which is the power of the legislature and executive.<sup>221</sup>

In the case of *Mathew Okwanda Case*<sup>222</sup> the Justice Majanja took a cautious approach in making a decision on whether the government had violated the petitioner's constitutional right to health by not a rolling out an appropriate policy framework. The Judge held that:

It is not unreasonable for the petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions. These, however, are matters of policy which the State is expected to address in light of its clear constitutional obligations. In the absence of a focused dispute for resolution by the court, I am reluctant to express myself on the broad matters raised in the submissions unless there is sufficient material that there has been a violation of the Constitution and the court is required to act to provide the requisite relief.

Foreign courts have also taken different approaches in making decisions that touch on the allocation or distribution of resources where socio-economic rights have been infringed. Some courts completely shy away from interfering with the tripartite scheme of government to those

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<sup>221</sup>Constitution of Kenya, Article 165(3).

<sup>222</sup> [2013] eKLR.

that strongly assert their role in reviewing governments' action. The South African Constitutional Court has taken a cautious approach by trying to maintain an appropriate constitutional balance by restraining itself from dealing with budgetary and resource allocation issues and focusing on assessing the reasonableness of state programmes.

In the case of **Soobramoney**<sup>223</sup> the South African Constitution failed to review states' budgetary allocations and accepted the states' claim that it did not have adequate resources to meet the medical needs of the claimant. In the *TAC Case*<sup>224</sup> the court restrained itself and argued that the South African Constitution contemplated rather a restrained and focused role of the courts. However the court intervened by requiring the state to remedy its programme that restricted access to a drug that prevented mother-to-child transmission of HIV.

Kenyan courts in adjudicating the right to health should draw a clear understanding of their role in enforcing socio-economic rights vis-à-vis the doctrine of separation of powers.<sup>225</sup> Article 20(5) of CoK articulates three principles upon which courts and tribunals should be guided with in the scenario where the state claims that it does not have enough resources to implement the rights under Article 43. The courts can therefore assess the states allocation of resources where: the state has failed to show that the resources are not available; the state has failed to give priority to ensuring the widest possible enjoyment of a socio-economic right including the vulnerability of particular groups and individuals; and finally the courts can interfere with states' allocation of resources provided their decision is not arrived solely on the basis that it would have reached a different conclusion.<sup>226</sup>

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<sup>223</sup>[1998] 1 SA 765.

<sup>224</sup>(2005) 5 SA 721 (CC).

<sup>225</sup>Biegon and Musila (n 35) 46.

<sup>226</sup>Constitution of Kenya. Article 20(5).

The courts should not fear to issue positive orders to the state where it is clear that its allocation of resources is not in conformation with the CoK. In the *Mwai Kabui Case*, the judge held that:

Socio-economic rights are by their very nature ideologically loaded. The realization of these rights involves the making of ideological choices which, among others, impact on the nature of the country's economic system. This is because these rights engender positive obligations and have budgetary implications which require making political choices. In our view, a public body should be given appropriate leeway in determining the best way of meeting its constitutional obligations.

Jotham Okome Arwa,<sup>227</sup> argues that the court's decision in *Mwai Kabui Case* appears to be making three fundamental pronouncements in the process of developing socio-economic rights jurisprudence for Kenya: First, the High Court makes it clear that, while adjudicating socio-economic rights disputes, the courts should not focus on the rights of the individual, applicant, but should instead focus on the impact of its decision on the realization by all citizens of their socio-economic rights; second the court states categorically that the available resources are not adequate to facilitate the immediate provision of socio-economic goods and services to everyone on demand; third the court took the position that the court should leave resolution of socio-economic conflicts to the executive and legislative branches of government. This was a wrong argument. The constitution gives the court a leeway to interfere with the decision of state concerning the allocation of resources as long as it is not solely based on the fact that it would have reached a different conclusion.<sup>228</sup>

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<sup>227</sup> Arwa (n 8).

<sup>228</sup> Constitution of Kenya, Article 25 (5) (c).

Article 20 (5) (c) does not completely bar courts, tribunals or other authorities from interfering with decisions concerning allocation of available resources<sup>229</sup> The Courts only have to draw a line when they find it necessary to interfere with decisions of state organ and how to address violations where resources are implicated. One way is to ask the state organ to adopt the PANTHER principles of the human right based approach when allocating available resources.

#### 4.4 Crafting of Remedies and Monitoring the Implementation of the Right to Health

Once a court has adjudicated a claim and found that indeed there exists a violation of the right to health, it has to formulate an appropriate remedy. Formulating appropriate remedies for socio-economic rights is more complex than formulating an appropriate remedy of civil and political rights violations which requires that the victim be put in the position he would have been in were it not for the violation.<sup>230</sup> Article 23(3) grants the Court with the powers to grant an appropriate remedy and lists some of the remedies the court may grant when there is a violation of rights. However most of these conventional remedies are inappropriate in the context of socio-economic rights.<sup>231</sup> A declaration of rights is best only in situations where there are multiple ways through which the state may remedy a violation and is attractive to a court that is reluctant to intrude too much into the executive and legislative spheres.<sup>232</sup> However enforcement of declaration of rights is usually at the mercy of the political will of the state.

In most cases states may not comply with the court's decision where it declares the violation of the right to health. In this regard the court has to exercise supervisory role over the implementation of the remedy declared. Socio-economic rights violations are systemic in nature,

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<sup>229</sup> Kaguongo (n 126).

<sup>230</sup> K Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative law* (2008)

<sup>231</sup> Arwa (n 15).

<sup>232</sup> Biegon (n 3).



often reflecting underlying structural failures that result in historical denial of rights for large numbers of groups and individual.

The courts have to be innovative while fashioning appropriate remedies having regards to the facts and circumstances of the particular cases that they are dealing with socio-economic rights. Mbazira<sup>233</sup> recommends the use of structural interdicts which he argues are most ideal in the context of socio-economic rights.<sup>234</sup> He identifies five models of structural interdicts; the bargaining model,<sup>235</sup> the legislative/administrative hearing model,<sup>236</sup> the expert remedial formulation model,<sup>237</sup> the report back to court model,<sup>238</sup> and the consensual remedial model.<sup>239</sup> So far none of the models have been adopted by then Kenyan courts in litigating the right to health and other socio-economic rights.

The government should submit its periodic reports on the status of socio-economic rights in general and the right to health in particular in the country to the CDESCR as per the provisions of the ICESCR. The government should further take concrete steps to ensure the protection, respect and fulfillment of all ESC rights.

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<sup>233</sup> Christopher Mbazira, 'Litigating Socio-Economic Rights in South Africa: A choice between Corrective and Distributive Justice (Pretoria University Law Press 2009).

<sup>235</sup> This model involves the court in making remedial decisions through negotiations by parties involved in the case.

<sup>236</sup> This model enjoins the court to provide some sort of a public hearing in which all persons who are interested in the dispute are allowed to express their views before a decision is made by the court.

<sup>237</sup> This model requires the court to appoint an expert to help the court with the technical expertise required in the case.

<sup>238</sup> This model involves the court in issuing directives or advice to the relevant government on terms that the said department is required to report back to the court regarding the progress made in compliance with the directives or advice.

<sup>239</sup> This model involves secure the consensus of the parties and third parties in the formulation of an appropriate remedy.

## 4.5 Conclusion

The practical challenges facing Kenyan courts in the adjudication of the right to health and other socio-economic rights can be addressed. Although the right to health is broad and complex in its conceptualization and implementation it does not mean that it cannot be actualized. In adjudicating the right to health the courts should adopt both the minimum core content approach and the reasonableness test approach ensuring that the human dignity of the litigant is protected. Whatever approach the court adopts should aim at promoting and implementing the Bill of Rights as envisaged in the CoK.

The doctrine of separation of powers does not bar state organs to have checks and balances in place. The judiciary can therefore employ the principle of checks and balances to ensure that the executive's policies are meant to ensure that the right to health and other socio-economic rights are implemented.

When a human right is violated remedies are usually provided. Formulating appropriate remedies for violation of socio-economic rights is more complex than formulating remedies for civil and political rights violation. However this should not bar the courts from crafting the remedies and monitoring the implementation of the right to health.

## **CHAPTER FIVE**

### **5.0 CONCLUSIONS AND RECOMMENDATION**

#### **5.1 Introduction**

This chapter seeks to highlight what the research has accomplished and ends by suggesting the way forward in addressing the challenges facing judicial enforcement of the right to health. The recommendations raised in this chapter are limited to judicial enforcement of the right to health.

#### **5.2 Conclusions**

##### **5.21 Chapter Summary**

Chapter One introduced the background to the study, interrogated the literature review on the right to health with the aim of identifying research gaps, discussed the theoretical and conceptual framework links with the right to health. Chapter one also introduced the research problem, research questions, research objectives, problem statement, justification for the study and the research methodology to be used.

Chapter two summarized the historical development of the right to health under international human rights law and linking it to its constitutional protection in the CoK. It analysed the normative content of the right to health and the State's obligations towards its realization. The states obligation discussed included the obligation to protect, respect, fulfil and progressive realization of the right to health. This chapter concluded that the right to health is a fundamental right upon which the realization of other socio-economic rights is impinged.

Chapter three interrogated judicial enforcement of the right to health in the CoK by the Kenyan Courts. It analyzed constitutional provisions that protect the right to health and how such provision will be interpreted by Court when enforcing the right to health. In discussing the judicial enforcement of right to health this chapter analyzed some of the decisions made by High Court of Kenya when adjudicating the right to health. It also looked at other previous decisions that the High Court and the South African Constitutional Court had delivered on enforcement of socio-economic rights. It also discussed how the courts had interpreted progressive realization of socio-economic rights. This chapter concluded that the Kenyan Courts face a lot of doctrinal challenges in the judicial enforcement of the right to health and other socio-economic rights.

Chapter four addressed the three key challenges that the Kenyan Courts face or may face in adjudicating the right to health. These challenges included: the normative interpretation of the right to health and the choice between the minimum content core approach developed by CESCR and the reasonableness test approach developed by the South African Constitutional Court; the balancing between making decision that touch on allocation of resources and respecting the doctrine of separation of powers; and finally drafting an appropriate remedy when the right to health has been infringed and how to monitor the implementation. This chapter concluded that the Kenyan Courts faced the mentioned challenges which should be addressed urgently and Kenya can borrow from other jurisdictions. It also concluded that whatever approach that will be adopted it should not contravene with the spirit of the CoK.

Chapter five discusses findings and makes a general conclusion on the judicial implementation of the right to health. Based on the findings it proceeds to proffer recommendations in order to address the implementation of the right to health in the CoK and the challenges that the Kenyan

Court face. The recommendations are aimed at providing a general framework upon which socio-economic rights in the CoK can be fully realized despite the challenge of limited resources.

### 5.21 General Conclusions

The right to health is recognized under international human right law. It is interlinked with other rights such as the right to life, right to food, right to clean water and sanitation amongst others. The realization of right to health is very vital for the survival of the human kind. Therefore state must ensure it is protected, fulfilled and respected. Its normative content is accessibility, availability, acceptability and quality.

The justiciability of the right to health in Kenya is not in contention. Kenya is the second country in Africa to recognize the right to health after South Africa. The CoK of Kenya has recognized it as a socio-economic right under the CoK together with other socio-economic rights. Realization of the right to health is therefore a State's obligation to ensure that it is protected, respected and fulfilled. Although one challenge that will face the implementation of the right to health is scarcity of resources the Kenyan government has to ensure that it utilizes the available resources to provide the basic primary health for people.

So far the right to health in Kenya has been adjudicated under the 2010 CoK. In the cases adjudicated courts have rejected the minimum content core approach developed by CESCR and adopted the reasonableness test approach developed by the South African Constitutional Court. The Kenyan courts have borrowed heavily from the South African jurisprudence especially the *TAC*, *Grootboom* and *Soobramoney* cases when adjudicating the right to health and other socio-economic rights. Implementation and realization of socio-economic rights is based on States available resources. The courts have failed in recognizing the facts and circumstances that were

attached to the South African cases and went ahead and applied the same in the Kenyan scenario. The courts should therefore strive to adopt the minimum content core approach to ensure that Kenyans enjoy the basic primary health care. However a hybrid model where the reasonableness test approach can also be adopted in order to uphold the doctrine of separation of powers.

The judiciary in its decisions is trying to uphold the doctrine of separation of powers by not interfering with the allocation of available resources. Although the doctrine of separation of powers designates powers to different arms of government as envisaged by Montesquieu, the doctrine is not essentially strict. The principle of checks and balances allows state organs the power to check upon each other to ensure that each arm discharges its powers constitutionally. The judiciary should not be afraid to interfere with allocation of available resources as long as it is guided by the principles articulated under Article 20 (5) of CoK.

The courts also face the challenges of drafting an appropriate remedy. So far the Courts have only granted remedies in the form of declarations and injunctions. These traditional remedies are not suited for socio-economic rights violations. Effective judicial response for violations of socio-economic rights is mostly dependent on the form of justice that the courts see themselves in dispensing justice.

From the comparative studies it is clear that domestic jurisdictions have gone a great length to give effect to socio-economic rights and the right to health in particular as justifiable rights. The Kenyan judiciary should strive to contribute to this growing jurisprudence taking into account that Kenya is the second country in Africa after South Africa that has constitutionalized the right to health and other socio-economic rights. Kenya's interpretation and judicial enforcement of the right to health will have an impact on other countries in the African Region.

Kenya, like many African countries faces many challenges in the health sector which are systematic and structured. So far in addressing those challenges Kenya has not adopted a human right based approach. Such challenges include corruption, strikes that have led to death, poor health workers pay, devolution of health services that has received resistance, inefficiency in public service, poor physical access to medical services, professional negligence, NHIF scandals amongst other. In order to address these challenges and structural impediment there is need of adopting a human right based approach.

### **5.3 Recommendations**

From the findings of this study, the following recommendations are made in ensuring not only right to health is judicially enforced but it's fully realized with other socio-economic rights articulated under article 43 of the CoK.

Kenyan Courts in adjudicating the right to health should recognize that it is constitutionally protected hence justifiable. CoK is supreme and therefore constitutional supremacy must be upheld. It should therefore foster at promoting the spirit of the constitution and the Bill of Rights recognizing that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Judicial enforcement of the right to health should aim at protecting the most vulnerable in the society by ensuring that they can access the basic primary health care and that state's policies and programmes do not violate this right.

In confronting the separation of powers challenge, the courts have constitutional mandate to disturb resource allocation decisions of the political branches. Article 20(5) (c) does not bar court from interfering with a decision by a State organ concerning the allocation of available resources. However such interference must not be solely on the basis that it would have reached

a different conclusion. The court can interfere with state allocation of available resources where the state fails to give priority to ensuring the widest possible enjoyment of the right to health having regard to the prevailing circumstances including the vulnerability of particular groups or individuals.

When interpreting the right to health the courts should adopt a hybrid approach of the minimum content core approach and the reasonableness test approach according to the prevailing circumstances. The hybrid model should enable the courts to lead to the full realization of the promise of socio-economic rights and the right to health in the context of transformative constitutionalism. In adopting the minimum content core approach the courts should rely on Article 2(6) of CoK, and apply international law.

The right to health is a broad, multifaceted right encompassing several elements. The courts will be faced with some of these challenges. Courts should therefore examine the various approaches adopted in various jurisdictions in enforcing the right to health and tease out lessons that Kenya can learn. Currently Kenya has borrowed heavily from the South African Constitutional Court especially in adopting the reasonableness approach. The courts should draw its comparison beyond the African Continent when adjudicating the right to health in order to provide a broad platform of interpreting the right to health and the violations attached to it.

The Kenyan courts should also aim at harmonizing the CoK with the international human rights framework. Article 2 (5) and 2(6) recognizes the adoption of any general rules of international law and treaty or convention ratified by Kenya to form part of the law of Kenya under the CoK. Kenya so far has ratified the UDHR and ICESCR. However in interpreting socio-economic rights the Kenyan courts have adopted the reasonableness approach developed by South Africa



instead of the minimum content core approach developed by CESCR. This threatens to create disharmony between the international legal framework and the domestic legal framework, something which can happen in all countries that have ratified the ICESCR and which have also constitutionalized socio-economic rights.

Human rights NGOs and monitoring institutions such the Kenya Human Rights and Equality Commission should expand the scope of their work to include socio-economic rights. They should create awareness amongst the public on the normative content of socio-economic rights, state's obligations and individuals' duties in realizing them. The public should be educated on the constitutional provision, how to make claims when the right to health violations exists, how to determine the right to health violations and the remedies available. The civil society should also aim at prompting public interest litigation. The NGOs should also take an active role in reminding the government of its obligation to file its periodic reports to the CESCR, and should complement such reports with their own shadow reports. The Office of the Ombudsman should use its constitutional mandate more proactively to investigate all human rights violations, with a particular focus on ESC rights.

## BIBLIOGRAPHY

1. Arwa JO, 'Litigating Socio-economic Rights in Domestic Courts: The Kenyan Experience' (A paper presented at the Colloquium on the African Charter on Human and Peoples Rights held in Cape Town South Africa between 7<sup>th</sup> and 10<sup>th</sup> November 2012).
2. Beatty DM, 'The Last Generation: When Rights Lose Their Meaning' in David M Beatty (ed) *Human Rights And Judicial Review: A Comparative Perspective* (1994).
3. Beletsky L, Ezer T, Overall J, Byrne I and Cohen J, 'Advancing Human Rights in Patient Care: The Law in Seven Transitional Countries' Open Society Foundations.
4. Biegon J and Musila G (eds), *Judicial Enforcement of Socio-economic Rights in the 2010 Constitution: Conceptual and Practical issues*( 10<sup>th</sup> Series of ICJ Kenya's Judiciary Watch Reports Series, Kenyan Section of the ICJ 2013).
5. Bilchitz D, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence' (2003) 19 South African Journal of Human Rights 13.
6. Byre AD and Byfield BY (eds), *International Human Rights Law in the Commonwealth Caribbean* (International Studies in Human Rights, Martinus Nijhoff Publishers 1991).
7. Chapman A, 'Core Obligations Related to the Right to Health and their Relevance for South Africa' in Danie Brand and Sage Russel (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

8. Chapman AR, 'Violations of the Right to Health' SIM Special 87.
9. Coomans F (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006).
10. Coomans F, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 ZaöRV 167.
11. Desierto D.A, 'Justiciability of Socio-Economic Rights: Comparative Powers, Roles, and Practices in the Philippines and South Africa' (2009) 11 Asian-Pacific Law & Policy Journal 114.
12. Eide WB and Kracht U (eds) *Food and Human Rights in Development: Legal and Institutional Dimensions and Selected Topics* (Volume 1, Intersentia 2005).
13. English R and Havers P (eds), *An Introduction to Human Rights and the Common Law*(Hart Publishing 2000).
14. Go4Health, *Realizing the Right to Health for Everyone: The Health Goal for Humanity* (Interim Report) (September 2013).
15. Government of Kenya, 'Transforming Health: Accelerating Attainment of Health Goals' (Health Sector Strategic and Investment Plan (July 2013-July 2014).
16. Government of Kenya, Constitution of the Republic of Kenya, 2010.
17. Helena Nygren-Krug, 'Health and Human Rights – a Historical Perspective' <<http://www.unspecial.org/UNS673/t24.html>> accessed 12 July 2014.

18. Herring J, *Medical Law* (Pearson Education Limited 2008).
19. Hope T, Savulescu J and Hendrick J, *Medical Ethics and Law: The Core Curriculum* (Churchill Livingstone 2003).
20. <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>
21. International Commission of Jurists, *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa*, (African Human Rights and Access to Justice Program Casebook Series Volume 2, The Kenya Section of the International Commission of Jurists 2007).
22. Janus Symonides (ed), *Human Rights: Concepts and Standards* (Ashgate Dartmouth 2000).
23. Krieken PJ, *Health, Migration and Return: A Handbook for a Multidisciplinary Approach* (TMC Asser Press 2001).
24. Lehmann K, 'In Defense of the Constitutional Court: Litigating Social Economic Rights and the Myth of the Minimum Core' (2006) 22 American University International Law Review 163.
25. Leonard EW, 'State Constitutionalism and the Right to Health Care' 12 Journal of Constitutional Law 1325.
26. Manfred Nowak, *Introduction to the International Human Rights Regime* (Martinus Nijhoff Publishers 2003).
27. Mann JM, Gruskin S, Grodin MA and Annas GJ (eds), *Health and Human Rights* (Routledge 1999).
28. Mbazira C, 'Litigating Socio-Economic Rights in South Africa: A choice between Corrective and Distributive Justice (Pretoria University Law Press 2009)

29. MelikÖzden, 'The Right to Health: A Fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions'
30. Neier A, 'Social and Economic Rights: A critique' Human Rights Brief Washington College of Law 2006.
31. Nolan A, Porter B, Langford M, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' Center For Human Rights And Global Justice Working Paper Number 15, 2007.
32. O'Regan K, 'Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution' (2005) 8 PER/PELJ 120.
33. Pan H, 'Conceptualizing Human Rights Application to Health Work: A Typology of Rights-Based Approaches to Health'( Degree of Bachelor of Arts in Legal Studies in the College of Letters and Science, University of California at Berkeley May 2013).
34. Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press 2005).
35. Pollard D, Parpworth N and Hughes D, *Constitutional and Administrative Law: Text with Materials* (4<sup>th</sup>edn, Oxford University Press 2007) 45.
36. Roach K, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative law* (2008)

37. Roschmann C and Wendod P (eds) 'Economic Rights as Human Rights' (Stakeholders' Conference, South Africa Cape Town, September 2009).
38. Steiner HJ, Alston P and Goodman R (eds), *International Human Rights in Context: Law, Politics Morals* (3<sup>rd</sup>edn, Oxford University Press 2007).
39. Swart M, 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 South African Journal of Human Rights 215.
40. The Kenya National Commission of Human Rights, 'Realizing Sexual and Reproductive Health Rights in Kenya: A myth or reality?' A Report of the Public Inquiry into Violations of Sexual and Reproductive Health Rights in Kenya , April 2012
41. The Kenya Section of the International Commission of Jurists, *Handbook on Human Rights for Judicial Officers* (Kenya Section of the International Commission of Jurists, 2001).
42. UNGA, 'Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt' (17<sup>th</sup> January 2007) 4<sup>th</sup> session 2006 UN Doc A/HRC/4/28.
43. Verma S, 'Justiciability of Economic, Social and Cultural Rights: Relevant Case Law' [2005] The International Council on Human Rights Policy.
44. WHO, *Global Strategy for Health for All by the Year 2000* (Geneva, 1981).
45. Willis E, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' *Am. U. Int'l L. Rev* 35.
46. Young KG, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 13 *Yale Journal of International Law* 113.