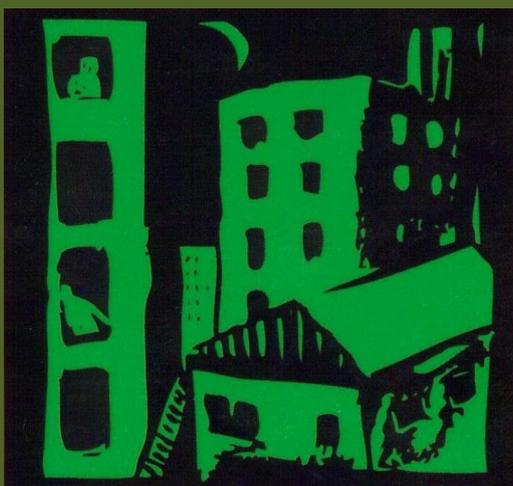


LAW
DEMOCRACY
& DEVELOPMENT



VOLUME 17 (2013)

DOI: <http://dx.doi.org/10.4314/ldd.v17i1.20>

ISSN: 2077-4907

Litigating socio-economic rights in domestic courts: The Kenyan experience

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1 INTRODUCTION

Bethwell A Ogot argues that the pursuit of development without incorporation of a socio-economic agenda is bound to be counter-productive.¹ During the

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¹ Ogot argues that incorporation of socio-cultural issues is indispensable for the success of the development agenda. He argues that Kenya, like other African states, was preoccupied with the quest for development on attainment of independence. But development as a process and an objective was interpreted to mean modernisation, defined largely in economic terms. Cultural and social issues were not given any priority. It was believed that traditional social and cultural values and institutions were incompatible with modernity and this he argues is what led to the failure of the Kenyan development agenda. Ogot *BA Building on the indigenous: Selected essays, 1981-1998* ((1999).

colonial period, the white minority rulers pursued a development agenda that involved the exclusion as well as exploitation of the native population.² Colonial laws and policies excluded Africans from active participation in the economic as well as political life of their communities. The most productive parcels of land were expropriated by the state and given to the white settlers and the natives were excluded from the productive sectors of the economy to avoid competition and conflicts with the white settlers.³ This resulted in the aggravation of social tensions and generated disharmonies, gross inequalities, poverty and social conflicts and precipitated a very vicious struggle for independence. For this reason, one would have expected the pursuit of socio-economic rights to have been chosen as the primary objective of the independent state, but this was not to be.

The first Kenyan Constitution, which was negotiated at independence, incorporated many of the conventional civil and political rights,⁴ but was conspicuously silent on socio-economic rights. This created a situation where very little attention was given to socio-economic rights and culminated in a socio-economic crisis. The majority of the populace lived in squalid conditions. Poverty levels rose sky-high. The gap between the poor and the rich kept on widening, and maternal mortality ratio soared to a level where less than half of women received care when giving birth.

In rural areas, in particular, long distances to health facilities, and lack of ambulances and health care professionals discouraged mothers from seeking health care. Rapid urbanisation also created dense population hot-spots in towns, characterized by deplorable living conditions, poor sanitary conditions and chronic poverty. Many people die of treatable diseases caused by lack of toilet facilities, and poor quality water for cooking, drinking and maintenance of hygienic standards. In both urban and rural areas the majority of people lack access to quality education, food and housing.

As illustrated above, the socio-economic situation in Kenya has been so dire that it even attracted the attention of the United Nation's Committee on Economic Social and

² Colin Leys in "Underdevelopment in Kenya - The political economy of neo-colonialism 1964 - 1971" (1973) argues that the under development that is still being experienced in Kenya today was caused by the exclusionist and exploitative policies that have their roots in the colonial state.

³ Leys argues that it was the policy of exclusion and exploitation of the native population from the productive sectors of the economy that led to the socio-economic crisis that is still being experienced in Kenya today. He makes the point thus: The starting point of under-development theory is the period in which any given region of today's Third World began to be progressively incorporated into a permanent relationship with the expanding capitalist economy. Sometimes the initial relationship was largely one of simple plunder and extortion though generally represented as trade (as in the case of the slave trade), but even where the trade was based on exchange, the essence of it was that it was conducted on unequal terms, mainly because it was backed by superior force on the side of the capitalist "traders". The profits formed part of the original or primitive accumulation of capital in Europe, which was necessary before capitalist accumulation based on wage labour could occur". Leys (1973) at 8.

⁴ The civil and political rights that were included in the Bill of Rights of the independence Constitution were: the right to life (s 71), the right to personal liberty (s 72), protection from slavery and forced labour (s 73), protection from inhuman treatment (Section 74), protection from arbitrary search or entry (s 76), right to protection of law (s 77), freedom of conscience (s78), freedom of expression (s 79), freedom of assembly and association (s 80), freedom of movement (s 81) and the right to non-discrimination (s 82).

Cultural Rights. In November, 2008, at its 41st session⁵, the Committee asked the Kenya government questions on the steps it was taking inter alia to address what it perceived as a socio-economic crisis in the country.

One of the important steps that the Kenya government took to address the socio-economic problem was the enactment of a new Constitution, the Constitution of Kenya 2010, which entrenched virtually all categories of socio-economic rights. The main challenge, however, has been how to translate the newly introduced socio-economic rights from paper rights to substantive rights. This article examines Kenya's experience in this regard. Part II examines how the constitution of Kenya 2010 has endeavoured to revitalise socio-economic rights, while Part III looks at the challenges facing socio-economic rights litigation before the Kenyan courts. Part IV then offers some insights on how to translate socio-economic rights from abstract paper rights to fully-fledged rights, while Part V concludes with lessons that the world can learn from the Kenyan experience with socio-economic rights litigation.

2 REVITALISATION OF SOCIO-ECONOMIC RIGHTS LITIGATION UNDER THE CONSTITUTION OF KENYA 2010

If there is one great achievement, more than all others, that the Constitution of Kenya 2010 has made, it is the way it has revitalised socio-economic rights litigation in Kenya by creating new opportunities for socio-economic rights litigation that were hitherto non-existent. The following are some of the new opportunities for the development of progressive jurisprudence on socio-economic rights that have been opened up by the Constitution of Kenya 2010:

- (a) It has entrenched a very wide array of socio-economic rights. It is indeed the first constitution to include virtually all categories of socio-economic rights;
- (b) It has abandoned the traditional dualist doctrine, and instead created a monist state, thereby allowing the direct application, in domestic courts, of the various international human rights instruments that have been ratified by Kenya;
- (c) It has encouraged a rights-centric interpretative approach;
- (d) It has established several domestic human rights institutions with the mandate to promote and protect human rights;
- (e) It has adopted very liberal standing requirements; and
- (f) It has enabled the use of international human rights norms as extrinsic aids to statutory as well as constitutional interpretation.

As already pointed out earlier, the new Constitution has entrenched a wide array of socio-economic rights that were hitherto non-existent under the old Constitution. These include the following:

- (a) The right to the highest attainable standard of health, which includes the right to health care services including reproductive health care;
- (b) The right to accessible and adequate housing, including the right to reasonable standards of sanitation.
- (c) The right to freedom from hunger, including the right to adequate food of acceptable quality

⁵ The 41st Session of the United Nations Committee on Economic, Social and Cultural Rights was held in Geneva from 3 – 21 November 2008 during which time the report submitted by the Kenya government was considered and certain recommendations made.

- (d) The right to clean and safe water in adequate quantities;
- (e) The right to social security; and
- (f) The right to education.⁶

The fact that these categories of rights are expressly referred to in the Constitution means that they are justiciable and consequently enforceable, both horizontally as well as vertically, before the local courts. This has greatly revitalised the litigation of socio-economic rights before domestic courts. Besides broadening the categories of socio-economic rights that are to be enjoyed by citizens, the Constitution of Kenya 2010 has also greatly promoted the application of international law in domestic courts thereby paving the way for the development of a very progressive socio-economic rights jurisprudence in Kenya. Article 2(6) of the Constitution of Kenya 2010 provides as follows: "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

This provision marks a fundamental departure from the common law doctrine of dualism to which Kenya subscribed under the independence Constitution.⁷ Under the dualist doctrine, significant entitlements pursuant to various international instruments ratified by Kenya remained in abeyance and could not be directly enforced before the domestic courts simply because they had not been domesticated⁸. Accordingly, prior to the 2010 Constitution, successful reliance by individuals and groups on international human rights instruments was not guaranteed due to the fact that international law could not automatically apply in domestic courts without undergoing a process of transformation through domestication.

The non-application of international instruments by domestic courts in Kenya was confirmed in *Ukunda v Republic*⁹ as well as in *Pattni and Another v Republic*.¹⁰ In both these cases, as well as in several others, Kenyan courts held that norms of international law had no direct application in domestic courts. Article 2(6) of the new constitution has now changed all this with the result that international instruments ratified by Kenya now apply directly before domestic courts.

Kenya has ratified numerous international instruments that contain provisions dealing directly with socio-economic rights. These include the International Covenant on Socio-Economic and Cultural Rights, and the International Covenant on Civil and Political Rights, among others.¹¹ Those instruments now apply directly in domestic

⁶ All these categories of rights are entrenched in Art 43 of the Constitution.

⁷ See Ambani JO "Navigating the 'Dualist Doctrine'. The case for progressive jurisprudence on the application of international human rights norms in Kenya" in Killander M(ed) *International law and domestic human rights in Africa* (2010) at 25.

⁸ Ambani (2010) at 25

⁹(1970) EA 512. In this case the Court ruled that international law is not among the categories of laws that apply directly in Kenyan courts by virtue of the provisions of the Judicature Act.

¹⁰(2001) KLR 262. In this case, Githinji, Osiemo and Otieno JJ ruled that even though international norms are of persuasive value, they are not binding in Kenya unless they are incorporated into the Constitution or other statutes.

¹¹ Other international human rights instruments dealing with various categories of socio-economic rights which have been ratified by Kenya include the following: The African Charter on Human and Peoples Rights, the Convention on the Rights of the Child, and the African Charter on the Rights and Welfare of the Child.

courts and individuals and groups of individuals can directly enforce their socio-economic rights provisions before domestic courts. This has given a great boost to the litigation of socio-economic rights before domestic courts. The Constitution of Kenya 2010 also contains rights –centric provisions. Article 20 thereof, for example, provides as follows:

In applying a provision of the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom; and adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

Article 20 of the Constitution of Kenya 2010 empowers a court to resolve any ambiguity with regards to the meaning of any provisions in the Bill of Rights in favour of rights enforcement. Read together with Article 2 (b) of the same Constitution, Article 20 further empowers a court to apply the norms of international law while interpreting and/or applying any provisions in the Bill of Rights.¹² For example, while determining the scope of the socio-economic rights enumerated in Article 43 of the Constitution, courts are empowered, in terms of Article 20 thereof, to follow the various General Comments that have been issued by the United Nations Committee on Economic, Social and Cultural Rights under the auspices of the International Covenant on Economic, Social and Cultural Rights. A court is further permitted to apply the rulings and decisions made by the African Commission or any other court or commission established pursuant to an international treaty ratified by Kenya. This has greatly revitalised the enforcement of socio-economic rights before domestic courts.

In line with its policy of promoting and protecting human rights, the Constitution of Kenya 2010 has also created various human rights institutions. These include the Kenya National Commission on Human Rights, the Commission on Administrative Justice, and the Gender and Equality Commission. Each of these constitutional commissions is mandated to promote and protect human rights in general, and socio-economic rights in particular. These commissions have the right, power and mandate to institute court proceedings before domestic courts on any matter touching on human rights in general or socio-economic rights in particular. Since they are directly funded by the state, they have the ability to institute proceedings before any court on any matter touching on socio-economic rights. They have both the power and the mandate to institute class actions or public interest litigation where necessary. The role of national human rights institutions in promoting international law in domestic legal systems goes beyond the institution of proceedings before domestic courts and includes the following:

- Commenting on existing and draft laws;
- Monitoring the domestic human rights situation;
- Advising on international human rights standards;
- Education and information dissemination on human rights;
- Receiving complaints and petitions on human rights violations; and

¹² The norms of international law that are incorporated by Art 2(6) of the Constitution as read together with Art 20 include all such norms as have attained customary international law status in the municipal courts. Customary international norms are usually inferred from a combination of state practice and the acceptance of an obligation to be bound.

- Making recommendations to the government and monitoring compliance with its recommendations and advise

If all the national human rights institutions created under the new Constitution faithfully discharge their mandates as outlined above, then the social, political and cultural environment for the litigation of socio-economic rights will fundamentally change for the better.

Finally, the Constitution of Kenya 2010 has also expanded the *locus standi* rules, thereby making it possible for any person to institute proceedings in court seeking to redress alleged violations of fundamental rights. Article 22(1) provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 22(2) then clarifies that in addition to a person acting in their own interests, court proceedings seeking to redress violation of any right or fundamental freedom in the Bill of Rights may be instituted by a person acting on behalf of another person, who cannot act in his/her own name, or a person acting as a member of a group or class of persons, or a person acting in the public interest or an association acting in the interest of its members. These provisions make it possible for anybody to go to court for violation of socio-economic rights, in sharp contrast to the provisions under the old Constitution that applied very restrictive *locus standi* rules. This has operated to further revitalise the litigation of socio-economic rights in domestic courts.

In view of the foregoing, one would be right in supposing that litigation of socio-economic rights before the Kenyan courts has greatly improved and that Kenyan citizens presently enjoy, to the fullest, all the socio-economic rights entrenched in the new Constitution. This however has not happened owing to the numerous challenges that have placed insurmountable hurdles in the way of meaningful litigation of socio-economic rights in Kenya. What follows is an examination of some of these challenges.

3 CHALLENGES FACING SOCIO-ECONOMIC RIGHTS LITIGATION BEFORE KENYAN COURTS

Apart from the justiciability challenge¹³ which appears to have been resolved by the Constitution of Kenya 2010, several challenges still beset socio-economic rights litigation before Kenyan courts. They include the following:

- (a) Hostile judicial attitude towards human rights litigation;

¹³ One of the biggest challenges to the judicial enforcement of socio-economic rights before domestic courts is the justifiability challenge. There is a sharp polarity of public, and even judicial, opinion regarding the vexed question of justifiability of socio-economic rights. While proponents of judicial enforcement of socio-economic rights in domestic courts argue that socio-economic rights are justiciable like any other rights and should accordingly be enforced before domestic courts, there is a sizeable professional, judicial, and lay opinion that argues against the justifiability of socio-economic rights. This is what has been referred to herein as the justifiability hurdle. Arguments that have been advanced to counter the justifiability of socio-economic rights can be grouped into legitimacy based arguments and institutional competence based arguments. Scott C & Macklem FP "Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution (1992) 141 *University of Pennsylvania Law Review* 120.

- (b) The culture of judicial conservatism and deference to executive decisions;
- (c) Judicial tendency to copy the emerging socio-economic rights jurisprudence in South Africa;
- (d) Non-availability of the requisite procedural framework for the enforcement of socio-economic rights;
- (e) Lack of exposure to international human rights law;
- (f) Limited access to relevant international human rights documents; and
- (g) Lack of adequate case reporting.

The above factors have individually and collectively hampered socio-economic rights litigation in Kenya. In what follows, each of them will be examined briefly to ascertain the degree to which they have hindered socio-economic rights litigation in Kenya.

3.1 Hostile judicial attitude towards socio-economic rights litigation

Article 19(1) of the Constitution of Kenya 2010 expressly state that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 20(3)(b) provides that in applying the Bill of Right, a court shall adopt an interpretation that favours the enforcement of a right or fundamental freedom. These provisions are intended to strengthen the justifiability of socio-economic rights in Kenya¹⁴.

In spite of these clear constitutional provisions, various courts in Kenya still entertain doubts regarding the justifiability of socio-economic rights. This is largely attributable to the historical hostility of Kenyan courts to human rights, that has been alluded to earlier. Even though the new Constitution has fundamentally changed the legal, political and constitution order, the ghosts of the past era continue to ominously torment human rights litigation under the new constitutional order for several reasons. First, most of the judges who served under the old constitutional dispensation still serve as judges in the reformed judiciary and some have in fact been elevated to the Supreme Court. Secondly, the jurisprudence hostile to human rights that was developed by the Kenyan courts under the old constitutional order may still retain precedential value. Finally; there is no shared socio-economic rights philosophy that can inform the development of consistent jurisprudence with regards to the enforcement of socio-economic rights before the Kenyan courts. As argued by Professors Ojwang and Otieno-Odek¹⁵ lack of judicial independence coupled with the patrimonial tendencies of the post-independent state led to the development of a largely hostile attitude on the part of the Kenyan judiciary to human rights litigation. They put this point thus:

When the subject of official action is governed by a fundamental policy consideration, the courts are likely to accord defence to the position of the state. In that case, the court tends to show interpretative restraint in approaching conflicting claims by the state and the individual respectively.¹⁶

¹⁴ By specifically directing the court to adopt an interpretation that favours the enforcement of socio-economic rights the constitution expressly directs the court to always seek to hold that socio-economic rights given in any given circumstances are justiciable except in very extreme situations.

¹⁵Ojwang J & Otieno-Odek J "The judiciary in sensitive areas of public law: Emerging approaches to human rights litigation in Kenya" (1988) 35(1) *Netherlands International Law Review* 29 at 36.

¹⁶ Ojwang & Otieno-Odek (1988) at 36.

Restraint is well exemplified in the following plea by Sir Charles Newbold:

The courts derive a considerable amount of authority, and perhaps...the acceptance of their authority from their independence of the executive, from their dissociation from matters political. In a democracy...the determination of matters political rests ultimately with the will of the people through the ballot box. For that purpose the people elect the executive and the legislature, and it is on these two branches.... that the primary responsibility rests. The third branch...the judiciary should not seek to interfere in a sphere which is outside the true function of the courts.¹⁷

That judges under the old constitutional order have – like the ruling elite that they served- been very hostile to human rights litigation, can be illustrated by the decision in *George Anyona v Zachary Onyonka and Another*.¹⁸ The plaintiff, an election candidate, sought an injunction against the chairman of his district branch of the *de jure* single party (KANU) and the returning officer in charge of the elections in the district. Arising from a personal difference and hostility between himself and the district party branch chairman, the plaintiff, who was to present his nomination papers shortly, apprehended that the returning officer, who had earlier threatened so to do, would reject his papers, which would amount to automatic exclusion from the electoral process. He filed an application in court seeking to restrain the returning officer from rejecting his papers, arguing that this would be a violation of his fundamental rights as enshrined in the Bill of Rights. Justice Hancox, in the High Court, dismissed the application arguing that the returning officer had not rejected the applicant's papers and accordingly he was not satisfied that any of the applicant's constitutional rights as enshrined in the Bill of Rights had been infringed.

Such a hostile attitude to human rights litigation was manifested in many human rights decisions handed down under the old constitutional dispensation. Accordingly, the human rights jurisprudence that was developed by the Kenyan judiciary, while interpreting various provisions of the Bill of Rights, was extremely cynical, conservative and government friendly. In the process, some individual judges developed a very negative attitude towards human rights litigation. Such attitudinal characteristics are usually not easy to discard simply because a new constitutional order has supplanted the old order. Some of the judges who served under the old order still serve in the judiciary.¹⁹ It would be unreasonable to expect such judges to completely abandon their previously held attitudinal characteristics simply because the carpet has now been pulled from under their feet by the new Constitution.

In order to disguise their relative hostility towards human rights, Kenyan courts sometimes hide behind procedural technicalities. In *Kenya Aids Society v Arthur Obel*²⁰ the plaintiff sought an injunction to restrain the defendant, a medical doctor and a professor in clinical pharmacology, from manufacturing and offering for sale to the

¹⁷Ojwang & Otieno-Odek (1988) at 36.

¹⁸Nairobi High Court Civil Case No. 3346/79 (unreported). Also see *The Standard Newspaper* (Kenya) 18 October 1979.

¹⁹Even though some effort has been made to get rid of some of those judges, various applications have been made to Kenyan courts which have not only stultified the operations of the vetting board (a body created under the new Constitution to remove judges from the old order who are found to be unfit to hold office) but have also ensured that even the judges who have been found to be unfit remain in office.

²⁰(1997)LLR598.

public, a herbal concoction dubbed “Pearl Omega” which was alleged to be capable of treating HIV/AIDS, but whose potency had never been tried nor even proved. Persons living with HIV and AIDS were being duped into buying the drug at exorbitant prices. The plaintiff then went to court to protect their right to health but the case was dismissed on technical grounds in spite of overwhelming evidence of violation of the right to health. This decision can be contrasted with the decision in the case of *Midwa v Midwa*²¹ (*Midwa* case), where the husband petitioned for divorce after his wife tested HIV positive and brought proceedings to have the wife vacate their jointly owned matrimonial house where they were living with their two children on the grounds that she posed a grave danger to his life as well as to the lives of their two children. The Court without considering the fundamental rights of the wife ordered her to vacate the matrimonial home and move into the servant quarters.

The injustice manifested in the *Midwa* case is similar to the injustice that resulted from the decision of the High Court in *Reitmair v Reitmair*²² where a woman sought a divorce from her husband on grounds of cruelty. The particulars of cruelty were that he was engaged in an illicit liaison with a woman whose husband had died of AIDS and that he refused to take an HIV test. The High Court granted the divorce without considering the fundamental rights of the husband.

3.2 Culture of judicial conservatism and deference to executive decisions

The second major challenge to the litigation of socio-economic rights before domestic courts in Kenya has been the problem of judicial conservatism. Even among the new judges the human rights jurisprudence developed under the old constitutional order is likely to influence their thinking if they practised as advocates during the old constitutional order. Indeed, a culture of cynicism, conservatism and deference to the decisions of the executive organs of government by the judiciary has already been seen even among the new judges, as is illustrated by the High Court decision in *John Kabui Mwai and 3 Others v Kenya National Examination Council and 2 Others*²³ (*John Kabui Mwai* case). In this case the Ministry of Education introduced an affirmative action programme in the admission to state owned national schools²⁴ by lowering the entry marks for students from public primary schools compared to students from private primary schools. In Kenya national schools offer the best quality education. Most parents want their children to join national schools, which is why they take them to the best managed private schools. The lowering of entry marks for pupils from public primary schools was therefore met with outrage by most parents with pupils in private primary schools, and accordingly the owners of private primary schools, through their association, sued the Kenya National Examination Council for subjecting pupils from private primary schools to a different exam grading system from that applied to pupils from public primary school. They also sued the Ministry of Education challenging the introduction of the affirmative action programme in the admission of pupils to national

²¹ (2000) 2EA 453.

²²(2001) LLR 2071 (HCK).

²³(2011) Kenya Law Reports (electronic report) (eKLR).

²⁴ National schools are those few privileged public schools that have been given the best facilities by the state and which receive students from all over the country.

schools alleging that their children's rights to quality education had been infringed. The Constitutional Court in dismissing their application adopted the same old, cynical, conservative, and state-friendly approach to the interpretation of Article 43 of the Constitution which deals with socio-economic rights. The Court stated as follows:

The realisation of socio-economic right means the realization of the conditions of the poor and less-advantaged and the beginning of a generation that is free from socio-economic need. One of the obstacles to the realisation of this objective however is limited resources on the part of the government. The available resource is not adequate to facilitate the immediate provision of socio—economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods and services that focus beyond the individual.

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.²⁵

The Constitutional Court, in this matter, appears to be making three fundamental pronouncements on 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 realisation by all citizens of their socio-economic rights. While the objective of this approach appears to be noble, it has one fundamental weakness which is that it is likely to discourage litigants from filing socio-economic rights related suits, knowing that the court will not be interested in vindicating their rights but will be more interested in vindication by all of their socio-economic rights.

Secondly, 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. Finally, the Constitutional Court adopted the position that the Court should leave adjudication of socio-economic conflicts to the executive and legislative branches of government. This is exactly what the Court meant when it stated that "in our view, a public body (meaning the executive or legislature) should be given (presumably, by the court) leeway in determining the best way of meeting its constitutional obligation" (presumably by making socio-economic choices).

3.3 Judicial tendency to copy the emerging socio-economic rights jurisprudence in South Africa

Close study of the various decisions that have recently been made by Kenyan courts in the area of socio-economic rights litigation reveals that they are not keen to develop their own autochthonous socio-economic rights jurisprudence, and are instead keen to copy South African jurisprudence. Little attention has been given to the fundamental

²⁵ *John Kabui Mwai* at 6.

differences in the socio-economic rights legal and constitutional framework as between Kenya and South Africa.

There are fundamental differences between Kenya and South Africa which would have far-reaching implications for the development of their respective socio-economic rights jurisprudence. First, while Kenya is a State party to the International Covenant on Economic, Social and Cultural Rights, South Africa is not. This means that South Africa is not bound to comply with the standards set by the United Nations Committee on Economic, Social and Cultural Rights while Kenya is bound thereby. In this regard it is instructive to note that the various General Comments that have been issued by the United Nations Committee on Economic, Social and Cultural Rights set socio-economic rights standards that appear to be higher than the standards so far set by the South African Constitutional Court.

Secondly, while Article 2(6) of the Constitution of Kenya, 2010 provides that “[a]ny treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution.” Section 231(4) of the South African Constitution provides that South African courts can apply “self-executing provisions of a treaty even if the treaty has not been enacted into law”. From the foregoing it follows that while in South Africa only “self-executing” treaties can be relied on as extrinsic aids to interpretation; Kenyan courts can apply the international law norms contained in “any treaty that has been ratified by Kenya”.

Finally, while in South Africa the scope of various socio-economic rights is defined by supportive legislation in Kenya little legislation have been enacted with the result that most socio-economic rights are presently not limited by any statutory provisions. Accordingly, their scope is much broader than the scope of the same rights under the South African Constitution.

That Kenyan courts have been keen to borrow South African jurisprudence ad nauseum is illustrated by a long chain of socio-economic rights cases. In the *John Kabui Mwai* case, for example, the Constitutional Court adopted the reasoning in the South African case of *Soobramoney v Minister of Health (KwaZulu-Natal)*²⁶ by purporting to play the role of super legislature determining how to allocate scarce resources as between various competing categories of interests in spite of the clear provisions of Article 20(5) which provided clear guidance on how a court should deal with such situations. In that case the court ruled that the state did not have adequate resources to provide the goods and services which were demanded by the petitioners without any allegation to that effect being made by the state and further without any evidence in proof of the same being tendered. Article 20(5) of the Kenya Constitution 2010 provides that “in applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or any other authority shall be guided by the following principles- (a) it is the responsibility of the state to show that the resources are not available...” Had the Court followed the Constitution instead of the decision in *Soobramoney*, the outcome would no doubt have been different.

A similar trend is discernible in some of the eviction cases that have recently been decided by the High Court. In *Susan Waithera and 4 Others v The City Council of*

²⁶ (1998) (1) SA 765 (CC).

*Nairobi*²⁷ as well as in the case of *Musa Mohammed Dagane and 25 Others v The Attorney General and 3 Others*²⁸, the petitioners challenged their threatened eviction from parcels of land which they admitted belonged to the public. Relying on the reasonableness standard espoused in the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others*²⁹ the High Court in both cases issued restraining orders. In arriving at their decisions, both courts failed to consider the fact that the decision in the *Grootboom* case was greatly influenced by South African legislation that defined the scope of the right to housing as entrenched in the South African Constitution. No such legislation exists in Kenya at the moment.

Secondly, both courts failed to consider General Comment No. 4³⁰ issued by the United Nations Committee on Economic, Social and Cultural Rights which defined the scope of the right to housing under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights which set a completely different standard and which was binding on the Kenyan courts (but which was not binding on the South African courts).

Moreover, both Courts failed to consider General Comment No. 3 issued by the United Nations Committee on Economic, Social and Cultural Rights which prescribes a different standard, otherwise known as the minimum core obligations approach, whereby States parties are required to ensure the satisfaction, at the very least, of minimum levels of each of the rights protected under the International Covenant on Economic, Social and Cultural Rights. This would appear to impose on States parties a standard different from the reasonableness standard espoused in the *Grootboom* case. It requires State parties to ensure immediate realisation of the minimum levels of socio-economic rights to those brackets of the population that are most (or totally) deprived.

3.4 Non-availability of the requisite procedural framework for the enforcement of fundamental rights

Various issues emerge in the context of socio-economic rights litigation. The following are some of the issues that will always call for urgent consideration whenever a court is called upon to adjudicate on a matter touching on socio-economic rights:

- a) Which court has jurisdiction to determine the matter;
- b) Which applicant has the *locus standi* to seek the relief sought; and
- c) What is the procedure to be followed?

These issues, which are largely procedural, can have far-reaching implications for the availability or otherwise of an appropriate remedy. In *Olga Tellis v Bombay Municipal Corporation*³¹, the Supreme Court of India made it clear that procedural constraints can sometimes render a constitutional right totally unavailable. It is for this reason that Article 22 of the Constitution of Kenya 2010, while providing that the Chief Justice shall

²⁷2011eKLR(electronic report)

²⁸2011eKLR (electronic report)

²⁹ 2001 (1) SA 46 (CC).

³⁰ UN Doc. E/1992/23, Annex III.

³¹ AIR (1986) Supreme Court 18.

make rules governing the enforcement of fundamental rights, has set the constitutional benchmarks which such rules must meet.

The fact that no rules have been promulgated by the Chief Justice under Article 22 to govern the enforcement of rights enshrined in the Bill of Rights therefore militates against the litigation of socio-economic rights before domestic courts in Kenya.

3.5 Lack of exposure to international human rights law

In Kenya human rights have not (until recently) been given prominent attention by both the courts as well as institutions of higher learning, including universities. During the previous constitutional dispensation (which was characterised by a general attitude of hostility towards human rights, in general, and socio-economic rights, in particular) human rights issues did not feature prominently in the courts.

A number of law schools did not (until recently) offer human rights courses, and even when human rights courses were offered, they were never made compulsory courses. This created a situation where many students would graduate from universities and law schools and eventually qualify as advocates without attending any human rights class. For the above reasons, there has been little exposure on the part of many Kenyan lawyers to international human rights law, leading to poorly drafted pleadings that usually do not reflect all the relevant issues. This coupled with the relatively high cost of litigation and cumbersome procedural rules, hinder socio-economic rights litigation in Kenya.

3.6 Limited access to relevant international human rights documents

Another problem that has greatly hampered socio-economic rights litigation before domestic courts in Kenya is the fact that most Kenyan lawyers have difficulty accessing various international human rights instruments and texts. This is so largely because Kenya, like most developing countries, does not have well-developed library resources. There are very few law libraries in Kenya and even the ones that exist are not usually well-stocked. For this reason access to international human rights instruments by both courts as well as lawyers is greatly hampered, which further hinders socio-economic rights litigation before domestic courts.

3.7 Lack of adequate case reporting

Finally, socio-economic rights litigation before the Kenyan courts is greatly hampered by the lack of adequate case reporting. Until recently, there was no recognised publicly funded law reporting agency in Kenya. It is only recently that the National Council for Law Reporting (NCLR) was established to undertake law reporting in Kenya. The NCLR, however, only reports cases that it considers to be ground breaking, with the result that most cases are still unreported in Kenya. This makes effective legal research very difficult and greatly hampers litigation in general and socio-economic rights litigation in particular.

4 TRANSLATING SOCIO-ECONOMIC RIGHTS FROM ABSTRACT PAPER RIGHTS TO FULLY-FLEDGED RIGHTS

If the currency of socio-economic rights is not to suffer much devaluation there is a need to address all the existing challenges to enforceability of socio-economic rights before domestic courts. In the context of Kenya, there is an urgent need to find a practical solution to each of the problems discussed in part III above. Most of the problems discussed in Part III can effectively be solved through a rigorous policy of judicial training. Judges and magistrates should be thoroughly trained in international human rights law in general and socio-economic rights in particular. Similarly, lawyers in practice should be trained in international human rights law through mandatory continuous legal education programmes. Furthermore, more resources should be channeled towards law reporting as well as the improvement of library facilities. Every effort should be made to ensure that international human rights instruments as well as major decisions by international human rights judicial bodies are readily available.

In the context of Kenya, however, translating socio-economic rights from abstract paper rights to fully-fledged rights will, in addition to the foregoing, call for substantial procedural reforms, adoption of the minimum core approach to socio-economic rights (as recommended by the United Nations Committee on Economic, Social and Cultural Rights), a precise definition of the normative content of the various categories of socio-economic rights entrenched in Article 43 of the Constitution, and more attention being given to the often confusing problem of remedy selection in the context of socio-economic rights litigation.

The remaining portion of Part IV will be devoted to addressing these problems. The most commonly ignored problem as far as litigation of socio-economic rights before domestic courts is concerned is the problem of absence or inadequacy of procedural rules, a problem that sometimes completely removes the substance of a right that is granted by law. Such problems abound in the context of all forms of litigation but are critical in the context of human rights litigation. For example, a procedural rule that required all claimants in a lawsuit to serve the respondents personally with court papers completely whittled down a constitutionally guaranteed right of any voter to challenge the outcome of a presidential election in an election contested and won by an incumbent President simply because the presidential security guards would not allow any court process server to effect personal service of court papers upon the President.³²

Accordingly, it is extremely important to consider the extent to which procedural rules can attenuate or even completely whittle down the socio-economic rights guaranteed in the Constitution. Given their very nature, constitutional rights, in general, and socio-economic rights, in particular, are not amenable to vindication via the ordinary rules of civil procedure. It is for this reason that the repealed Constitution of Kenya provided, under section 84 thereof, that the Chief Justice would make rules for the enforcement before courts of the rights and fundamental freedoms entrenched in

³² In *Mwai Kibaki v Daniel Arap Moi* (Civil Appeal No. 172 of 1999) the Court of Appeal dismissed an election petition challenging the re-election of the former President, arguing that the President had not been served with the court papers and ignoring argument that the petitioners were not allowed by the presidential security detail to serve the papers.

the Bill of Rights. Owing to the general atmosphere of hostility towards enforcement of fundamental rights and freedoms, successive Chief Justices in Kenya refused to promulgate the requisite rules of practice and procedure required under section 84 of the repealed Constitution. After a period of 38 years, Chief Justice Bernard Chunga promulgated the Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure Rules, 2001³³. These Rules were replaced in 2006 by new rules developed by the then Chief Justice Evan Gicheru, which became known as the Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual (High Court Practice and Procedure Rules), 2006³⁴ (Gicheru Rules). These Rules are still in force to date. However, the new Constitution in Article 22(3) empowers the Chief Justice to make rules of practice and procedure governing the enforcement of fundamental rights and freedoms as entrenched in the Bill of Rights. The Constitution, however, prescribes the criteria that must be met by such rules which include the following: liberal *locus standi* rules, elimination of procedural technicalities, and promotion of informal documentation, complete elimination of filing fees, and the involvement of experts either as *amici curiae* or as interveners.

As yet the Chief Justice has not made any rules as directed by Article 22(3) of the Constitution. Accordingly, the Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual (High Court Practice and Procedure Rules 2006 remain in force. It should be remembered that these Rules were meant to operate the repealed constitutional dispensation. This is regrettable, but it is hoped that Kenya will not have to wait for another 38 years before it gets the new rules to guide the enforcement of fundamental rights and freedoms entrenched in the Bill of rights. The absence of rules governing the enforcement of human rights, however, means that the current regime for enforcement of fundamental rights and freedoms under the Constitution of Kenya 2010 is much weaker than that which the Constitution envisages, in the following respects.

First, the procedural informality envisaged under Article 22(3)(a) is not being enjoyed by socio-economic rights litigants, as they are still required to comply with the complicated Gicheru Rules which were intended to be employed by lawyers litigating human rights issues under the previous constitutional order that applied restrictive rules of standing, and which was generally hostile to human rights litigation.³⁵

Accordingly, they are inappropriate for use by ordinary laymen seeking to vindicate socio-economic rights under the new liberal standing rules. Moreover, the Constitution of Kenya 2010 envisages the introduction of epistolary jurisdiction as has been done in India, which implies "...and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentation". In view of the foregoing, it follows that although the Constitution has directed the Chief Justice to make rules facilitating the employment of informal documentation systems in human rights

³³ These rules became known as the *Chunga Rules*.

³⁴ These rules became known as the *Gicheru Rules*.

³⁵ Elisha OZ "The law, the procedures and the trends in jurisprudence on constitutional and fundamental rights litigation in Kenya" (2008-2010) 2 *Kenya Law Review* 784, argues that the lack of clarity and the complexity of the procedural rules governing human rights litigation undermine the enjoyment by citizens of the fundamental rights and freedoms.

litigation, owing to lethargy on the part of the Chief Justice in this regard, those seeking to enforce human rights abuses are still denied that right.

Secondly, the provisions of Article 22(3) of the Constitution which explicitly state that “no fee may be charged for commencing the proceedings for enforcement of fundamental rights” are still inoperative. This has serious implications for the enforcement of socio-economic rights, especially when it is considered that the majority of victims of socio-economic rights infringements are very poor and is accordingly unable to raise the current filing fees which are too high for them.

Finally, as has been alluded to above, one of the reasons why some people oppose the justifiability of socio-economic rights before domestic courts is the argument that courts of law lack the technical expertise to handle the complex issues that emerge in the context of socio-economic rights litigation and which are usually outside the training and expertise of judges. The Constitution of Kenya 2010, in order to address this problem, has directed the Chief Justice to make rules to facilitate the involvement of expert individuals or organizations who should be encouraged to appear as *amici curiae* or as interveners in human rights litigation, generally, and socio-economic rights litigation, in particular. The involvement of such persons, especially in socio-economic rights litigation, would add immense value to such proceedings. Accordingly, the fact that there is presently no effective mechanism for the involvement of such experts in socio-economic rights litigation actually derogates substantially from the rights entrenched in Article 43 of the Constitution of Kenya 2010.

Another problem that commonly affects the enforcement of socio-economic rights in domestic courts is the reluctance by states to adopt the minimum core approach as is required under the provisions of the International Covenant on Economic, Social and Cultural Rights. The Committee on Economic, Social and Cultural Rights has construed the provisions of the Covenant as engendering a minimum core obligation incumbent on State parties. The Committee opines that the satisfaction of, at the very least, minimum essential levels of each of the rights, is incumbent on every State party. For example, where any significant numbers of individuals in any State party are deprived of the right to food, the right to primary healthcare, the right to basic shelter and housing, or the most basic forms of education, then such state will be said to be in breach of its minimum core obligations. When any State party is in breach of its minimum core obligations, as explained above, then the victims of such violation should be enabled to file appropriate proceedings in court to compel the state to comply with its obligations under the provisions of the Covenant. According to this perspective the adoption by a State party of the minimum core approach to the realisation of socio-economic rights is consistent with the extension to the individual victims of the violation (those belonging to the category of people denied even the minimum essential levels of socio-economic rights) of the right to demand the immediate provision of socio-economic goods and services.

The minimum core approach to the realization of socio-economic rights has been rejected by many States parties, and in the South African *Grootboom* case the Constitutional Court did not accept the possibility of the minimum core approach by arguing that it is something that is impossible to realise.

Kenyan courts have tended to follow the South African jurisprudence in this regard. In the few cases that have been heard by the courts since the promulgation of the new Constitution, they appear to have adopted an attitude that is hostile to the adoption of the minimum core approach. As has been illustrated by the decision in the *John Kabui Mwai Case*³⁶ the Kenyan Constitutional Court on 16 September 2011 rejected the application of the minimum core approach. While some legal commentators have hailed the rejection of the minimum core approach,³⁷ others have protested the move, arguing that such hostile attitudes to the enforcement of socio-economic rights actually defeat the goal of promoting these rights. Mbazira³⁸, for example, argues that the theory that it is impossible to determine the minimum core of rights has not been empirically demonstrated. The difficulties that may attend the precise definition of the minimum core content of socio-economic rights should be resolved and States parties encouraged to determine the minimum core content of socio-economic rights as this will add substantial value to socio-economic rights litigation.

The rejection of the minimum core approach has been done in most cases in the context of attempting to define with precision the normative content of rights, which is another problem that afflict the enterprise of socio-economic rights litigation. The courts are required to subject the policies and other measures of the state to promote the realisation of socio-economic rights to constitutional standards. These standards are, however, unclear. In the *Grootboom* case³⁹ the South African Constitutional Court argued that in determining whether the state has met the constitutional threshold with regards to the realisation of socio-economic rights, it should examine the steps taken so far by the state to ascertain their reasonableness or otherwise, while in, *Minister of Health and Others v Treatment Action Campaign and Others*(TACCcase)⁴⁰ the court applied the rationality test.

Kenyan courts have applied the reasonableness test as illustrated by the *John Kabui Mwai* case referred to above. The Constitution of Kenya 2010 however proposes a slightly different standard. Article 20(5) enjoins a court to give priority to ensuring the widest possible enjoyment of the right or fundamental freedom, having regard to the prevailing circumstances, including the vulnerability of particular groups or individuals. What this means is that the primary goal of the state should be to facilitate the realisation of the rights by the widest possible group of the populace. This obviously involves striving to ensure that as many people as possible have access even to the most minimum level of the rights. As yet no court decision has attempted to interpret this provision obviously owing to the relative novelty of the constitution of Kenya 2010. It is hoped that in the very near future Kenyan courts will develop appropriate jurisprudence in this regard.

³⁶ (2011) eKLR (electronic report)

³⁷ See Liebenberg S "The value of human dignity in interpreting socio-economic rights"(2005) *South African Journal of Human Rights* 230

³⁸Mbazira C, "Litigating socio-economic rights in South Africa: A choice between corrective and distributive Justice" (2009) at 17-27. See also Fabre C "Constitutionalizing socio-economic rights"(1998)6 *Journal of Political Philosophy* 263 at 280.

³⁹ 2001(1) SA 46 (CC).

⁴⁰ 2002(5) SA 721 (CC).

The final problem that attends to the translation of socio-economic rights from abstract paper rights to concrete rights is that of remedy selection. Most of the conventional remedies are inappropriate in the context of socio-economic rights. As was noted by the Kenyan Constitutional Court in the *John Kabui Mwai* case, socio-economic rights litigation sometimes requires the granting of relief that may go beyond the litigants involved in the case. What forms should such relief take? And how is it to be structured?

In General Comment No. 9, the Committee on Economic, Social and Cultural Rights has advised that the right to an effective remedy need not be interpreted as always requiring a judicial remedy. The Committee argues that in certain circumstances administrative remedies will be adequate. It recommends that in those circumstances, accessible, affordable, timely and effective administrative remedies should be considered. Such administrative remedies are however intended to supplement, rather than to substitute, judicial remedies. Under Article 23(3) of the Kenya Constitution 2010, a court is empowered to grant any appropriate relief, including judicial relief, which includes declaratory orders, conservatory orders, compensatory orders, and judicial review orders.

The courts should therefore be very innovative when fashioning appropriate remedies, having regard to the facts and circumstances of the particular cases with which they are dealing. Article 23(3) gives the court a very powerful tool that it can use to provide very innovative remedies to promote the realisation of socio-economic rights. Fabre⁴¹ for example, recommends the addition of *judicial preview* orders to the relief that courts can grant to redress violation of socio-economic rights. Such orders would, for example, direct the state to permit the beneficiaries of particular policies or legislation that are still being developed by the state, to review them and comments on them *before* they are implemented. This will give the state the opportunity to consider the views of the beneficiaries of any policy or law to avoid a situation where the beneficiaries may be compelled to go to court after the policy has been adopted or the legislation enacted, to have the same declared null and void.

Such remedies are already available in the Republic of Ireland as well as in France. Mbazira⁴² on the other hand, recommends the use of structural interdicts which he argues are most ideal in the context of socio-economic rights. He identifies several models of structural interdicts which includes; the bargaining model, the legislative/administrative hearing model, the expert remedial formulation model, the report back to court model, and the consensual remedial model. The bargaining model involves the court in making remedial decisions through negotiation by the parties involved in the case. This makes it possible for the parties to arrive at the decision that is in line with their interests. This obviates enforcement difficulties.

The legislative/administrative model enjoins the court to provide some sort of 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 (just as is done in legislative committee or administrative hearings), while the expert remedial model requires the

⁴¹(1998) 26 at 89.

⁴² (2009) at 169 & 176.

court to appoint an expert to help it with the technical expertise required in the case. The report back to court model involves the court in issuing directives or advice to the relevant government department is which required to report back to the court regarding the progress made in compliance with the directives or advise. Finally, the consensual remedial model involves securing the consensus of the parties and third parties in the formulation of an appropriate remedy. Roach⁴³hails the use of suspended declarations of invalidity in Canada and recommends the combining of individual and systemic reliefs.

None of these innovative remedies have been fashioned by the Kenyan courts in an effort to redress the violation of socio-economic rights. Courts are frequently called upon to apply the traditional judicial remedies. This greatly limits the quality of justice that can be administered to victims of violations of socio-economic rights. In Kenya the primary remedies that are commonly employed to redress violations of socio-economic rights are declarations and injunctions. Since the passing of the new Constitution, lawyers are beginning to embrace the use of compensatory damages.

It should be noted, however, that these traditional remedies are not very suited to the circumstances of socio-economic rights. This is so because the traditional remedies are adapted to the circumstances of conventional civil proceedings. New forms of relief that have been developed in the context of human rights, in general, and socio-economic rights, in particular, such as, judicial pre-view remedies, structural interdicts, suspended injunctions, etc , are not amenable to traditional kinds of relief. Having examined the efforts that have been made to revitalise the litigation of socio-economic rights in the domestic courts of Kenya against the background of the challenges that have beset the litigation of socio-economic rights in Kenya, it is instructive to consider what lessons can be learnt from Kenya. The next section continues with this discussion.

5 LESSONS FROM KENYA – EMERGING ISSUES IN SOCIO-ECONOMIC RIGHTS LITIGATION

If there is one conclusion, more than another that has emerged from the foregoing analysis of the Kenyan experience with socio-economic rights litigation, it is that socio-economic rights advocacy urgently requires a paradigm shift. Socio-economic rights activists should abandon their traditional preoccupation with the mere popularisation of the rights, and instead focus their attention on factors that inhibit the full enjoyment of the rights even in situations where such socio-economic rights have been explicitly granted, either in international instruments ratified by the states concerned or in domestic constitutions or statutes. In particular, the following questions need to be carefully considered:

⁴³ In the case of a suspended declaration of invalidity, a court that has found a particular policy or piece of legislation to be unconstitutional suspends the declaration of invalidity of the legislation or policy to give the state the opportunity to take a remedial measure. Roach K “Crafting remedies for violation of socio-economic rights” in Squires J *et al* (eds) *The road to a remedy – Current issues in the litigation of socio-economic Rights*(2005) at 111.

- (a) What is the underlying philosophy of the judiciary with regards to human rights litigation? Does the judiciary subscribe to the philosophy of conservatism or activism?
- (b) What is the ideological leaning of the individual judges charged with the responsibility of adjudicating socio-economic rights disputes? Do they share Ronald Dworkin's⁴⁴ call for a fusion of constitutional law with moral philosophy or do they agree with Jeremy Bentham's argument that the idea of moral rights is "nonsense on stilts"?
- (c) What is the exact scope of rights granted to citizens by the constitutional framework for the socio-economic rights?
- (d) What is the form of justice that is being pursued by the state's socio-economic rights regime? Is it distributive or corrective justice?
- (e) Have the international and domestic legal frameworks for socio-economic rights litigation been harmonised?
- (f) What is the integrity of the socio-economic rights jurisprudence that has been developed by the domestic courts? Does it accord with the domestic or international legal framework for socio-economic rights? Or with the domestic legal framework for some other country?

In what follows, an attempt will be made to examine each of the above questions, albeit in summary, as a detailed consideration of thereof is obviously beyond the scope of this article.

As has been illustrated, the fact that a country has very good human rights law does not automatically lead to the conclusion that the citizens of that country will automatically enjoy their fundamental rights and freedoms to the fullest. The Kenyan independence Constitution, for example, had excellent provisions in its Bill of Rights section dealing with civil and political rights. This, however, did not prevent the grave violations of human rights that were witnessed in Kenya between 1963 and 2002. In its report on violation of human rights in Uganda, the Uganda Commission of Inquiry into Violations of Human Rights in Uganda observed as follows:

A country may have the best written bill of rights in the world, but if the state organs and institutions, and leaders at all levels, and every individual in the country are not committed and do not pay attention to them, then the human rights so guaranteed are not worth the paper(s) they are written on.⁴⁵

Like every other organ of state, the judiciary must have, and state, its philosophy with respect to human rights in general and socio-economic rights in particular. It is this philosophy that will inform the thinking and/or reasoning of the individual judges. The mere existence of such a philosophy will encourage the development of a consistent jurisprudence with regards to human rights in general and socio-economic rights in particular.

Given the fact that human rights litigation sometimes involved very controversial issues where, in most cases, there is no one correct answer – and accordingly judges frequently find themselves having to make decisions based on their own individual idiosyncrasies – the existence of a judicial policy on human rights litigation helps the individual judges in making correct choices whenever they have to make a choice between two equally plausible, but contradicting positions. The dilemma that judges

⁴⁴Dworkin R, *Taking rights seriously* (1977) at 149.

⁴⁵ These observations and comments are found at page 581 of the report on the findings, conclusions and recommendations of the commission of inquiry into the violations of human rights in Uganda.

usually face, but which is rarely talked about by legal experts, is highlighted by Dworkin⁴⁶ in the following manner:

When men and women disagree about whether the right to free speech extends to abusive language, or whether capital punishment is cruel and unusual within the meaning of the constitution...then it is both silly and arrogant to pretend that there is somehow, latent in the controversy, a single right answer. It is wiser and more realistic to concede that though some answers may be plainly wrong, and some arguments plainly bad, there is nevertheless a set of answers and arguments that must be acknowledged to be, from any objective or neutral stand point, equally good.⁴⁷

Such situations as described by Dworkin in the above excerpt occur more frequently in socio-economic rights litigation than in any other type of litigation. That is why an explicit judicial philosophy with regard thereto will greatly aid the development of appropriate jurisprudence. As Kanyeihamba⁴⁸ argues, an activist philosophy is more appropriate for human rights litigation than a conservative philosophy, and the more so in the context of socio-economic rights litigation.

The fact that socio-economic rights litigation often involves judges in making choices between conflicting, and sometimes equally plausible positions, means that the ideological positions of the individual judges cannot be ignored. In Kenya, for example, the fact that judges, who only yesterday exhibited open hostility towards human rights are now entrusted with the responsibility of promoting human rights, is something that should be taken very seriously by socio-economic rights activists. This means that socio-economic rights activists should play a more active role in the appointment of judges especially Constitutional Court and Supreme Court judges.

Supreme Court and Constitutional Court judges should be persons who believe in the fusion of constitutional law with moral philosophy, who believe in the idea that citizens have moral rights against their governments, which rights it is the duty of the courts to enforce, and that there is no sphere of governmental activity that is beyond the reach of judicial scrutiny.

Another area that needs careful scrutiny by socio-economic rights activists is the precise scope of socio-economic rights granted to citizens by the legal and constitutional framework. Socio-economic rights activists have tended to focus their attention more on the substantive rights, but have ignored the equally important procedural rights. The Kenyan experience exposes the folly involved in spending a lot of resources on substantive rights advocacy, while ignoring the equally important procedural rights. For 38 years Kenya had an excellent Bill of Rights in its Constitution, but there were no procedural rules to enforce them. Now Kenya has even better human rights provisions in its new Constitution which has taken the bold step of constitutionalising socio-economic rights, but there are no procedural rules to enforce them (even though the constitution itself has directed the Chief Justice to make those rules and has even given him guidance on the form that such rules should take). The absence of such rules, as has been shown above, means that socio-economic rights litigation cannot meet the full

⁴⁶Dworkin (1977).

⁴⁷Dworkin (1977), Chapter 13 entitled "Can rights be controversial" at 279.

⁴⁸Kanyeihamba GW, *Kanyeihamba's commentaries on law politics and governance* (2 impr)(2006) at 41.

constitutional standard. This article advances the thesis that substantive socio-economic rights are meaningless in the absence of effective procedural rules to effectuate the same.

The procedural rights argument is inextricably linked to the form of justice argument. It is important that the vision of the socio-economic rights regime be made clear to every citizen. The socio-economic rights legal framework may pursue distributive justice or corrective justice. If the primary goal of the legal regime is to facilitate the realisation of distributive justice, then the contents of its substantive and procedural norms should reflect this. If on the other hand, the primary objective of the legal regime is to pursue corrective justice, then this should be clearly reflected in its substantive and procedural norms.

A legal regime that prioritises the interests of the entire community over those of the individual will deny individuals⁴⁹ relief if the grant of such relief will affect the realisation by everyone of their socio-economic rights. The courts in such a state, upon proof of socio-economic rights violations, might prefer to direct the state to develop a programme that will benefit everybody including the claimant, rather than direct the state to pay huge compensatory damages to the individual claimant without regard to the effect of such payments on the ability of the state to remedy similar violations against others. There is need for clarity on this issue to guide the courts. The Kenyan Constitution, for example, is not clear on its vision of socio-economic rights litigation. It is rather ambivalent approach to this issue, coupled with the absence of any clear jurisprudential position taken by the Kenyan courts in that regard, have created a lot of confusion.

Another lesson that emerges from the Kenyan experience with socio-economic rights litigation is the need to harmonise the constitutional and international frameworks for socio-economic rights litigation. Article 2(b) of the new Constitution provides that all international instruments ratified by Kenya constitutes a source of law that can be enforced by domestic courts. Kenya has ratified the International Covenant on Economic, Social and Cultural Rights, meaning that it is a source of law in Kenya, like any other law. With regards to socio-economic rights, the Committee on Economic, Social and Cultural Rights has advised State parties to adopt the minimum core obligation approach. In spite of that, the Constitutional Court, while purporting to interpret the Constitution, has rejected the minimum core obligations approach in favour of the reasonableness approach. 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 Covenant and which have also constitutionalised socio-economic rights. It is an area that needs to be carefully studied, and appropriate jurisprudence developed in connection therewith.

Finally, there is the problem of the extent to which courts can rely on precedents from other jurisdictions in socio-economic rights cases. Enforcement of socio-economic rights before domestic courts rekindle the universalist – relativist debate. On the one hand, socio-economic rights are human rights, and like all human rights they are

⁴⁹ Such a society subscribes to a communitarian philosophy and would ordinarily prioritise distributive justice above corrective justice.

supposed to be universal, meaning that normative standards set in other countries should be applied with relative ease by a domestic court. For this reason, excellent human rights standards developed in one country will always be applied by courts in other countries when adjudicating similar disputes. This is why the human rights jurisprudence developed in South Africa and India has continued to influence the development of jurisprudence in other countries.

On the other hand, socio-economic rights are resource dependent. Availability or adequacy of resources is something that varies from one country to another depending on several factors. For this reason, some people argue that socio-economic rights are not universal but relative. According to them, it is wrong to apply universal standards in the adjudication of socio-economic rights, which are considered not to be universal. Such individuals subscribe to the philosophy of relativism. Relativists argue that it is wrong for courts in one country to apply socio-economic rights precedents developed in other countries because such precedents were informed by the unique circumstances of that country.

It has been explained above that Kenyan courts have tended to apply South African socio-economic rights jurisprudence, in spite of the fact that the constitutional frameworks for socio-economic rights in the two countries are not exactly similar; and further, in spite of the fact that while Kenya has ratified the International Covenant on Economic, Social and Cultural Rights, South Africa has not ratified it, although it has signed it. This has created some confusion. For example, the law governing the eviction of squatters in South Africa is different from the law in Kenya. This is so because in South Africa both the Constitution and a statute protect the rights of squatters not to be evicted unless certain requirements are met.

In Kenya, there are no such explicit eviction laws in the Constitution other than the right to adequate housing. In spite of this fundamental difference in the law, Kenyan courts have consistently followed the decision in the *Grootboom* case when dealing with eviction cases. In *Satrose Ayuma and 11 Others v Registered Trustees Of Kenya Railways Staff Retirement Benefit Scheme and 2 Others*⁵⁰ the Court applied the *Grootboom* case. The same approach has been followed in *Susan Waithera and 4 Others v City Council of Nairobi*⁵¹ as well as *Musa Mohammed Dagane and 25 Others v The Attorney General and 3 Others*⁵².

6 CONCLUSION

In conclusion, it can be said that there is need for more research in the area of socio-economic rights litigation. The issue of justifiability of socio-economic rights is still problematic even after various states have actually taken bold steps to constitutionalise them. Similarly, the problem of translating socio-economic rights from being abstract paper rights to concrete rights enforceable before ordinary courts still presents formidable challenges. Resolution of some of these challenges calls for a concerted

⁵⁰ Petition No. 64 of 2010. Also known as the *Muthurawa* case

⁵¹(2011) eKLR(electronic report).

⁵² (2011) eKLR(electronic report).

global effort. Finally, as recommended above, there is need for a paradigm shift in socio-economic rights advocacy if success is to be realised in this field. Many of the emerging issues raised above have not been thoroughly studied.

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