

Strathmore University

Law School

THE CASE FOR STRUCTURAL INTERDICTS IN THE PROTECTION AND FULFILMENT OF SOCIO-ECONOMIC RIGHTS IN KENYA

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAWS (LL.B), STRATHMORE UNIVERSITY LAW SCHOOL

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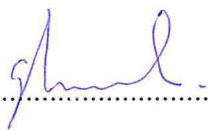
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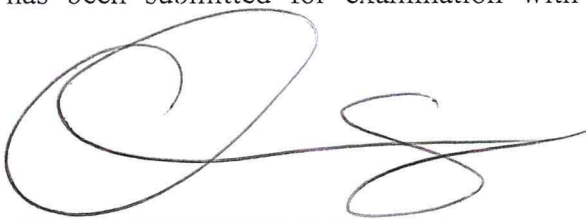
DECLARATION

I, CEPHAS DOC, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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Date: 29th May 2018

This Dissertation has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

In 2010, Kenya promulgated a new constitution that bore all the hallmarks of progress and which is widely considered transformative. One stark example of this was the unprecedented inclusion of Socio – Economic Rights under in the constitution under Article 43, thereby granting very high legal status to these rights which have been traditionally considered the results of proper social and governmental order crystallised in protection and fulfilment of civil and political rights. This in effect created the possibility for a plethora of transformative jurisprudence in the Kenyan legal landscape with the judiciary leading the way through proper interpretation of the law concerning human rights and defining contours of enforcement of the same.

This new order brings with it novel remedies for compliance in the event of a breach of economic and social rights. One such remedy is the Structural Interdict (supervisory orders) which allows a court to monitor compliance with its orders over a specific and determined period of time after a declaration of rights has been made. Although now nipped in the bud, this remedy was in use in Kenya and increasingly gained legal notoriety up until the Court of Appeal capped its use in the landmark case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR* (herein after referred to as ‘The Mitu-Bell Case’).

This dissertation analyses that decision in light of the transformative ideals of the Kenyan constitution and proffers a contrary perspective. It considers the judgement of the court of appeal, although well-reasoned, severely retrogressive and inimical to the ideals of progress espoused by the Constitution of Kenya 2010. The arguments of the Court of Appeal are considered, analysed and countered; hence the case for structural interdicts in Kenya.

LIST OF CASES

1. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2003) ACmHPR Comm.
2. Centre for Rights Education & Awareness (creaw) & 8 others v Attorney General & another [2012] eKLR Para 49
3. Communications Commission Of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014)
4. Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance vs Speaker of the National Assembly and Others case [2016], Constitutional Court of South Africa. ZACC 11
5. Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744; 1996
6. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)
7. Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security & 3 Others (2011) Eklr
8. Jasbir Singh Rai & 3 others -v- Estate of Tarlochan Singh Rai & 4 others (2013) eKLR,
9. John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others [2011] eKLR
10. Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eklr
11. Kepha Omondi Onjuro & others v Attorney General & 5 others, Nairobi HCC Petition No. 239 of (2014) eKLR,
12. Matiso v Commanding Officer, Port Elizabeth Prison (1995) 4 SA 631 (CC)
13. Mitu-Bell Welfare Society v Attorney General & 2 others [2013] eKLR
14. Moi University v Council of Legal Education & another [2016] eKLR,
15. Njoya & Others vs. Attorney General and Others [2004] 1 KLR 232
16. Re Interim Independent Election Commission [2011]eKLR
17. Samuel G. Momanyi v Attorney General & another (2012) eKLR
18. Satrose Ayuma v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme (2010)

19. Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) ACmHPR Comm. 2001
20. Soobramoney v Minister of Health, Kwazulu-Natal (1998) Constitutional Court of South Africa
21. The Queen vs Beauregard (1986), The Supreme Court of Canada, [1986] 2 SCR 56
22. Telkom Kenya Ltd. -vs- John Ochwada (2014) eKLR

LIST OF LEGAL INSTRUMENTS

1. CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990
2. Civil Procedure Rules Kenya, 2010
3. The American Declaration of Independence, In Congress July 4, 1776
4. The Constitution of Kenya, 2010
5. The International Covenant on Economic, Social and Cultural Rights, 1966
6. The Rent Restriction Act (No. 25 of 2015.)
7. The Universal Declaration of Human Rights, 10 December 1948

CHAPTER ONE: INTRODUCTION

1.1. BACKGROUND OF THE STUDY

The Structural Interdict is one of the legal remedies available in constitutional law litigation. It is a type of injunction requiring the government to report back to the court at regular intervals about the steps taken to comply with the constitution.¹ As a matter of principle, it gives a court authority not just to issue orders with respect to matters before it, but also to oversee and superintend their implementation. Its ongoing nature is facilitated by the court's retention of jurisdiction, and sometimes by the court's active participation in the implementation of the decree.² Hence where a court issues orders flowing from a judgement or ruling, it will reserve a sort of 'supervisory jurisdiction' in their implementation.

In 2010, Kenya promulgated a new constitution which has been touted as 'one of the most progressive in the world'³ and which draws heavy influence from the constitution of South Africa. For this reason, South African jurisprudence concerning the institutionalization of this legal remedy informs the legal substance of this of this dissertation. The Constitution of Kenya boasts a very robust bill of rights which may be argued to competently guarantee all the rights attaching to a citizen of any democratic state. In drafting the Constitution, inspiration was sought from other jurisdictions and some of the provisions clearly mirror the foreign laws from which they were drawn. For example, the Bill of Rights clearly shows influences from the Constitution of South Africa with respect to a general limitations clause that contains similar wording and also, decisions of the Constitutional Court of South Africa in respect of socio-economic rights were incorporated.⁴

The implementation of the structural interdict as a constitutional remedy has not quite been robust in the Kenyan legal scene. After a few attempts by both the High Court and the Supreme Court, the Court of Appeal has resisted the application of the structural interdict and eloquently laid grounds upon which this remedy has been capped.

¹Roach K, *Crafting Remedies for Violations of Economic, Social and Cultural Rights, in the Road To A Remedy: Current Issues In The Litigation Of Economic, Social And Cultural Rights* p111, 113.

²Mbazira C, *Litigating Socio-Economic Rights In South Africa: A choice between corrective and distributive justice*, Pretoria Law Press, 2009.

³Mutunga W, Chief Justice and President of Supreme Court of Kenya, 'Keynote speech for the Africa and International Law Conference Albany Law School, at 9.15 on April 13, 2012

⁴Waruguru Kaguongo, 'Introductory Note on Kenya' -

<http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf> - accessed on 8 November 2017.

In the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR the Court of Appeal sitting in Nairobi on the 1st of July, questioned the nature of structural interdicts and their recent use on Kenyan jurisprudence. The court arrived at a decision which in effect ended the use of this remedy in Kenya citing the following reasons;

- a) The Civil Procedure Act and rules do not provide for such procedure.⁵
- b) Structural interdicts allow delegation of judicial function which is an abdication of judicial responsibility.⁶
- c) Article 23(3) cannot not be construed to permit the High Court to borrow legislations from other countries and through judicial interpretation embed them into the laws of Kenya.⁷

It is these precise grounds that this dissertation challenges by making counter arguments for each of them and which counter arguments consist the case for structural interdicts in Kenya.

1.2. STATEMENT OF THE PROBLEM

Despite the promulgation of a progressive constitution with a robust bill of rights, an independently functioning judiciary and spirited attempts by both the High Court and the Supreme Court to issue the structural interdict, this remedy still faces obstacles in implementation given that the Court of Appeal has unequivocally capped the suggested application of this remedy in the now famous 'Mitu-Bell' case.

Effectively, the dissertation challenges the decision of the Court of Appeal using the following arguments:

- The structural interdict fosters present and future compliance of government with its constitutional duties.
- Because of its very nature, it will increase judicial independence and involvement in remedying breaches of government agencies and if effectively applied, will buttress the separation of powers.
- It curbs arbitrariness of government agencies which may be in conflict with the law and hence is a check for government inaction and excesses.

⁵ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, para 68

⁶ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, para 77

⁷ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, para 112

1.3. RESEARCH OBJECTIVES

This dissertation achieves the following specific objectives:

- Explaining the concept of the structural interdict and the achievements that may be expected with its inclusion in Kenya in protection and fulfilment of socio-economic rights.
- Demonstrating the legal and institutional framework through which the structural interdict may be enshrined and implemented respectively.
- Examining the decision of the Court of Appeal in the ‘Mitu-Bell case’ and proposing an argument why it is retrogressive under a progressive Constitution.
- Rendering an informed and factual analysis on the extent to which courts can adopt foreign comparative jurisprudence and general rules of international law.

1.4. RESEARCH QUESTIONS

The dissertation answers the following questions:

- What is the immediate necessity of the structural interdict?
- Why is the Court of Appeal judgement in the ‘Mitu-Bell’ case, inimical to the effective protection and fulfilment of socio-economic rights in Kenya?
- How does the application of the structural interdict augur with the separation of powers in light of increased judicial supervision of other government agencies.

1.5. HYPOTHESIS

It is the considered hypothesis of this dissertation that:

The enshrinement of the structural interdict in Kenyan law enhances the protection and fulfilment of socio-economic rights, while at the same time promoting judicial authority without prejudicing the separation of powers.

1.6. LITERATURE REVIEW

Christopher Mbazira in his book *Litigating Socio-Economic Rights in South Africa* in chapter six talks at length about the structural interdict, its nature and function. He explains that ‘the structural interdict has been used by the courts in a manner that goes against traditional perceptions of the role of the courts as envisioned under the theory of corrective justice.’⁸ It has enabled judges to discard their position as mere umpires and to assume positions which make them active participants in the dispute.⁹ The courts have made not only extensive judicial decrees, but have also overseen their implementation.¹⁰ This has generated much controversy and objection to the structural interdict as an appropriate relief. This is because it forces courts to do things that they are ordinarily not expected to do.’¹¹ He however clarifies that it is a remedy which ordinarily is of a last resort nature and even if it must be used, there are norms and guidelines that must necessarily be employed in issuing them.¹² He has discussed these norms and principles at length.

Iain Currie & Johan de Waal in their book ‘Limitation of Rights, in The Bill of Rights Handbook suggest the five characteristics that make up Structural Interdicts.’¹³

The first step is issuance of a declaration by the Court identifying how the government has infringed an individual or group’s constitutional rights or otherwise failed to comply with its constitutional obligations.¹⁴

Second, the court mandates government compliance with constitutional responsibilities.¹⁵

Third, the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a preset date. This report, which should explicate the government’s action plan for remedying the challenged violations, gives “the responsible state agency the opportunity to choose the means of compliance” with the constitutional rights in question, rather than the court itself developing or dictating a solution.¹⁶ The submitted plan is typically expected “to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached.”¹⁷

⁸ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 165

⁹ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 165

¹⁰ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 165

¹¹ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 165.

¹² Mbazira, *Litigating Socio-Economic Rights In South Africa*, 165

¹³ Currie .I & De Waal .J, *Remedies in the Bill of Rights Handbook*, 1999

¹⁴ Currie & de Waal, *Remedies in The Bill Of Rights Handbook*, 219

¹⁵ Currie & de Waal, *Remedies in The Bill Of Rights Handbook*, 219

¹⁶ Currie & de Waal, *Remedies in The Bill Of Rights Handbook*, 219

¹⁷ Currie & de Waal, *Remedies in The Bill Of Rights Handbook*, 219

Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations.¹⁸ This stage of a structural interdict may involve multiple government presentations depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. After court approval, a final order (integrating the government plan and any court-ordered amendments) is issued.¹⁹

Dr Mutakha Kangu also states that the transformative nature of the constitution lies in its ability to address the systemic and structural problems of the Kenyan society.²⁰ Structural interdicts or injunctions are therefore appropriate remedies that can be fashioned to address demonstrated government inaction or systematic and structural problems in society.²¹

This dissertation relies on these sources of literature together with other numerous and informative sources in developing an understanding of the nature of Socio-economic rights and the role of structural interdicts in their enforcement.

1.7. THEORETICAL FRAMEWORK

This dissertation employs the ideas of John Locke presented in the Second Treatise on Government in developing a theoretical framework for the case for the structural interdict. Particular regard is had to chapter nine of the treatise in which he identifies three elements which constitute the civil society to wit:²²

- a. An established, settled, known law, received and accepted by common consent as the standard of right and wrong and as the common measure to decide all controversies.
- b. A known and impartial judge, with authority to settle all differences according to the established law.
- c. A power to back up and support a correct sentence, and to enforce it properly.

He states that in the state of nature, man is lord of his possessions but cannot prevent others from taking them. Hence the need for uniting and giving prerogative to a government that affords them the protection that they need. This can only be done with the existence of a law

¹⁸ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁹ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

²⁰ Mutakha K, 'Remedies In Constitutional Litigation Under The Kenyan Constitution Of 2010' LSK continuous Professional Development Seminar, Green Hills Hotel, Nyeri, 15th to 16th September, 2016

²¹ Mutakha K, 'Remedies In Constitutional Litigation Under The Kenyan Constitution Of 2010', 2016.

²² Locke J, 'Second Treatise of Government' - <<http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf>>

by which everyone abides. It is arguable in light of this explanation that these **‘possessions of man’** in the context of an **‘established, settled, known law, received and accepted by common consent as the standard of right and wrong’**, are human rights and particularly socio-economic rights (for the purposes of the study). The **‘known and impartial judge’** is a court of law or largely speaking the judicature, which guarantees these rights according to the established law. While in the third aspect where he is referring to criminals and those who breach the law, **‘power to backup and support a correct sentence’** is extrapolated to mean the enforcement of court decision and judgement.

The foregoing explanation constitutes a theoretical framework upon which the case for structural interdicts may rely. While the executive or government agencies and administrative institutions are capable of breaching the law especially in the context of protection and fulfilment of socio-economic rights, the judiciary in an action brought before a court, can then declare rights of parties affected and superintend the correction of the breach giving rise to such action.

1.8. DESIGN AND METHODOLOGY

This study is based entirely on desktop research. Foreign case law and Kenyan case law are heavily relied upon. The Constitution of Kenya, Acts of Parliament and books consist primary sources while internet reports, libraries and journal articles do the office of secondary sources of data.

1.9. CHAPTER BREAKDOWN

Chapter One - Introduction to the Study

This chapter gives the background of the study, the problem, the literature review, the objectives and questions, the hypothesis, and the design methodology of the study.

Chapter Two – Theoretical Framework

This chapter considers the theory of Social Contract as espoused by John Locke and its connect with the concept of Constitutionalism. The substantive content of these two distinct concepts is used as a foundational framework to explain the existence and enforcement of Socio-Economic rights within a legal regime.

Chapter Three -The State and Socio-Economic Rights

This chapter explains the interface between the nature of socio-economic rights and the role of the state in respecting, protecting and fulfilling these rights.

Chapter Four – The case for Structural Interdicts in Kenya

This chapter considers the landmark Court of Appeal judgement in the Mitu-Bell case which capped the use of Structural Interdicts and makes an argument in response to the justifications given by the honourable court. In so doing, both local and foreign jurisprudence is considered.

Chapter Five – Conclusion and Recommendations.

This is a succinct restatement of the case for the inclusion of structural interdicts in Kenyan law, the benefits of this remedy and role of legal practitioners in advocating for the same.

CHAPTER TWO: THEORETICAL FRAMEWORK OF THE STUDY (SOCIAL CONTRACT AND CONSTITUTIONALISM)

2.0. INTRODUCTION

The structural interdict is a means of enforcement of human rights which can only exist and be asserted by law. Rule of law then becomes an absolute which must precede the successful assertion of human rights. There is however no single accepted definition of the principle of rule of law and for the purposes of this dissertation, the definition given by the UN Secretary General is most relevant. The Secretary General describes it as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’²³ From this definition, it is clear that rule of law **consists in strict adherence of all persons including state** to publicly promulgated and accepted laws.

It is with this understanding that the enshrinement and enforcement in law of human rights must be construed. There is no rule of law within societies if human rights are not protected and vice versa; human rights cannot be protected in societies without a strong rule of law.²⁴ The rule of law is the implementation mechanism for human rights, turning them from a principle into a reality.²⁵

The impression of an inward active principle is to natural things, what the promulgation of law is to men: because law, by being promulgated, imprints on man a directive principle of human actions.²⁶ The very idea of obedience presupposes knowledge of that which is to be obeyed, without which knowledge there could be only the coincidence, never the obligation,

²³ Report of the Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies, 23 August 2004, 6

²⁴ <<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>> accessed on 15 December 2017

²⁵ <<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>> accessed on 15 December 2017

²⁶ Aquinas T, ‘Summa Theologica -Part I-II, Q93. Art 5’

of obedience.²⁷

This is a basic description of the idea of social contract. It is an actual or hypothetical compact agreement between the ruled and their rulers, defining the rights and duties of each. In primeval times, according to the theory, individuals were born into an anarchic state of nature, which was happy or unhappy according to the particular version.²⁸ They then, by exercising natural reason, formed a society (and a government) by means of a contract among themselves.²⁹

The rule of law is almost synonymous to **constitutionalism** which generally speaking is the idea of government by law. It is the proposition that a government derives authority from a constitution and limits the exercise of this authority to the extents given in that constitution.

Hence the two concepts of existence of government through social contract and the limits of exercise of power by that government, form the theoretical bedrock for the discussion around structural interdicts and human rights. In this regard they are discussed respectively as follows, but must not be read disjunctively.

2.1. JOHN LOCKE AND THE SOCIAL CONTRACT

In his famous Second Treatise of Government, John Locke begins by describing his understanding of the state of nature as being one in which men are perfectly free to order their actions, and dispose of their possessions and themselves, in any way they like, without asking anyone's permission.³⁰ He also characterises this state as one of equality in which no-one has more power and authority than anyone else.³¹ He explains the existence of civil society saying that 'though in the state of nature man has an unrestricted right to his possessions, he is far from assured that he will be able to get the use of them, because they are constantly exposed to invasion by other so his hold on the property he has in this state is very unsafe, very insecure'³²

This makes him willing to leave a state in which he is very free, but which is full of fears and continual dangers; and not unreasonably **he looks for others with whom he can enter into a**

²⁷ Bailey G, 'The Promulgation of Law' America Political Science Review Journal, Vol 35 Issue 6, December 1941, 1059-1084

²⁸ <<https://www.britannica.com/topic/social-contract>> accessed on 15 December 2017

²⁹ <<https://www.britannica.com/topic/social-contract>> accessed on 15 December 2017

³⁰ Locke J, 'Second Treatise of Government', 4

³¹ Locke J, 'Second Treatise of Government', 4

³² Locke J, 'Second Treatise of Government', 123

society for the mutual preservation of their lives, liberties and estates, which he calls by the general name 'property'.³³

He then describes the state of nature as lacking in many things but only expounds on three which may conversely be adapted as the characteristics of a civil society to wit;

1. An established, settled, known law, received and accepted by common consent as the standard of right and wrong and as the common measure to decide all controversies.³⁴
2. A known and impartial judge, with authority to settle all differences according to the established law.³⁵
3. Power to back up and support a correct sentence, and to enforce it properly.³⁶

Already he is characterising civil society as a necessary arrangement where men put themselves under government in the hope of preservation of their property.³⁷

Generally under the social contract theory, those in society agree to cede individual sovereignty and independence which exists in the state of nature and agree to be bound by a government in exchange for the protection of their rights, liberties and estates from interference by fellow men and even government itself.³⁸ The great purpose for which men enter into society is to be safe and at peace in their use of their property; and the great instrument by which this is to be achieved is the laws established in that society.³⁹

Having established the necessity of government, it follows that the '**possessions of man**' which he seeks to protect by consenting to a government and the 'established, settled, known law, are strictly what that law prescribes as belonging to him'⁴⁰. In the context of modern day government, a bold inference is made that these possessions are the equal of human rights contained in a bill of rights in the constitution of a state.⁴¹ For example under the Kenyan constitution, the Bill of Rights is contained in Chapter 4 and is considered under Article 19 (1) as an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.⁴²

³³ Locke J, 'Second Treatise of Government', 123

³⁴ Locke J, 'Second Treatise of Government', 124

³⁵ Locke J, 'Second Treatise of Government', 125

³⁶ Locke J, 'Second Treatise of Government', 126

³⁷ Locke J, 'Second Treatise of Government', 124

³⁸ Locke J, 'Second Treatise of Government', 134

³⁹ Locke J, 'Second Treatise of Government', 134

⁴⁰ Locke J, 'Second Treatise of Government', 124

⁴¹ Locke J, 'Second Treatise of Government', 124

⁴² Article 19, *Constitution of Kenya*, (2010)

Secondly, Locke in referring to a **‘known and impartial judge with authority to settle all differences according to the established law’** is thinking in the line of resolution of conflict between man and man before a judge.⁴³ However in consideration of this topic, an analogy is made where the concept of impartial judge applies to a modern day court of law and that government also qualifies as ‘man’ who is amenable to the jurisdiction of the court when accused of unjust interference with the ‘possessions of another man’(earlier on characterised as human rights).⁴⁴

Finally, the idea of **‘power to back up and support a correct sentence, and to enforce it properly’** as per Lockean understanding would mean visiting the requisite punishment on criminals after sentencing while being able to contain resistance from them.⁴⁵ This conception can be analogised to the implementation of law by the executive arm of government and particularly with regard to the enforcement and protection of human rights after judicial determination. For example following a determination of an existing breach of socio - economic rights, a court may issue a structural interdict to remedy such breach and in effect exercise its power to backup and support a correct sentence, and to enforce it properly.⁴⁶

Thus the foregoing explanations demonstrate that government is by and large a product of the Social Contract which in light of this topic may be summed as a general acquiescence by the public to governance, crystallised in a constitution. Such government derives their just powers from the consent of the governed and exists is formed to secure the rights of the governed.⁴⁷

⁴³ Locke J, ‘Second Treatise of Government’, 125

⁴⁴ Locke J, ‘Second Treatise of Government’, 4

⁴⁵ Locke J, ‘Second Treatise of Government’, 134

⁴⁶ Locke J, ‘Second Treatise of Government’, 134

⁴⁷ The American Declaration of Independence, In Congress July 4, 1776.

2.2. CONSTITUTIONALISM

Most countries that have a written constitution consider it the most important legal document in their legal regime and one by which all other written law must align.⁴⁸ It is the supreme law and has been analogised with a trust agreement.⁴⁹ The “trustees” in the constitutional scheme (the government) are not identical with the “settlor” (the sovereign) and therefore are not at liberty to alter the trust agreement and change the limits of their authority.⁵⁰ From this agreement must come decisions about the extent of authority.⁵¹

A written constitution is not only a set of rules, it is also a way of creating rules.⁵² It is therefore more than just a document. It embodies the wishes and aspirations of the country. All the laws, by laws, rules and regulations find their legitimacy from the constitution.⁵³

Constitutionalism is the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to govern within its constitutional limitations.⁵⁴ In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions.⁵⁵

Constitutionalism rests on two pillars. First, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined core values.⁵⁶ Second, the existence of a clearly defined mechanism for ensuring that the

⁴⁸ The Oxford Encyclopedia of American Political and Legal History, Volume 1, Donald T. Critchlow, Philip R. VanderMee, 2012, 167

⁴⁹ Oxford Encyclopedia of American Political and Legal History, 2012, 167

⁵⁰ Oxford Encyclopedia of American Political and Legal History, 2012, 167

⁵¹ Oxford Encyclopedia of American Political and Legal History, 2012, 167

⁵² Oxford Encyclopedia of American Political and Legal History, 2012, 167

⁵³ Maina C, Constitutional Making Process In Tanzania: The Role Of Civil Organisations – ‘A Case Study prepared for the Civil Society and Governance in East Africa Project’, 1999, 3

⁵⁴ Fombad CM, ‘Constitutional Reforms And Constitutionalism In Africa: Reflections On Some Current Challenges And Future Prospects’, 2011, 3

⁵⁵ Fombad CM, ‘Constitutional Reforms And Constitutionalism In Africa: 2011, 3

⁵⁶ Fombad CM, ‘Constitutional Reforms And Constitutionalism In Africa: 2011, 3

limitations on the government are legally enforceable.⁵⁷

In this sense, modern constitutionalism has six core elements:⁵⁸

- i. the recognition and protection of fundamental rights and freedoms;
- ii. the separation of powers;
- iii. an independent judiciary;
- iv. the review of the constitutionality of laws;
- v. the control of the amendment of the constitution; and
- vi. Institutions that support democracy.⁵⁹

For the purposes of this dissertation and the discussion around human rights and their enforcement, the first three elements will be considered in the context of the Constitution of Kenya.

2.2.1. The recognition and protection of fundamental rights and freedoms

Most constitutions have a framework that enshrine fundamental human rights and freedoms and which is commonly referred to as a bill of rights. Ideally the optimal protection of human rights is to insert a list of human rights guarantees into the constitution.⁶⁰ This recognition at constitutional level ensures that all branches of government are bound by the rights in their actions, and that legislation shall respect these rights due to the constitution's hierarchal supremacy.⁶¹ Furthermore, it will automatically foster more public support for the human rights enumerated in the constitution, if their inclusion is a result of a participatory constitutional process and adopted by the people through a national referendum.⁶²

For example, in the Kenyan legal regime, the Constitution of Kenya at Article 19 reads:

- (1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

⁵⁷ Fombad CM, 'Constitutional Reforms And Constitutionalism In Africa: 2011, 3

⁵⁸ Fombad CM, 'Constitutional Reforms And Constitutionalism In Africa: 2011, 3

⁵⁹ Fombad CM, 'Constitutional Reforms And Constitutionalism In Africa: 2011, 3

⁶⁰ The Danish Institute for Human Rights, 'The Constitutional Protection of Human Rights', 2012, 7 - https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/the_constitutional_protection_of_human_rights_en.pdf on 18th September, 2017

⁶¹ Danish Institute, 'Constitutional Protection of Human Rights', 2012, 7

⁶² Danish Institute, 'Constitutional Protection of Human Rights', 2012, 7

- (2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.⁶³

2.2.2. The Separation of Powers

The doctrine of Separation of Powers deals with the mutual relations among the three organs of the Government namely legislature, executive and judiciary.⁶⁴ The doctrine means that specific functions, duties and responsibilities are allocated to distinctive institutions with a defined means of competence and jurisdiction.⁶⁵ That if one of the three spheres of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them.⁶⁶ The same will be said of the executive authority, it is not supposed to enact law or to administer justice.⁶⁷

In the constitutional theory of John Locke in his Second Treatise of Government He writes that:⁶⁸

*'It may be too great a temptation to humane frailty apt to grasp at Power, for the same Persons who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government'*⁶⁹

Baron Montesquieu ably explained this doctrine in the following manner;

'When the legislative and executive powers are united in the same person, or in the same

⁶³ Article 19, *Constitution of Kenya*, (2010)

⁶⁴ Tej B Singh, 'Principle of Separation of Powers and Concentration of Authority', *Judicial Training and Research Institute Journal*, Second Year, Issue 4 & 5 March, 1996

⁶⁵ Mojapelo J, 'The doctrine of separation of powers (a South African perspective)' *General Council of the Bar of South Africa*, 2013, 1 - <<http://www.sabar.co.za/law-journals/2013/april/2013-april-vol026-no1-pp3746.pdf>>

⁶⁶ Mojapelo J, 'The doctrine of separation of powers' *General Council of the Bar of South Africa*, 2013, 1

⁶⁷ Mojapelo J, 'The doctrine of separation of powers' *General Council of the Bar of South Africa*, 2013, 1

⁶⁸ Mojapelo J, 'The doctrine of separation of powers' *General Council of the Bar of South Africa*, 2013, 1

⁶⁹ Locke J, 'Second Treatise of Government', 143

*body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.*⁷⁰

*Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*⁷¹

*There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals*⁷²

In the Kenyan case, the constitution of Kenya establishes three distinct arms of government and delineates their functions and roles in conformity with this principle.

Parliament is established under Chapter 8 of the Constitution and it consists of the National Assembly and the Senate and has the mandate to make provision having the force of law among other functions.⁷³

The Executive is also established under article 130 and comprises the President, the Deputy President and the rest of the Cabinet and its authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.⁷⁴

The Judiciary is established under article 159 and its authority is derived from the people, vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution.⁷⁵

The constitution of Kenya envisages an operation of this principle as an inherent component of the structure of government. However in the end, courts must determine whether unauthorised trespassing by one arm of the state into the terrain of another has occurred.⁷⁶ In

⁷⁰ Montesquieu B, 'Spirit of The Laws: Of the Laws Which Establish Political Liberty, with Regard to the Constitution, Book XI, 1749

⁷¹ Montesquieu, 'Spirit of The Laws: Book XI, 1749

⁷² Montesquieu, 'Spirit of The Laws: Book XI, 1749

⁷³ Article 93&94, *Constitution of Kenya*, (2010)

⁷⁴ Article 129 & 130, *Constitution of Kenya*, (2010)

⁷⁵ Article 159, *Constitution of Kenya*, (2010)

⁷⁶ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function' Oliver Schreiner Memorial Lecture, University of the Witwatersrand, Johannesburg, 23 October 2008, 18

that narrow sense, the courts are the ultimate guardians of the Constitution.⁷⁷ They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so.⁷⁸ It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of government and the extent of such intervention.⁷⁹ It is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.⁸⁰

But even in these circumstances, courts must observe the limits of their own power.⁸¹

On this basis, the idea of structural interdicts is promoted and enabled by the Kenyan government architecture. That in one of the ways the courts may play their role as a defender of the constitution is through issuing structural interdicts to remedy the breach of a socio-economic right. In exercising this duty, a degree independence must be granted to the judiciary.

2.3.4. Judicial Independence

This is the idea that in the exercise of judicial authority, the Judiciary, as constituted **shall be subject only to the Constitution and the law and shall not be subject to the control or direction of any person or authority.**⁸² The scholar RWM. Dias remarks about it thus:

*The success or failure of judicial control of the abuse of power, whatever form such control may assume, depends on the judges being independent of those wielding the power.*⁸³
*Independence means far more than immunity from interference; it means that they are free to bring their own sense of values to bear in considering legislation and do not simply reflect the values of government.*⁸⁴ *For there can be no protection against abuse of power, even when safeguards are enshrined in the Constitution, if the judges who have to interpret these whenever the government is challenged are only puppets of the government.*⁸⁵

This principle was explained in the case of *The Queen vs Bearegard (1986)* in which Chief Justice Brian Dickson on judicial independence stated that;

⁷⁷ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function', 18

⁷⁸ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function', 18

⁷⁹ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function', 18

⁸⁰ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function', 18

⁸¹ Moseneke J, 'Separation of Powers, Democratic Ethos and Judicial Function', 18

⁸² Article 160, *Constitution of Kenya*, (2010)

⁸³ Dias, RWM, *Jurisprudence London*, Butterworths 4th Edition, 1976, 128

⁸⁴ Dias, RWM, *Jurisprudence London*, Butterworths 4th Edition, 1976, 128

⁸⁵ Dias, RWM, *Jurisprudence London*, Butterworths 4th Edition, 1976, 128.

*'The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.'*⁸⁶

Under article 160 of the constitution of Kenya, this concept is well articulated and reads;

*'In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.'*⁸⁷

This principle is closely tied with the Separation of powers doctrine. **If courts are to have a capacity to issue structural interdicts, there must be no interference from government.**

A judiciary of undisputed integrity is the bedrock institution essential for ensuring compliance with democracy and the rule of law.⁸⁸ Even when all other protections fail, it provides a bulwark to the public against encroachments on its rights and freedoms under the law.⁸⁹

As compared, therefore, to the other organs of government, the Judiciary must be well-anchored upon a foundation that does not flinch at pangs inflicted by the public power, nor pander to attractions of things allied to such power; that foundation sits in the stable of law, and legality.⁹⁰

Ojwang J gives a rubric upon which the concept of judicial independence may be founded;

1. Firstly, the citizen has to trust that the courts judgement has a finality, and is entitled to obedience, as a matter of constitutional obligation.⁹¹
2. Then the citizen has to trust that the Judiciary shall be guided by rules, principles and discretions not influenced by the very power-wielders who cause oppression, or other harm. That is to say, the citizen expects the Judiciary to be independent, in its decision-making.⁹²

⁸⁶ The Queen vs Beaugard (1986), The Supreme Court of Canada, [1986] 2 SCR 56, 30

⁸⁷ Article 160, *Constitution of Kenya*, (2010)

⁸⁸ <<https://www.judicialintegritygroup.org/jig-group/jig-history/78-jig>> - accessed on 26 January 2018

⁸⁹ <<https://www.judicialintegritygroup.org/jig-group/jig-history/78-jig>> - accessed on 26 January 2018

⁹⁰ Ojwang B, 'The Independence of the Judiciary in Kenya' Conference on the Independence of the Judiciary in Sub-Saharan Africa: Towards an Independent and Effective Judiciary in Africa, Imperial Resort Beach Hotel, Entebbe, June 24-28, 2008

⁹¹ Ojwang B, 'The Independence of the Judiciary in Kenya' June 24-28, 2008

⁹² Ojwang B, 'The Independence of the Judiciary in Kenya' June 24-28, 2008

3. And lastly, the citizen expects the Judiciary to be fair, in its decision-making.⁹³

All these attributes underline one theme, **independence**, as the hallmark of the Judiciary, in a constitutional set-up that protects the citizen, as an individual, even as the nations broad social goals are pursued by the relevant public agencies, which are driven by a political-cum-administrative mandate.⁹⁴

2.4. CONCLUSION

The two foregoing concepts of **social contract** as a theory and **constitutionalism** as a foundational concept now lay the groundwork for the discussion around the enforcement of human rights. When read together, they create the import that government is formed by agreement from the governed by way of a constitution and that it will derive its powers from that constitution only and not exceed them. That in the exercise of the powers donated to it by the constitution, government must act in a manner that engenders mutuality and cooperation within it and that the excesses of one arm may be checked by another. With this understanding, the question of human rights and their enforcement can then be discussed especially when they are asserted against the government.

⁹³ Ojwang B, 'The Independence of the Judiciary in Kenya' June 24-28, 2008

⁹⁴ Ojwang B, 'The Independence of the Judiciary in Kenya' June 24-28, 2008

CHAPTER THREE: THE STATE AND SOCIO - ECONOMIC RIGHTS

INTRODUCTION

In this chapter, the interplay between the legal nature of Socio – Economic rights and role of government, is considered. A government exercises its mandate by law and must order its business according to the rule of law. Socio –economic rights which form part of human rights must then be enshrined in law if they are to gain protection and enforcement from the government. Thus the legal nature of these rights and the extent to which a government is amenable to their protection and fulfillment is discussed.

3.1. The Character of Socio – Economic Rights

Socio-economic rights (SERS) are rights that give people access to certain basic needs necessary for human beings to lead a dignified life.⁹⁵ They concern the basic social and economic conditions needed to live a life of dignity and freedom, relating to work and workers' rights, social security, health, education, food, water, housing, healthy environment, and culture.⁹⁶ The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a key authority in the conceptualisation and implementation of SERs. It is arguably the most authoritative document with regard to the conceptualisation of SERs and state duty in their implementation. Some of them include but are not limited to:

- The Right to Work and Workers' Rights⁹⁷

⁹⁵ Khoza S, *Socio-Economic Rights in South Africa*, 2nd Edition, 2007, 20

⁹⁶ < <https://www.escr-net.org/rights> > - On 14 August 2017

⁹⁷ Article 6, 7&8, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) 2200A (XXI)

- The Right to the enjoyment of the highest attainable standard of physical and mental health.⁹⁸
- The Right to Social Security⁹⁹
- The Right to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹⁰⁰
- The Right to Education which (education) shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.¹⁰¹

In the context of Kenya and at the national level, the constitution contemplates under Article 43 the idea of socio-economic rights and describes them thus;

Economic and Social Rights

(1) Every person has the right--

- a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;
- b) to accessible and adequate housing, and to reasonable standards of sanitation;
- c) to be free from hunger, and to have adequate food of acceptable quality;
- d) to clean and safe water in adequate quantities;
- e) to social security; and
- f) to education.¹⁰²

⁹⁸ Article 12, *International Covenant on Economic, Social and Cultural Rights*

⁹⁹ Article 9, *International Covenant on Economic, Social and Cultural Rights*

¹⁰⁰ Article 11, *International Covenant on Economic, Social and Cultural Rights*

¹⁰¹ Article 13, *International Covenant on Economic, Social and Cultural Rights*

¹⁰² Article 43, Constitution of Kenya (2010)

3.1.2 The Justiciability of Socio-Economic Rights.

Black's Law dictionary defines justiciability as 'capacity to claim a right before a tribunal.'¹⁰³ It is the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person's right.¹⁰⁴ It would then, broadly speaking, be the extent to which a matter is suitable for judicial determination.¹⁰⁵ Enshrining rights in the bill of rights makes them amenable to judicial interpretation and enforcement.

Justiciability of socio-economic rights has been said to consist in two dimensions; **the legitimacy dimension** and **the institutional competence dimension**.¹⁰⁶ The legitimacy dimension refers to the nature, or character, of socio - economic rights and asks whether it would be legitimate to confer constitutional status on socio - economic rights in light of their subject matter.¹⁰⁷ The institutional competence dimension of justiciability looks more to the nature, or character, of the judiciary, and addresses whether the judiciary possesses the institutional capacity and competence to adjudicate social rights.¹⁰⁸

Most criticisms and arguments against inclusion of socio- economic rights in a constitution centre around institutional competence. They advance the conception that socio-economic rights require governmental action, are resource-intensive thus expensive to protect; progressive and therefore requiring time to realize; vague in terms of the obligations they mandate; and involving complex, polycentric, and diffuse interests in collective goods.¹⁰⁹ A clear example was the debate concerning introduction of socio-economic rights in the South

¹⁰³ <<https://thelawdictionary.org/justiciability/>> - accessed on 30 January 2018

¹⁰⁴ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a new South African Constitution', University of Pennsylvania Law Review, November 1992, 17

¹⁰⁵ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees?', 17

¹⁰⁶ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees?', 20

¹⁰⁷ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees?', 21

¹⁰⁸ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees?', 21

¹⁰⁹ Scott C and Macklem P, 'Constitutional Ropes of Sand or Justiciable Guarantees?', 24

African Constitution. Those against their inclusion argued that it would be equally erosive to the legitimacy of the Constitution if it promised too much and since rights impose corresponding duties, the constitution would lose its credibility if it told people they have rights in respect of which the state cannot deliver, due to a lack of resources.¹¹⁰ The Constitutional Court of South Africa however weighed in on this matter and asserted that;

*It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights, such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.*¹¹¹

With regard to justiciability of socio-economic rights, the court further opined that;

*These rights are, at least to some extent, justiciable. The fact that socio-economic rights will almost inevitably give rise to such (budgetary) implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.*¹¹²

Notably, these rights continue to enjoy constitutional guarantee in most progressive jurisdictions. In Kenya, the Court of Appeal examined the justiciability of these rights in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR* and rendered itself thus;

*'To continue to afford socio-economic rights less judicial protection and enforcement is erroneous because by their very nature socio-economic rights are crucial to a state's development; they cannot be mere "aspirations" and must be afforded the protection they rightly deserve.'*¹¹³

¹¹⁰ HeynS C, 'Introduction to socio-economic rights in the South African Constitution' 1998, 3

¹¹¹ Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC), para. 77.

¹¹² Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 Constitutional Court, para 78

¹¹³ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR, para 34

In light of this justiciable status of these rights and their positive nature, the role and obligation of the state in their respect, protection and fulfilment is discussed below.

3.2. State Obligation And Socio-Economic Rights

To Respect, Protect and Fulfil

The rule of law has played an integral part in anchoring economic, social and cultural rights in national constitutions, laws and regulations.¹¹⁴ Where such rights are justiciable or their legal protection is otherwise ensured, the rule of law provides the means of redress when those rights are not upheld or public resources are misused.¹¹⁵ The preamble to the Universal Declaration of Human Rights anticipates this very important concept when it conceptualises it in the following words;

‘Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, **that human rights should be protected by the rule of law**’.¹¹⁶

Karel Vasak explains the legal nature of human rights and legal reality which must foster their enjoyment. He states that in order for human rights to become a legal reality, three requirements must be met:

- an organized society must exist in the form of a de jure State;¹¹⁷
- within the State human rights must be exercised in a pre-established legal framework, which may nevertheless vary according to circumstances and according to the nature of the rights;¹¹⁸

¹¹⁴ <<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>> on 21 September 2017

¹¹⁵ <<https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/>> on 21 September 2017

¹¹⁶ Preamble, Universal Declaration of Human Rights, 10 December 1948

¹¹⁷ Vasak K, *The International Dimensions Of Human Rights*, Greenwood Press Westport, Connecticut, 1982, 4

¹¹⁸ Vasak K, *The International Dimensions Of Human Rights*, 4

- those entitled to exercise human rights must be provided with specific legal guarantees and, in particular, recourse must be provided so as to ensure that those rights are respected.¹¹⁹

Through ratification of international human rights treaties, states undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties under international law to respect, to protect and to fulfil human rights.¹²⁰

This international typology was for instance asserted in the case of *SERAC vs Nigeria (2001)* in which the African Commission on Human and Peoples' Rights rendered itself thus;

*Internationally accepted ideas of the various obligations engendered by human rights indicate that **all rights - civil and political rights and economic, social and cultural** - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the **duty to respect, protect, promote, and fulfil these rights**. These obligations universally apply to all rights and entail a combination of negative and positive duties.*¹²¹

The constitution of Kenya captures the nature and extent of these obligations under Article 21(1) and (4);

1. It is a fundamental duty of the State and every State organ to **observe, respect, protect, promote and fulfil** the rights and fundamental freedoms in the Bill of Rights¹²²

Sub - article 4 reads

1. The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹²³

For the purposes of this discussion and with regard to the nature and character of SERs, this paper will focus on the obligations of respecting, protecting and fulfilling SERs.

3.2.1. The Obligation to Respect

The obligation to respect means that States must refrain from interfering with or curtailing the

¹¹⁹ Vasak K, *The International Dimensions Of Human Rights*, 4

¹²⁰ <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>>- accessed on 30 January 2018

¹²¹ Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) ACmHPR Comm. 2001, para 44.

¹²² Article 21, *Constitution of Kenya* (2010)

¹²³ Article 21, *Constitution of Kenya* (2010)

enjoyment of human rights.¹²⁴ The African Commission defined the obligation to respect human rights as, requiring the State to refrain from interfering with the existing fundamental rights of rights-holders; to respect the right-holders autonomy, freedom and resources; as well as the liberty of their actions in using the resources available to them individually and collectively in the realisation of their fundamental rights.¹²⁵ For example under the right to housing, the state must refrain from instituting unlawful evictions unless the required procedural guarantees are met.

In the case of *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security & 3 Others* (2011) eKLR, an application was brought by a group of 1,122 people who had been forcefully evicted from an un-alienated public land that they had been occupying since the 1940s. The Petitioners approached the Court citing a violation of both civil and political rights as well as economic, social and cultural rights contained in the Constitution of Kenya 2010, especially the right to life under Article 26(1) and (3), the right to human dignity under Article 28 and 29, the right to information under Article 35(1), the right to property under Article 40, the right to housing, food, water and health as contained in Article 43(1) as well as the right to fair administrative action under Article 47.²⁵³ They sought a permanent injunction restraining the Respondents from evicting them in future, a mandatory injunction ordering the Respondents to provide them with suitable and permanent alternative land, shelter or accommodation, and an order for general, aggravated and exemplary damages. The Court then provided substantive remedies as requested by the Petitioners, ordering the Respondents by a mandatory injunction to return the Petitioners to the land from which they were evicted, to reconstruct for them reasonable residences or houses with all the requisite social amenities to be mutually agreed upon by all the parties, **a permanent injunction restraining the respondents from forcefully evicting the Petitioners in future** as well as damages of Kshs. 200,000 for each of the 1,122 Petitioners.¹²⁶

3.2.2. The Obligation to Protect

The obligation to protect requires States to protect individuals and groups against human

¹²⁴ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> On 15 August 2017

¹²⁵ SERAC case para 45

¹²⁶ *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security & 3 Others* (2011) eKLR,

rights abuses.¹²⁷ This obligation entails the responsibility of the State to protect right-holders against political, economic, and social interferences of their rights by third parties which lead to the violation or threats of violation of their fundamental rights.¹²⁸ The State is thus under a duty to put in place effective legislative, policy, administrative and regulatory structures to ensure that third parties do not violate the rights of right-holders, and further requires the State to put in place effective judicial and other remedial measures for the vindication of rights in instances of violation.¹²⁹

Its obligations to protect obliges it to prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and landowners, and where such infringements occur, it should act to preclude further deprivation as well as guarantee access to legal remedies.¹³⁰ A clear example is where the government of Kenya passed the Rent Restriction Act which makes provision for restricting the increase of rent, the right to possession and the exaction of premiums, and for fixing standard rents, in relation to dwelling-houses.¹³¹ Also there is sufficient judicial installation through which legal redress for the violation of this right may be sought for example through the High Court.

In the case of *Susan Waithera Kariuki & 4 others v Town Clerk, Nairobi City Council & 2 others* there was a threatened demolition of houses and eviction of the Applicants from their homes, which were in informal settlements, on the ground that the houses were built on road reserves. The court emphasised the requirement that the Constitution is to be interpreted in a manner that promotes its purposes, values and principles as well as advance the rule of law, human rights and fundamental freedoms as is enshrined in Article 259(1) of the Constitution. The Court thus held that Applicants' right to housing overrode the First Respondent's duty to plan the City, and that it was unconstitutional to forcefully evict the Applicants from the houses they had occupied for over forty years with the consequence that they are rendered homeless. It further called on the State **to expeditiously put in place the requisite legislative, policy and programmatic framework which sufficiently catered for the short-, medium- and long-term housing needs of everyone**, but that responded to the special needs of the most vulnerable and marginalised people living in crisis situations, such

¹²⁷ - <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> On 15 August 2017

¹²⁸ SERAC case para 46

¹²⁹ The East African Centre for Human Rights, *A compendium on economic and social rights cases under the Constitution of Kenya 2010, 2015, 18*

¹³⁰ SERAC case para 61

¹³¹ Preamble, *Rent Restriction Act* (No. 25 of 2015.)

as the applicants.

3.2.3. The Obligation to Fulfil

The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.¹³² In **fulfilling** SERs rights, the state must endeavour to provide and actively ensure the **sustained existence of the necessary means** through which they may be enjoyed by all citizens without discrimination.¹³³ One way this may be done is through providing direct subsidies or assistance when the poor are not able to obtain essential services or goods at market prices.¹³⁴

In Kenya for example the government announced Sh 6 billion maize subsidy to lower the cost of flour to Sh90 for a two-kilogramme packet and ease inflationary pressure.¹³⁵ Also in fulfilling the right to education which is a socio-economic right under the constitution of Kenya, the state has built many schools and institutions of learning from primary to tertiary education. For example in 2014 the government of Kenya announced it would build technical training institutes in every constituency in the next five years in a bid to solve the shortage of skilled personnel in technical fields such as artisans, technologists, technicians and other technical expertise and to stimulate economic competitiveness and alleviate poverty.¹³⁶

3.2.5. Progressive Realization

Given the resource and knowledge restraints faced by many countries, the International Covenant on Economic, Social, and Cultural Rights recognizes the fulfillment of economic and social rights can only be achieved over time, and calls for the **progressive realization of ESCR**.¹³⁷

Article 2(1) of the ICESCR reads;

Each State Party to the present Covenant undertakes **to take steps**, individually and through international assistance and cooperation, especially economic and technical, to the maximum

¹³² <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>> On 15 August 2017

¹³³ Khoza S, *Socio-Economic Rights in South Africa*, 2nd Edition, 2007, 36

¹³⁴ <<https://www.escr-net.org/resources/obligation-fulfill>> - accessed on 31 January 2018

¹³⁵ <<https://www.businessdailyafrica.com/news/State-sets-price-of-maize-flour-at-Sh90-a-packet-in-subsidy-plan/539546-3928914-qfmuwcz/>> - accessed on 30 January 2018

¹³⁶ <<https://www.standardmedia.co.ke/article/2000131118/government-to-build-60-technical-institutes>> - accessed on 30 January 2018

¹³⁷ <<https://www.escr-net.org/resources/progressive-realisation-and-non-regression>> - accessed on 31 January 2018

of its available resources, with a view to **achieving progressively the full realization** of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.¹³⁸

This term '**progressive realization**' is given meaning in the context of SERs by the Committee on Economic Social and Cultural Rights (CESCR) in its General Comment on The Nature of States Parties' Obligations. The ICESCR anticipates that states will take '**active steps**' in the realization of the rights contained in it. The general comment succinctly describes what these steps entail;

*'...Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.'*¹³⁹

While there may be difficulty in coming up with an all-inclusive and overarching definition of the term 'progressive realization', the general comment goes ahead to give a clear understanding of the concept under paragraph 9 where it reads;

'...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... 'Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the

¹³⁸ Article 2(1), International Covenant on Economic, Social and Cultural Rights, 16 December 1966

¹³⁹ CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, 2

*context of the full use of the maximum available resources.*¹⁴⁰

In the case of *Centre For Rights Education & Awareness(creaw) & 8 others v Attorney General & another* [2012] eKLR, the High Court of Kenya explained that ‘the Constitution is thus very clear on what rights are subject to the progressive realisation test-the social and economic rights to health care, education, water, housing, and sanitation.¹⁴¹ Such rights require the allocation of resources, and as is the case with similar provisions in the International Covenant on Economic, Social and Cultural Rights, the state’s obligation is made subject to the availability of resources.’¹⁴²

3.3. CONCLUSION

From the foregoing explanations, it is clear that the state has obligations of respect, protection and fulfilment of rights towards its citizens. If it breaches these duties and the citizens are incapable of enjoying these rights as they should, the judiciary will so determine such breach and mandate the government to remedy such breach as the following case demonstrates;

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2003)¹⁴³

In this case, the complainants (Endorois community) alleged that the Government of Kenya in violation of the African Charter on Human and Peoples’ Rights, the Constitution of Kenya and international law, forcibly removed them from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.¹⁴⁴

The Respondent (Government of Kenya) argued that following the Declaration of the Lake Bogoria Game Reserve, the Government embarked on a re-settlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. It argued that this was over and above the compensation paid to the Endorois after their

¹⁴⁰ CESCR General Comment 3, 9

¹⁴¹ *Centre For Rights Education & Awareness(creaw) & 8 others v Attorney General & another* [2012] eKLR Para 49

¹⁴² *Centre For Rights Education & Awareness(creaw) & 8 others v Attorney General & another* [2012] eKLR Para 49

¹⁴³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2003) ACmHPR Comm.

¹⁴⁴ Endorois case, Para 2

ancestral land around Lake was gazetted.¹⁴⁵

It was decided that the Respondents (Government of Kenya) **bears the burden for creating conditions favourable to a people's development** and that it was not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The government was obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission contended that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicated that the government did not adequately provide for the Endorois in the development process. It found against the government that the Endorois community has suffered a violation of Article 22 of the Charter.¹⁴⁶

CHAPTER FOUR: THE CASE FOR THE STRUCTURAL INTERDICTS IN KENYA

INTRODUCTION

In this chapter an indepth analysis of both local and international jurisprudence around structural interdicts is done. The concept of 'transformative constitutions' comes out as a key pillar upon which the very validity and necessity of structural interdicts turns. Further, an analysis of the Mitu – Bell case is done (which case is arguably the most influential and significant case on structural interdicts in Kenyan law). The considerations of the appellate court in nullifying the judgement of the High Court are analysed and countered, with the aggregate of the counter arguments consisting the case for structural interdicts in Kenya.

The nature of Structural Interdicts

A structural interdict is a judicial remedy that demands the violator to rectify the breach of fundamental rights under court supervision.¹⁴⁷ It normally provides an on-going supervision and requires compliance with constitutional provisions and mandates.¹⁴⁸ It works such that the government reports back to the court at regular intervals about the steps they have taken to comply with the orders given.¹⁴⁹ Because of its nature, it can be used both as relief for those whose rights have been violated and as a remedy to deter violations of a similar nature

¹⁴⁵ Endorois case, Para 142

¹⁴⁶ Endorois case, Para 298

¹⁴⁷ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁴⁸ Mutakha K, 'Remedies In Constitutional Litigation Under The Kenyan Constitution Of 2010'

¹⁴⁹ Mitra Ebadolahi, "Using Structural Interdicts and the south African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa," *The New York University Law Review*, Vol. 83 (2008), p. 1565.

in future.¹⁵⁰

Iain Currie & Johan de Waal suggest the five characteristics that make up Structural Interdicts which include;¹⁵¹

1. Issuance of a declaration by the Court identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations.¹⁵²
2. The court mandates government compliance with constitutional responsibilities.¹⁵³
3. The government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a preset date. This report, which should explicate the government's action plan for remedying the challenged violations, gives "the responsible state agency, the opportunity to choose the means of compliance" with the constitutional rights in question, rather than the court itself developing or dictating a solution.¹⁵⁴
4. Once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations.¹⁵⁵ This stage of a structural interdict may involve multiple government presentations depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. After court approval, a final order (integrating the government plan and any court-ordered amendments) is issued.¹⁵⁶

4.1. The South African approach to Structural Interdicts

In the South African legal regime, the structural interdict was first recognised as a legal and valid remedy in the case of *Pretoria City Council vs Walker (1998)* in which it was held that litigants seeking either a declaratory or mandatory order to vindicate a constitutional right could also obtain **a court order that the sphere of government in question take appropriate steps as soon as possible to eliminate the violation of rights and to report**

¹⁵⁰ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 166.

¹⁵¹ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁵² Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁵³ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁵⁴ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁵⁵ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

¹⁵⁶ Currie & de Waal, Remedies in The Bill Of Rights Handbook, 219

back to the court in question.¹⁵⁷ (emphasis mine)

This remedy continues to enjoy a robust existence and usage in South Africa with one of the most prominent examples being in The Nkandla Judgement.¹⁵⁸

Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance vs Speaker of the National Assembly and Others case[2016] ZACC 11 (The Nkandla Judgement).

Facts

Several South Africans, lodged complaints with the Public Protector concerning aspects of the security upgrades that were being effected at the President's Nkandla private residence.¹⁵⁹

The Public Protector arrived at the conclusion that the President and his family were unduly enriched as a result of the non-security features, and took remedial action against him in terms of section 182(1)(c) of the Constitution.¹⁶⁰

The Economic Freedom Fighters (EFF) launched an application to court, and in effect asked for an order affirming the legally binding effect of the Public Protector's remedial action; directing the President to comply with the Public Protector's remedial action; and declaring that both the President and the National Assembly acted in breach of their constitutional obligations.

The Court held that the findings and remedial actions taken by the Public Protector were binding unless set aside by a judicial order and that the National Assembly flouted its obligations by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector.¹⁶¹

¹⁵⁷ <<http://www.polity.org.za/article/the-nature-and-role-of-the-structural-interdict-supervisory-order-its-use-and-appropriateness-as-a-remedy-in-the-nkandla-judgment-2016-04-11>> - accessed on 31 January 2018

¹⁵⁸ Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance vs Speaker of the National Assembly and Others case [2016], Constitutional Court of South Africa. ZACC 11

¹⁵⁹ Economic Freedom Fighters v Speaker of the National Assembly and Others, 2016 para 5

¹⁶⁰ Economic Freedom Fighters v Speaker of the National Assembly and Others, 2016 para 10

¹⁶¹ Economic Freedom Fighters v Speaker of the National Assembly and Others, 2016 para 99

The court further issued orders in the nature of a Structural Interdict which included:¹⁶²

7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.

8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.

The result was that the President had to comply with the orders of court and had to effect them promptly within the stipulated time under the supervision of the court.

4.2. The Kenyan Approach to Structural Interdicts

In Kenya both the High Court and the Supreme Court have previously issued orders in the nature of a structural interdict in what may be referred to as 'making jurisprudential strides'.¹⁶³ For example the Supreme Court in *Communications Commission Of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014) eKLR* issued orders in the nature of a structural interdict. In this case, The CCK had shut down six radio stations and Citizen TV services belonging to Royal Media Services in some parts of the country claiming the media house was using unauthorised or 'grabbed' frequencies. Royal Media Services on the other hand claimed that the move was politically motivated and had no legal basis. The case went all the way to the Supreme Court and in its decision, the court issued a structural interdict against the CCK crystallised in orders which read;¹⁶⁴

- 1. The 1st Appellant shall, in exercise of its statutory powers, and within 90 days of the date hereof, consider the merits of applications for a BSD licence by the 1st, 2nd and 3rd respondents, and of any other local private sector actors in the broadcast industry, whether singularly or jointly.*

¹⁶² Economic Freedom Fighters v Speaker of the National Assembly and Others, 2016 para 105

¹⁶³ <https://thealchemyofatransformativeconstitution.wordpress.com/2016/08/18/kenyan-court-of-appeal-shackles-the-novel-and-innovative-remedies-for-socio-economic-rights-violation/> - accessed 30 January 2018

¹⁶⁴ Communications Commission Of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014) para 415

2. *The 1st appellant (CAK) shall, in exercise of its statutory powers, ensure that the BSD licence issued to the 5th appellant herein, is duly aligned to constitutional and statutory imperatives.*
3. *The 1st appellant (CAK), in exercise of its statutory authority, shall, in consultation with all the parties to this suit, set the time-lines for the digital migration, pending the international Analogue Switch-off Date of 17th June, 2015.*
4. *Upon the course of action directed in the foregoing Orders (d & e) being concluded, the 1st appellant (CAK) shall notify the Court through the Registry; and the Registrar shall schedule this matter for mention, on the basis of priority, before a full Bench.*

Also the High Court has in previous instances issued a structural interdict like in *Satrose Ayuma & 11th Others v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of (2010) eKLR*. In this case the petitioners had been evicted from the land they lived on which was claimed by the respondents as belonging to them. The petitioners claimed various violations of fundamental rights and freedoms including the right to accessible and adequate housing among others. In finding for the petitioners, Lenaola, J. issued a structural interdict contained in orders which read in part:¹⁶⁵

c) The 3rd Respondent shall within 90 days of this Judgment file an Affidavit in this Court detailing out existing or planned State Policies and Legal Framework on Forced Evictions and Demolitions in Kenya generally and whether they are in line with acceptable International standards.

d) The 3rd Respondent shall within 90 days of this Judgment file an Affidavit in this Court detailing out the measures the Government has put in place towards the realisation of the right to accessible and adequate housing and to reasonable sanitation in Kenya as is the

¹⁶⁵ *Satrose Ayuma v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme (2010)* para 111

expectation of Article 43(1) (b) of the Constitution.

e) Within 21 days of this Judgment, a meeting shall be convened by the Managing Trustee of the 1st Respondent together with the Petitioners, where a programme of eviction of the Petitioners shall be designed taking into account all the factors clearly outlined (emphasis supplied)

These are just some of the instances in which there was an application of structural interdicts in the Kenyan legal scene. However the case of *Mitu-Bell Welfare Society v Attorney General & 2 others* [2013] eKLR stands out as arguably the most prominent case with regard to structural interdicts in Kenya partly because of an elaborate appeal judgement which entirely nipped in the bud the growing usage of structural interdicts in Kenya and partly because of the wide debate it spurred in legal and academic circles. The case is discussed below in both its original and appeal instances.

4.2.1. Mitu-Bell Welfare Society v Attorney General & 2 others[2013] eKLR

The petitioner was a society registered under the provisions of the Societies Act, Cap 108 Laws of Kenya and comprised residents of Mitumba Village which held some 3065 households or approximately 15, 325 men, women and children. They were evicted from the land they lived on by the respondents who claimed among other things that it was their land and further that the continued existence of the petitioners in the suit land was posing a security risk as they were on flight paths. Mumbi J in finding for the petitioners stated that the actions of the respondents in demolishing the village resulted in a violation of the rights of the petitioners under the Constitution. She then issued a structural interdict consisting in the following orders:¹⁶⁶

i) That the respondents do provide, by way of affidavit, within 60 days of today, the current state policies and programmes on provision of shelter and access to housing for the marginalised groups such as residents of informal and slum settlements.

¹⁶⁶ *Mitu-Bell Welfare Society v Attorney General & 2 others*[2013] eKLR

iii) That the respondents do engage with the petitioners, Pamoja Trust, other relevant state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioners' grievances following their eviction from Mitumba Village.

iv) That the parties report back on the progress made towards a resolution of the petitioners' grievances within 90 days from today.

4.2.2. The Appeal: Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR

The Court of Appeal found for the appellants and proceeded to set aside the ruling of the High Court. It revisited the facts of the case and among other considerations, concluded that the trial judge had erred on various points of fact and law.

It then addressed itself to the question of the structural interdict as a constitutional remedy to the violation of constitutional rights in Kenyan law. It categorically and totally rejected the structural interdict in Kenyan law citing the following reasons:

1. A judgment brings to an end the jurisdiction of the court that delivers the same and **that there is no provision under the Civil Procedure Act or Rules for partial judgments** or reserving powers to receive additional pleadings.¹⁶⁷ It espoused the view that the concept of partial judgment or interim judgment which allows parties to file affidavits and reports (conditions under which structural interdicts exist) after hearing of the parties is unknown to the Kenyan law.¹⁶⁸
2. The nature of the orders given allowed for third parties to engage in identifying an appropriate resolution to the petitioners' grievances as had been previously done with legal basis being Article 23 (3) of the Constitution that allows the court to grant appropriate relief. This amounts to **an abdication of judicial function** and an unauthorized reliance by judges on non-judges.¹⁶⁹ The court cited the *Telkom Kenya Ltd. -vs- John Ochwada(2014) eKLR* case in which the court expressed itself as follows:

"It would be a serious abdication of the judicial function was the same to be delegated to the parties who come to the courts for that very determination. Such

¹⁶⁷ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 68

¹⁶⁸ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 71

¹⁶⁹ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 77

delegation is a nullity for all purposes and the challenge to the learned judge's ruling on that score is well-founded and upheld."¹⁷⁰

3. **Article 23 (3)** of the Kenya Constitution that permits the High Court to grant an appropriate relief **should not be construed to be provision that permits the High Court to borrow legislations from other countries** and through judicial interpretation embed them into the laws of Kenya.¹⁷¹ That there had been over reliance on foreign jurisprudence without taking into account the circumstances under which that interpretation of law was reached.

4.3. Analysis of Mitu-Bell and Arguments for Structural Interdicts in Kenya.

The decision by the Court of Appeal has attracted wide debate and sparked discussion around the viability of structural interdicts. It has been claimed that the court in this decision rubbished jurisprudence that is critical in the realisation of constitutional aspirations hitherto developed by the High Court.¹⁷² Since the decision has not been appealed, the effect is that the Court of Appeal has capped the use of the innovative remedy of Structural Interdicts in Kenya up until the court itself or the Supreme Court shall depart from that jurisprudence in the absence of a referendum that substantially changes the provisions of Article 23 of the Constitution of Kenya.

Nonetheless, a case for Structural Interdicts in Kenya is made below and is contained under various heads of argument;

4.3.1. The authority of Legislation (Civil Procedure Act and Rules) vis a vis The Constitution of Kenya

¹⁷⁰ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 76

¹⁷¹ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 112

¹⁷²<<http://ohrh.law.ox.ac.uk/turning-back-the-clock-on-socio-economic-rights-kenyas-court-of-appeal-decision-in-the-mitu-bell-case/>> - accessed on 30 January 2018

The court argued that *Section 25* of the **Civil Procedure Act** provides that the court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow. Under *Order 21 Rule 7 (1)* the decree shall agree with the judgment.¹⁷³ The court further defined judgement as the final court order regarding the rights and liabilities of the parties that resolves all the contested issues and terminates the law suit.¹⁷⁴ It is the court's final and official pronouncement of the law on action that was pending before it.¹⁷⁵ A judgment has the effect of terminating the jurisdiction of the court that delivered the judgment.¹⁷⁶ In the court's view, delivery of a judgement renders a court *functus officio* under Kenyan law.

The trial court however issued an interdict on the legal basis of Article 23 (3) of the Constitution of Kenya which confers power to a court to **grant appropriate relief** including declarations of rights, injunctions, conservatory orders, and compensation. Article 23(3) reads;¹⁷⁷

In any proceedings brought under Article 22, a court may grant **appropriate relief**, including–

- a) a declaration of rights;
- b) an injunction;
- c) a conservatory order;
- d) 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;
- e) an order for compensation; and
- f) an order of judicial review.

While the constitution does not expressly provide for structural interdicts, jurisprudence surrounding the question of appropriate relief in protecting SERs is clear that the structural interdict is one such relief. In the South African case of *Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)* the court in considering appropriate reliefs rendered itself thus;

'Appropriate relief will in essence be relief that is required to protect and enforce the

¹⁷³ Order 21, Rule 7(1) Civil Procedure Rules, 2010

¹⁷⁴ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 69

¹⁷⁵ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 69

¹⁷⁶ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 69

¹⁷⁷ Article 23, Constitution of Kenya (2010)

*Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.*¹⁷⁸

Up until this point, this was the position taken by High Court in the cases of *Satrose Ayuma* (discussed above) and *Kepha Omondi Onjuro & others v Attorney General & 5 others, Nairobi HCC Petition No. 239 of 2014*, where Odunga, J. issued among others orders and directions that eviction of the petitioners in the suit shall be undertaken inter alia with full participation of stakeholders and Commissioners from the Kenya National Commission on Human Rights Commission. The respondents were to file quarterly reports in court on the progress of the project until further orders of the court; that each party shall have liberty to apply.¹⁷⁹

The Court of Appeal departed from this transformative jurisprudence flowing from Article 23 and gave prominence to the Civil Procedure Act and Rules. The effect is then that statutory provisions override constitutional provision and this flies directly in the face of constitutional supremacy as anticipated under Article 2(4) of the Constitution of Kenya;

*(3) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*¹⁸⁰

A power play thus emerges between statutory and constitutional interpretation but which was succinctly addressed in the case of *Matiso v Commanding Officer, Port Elizabeth Prison* (1995) 4 SA 631 (CC) where Froneman J rendered himself thus: “*The interpretation of the Constitution will be directed at ascertaining the foundational values inherent in the Constitution, whilst the interpretation of the particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms with the fundamental values or principles of the Constitution.*”¹⁸¹

¹⁷⁸ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 19

¹⁷⁹ *Kepha Omondi Onjuro & others v Attorney General & 5 others, Nairobi HCC Petition No. 239 of (2014)* eKLR, para 150

¹⁸⁰ Article 2(4), Constitution of Kenya 2010

¹⁸¹ *Matiso v Commanding Officer, Port Elizabeth Prison* (1995) 4 SA 631 (CC)

Article 259 of the Constitution of Kenya states that,¹⁸²

This Constitution shall be interpreted in a manner that—

- a) promotes its **purposes, values and principles**;
- b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c) permits the development of the law; and
- d) contributes to good governance.

The values and principles of the constitution are anticipated under article 10;

The national values and principles of governance include --

- a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
- c) good governance, integrity, transparency and accountability; and
- d) sustainable development.

On these grounds, a court has mandate to develop appropriate relief in instances of breach of rights contained in the bill of rights. Human dignity, social justice, human rights and public participation are *per se* sufficient to warrant issuance of structural interdicts if they are the most appropriate relief in the circumstances. In spite of this glaring fact, the Court of Appeal chose to sacrifice this progressive approach to constitutional interpretation and sacrificed it at the altar of statutory rigidity and talismanic formalism. The supremacy of the constitution over statute is not in question. For example in the case of *Samuel G. Momanyi v Attorney General & another (2012) eKLR*, the court issued an order ‘declaring Section 45(3) of the Employment Act 2007 invalid by reason of its violation of the rights and fundamental freedoms in the Bill of Rights of the Petitioner rights and fundamental freedoms.’¹⁸³

On this basis, the Court of Appeal erred in declaring statutory provisions to be inherently supreme as to overwhelm the spirit, values and principles of a transformative constitution. In *Njoya & Others vs. Attorney General and Others [2004] 1 KLR 232* Ringera, J (as he then was) held at paragraph 18 that:

¹⁸² Article 259(1), Constitution of Kenya 2010

¹⁸³ *Samuel G. Momanyi v Attorney General & another (2012) eKLR*

*“I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution.”*¹⁸⁴

4.3.2. Structural Interdicts amount to an Abdication of Judicial Functions

The court held the view that trial court erred in law and abdicated its role by delegating judicial functions and powers to “Pamoja Trust” and other unnamed state agencies and civil society organizations with a view to identifying an appropriate resolution to the petitioner’s grievances following their eviction from Mitumba village.¹⁸⁵ In so doing it stated that ‘it is fundamental to the independence, impartiality and integrity of the judiciary for a judge to exercise the powers of office without undue or unauthorized reliance upon non-judges.’¹⁸⁶ It affirmed the dicta in the Telkom case¹⁸⁷ while relying on the case of *R -vs- Governor of Brixton Prison, ex parte Enahoro (1963) 2 QB* where it was expressed that;

“it is well settled that certainly no person made responsible for a judicial decision can delegate his responsibility.”

As per the trial court, the legal basis for involving third parties is *Article 23 (3)* of the Constitution that allows the court to grant appropriate relief. In the *Satrose Ayuma case*, (discussed above) it was stated that the legal basis for stakeholder involvement is *Articles 9 and 10* of the Constitution on public participation.

In considering *Articles 9, 10 and 23 (3)* of the Constitution as read with the jurisdictional mandate and functions of the court as provided for in *Article 159 (1)* of the Constitution, the Court of Appeal asserted that the concept of public participation and the provisions of *Article 23(3)* that allow the High Court to come up with an appropriate relief do not authorize

¹⁸⁴ Njoya & Others vs. Attorney General and Others [2004] 1 KLR 232, para 18

¹⁸⁵ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 54

¹⁸⁶ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 77

¹⁸⁷ Telkom Kenya Ltd. -vs- John Ochwada (2014) eKLR

members of the public and other stakeholders to participate in the hearing, determination and crafting of appropriate reliefs and resolutions to disputes.¹⁸⁸

The court fails to appreciate the role of the judiciary in a legal system such as that of Kenya where statutes should be in line with the constitution, and administrative regulations in line both with legislative statutes and the constitution.¹⁸⁹ Part of the judiciary's role of interpreting the law may include making judgments about the validity and applicability of a particular law within the context of several superior layers of the legal system.¹⁹⁰ For this reason judges have a role in re-establishing the rule of law, detecting legal 'inconsistencies' and 'gaps' and **providing remedies to defects** caused by the excesses of other branches of government.¹⁹¹ If the state is to be prevented from descending into a mechanism of arbitrary control, with little accountability to the citizenry it is intended to serve, **mechanisms of transparency and participation** are essential to develop countervailing power.¹⁹²

An analogy is drawn here with the judicial adjudication and enforcement of civil and political rights. In arguing for judicial involvement in the enforcement of SERs the same criteria for judicial intervention in matters relating to the exercise of political power and civil rights used.¹⁹³

This criteria consists in;¹⁹⁴

- control of the lawful application of that power by the political branches; and
- the protection of the rights of individuals and minorities granted by the constitution or the law

It appears that the grounds available to the judiciary in protection of civil and political rights are the same for SERs. The question then is why limit judicial involvement in the protection of socio economic rights to simply a declaration of rights and divest it of its remedial function? An even stronger case is made when considering that part of the justification for an

¹⁸⁸ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 75

¹⁸⁹ The International Commission of Jurists, 'Courts and the Legal Enforcement of ESC Rights: Comparative experiences of justiciability', Geneva, 2008, 76

¹⁹⁰ The International Commission of Jurists, Geneva, 2008, 76

¹⁹¹ The International Commission of Jurists, Geneva, 2008, 76

¹⁹² Davis M, 'socioeconomic rights: Do they deliver the goods?' International Journal of Constitutional Law, July 2008, Pages 687–711—<<https://academic.oup.com/icon/article/6/3-4/687/654417>> on 30 January 2018

¹⁹³ The International Commission of Jurists, Geneva, 2008, 76

¹⁹⁴ The International Commission of Jurists, Geneva, 2008, 76

active role for the judiciary is the protection of the rights of vulnerable minority groups in society against abuse from the majority.¹⁹⁵ It only stands to reason that it should be particularly important to promote – and not to deny – the participation of judges in the adjudication of ESC rights.¹⁹⁶

Further the involvement of third parties does not necessarily amount to an abdication of judicial function because at the relevant point, the matter has been adjudicated and a decree of rights issued. An interdict will allow the court to reserve jurisdiction over the case while superintending the implementation of its orders by the parties. The involvement of an expert third party only gives effect to this remedial function of the judiciary.¹⁹⁷ Mbazira opines that the nature of socio economic rights litigation (structural litigation) is that the suits challenge large scale government deficiencies, sometimes arising out of organisational or administrative failure.¹⁹⁸ The facts in institutional or structural litigation **are often complex**, and much of the judges' efforts are dedicated to **finding an amicable solution acceptable to all the parties** and which will lead to structural reforms.¹⁹⁹ Swart M adds that the nature of the interdict accepts that socio-economic rights, in the context of constitutional commitment do require supervision to assist with government's' inaction of orders.²⁰⁰ The violation of socio-economic rights, cannot be remedied by an order that has a once-and-for -all effect and litigants are normally poor and cannot come to court over and over.²⁰¹

César Rodríguez presents a classic formulation of these cases when he states that,²⁰²

These cases are “structural cases.” with the following characteristics

1. Affect **a large number of people** who allege a violation of their rights, either directly or through organizations that litigate the cause;
2. Implicate **multiple government agencies** found to be responsible for pervasive public policy failures that contribute to such rights violations;

¹⁹⁵ The International Commission of Jurists, Geneva, 2008, 83

¹⁹⁶ The International Commission of Jurists, Geneva, 2008, 83

¹⁹⁷ M Wesson 'Grootboom and Beyond Reassessing the Socio – economic jurisprudence of the South African Constitutional Court', 2004 SAJHR 306

¹⁹⁸ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 178.

¹⁹⁹ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 178.

²⁰⁰ Swart M “left out in the cold? Crafting Constitutional Remedies for the poorest of the poor” South African Journal on Human Rights, 2005, 227

²⁰¹ Swart M ‘left out in the cold?’, South African Journal on Human Rights, 2005, 227

²⁰² C. Rodriguez, 'Beyond the Courtroom: The Impact of Judicial Activism on Socio- economic Rights in Latin America', Texas Law Review, 2010 - 2011, 1671

3. Involve structural injunctive remedies, i.e., enforcement orders whereby **courts instruct various government agencies to take coordinated actions** to protect the entire affected population and not just the specific complainants in the case.

The foregoing discussion on socio-economic rights litigation suggests that the adjudication and implementation of socio-economic rights invites the involvement of various organizational and administrative agencies.²⁰³ Because of this complex nature of these matters, **a court cannot simply stop at declaration of rights** but must go further and supervise their implementation (even with the help of experts) when necessary.²⁰⁴ Such action cannot in proper light be claimed to be abdication of judicial function.

In fact it is manifestly clear that stopping at declaratory orders when the situation calls for post judgement supervision, is an abdication of judicial function (emphasis mine).

4.3.3. The Transformative Nature of the 2010 Constitution and the Authority of Foreign Precedent

The Court of Appeal espoused the view that **Article 23 (3)** of the Kenya Constitution that permits the High Court to grant an appropriate relief **should not be construed to be provision that permits the High Court to borrow legislations from other countries** and through judicial interpretation embed them into the laws of Kenya.²⁰⁵

This argument fails to recognise the transformative nature of the constitution of Kenya

²⁰³ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 178

²⁰⁴ C. Rodriguez, 'Beyond the Courtroom', *Texas Law Review*, 2010 - 2011, 1671

²⁰⁵ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 112

promulgated in 2010. In its enactment, Kenya came of age in terms of recognising the importance of socio-economic rights and their role in democratic governance.²⁰⁶ In the case of *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR, the court stated that the transformative agenda of the Constitution of Kenya looks beyond merely guaranteeing abstract equality but also is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources under Articles 6(3) and 10 (2) (b).²⁰⁷ Davis and Klare explain transformative ideology as consisting of an approach to legal problems informed by the constitutional values and aspirations of the bill of rights in laying the foundations of a just, democratic and egalitarian order.²⁰⁸

In addressing the transformative nature of Kenya's 2010 constitution, Professor Yash Ghai describes a transformative constitution as one which aims not only to change the purposes and structures of the state, but also society.²⁰⁹ It is one that, emphasizes social and sometimes economic change, and requires state organs, **particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society.**²¹⁰

That the state must undertake positive initiatives and legislation, and in cases of failure, **courts may instruct them to do so and even elaborate** what needs to be done (emphasis supplied).²¹¹ The idea of transformative constitutionalism must consist in a commitment to **substantive equality** and improving **socio-economic conditions.**²¹²

It is in this same spirit of transformative constitutionalism that the Supreme Court of Kenya

²⁰⁶ Khakula A, 'Enhancing The Realisation and Enforcement of Socio-Economic rights in Kenya: The Minimum core obligation and the supervisory jurisdiction of the courts' 2015, 10

²⁰⁷ *John Kabui Mwai & 3 others v Kenya National Examination Council & 2 others* [2011] eKLR, page 5 para 2

²⁰⁸ Davis D and Klare K, 'Transformative Constitutionalism and the Common and Customary Law', South African Journal on Human Rights, Vol. 26, No.3, 2010, 412

²⁰⁹ Ghai Y, 'Interpreting Kenya's Transformative Constitution' 2014 available at

<<http://awaazmagazine.com/previous/index.php/editors/item/535-interpreting-kenya-s-transformative-constitution>> - accessed 30 January 2018

²¹⁰ Ghai Y, 'Interpreting Kenya's Transformative Constitution' 2014

²¹¹ Ghai Y, 'Interpreting Kenya's Transformative Constitution' 2014

²¹² Langa J, 'Transformative constitutionalism', Prestige Lecture delivered at Stellenbosch University' 9 October 2006, 6

rendered itself thus in *Re Interim Independent Election Commission*;²¹³

'The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.'

Consistent with this ideology, the Supreme Court went ahead to issue a structural interdict in *Communications Commission Of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014) eKLR*. It is therefore appalling that the Court of Appeal which is subordinate to the Supreme Court²¹⁴ would vacate progressive jurisprudence developed by a higher court that has considered Kenya's transformative constitution, and instead favour of a formalistic and positivistic approach to constitutional interpretation.²¹⁵

The Court of Appeal rightly asserted that 'Kenyan courts should not simply adopt foreign jurisprudence without ensuring the context and relevance of the foreign statute that is subject of interpretation by the foreign court.'²¹⁶ It relied on the case of *Jasbir Singh Rai -v- Estate of Tarlochan Singh Rai (2013)*, in which the supreme court of Kenya held that;²¹⁷

"In the development and growth of our jurisprudence, commonwealth and international jurisprudence will continue to be pivotal. However, the Supreme Court will have to avoid mechanistic approaches to precedent. It will not be appropriate to pick a precedent from India one day, Australia another day, South Africa another, the US yet another, just because they seem to suit the immediate occasion. Each of those precedents has its place in the jurisprudence of its own country."

In this regard, it argued that Kenya's constitution does envisage enabling legislation for the right of access to adequate housing as opposed to the South African constitution which provides for such under Art 26(3).²¹⁸ The court also argued that the Kenya Constitution does not have a provision similar to Articles 32 and 226 of the Indian Constitution allow for the

²¹³ *Re Interim Independent Election Commission* [2011]eKLR, para 86

²¹⁴ Article 259(1), Constitution of Kenya 2010

²¹⁵ *Re Interim Independent Election Commission* [2011]eKLR, para 86

²¹⁶ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 123

²¹⁷ *Jasbir Singh Rai & 3 others -v- Estate of Tarlochan Singh Rai & 4 others (2013) eKLR*, para 100

²¹⁸ *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others* [2016] eKLR para 123

concept of continuing mandamus.²¹⁹

On this basis the court faulted the trial court for reliance on foreign jurisprudence and for being influenced by orders given in the Indian case of *Olga Telis & Others -v- Bombay Municipal Corporation (1985) Supp. SCR 51* and the orders and directions issued by the South African Constitutional Court in the case of *Irene Grootboom & others -v- The Government of the Republic of South Africa & others (2001) (1) SA 46*.²²⁰

While this analysis is legally sound, it appears that it is not entirely capable of capping the use of structural interdicts in Kenya. The court noted that India, Canada and South Africa are some of the states that embrace post-judgment supervisory orders.²²¹ The supreme court of Kenya noted in *Communications Commission of Kenya v Royal Media Services Limited* that India, South Africa, Colombia, Kenya and others have transformative constitutions that reflect a vision of transformation.²²² Structural interdicts have been issued in these countries on the basis of appropriate relief flowing from the transformative nature of their constitutions. It cannot therefore stand that interdicts should not apply in Kenya on the basis of differing contexts when the transformative ideals are substantially adopted by each constitution of the said countries.²²³ Indeed the case for structural interdicts turns on provisions of Article 23(3) of the Constitution of Kenya under the umbrella of appropriate relief.²²⁴ In fact it is noteworthy that the Court of Appeal in the Mitu-Bell case rendered itself thus; *'It is our view that if properly crafted to avoid vagueness; a supervisory order can be made pursuant to the provisions of Article 23 (3).*²²⁵

4.4. CONCLUSION

The foregoing arguments have challenged the retrogressive judgement of the Court of Appeal in capping the use of structural interdicts in Kenya.²²⁶ They provide a competent case that argues for structural interdicts for the protection and fulfilment of socio-economic rights in Kenya. A case which may aptly be restated in the following three points;

²¹⁹ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 112

²²⁰ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 120

²²¹ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 101

²²² Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, para 377

²²³ Jasbir Singh Rai & 3 others -v- Estate of Tarlochan Singh Rai & 4 others (2013) eKLR, para 100

²²⁴ Article 23, Constitution of Kenya (2010)

²²⁵ Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 112

²²⁶ <<https://thealchemyofatransformativeconstitution.wordpress.com/2016/08/18/kenyan-court-of-appeal-shackles-the-novel-and-innovative-remedies-for-socio-economic-rights-violation/>> - accessed on 30 January 2018

1. The Constitution is the supreme law (*lex fundamentalis*) of the land and its interpretation takes precedence over statutory provisions.²²⁷
2. The protection and fulfilment of socio-economic rights invites the involvement of various expert organizational and administrative agencies and a mandate by court involving these (third) parties in remedying a breach of these rights does not amount to an abdication of judicial functions.²²⁸
3. The court fails to appreciate the transformative nature of the 2010 constitution of Kenya and the context in which it was promulgated. Such constitution emphasizes social and sometimes economic change, and requires state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society.²²⁹

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

The structural interdict as a constitutional remedy is vital in correcting violations that arise from structural settings and are caused by systemic problems while managing the future actions of the parties responsible for these breaches.²³⁰ Structural interdicts can only achieve this function when legally applicable under a transformative legal regime where courts may instruct the state to undertake positive initiatives and legislation concerning its constitutional

²²⁷ Article 2(4), Constitution of Kenya 2010

²²⁸ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 178

²²⁹ Ghai Y, 'Interpreting Kenya's Transformative Constitution' 2014

²³⁰ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 223.

duties in cases of failure and even elaborate what needs to be done in cases of uncertainty.²³¹ Because of its ongoing nature and considering that its enforcement potentially involves many institutions, it must be properly crafted to avoid vagueness.²³²

In the case of *Moi University v Council of Legal Education & another* [2016] eKLR the court canvassed the concept of structural interdicts and enumerated the advantages that accompany it. Notably the court while citing *Fose vs. Minister of Safety & Security* [1977] ZACC 6 adopted appropriate relief under Art 23(3) to be sufficient legal for interdicts in rendering itself thus;

*'One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict.'*²³³

In the Kenyan context, the benefits of structural interdicts can be immense and the results significant. These may include;

1. They create a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation of court orders.²³⁴
2. They provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders which is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate.²³⁵
3. The very process of formulating and presenting a plan to the courts improves government accountability, helping officials identify which organ of the State is responsible for providing particular services or for ensuring access to specific rights.²³⁶
4. Structural interdicts **have contributed to a better understanding on the part of public authorities** of their constitutional legal obligations in particular areas, **whilst also assisting the judiciary in gaining a valuable insight** in the difficulties that these authorities encounter in their efforts to comply with their duties.²³⁷

²³¹ Ghai Y, 'Interpreting Kenya's Transformative Constitution' 2014

²³² Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [2016] eKLR para 112

²³³ *Moi University v Council of Legal Education & another* [2016] eKLR, para 211

²³⁴ *Moi University v Council of Legal Education & another* [2016] eKLR, para 211

²³⁵ *Moi University v Council of Legal Education & another* [2016] eKLR, para 211

²³⁶ *Moi University v Council of Legal Education & another* [2016] eKLR, para 211

²³⁷ *Moi University v Council of Legal Education & another* [2016] eKLR, para 211

5. Because they are court orders to satisfy constitutional obligations, they help authorities comply with otherwise politically unpopular constitutional obligations and cushion against pressure from small but politically powerful interest groups opposed to certain rights.²³⁸
6. They provide a better outcome than other remedies in Economic and Social Rights litigation. This is because they go beyond remedying an individual violation of these rights and provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case.²³⁹

However the biggest criticism levelled against the interdict is that it breaches the doctrine of separation of powers, because courts can interfere with policy matters while making decisions that affect budgetary allocation.²⁴⁰

A case example is that of *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Other [2011]eKLR* in which this same concern was raised albeit concerning the nature of socio-economic rights. The court opined,²⁴¹

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

However, the court in this case noted that due to inadequacy of resources in providing socio-economic goods and services to everyone on demand as individual rights, there has to be a holistic approach that focuses beyond the individual.²⁴²

This is the more reason for using structural interdicts because they afford relief to a class of people instead of individual relief only which may well turn out to be prohibitively expensive when a large number of people are affected.²⁴³

On the question of separation of powers, care has to be taken as to not allow the judiciary to

²³⁸ *Moi University v Council of Legal Education & another [2016] eKLR*, para 211

²³⁹ *Moi University v Council of Legal Education & another [2016] eKLR*, para 211

²⁴⁰ Mbazira, *Litigating Socio-Economic Rights In South Africa*, 223.

²⁴¹ *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Others*, Nairobi Petition No. 15 of 2011 eKLR

²⁴² *John Kabui Mwai and 3 Others v Kenya National Examinations Council & Other [2011]eKLR*

²⁴³ *Moi University v Council of Legal Education & another [2016] eKLR*, para 211

manifestly interfere with the role and function of other arms of the government. This same position was held by the Constitutional Court of South Africa in *Soobramoney v Minister of Health, Kwazulu-Natal (1998)* where the court held that;²⁴⁴

A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

It is important that a balance has to be struck between the protection and fulfilment of socio-economic rights having respect to the territorial integrity of the arms of government.

If remedies such as the structural interdicts are to succeed, it is a recommendation that lawyers and litigators dedicate sufficient effort in substantively elaborating on the most appropriate remedies for the redress of the violations in question.²⁴⁵ To achieve the transformative aspirations of the 2010 Constitution, especially in relation to the entrenched justiciable SERs, both practitioners and the courts must contemplate, develop, adopt and employ more creative and innovative remedies for the redress of SERs, as has been done in national jurisdictions that have recently adopted transformative constituting documents such as Canada and South Africa.²⁴⁶

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²⁴⁵ Orago N, 'Socio-economic rights and the potential for structural reforms: A comparative perspective on the interpretation of the socio-economic rights in the Constitution of Kenya 2010, Pretoria University Law Press (PULP), 2015, 79

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