



**THE CASE FOR JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS IN
KENYA: DRAWING FROM THE EXPERIENCE IN SOUTH AFRICA, INDIA
AND THE UNITED STATES**

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EXECUTIVE SUMMARY

This thesis looks at the objections raised against judicial enforcement of socio-economic rights particularly the arguments that attempt to make a normative distinction between positive rights and negative rights corresponding with socio-economic rights and civil and political rights respectively. Under close scrutiny, virtually all the perceived distinctions of this two categories of rights, especially as entailing different enforcement dynamics, have been found without any strong foundation and that the few difference, if any, do not warrant the conclusion that socio-economic rights are not amenable to judicial enforcement. The opposition to justiciability arising from judicial incapacity and legitimacy are also examined.

The thesis goes deeper to address the moral and philosophical concerns that are associated with enforcement of socio-economic rights especially with concerns about the distributive aspects. The ideas of John Locke, regarded as the father of liberalism, and of the more recent libertarian Robert Nozick have been put forward and examined in the context of whether the moral obstacles that they raise in relation to socio-economic rights are warranted. In particular Nozick's ideas of his entitlement theory have been examined in the context of Kenya. What emerges is that though ideas are powerful, the present reality of economic inequality and the historical roots of property ownership do not tell a story of just acquisition but rather the picture that emerges is one precisely characterised by what he would regard as unjust acquisition or transfers and hence warrant rectification. This thesis takes the position that one of the ways that this rectification would be accomplished is thorough enforcement of socio-economic rights.

Even if one disagreed with the Nozick's conception of justice as propounded in his entitlement theory, John Rawls powerful exposition of distributive justice comes in as the more persuasive argument advocating for institutional justice where "all social values – liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."

This thesis also looks and finds that in the recent past, theoretical issues aside, there have been significant development of socio-economic rights jurisprudence that takes the whole debate to how best these rights should be subject to judicial enforcement rather than whether or not they should be in the first place. India offers useful lessons using the approach where civil and political rights in the contextual background of directive principles are applied innovatively to enforce socio-economic rights. Some important inputs that Kenya could draw from India is the accommodation of the need to relax the rules of standing to allow for public interest litigation where interested parties, especially those working with and for indigent individuals and communities that are affected can be allowed undertake litigation. Similarly, where the services of legal professionals are not available, the epistolary jurisdiction provides a lifeline in that respect. The criticism of this approach is that the enforcement of right depends of the persuasions of the judiciary as can more recently where socio-economic right are not as robustly enforced as before. The American jurisprudence, although there no explicit acknowledgement of socio-economic rights, has also lessons for Kenya.

South African offers the best inspiration for enforcement of socio-economic rights for Kenya. Both countries have gone through a traumatic history of dispossession and repression in colonialism and apartheid respectively. Both countries remain highly unequal. Nonetheless, South Africa has constitutionalised socio-economic rights and has gone ahead to produce interesting jurisprudence in this area. So far, the approach of enforcement has been based on the reasonableness test to assess whether the state has fulfilled its obligation in relation to socio-economic rights. It is only a matter of time for the minimum core-obligations approach to be accepted as the better approach. Challenges relating to appropriate remedies and enforcement abound but this is not unique judicial enforcement of socio-economic rights.

INTRODUCTION

“Today, one in nearly seven people do not get enough food to be healthy and lead an active life, making hunger and malnutrition the number one risk to health worldwide – greater than AIDS, malaria and tuberculosis combined.” World Food Program (WFP)¹

“This is good time for human rights.”² Indeed it would seem that human rights language has acquired the status of ethical *lingua franca* at least at the level of rhetoric.³ What this acceptance does not reveal is that there is a more contested area of what and which are the human rights that are accepted as such and in particular whether social and economic rights are really rights. For some, socio-economic rights are not rights at all but are rather mere aspirations⁴ and this is largely so in the in the United States of America which to date has only signed but not ratified⁵ the International Covenant on Social Economic and Cultural Rights (CESCR).⁶ Some scholars acknowledge the importance of social and economic rights but they see their fulfilment more not as justiciable human rights but rather they see their fulfilment belonging to the realm of the democratic political process.⁷ The Constitution of South Africa represents the other end of recognition of social and economic rights not just as directive principles as found in the Indian Constitution but as justiciable constitutional rights.

¹ http://www.wfp.org/aboutwfp/introduction/hunger_what.asp?section=1&sub_section=1

² See Raz, Joseph, "Human Rights Without Foundations" (March 2007) Oxford Legal Studies Research Paper No. 14/2007 Available at SSRN: <http://ssrn.com/abstract=999874>.

³ Ibid. p. 1 Quoting John Tasioulas “the Moral of Human Rights”

⁴ See Eide, Asbjorn, Catarina Krause and Allan Rosas. (eds.) 2001, *Economic, Social and Cultural Rights: A Textbook*, 2d ed., Norwell, Kluwer Academic Publishers. p. 23 Footnote 7

⁵ USA signed the International Covenant on Economic, Social and Cultural Rights on 10/05/1977 but has not ratified. see <http://www.unhchr.ch/tbs/doc.nsf/887ff7374eb89574c1256a2a0027ba1f/80256404004ff315c125638b005e5237?OpenDocument>

⁶ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27

⁷ See Viktor Osiatynski article, *Beyond Rights in Abuse* published in A. SAJO (ed.), *The Dark side of Fundamental Rights*, Utrecht, Eleven International Publishing, 2006

The question of the position of socio-economic and cultural rights has been and remains a hotly contested issue. Historically, the ideological divide between communism and Western capitalism resulted in adoption of the two separate treaties namely, the International Covenant of Social Economic and Cultural Rights (CECSR) and the International Covenant on Civil and Political Rights (CCPR).⁸ The initial position by the United Nations was to adopt a single treaty but this was reversed.⁹ The question of the status of the two categories of rights was at issue in 1993, at Vienna during the World Conference of Human Rights attended by representatives of 171 governments, when it was stated that:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”¹⁰

The Vienna Declaration thus affirmed that all rights are universal, indivisible, interdependent, interrelated and that they require fair and equal treatment and emphasis. Making socio-economic rights justiciable is a step further towards actualization of these principles. Further, all justification of rights in terms in equality, dignity, justice, freedom and peace as found in the preamble of the Universal Declaration of Human Rights point toward treating socio-economic rights with the full status as human and legal rights. This necessarily involves providing for remedies in case of violations hence the need for

⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) Of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49

⁹ Eide, Asbjorn, Catarina Krause and Allan Rosas. (eds.) 2001, Economic, Social and Cultural Rights: A Textbook, 2d ed., Norwell, Kluwer Academic Publishers. p. 22

justiciability.

The debate on the status and the realization of social and economic rights has been renewed because of such factors as the collapse of the Soviet Union, the rise of neo-liberalism as well as due to globalization with its attendant marginalization of huge populations who wallow in poverty while a minority swims in opulence. The question of poverty has become a central issue in the human rights discourse. What is the meaning of human rights in the face of what is seemingly truer than ever as was said by Mahatma Gandhi, "We have enough for everybody's need, but not enough for everybody's greed."¹¹ Perhaps the more contested aspect is whether the judiciary should really be the arena for enforcement of socio-economic rights. In the recent years there is no doubt that socio-economic rights have received renewed attention and this can be attested also by the growing number scholarly works in this area.

This thesis on the justiciability of social and economic rights locates itself within this growing discourse. More specifically, this thesis looks at the question of justiciability of socio-economic rights and its viability in Kenya. The thesis makes a proposal for having socio-economic rights as judicially enforceable rights. As noted, judicial enforcement remains a hotly contested issue. This contest was also enacted during the debate on whether or not socio-economic rights should be included in the South African Constitution and if so what form should they take; should they be formulated as directive

¹⁰ The World Conference on Human Rights: The Vienna Declaration and Program of Action, UN doc. A/CONF.157/ part 1 para. 5. [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

¹¹ Quoted by Franklyne Ogbunwezeh, African Poverty and Social Justice, - 3/31/2005. <http://www.globalpolitician.com/articlesdes.asp?ID=513&cid=8&sid=59>

principles or as justiciable rights?¹² In the case of South Africa the final leaning was in favour of justiciable constitutional rights.¹³

In making the case for justiciability of socio-economic rights the thesis will examine and address the arguments made by critics of their justiciability. This aspect will be dealt with in chapter one where arguments for and against judicial enforcement of socio-economic rights will be examined. The second chapter will locate the justiciability debate in normative theoretical issues of justice that underpin the whole of this question. The present and historical reality of economic-disparity in Kenya will form the background with which these justice concerns will be examined. Apart from the theoretical hurdles to justiciability there are issues relating to practice and enforcement that are also problematic. The concerns will be looked at, in chapter three, in the light of various experiences of adjudication by the courts. The different approaches to litigation and adjudication of socio-economic rights will be highlighted with a view to drawing lessons with regard to the challenges that justiciability of these rights poses. This thesis will

¹² See Albie Sachs, *Judicial Enforcement of social and economic rights: The Grootboom Case*. - London, Address given at the LSE, 2003 - Albie says, “When political prisoners were released in South Africa and exiles like myself able to return, serious negotiations about a new constitutional order began, and the debate on the enforcement of social and economic rights entered a new and pressing phase. Three distinct positions emerged. There were those who argued that such rights should be seen as aspirational only, and not be embodied in any way in the constitution. A second current favoured incorporating such rights in the constitution, but giving them the status of guiding principles only and not making them enforceable by the courts. The third position was that appropriate language should be found to make them justiciable as enforceable constitutional rights.” wcl.american.edu. p. 8 of the Paper

¹³ See the Constitution of South Africa particularly articles 24 (the right to a healthy environment), Article 25 (Right to property and in particular right to access to land, tenure security and land restitution), Article 26 (right to housing), Article ²⁷ (Right to health care, food, water and social security), Articles 28 (in relation to Children – rights to basic nutrition, shelter, basic health care services and social services), Article 29 (right to education) and Article 35 (in relation to detained persons – right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment)

therefore focus on the domestic framework of protection and therefore the international and regional system for enforcement of these rights will not be examined in detail save as in relevant to the domestic framework. The experiences from United States of America, India and South Africa will form the basis of examination of how socio-economic rights justiciability plays out.

CHAPTER ONE

1 COUNTERING THE ARGUMENTS AGAINST JUSTICIABILITY

1.1 The Status of Socio-Economic Rights

Socio-economic rights remain underdeveloped jurisprudentially compared to civil and political rights. This is partly due historical differences of a political and ideological nature between western capitalist bloc and the communist one that resulted in the two main international human rights treaties, International Convent on Civil and Political (ICCPR)¹⁴ and the International Covenant on Economic Social and Cultural Rights (ICESCR),¹⁵ being formulated separately. The ICCPR treaty had better mechanisms for enforcement compared to the later. This status, even at the international level has been changing in the recent past as seen with the recent adoption of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights.¹⁶

Critics of justiciability of socio-economic advance four main arguments namely that civil and political right are normatively different; that judges lack institutional legitimacy; they lack institutional capacity; and that they lack of proper remedies.

¹⁴ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49

¹⁵ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27

¹⁶ Amnesty International, UN adopts key economic, social and cultural rights instrument. 19 November 2008 <http://www.amnesty.org/en/news-and-updates/good-news/un-adopts-key-economic-social-and-cultural-rights-instrument-20081119>

1.2 Normative Difference?

1.2.1 Positive v. Negative Rights

According to traditional thinking, civil and political rights are “negative” rights that require the state to refrain from interfering with the individual while socio-economic rights require the state to take “positive” measures “to do something.” Civil and political rights are said to involve merely limited state action while social and economic rights are referred as “positive” rights since they require greater state intervention. This distinction, it is argued, then makes the civil and political rights more amenable adjudication by courts compared to the socio-economic rights since it is easier for courts to restrain governmental action than to require action in particular ways. Is this characterization really true? A closer look at the obligations of the state in relation to both categories of rights reveals that the basis of the differentiation and categorization is simplistic. The two categories of rights entail both negative and positive duties. In deed many scholars concede that this basis of looking at the two categories of rights no longer holds water when critically examined.

Contrary to conventional assumption, virtually all civil and political have aspects that necessitate both positive and negative duties. An example is the right to be free from torture, a right that is normally seen as a “negative right,” places on the state the negative obligation to respect individuals rights by refraining from undertaking acts that amount to torture but it also entails a positive duty for the state to take measures to protect individuals from torture perpetrated by third parties. The duty to protect may involve putting legislation in place that criminalizes torture. In the same vein, the right to life

entails an obligation by the state not only not to violate this right directly through acts of its agents but also requiring taking positive measures to ensure protection of the right to life through for example legislative and administrative measures. The obligation on to state protect the right to life also involves a positive duty for it to conduct effective investigation of any death that occurs under questionable circumstances as was, for example, found in the case of *Finucane v. The United Kingdom*.¹⁷ An examination of other civil and political rights that are thought to entail only governmental restraint reveals similar existence of both positive and negative duties.

Similarly, although socio-economic rights are characterised as positive rights requiring heavy state intervention, a closer look reveals that this is not entirely true. They have elements of both positive and negative obligation upon the state. The right to housing, for example, apart from requiring that the state takes positive legislative, administrative and other measures also entails a negative duty by the state not to interfere with enjoyment of this right by, for instance, not evicting persons without certain procedural guarantees.¹⁸

¹⁷ *Finucane v. The United Kingdom* (Application No. 29178/95) Judgment Strasbourg 1 July 2003 ECtHR it was said, "The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, Series A no. 324, p. 49, § 161, and *Kaya v. Turkey*, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances." para. 67

¹⁸ See UN Comments and Facts – Rights to Housing (PDF) p. 25 where it is stated, "The duty to respect the right to adequate housing means that Governments should *refrain* from any action which prevents people from satisfying this right themselves when they are able to do so. Respecting this right will often only require *abstention* by the Government from certain practices and a commitment to facilitate the "self-help" initiatives of affected groups. In this context, States should desist from restricting the full enjoyment of the right to popular participation by the beneficiaries of housing, rights, and respect the fundamental right to organize and assemble. In particular, the responsibility of respecting the right to adequate housing means that States must *abstain* from carrying out or otherwise advocating the forced or arbitrary eviction of persons and groups." (emphasis mine)

Similarly, the right to the food also involves a negative duty upon the state not to interfere with the people's means on livelihood.

1.2.2 Costly v. Not-so-Costly Rights

Flowing from the notion that civil and political rights entail negative duty while socio-economic rights bear positive duties that require the state "to do something," is the assumption that the latter category of rights involves massive state expenditure while the former category does not. Again, this is fallacious. Both categories of rights involve certain costs to a greater or lesser degree. The characterisation of socio-economic rights as more costly *vis-à-vis* civil and political rights fails to look at what it really needs to fulfil civil and political rights. The right to vote, for example, requires the state to spend a huge amount of resources by holding of regular free and fair elections. Similarly, the right to a fair trial requires the maintenance of the judiciary – an undertaking that cannot be characterised as not costly. Another example is that protection of the right to property and the freedom of contract requires massive state expenditure in the form of, *inter alia*, maintenance of a security machinery, the courts and as well as for enforcement mechanisms including having a prison system. As Cass Sustein states, "All constitutional rights have budgetary implications; all constitutional rights cost money... It follows that insofar as they are costly, social and economic rights are not unique."¹⁹ In countering the argument that perhaps socio-economic rights could be unusually costly, he says, "any such comparisons are empirical and contingent; they cannot be made on an *a priori* basis. We could imagine a society in which it costs a great deal to protect private property, but

¹⁹ Sunstein, Cass R., Why Does the American Constitution Lack Social and Economic Guarantees? (January 2003). U of Chicago, Public Law Working Paper No. 36. Available at SSRN: <http://ssrn.com/abstract=375622> or OI: 10.2139/ssrn.375622. At page 5 where he refers to the book he

not so much to ensure basic subsistence.”²⁰ In deed, such cases as *Njoya and Others v. Attorney General* where the High Court of Kenya did not shy away from making a decision that led to massive state expenditure through holding of a referendum on the proposed new constitution.²¹ Similarly the *Airey v. Ireland* case where the applicant had not been provided with legal aid, the decision finding a violation of the right of access to court, had wide-ranging budgetary implication.²² The arguments on the basis of positive/negative and costly/cheaper characterization are therefore not convincing and should not be used to as the basis for rejecting justiciability of socio-economic rights.

1.3 Courts’ Lack of Institutional Legitimacy

1.3.1 Anti-Democratic Argument

The more plausible argument against justiciability of socio-economic rights could be that judges lack both institutional legitimacy and well as institutional capacity.²³ Judges are unelected and this raises the issue of accountability. This argument is usually linked to the positive/negative characterization particularly in relation the assumption that socio-economic rights require massive resource expenditure. It is said that flowing from this if the judges were to be involved in the adjudication of these rights they would necessarily be intruding in the realm of policy and in a manner that has serious budgetary implication. Further, they are ill-suited to deal with policy issues involved that are

co-authored with Stephen Holmes: *The Cost of Rights* (1999)

²⁰ Ibid. p. 6

²¹ See *Njoya & 6 Others v. Attorney General & 3 Others* [2004] 1 KLR 261. The High Court judgment was to the effect that the constituent power of making and new constitution lay in the people of Kenya and it could only be exercised through a constituent assemble or through a referendum.

²² *Airey v. Ireland*, (1979) EHCR App no 6289/73, 09/10/19791

²³ Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*. Columbia Human Rights Law Review, Vol. 38, No. 2, 2007 Available at SSRN: <http://ssrn.com/abstract=999700> p.10

involved in the determination of socio-economic rights which, according to the doctrine of separation of powers, is the domain of the legislative branch of government together with the executive one.

Politics and democracy, the argument goes, are precisely about letting the people decide policy issues of resource allocation through electing their representatives and giving them this mandate. Judges, being unelected, do not have the mandate to decide on issues of policy. Having the judiciary involved in adjudication of socio-economic rights amounts to improper intrusion into a governmental function that is, according to the doctrine of separation of powers, meant for the political branches. Critics of justiciability of social therefore conclude that it is anti-democratic for judges to be involved in policy decisions. It is argued that social and economic rights should therefore be realised through the democratic political process. The political branches of government are better placed because they are elected and hence accountable to the people. The political branches also have the necessary machinery to determine policy issues in relation to resource allocation and priority-setting on matters of development that are invariably involved in socio-economic rights issues.

1.3.2 Civil and Political Rights Involve Policy

The response to the above argument is that it is not refuted that policy issues are involved in adjudication of socio-economic rights because this is in deed the case. The question to ask is why this argument of judicial “interference” with policy matters in adjudication of socio-economic rights raises such high level of resistance compared to when the civil and political rights also raise policy concerns. As argued earlier, the latter category of rights

also involves making decisions that have serious policy and budgetary implications but this does not raise such high level furore. The truth of the matter is that the argument on “interference” can only be properly located within the general distrust of courts to handle policy matters while noting that this extends to any rights adjudication including that where civil and political rights are in issue.

It is not unusual to have distrust of courts whenever they are involved in policy issues that are considered to belong to other branches of government.²⁴ The adjudication of both categories of rights may involve policy decisions. It would be argued that adjudication of socio-economic rights represent “too much” intrusion into policy matters but, as in the case of the argument of social and economic rights being “too costly,” this is an empirical argument and does not address the normative issue at hand.

The argument that judicial enforcement of socio-economic rights violates the doctrine of separation of powers is dependent on the assumption of inherent normative distinction between civil and political rights on the one hand and socio-economic rights on the other and the corresponding assumption about state obligation particularly in relation to state expenditure of resources. An example of a landmark decision in the United States of America that was based on the fourteenth amendment that guarantees the right to equal protection that had enormous budgetary and policy implication is in the *Brown v. Board of Education* case.²⁵ Once the false distinction between the categories of rights is

²⁴ Ibid. Eric C. Christiansen, writes, “Legitimacy concerns may also reflect a broad-based distrust of judicial review more than a specific concern about social rights adjudication.” at p. 11

²⁵ *Brown v. Board of Education* (I), 347 U.S. 483 (1954). This case could be regarded as having dimensions

unmasked, judicial involvement in policy decision cannot be distinguished as between the two categories of rights.²⁶ The legitimate concern would be how far the courts could go in “policy intrusion.” Otherwise there is nothing inherently wrong with policy, as enacted by the legislature and as implemented by the executive, being tested for compliance with human rights standards – that include both categories of rights.

1.3.3 Human Rights as Trumps on Democracy

Another response to the anti-democratic argument is in the very nature of human rights. If we are to understand human rights as claims that belong to every person simply because of being human beings,²⁷ then human rights are to be understood as constants and not variables. The very nature of human rights therefore demands that their recognition and realisation should not depend on whether or not a particular party that is in power. Human rights should not vary with the democratic process as determined by the vulgarities of politics but rather they should be guaranteed at all times. As Victor Osiatynski, although he uses the point to make an argument directly opposite to the one advocated here, puts it: “a constitutional right can be compared to a veto power.”²⁸ The reason why human rights are codified in the constitution is because they should not vary with each political regime and this corresponds with the conception of rights as veto

of both categories

²⁶ See Roberto Gargarella, Pilar Domingo and Theunis Roux, *Courts, Rights and Social Transformation: Concluding Reflections*. The authors write, “The first difficulty with this claim [separation of powers claim] has already been canvassed, that is, the judicial enforcement of civil and political rights also involves allocation of resources. If this is a problem at all, therefore, it not a problem unique to social rights.” Roberto Gargarella, Pilar Domingo and Theunis Roux, editors (2006) *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?* p. 259

²⁷ The Preambles to ICCPR as well as to ICESCR state that, “Recognizing that these rights derive from the inherent dignity of the human person” indicating that these rights accrue to the individual only on account of the being human.

²⁸ Victor Osiatynski, *Beyond Rights*. In Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Supra* note 26 at p. 313

powers that are to be guaranteed at all the times. It would be absurd to think, for example, that the right to a fair trial should depend on the whether at a particular time a more or less democratic party is in power. Rights do not expand or shrink in accordance with the political dynamics. A certain regime may have more commitment to realisation of human rights than another but this should not affect the normative claim to a right. Availability of human rights should therefore not fluctuate in accordance with the political persuasion of a given time. In this sense human rights can be understood as constants in the democratic process. Civil and political rights are constitutionalised precisely to ensure their respect in spite of the prevailing majority interests and in this way the rights of the minorities are guaranteed. Therefore, there is no reason why socio-economic rights should not be guaranteed at all times irrespective of majoritarian interests especially when understood as minimum core obligations that are necessary for a person to live a dignified life. As Jeanne Woods puts it:

In the case of social rights, judicial review serves the function of checking the political branches to ensure that they are responsive to the constitutional rights of the least privileged in society, and that policymakers do not lose sight of their suffering in the inevitable political games of compromise and horse-trading.²⁹

1.3.4 Separation of Power v. Checks and Balances

The argument that by judges adjudicating on social and economic rights they intrude into the political branches' mandate as against the separation of powers doctrine also fails to consider that in reality there is never total or strict separation of powers. In most constitutional set-ups, there is some limited "intrusion" of one branch of government into what is considered the traditional domain another. Concerns about the proper limits of

²⁹ Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 *Texas International Law Journal* 763 (2003). p.5

judicial review raise general reluctance to justiciability of certain matters. Ordinarily this concern should not translate into total rejection of justiciability. It is conceded that adjudication of socio-economic rights, no doubt just like litigation on civil and political rights, may raise warranted concerns about the proper limits of justiciability but these concerns do not justify a blanket exclusion of justiciability of socio-economic rights since there exists principles of interpretation as for example represented by the “political question doctrine”³⁰ in the United States of America that would, and do in fact, guide the courts in the process of adjudication.. It is not as though judges are unaware of the possible conflict and the limits of their power as Justice Sachs puts it:

The key question then is not whether unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels them to enter what might be politically contested terrain. It is precisely in situations where political leaders may have difficulty withstanding populist pressures, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable. It is at these moments that the judicial function expresses itself in its purest form. The judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice is done to all without fear, favour or prejudice.³¹

The proper concern, in relationship to justiciability, should be whether there are proper checks and balances in the whole structure of government. Just like in adjudication of other rights, a certain level of “intrusion” is not just permissible but welcome within the

³⁰ See *Baker v. Carr*, 369 U.S. 186 (1962). While outlining the general criteria on the issue of justiciability, the Court said in the case, “It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”

³¹ Supra note 12 at p. 9

concept of checks and balances. Gargarella says that it therefore:

“follows that the mere fact that the judicial enforcement of social rights may and does result in judges interfering in the political branches’ domains of power does not constitute a violation of the separation of powers doctrine. On the contrary, for a constitutional system based on the principle to work, judges *must* ‘interfere’ in the affairs of the other branches-reproaching them for abusing their power, signalling their mistakes, and generally suggesting better alternatives to the chosen course of conduct.”³²

1.3.5 The Conception of Democracy in Issue

At the root of the concerns with judicial enforcement in socio-economic rights is the whole question of the conception of democracy. Roberto Gargarella, in *Theories of Democracy, the Judiciary and Social Rights*,³³ makes a powerful case for deliberative democracy as the best suited for adjudication of socio-economic rights. He however finds it interesting that other conceptions of democracy, though diametrically opposed to each other, reach the same conclusion as pertains to judicial enforcement of socio-economic rights namely, abstinence. On the one end is what he terms “pluralist” democracy represented by Hamilton and Justice Marshall whose basic democratic premise is that “people spoke once” in the constitution and where the “constitution is hostile to social rights, this means judges should refuse to enforce these rights, even where they are incorporated into ordinary legislation”³⁴ On the other hand, those who advocate for “participatory democracy,” like Michael Walzer, arrive at judicial deference as the best stance to be adopted by the undemocratically appointed judges faced with a situation where the legislature chooses not to enact social rights.

³² Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights*. Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), Supra note 26 at p. 260

³³ Ibid.

³⁴ Ibid.

Gargarella argues that in deliberative democracy, judges cannot and should not remain aloof to the democratic process of discussion since they are placed and given an important and special role of adjudicating grievances of those who fail to secure their rights in the democratic process. Other writers see the role of judges in the social right rights adjudication as part of a necessary dialogue required to solve both legislative and administrative inertia/blockages that necessarily arise in the democratic process.³⁵

Rosalin writes:

“In a dialogic understanding, however, legislative blind spots and burdens of inertia are of such profound significance to the legitimacy of the constitutional system as a whole that there is an urgent need to identify ways in which other social and governmental institutions, including courts, can mitigate these blockages. Further, both the coercive and conversational aspect of the judicial process will contribute to courts’ capacity to perform a role of this kind.”³⁶

The point here is that a different conception of democracy, and preferable, sees judicial intervention as part and parcel of the democratic process that is in deed desirable and hence from this perspective the argument against justiciability of socio-economic rights on account of this intervention is not sustainable.

1.3.6 Justiciability v. Democratic Participation

It is important to note that there are also those who, even as they favour greater realization of socio-economic rights for the poor, see justiciability of these rights as strategically misguided. The argument here is that focus on litigation of these rights stifles the development of political and social movements by expending energy at the

³⁵ See Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*. He argues that judicial intervention is necessary to cure the legislative process that is “subject to a series of blockages arising from the potential for blind spots and the burden of inertia in the process of law making and implementation.” *International Journal of Constitutional Law* 2007 5(3):391-418; <http://icon.oxfordjournals.org/cgi/content/abstract/5/3/391>

³⁶ *Ibid.*

judiciary rather than the political process which ultimately should be the proper arena for struggle for socio-economic rights. The argument is that “constitutional adjudication on these rights will ultimately have a negative impact on the development of social justice. The basis for this postulation is that judicial approach to change is inherently reactionary and it is only the political sphere that enables radical debates that catalyse more progressive social policies.”³⁷ This argument is part of the broader distrust of law and the judiciary seen as not favouring social transformation in the interest of the poor. This is because law as well its enforcers, the judiciary, are seen as intrinsically skewed to preserve the *status quo* in favour of the rich and powerful classes. Javier A. Causo, while tracing the role of law as a tool for change in Latin America says that even in occasions where, in the twentieth century, there has been gradual and incomplete activation of constitutional rights previously dormant:

it appears they were the result, rather than the cause, of political mobilization and the expansion of political democracy. Only when the previously disenfranchised majority managed to accumulate sufficient political power did some of the promises of constitutionalism reach them. This suggests that – at least in Latin America – the actual realization of fundamental rights established in constitutional charters and legislation requires the marginalized are first able to gain a minimum amount of political power.³⁸

Wiktor Osiatynski, while referring to the argument by Mary Ann Glendon “who blames the revolution of rights for the atrophy of democratic politics in the United States,” frames the impact of constitutionalisation of rights in the following way:

In a democracy, there is a constant pressure on the framers to put ever more rights

³⁷ Ellen Wiles, Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law

Am. U. Int'l L. Rev. 35 (2006)

³⁸ Javier A. Causo, The Changing Role of Law and Courts in Latin America: From Obstacle to Social Change to a Tool of Social Equity. The Article is found in: Roberto Gargarella, Pilar Domingo and Theunis Roux, editors (2006) Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor? p. 62

into the constitution. But the more rights there are the less room is left for democracy, for public debate and for compromises in the society. Consequently, power is transferred from parliament to the courts in which constitutional claims are settled.³⁹

Undoubtedly, these are powerful arguments and they are not altogether without merit. In deed, were the struggle for realization of socio-economic rights to be conceived purely or mainly from the perspective of litigation without any social moments and democratic involvement by the marginalised groups, the strategy would not yield satisfactory results. That said, the language of rights is a powerful tool for social mobilization. It is one thing to struggle for what is considered as a right and another to do so for mere “aspirations.” Jeanne Woods, while acknowledging that “true transformation will require the development of broad social movements and the organization and mobilization of the marginalized and the disempowered,” sees rights as slogans:

... The mere rhetorical designation of a claim as a “right” has powerful implications. Once specified as a right, there is a visceral attachment to the claim. As distinct from a privilege or an entitlement, it attains a normative quality: in the view of the claimant, the sovereign no longer has discretion to withhold the claim. Its denial is a violation of something dear, something essential to ones dignity, something inseparable from one’s status as a human being. A violation of a right is an affront to the human spirit. Once economic and social claims are framed as rights, their conceptualization as slogans has transformative possibilities. Slogans inspire, mobilize and direct. They are rhetorical devices aimed not only at attaining the ultimate end declared therein, but more importantly, at the process of organizing to reach the goal.⁴⁰

As will be argued later, this thesis does not propose that the struggle for social and economic rights can only be realized through making them justiciable but it seeks to show that justiciability of these rights is crucial within the context of other means through

³⁹ See Victor Osiatynski, *Beyond Rights*, Supra note at p. 313

⁴⁰ Jeanne M. Woods, *Rights as Slogans: A Theory of Human Rights Based on African Humanism*, 17 *National Black Law Journal* 52 (Columbia University Edition) (2003). p. 59

which these rights are realized.

1.4 Lack of Institutional Capacity

1.4.1 No Tools and No Standards

The other related argument raised against judicial intervention, granted that judges could legitimately adjudicate on socio-economic rights, is that in practice such adjudication faces the difficulties of incapacity of the judges given the policy considerations that may be at issue. Related to this argument is argument that that it is difficult for court to establish standards for assessment of the obligation. Social rights are said to be by nature indeterminate and lacking in conceptual clarity as to be amenable to judicial enforcement. Aryeh Neier, in a paper titled, *Social and Economic Rights: a Critique*,⁴¹ argues against the codification of social and economic rights as broad assertions in the form found in the Universal Declaration of Human Rights and in the South African Constitution. He asks, “What shelter, employment, security, or level of education and health care is the person entitled to?” He sees that these issues should be dealt with through the “process of negotiation and compromise.” Judges are said not to have the total picture that is necessary to adjudicate of socio-economic rights especially the budgetary issues at hand. A South African Constitutional judge involved in adjudication of socio-economic rights, Justice Sachs Albie, puts it thus:

“But even where our background and modes of thought might be thought to predispose us differently, there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities, to pronounce on these issues. That is what Parliament is there for. It has hearings and receives inputs from a variety of people with special expertise in particular areas. The very nature of the political process calls for compromise and a balancing out of interests, something to be applauded in an

⁴¹ Aryeh Neier, *Social and Economic Rights: A Critique*. 13 No. 2 Hum. Rts. Brief 51 (2006).

open and democratic society based on principles of give-and-take rather than of all-or-nothing. We are institutionally completely unsuited to take decisions on houses, hospitals, schools and electricity. We just do not have the know-how and the capacity to handle those questions.”⁴²

1.4.2 Where There is a Will There is a Way

While acknowledging that adjudication on socio-economic rights has its challenges what is important is to realize that these are not insurmountable difficulties.⁴³ The argument that there are no judicially discoverable standards to warrant justiciability of these rights is increasingly becoming a moot question particularly in the light of a growing jurisprudence in this area not just in South Africa and India, where undoubtedly groundbreaking adjudication has been taking place, but also in other parts of the world where “new paradigms of judicial enforcement of economic, social, and cultural rights are emerging in liberal states, challenging many previous assumptions.”⁴⁴ Once the theoretical mindset barrier to justiciability of socio-economic right is overcome, and increasingly this is becoming the case, then it is possible that even where formulation of these rights may appear vague and not so clearly defined as to warrant judicial intervention, the courts will be able to come-up with standards and definitions by employing “well established interpretive principles to define constitutional norms.”⁴⁵ While noting courts institutional incapacity, as above noted, Albie Sachs says, “But we do know about human dignity, we do know about oppression and we do know about things that reduce a human being to a status below that which a democratic society would regard

⁴² See, Sachs, Supra note 28 at p. 3

⁴³ Jeanne M. Woods writes, “regardless of the approach, the application of judicial review remedies to this category of rights is not unproblematic. Legitimate questions of judicial competency and accountability remain.” *Emerging Paradigms of Protection for “Second Generation” Human Rights*, 6 Loyola Public Interest LJ 103 (2005). p.104

⁴⁴ Ibid. p.104

as tolerable.”⁴⁶

The process of definition of rights civil and political rights develops through the litigation and adjudication and this is equally so for economic rights. Even the contours of traditional civil and political rights such as freedom of expression, the right to privacy and the right to a fair trial among others are still not completely defined and the process of clarification/definition through litigation and adjudication is an on-going one. The point here is that past historical barriers of justiciability in relation to socio-economic rights has had a negative impact on the development of jurisprudence on these rights and in particular on the establishing of the definitions, content, obligations in relation to the rights and the limits and extents of the same. All indications are that standards for socio-economic rights are being incrementally developed.

From the international level, the obligation of states in respect to economic, social and cultural rights continues to be clarified with, for example, the Committee on Economic Social and Cultural Rights saying that:

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that *a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights* is incumbent upon every State party. Thus, for example, *a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant*. If the Covenant were to be read in such a way as not to establish such a *minimum core obligation*, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource

⁴⁵ Jeanne M. Woods, Justiciable Social Rights as a Critique of the Liberal Paradigm. Supra note 29 at p. 5

⁴⁶ Ibid. at p. 10

constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "*to the maximum of its available resources*". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴⁷ (Emphasis added.)

The foregoing pronouncement demonstrates that it is possible to develop judicially discoverable standards by which courts are able to determine the nature and extent of the state obligation pertaining to a particular right and hence determine, in respect to specific litigants, whether it has or has not been met. Where there is a will there is way

1.5 Lack Proper Judicial Remedies

Even granted it is acceptable that the judiciary may legitimately and competently adjudicate on socio-economic rights, it is argued that there exist no appropriate remedies for redress even where violation of socio-economic rights may be found. The question that is asked is: is the judiciary to issue directives to the legislature or the executive on what to do? This argument is usually linked to the issue of the proper role of the judiciary in the sense of how are judges expected to issue directives to the political branches regarding areas which 'properly' understood are the mandate of the very political branches? Is it worth to make socio-economic rights justiciable only to finally just offer empty declaratory remedies that have no real impact? Alternatively, if the judiciary opts for stronger remedies, how would they be enforced taking into account that the judiciary is the "least dangerous branch of government" as Hamilton argued:

The judiciary, on the contrary, has no influence over either the sword or the purse;

⁴⁷ CESCR General Comment 3. (General Comments) The Nature of States Parties Obligations (Art. 2, par.1): 14/12/90.
[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument). para. 10

no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.⁴⁸

The progression of this argument is that, in the final analysis the status, respect and authority of the judiciary is weakened. This argument is buttressed by such cases as the *Grootboom* case in which every after a favourable judgment was made for the litigants four years after the judgment, their situation remained largely the same.⁴⁹

The point to be made in reference to this argument on lack of proper remedies is that this is not a problem unique to socio-economic rights. The issue of proper remedies in case of violation of civil and political rights as well as other cases confronts the judiciary all the time particularly where judicial review is involved. Take the example of a finding that poor prison conditions violate a litigant's right not to be treated in a degrading and inhumane manner. The potential for policy and budgetary ramifications weighs heavily when consideration of remedies is being made in such a case. Similarly, where a constitutional court is to declare a given law as unconstitutional is the judiciary making directives to the legislature? The enforcement of remedies in both cases will be a challenge.

Another response to the issue of remedies, and which will be dealt with further in later parts of this thesis, is that adjudication of socio-economic rights calls for more innovative

⁴⁸ Alexander Hamilton, The Federalist No. 78: The Judiciary Department. Independent Journal Saturday, June 14, 1788.

<http://www.constitution.org/fed/federa78.htm>

⁴⁹ See infra note 164

remedies. Most constitutions provide for the judiciary to provide appropriate remedies which provides avenues for fresh/new thinking. For example in the Constitution of Kenya, where there is found a violation of fundamental rights and freedoms, the High Court “may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).”⁵⁰ The issue of implementation of the remedies, while it remains a challenge to judicial enforcement of socio-economic rights, is not peculiar to these rights and, as will be discussed further, it is possible to develop innovative and mechanisms to ensure compliance.

Perhaps the best answer to the critics’ arguments that seeks to preclude justiciability with argument akin to saying that “it is impossible” is to state: “it is happening!” It is argued that the enforcement mechanism/remedies are problematic. While acknowledging that there are challenges in this area, socio-economic jurisprudence, for example, in South Africa and India shows that the problems are not insurmountable. Justiciability of these rights requires thinking outside the box of traditional remedies and enforcement mechanisms. Such cases as *Soobramoney v. Minister of Health, Kwa-Zulu Natal* (1997)⁵¹ where the South African Constitutional Court adopted a deferential stance to the executive's refusal to grant dialysis for a diabetic patient who was chronically ill; the *Government of the Republic of South Africa and Others v Grootboom and Others* (2001)⁵² where the Constitutional Court found violation of the right to housing for

⁵⁰ Sections 84 (3) of The Constitution of Kenya. Sections 70 to 83 deal with the substantive Fundamental Rights and Freedoms of the Individual

⁵¹ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696

⁵² *Government of the Republic of South Africa and Others v. Grootboom and Others* 2001 (1) SA 46 (CC)

families who were living in deplorable conditions with the barest of shelter; and the *Minister of Health v Treatment Action Campaign*(2002)⁵³ where the Constitutional Court ordered that ant-retroviral medication be made available to pregnant mothers shows that it is possible to grapple with challenges of justiciability and develop sound jurisprudence in accordance with well established principles of judicial interpretation.

There are already invaluable lessons on the question of remedies from jurisprudence of socio-economic, for example, from the Indian practice. The experience point to the need, in the case of socio-economic rights adjudication, to allow for broader understanding of *locus standi* by allowing public interest litigation; the need to dispel with too strict adversarial proceedings where fundamental rights are concerned by allowing expert commissions; and the need for less procedural formalities by allowing initiation of proceedings with such informal ways such as letters to serve as petitions in what is referred to as “epistolary jurisdiction.” These measures are vital to make socio-economic rights available to those who need them the most and who may not otherwise have access to courts to enforce these important rights. It will be demonstrated, later in this thesis, that innovative remedies and compliance mechanisms are not just feasible but they are already being crafted.

1.6 Other Arguments against Justiciability

1.6.1 Justiciability as Dangerous

Combining various arguments, *inter alia*, proliferation of rights, judicial implementational difficulties and erosion of judicial authority, it is said that justiciability

⁵³ *Minister of Health and others v. Treatment Action Campaign and others* (CCT15/02) [2002] ZACC 14

of socio-economic rights is not just an undesirable but actually dangerous to the realization of civil and political rights. Justiciability or even recognition the former category of rights is seen as diluting the potency of the latter category of rights. Aryer Neier, after saying that it is always possible for states to argue that they cannot guarantee social and economic rights due to resource constraints, states that:

Therefore, I think it is dangerous to allow this idea of social and economic rights to flourish, particularly because there will always be different stages of development and different resources to consider the benefits. Another way in which the idea of social and economic rights is dangerous is that you can only address economic and social distribution through compromise, but compromise should never enter into adjudication of civil and political rights.⁵⁴

Joseph Raz, in his article entitled, *Human Rights without Foundations*⁵⁵ argues against proliferation of the human rights. For him, “a right being a human right does not entail that it is either basic or very important.”⁵⁶ He sees rights as setting moral limits of state’s sovereignty. He concludes that if there is “further international recognition and enforcement of individual rights, the rights will lose much of the aura of exceptional standing which is currently associated with ‘human rights.’”

The argument that justiciability of social and economic rights will cause dilution of civil and political rights reflects the past Western mindset that thought of the categories of rights in a hierarchical manner and which privileged civil and political rights at the expense social and economic rights. One could reply to such claims by asking; what exceptional aura do human rights have to millions living in extremes of poverty? What is the value and meaning of the right to privacy for one who is homeless – sleeping on the

⁵⁴ See Aryer, Supra note 41

⁵⁵ Raz, Joseph, *Human Rights Without Foundations*. Supra note 2

⁵⁶ Ibid p. 19

streets? How does a person facing extreme poverty effectively exercise the various civil and political rights? In the absence of enjoyment socio-economic rights the “the celebrated freedom of the pauper to “sleep under bridges of Paris” makes a mockery of human dignity and compromises political freedom.”⁵⁷ This argument also fails to take into account that “all human rights are universal, indivisible and interdependent and interrelated” and further that “the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”⁵⁸ It cannot be dangerous to civil and political rights if, for example, the individual enjoys adequate housing, health, is educated and free from the most basics of human wants. On the contrary the enjoyment of these rights is, at the minimum, complementary if not a prerequisite.

1.6.2 Access to Justice Concerns

There is also the argument that even if socio-economic rights were made justiciable, the poorest and neediest would not be the beneficiaries but rather those with capacity to litigate will be the eventual beneficiaries. It has been said that “as has been a tendency with civil and political rights, cases are brought only by the most articulate, assertive, and wealthy individuals; the most disadvantaged, poor, and marginalized do not have the knowledge, ability, or resources to be able to voice their claims, and cases are decided without taking their potentially competing needs into account.”⁵⁹ In Hungary, as Adras Sajo, argues, the beneficiaries of the adjudication of social rights are the middle class and the “protection of social rights in Eastern Europe is hardly the protection of the

⁵⁷ Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, *Supra* note 29 at p.763

⁵⁸ The World Conference on Human Rights *Supra* note 10

⁵⁹ Ellen Wiles, *Supra* note 37 at p. 56

weakest.”⁶⁰ Clearly there are legitimate concerns about whether those most deserving to be the beneficiaries of better protection of socio-economic rights – the most marginalized and those whose deprivations are not compatible with a life in dignity as every human being deserves – will actually be the ones to benefit. However, this does not mean therefore that these rights should not be justiciable rather the implication of the question entails looking into the whole legal system including such issues as standing, remedies, compliance and access to justice. There will be further consideration of this issue later in chapter three of this thesis but suffice to state here that there are ways that these concerns can and are being addressed in various jurisdictions.

1.6.3 The Issue of Progressive Realisation

Under CESCR, and in deed in many constitutions in which socio-economic rights are codified, state obligation is expressed in terms of progressive realisation. The Covenant stipulates:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum 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.⁶¹

The issue of progressive realization of socio-economic rights, in contrast to the immediate obligation attaching to civil and political rights,⁶² has brought questions on

⁶⁰ See Adras Sajo, *Social Rights as Middle Class Entitlements in Hungary: The Role of the Constitutional Court*. Roberto Gargarella, Pilar Domingo and Theunis Roux, (eds) Supra note 26 at p. 97

⁶¹ Article 2, International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27

⁶² Under ICCPR, the language of progressive realization is absent. Article 2 prescribing the state obligation state:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,

how the courts are to assess the fulfilment of a right that requires progressive realization. At this point it is important to note the General Comments by the Committee on Social Economic and Cultural Rights indicate that certain obligations in relation to these rights are immediate.⁶³ Also importantly, according to the General Comment, the onus of demonstrating that the minimum core obligation has been met is on the state party and this is not a standard which the court could not assess. There is also national jurisprudence that points toward courts prudently addressing these concerns.⁶⁴

1.7 A Holistic Approach

It is important to bear in mind that the fact the socio-economic rights become justiciable does not mean that they are removed from the purview of political process – it is not a mutually exclusive approach. It is acknowledged that justiciability is not the only way to meet state's obligations as these entail taking appropriate legislative, administrative,

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - c) To ensure that the competent authorities shall enforce such remedies when granted.

⁶³ The concept of minimum core obligation as explained in General Comment No. 3 by Committee on Economic Social Cultural Rights (cf. p. ---- of this thesis). Additionally the Committee said in the same General Comment, “there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be *capable of immediate application by judicial and other organs in many national legal systems*. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain. (Emphasis added).

⁶⁴ See TAC case. Supra note 53 constraints of “availability of resources” did not convince the South African Constitutional Court while providing for remedies in the instant case.

budgetary, judicial and other measures towards the full realization of such rights. Further, the nature of rights is that they are certain irreducible minimums which though subject to the democratic process have guarantees beyond politics hence their place in the constitution. There is nothing inherently wrong in socio-economic rights enjoying this constitutional guarantee coupled with judicial enforcement. Further, if one is to consider that judges are especially placed to address concerns of persons whose interests may not have been addressed by the democratic process and further that true democracy requires all actors to play a role in societal discussions, then having these rights enforceable by courts in fact strengthens democracy.⁶⁵

1.8 Conclusions

This part of the thesis has gone into lengths to present the arguments for and against justiciability of socio-economic rights. The general conclusion on these arguments is that while some of the arguments are well-grounded and raise concerns that deserve serious interrogation, some of the arguments are based on fallacious assumptions and perhaps even on past ideological revulsions and preferences rather than sound reasoning. The point that runs throughout the argument for justiciability of socio-economic rights is that there are serious challenges raised against justiciability but concerns are not insurmountable, they can and are being addressed. This thesis argues that it is no longer

⁶⁵ See Roberto Gargarella, *Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?* Where he says, "... one may easily come to the conclusion that judges are institutionally placed in an exceptional position for contributing to foster deliberation: the Judiciary is the institution in charge of receiving complaints from all those who are or feel they have been unduly treated by the decision-making process. There is no other institution whose corridors are daily filled by those in need of help and public attention. Judges are (quite) naturally inclined to look at the political system from the perspective of those who suffer from it – they are required to look at this system paying attention to its weaknesses, failures and ruptures. Even better than that, judges are institutionally obliged to listen to the different parties in a conflict - and not only to the side that claims to have been mistreated. Politising the courts: proper role of courts of Gargarella-Courts and Social Transformation in New Democracies. p. 39

tenable to posit that, as a whole, socio-economic rights are not amenable to judicial enforcement. Perhaps what has not been considered in this chapter are the theoretical underpinnings and assumptions that underlie the criticisms of the justiciability of socio-economic rights. Behind these arguments is a conception of the role of the state, the nature of rights and in general how society should be organized. The dominant conception is based on Western liberal paradigm, with foundations on John Locke ideas, that primarily ascribes as a minimalist role to the state in the organization of society. This issue will be the subject of focus in the next chapter and particularly as it relates to the developing world experiences and to Kenya in particular.

CHAPTER TWO

2 THE NORMATIVE IMPERATIVE OF JUSTICIABILITY IN KENYA

2.1 The Position of Social-Economic Rights in Kenya

The Constitution of Kenya guarantees only the classical civil and political rights but is silent on the socio-economic rights.⁶⁶ Kenya ratified CESCR on 6th January 1976 but is has yet to domesticate this treaty and the judiciary takes little part in the enforcement of these rights. This conspicuous silence was noted by the Committee on Economic, Social and Cultural Rights in 1993 when it said:

the Committee notes with concern that the rights recognized by Kenya as a State party to the International Covenant on Economic, Social and Cultural Rights are neither contained in the constitution of Kenya nor in a separate bill of rights; nor do the provisions of the Covenant seem to have been incorporated into the municipal law of Kenya. Neither does there exist any institution or national machinery with responsibility for overseeing the implementation of human rights in the country. According to the information available to the Committee, the High Court does not play an effective role in the enforcement of human rights.⁶⁷

When the above comments were made, Kenya had never made any report to the Committee and only made its first periodic report in September 2007.⁶⁸ Yet the situation on social and economic rights remains largely the same. The fact that Kenya made its first report in this area is a welcome step since it signals the state's acknowledgement of its obligation under the CESR treaty. Another encouraging step that would have had revolutionary impact on implementation of social and economic rights was the inclusion

⁶⁶ See Chapter V of the Constitution of Kenya headed, Protection of Fundamental Rights and Freedoms of the Individual.

⁶⁷ Conclusions and recommendations of the Committee on Economic, Social and Cultural Rights, Kenya, U.N. Doc. E/C.12/1993/6 (1993).

⁶⁸ See UN Committee on Economic, Social and Cultural Rights (CESCR), *Implementation of the International Covenant on Economic, Social and Cultural Rights: periodic reports submitted by States*

economic and social rights in the New Proposed Constitution that was defeated in the 2005 referendum. The proposed constitution had recognised labour rights, rights to social security, health, education, housing, food, water, sanitation, environment, language and culture, consumer rights.⁶⁹

The constitution of a country defines and not only the political power relations by providing the structure of the various arms of government but it also sets out, by the bill of rights, the normative framework for legal claims of persons under the jurisdiction of the that state. Although, constitutionalisation of rights is not necessarily conclusive of the reality on the ground, the absence of any constitutional guarantees of socio-economic rights tells a lot about the nature and structure of the state.

Kenya is a country that is highly unequal and a large number people live in poverty in conditions that are inconsistent with a dignified life. According to UNDP “Globally, Kenya is among the 30 most unequal societies in the world and among the top ten low-income economies with a high concentration of income.”⁷⁰ The gap between a small rich class and a majority poor class is conspicuous and widening. As will be shown shortly, this situation is not as a result a small elite being industrious and a majority that is lazy. The appalling conditions of living are due to many factors but prime among them is an unequal distribution of resources - primarily land.

parties under articles 16 and 17 of the Covenant: Kenya, 11 September 2007. E/C.12/KEN/1.
⁶⁹ See Articles 59 to 70 of Kenya’s Proposed New Constitution where these rights were incorporated.
⁷⁰ United Nations Development Programme (UNDP), Kenya Human Development Report 2001 Addressing Social and Economic Disparities for Human Development. p. 31

The inequality in Kenya is structural and has historical roots. Presently, in Kenya, fifty six (56%) of the Kenyans live below the poverty line⁷¹ (living on less than two dollars a day). The country's richest ten percent (10%) households control forty two percent (42%) of the income while the poorest ten percent (10%) households control only 0.76% of the total income.⁷² The majority of the population (70%) controls only 30% of the total income.⁷³ Poverty is therefore a central human rights issue in Kenya today. While making criticism of the first periodic report by Kenya on social and economic rights, a group of civil society organizations said: "Poverty engenders inequality, discrimination and exclusion, violating individual rights and freedoms. It attacks the very foundation of human rights: the right to dignity and autonomy of the person."⁷⁴ Not only are the poor denied the right to food, education, health, work, social security, housing and other socio-economic rights but that they are increasing criminalized because of the poverty.⁷⁵ It is interesting to note that the picture that emerges of economic inequality is comparable to the legacy of apartheid.⁷⁶

⁷¹The United Nations Environment Programme, Poverty and Environment in Kenya.

http://www.unep.org/dpdl/poverty_environment/Projects/Country_profiles/Kenya/kenyacontext.asp

⁷² Society for International Development (CID), *Pulling Apart: Facts and Figures on Inequality in Kenya*. p. 20 CID 2004.

⁷³ Ibid.

⁷⁴ List of issues by the Civil Society Coalition on economic social and cultural rights.

<http://209.85.129.104/search?q=cache:mVPSKkuIVScJ:www.ohchr.org/english/bodies/cescr/docs/info-ngos/khrckenya39.pdf+social+and+economic+rights+in+kenya&hl=en&ct=clnk&cd=13>

⁷⁵ See Report by Commonwealth Human Rights Initiative and the Kenya Human Rights Commission, *The Police, The Politics, The People: Police Accountability in Kenya*. p. 19. 2006
www.humanrightsinitiative.org/publications/police/kenya_country_report_2006.pdf -

⁷⁶ See Sandra Liebenberg, Human Development and Human Rights: South African Country Study. Human Development Report 2000 Background Paper. Where she writes, "Apartheid left a legacy of deep poverty and inequality in the country. For a long time South Africa had the highest measurement of income inequality (Gini coefficient) in the world. Today only that of Brazil is higher. The poorest 40% of households (equivalent to 50% of the population) receive only 11% of total income, while the richest 10% of households (equivalent to only 7% of the population) receive over 40% of total income. Inequality of income distribution between race groups is considerable, and accounts for 37% of total income inequality.¹¹ Poverty also has strong gender dimensions in South Africa with female-headed households having a 50% higher poverty rate than male-headed households.¹² In all of the key social indicators, including life expectancy, infant mortality, illiteracy, fertility and access to safe water, South

The pertinent question for those who go hungry, those without work, healthcare, education, housing among other basic need is: what meaning could human rights have if a person is denied these basic needs that would enable one to live as a dignified human beings? There has been a clamour for constitutional change in Kenya for the last, close to, twenty years but for the ordinary Kenyans a new constitution represents the bringing about of an order in which these concerns are addressed. Although “most of the contents of the constitution relate to the structure of government and the process of governance, the Bill of Rights, especially one that includes the “second generation” of rights becomes a pillar upon which the citizenry is able to assess government performance at the political and socio-economic level.”⁷⁷ This is the context in which this thesis makes a case for justiciability of social and economic rights.

2.2 The Liberal Paradigm and the Situation of Kenya

Underlying the criticism for justiciability of socio-economic rights is the notion that the state should play a minimal role in the distribution of resources and that private property is sacrosanct. The liberal human rights discourse is based on a Lockean fiction based on the monarchical era that assumes a radical individual autonomy requiring minimal state interference.⁷⁸ This ignores the pervasive role of the modern state in regulation and

African fares very poorly against comparable middle-income countries.¹³ A study on Poverty and Inequality in South Africa identifies the poverty traps set by apartheid as "an important explanation for the persistence of poverty in South Africa." These relate to the absence of complementary assets and services "and a poverty of opportunity whereby people are unable to take full advantage of the few assets that they do have." These conditions reproduce poverty and perpetuate inequality, particularly in the context where the South African economy is contracting.”
<http://hdr.undp.org/en/reports/global/hdr2000/papers/sandra%20liebenberg.pdf>

⁷⁷ Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen, Kamotho Waiganjo Kenya Constitutional Documents: A

Comparative Analysis) Bergen: Chr. Michelsen Institute (CMI Report R 2006: 5) p.41

⁷⁸ Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*,” Supra note 29 p.768

involvement in the distribution of resources but it must be acknowledged that today's corporate globalisation has seriously eroded state power. Further, the Lockean assumption of a minimalist neutral state is not true of many societies with an example of Kenya. The state has played a significant role in the present situation of gross inequality and poverty in Kenya. This can be traced to the colonial era where the colonial state appropriated indigenous peoples' resources and gave them to a settler white class. The neo-colonial state did not change this fundamental inequality. The state was involved in the creation of the current unjust situation where a small class controls virtually all resources and it should be involved in the redistribution process. Making socio-economic rights justiciable is one of the ways to do this.

2.2.1 Moral Implications of Justiciability

There two interlinked moral problems that face the enforcement of socio-economic rights: first is the question that this enforcement necessarily involves taking what “belongs” to one individual and distributing it to another;⁷⁹ and secondly involving the state to undertake the distribution while the state *per se* has no rights unless by consent of the individual as Robert Nozick concludes:

Individuals have rights, and there are things no person or group may do to them (without violating their rights). So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do. How much room do individual rights leave for the state?

Our main conclusions about the state are that a minimal state limited to the

⁷⁹ See Wiktor Osiatyński, Needs-Based Approach to Social and Economic Rights, where he captures this moral concern by saying, “Still other controversies focus on the moral aspect of social and economic rights, particularly in relation to individual incentive and responsibility for one’s own life. This is because social rights consist of providing some groups and individuals with the goods and services that are bought on the market by the majority of people and are financed by the same majority through taxation.” <http://www.humanrights.unisi.it/hr/allegati/onsocial.doc>

narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate person's rights not to be forced to do certain things, and is unjustified; and that the minimal state is justified as well as right. Two noteworthy implications are that the state may not use its coercive apparatus for the purpose of getting some citizens to aid others, or in order to prohibit activities to people for their own good or protection.⁸⁰

It is therefore important to address these normative concerns surrounding the issue of justiciability. This thesis takes cognisance of the reality that enforcement of socio-economic rights involves the question of redistribution of resources as noted by Henry J. Richardson in the context of South Africa in his paper: *Patrolling the Resource Transfer Frontier-Economic Rights and the South African Constitutional Court's Contributions to International Justice*:

The question of the *justiciability of economic, social, and cultural rights provides an opportunity for wealth and resource transfers to poor and vulnerable people of color*, which are sorely needed in South Africa and globally. Post-apartheid South Africa has shown great global justice leadership in its rights-protective Constitution, its institutions of truth and reconciliation, and in the work of its Constitutional Court to date in confirming the justiciability of economic, social, and cultural rights under its Constitution and also under the International ESCR Covenant under international law as a treaty which South Africa has signed, and in defining and protecting those rights as legal rights to entitled persons.⁸¹ (Emphasis added)

In doing so, this part of the thesis will present the ideas and principles expounded by John Locke and his modern counter-part Robert Nozick in presenting the position that seems incompatible with enforcement of socio-economic rights. The thesis will show that even as these great authorities present powerful arguments in support of their positions, there are fundamental issues particularly in the context of Kenya that point to other

⁸⁰ Anarchy, State, and Utopia. New York: Basic Books, (1974). p.(ix)

⁸¹ Henry J. Richardson, *Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court's Contributions to International Justice*. African Studies Quarterly

ideas. The arguments made here are to be contextualized within the debate of whether or not socio-economic rights should be enforceable by the state apart from objections raised and dealt with in the preceding chapter on whether the judiciary should adjudicate on these matters. In this sense, this chapter delves into the deeper moral and philosophical questions that ultimately lie behind the opposition to justiciability of socio-economic rights.

Justiciability of socio-economic rights necessarily entails assigning the state a role in distributive justice. The state's obligation to fulfil socio-economic rights has implication on the nature and conception of the state. In addressing these rights there is implicit acknowledgement of the existence of inequality and poverty on one hand and riches on the other hand.

It is interesting to note that the question of enforcement of socio-economic rights is taking place at a time that coincides with the ascendancy of the neo-liberalism whose basic tenets emphasize organisation of society through the market forces of demand and supply with minimal interference from the state. It is therefore importance to locate the question of justiciability of these rights within the ideological debate of "big government" and "lean government" and where with the "demise" of communism and socialism with the associated expanded role of the state in organizing society is viewed with abhorrence and mistrust. Most of the what neo-liberalism emphasizes, *inter alia*, privatization, market deregulation, trade liberalisation, cutting public expenditure for social services can be said to be unfavourable to social and economic rights.

To say that the state has the obligation to ensure that a particular person enjoys the right to food, education and health means placing on the state the duty to do this using various means. This duty could be fulfilled through the government ensuring that the policies it passes and implements are such as to ensure that these rights are provided for. The other way is through direct provision of the same. In both of these ways the state needs resources. The modern state gets resources by taxation and other forms of ownership of property. The state, for example, has certain powers such as the powers arising from the doctrine of eminent domain where ultimately even private land can be taken by the government as well as laws other which place all un-alienated law to the government.⁸² Another example of state power is the police powers through which it undertakes taxation.

The obligation to fulfil socio-economic rights has the other side where, particularly in the western capitalistic societies, the rights to private property is one, if not, the most jealously guarded rights. For example, the constitution of the United State protects these through clauses relating to equal protection and due process, prohibitions against takings. One cannot therefore, address the issue of justiciability of socio-economic right without examining these issues of dealing with the distribution of resources.

The underlying revulsion to social rights emanates from the aversion to this distributive role seen as taking from one party or class to another. Why should the state have the powers to take the property belonging to one party and allocate it to another under a notion of entitlement to socio-economic rights? The question is asked: is it just for what

⁸² See Jasper N. Mwendwa, Spatial Information in Land Tenure Reform with Special Reference to Kenya

rightfully belongs to one person to be compulsorily taken away in order to satisfy the needs of another? Any justification of justiciability of social- economic rights must address itself this philosophical and moral dilemma. However, there is an assumption that what is said to be the property of a particular person really belongs to him at least in the in sense of absolute exclusion of others. Even if the society could agree that a given property belongs to a particular person, it still has to be answered whether that ownership is justifiable. Put in another way, the question is whether it would be proper to compulsorily take away a part of the individual's property, through for example taxation and transfer it to another, without there being an injustice. What property legitimately belongs to a person? When can an individual say that she or he is entitled to what he or she owns? Answering these questions is crucial to understanding and justifying justiciability of socio-economic rights.

2.2.2 John Locke ideas

It is fair to say that underlying the opposition of socio-economic rights is the issue of the conception of how the society is to be organized. Most modern human rights discourse can be located in liberalism. It is important to examine to what extent socio-economic rights are justifiable or otherwise not justifiable within this liberal framework. In this respect it is worthy to examine John Locke's ideas as he is considered the father of modern liberalism.

Locke's ideas can be historically located in the period during the emergence of the modern state where the individuals, particularly the "lords" had their property and ceded

where he says, "In Kenya, Government Land Comprises of 10%, Private Land 20% and Trust Land

only the necessary functions to state to enable society to function properly. For him the pre-state conditions of man in the ‘natural conditions’ is seen as entailing perfect freedom. He sees freedom as inherently belonging to the individual and hence in his celebrated book, *The Second Treatise of Government*, he sees the function of a legitimate civil government being to “preserve the rights of life, liberty, health, and property of citizens and to prosecute and punish those who violate the rights of others” and he puts thus:

Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property – that is, life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.⁸³

This position of an autonomous individual remains a central tenet of liberalism. A minimalist conception of the role of the state, with attendant influence on jurisprudence, remains the world view of liberals for whom:

The State is seen as a potential ‘enemy’ of the natural liberty of the individuals. This is first visible on the level of language: it has almost become politically taboo to consider speaking about an active role of the State. A positive image of the state is absent, and consequently a positive or active role of the state is not welcomed. But the ‘deep-level philosophical condition’ also has consequences in judicial practice: It fits this picture that the Supreme Court only sanctions state action, but not state non-action (omission). There is no duty of action on the part of the state recognized (see the *De Shaney* case¹). On the contrary, it is a rhetoric that confines the role of the State to a passive one, where it is forbidden to act. This understanding prevents the evolution of jurisprudence in a direction which is now commonplace in Europe, and which acknowledges more openly a positive, or protective role of the state.⁸⁴

70% of the total land in Kenya”. <http://www.fig.net/pub/proceedings/nairobi/mwenda-TS7-2.pdf>

⁸³ John Locke; *The second treatise of government* (1690) Chapter 7: Of Political or Civil Society p:138

For Locke the pre-state situation is positively conceived and in this sense he differs from the rather pessimistic predecessor, Thomas Hobbes, who saw the necessity of the sovereign in order to avoid “the life of man, solitary, poor, nasty, brutish, and short.”⁸⁵ He embraced natural rights which he saw as pre-dating modern government and hence conceived he them in terms of terms of freedom from the state. This position is understandable developing, as it did, from the experience during the time when the monarchy and the feudal lords system claimed the right to property, especially land, to the exclusion the poor majority.

2.2.3 Robert Nozick Entitlement Theory

The ideas of Locke with regard to property and the role of the state resonate with Robert Nozick as the modern defender of property rights who, while advocating for a minimalist state, sees interference with pre-existing private rights is undesirable.⁸⁶ He has no place for distributive justice. For him, free market offers the best social organisation for justice. His entitlement theory holds that one is entitled to what is his if there was initial legitimate acquisition directly from nature or from voluntary transfer through a gift, purchase or other legal transmission including inheritance. So when can a transfer or an original acquisition be considered unjust? In the case of a transfer Nozick sees any acquisition by fraud, by theft or by “no fault” state invention for re-distribution as unjust.⁸⁷ As for the original acquisition from nature:

⁸⁴ Georg Sommeregger, The Liberal Roots of Third-Party Effect Doctrines
http://web.ceu.hu/downloads/CEU_Gazette_Summer_2003_2004.pdf

⁸⁵ Thomas Hobbes, *The Leviathan, Chapter Xiii of the Natural Condition of Mankind as Concerning Their Felicity and Misery*. <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html>

⁸⁶ See, R Nozick Anarchy, state and utopia (1974).

⁸⁷ This means that if one gets property from one who acquire it illegally, then title to that property does not

Nozick takes his lead from the Lockean notion that each person owns himself and that by mixing one's labour with the material world, one can establish ownership of a portion of the material world. Nozick explains that what is significant about mixing one's labour with the material world is that in so doing a person tends to increase the value of a portion of the external world. He reasons that in such instances, self-ownership can bring about ownership of a part of the physical world. According to Nozick, the Lockean Proviso means: 1) that previously unowned property becomes owned by anyone who improves it; 2) that an acquisition is just if and only if the position of others after the acquisition is no worse than their position was when the acquisition was un-owned or owned in common.⁸⁸

The third principle that Nozick postulates is that of rectification where he concedes that in so far as the original transfer was not voluntary or acquisition of a given property leaves another person in a worse position than when it was not so appropriated then, as far as is it possible, rectification should be undertaken. He therefore conceives human beings in Kantian terms as an ends in themselves. The state has no business interfering with private property unless it can be shown that there is fault in the ownership of that property. Short of voluntary transfer and just acquisition, other coercive measures including by the state to achieve egalitarian re-distribution of resources is seen as unjust and unacceptable. If one has absolute right to a property then justice demands that one should use that property as one pleases. The state could only have legitimate grounds for intervention and undertaking Rawlsian distributive justice only in case where the acquisition of that property is in the place unjustified.

If one were to stop examining Nozick ideas at this juncture, the logical conclusion is that he would be advocating for anarchy since no legitimate reason would exist for a

pass as the maxim says : *nemo dat quod non habet*—one cannot give what one does not have
⁸⁸ See Edward W. Younkins Robert Nozick's Libertarian Framework For Utopia (Part Two)
<http://www.quebecoislibre.org/020427-13.htm>

government with powers to tax people for protection. However, he goes further to argue that an “ultra-minimal state” would emerge as dominant protecting agency that would protect individual rights and property by “taxation.” The long and short of Nozick’s position is that only justifiable taxation by the state is one that goes to provide protection to property rights and other related rights. This is in contrast to taxation towards what he called “end-state” or patterned theories of justice, as advocated by John Rawls, which he (Nozick) sees as morally equivalent to forced labour since it amounts to depriving the individual of himself and the product of his labour.

2.3 Answering Locke and Nozick

2.3.1 Land Inequality

If one agrees to the principles propounded by Nozick, it would seem that having socio-economic rights justiciable would be an injustice to those who are justifiably entitled to their property. From a moral point of view it would seem that in the course of fulfilling socio-economic rights in this way, rights of others, particularly the right to property, would be violated. But is that really the case? This thesis will make argument to show that it is possible to justify recognition and enforcement of socio-economic rights with reference to Kenya even if one were to embrace Nozick’s entitlement theory. Further, it will also be argued that there is a fundamental issue of justice that he misses in his conception and this gives way to a conception of justice that is compatible with socio-economic rights.

A fuller picture of the inequality and poverty that pervades Kenya can only be fully appreciated if one looks at the foundation of inequality and poverty viz. land inequality. There are people who tend to say that in the modern world, land is not as important and as central the economy as it used to be. This however is not the case, at least, in Kenya. Over eighty percent of the Kenyan population lives in the rural areas and depends on agriculture.⁸⁹ In spite of this reality the state of land inequality stands glaring with a few families including that of the two former president and the incumbent president⁹⁰ having extremely large shares leaving the majority either landless or with very small uneconomical parcels as one report shows:

Kenya's two former first families and the family of President Mwai Kibaki are among the biggest landowners in the country. A residual class of white settlers and a group of former and current power brokers in the three post independent regimes follow them closely while a few businessmen and farmers, many with either current or past political connections, also own hundreds of thousands of acres.

The extended Kenyatta family alone owns an estimated 500,000 acres — approximately the size of Nyanza Province [*home to over 4.5 million people*]⁹¹ — according to estimates by independent surveyors and Ministry of Lands officials who spoke on condition of anonymity. The Kibaki and Moi families also own large tracts of land though most of the Moi family land is held in the names of his sons and daughters and other close family members. Most of the holders of the huge parcels of land are concentrated within the 17.2 per cent part of the country that is arable. The remaining 80 per cent is mostly arid and semi arid land. In fact, according to the Kenya Land Alliance, *more than a half of the arable land in the country is in the hands of only 20 per cent of the 30 million Kenyans*. That has left up to 13 per cent of the population absolutely landless while another 67 per cent

⁸⁹ According to United Nation Development Programme (UNDP), Kenya Human Development Report 2001 Addressing Social and Economic Disparities for Human Development, "Agriculture is the single most important sector in the Kenyan economy, contributing approximately 25% of the GDP and employing 75% of the national labour force. Over 80% of the country's population live in the rural areas and derive their livelihoods directly or indirectly from agriculture. Most of the vulnerable groups—pastoralists, the landless and subsistence farmers—also depend on agriculture for their main livelihoods."

⁹⁰ Kenyatta is the Kenya's first President who took over from the British colonial regime and his it began in 1963 until his death in 1978 when Moi took over until the first multiparty transition in 2002 to the incumbent president Kibaki now serving his final second term.

⁹¹ Addition mine. See <http://www.cbs.go.ke/>

on average own less than an acre per person.⁹²(Emphasis added)

Although inequality, particularly in relation to access to productive resources especially land, does not always entail poverty there is a strong correlation between the two.⁹³ On the other hand, poverty directly affects the realisation socio-economic rights. In Kenya, poverty is not due to the individual's laziness or lack of personal endeavour but is largely a function of historical and structural socio-economic set-up that, by and large, determines a person chances on life. As noted by UNDP, "Landlessness adversely affects the ability to provide basic needs: food, clothing and shelter [and]in fact, in most cases, the poorest of the poor in the rural areas are landless."⁹⁴ Largely, where, how and to whom a person is born determines one's destiny. For example, if one is born a female in North Eastern of an ordinary family, the chances of life in terms of survival, the right to food, health and education among others are greatly diminished.⁹⁵

⁹² The East African Standard, Who owns Kenya?, Friday October 1, 2004

⁹³ See United Nations Development Programme (UNDP), Kenya Human Development Report 2001: Addressing Social and Economic Disparities for Human Development Where it says, "An often-cited cause of poverty in Kenya is the lack of access to or ownership of productive assets, particularly land. In Kenya, where land remains by far the most important asset for the rural poor, a close relationship between the distribution of income, land ownership and poverty is expected. This is because many communities in the rural areas depend on land for production and livelihood. Access to land by the poor is thus important in poverty alleviation." p. 33

⁹⁴ United Nations Development Programme (UNDP), Kenya Human Development Report 2001 Addressing Social and Economic Disparities for Human Development. p.35

⁹⁵ See generally Centre for Economic and Social Rights: Fact sheet no. 4: Making Human Rights Accountability More Graphic, here the following there is, *inter alia*, the following information:

- Less than one in ten young children in North Eastern province
- More than 80 percent of women and 60 percent of men living in the North Eastern province have no education at all.
- About one in four children in the North Eastern province suffer from acute malnutrition (wasting), which contributes to higher child mortality in the province.
- While eight out of every ten births in Nairobi are attended by skilled health professionals, less than one in ten births in North Eastern province are attended
- Less than one in ten young children in North Eastern province are immunized compared to nearly eight in ten in Central province

2.3.2 Rectification Justifies Enforcement

The present ownership of property in Kenya is highly unequal and this, unfairly, determines a person's chances of life. This state of affairs is not accidental. It is neither the product of the “invisible hand” of the market. Even as the whole Nozick’s entitlement theory is not embraced in this thesis, the history of the present ownership of property would be in partial agreement with part of the logic the especially the third principle relating to rectification where he, while acknowledging that it may involve some difficulty, Nozick sees the possibility of correcting past injustices in which acquisition or transfer may have occurred illegitimately. Rectification is called for where “enough and as good” (“Lockean proviso”) was not left for others in the initial appropriation or where the transfer was not really voluntary. If this principle were to be applied in the case of Kenya, the logical conclusion would be to embrace enforcement of social and economic rights. Kenya’s the history of acquisition calls for rectification and this enforcement is one way of doing it. Therefore judicial enforcement of these social rights should not attract moral aversion purportedly due to injustice of taking what rightfully belongs to one person and redistributing it to another un-deserving individual.

2.3.3 Pre-Colonial Ownership of Property

The pre-colonial Kenya comprised diverse communities with varying cultures and traditions. Although different communities had various forms of ownership of property, land in particular, was largely communally owned.⁹⁶ However, there were different land tenure systems but three characteristics were common: firstly, by virtue of membership in

⁹⁶ See Mutindi Mumbua Kiluva-Ndunda, *Women's Agency and Educational Policy: The Experiences of the Women of Kilome, Kenya* SUNY Press, 2001 p.62

some social unit of production or political community individuals could claim certain property rights; secondly; certain control over the land was in the province of the political authority which guaranteed rights of access in a manner that was re-distributive both spatially and intergenerationally; thirdly, rights similar to individual ownership accrued to the individual by virtue of labour input; and finally land which required more intensive labour than the individual could marshal or which by nature required communal sharing was controlled by a political authority.⁹⁷ Although, certain social categories, like the women, did not have full property rights, egalitarian/communitarian principles that generally guaranteed access were applicable. This pattern of ownership was generally seen in both agriculturalist and pastoralist communities in, respectively rights to cultivate and rights of grazing. That was before the colonialist set-in...

2.3.4 Colonial Dispossession

To begin within the state that is currently known as Kenya was carved out in 1884 in the Berlin Conference where the European powers barbarically shared out Africa during what is now characterized as the Scramble for Africa and ironically it was done in the name of civilization. Subsequently, in 1886, Germany and Britain signed the Anglo-German Treaty which created the territories of Kenya and Tanganyika. The occupation process was by force and trickery as noted by Ahluwalia and Nursey-Bray:

The colonization of Kenya was effected by force. The imperial monopoly of force was created and a foreign minority dominated the indigenous population. During this early period major events occurred which would later define the socio-economic, political and cultural character of Kenya.⁹⁸

⁹⁷ See John Momanyi Mironga, The Implications of Existing Land Tenure Systems on Land Use and Natural Resource Management in Kenya.
<http://www.ossrea.net/publications/newsletter/jun04/farticle17.htm>

⁹⁸ D. Pal S. Ahluwalia and Paul Nursey-Bray, The Post-colonial Condition: Contemporary Politics in Africa Published by Nova Publishers, 1997 p. 84

Initially, the regions that is now Kenya was managed by the Imperial British East African Company until its bankruptcy in 1895 when Kenya came directly under the British through the declaration of the East African Protectorate. Among the first acts of appropriation was through the East African Order in Council and the Crown Lands Ordinance of 1902 which were based on the principle of *terra nullis* in total disregard of the pre-existing forms of ownership and land use by the African people whose forms of ownership, control and use was not in the manner where land was traded like a commodity as in the western culture.⁹⁹ The Crown Lands Ordinance of 1902 made all land that was not “occupied” by Africans to be crown land and hence available for alienation for British settlers.

In 1915, the Crown Land Ordinance of 1902 was repealed by the 1915 Crown Land Ordinance that declared all land occupied and reserved for Africans as Crown Land. In this way the Africans were made to be “tenants at will” which meant that their land could be taken away and given to white settlers. Further colonial legislation established the apartheid-like White Highland only for white settlers and located in areas with the best agricultural potential.¹⁰⁰ Africans were left concentrated in comparatively smaller and much less fertile areas. Further, obligatory requirements for Africans to pay tax reduced

⁹⁹ Ibid. p 84

¹⁰⁰ Felsites Kinuna Kinyanjui, Causes of Persistent Rural Poverty in Thika District of Kenya, C.1953-2000- A Thesis Submitted in Fulfilment of The Requirements of the Degree of Doctor Of Philosophy of Rhodes University. 2007 who states that, “Colonialism was driven by political and economic imperatives. To facilitate colonial political economy, new land policies were introduced in Kenya. The English Land Law was imported into the protectorate and applied to areas that were designated as White Highlands for the exclusive settlement of whites. These areas were selected from the more arable and habitable parts of the colony. Under English Law, the white settlers secured freeholds and long-lease titles but not rights of occupancy. An alien perspective of land ownership began to emerge and the state became an important player in land use and control. The land users held land at the pleasure of the state.”

most of them to forced labourers in the White Highlands. The effect of colonial policy is summed up amply by Kinjajui in reference to Thika district which is a microcosm of Kenya:

The colonial state established a settler economy that supplanted the pre-colonial modes of production. Land alienation, institutionalisation of forced labour, imposition of poll and hut taxes, and restrictions on African production of profitable crops, including coffee, were the main mechanisms employed to subjugate the people of Thika. Peasant commodity production was kept under check and any African initiative suppressed at the earliest opportunity to counter any competition to the favoured settler agriculture sector.¹⁰¹

The above described colonial situation continued to obtain until the Africans through the Mau Mau Revolution took arms against the colonial state. The major grievance that sparked the Mau Mau guerrilla war was land. Due to this war and as well as other happenings in other colonies, the British could come to the realization that direct colonialism was no longer sustainable and this made them decide to relinquish power and so independence was granted in 1963 with Kenyatta becoming the Prime Minister.

However, the grant of independence did not herald a new dispensation in terms of ownership of means of production. Kenyatta's regime adopted the policy of the "willing seller willing buyer" to deal with transfer of land from the white settler community.¹⁰² The beneficiaries of this policy was the white settler community who were to receive compensation for the property that they had acquired by force and also that had been developed not with their labour but through cheap/forced labour of the Africans. This

p. 52

¹⁰¹ Ibid. p.303

¹⁰² Readings on Inequalities in Kenya: Sectoral Dynamics and perspectives. Society for International Development (CID), CID 2006. p.299

position can be seen in Kenyatta's words to the white settler community in August 1963 in Nakuru where he assured them of protection of their interests and stay in Kenya by telling them:

If I have done wrong to you it is for you to forgive me. If you have done wrong to me it is for me to forgive you. We want you to stay and farm this country.¹⁰³

The other beneficiaries of this “wiling buyer-willing seller” policy were the collaborationists who cooperated with the colonial regime since it is they who had the money to purchase the land on those terms. The freedom fighters who took arms and went to the forest to engage the colonial state could not possibly have had any money to buy the land. Neither could those who were held in prison or concentration camps similar to the *gulag* or the Nazi camps that were used by the British to condemn whole populations in an attempt to isolate the freedom fighters.¹⁰⁴ The collaborationist homeguard class was doing business as usual, particularly those who were in the provincial administration machinery that was used by the British for coercion purposes, when others who offered resistance to colonialism were subjected to all manner of tribulations. Further, the President, even presently, had powers to use land for political patronage¹⁰⁵ through section 3 of the Government Lands Act which provides:

The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over un-alienated Government land

¹⁰³ Ngugi wa Thiong'o, *Detained: A Writer's Prison Diary* (Nairobi: Heinemann, 1981), p. 88.

¹⁰⁴ See generally, Elkins, Caroline. *Imperial Reckoning: The Untold Story of Britain's Gulag in Kenya*. New York: Henry Holt and Company, 2005.

¹⁰⁵ Kinyanjui (Supra Note 100) notes, “Kenyatta and the new political and economic elite used their positions and connections to acquire huge tracts of land in Thika District. They bought out white landowners and they entrenched themselves as the new land aristocrats. This was perfected by Kenyatta's ability to reward his allies, co-opt potential critics and silence serious and organised

This pattern of ownership continued in Moi's regime with pervasive land grabbing culture.¹⁰⁶ The net effect of the colonial and post-colonial policy on land and the continuation of the colonial policies are acknowledged in the recent government Draft National Land Policy:

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialise and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonization process of the country represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy.¹⁰⁷

2.3.5 Social Rights Rectifying Historical Injustice

This part of the thesis has gone into lengths to show that the present pattern of ownership of means of production, particularly land, is not due hard work on the part of those who control vast acreage but it is part of continuing dispossession that has historical roots. In deed, it is correct to conclude that generally, particularly with regards to land, the those who today are landless or have very little land are descendants of those were unjustly disposed or victims on unjust acquisition while on the other hand those who control vast resources either themselves made unjust acquisition or are heirs to those who unjustly acquired such land. In Nozickian terms, it cannot be claimed that it is morally wrong to effect justice through enforcement of socio-economic rights. In deed, such enforcement is one way to redress past injustices.

opposition.” p.71

¹⁰⁶ See Report by the Presidential Commission on Land Grabbing popularly known as Paul Nding'u Commission.

¹⁰⁷ Ministry of Lands, Draft National Land Policy. para. 25

It has also shown that the history of Kenya is central to determination of who owns what and that the “invisible hand” of the market had very little hand in this process. The process of land acquisition was not only not by voluntary transfer nor of an initial appropriation which satisfies that Lockean proviso leaving "enough and as good" for others but rather as noted by Murray Rothbard, “on the contrary, the historical evidence cuts precisely the other way: for every State where the facts are available originated by a process of violence, conquest and exploitation: in short, in a manner which Nozick himself would have to admit violated individual rights.”¹⁰⁸ The formation of the present state of Kenya was central to property ownership and therefore the state must be involved in the rectification process. In the circumstances of Kenya, it cannot therefore be said, as Nozick concludes, that the minimal state is the most extensive state that can be justified. Any state more extensive violates people’s rights”¹⁰⁹ The state was involved in the prevailing property ownership in Kenya and it cannot abdicate from its obligation but to it has to “clean up its own mess” so to say through fulfilment of socio-economic right so as to, at least, mitigate historical and continuing injustices. The caveat here is that there is need to re-organise the state in order for this to happen.

2.3.6 Rawlsian Distributive Justice

This thesis has argued that even if one were to agree with Nozick in his theory of just acquisition and where this has not been the case then the need for rectification, this would lead to justification for enforcement of socio-economic rights. One however does not have to agree with Nozick to see that there are inherent issues with Nozick’s position. For

¹⁰⁸ Murray N. Rothbard, Robert Nozick and the Immaculate Conception of the State. *Journal of Libertarian Studies* Vol. No.1 Pentagon Press. Great Britain. p.45

¹⁰⁹ Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 149 and 333. *****

Nozick, and in the footsteps of Locke, every individual owns himself or herself. It follows that the individual is entitled to the product of his labour or any just acquisition. Further, if one is not naturally endowed for example if one is either physically or mentally disabled, he or she cannot expect any social support as a matter of right but rather only as a matter of charity.

Nozick saw no injustice arising from vulgarities of fate. For John Rawls however:

The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts.¹¹⁰

No one determines how, where and by whom he or she is to be born. It is therefore not fair that one's chances of life in terms of opportunities should be determined by birth. A just society is one that attempts to take care of those whose "fate" seems unfair. For Rawls, justice is the standard test for institutions as he puts it in the introduction of his acclaimed book, *A theory of Justice*. He embraces distributive justice as the overriding norm. In his famous classic, he begins by stating that:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the whole welfare society cannot override.¹¹¹

John Rawls frames his general conception of justice by saying that "all social values – liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any, or all, of these values is to

¹¹⁰ John Rawls *A theory of justice*. The Belknap Press of Harvard University Press (1971).p.87

everyone's advantage.”¹¹² Flowing from this Rawls advocates for a system in which differences due to “luck” are institutionally organised in way that benefits the least fortunate as he puts it:

No one deserves his greater natural capacity nor merits a more favourable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return.¹¹³

2.4 Beyond the Liberal Construct

Although Rawls has a more appealing idea of justice, he nevertheless remains within the liberal construct that sees the organisation of society in individualistic terms.¹¹⁴ For liberalism, the self is understood in terms of the individual and this also guides the understanding of rights. Liberalism primarily conceives rights in negative terms. Economic and social rights enforcement demands a different conception of the state as well as a different world view in regard to understanding of the person.

Making socio-economic rights justiciable is also an affirmation of the social nature of the person. The liberal individualistic view with skewed emphasis on civil and political rights tends to ignore this dimension. It is possible to conceive a different world view of reality and social organization as, for instance, that represented by the African world view where the interdependence of human beings is seen in terms of “I am because we are.”¹¹⁵ This

¹¹¹ Ibid. p. xix

¹¹² Ibid. p.54

¹¹³ Ibid. p.102

¹¹⁴ See Jeanne M. Woods, Justiciable Social Rights as A Critique of the Liberal Paradigm. Supra Note 29

¹¹⁵ John S. Mbiti, African Religions and Philosophy (1969, 141)

philosophical outlook can be seen in the African Charter on Human and Peoples' Rights where the dichotomy between the various rights is not only absent but that individuals as well as peoples have rights.

CHAPTER THREE

3. DRAWING FROM AMERICA, INDIA AND SOUTH AFRICA

This chapter shall examine the models for judicial enforcement of socio-economic rights and with a view to drawing lessons from the experiences.

3.1 The American Experience

The Constitution of United States of America does not explicitly contain or recognise socio-economic rights. Further, the US sees socio-economic rights not as rights but mere aspirational principles.¹¹⁶ However, there are cases in the field of socio-economic rights that have been handled at the federal level by the Supreme Court as well as cases at state level where certain states in their constitutions recognise socio-economic rights. Some of the cases are hereunder highlighted.

3.1.1 Brown v. Board of Education¹¹⁷ and the Aftermath

In this case, black students were denied entry into public schools but which admitted white children under laws that required or permitted segregation according to race. The application made by the parents on behalf of the children sought orders from the Court for their children to be admitted into the public school on non-segregated basis. The plaintiffs had been denied relief by the federal district court that relied on the authority in *Plessy v. Ferguson*,¹¹⁸ that had sanctioned the “separate but equal” doctrine in which “equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.” The question in issue in *Brown v.*

¹¹⁶ See supra note 5

¹¹⁷ See Supra note 25

¹¹⁸ See *Plessy v. Ferguson*, 163 U.S. 537

Board of Education was: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”¹¹⁹

The Court answered in the affirmative and said that separate educational facilities are inherently unequal on the basis that:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.¹²⁰

This revolutionary decision did not herald the end of discriminatory practices necessitating *Brown II*¹²¹ which raised the issue of manner of implementation of *Brown I* and in answer the Supreme Court placed responsibility on the district courts and recommended that they should act on the new principles promptly and to move toward full compliance with them "with all deliberate speed." This opened an avenue though which a lot of resistance to implementation of *Brown I* was offered.¹²² Resistance was made until Congress passed the 1964 Civil Rights Act which boosted the anti-segregation efforts. However, in the seventies, the Supreme Court began to undermine the *Brown* decision culminating in *Missouri v. Jenkins*,¹²³ where it found unconstitutional orders increasing taxation in an effort to remedy *de facto* segregation by attracting suburban

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ *Brown v. Board of Education*, 349 U.S. 294 (1955) (USSC+)

¹²² See Kimberly Jenkins Robinson, The Case for a Collaborative Enforcement Model for a Federal Right to Education. 40 U.C. Davis L. Rev. p. 1661

¹²³ *Missouri v. Jenkins*, 515 U.S. 70 (1995)

students into urban districts. This case signalled the end of judicially mandated anti-segregationist efforts¹²⁴ and “restored power to state and local governments”¹²⁵

3.1.2 San Antonio Independent School District v. Rodriguez

In *San Antonio Independent School District v. Rodriguez*,¹²⁶ the applicants were members of the Edgewood Concerned Parent Association representing their children and similarly situated students. Under the Equal Protection clause, they challenged the constitutionality of using property tax in each district to supplement educational funds for the reason that the state did not have a large tax base under these criteria and therefore the result was that there was inequality between districts in funding of school system in a way that disfavoured the poorer members who resided in such districts. The District Court found that wealth was a “suspect” class and that education was a fundamental right hence the strict scrutiny test of a compelling state interest was applied with the finding of unconstitutionality. Upon appeal to the Supreme Court, this decision was reversed. The Court did not find education either directly or indirectly a fundamental right nor were the poor families seen as definable “suspect” class to warrant strict scrutiny test. The Court found that the system of funding was rationally related to legitimate state interest hence it was constitutional. This decision meant that not federal right to education was found.

¹²⁴ See J John Harris III, Charles J Russo, Frank Brown The Curious Case of Missouri v. Jenkins: The end of the road for court-ordered desegregation? *The Journal of Negro Education*, , Winter 1997 http://findarticles.com/p/articles/mi_qa3626/is_199701/ai_n8755430/pg_2?tag=artBody;col1

¹²⁵ See Kimberly supra note 122 p.1665

¹²⁶ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)

3.1.3 *Goldberg v. Kelly et. al*

In *Goldberg v. Kelly et al*,¹²⁷ the plaintiffs were recipients of financial aid programs assisted by the federal government namely Aid to Families with Dependent Children (ADC) or from New York State's general Home Relief program. The affected New York residents alleged that without prior notice or chance to make representations, their welfare benefits were terminated or about to be terminated and hence they claimed this was in violation of procedural due process. The district court agreed with them saying that any post-termination procedure was not sufficient to satisfy the due process requirement. Upon appeal by Commissioner of Social Services of the City of New York, the Supreme Court affirmed the lower court's decision. The Court while being empathetic with the plight of the respondents said that:

For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context - a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended - is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

The Court rejected the argument the procedural due process could be “outweighed by countervailing governmental interests in conserving fiscal and administrative resources.” What is interesting in this case is that the welfare benefits granted by the state were considered as “property” the deprivation of which required due process. In this context,

¹²⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970)

the argument that the benefits were a “privilege” and not a “right” could not hold water. This decision can arguably be considered as indirectly providing a basis of social security as a right and as not charity as was said:

Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.¹²⁸

3.2 The Indian Experience

3.2.1 Constitutional Provisions

India is one of the countries that has a rich jurisprudence on judicial enforcement of socio-economic rights. This jurisprudence paved the way for new and innovative thinking of the role of the judiciary and broke the formalist tradition and in this sense it was revolutionary.¹²⁹ It has done so in spite of the fact that in the Indian Constitution socio-economic rights are protected in weaker form as directive principles albeit unenforceable.¹³⁰ The Constitution India was in place since 1947 but it was not until the 70s that the Supreme Court began to seriously implement the fundamental rights and take this proactive stance perhaps due its complicity during the state repression commencing 1975 Declaration of Emergency and the need to reclaim its position.¹³¹ The criticism that has been level against the activist Supreme Court is that the jurisprudence does not enjoy

¹²⁸ Ibid.

¹²⁹ See Roberto Gargarella, Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?

¹³⁰ See Article 37 of the Constitution of India. Which provides, “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”

¹³¹ Jeanne M woods, Emerging Paradigms for Protection of “Second Generation Rights” Supra Note 43)

legal certainty depending, as it does, on persuasions of the individual judges of the day. In deed, the initial enthusiasm championed especially by Judge Bhagwati may have waned.¹³² The lesson to drawn, even as welcome as the innovation of basing social and economic rights on civil and political rights backed by directive principles is, there is better protection if they are provided for as specifically justiciable rights.

3.2.2 Public Interest Litigation

The Supreme Court of India in an effort to make justice available to the poorest classes of victims of violations of human rights has relaxed the rules of standing to allow for persons to bring cases even where they are not directly affected. As former Supreme Court Judge, Krishna Lyer who together with P. N. Bhagwati is notable for this innovative and bold role of the judiciary in proactively championing the plight of those marginalised by the justice system puts it:

public interest litigation is really a democratization of the judicial office and judicial remedies. The traditional view, which we inherited from Britain, confines all litigation to private parties: if a person is beaten, he alone can go to the court; if a person's property is spoiled by pollution, she must complain. On the other hand, in a democracy, the injury of one person is common concern, and, very often, the victim may be too poor or illiterate to bring their grievance to court. If some organisation, oriented in public grievance, thinks of challenging on a victim's behalf, there is no reason for denying them this opportunity; so we begin with 'love thy neighbours' as applicable to jurisprudence.¹³³

Justice Bhagwati on his part in a case, *S. P. Gupta v. Union of India*,¹³⁴ in relation to *locus standi* as well as on class action, which is another crucial matter that goes along way in enhancing access to justice for victims faced with a similar situation, said that:

p.105

¹³² Ibid. p. 110

¹³³ Centre on Housing Rights & (COHRE), *Evictions Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, Geneva, Switzerland. p.31

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons by reasons of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case any breach of fundamental rights of such persons or determinate class of persons, in this court under Article 32 seeking judicial redress for the legal wrong or legal injury caused to such person or determinate class of persons.¹³⁵

This aspect of the Indian experience is really crucial in the sense that it is often raised that even as socio-economic rights are to be made justiciable, the neediest and deserving targeted beneficiaries do not finally become the actual beneficiaries as they finally do not have the financial means to pursue justice in courts.¹³⁶ In *Guruvayur Devaswom Managing Commit. And Anr. Vs. C.K. Rajan and Ors*,¹³⁷ the Supreme Court remarked that, “The Courts exercising their power of judicial review found to its dismay that the poorest of the poor, deprived, the illiterate, the urban and rural unorganized labour sector, women, children, handicapped by 'ignorance, indigence and illiteracy' and other down trodden have either no access to justice or had been denied justice. Liberal rules of standing allowing for public interest litigation offer a real chance for overcoming perhaps the greatest obstacle of the poor and marginalized communities and groups in accessing justice form courts.”¹³⁸ It is noteworthy this relaxation of rules of standing does not mean that just about anyone has standing, there is still requirement for but person to act *bona*

¹³⁴ S.P. Gupta v Union of India, AIR 1982 SC 149

¹³⁵ Ibid.

¹³⁶ See Andras Sajó, Social Rights as Middle Class Entitlement in Hungary. Supra note 60

¹³⁷ *Guruvayur Devaswom Managing Commit. & Anr. VS. CK Rajan & Others* - Judgments of the Supreme Court of India - CASE NO.: Appeal (civil) 2148 of 1994

¹³⁸ See S.Gloppen Public Interest Litigation, Social Rights And Social Policy Christian Michelsen Institute <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf>

fide, have sufficient interest and not for personal gain or private profit or political motive or any oblique consideration.¹³⁹

3.2.3 Epistolary Jurisdiction

Additional procedural simplification by the Supreme Court came in the form of what has come to be known as “epistolary jurisdiction” where letters to the judiciary were seen as sufficient to initiate proceedings. An example of such a case is the case of people *Union for Democratic Rights v. Union of India*,¹⁴⁰ where a workers human rights group wrote a letter to the Supreme Court complaining of being paid less than the minimum wage and the Court said that the letter was a sufficient complaint and that the group had standing to file the matter as class action. In this case, the Court took the bold view that acceptance of lower wages than the minimum wages was not voluntary in the light of prevailing vulnerability and poverty and therefore this amounted underpayment of the workers which was a violation of constitutional guarantee against trafficking and forced labour.¹⁴¹

3.2.4 Commissions of Inquiry

Another innovative aspect of the form the Indian jurisprudence is seen in the setting up of commissions of enquiry or socio-legal commissions to provide the judiciary with the necessary information required to adjudicate disputes. In *Agra Protective Home* case there was allegation of poor health conditions of prostitutes kept in a state-run protective home, the Court commissioned the District Judge to report on the conditions in the home and in “*Bandhua Mukti Marcha*”¹⁴² case, the Court institutionalised the “practice of appointing socio-legal commissions of inquiry for the purpose of gathering relevant

¹³⁹ See *Ashok Kumar Pandey v. State of W. B.*, (2004) 3 SCC 349

¹⁴⁰ *People’s Union for Democratic Rights v Union of India*, A.I.R. 1982 S.C 1473

material in public interest litigation.”¹⁴³ By the court commissioning for information to be obtained in this way, it moves to address one of the major hurdles that face socio-economic litigation viz. that for many victims of violation of these rights, if the burden of proof is to lie solely with them and yet the government agencies hold the vital information, it is very difficult for them to discharge this burden of proof. Further, the courts also moves away from the overly adversarial litigation to more investigative or/and collaborative litigation where the court is more proactive and does not rely too heavily on the strengths of the parties to determine the progression of the dispute or the outcome.

3.2.5 Innovative Remedies

One of the other measures that the Supreme Court of India took in availing socio-economic rights is by crafting innovative reliefs under the mandate of providing appropriate remedies. Among these measures include interim reliefs with mandatory injunctions, not necessarily confined to preservation of the *status quo* pending final determination of the suit as found in traditional interlocutory measures; and follow-up measures such as commissions to undertake inspection to ensure compliance. Remedies for enforcement for socio-economic rights require creativity if they have be more than mere declarations or just temporarily reprieve to hoodwink the litigants.

The following are some of the cases that show how the Indian Supreme Court has been applying these principles:

¹⁴¹ Ibid. *People's Union for Democratic Rights v Union of India*, A.I.R. 1982 S.C 1473

¹⁴² *Bandhua Mukti Marcha v. Union of India*, AIR 1984 SC 802

¹⁴³ Bhagawati, Judicial Activism (p. 575) quoted in: *The Role of The Constitutional Court. Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* By Roberto Gargarella, Pilar Domingo, Theunis Roux, Ashgate Publishing, Ltd., (2006) p.279 footnote 36

3.2.6 Dr. Upendra Baxi v State of U.P.¹⁴⁴

In this case, a complaint was made on behalf of female inmates of a state-run protective home due to the poor health condition that prevailed in the facility. The Supreme Court agreed with the complainants that the conditions that subsisted in the facility were so deplorable as to constitute violation of the rights of the women and girls to live in basic human dignity. It ordered that the state should make improvement necessary to ensure a healthy standard of living for the inmates. This is one of the cases where the Supreme Court applied innovative remedies. After undertaking the improvements, the state moved the inmates to another facility without informing the Court. On being informed of this through epistolary petition, the Supreme Court ordered for implementation of protective measures in the new facility where they were moved. They included structural renovations, provision of cooking gas in the kitchen, vocational training and rehabilitative measures for the women.

3.2.7 Olga Tellis Case

In *Olga Tellis & Ors v Bombay Municipal Council*,¹⁴⁵ pavement and slum dwellers were to be moved by the Municipal Councils of Maharashtra and Bombay in accordance with an 1888 Act. The slum dwellers moved to court claiming that such an action would violate their right to life as guaranteed in Article 21 of the Indian Constitution since having a home in the city gave them a chance to have a livelihood. The Court opined that the right to life encompassed the means to livelihood as supported by the directive principle of adequate means of livelihood and work. However, the court held that the right to shelter for livelihood could be denied where a just and fair procedure was

¹⁴⁴ *Dr. Upendra Baxia v. U.P.* (1986) 4 S.C. 106 (India)

undertaken as per the law i.e. the action must be reasonable and the affected persons should be granted a hearing. In the instant case, the court found that these procedural safeguards were fulfilled and that no there was right to alternative site. The Court however went ahead to grant a one month temporarily reprieve before any eviction.

Although in the instant case, the litigants did not get substantial relief and the decision has been criticized for merely placating the victims with words but doing little in term of real protection, it nonetheless signals a broad interpretation of the right to live.¹⁴⁶

3.3 The South African Experience

3.3.1 Constitutional Provisions

Undoubtedly, South Africa provides a strong case of socio-economic rights. It is arguably the most progressive in this respect in that not only does the Bill of Rights constitutionalize these rights but they are also made justiciable.¹⁴⁷ Although these rights are made directly enforceable by the judiciary, they can be classified into two categories: first, those that are not made subject to availability of resources like the children's rights to family care or parental care, or to appropriate alternative care when removed from the

¹⁴⁵ *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51.

¹⁴⁶ See Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future For Socioeconomic Rights In National Law* (Supra note 37), where he says, "Cases such as *Olga Tellis* will inevitably constitute somewhat symbolic gestures in India, as they cannot effect the depth of social and economic change necessary to ameliorate the poverty besetting much of the country. However, rather than discount the principle of socio-economic rights on this basis, I would emphasize that this situation highlights the importance, emphasized at the beginning of this article, that socio-economic rights should be supported not just by judicial adjudication, but by broader social welfare policies and economic development strategies, so that all states are focused on achieving the minimum core in every possible way."

¹⁴⁷ Not distinction or categorisation is made under the Constitution with regard to social economic right and civil and political rights.

family environment¹⁴⁸ and to basic nutrition, shelter, basic health care services and social services¹⁴⁹ as well as those that guarantee “the right of detained persons to be provided with adequate accommodation, nutrition, reading material and medical treatment;”¹⁵⁰ and second, those where the state’s obligation is “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” and such rights include the right to an environment that is not harmful to their health or well-being¹⁵¹ the right of access to adequate housing¹⁵² for the right of access to health care services; sufficient food and water; and social security.¹⁵³ There are other socio-economic rights guaranteed in the constitution but it is noteworthy that the rules of standing have are liberal¹⁵⁴ and there is provision for purposive interpretation¹⁵⁵ of the Bill of Rights unlike the situation in India.

¹⁴⁸ Section 28(1) (b)

¹⁴⁹ Section 28(1)(c)

¹⁵⁰ Section 35(2) (e)

¹⁵¹ Section 24

¹⁵² Section 26(1)

¹⁵³ Section 27 (1). See also, for a discussion of whether the sections 28 specifically for children as opposed to section 26 all persons entails immediate realisation as opposed to the latter where obligation is for “progressive realisation.”, Cass R. Sunstein, Social And Economic Rights? Lessons from South Africa. http://papers.ssrn.com/paper.taf?abstract_id=269657

¹⁵⁴ See South African Constitution section 38; Enforcement of Rights: Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, group or class of persons;
- (d) anyone acting in the *public interest*; and
- (e) an association acting in the interest of its members.

¹⁵⁵ See South African Constitution section 39; Interpretation of Bill of Rights:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum...
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport, and objects of the Bill of Rights.

The following cases serve to indicate the way the South African judiciary has handled socio-economic rights:

3.3.2 Soobramoney case

In one the first case to test the justiciability of socio-economic rights by the Constitutional Court, *Soobramoney v Minister of Health (KwaZulu-Natal)*¹⁵⁶ case, the applicant sought the order from the Court to be put on dialysis to address a chronic renal failure caused by his diabetic condition. His condition had been diagnosed as irreversible and therefore the dialysis was only meant to prolong his life. He based his application on sections 27(1) of the Constitution which provides for the right of everyone to have access to health care services, section 27(3) which provides for the rights to emergency medical treatment, as well as on the right to life as provided for in section 11. The application failed since the Court adopted a deferential attitude to the state's decision as represented by the hospital's policy decision, based on resource constraints, of only availing dialysis machines to those who had chances of recovery or those who could get kidney transplants.¹⁵⁷ The Court found that the right to medical treatment was subject to available resources and it could not interfere with the state's budgetary allocations. Adopting a deferential position, the Court said that it would, "be slow to interfere with rational decisions taken in good faith by the political organs and medical authority whose responsibility it is deal with such matters."¹⁵⁸ It also interpreted the rights to life narrowly saying that it could not be pleaded in this case since the constitutionalisation of the right to health superseded the right. Soobramoney died shortly after this decision.

¹⁵⁶ Supra note 51

¹⁵⁷ Ibid.

¹⁵⁸ Ibid. at 1706

For some, this decision is seen as one where the judiciary was not prepared to interfere with a mandate that belongs to the political branches but many advocates of socio-economic rights found it rather disappointing.¹⁵⁹ This case shows that it is not just sufficient to have socio-economic rights enshrined in the constitution but further issues such as the inclinations of the judiciary also play a role in determination how effectively the enforcement will occur.

3.3.3 Grootboom Case

In *Government of the Republic of South Africa v. Grootboom*¹⁶⁰ case, applicants were nine hundred families among them five hundred and ten children, who were living in deplorable conditions at a sports field following an eviction. They had been living at the banks of a river in Wallacedene. Following serious floods that destroyed their temporally shelter, they were forced to move to a near-by privately owned land that had been earmarked for public low-cost housing. The private owner went to court and obtained eviction orders. Grootboom and others defied the orders saying they had nowhere else to go but they were forcefully evicted where upon they went to the Constitutional Court to seek redress for enforcement of their right to housing. They had been evicted through a lower court's orders obtained by the private land owner where they had been squatting in an area. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services.

¹⁵⁹ See Jeanne M. Woods, *Emerging Paradigms* (Supra note 43), where she says, "In acknowledging that a persons wealth determined whether he would live or die, yet failing to interpret the constitutional rights to health and life to avoid this outcome, the Court missed an opportunity to give meaning to the new social contract"

¹⁶⁰ *Grootboom* 2000(II)BCLR at 1191

The Court held that the Constitution did require the state to go beyond available resources to realise socio-economic rights immediately. The government argued that the housing policy that it was progressively implementing was evidence of its commitment to meet its constitutional obligation. The Court while commending the housing policy noted that this policy was unreasonable for neither did it cater for the poorest of the poor nor provide for emergency situations. The Court made a declaratory remedy viz. that the state was required to meet its constitutional obligation including reasonable measures designed to “provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions”¹⁶¹

Although this decision was a step forward in view of the *Soobramoney* decision,¹⁶² what is notable is the rejection of the minimum core obligation assessment as represented by the *amicus curie* by saying that this standard did not create a positive individual right to housing on demand¹⁶³ instead preferring the reasonableness test. This decision also exposes the inadequacies that could arise for judicial enforcement of socio-economic rights where no proper remedies are put in place. The Court recommended that the South African Human Rights Commission to monitor compliance. The Commission did not get back to Court and no improvement on the lives of residents happened four years after the decision.¹⁶⁴ It is encouraging that in another case *Minister of Public Works v. Kyalami*

¹⁶¹ Ibid. at 1209

¹⁶² Cass R. Sunstein, Social and Economic Rights? Lessons from South Africa where he says, “... the Court has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.”

¹⁶³ Ibid. at 1208

¹⁶⁴ See Schoonernakker, Treated with Contempt, SUNDAY TIMES (S .Afr) March 21 2004, available at <http://www.suntimes.co.za/2004/03/21insight/inol.asp> Quoted in Jeanne M. Woods, Emerging Paradigms.

Ridge the Constitutional Court did not find that private property rights were so paramount as to deny slum-dwellers temporally housing constructed by the government in a situation where the upper-middle-class white property owners had complained of depression of market values of the property due to the proximity of the temporally houses.¹⁶⁵

3.3.4 Treatment Action Campaign Case

Further development of jurisprudence of socio-economic rights in South Africa can be seen in *Treatment Action Campaign* (TAC) case.¹⁶⁶ The issue in this case was that the government restricted a program of anti-retroviral drug, Nevirapine that prevented mother-to-child transmission of HIV virus only to pilot areas in research and training hospitals. The applicant claimed, and the Court agreed, that this policy was unreasonable in failing to provide an effective national programme. The Court rejected several arguments by the state: on the efficacy of the drug the Court saw no evidence of this allegation; on the shortage of nurses needed to safely administer the drug, the Court answered by recommending the training of more nursing aides; and on problems associated with breast-feeding and resistance to the drugs, the Court said that education of pregnant mothers on the risks could be undertaken as well as provision of clean water. Other factors that leaned in favour of the applicants included the fact that costs of administering the drug was minimal and that the government was already expanding the programme since the institution of the suit. The Court ordered the government to take reasonable measures remove restrictions on administering the drug in instances where this was medically indicated and where the capacity to do so existed. It also ordered the

¹⁶⁵ See *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC) (S. Afr.).

¹⁶⁶ Supra note 53

government to “devise and implement within its available resources a comprehensive and coordinated program” that would extend HIV testing and counselling facilities to public hospitals which still lacked the capacity to administer the drug.¹⁶⁷

In this TAC case, the Court like in the *Grootboom* case also rejected the minimum core obligation standard by saying that its finding of unreasonableness did not mean that “that everyone can immediately claim access to such treatment.” The Court said that the only right generated is for the state to take reasonable measures for progressive realisation of the right. Reasonableness test can be located in administrative law “due to its focus on procedural and technical issues related to the content and implementation of socioeconomic policy rather than on the satisfaction of the survival interests of poor and vulnerable sectors of society, the Court’s approach is at best of limited use to citizens in their efforts to secure access to those goods and services which they are entitled to have by virtue of their inherent human dignity.”

Reasonableness test is also problematic in the sense that the applicant is expected to satisfy the Court that a particularly policy does not meet certain standards. This task can be daunting for poor victims of violation who have to meet the burden of proof that is often not within their competence and even when they overcome it the remedy seems to lie at the policy level so the individual claimant seems to “take nothing home.” There is therefore need to put serious efforts to establish minimum core obligation as Jeanne Woods puts it:

¹⁶⁷ TAC, 2002 (10) BCLR at 1071

Yet if it is possible to establish nonderogable norms of liberty that cross cultural boundaries, it is possible to determine the minimum core content of social rights. All human beings need a certain minimum caloric intake to stay alive and healthy. All human societies need to educate their young. And, while the particulars of one's dwelling may vary widely from one society to the next, there is no gainsaying the basic human need for shelter. But to Walzer need is vague, elusive, and subject to an inevitable scarcity of resources. Therefore it is not a source of rights but a potential distributive principle, subject to political limitation.¹⁶⁸

3.3.5 Mazibuko case

In the recent *Lindiwe Mazibuko and Others v. The City of Johannesburg and Other*¹⁶⁹ case handed down by the High Court on 30 April 2008, the issues were; firstly, whether the City's policy of imposing prepayment water meters that automatically shut down when the ceiling of the amount of free water was exceeded and hence left the poor household without water for 15 days was legal and constitutional; and secondly whether regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water (the National Standards Regulations) which define the basic water supply as 25 litres per person per day or 6 000 litres per household per month was legal and constitutional.

The Court found that both were illegal and unconstitutional and ordered that the residents of the Phiri, the affected area, be supplied with 50 litres of water per person per day and well as that the residents had a right to an option for metred water supply. In the case of pre-paid water metre, the basis of the decision was that by imposing an automatic shut-off water metre there failure to give reasonable notice for affected persons to make

¹⁶⁸ See Jeanne M. Woods, Justiciable Social Rights as A Critique of the Liberal Paradigm. Supra note 29 763

¹⁶⁹ *Lindiwe Mazibuko and Others v The City of Johannesburg and Others Case No 06/13865 (W) (Mazibuko case)*

representation and there also was unequal treatment in two respects; firstly, richer whites community had water on credit unlike the Phiri community which was largely poor and of black race; and secondly, since women of this Phiri community were more involved in domestic chores there was discrimination on the basis of sex. On amount of water per day, court noted that 25 litres per person per day was woefully insufficient. What is significant in this decision is that it can be seen a move towards the possibility of establishing minimum core obligation as it noted that with sufficient information it was possible to arrive at this standard in relation to the right to have access to water.

CONCLUSION

The situation of poverty and inequality in Kenya demands urgent redress. Although there are avenues involving the political process to address these issues, making socio-economic rights justiciable is one important way to address them. There are lessons that could be drawn from the jurisprudence from various jurisdictions. Firstly, the rights will need to be first incorporated into the constitution since they are presently no in the Kenyan Constitution. Secondly, socio-economic rights will need to be made justiciable by providing that they are judicially enforceable. Thirdly, serious attempts should be made towards defining the obligation that accrues with the social rights to avoid reducing justiciability to an extended aspect of administrative law resting only the reasonableness of policy. Fourthly, there is need for other measures including, *inter alia*, procedural measures like relaxation of rules of standing to accommodate public interest litigation; simpler more litigant friendly procedures similarly to epistolary jurisdiction; introduction of commissions of enquiry to assist the court both in gathering information and monitoring compliance; Allowing for creative remedies and innovative mechanism to ensure compliance.

It is important to realize the enforcement of socio-economic rights requires re-conception of society; the nature and role of the judiciary; and the state in general needs to be re-examined within this context. As it were, some of the frustrations of litigation of socio-economic rights be explained by the Christian metaphor of “putting new wine in old wines-skin.” It cannot work. The need for conceptual and paradigmatic shift is absolutely necessary.

Justiciability of social economic rights is but part of the broader process that needs to be undertaken to realise social justice in Kenya. It would be foolhardy to suggest that it would be a panacea to the myriad justice issues confronting Kenya and the world at large especially as pertains to poverty and human rights. Solutions must be looked for both from the consumption and the production sides.¹⁷⁰ Nonetheless making socio-economic rights justiciable in Kenya would go a step in the rights direction in redressing present and historical injustices and in building a more equal and just society.

In order to serve as warning this thesis will end on rather pessimist note. The major criticism that is made on justiciability of socio-economic rights so far relates to tangible benefits that are expected to accrue for “wins” to claimants. In many cases as above noted, the remedies granted are either too weak as to amount to nothing or that they lack means to enforce compliance with a seemingly favourable decision. Marius Pieterse, in *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*,¹⁷¹ captures the false victories succinctly. His criticism is poignantly relevant to socio-economic rights although the thrust of the insight is applicable to the whole human rights discourse. In this respect, his depiction of the drama of judicial enforcement of socio-economic rights is worth quoting at length since it is very

¹⁷⁰ Shadrack B. O. Gutto, Beyond Justiciability: Challenges of Implementing/Enforcing Socioeconomic Rights in South Africa where he says, “The promotion and implementation of socio-economic rights, in the South African context, requires development of sharpened normative guidelines that favour redistributive social justice at production and consumption levels. A different kind of critical legal studies is called for in this field.”

¹⁷¹ Marius Pieterse *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*. Human Rights Quarterly 29 (2007) 796–822 © 2007 by The Johns Hopkins University Press

illuminating and helps those enthusiastic about socio-economic rights to avoid pitfalls that arise and will continue to arise if not properly addressed.

ACT 1: On the Streets

Member/Citizen: I am hungry.

State/Society: (Silence) . . .

Member/Citizen: I want food!

State/Society: (Dismissive) You can't have any.

Member/Citizen: Why?

State/Society: You have no right to food.

Member/Citizen: (After some reflection) I want the right to food!

State/Society: That would be impossible. It will threaten the legitimacy of the constitutional order if we grant rights to social goods. Rights may only impose negative obligations upon us. We cannot trust courts to enforce a right to food due to their limited capacity, their lack of technical expertise, the separation of powers, the counter-majoritarian dilemma, the polycentric consequences of enforcing a positive right, blah blah blah. . .

Member/Citizen: (Louder) I want the right to food!!

State/Society: (After some reflection) All right, if you insist. It is hereby declared that everyone has the right to have access to sufficient food and water and that the State must adopt reasonable measures, within its available resources, to progressively realize this right.

Member/Citizen: Yeah! I win, I win!

State/Society: Of course you do.

ACT 2: In Court

Member/Citizen: I want food, your honor.

State/Society (Defendant): That would be impossible, your honor. We simply do not have the resources to feed her. There are many others who compete for the same social good and we cannot favor them above her. If you order us to feed her you are infringing the separation of powers by dictating to us what our priorities should be. We have the democratic mandate to determine the pace of socioeconomic upliftment, and currently our priorities lie elsewhere.

Member/Citizen: (Triumphantly) But I have the right to food!

State/Society (Court): Member/Citizen is right. It is hereby declared that the State has acted unreasonably by not taking adequately flexible and inclusive measures to ensure that everyone has access to sufficient food.

Member/Citizen: Yeah! I win, I win.

Everyone: Of course you do.

ACT 3: Back on the Streets

Member/Citizen: I am hungry.

State/Society: (Silence) . . .

Member/Citizen: I want food!

State/Society: We have already given you what you wanted. You have won, remember? Now please go away. There is nothing more that we can do.

Member/Citizen: But I am hungry!

State/Society: Shut up.

(Member/Citizen mutely attempts to swallow the judgment in her favour.)¹⁷²

¹⁷² Ibid. at p.816

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