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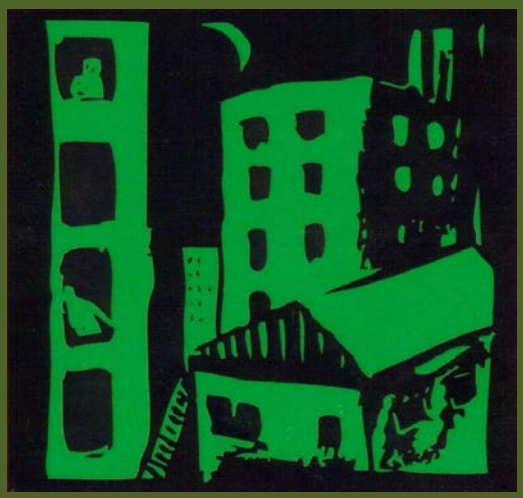

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Using courts of law to tackle poverty and social exclusion: The case of post-2010 Kenya

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1 INTRODUCTION

Intellectual and political skepticism about the place of the courts in effecting social transformation is not uncommon. In *The Hollow Hope*, American scholar Gerald Rosenberg strongly criticised the famous US Supreme Court decision in *Brown v Board of Education* and asserted that it was nearly impossible to generate significant social reforms through litigation, primarily because courts are relatively ineffective and weak. He also argued that courts pale into significance in comparison with other social and political forces, such as, a reforming parliament, a foresighted Executive or a determined civil society.[1] Just as Hitler asked the Pope: "where are your battalions?" courts lack the financial muscle or the political authority to effect change on their own, thereby attracting a similar kind of cynicism and doubt.

[*]This article is an extract from a forthcoming larger study on Courts and Politics in East Africa.

[1]Rosenberg G *The Hollow Hope: Can courts bring about Social Change?* 2nd ed (Chicago: University of Chicago Press 2008).

Numerous other studies provide an alternative view, and just as the Church demonstrated that its strength lay elsewhere than in the military muscle it could marshal, the courts of law manifest a different kind of power. Indeed, the example of courts in countries of the Global South, such as, India, South Africa and Brazil, reveal the possibilities for what can be described as judicially motivated social change directed at the elimination of conditions of poverty and social marginalisation.[2] To take just the example of gender justice over the last year, a court in Columbia found that femicide was a crime,[3] while another in Botswana recognized a group advocating for the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals.[4] Although court led change may be slow, conflicted and uncertain, there is no doubt that its impact can be revolutionary.[5]

Nevertheless, in order to achieve such change the primary instrument from which the courts derive their power—the constitution—needs to be reformulated in order to provide both for the recognition of the full range of human rights and to empower the courts to effect the necessary change that follows from such stamp of approval. Such recognition must cover both civil and political rights (CPRs) as well as economic, social and cultural rights (ESCRs). In other words, the constitutional framework needs to be one that establishes the foundation on which the courts can make interventions which are meaningful for the poor and the marginalised. Once that is done, then the courts themselves have to rise to the occasion. However, achieving transformation is no overnight accomplishment. In the words of former Chief Justice of South Africa Pius Langa:

> Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution... because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.[6]

Recent developments in Kenya provide ample fodder for a serious reflection on both the possibilities and the limits of court led transformation. In the aftermath of the promulgation of a Constitution that has been described as nothing less than "transformative", the judiciary in Kenya is playing both catch-up and leap-frog in terms

[2]Vilhena O Baxi U & Viljoen F (eds) *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria: Pretoria University Law Press 2013).

[3] see Bradshaw-smith a "Colombia's Supreme Court hands out 1st ever femicide conviction" 12 march 2015, Reuters. Available at http://colombiareports.com/colombia-supreme-court-rules-first-ever-femicide-conviction/ (accessed 15 June 2015).

[4] See *Thuto Rammoge and 19 Others v the Attorney General*, Case No MAHGB-000175-13 and BBC, "Botswana gay rights group wins landmark case" (14 November 2014). Available At http://www.bbc.com/news/world-africa-30054459 (accessed 15 June 2015).

[5] See Gloppen S & Kanyongolo FE "Courts and the Poor in Malawi: Economic marginalisation, vulnerability, and the law"(2007) 5 *International Journal of Constitutional Law* 258 at 265.

[6] Langa P, "Transformative Constitutionalism" (2006) 17(3) *Stellenbosch Law Review* 351-360 at 354.

of pushing the agenda for social and economic change in the country. A number of fairly far-reaching decisions in a range of areas have changed the image of the institution from one riddled by corruption, compromise and cowardice, to a body that is forcing the pace of transformation in the East Africa region. In light of these changes, this article starts by providing some background to how the 2010 Kenyan Constitution (the Constitution) changed the human rights landscape in the country. It then moves on to focus on the manner in which the courts have addressed the question of evictions (or to put it in more rights friendly language the right to shelter and housing).

Part 4 of the article addresses the right to health and is followed by an examination of the often ignored phenomenon of cultural rights. The lens of analysis then shifts from the substantive rights to the groups which are supposed to benefit most from their judicial protection: first, women in Part 6, followed by the situation of sexual minorities—with a particular focus on the LGBTI community in Kenya—in Part 7. Using these examples, the article concludes with some reflections on whether these court led interventions will lead to fundamental transformation of the social and economic landscape in the country.

2 SCALING THE WALL: THE EXAMPLE OF THE 2010 KENYAN CONSTITUTION

Although it took nearly 20 years of violent street action, intense political negotiation and adroit social engineering, the Constitution could be described as well worth the long wait. This is particularly the case with respect to the reformulation of judicial power which has greatly boosted access to the courts of law especially by marginal and vulnerable groups and individuals. Several provisions of the Constitution are addressed to this goal. Hence, Article 22 adopted the 'busy body' model of access to the courts by allowing suits not only by a person whose rights have been violated, but covers a whole range of other permutations of the right to sue, including "... a person acting in the public interest,"[7] thus debunking the delimiting rule of *locus standi.*

Article 23 stipulates that the courts can grant a wide range of different forms of relief, opening the field to more imaginative methods of enforcement. In the case of *John Harun Mwau & 3 Others v Attorney General & 2 others*,[8] the Court observed: "The intent of Articles 22 and 23 of the Constitution is that persons should have free and unhindered access to this court for the enforcement of their fundamental rights and freedoms."[9] Equally significant to the reformulation of the access and enforcement provisions has been the incorporation of ESCRs directly into the Bill of Rights, the first instance that this has happened in East Africa and one of only a handful on the continent. Article 43 explicitly protects the right to health care services, accessible and adequate housing, reasonable standards of sanitation, freedom from hunger and adequate food, clean and safe water, social security and education.

[7] See Article 22(2)(c) 2010 Constitution of Kenya.

[8] High Court Petition No. 123 of 2011.

[9] *John Harun Mwau & 3 Others v Attorney General & 2 others*, (para 179).

Article 20(5) directly addresses the issue of resources by stating that the State has the responsibility to show that resources to implement the right in question are not available. Such a formulation puts the burden on the state to prove that its failure to implement the right has been reasonable. The provision also adds a rider against possible over-enthusiasm on the part of the judiciary: "the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion." Finally, Article 21(2) stipulates: "The State *shall take* legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43." To cap it all, Article 258 provides for the manner in which the Constitution will be enforced.

The above provisions were buttressed by new rules issued by the Chief Justice with respect to the enforcement of human rights.[10] Known as the "Mutunga" Rules, an emphasis is placed on enhancing access to justice "...in a just, expeditious, proportionate and affordable manner, and further require the courts to take into account the situation of vulnerable groups such as the poor, illiterate, uninformed, and unrepresented as well as persons with disabilities."[11] The Rules also provide for leniency in their application to costs, especially where public interest cases are concerned, ensuring that those who pursue such litigation are not also punished with awards of costs against them.[12]

Despite the many new and progressive provisions enshrined in the Constitution, it has also met several challenges, among them Executive disdain for institutional mechanisms of governance as well as attempts by the Legislature to control and undermine the judiciary. PLO Lumumba points to an old demon that has bedevilled Kenyan politics for a long time:

> Today, Kenya is under threat from negative ethnicity and corruption. Negative ethnicity informs and defines the conduct of politics and business in Kenya and operates under one unwritten rule, 'everybody is guilty except those from my community'. This attitude has created a culture of impunity which makes it difficult for institutions to fulfill their mandates because of political interference or intimidation.[13]

In the short time that the Constitution has been in force, litigation over ESCRs in Kenya has been fairly robust especially when contrasted to the desert-like situation

[10] See The Constitution of Kenya (Protection of Fundamental Freedoms) Practice and Procedure Rules, 2013, Legislative Supplement No. 47, 28 June 2013, Kenya Gazette Supplement No. 95.

[11] The East African Centre for Human Rights "A Compendium on Economic and Social Rights Cases under the 2010 Constitution of Kenya," at 6. Available at http://www.eachrights.or.ke/pdf/2014/A-Compendium-On-Economic-And-Social-Rights-Cases-Under-The-Constitution-Of-Kenya-2010.pdf (accessed 24 August 2015).

[12] See the case of *Consumer Confederation of Kenya v Attorney General & 4 Others* (High Court Petition No. 88 of 2011 at paras. 43-46.

[13] Lumumba, PLO, "The Trial of Integrity in Kenya," Katiba Institute. Available at http://www.katibainstitute.org/index.php/the-trial-of-integrity-in-kenya (accessed 24 August 2015).

surrounding those rights previously.[14] For their part, the courts have largely taken to heart the new provisions which have elevated this category of rights to constitutional protection. That development has been accompanied by a broad re-orientation in the perspective of the Kenyan judiciary, away from the overly deferential and timid Bench that was in place from independence to the end of the 1990s. Hence, Justice Mumbi Ngugi has stated:

> As Kenya embarks on the implementation of the new Constitution with its provisions on the rights of citizens, all parties must be reminded of the need to observe the rule of law which is the core and the foundation of our society. Without observance and obedience of the orders of the court by parties in the position of the 2nd respondent and indeed by all organs of state and all persons, the aspirations of Kenyans set out in the Constitution will remain a mirage. The court must be on guard to prevent this.[15]

To what extent has the spirit of the new Constitution actually been adopted by the courts of law? The case of *Patricia Asero Ochieng & ors. v AG*[16] involved a challenge levelled against the Anti-Counterfeit Act of 2008 on the grounds that the law threatened the petitioners' access to affordable and essential drugs and medicines, thereby infringing their fundamental right to life, human dignity and health as persons living with/affected by HIV/AIDS.[17] The Court noted that the law prioritised enforcement of intellectual property rights in dealing with the problem of counterfeit medicine and thus failed to exempt generic drugs and medicines from the definition of counterfeit goods. As a consequence it inadequately protected those who needed such drugs to enhance their health:

> It has not taken an approach focused on quality and standards which would achieve what the respondents have submitted is the purpose behind the Act: the protection of the petitioners in particular and the general public from substandard medicine. Protection of consumers may have been a collateral issue in the minds of the drafters of the Act. This is why for instance, the rights of consumers of generic medicine are alluded to in the proviso to Section 2 of the Act.[18]

The *Ochieng* case was important for several reasons. First, because it re-affirmed the viability of litigation designed to advance social rights and justice.[19] It demonstrated that a case initiated by only a few individuals could have much wider implications for a broad cross-section of society, particularly the less privileged.[20] It also showed that the courts in Kenya were willing to come to the aid of marginal and vulnerable

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[14] See the cases compiled in International Commission of Jurists—Kenya Chapter, *Case digest on enforcement of economic, social and cultural rights*, (ICJ-K, Nairobi, 2014).

[15] *Mitu-Bell Welfare Society v Attorney General*, Petition 164 of 2011. Available at http://kenyalaw.org/caselaw/cases/view/80426 (accessed 18 June 2015) at para.32.

[16] Petition 409 of 2009; 8 CHRLD (2014) 230.

[17] Durojaye E & Mirugi-Mukundi G "States' obligations in relation to access to medicines: Revisiting Kenyan High Court decision in *P.A.O and Others v Attorney General and Another*," (2013) 17 *Law, Democracy and Development* 24 - 48.

[18] Judgment of Justice Ngugi in *PAO v. AG* para.83.

[19] Durojaye & Mirugi-Mukundi (2013) at 40.

[20] Durojaye & Mirugi-Mukundi (2013) at 41.

communities. Nevertheless, the case has been criticised because it did not rely on the non-discrimination clause in the Bill of Rights, and failed to cite the important jurisprudence of the African Commission on Human and Peoples' Rights on the right to health.[21] In the following sections of the article, I consider the manner in which the Kenyan courts have dealt with a range of ESCRs, starting with the right to shelter/housing.

3 ADDRESSING EVICTIONS THROUGH THE COURTS OF LAW

Caught up in the throes of globalisation and foreign led investment, a number of countries in the Global South have seen measures of land expropriation which have had serious consequences for the poor and the marginalised. In the aftermath of the enactment of the Constitution, it is not surprising that a number of cases in the Kenyan courts have dealt with the issue of evictions. In *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Benefits Scheme & 2 others*[22] (the "Muthurwa Case"), the petitioners claimed that they had been unlawfully evicted in violation of the constitutional right to housing, the right not to be treated in a cruel, inhuman or degrading manner, the right of every child to be protected from inhuman treatment, the right of the older members of society to live in dignity, and the right of access to information held by the State: a mix of ESCRs and CPRs.

The petitioners, *inter alia,* sought an injunction restraining the respondents, or their servants, agents or others acting on their behalf from demolishing their houses, terminating leases or tenancies, transferring or alienating the suit premises or in any other manner affecting the petitioners and the persons they represent from the suit premises. The Court issued an interim order restraining the respondents from carrying out "constructive evictions" and the two parties were to agree on a programme of eviction taking into account all the considerations stated in the judgment. The case was especially important for pointing out the lack of legal guidelines on eviction and displacement in Kenya, particularly for low income earners.[23]

The case of *Susan Waithera Kariuki & ors. v Town Clerk, Nairobi City Council & Ors*[24] also addressed the issue of evictions from so-called informal settlements. Relying extensively on International Law and South African jurisprudence in the area, Justice Musinga stated,

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[21] Durojaye & Mirugi-Mukundi (2013) at 43.

[22] Petition No. 65 of 2010. Available at http://kenyalaw.org/caselaw/cases/view/90359/

[23] The court also made reference to the United Nations Basic Guidelines Principles and Guidelines on Development based Evictions and Displacements. Available at http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf.) and General Comment No.4 of the Committee on Economic, Social and Cultural Rights. Although the injunction against eviction was granted, the prayer for reconnection of sewerage systems, water supply and toilet facilities was rejected because the court found that the tenants had failed to pay their dues.

[24] Petition No.66 of 2010; [2011] eKLR. Available at http://kenyalaw.org/Downloads_FreeCases/80847.pdf; 8 CHRLD (2014) 206-207.

> It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two days' notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes. The petitioners ought to be treated with dignity as required by our Constitution. It is unconstitutional to forcefully evict such a large number of people from dwellings where they have lived for more than forty years and render them homeless overnight. The government has a constitutional obligation to provide them alternative housing. In all instances where forceful eviction has to be executed it has to be done humanely.[25]

The Court was of the view that the Council was obliged to provide the evictees with adequate alternative accommodation.[26]

The *Micro & Small Enterprises* case[27] elaborately laid out the framework for evictions under the new Constitution, but also displayed a willingness on the part of the Court to ensure that the petitioners had their full day in court. Thus, even though the petitioners had not mentioned the obvious provision that affected their case, the Court invoked the decision in the *Githunguri* case[28] to state that Article 43 "… entitle[d] the petitioners to protection of their opportunity to earn their living through hawking business as a means of protection of the right to be free from hunger and to social security."[29] The petitioners challenged their eviction from the streets of Mombasa by the County Government who claimed that, as hawkers, they posed a security threat in addition to affecting tourism in the town.[30] The Court made the following trite observation about the necessity not to hold up the petitioners in a raft of technicalities, including *locus standi*:

> In my view, the Court has a primary duty under Articles 20, 21, 22 and 23 of the Constitution to protect an applicant from possible harm from violation, or threatened or likely violation, of his rights without waiting to remedy the harm after the threatened danger has occurred; the court must make orders to pre-empt such injury and to preserve the enjoyment by the applicant of his right until the court hears and determines, through the Petition, the question whether there has been violation or threatened violation of the right. For instance, in the circumstances of this case, the

[25] *Susan Waithera Kariuki & ors. v Town Clerk, Nairobi City Council & Ors*, at 7.

[26] The case of *Ibrahim Sangor Osman & 1121 Others v The Minister of State for Provincial Administration and Security & 3 Others*, Constitutional Petition No.2 of 2011 (High Court of Kenya at Embu)—concerning an eviction in Garissa—recognized the interdependence of civil and political rights on the one hand, and economic, social and cultural rights on the other.

[27] *Micro & Small Enterprises Association of Kenya Mombasa Branch (Acting in the interest of its Members to the exclusion of those who may have sought reliefs in their own right) v Mombasa County Government & 43 others*, Constitutional Petition No.3 of 2014, [2014] eKLR. Available at http://kenyalaw.org/caselaw/cases/view/94712/ (accessed 18 June 2015).

[28] Criminal Application 271 of 1985. Available at http://kenyalaw.org/caselaw/cases/view/6852/

[29] *Micro & Small Enterprises* at para.12.

[30] The County Government said that there was a need to keep Mombasa "… safe and environmentally friendly to attract more tourists noting that tourism is a major foreign income earner for the Nation."

> applicants should not suffer violation of their social economic rights for want of an earning capacity before the hearing of their Petition.[31]

As a mid-way solution, the Court ordered that the petitioners be allowed to continue hawking their wares in areas outside the Central Business District.[32]

The spate of recent cases on evictions have witnessed the courts in Kenya step up to the plate on this particularly vexed area of ESCRs, especially in a context where evictions have taken place, "…against a backdrop of a culture of impunity often manifested in the persistent and routine disregard for individual rights and freedoms prescribed by both domestic and international law."[33] Through a mixed application of the International Law on the matter, plus the stipulation of the right now embedded within the Constitution, it is clear that the courts will no longer be able to look askance as evictions take place without sanction.

4 THE RIGHT TO HEALTH

The new provisions of the Kenyan Constitution have also opened the space for more focussed human rights litigation over health rights. In the case of *Matthew Okwanda v The Minister of Health and Medical Services*,[34] the petitioner sought reasonable care and assistance as an older member of society under Article 57 of the Constitution. Suffering from diabetes mellitus and benign hypertrophy, the petitioner moved the court under Article 43 which is the omnibus provision on ESCRs in the Constitution. While the court dismissed the petition because of the failure of the petitioner to adduce sufficient evidence to demonstrate that his right to health had actually been infringed, it outlined the obligation of the State in such circumstances as follows:

> Article[s] 21 and 43 require that there should be 'progressive realization' of [SERs], implying that the state must begin to take steps, and I might add be seen to take steps, towards realisation of these rights…. Its obligation requires that it assists the court by showing if, and how, it is addressing or intends to address the rights of citizens to the attainment of the [SERs], and what policies, if any, it has put in place to ensure that the rights are realised progressively, and how the petitioners in this case fit into its policies and plans.

This approach found approval and development in the later case of *The AIDS Law Project v AG & 3 others*,[35] which challenged section 24 of the HIV and AIDS Prevention and Control Act,[36] which criminalised HIV exposure and transmission. Criticising the overly broad provision in the Act which gave the courts a very wide power of discretion,

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[31] *Micro & Small Enterprises*, at par16.

[32] *Micro & Small Enterprises*, para 22.

[33] Juma L "Nothing but a mass of debris: Urban evictions and the right of access to adequate housing in Kenya" (2012) 12(2) *African Human Rights Law Journal* 470 - 507 at 475.

[34] High Court of Kenya at Nairobi, Petition No.94 of 2012.

[35] Constitutional Petition No. 97 of 2010; [2015] eKLR, (18 March 2015).

[36] No. 14 of 2006.

the Court stated that judges have no powers to create laws, which the Act was purporting to do:

> Though Bentham's language and comparison may have been exaggerated, the point is that legislation ought not to be too vague that the subjects have to await the interpretation given to it by the judges before he can know what is and what is not prohibited. Whereas judge-made laws may be tolerated under common law it certainly has no place in [the] criminal legal system.[37]

Going on to rule on whether the section was precise enough, the Court stated:

> In the absence of a clear definition of what amounts to 'sexual contact' under section 24 of the Act, it is impossible to state with certainty and precision how the targets of the section are expected to conduct themselves and in respect of whom. Are, for example, children 'sexual contacts' in relation to their mothers and if so how is the disclosure supposed to take place between the mother and the child? We therefore agree with the position taken by the petitioner and the amicus curiae that section 24 of the Act as drafted is so broad that it could be interpreted to apply to women who expose or transmit HIV to a child during pregnancy, delivery or breastfeeding. Such overbroad legislation are to be deprecated and the spirit of the Constitution and its principles frowns upon such overbroad enactments.[38]

While the ruling of the Court made no reference to the right to health—even though the petitioners did so[39]—it is quite clear that the case marks a significant victory for persons living with or affected by HIV/AIDS, and demonstrates how civil and political rights can be linked to economic, social and cultural rights.

5 THE QUESTION OF CULTURAL RIGHTS

Although there has been a general shift towards addressing ESCRs in Kenya, there is much less focus on the phenomenon of cultural rights. The Constitution has provided for a reinvigoration of the context and the framework within which cultural rights in general, and customary law in particular, have been situated. Starting from the Preamble, the Constitution adopts a much more liberated approach to the issue of culture, with Article 11 stipulating that: "This Constitution recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and the nation." It goes on in Article 11(2) to enjoin the State to "… (a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; (b) recognise the role of science and indigenous technologies in the development of the nation; and (c) promote the intellectual property rights of the people of Kenya."

Article 11(3) enjoins Parliament to enact legislation to "(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural

[37] *The AIDS Law Project v AG & 3 others* para 67.

[38] *The AIDS Law Project v AG & 3 others* para 80.

[39] *The AIDS Law Project v AG & 3 others* para 37.

heritage; and (b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya."[40] At the same time, there is an attempt to balance cultural expression and self-determination with the rights of those who may be vulnerable or unfairly targetted by "harmful cultural practices."[41] Other provisions cover language and its use, participation in cultural life, and the right to join and maintain cultural associations.

The recent case of *Katam v Chepkwony & anor*[42] exemplified the approach of the courts to the issue of customary law. The case considered whether under Nandi culture a marriage between two women was valid. Justice Ojwang found that the custom was well established and that there was even case law in support of this institution. The custom of woman-to-woman marriage was read into the scheme of section 29 of the Law of Succession Act, and the Court held that the petitioner was indeed wife to the deceased, and her two sons the children of the deceased.[43]

Related in some ways to the right to culture—although also considered to be a civic right—is the right to freedom of religion. This is especially the case when the context within which the religious expression being asserted is one in which the community in question is a social or political minority. Issues such as dress, language, and social practice, straddle the line between religion and culture. The Kenyan courts have been somewhat conflicted on how to address this right. Hence, in the case of *Republic v Head Teacher, BOG Kenya High School, ex-parte SMY*[44] the respondent's right to wear a hijab at Kenya High School was rejected.[45] The argument adopted was that it was necessary to have standardised dress codes in controlled environments, that allowing the wearing of the hijab could amount to preferential treatment or even "invite disorder" among the other students, and that being a secular State, to allow the wearing

[40] See also Article 44 specifically addresses the issue of 'Language and Culture' and reads as follows:

"44. (1) Every person has the right to use the language, and to participate in the cultural life, of the person's choice.

(2) A person belonging to a cultural or linguistic community has the right, with other members of that community—

(a) to enjoy the person's culture and use the person's language; or

(b) to form, join and maintain cultural and linguistic associations and other organs of civil society.

(3) A person shall not compel another person to perform, observe or undergo any cultural practice or rite."

[41] See articles 53(d) and 55(d).

[42] 8 CHRLD (2014) 274-276.

[43] *Katam v Chepkwony & anor* at 276.

[44] Judicial Review 318 of 2010 [2012] eKLR. Available at http://www.kenyalaw.org/Downloads_FreeCases/88818.pdf (accessed 18 June 2015).

[45] The court observed that, '… the limitation imposed by the respondents in this case was justifiable in an open and democratic society like Kenya's whose face and diversity was represented by students at the Kenya High School. It was therefore lawful and did not amount to an infringement of the applicant's constitutional rights.'

of the hijab would, "… be tantamount to elevating the applicant and their religion to a different category from the other students who belong to the other religions."[46]

Quite clearly the learned judge in this case failed to apply the provisions of the Constitution relating to the manner in which limitations to rights should be applied (Article 24). Had she done so, her decision would have been more nuanced.[47]

An example of a more nuanced approach to such issues can be found in the case of *Seventh Day Adventist Church (East Africa) Limited v Minister for Education & 3 others.*[48] Described by Sipalla as an "excellent decision,"[49] Justice Lenaola argued that there was a need for balance between the rules which schools wished to apply and religious beliefs, and observed that it was not clear whether the rules regarding the Sabbath had been applied uniformly in all public schools. In order to even out what could have been different standards applied to the same issue the Court ordered the Minister of Education to design regulations concerning respect for religious liberty, including enforcement and complaint mechanisms.

The decision was important because it proceeded from a standpoint that differed from the dominant one which was prevalent in the *Hijab* case. It did this, first, by recognising the diverse nature of the communities existing in the public sphere and the obvious differences that would proliferate between them. Secondly, it sought to balance that diversity with the need for a certain level of uniformity. Finally, it sought to address a fundamental dimension of the protection of minorities, whether religious or cultural, namely, equality of treatment, and the inclusion of the affected minorities in the making of any decisions that may affect them. In other words, it placed an emphasis on the right of participation. As Justice Ojwang made clear in the case of *Muslims for Human Rights v Registrar of Societies*,[50] equality and non-discrimination should be the starting point for any consideration of an issue involving the curtailment of human rights. This position has come under more focus with respect to the protection of the rights of women in Kenya since 2010.

6 WOMEN'S HUMAN RIGHTS

The exercise of women's rights in Kenya has largely been characterised by a patriarchal structure of dominance in which women were treated as second class citizens, with the courts also playing a role in perpetuating this situation. To cite only one example drawn from the case law, *Kimani v Kimani* concerned, *inter alia*, the issue of whether the woman in the case was entitled to a share of the property acquired in the course of the

[46] *Republic v Head Teacher, BOG Kenya High School, ex-parte SMY*.

[47] For a critique of the decision, see Ghai, JC 'Kenya: Ruling on the Hijab Suit Lacked Depth,' *The Star*, 2 October 2012. Available at http://allafrica.com/stories/201210030056.html.

[48] Petition No. 431 of 2012.

[49] Sipalla H "Can Kenya see its transformative constitution as a law of 'maybe'?" *Pambazuka News*, 16 October 2014, Issue 698. Available at http://www.pambazuka.net/en/category.php/comment/93135 (accessed 18 June 2015).

[50] Petition 1 of 2011.

marriage. The judge not only decided that she was not, but also stated: "Perhaps apart from procreation and occasional cooking, a number of important wifely duties obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for these and more…."[51] Both the language of the law and its application were highly gendered.

The Constitution thus set out to correct this mode of judicial reasoning by introducing several progressive provisions on the rights of women, especially with respect to the protection of ESCRs, reproductive health and improved political representation.[52] Described as an instrument with a new narrative of social justice,[53] the Constitution made conceptual, institutional and structural reforms designed to ensure that the denials Kenyan women had previously suffered would cease. In particular, it reformulated the notion of equal opportunity, departing from the previous constitution which defined the notion of non-discrimination in negative terms.[54] It now compels a cross-cutting attention to equity not only in the Bill of Rights, but throughout the whole Constitution.[55]

Several cases have tested these new provisions, the first being *CREAW and 7 others v The Attorney General*,[56] which was concerned with the failure by then President Mwai Kibaki to include any women in the appointments made to four key state offices. In granting an injunction stopping the appointments, the Court stated that to the extent that the nominees were all men, "… the spirit of equality and freedom from discrimination was not given due consideration."[57] Dismissing the response of the Attorney General, the Court said: "While it may be argued that in future appointments to public offices women were likely to be included … no reasonable explanation was given by the respondent why none of the four appointees was a woman."[58]

In contrast, the first decision of the Supreme Court on the issue of gender representation in Parliament was not encouraging. In the *Gender Representation* case the majority held: "…There was no mandatory obligation resting upon the State to take

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[51] HCCC No.1610 of 1999 (unreported), quoted in Odhiambo AR & Oduor M "Gender Equality" in Lumumba PLO, Mbondenyi MK & Odero SO (eds), *The Constitution of Kenya: Contemporary readings* (Nairobi: Law Africa 2011) 99-152 at 104.

[52] African Women and Child Feature Service, "Women's Power through the Constitution: Our Constitution, Our Life!" Available at file:///C:/Users/User/Downloads/Womens_Constitution.pdf (accessed 18 June 2015).

[53] Domingo P and Wild L, "Will Kenya's 2010 Constitution work for women and children?" ODI/UNICEF Project Briefing No.74 (May 2012). Available at http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7677.pdf (accessed 18 June 2015).

[54] See Article 27 and compare to Article 82 of the previous constitution.

[55] Fitzgerald J "The road to equality? The right to equality in Kenya's new constitution" (2010) 5 *The Equal Rights Review* 55-69 at 58-60.

[56] Petition No.16 of 2011, High Court on February 3, 2011.

[57] *CREAW and 7 others v The Attorney General.*

[58] *CREAW and 7 others v The Attorney General.*

particular measures at a particular time for the realization of the gender-equity principle."[59] The decision of the Court arose from a request by the Attorney General for an advisory opinion on whether Article 81(b) of the Constitution on women's political representation was to be implemented immediately, ie, during the March 2013 elections, or was to be subject to the principle of progressive realisation. The Court was of the view that the provision in question embodied a broad principle and was not a right, and as such needed to be distinguished from a measure that would be immediately enforceable. With respect to the elections which were over the horizon, the Court held that the principle was therefore not enforceable for the exercise of the coming March 2013 franchise.[60] In effect, the Court held that an inequitable and gender unrepresentative Legislature would not be unconstitutional.

Writing in dissent, Chief Justice Mutunga argued that in light of the history and circumstances of the struggle by Kenyan women for equity and equality in all spheres of life, to hold that the principle was subject to progressive realisation and not immediate implementation would negate the will of the Kenyan people in voting for a new Constitution. Justice Mutunga could not fathom how: "…a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination among women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail."[61] In his view the aim should be 50:50 parity.

The decision of the majority drew a good deal of criticism. As Ociel Dudley pointed out, even if the "progressive realization" premises of the judgment were to be accepted, it was still flawed because there was no interrogation of the State to establish the steps taken to secure gender representation rights.[62] Consequently: "One could … say it was derelict of the Supreme Court, having erroneously found for progressive realization, to fail to query the State, to find out what specific benchmarks it had established, and whether the state had met those benchmarks."[63]

Despite this setback, other courts in Kenya have not felt similarly constrained by the tenor of the Supreme Court decision in making judgments that seek to give more substance to the gender progressive provisions in the Constitution. Thus, the case of

[59] See *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (2012) eKLR (Advisory Opinion Application No.2 of 2012). Available at http://kenyalaw.org/CaseSearch/view_preview1.php?link=172874117907442481919 70 (accessed 18 June 2015).

[60] See also Wachuka R "Understanding the Supreme Court's Advisory Opinion on the gender principle: A reader's summary" Green Background Blog. Available at http://rose-wachuka.blogspot.com/2012/12/understanding-supreme-courts-advisory.html (accessed 21 June 2015).

[61] Dissenting opinion of Mutunga, CJ in *Gender Representation* at para 11.5.

[62] Ociel DJ "Gender rights and wrongs: Critique of the Supreme Court Decision on the One Third Gender Principle" *Kenya Law,* 11 November 2013. Available at http://kenyalaw.org/kenyalawblog/gender-rights-and-wrongs-critique-of-the-supreme-court-decision/ (accessed 21 June 2015).

[63] Ociel (2013).

JAO v NA[64] invoked the constitutional and international principles on non-discrimination and equality, affirming that equal rights ruled during, within and after the dissolution of a marriage.

In the so-called *160 Girls Decision*, the High Court in Meru dealt with the issue of defilement and other forms of sexual violence.[65] The case involved a petition for a declaration that the police had neglected and/or omitted to carry out prompt, proper and effective investigations into the petitioners' complaints of defilement and other forms of sexual violence. The Court found that there had indeed been a violation of the petitioners' constitutional rights, particularly the freedom from violence, the right to dignity, non-discrimination and enjoyment of the equal protection of the law. Directing the respondent police to carry out prompt and proper investigations into the complaints, the Court also found that there had been a breach of the constitutional duty placed on the police to protect the petitioner's rights. As Winifred Kamau notes, the Court also accepted the government's culpability for systemic violence, in that "… failure to ensure proper and effective investigation and prosecution of sexual offences had created a 'climate of impunity' for commission of such offences."[66]

In spite of the firm statement of reproach issued by the Court, it nevertheless stopped short of granting the prayer for the formulation of a National Policy Framework, to implement the guidelines provided in the reference manual of the Sexual Offences Act, and an order that the respondent police officers regularly appear before the Court to report on compliance with its orders. Reflecting on the decision of the court, Kenyan Deputy Chief Justice Kalpana Rawal argued that such omission stopped short of giving full effect to the intent of the Constitution with respect to its provisions on women's human rights:

> The nature of the rights of women and children to be protected from all forms of sexual violence … is that, their realization is solely dependent on the willingness of the existing machinery of the state to efficiently, effectively and professionally perform their tasks. The state therefore, should not be heard to cite unavailability of resources as a reason for its failure to undertake a particular task. Therefore, unlike the socio-economic rights that requires (*sic*) *progressive realization*, the rights of women and children to be protected from all forms of sexual violence should be subject to *immediate realization*.[67]

Echoing the powerful dissent of Chief Justice Mutunga in the *Gender Representation* case, Rawal argued that the *progressive realisation* standard was not applicable to "socio-legal" rights. She makes the point that there is a need to turn the energy that has

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[64] Civil Case No.86 of 2012 (High Court at Kitale).

[65] *C.K (A child and 11 others v Commissioner of Police/Inspector General of Police and 2 others*, Petition No.8 of 2012 (2012) eKLR.

[66] Kamau W & Kamau K "Case comment—Victory for 160 Girls in defilement constitutional challenge" Kenya *Law* [Publication Date Unknown]. Available at http://kenyalaw.org/kl/index.php?id=4504 (accessed 21 June 2015).

[67] Rawal K "The immediate realization of women and children's rights: Lessons from the Kenyan case of *C.K. & 11 Others v. Commissioner of Police/Inspector General of Police & 2 Others Petition No. 8 of 2012*" *Kenya Law*. Available at http://kenyalaw.org/kl/index.php?id=4516 (accessed 21 June 2015).

been expended on the realisation of socio-economic rights to this former category category, especially with respect to the situation of women and children. The above resume of the cases on issues to do with gender justice and the rights of women demonstrates some progress in the area, although it is clear that contentious issues, such as, abortion, sex work and non-heterosexual sexual relations, are yet to be effectively tackled. Indeed, how have the Kenyan courts performed with respect to the situation of sexual minorities since 2010?

7 THE CASE OF SEXUAL MINORITIES

Recent developments in East Africa have seen heightened attention being paid to the situation of sexual minorities especially on account of the debate surrounding the adoption and eventual declaration of unconstitutionality of the Anti-Homosexuality Act in Uganda.[68] Before the adoption Constitution, the courts in Kenya were largely insensitive to the varied dimensions of the discrimination faced by sexual minorities, especially members of the LGBTI community. As Ghai and Ghai point out, "Kenyans don't like to talk about these issues. Press reports about people who are born with both male and female organs have rightly caused sympathy not outrage. But there is a tendency to reject the idea that people may find people of their own sex attractive."[69]

However prejudices against intersex and transgender people did not initially find much sympathy in the courts. Thus, in the case of *Richard Muasya v Attorney General*,[70] the issue of recognition of a third gender arose alongside a claim for damages on account of poor treatment by government health authorities of an intersexual individual. The Court found that the petitioner had been inhumanely treated and awarded 500,000 Kenyan shillings (KES) in damages. However, the Court noted that the law recognised only two sexes and that protecting intersex people from discrimination using the category of "other status" would result in the recognition of a third category of gender. The Court was of the view that Kenyan society was not ready for such a development, stating that the society was predominantly traditional "… in terms of social, moral and religious values. We have not reached a stage where such values involving matters of sexuality can be rationalized or compromised through science."[71]

A marked distinction has emerged after the adoption of the Constitution, exemplified in the first instance by the *Transgender Education and Advocacy (TEA)* application[72] for judicial review of the NGO Coordination Board's refusal to register the organisation. The critical issue in the case was whether it was appropriate for an

[68] See Oloka-Onyango J, "Debating love, human rights and identity politics in East Africa: The case of Kenya and Uganda" (2015) 15 (1) *African Human Rights Law Journal* 28-57.

[69] Ghai YP& Ghai JC *Kenya's constitution: An instrument for change* (Nairobi: Katiba Institute 2011) at 57.

[70] [2010] eKLR (HCK) (Kenya) Misc. Civ. Applic 890 of 2004).

[71] *Richard Muasya v Attorney General* (para.148).

[72] JR Miscellaneous Application No.308A of 2013. Available at http://kenyalaw.org/caselaw/cases/view/100341/.

organisation established to advocate for the rights of transsexuals to be refused registration. The Board refused to register TEA despite submission of all the necessary documentation because the names and passport size photographs of two of the officers who had applied on behalf of the organisation were different to those on their national identification cards.[73] The Board also claimed that the applicant's change of gender had put a halt to the registration process since there was an ongoing court case where Audrey Mbugua (the TEA chairperson) had "…sued the national examinations council seeking the removal of the male gender mark from his academic certificate to reflect her female status."[74] The Board asserted that it had not refused registration of TEA, but that it was "… awaiting the outcome of a pending case in which some (TEA) officials had sought to officially change their names and gender."[75]

The Court found that the grounds of refusal were wrong and based on irrelevant considerations given that the Act did not make it a requirement for the officials of an applicant for registration to state their gender, pointing out that the "…introduction of the issue of gender by the 1st respondent as a ground for refusing registration … is not one of the considerations in deciding whether or not to decline registration."[76] The Court held that "… to discriminate [against] persons and deny them freedom of association on the basis of sex or gender is clearly unconstitutional".[77]

In the *Baby A* case, the petitioner sought: legal recognition and protection of intersexual children; a declaration that such children were entitled to and/or guaranteed equal rights; and a further declaration that all non-therapeutic surgery on intersexual infants not approved by a court of law be stopped; directions in relation to guidelines, rules and regulations on the treatment of intersexual children; and an order directing the government to investigate, monitor, and collate data and/or statistics on all intersexual children in Kenya.[78] While refraining from ruling on whether or not there should be a third gender—which issue the Court said should be left to Parliament—the Court nevertheless said that Article 27(4) of the Constitution on non-discrimination needed to be read, "…in its own context and language". According to the Court, the Article "categorically states that there shall be no discrimination 'on any ground' from that provision". The court went on to observe: "An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals ought not to be discriminated against in any way including in the issuance of registration documents such as a birth certificate".[79]

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[73] *Transgender Education and Advocacy (TEA)* paras 11 and 12.

[74] *Transgender Education and Advocacy (TEA)* para 13.

[75] *Transgender Education and Advocacy (TEA)* para 28.

[76] *Transgender Education and Advocacy (TEA)* para 31.

[77] *Transgender Education and Advocacy (TEA)* para 36.

[78] *Baby A & The Cradle v The Attorney General & two others* Constitutional Petition 266 of 2013 at para 61.

[79] *Baby A & The Cradle v The Attorney General & two others* para 61.

The Court also extended its ruling to intersexuals in general, "…as opposed to the narrower and specific interests of Baby A who is only one such person in our Society". The Court also directed that the government develop guidelines to govern, among other things, the registration of intersexual children, medical examinations and corrective surgeries, as well as to collect data on them.[80]

More positive developments with respect to the situation of sexual minorities were registered in the case of *Eric Gitari v NGO Co-ordination Board & the Attorney General*,[81] which involved the refusal of the Board to register a group dedicated to the protection of the rights of gay people. Here the Court found that the grounds on which the Board sought to deny the group's registration were a violation of the Bill of Rights, holding that in refusing to accept the names proposed for registration, the Board had infringed the petitioner's freedom of association. The Court condemned the Board's "whiff of sophistry" in making the recommendation that the petitioner register the organisation by another name, which suggested that in essence the Board wanted to avoid recognition of the existence of the LGBTIQ groups, stating that such a recommendation suggested that "…the petitioner can register an organisation and call it say, the Cattle Dip Promotion Society, but [still] carry out the objects of promoting the interests of the LGBTIQ community."[82]

8 TOWARDS THE FUTURE

The above synopsis demonstrates that there has been significant progress made with regard to using the courts in Kenya in order to address issues of poverty and marginalisation. However, it needs to be pointed out that not all Kenyan judges are speaking from the same script in the post-2010 constitutional era. Hence, the judge in the case of *Charo wa Yaa v Jama Noor & 4 others*[83] held that the right to housing was, "... not a final product for dispensation but an aspirational right, which the state is to endeavour to render progressively." In the case of *John Kabui Mwai and 3 Others v Kenya National Examination Council and 2 Others*,[84] the court started off by making the valid observation that "[t]he realisation of socio-economic rights means the realisation of the conditions of the poor and less-advantaged and the beginning of a generation that is free from socio-economic need."[85] But then the court went on to state:

> One of the obstacles to the realisation of this objective however is limited resources on the part of the government. The available resource is not adequate to facilitate the immediate provision of socio—economic goods and services to everyone on demand as individual rights. There has to be a holistic approach to providing socio-economic goods

[80] *Baby A & The Cradle v The Attorney General & two others* paras 67 & 68.

[81] Petition No.440 of 2013 [2015] eKLR.

[82] *Eric Gitari v NGO Co-ordination Board & the Attorney General* (para145).

[83] Misc. Civ. App. No.8 of 2011.

[84] Petition No.15 of 2011. Available at http://www.hakijamii.com/publications/Education_case.pdf (accessed 27 June 2015).

[85] *John Kabui Mwai & 3 Others v Kenya National Examination Council and 2 Others* at 6.

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

Critiquing the case, Arwa argues that the Court in this instance appears to be making three fundamental pronouncements on the process of developing this kind of jurisprudence, namely, do not focus on individual rights but on the impact of a decision for all citizens; available resources are inadequate to facilitate the immediate provision of socio-economic goods and services; and the adjudication of socio-economic conflicts should more appropriately be left to the Executive and the Legislature.[86] This amounts to a near-total abdication of its responsibility to approach ESCRs differently to it was done before 2010.

On surveying the general jurisprudence on ESCRs since the enactment of the Constitution, Arwa points to broader limitations. In the first instance, he detected a continuation of the hostile judicial attitude towards human rights litigation, coupled with the culture of judicial conservatism and deference to Executive decisions. But for those cases which have moved away somewhat from the shadow of Executive obsequiousness, Arwa claims there is a tendency to copy the jurisprudence from South Africa in this area, while there is also a corresponding lack of exposure to international human rights law. Finally, he asserts that there is an absence of the requisite procedural framework for the enforcement of socio-economic rights.[87]

The above criticisms may be valid. However, the scale of cases on ESCRs which the Kenyan judiciary has taken up and decided in a progressive fashion in a relatively short period of time is quite impressive. This is especially the case with issues involving sexual minorities who are among the most vulnerable and marginalised members of society. In other words, a significantly conceptual and psychological barrier has been broken: litigants can see the light at the end of the tunnel, while the courts are not shy to help in illuminating the journey towards getting there. Although there are some hiccups, the jurisprudence is generally moving in the right direction. Of particular importance from a comparative perspective is the manner in which the Kenyan courts have reinforced the idea that such rights are justiciable, which contrasts sharply with the situation in the other countries of the East African region. Given the active nature of civil society in Kenya, it is quite clear that many more cases are going to be brought to the courts in a bid to expand the parameters of enforcement of a category of rights that has long been neglected.

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[86] See Arwa JO "Litigating socio-economic rights in domestic courts: The Kenyan experience" (2013)17 *Law, Democracy & Development* 419-443 at 424-425.

[87] Arwa (2013).