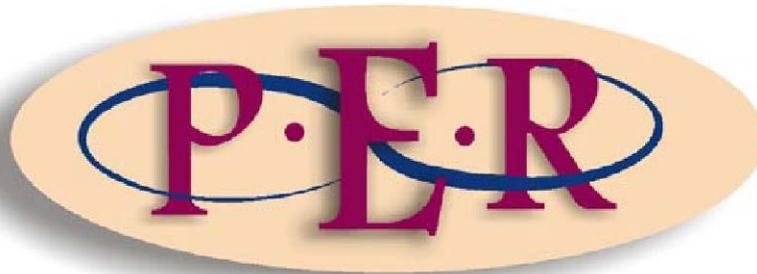


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NW Orago*

1 Introduction

In promulgating a new Constitution on 27 August 2010, Kenya ushered in a new and progressive constitutional dispensation aimed at enhancing substantive equality, democracy, good governance and the protection of human rights and fundamental freedoms. This is encompassed in the preamble of the 2010 Kenyan *Constitution* (the *Constitution*), which expresses the commitment of the Kenyan people to nurturing and protecting the well-being of all, as well as to recognising the aspirations of Kenyans to be governed by the values of human rights, equality, freedom, democracy, social justice and the rule of law.¹ The *Constitution* can be termed a transformative constitution² as it is aimed at effecting a restructuring of the Kenyan State and society to ensure the egalitarian redistribution of power and resources through the eradication of systemic forms of domination and material disadvantage.³ In order to achieve its transformative aspirations, the 2010 *Constitution* has espoused a positive State duty to combat poverty and inequality as

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¹ The *Constitution of Kenya*, 2010 paras 5-6 of the Preamble. See also a 10 of the 2010 *Constitution* which enumerates the national values and principles of governance which include: human dignity, equity, social justice, human rights and the protection of the marginalised; good governance, integrity, transparency and accountability; as well as sustainable development.

² For an elaboration of the concept of transformative constitutionalism, see generally Klare 1998 *SAJHR* 146-188.

³ For an understanding of the transformation intended to be achieved by a transformative constitution in the context of the 1996 *South African Constitution*, see Liebenberg, *Socio-economic Rights Adjudication* 25; Albertyn and Goldblatt 1998 *SAJHR* 249.

well as to promote social welfare,⁴ has adopted a substantive (redistributive) concept of equality,⁵ and has entrenched justiciable socio-economic rights (SERs). The entrenchment of these SERs in the *Constitution* engender the obligation on all organs of the State to respect, protect, promote and fulfil them so as to improve the living standards of the Kenyan people.⁶ An understanding of the nature, scope and extent of these obligations arising from the entrenched SERs is imperative for the government, the courts and the Kenyan society at large if the entrenched rights are to achieve their transformative potential. The rights are, however, not absolute and can be subjected to legitimate limitation in accordance with the law. As integral components of human rights law, SERs are similarly subject to legitimate limitation by the State. Therefore an understanding of SER obligations is incomplete without the undertaking of an analysis of the limitations, as they impact directly on the extent of the obligations that accrue to the State. The importance of a limitations analysis in the elaboration of entrenched constitutional rights is affirmed by Roza Pati, who contends that the ascertainment of the legal effect of a right by defining only its substantive scope is incomplete until a limitations analysis is undertaken, due to the need to balance societal needs against individual interests.⁷ The International Council of Human Rights Policy has also affirmed the importance of a limitations analysis, especially in instances where resources are constrained and capacities are inadequate, which is the prevailing situation in Kenya.⁸

The purpose of this article is to propose an approach, based on international and comparative law,⁹ to guide the Kenyan courts in interpreting and limiting the entrenched SERs in the context of adjudication to enhance the achievement of the

⁴ The 2010 Kenyan *Constitution*, Preamble para 5 and a 10.

⁵ The 2010 Kenyan *Constitution*, aa 10, 19(2), 20(4), 27 and 45(3).

⁶ The 2010 Kenyan *Constitution*, a 21. The duty to fulfil its obligations in the realisation of human rights is further entrenched by the constitutional requirement that the State enact legislation aimed at fulfilling obligations under international law. See the 2010 Kenyan *Constitution*, a 21(4).
⁷ Pati 2005 *Berkeley J Int'l L* 324-325. See also Mutakha-Kangu 2008 *LSKJ* 1, who argues that effective protection of human rights at the national level is dependent on the design of the limitation clause.

⁸ ICHRP 2003.ichrp.org 15.

⁹ The article relies heavily on comparative jurisprudence from South Africa on the basis of the *Constitution of the Republic of South Africa*, 1996, having strongly influenced Kenya's constitutional drafting team. Existing South African SER jurisprudence makes for a useful guide for the Kenyan courts, generally.

transformative potential of the *Constitution*. In this context, the article proposes that the Kenyan courts should adopt a proportionality approach in their limitations analysis in the adjudication of SER disputes. According to Brand, a proportionality approach envisages the courts weighing "the purpose and benefits of the infringement against its nature, effect and severity, and considers the relative efficacy of the infringing measure in achieving its purpose, to decide whether or not it is justified".¹⁰ To enhance the practical application of this approach, the article proposes that Kenyan courts adopt a three-stage constitutional analysis method for the adjudication of SER disputes instead of the traditional two-stage constitutional analysis method adopted for the constitutional adjudication of civil and political rights (CPRs). This approach envisages the analysis of the nature, scope and content of the entrenched SERs and a determination of their violation or denial in a specific case at the first stage; an analysis of their delimitation by the internal qualifiers engendered in the adoption of the standard of progressive realisation for the fulfilment of most of the entrenched SERs at the intermediate (second) stage; and the undertaking of a proportionality test using the general limitation clause entrenched in article 24 of the *Constitution* at the third stage. This proposal is based on the reasoning that if the transformative aspirations of the *Constitution* are to be realised and for the entrenched SERs to have a substantive positive impact on the lives of the Kenyan people, any measure by the government aimed at their limitation must be subjected to strict scrutiny by the courts, a form of scrutiny that can be achieved only by using the proportionality standard entrenched in the article 24 general limitation clause.

In order to achieve the above objective, the article is divided into four sections. The section to follow undertakes an analysis of the nature and scope of the SERs in the *Constitution* and the nature and scope of the obligations arising from these rights. Such an analysis of necessity entails a discussion of the internal limitations of SERs, especially those contained in article 43 of the *Constitution*. Section three of the article entails an analysis of the general limitation clause in comparative context and it proposes the adoption of a proportionality test by the courts in SERs adjudication.

¹⁰ Brand *Courts, Socio-economic Rights and Transformative Politics* 102.

It delves into an analysis of SERs limitations jurisprudence at the international level, at the regional level, and in South Africa, as a comparable foreign jurisdiction. From the comparative analysis, generally, it proposes the adoption of the proportionality test in the Kenyan context. Section four concludes this article.

2 Understanding the nature, scope and content of the socio-economic rights in the 2010 Kenyan *Constitution*

2.1 *The nature of the socio-economic rights in the Constitution*

Kenya has, for the first time in the country's history, entrenched SERs as part of a comprehensive Bill of Rights encompassed in a bold *Constitution*, with the objective of inducing the egalitarian transformation of the Kenyan society.¹¹ The main provisions on SERs in the *Constitution* are contained in article 21(2), which espouses the standard of progressive realisation,¹² article 43, which encompasses the rights to health, housing, food, water, social security and education,¹³ and article 53(1), which provides for children's rights to free and compulsory education as well as basic nutrition, shelter and healthcare. The importance of work in the realisation of improved standards of living, and thus the transformation of the socio-economic conditions of individuals and families, is also acknowledged by the *Constitution* in its espousal of an array of labour relation rights such as the rights to fair labour

¹¹ Article 19 earmarks the Bill of Rights as an integral part of Kenya's democratic state and the framework for all social, economic, and cultural policies. It further states that the objective of the entrenchment of rights in the *Constitution* is the preservation of the dignity of individuals and communities as well as the promotion of human rights and the realisation of the potential of all human beings.

¹² Article 21 deals with the implementation of rights and fundamental freedoms and sub-article 2 requires the State to "take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43".

¹³ Article 43 is entitled "Economic and social rights" and it provides in a 43(1) that "Every person has the right – (a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and, (f) to education". A 43(2) prohibits the denial of emergency medical treatment; and a 43(3) requires the State to provide social security to persons who are unable to support themselves and their dependants.

practices, fair remuneration, fair working conditions, the formation of and participation in trade unions, and the right to strike.¹⁴

These constitutionally entrenched SERs are complemented and buttressed by the constitutional incorporation of SERs in international and regional legal instruments through article 2(6), which provides that "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".¹⁵ The direct incorporation of international human rights law into the Kenyan domestic legal system *via* article 2(6) has been affirmed by the Kenyan courts in several judgments,¹⁶ including in the Supreme Court, where the Chief Justice, in a Dissenting Opinion, held that "CEDAW applies through the operation of article 2(6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984".¹⁷ Some of these international legal instruments providing for SERs that have been ratified by Kenya include: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),¹⁸ the *Convention on the Rights of the Child* (CRC),¹⁹ the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW),²⁰ the *Convention on the Rights of Persons with Disabilities* (UNCRPD),²¹

¹⁴ The 2010 Kenyan *Constitution*, a 41.

¹⁵ A complete analysis of a 2(6) is beyond the scope of this current article. The author has dealt with this issue elsewhere: see Orago 2013a *AHLJ* (forthcoming).

¹⁶ *John Kabui Mwai v Kenya National Examination Council* High Court of Kenya at Nairobi, Petition No 15 of 2011 6 ("Under article 2(6) of the Constitution the Convention forms part of our laws"); *Okwanda v The Minister of Health and Medical Services* High Court of Kenya at Nairobi, Petition No 94 of 2012 para 12 ("Apart from Constitutional provisions governing economic and social rights, Article 2(6) provides that treaties and conventions ratified by Kenya shall form part of the law of Kenya"); *Mitu-Bell Welfare Society v Attorney General* High Court of Kenya at Nairobi Petition No 164 of 2011 15 ("Article 2(5) and (6) of the Constitution make the general rules of international law and any treaty or convention that Kenya has ratified part of the law of Kenya. Consequently, the state, state organs and all persons, in carrying out evictions, should do so in accordance with the United Nations Guidelines on Evictions").

¹⁷ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Supreme Court of Kenya, Advisory Opinion Application 2 of 2012, Dissenting Advisory Opinion of Chief Justice Willy Mutunga, para 11.1.

¹⁸ *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). Assented to by Kenya on 1 May 1972.

¹⁹ *Convention on the Rights of the Child* (1989) (CRC). Ratified by Kenya on 30 July 1990,

²⁰ *Convention on the Elimination of all Forms of Discrimination against Women* (1979) (CEDAW). Assented to by Kenya on 9 March 1984.

²¹ *Convention on the Rights of Persons with Disabilities* (2006) (UNCRPD). Signed by Kenya on 30 March 2007 and ratified on 19 May 2008.

the relevant International Labour Organisation (ILO) Conventions,²² the *African Charter on Human and Peoples' Rights*²³ and its *Protocol on the Rights of Women in Africa*,²⁴ and the *African Charter on the Rights and Welfare of the Child*.²⁵ These international legal instruments form an important source of SER norms for Kenyan courts. They also serve as an important guide in the interpretation and application of the SERs entrenched in the *Constitution*, as was affirmed by the Supreme Court of Kenya in its Gender Rule Advisory Opinion.²⁶ This article thus draws inspiration from international law on the interpretation and application of the limitations provisions of the *Constitution* in SER adjudication.

The *Constitution* deems SERs as justiciable. According to Viljoen, justiciability entails three related factors: first, the nature of the claim - meaning that the claim must be based on the infringement of a clear, subjective right; secondly, the setting within which the claim can be resolved - meaning that the claim must be resolved by a judicial body or a body with judicial characteristics; and, thirdly, the consequences of a successful invocation of the claim by a petitioner - meaning that should the judicial body positively determine a violation of the subjective right in question, it must remedy the violation.²⁷ These criteria of the justiciability of SERs are met by the 2010 Kenyan *Constitution*, which encompasses these rights as an integral part of the Bill of Rights, providing standing to a wide array of parties to access the courts in instances of the violation, infringement, denial or the threatened infringement of these rights.²⁸ Justiciability is further affirmed by article 23 as read with article 165 of the *Constitution*, which gives jurisdiction to the High Court to hear and determine

²² Kenya has ratified 49 ILO Conventions, 43 of which are in force and 6 of which have been denounced. Some of the Conventions in force include: the *Forced Labour Convention* (1930) (No 29); the *Right to Organise and Collective Bargaining Convention* (1949) (No 98); *Equal Remuneration Convention* (1951) (No 100); *Abolition of Forced Labour Convention* (1957) (No 105); *Discrimination (Employment and Occupation) Convention* (1958) (No 111); *Minimum Age Convention* (1973) (No 138); and *Worst Forms of Child Labour Convention* (1999) (No 182). For the full ratification information, ILO Date Unknown www.ilo.org.

²³ *African Charter on Human and Peoples' Rights* (1981). Ratified by Kenya on 23 January 1992.

²⁴ *Protocol on the Rights of Women in Africa* (2003). Ratified by Kenya on 6 October 2010.

²⁵ *African Charter on the Rights and Welfare of the Child* (1990). Ratified by Kenya on 25 July 2000.

²⁶ *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 para 52.

²⁷ Viljoen "Justiciability of Socio-economic and Cultural Rights" 55.

²⁸ The 2010 Kenyan *Constitution*, a 22.

applications for the violation of rights and to redress such violations through the adoption of effective remedies.

The justiciability of similarly worded SERs in the South African *Constitution* was affirmed by the South African Constitutional Court (SACC) in the *First Certification* Judgement where the Court held that SERs could, at a minimum, be negatively protected from improper invasion.²⁹ The justiciability of the entrenched SERs has also been affirmed by the Kenyan Courts in several cases.³⁰

2.2 The nature and scope of the obligations accompanying the socio-economic rights

When a State entrenches human rights in the Bill of Rights of its Constitution, it assumes a continuum of negative and positive obligations for the realisation of those rights. This continuum of obligations applies to both CPRs and SERs, as was acknowledged by the African Commission on Human and Peoples' Rights in the case of *SERAC and Another v Nigeria*.³¹

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both [CPRs] and [SERs]-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties.

The obligation to respect requires the state to refrain from interfering with the rights and freedoms of right-holders, and to respect their free use of resources, individually or in community with others, in the realisation of their rights.³² The obligation to protect entails the State's putting in place a legislative framework and other measures aimed at creating a conducive atmosphere for the protection of right-

²⁹ *Re Certification of the Constitution of the Republic of South Africa* (First Certification case) 1996 1 BCLR 1253 (CC) para 78.

³⁰ See *Mitu-Bell Welfare Society v Attorney General* High Court of Kenya at Nairobi Petition No 164 of 2011 20-21; and *Ibrahim Songor Osman v Attorney General* High Court Constitutional Petition No 2 of 2011 7, among others.

³¹ *Social and Economic Rights Action Centre (SERAC) v Nigeria* 2001 AHRLR 60 (ACHPR 2001) (SERAC case) para 44.

³² SERAC case para 45.

holders from violation of their SERs by third parties, and the provision of effective remedies should such violation by third parties occur.³³ This is a positive obligation requiring the State to protect right-holders from political, economic and social interference. The obligation to promote requires the State to put in place measures aimed at the promotion of tolerance, raising awareness, and the building of infrastructure to enhance the enjoyment of human rights.³⁴ The obligation to promote human rights, especially SERs, is closely linked with article 25 of the African Charter, which engenders the duty of the state to promote and ensure, through teaching, education and publication, that Charter rights as well as its obligations are understood by everybody within its national jurisdiction. The obligation to fulfil is a positive one requiring the State to move its machinery towards the actual realisation of SERs either through the creation of a conducive and enabling atmosphere to allow individuals to realise their own SERs or the provision of basic needs such as food or social security resources to those who, due to circumstances beyond their powers, are unable to provide for themselves.³⁵

In the Kenyan context these obligations are contained in article 21 of the Constitution, which provides that "[i]t is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights".³⁶ Due to the similarities in the wording of the obligations, the Kenyan courts should seek guidance from international, regional and comparative foreign national jurisprudence in the interpretation of these obligations.³⁷

³³ SERAC case para 46. The duty to provide effective remedies is closely linked with the duty of States as provided in a 26 of the Charter which provides for the duty of the State to guarantee the independence of the courts and ensure the establishment and improvement of other appropriate national institutions entrusted with the protection and promotion of Charter rights.

³⁴ SERAC case para 46.

³⁵ SERAC case para 47.

³⁶ The *Constitution*, a 21(1). For an elaboration of the content of these obligations in relation to the SERs in the Kenyan *Constitution*, see *Mitu-Bell Welfare Society v Attorney General* High Court of Kenya at Nairobi Petition No 164 of 2011 22- 23.

³⁷ For an elaboration of these obligations at the international level using the tripartite typology, see Eide Date Unknown www.fao.org; Bilchitz *Poverty and Fundamental Rights* 184, 195-96; Craven *International Covenant on Economic, Social and Cultural Rights* 330ff, among others.

2.3 Internal limitation of the State's socio-economic rights obligations

The scope of Kenya's SER obligations is, however, not absolute, and can be limited by the State either through internal limitations, as is the case with the SERs contained in article 43 of the *Constitution*, or by the article 24 external limitation clause, for those SERs not subject to internal limitations.³⁸ This entails the acknowledgment that not all aspects of SERs can be immediately and completely realised in practice.³⁹ The reasoning behind this internal limitation is, therefore, to enhance the overall legitimacy of the entire constitutional project, because, as has been argued in the South African context, the unequivocal and unconditional inclusion of rights in a constitution which cannot practically be entirely realised due to resource constraints will have a corrosive effect on the legitimacy of the *Constitution* in general and the Bill of Rights in particular.⁴⁰ The adoption of the standard of progressive realisation, therefore, retains the legitimacy of the entrenched SERs while giving the State the requisite margin of appreciation to put in place measures aimed at the full realisation of these SERs over time.

In relation to the SERs contained in article 43, their scope is internally limited by the adoption of the standard of progressive realisation, requiring the State to take legislative, policy and other measures for the progressive realisation of those rights.⁴¹ The standard of progressive realisation in the *Constitution* has been adopted from article 2(1) of the ICESCR, which provides as follows:⁴²

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 realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

³⁸ The limitation of SERs under a 24 of the *Constitution* is discussed more elaborately in section 3 below.

³⁹ See De Vos 1997 *SAJHR* 93.

⁴⁰ Heyns and Brand 1998 *LDD* 154-155.

⁴¹ The *Constitution*, a 21(2).

⁴² ICESCR a 2(1).

The standard has similarly been adopted in other international human rights instruments providing for SERs⁴³ as well as in national constitutions that entrench justiciable SERs.⁴⁴ Therefore, a proper understanding of the standard and how it internally limits SERs necessitates a comparative analysis of international and foreign national jurisprudence.

2.3.1 *Progressive realisation*

The standard of progressive realisation was adopted as a flexibility device which acknowledges that the full realisation of SERs cannot be achieved in a short period of time due to the realities of the world and the difficulties, in terms of human and financial resources, faced by most developing countries.⁴⁵ The flexibility does not, however, mean that States should be lethargic or unduly delay the realisation of SERs at the national level. The CESCR, in interpreting the standard of progressive realisation, has affirmed that States must move as expeditiously, and as effectively, as possible towards meeting their goal of the full realisation of SERs, the *raison d'être* of the Covenant.⁴⁶ This need for the effective and expeditious realisation of SERs has been affirmed internationally⁴⁷ as well as nationally by SACC in the *Grootboom* case.⁴⁸

Even though the Covenant adopts the "progressive realisation" standard, it also contains immediate obligations.⁴⁹ They are as follows: non-discrimination;⁵⁰ an

⁴³ *Convention on the Rights of the Child* (UNCRC) a 4; *Convention on the Rights of Persons with Disabilities* (UNCRPD) a 4

⁴⁴ The 1996 South African *Constitution*, ss 25(5), 26 and 27. See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*) para 45, where the South African Constitutional Court adopted, in the South African context, the meaning of the standard of progressive realisation as developed internationally by the CESCR.

⁴⁵ *CESCR General Comment No 3* (1990) paras 1, 9; Sepulveda *Nature of Obligations* 312. For an elaboration of 'progressive realisation' in the Kenyan context, see the *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Supreme Court of Kenya, Advisory Opinion Application 2 of 2012 paras 27-59.

⁴⁶ *CESCR General Comment No 3* (1990) para 9.

⁴⁷ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) (*Maastricht Guidelines*) guideline 8; *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987) (*Limburg Principles*) principle 21.

⁴⁸ *Grootboom* para. 45.

⁴⁹ See *CESCR General Comment No 3* (1990) para 1; *CESCR General Comment No 4* (1991), para 8; *CESCR General Comment No 9* (1998) para 10; *CESCR General Comment No 13* (1999) paras

obligation to take steps (as discussed herein below); an obligation to realise the minimum core content of substantive SERs;⁵¹ trade union rights;⁵² an obligation to ensure fair wages and equal remuneration for equal work;⁵³ an obligation to take measures for the protection of children and young persons without discrimination; an obligation to penalise by law the employment of young children and young persons in dangerous or harmful work, and a duty to prohibit child labour;⁵⁴ a duty to provide compulsory primary education free of charge;⁵⁵ an obligation to respect the freedom of parents to choose schools for their children;⁵⁶ an obligation to respect the freedom to establish and direct educational institutions;⁵⁷ an obligation to respect the freedom essential for scientific research and creative activity;⁵⁸ and an obligation to monitor the implementation of the Covenant rights,⁵⁹ which includes the duty to submit initial and progressive reports to treaty monitoring bodies,⁶⁰ among others.⁶¹ The immediate nature of these duties is reflected in the wording of the rights, which provides for an undertaking to "ensure" and "guarantee".⁶² These obligations are thus not subject to the internal limitations of progression and the

31, 43; *CESCR General Comment No 14* (2002) para 30; *CESCR General Comment No 15* (2002) paras 17, 37; *CESCR General Comment No 16* (2005) paras 16, 32, 40; *CESCR General Comment No 17* (2005) paras 25, 39; *CESCR General Comment No 18* (2006) paras 19, 33; *CESCR General Comment No 19* (2008) para 40; *CESCR General Comment No 20* (2009) para 7; and *CESCR General Comment No 21* (2009) paras 25, 44, 55, 66, 67. See also *Limburg Principles* principles 16, 21

⁵⁰ *CESCR General Comment No 20* (2009) para 7, which provides that "[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant". The CESCR has also stated, in *CESCR General Comment No 13* (1999) para. 43 that State Parties have an immediate obligation in relation to the right to education, such as the guarantee that the right will be exercised without discrimination of any kind.

⁵¹ *Limburg Principles* principle 25, which provides that "State Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all".

⁵² ICESCR a 8.

⁵³ ICESCR a 7(a)(i).

⁵⁴ ICESCR a 10(3).

⁵⁵ ICESCR a 13(2)(a); *CESCR General Comment No 13* (1999) para 51.

⁵⁶ ICESCR a 13(3).

⁵⁷ ICESCR a 13(4).

⁵⁸ ICESCR a 15(3).

⁵⁹ In relation to housing, see *CESCR General Comment No 4* (1999) para 13. Monitoring requires the development of relevant indicators and benchmarks for each of the substantive SERs. See Sepulveda *Nature of Obligations* 363. According to the *Maastricht Guidelines* guideline 15(f), failure to monitor the realisation of SER is a violation of the Covenant.

⁶⁰ Chapman 1996 *Hum Rts Q* 25.

⁶¹ See Sepulveda *Nature of Obligations* 175,345; Chenwi 2010 www.spil.org.za 37ff.

⁶² Chenwi 2010 www.spil.org.za 27; Alston and Quinn 1987 *Hum Rts Q* 185-186.

availability of resources. They can be validly limited by the State only as per the general limitation clause provided for in article 24 of the *Constitution*.

2.3.2 *Obligation to take steps*

In an effort to expeditiously realise SERs, the standard of progressive realisation requires the State to immediately take deliberate, concrete and targeted steps aimed at and capable of fully realising SERs.⁶³ De Schutter avers that in order to fulfil this obligation as swiftly as possible, the State should adopt national strategies entrenched in legislative, policy and programmatic frameworks with quantified and time-based objectives reflected in sufficient benchmarks and monitoring indicators.⁶⁴ The UN Food and Agriculture Organisation (FAO) in their *Voluntary Guidelines for the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* (2004) also reiterates that strategies for the progressive realisation of SERs must include objectives, targets, benchmarks, time-frames, and actions to formulate policies, identify and mobilise resources, define institutional mechanisms, allocate responsibilities, coordinate the activities of different actors and to provide for monitoring mechanisms.⁶⁵

The necessity for the adoption of reasonable steps in the realisation of SERs is also affirmed, at the national level in the South African SER jurisprudence which indicates that for such measures to be reasonable, they must meet the following criteria: they must be comprehensive, coherent and coordinated, and must also be properly conceived and implemented; they must be inclusive, balanced, flexible and make appropriate short-, medium- and long-term provisions for people in desperate need or in crisis situations, whose ability to enjoy all human rights is most in peril; they must clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation; they must be tailored to the particular context in which they are to apply and take account of the different economic levels in society; they must be continuously

⁶³ *CESCR General Comment No 3* (1990) paras 2, 4.

⁶⁴ De Schutter *International Human Rights Law* 462.

⁶⁵ FAO 2004 www.fao.org para 33.

reviewed because conditions change; they must be transparent and have their contents made known appropriately and effectively to the public; and they must allow for meaningful or reasonable engagement with the public or affected people and communities.⁶⁶

It is, however, important to note that unlike sections 26(2) and 27(2) of the South African *Constitution*, which require the implementation measures to be reasonable, the reasonableness of measures is not a feature of the Kenyan *Constitution*. Article 21(2) only requires the State to take legislative and other measures for the progressive realisation of SERs in article 43 of the *Constitution*. The reasonableness of measures cannot thus be used as an internal limitation to the provision of entrenched SERs as it has been used by the South African courts in SER adjudication, where it was argued that it was a constitutional requirement.⁶⁷ Kenyan courts must take this into account in the adjudication of SERs and not import SER limitations that are not envisaged by the *Constitution* itself.

Though the entrenchment of justiciable SERs in the *Constitution* is an important step, the State still has the responsibility to put in place sufficient legislative, policy and programmatic frameworks for the operationalisation of the constitutional provisions. This has to be done in accordance with the requisite standards discussed above. Therefore, to rely on the standard of progressive realisation as an internal limitation to SERs, the State must show the courts the steps it has taken to ensure that the rights are progressively realised, failing which, the internal limitation cannot be relied on and the State has to justify the non-realisation of the entrenched SERs using the article 24 general limitation clause.

⁶⁶ Chenwi 2010 www.spil.org.za 35-37; Liebenberg *Socio-economic Rights Adjudication* 152-153; Brand *Courts, Socio-economic Rights and Transformative Politics* 124-131.

⁶⁷ For an elaborate analysis of how the reasonableness standard has been used to limit SERs in South Africa, see Liebenberg *Socio-economic Rights Adjudication* 138ff.

2.3.3 *The maximum of available resources*

An important component of the standard of progressive realisation is resources, and the requirement that States expend the maximum of their available resources is an acknowledgment that the realisation of SERs in any particular State is vitally dependant on the economy of the State.⁶⁸ This is due to the reality that States are not equally endowed in terms of resources and also have many and varied economic obligations which require balancing in the allocation of resources. However, even though the link between the available resources and the realisation of SERs calls for a margin of appreciation to be given to the government in the measures put in place to realise SERs, the discretion is not absolute, as it requires the prioritisation of social spending, especially to meet the urgent needs of the poor and vulnerable groups in society. This has been affirmed, at the international level by the CESCR, which has emphasised that even in situations of severe economic constraints, marginalised and vulnerable groups must be protected through the adoption of low-cost targeted programmes.⁶⁹ The CESCR has further developed criteria for the evaluation of States' resource constraint justifications for the non-realisation of SERs in the context of the Optional Protocol to the ICESCR, which includes the following:⁷⁰

- (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
- (b) whether the State Party exercised its discretion in a non-discriminatory and non-arbitrary manner;
- (c) whether the State Party's decision (not) to allocate available resources was in accordance with international human rights standards;
- (d) where several policy options are available, whether the State Party adopted the option that least restricts Covenant rights;
- (e) the time frame in which the steps were taken;

⁶⁸ Alston and Quinn 1987 *Hum Rts Q* 177-181.

⁶⁹ *CESCR General Comment No 3* (1990) para 12; and *CESCR General Comment No 15* (2002) para 13.

⁷⁰ CESCR 2007 tbinternet.ohchr.org para 8.

- (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalised individuals or groups, whether they were non-discriminatory, and whether they prioritised grave situations or situations of risk.

The requirement for a substantive State justification in the instances where resource constraints have been raised for the non-realisation of SERs has also been affirmed, at the national level, by the SACC where it held, in the *Metrorail* case, that:⁷¹

A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of State will not be held to have reasonably performed a duty simply by on the bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human and financial, in the context of the overall resources of the organ of the State will need to be provided.

The Kenyan courts must thus take into account the criteria developed by the CDESCR when assessing the State's justification of resource constraints for the non-realisation of SERs and must ensure that they undertake a careful analysis of such justifications, as was emphasised the SACC in the *Metrorail* case.

In the Kenyan context, the *Constitution* recognises that resources for the realisation of SERs are scarce, and thus accords a margin of appreciation to the government in its adoption of measures and the allocation of resources in the realisation of SERs by providing as follows:⁷²

[T]he 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.

⁷¹ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 88.

⁷² The 2010 Kenyan *Constitution* a 20(5)(c). See, however, the case of *Trusted Society of Human Rights Alliance v Attorney General* High Court of Kenya at Nairobi, Petition No 229 of 2012 (the *Mumo Matemu* case) paras 77, 98. Here the Court held that despite the doctrine of the separation of powers the courts still retained authority to review decisions by the executive to ensure that they were rationally/reasonably made and that they were compliant with both procedural and substantive constitutional requirements.

However, this discretion of the government to rely on the unavailability of resources as a defence for the non-realisation of SERs is not absolute, and is constrained by the *Constitution* itself, which places the onus on the government to demonstrate the unavailability of resources.⁷³ The *Constitution* further requires the government to prioritise its resources in the realisation of its SERs obligations by providing as follows:⁷⁴

[I]n allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

In relation to vulnerable and marginalised groups, the *Constitution* further provides for the prioritisation of resources towards the fulfilment of their needs.⁷⁵ The requirement that the SER needs of marginalised and vulnerable groups be prioritised is further reflected in article 53 of the *Constitution*, which is not made subject to the standard of progressive realisation. The use of the availability of resources as an internal limitation of SERs is thus not absolute and if the State fails to prioritise the realisation of the socio-economic needs of the vulnerable and marginalised groups in society, it has to justify such failure through the general limitation clause entrenched in article 24 of the *Constitution*.

2.3.4 Prohibition of retrogressive measures

The use of the term "progressive" necessarily prohibits the adoption of retrogressive measures by the State in the realisation of SERs. According to Sepulveda, progression entails two complementary obligations: "the obligation to continuously improve conditions, and the obligation to abstain from taking deliberately retrogressive measures except under specific circumstances".⁷⁶ The CESCR has been very assertive against retrogressive measures in its general comments, delineating

⁷³ The *Constitution*, a 20(5)(a).

⁷⁴ The *Constitution*, a 20(5)(b). For an affirmation of the obligation of the State to protect the rights of vulnerable and marginalised groups, see *Mitu-Bell Welfare Society v Attorney General* High Court of Kenya at Nairobi Petition No 164 of 2011 27-29.

⁷⁵ The *Constitution*, a 21(3).

⁷⁶ Sepulveda *Nature of Obligations* 319.

very stringent conditions for such retrogressive steps to be acceptable. It has affirmed that deliberately retrogressive measures must be fully justified in relation to the totality of the Covenant rights and in the context of the maximum use of available resources.⁷⁷

The CESCR has further elaborated in General Comment Number 19, in relation to social security, the criteria that it will use when considering the justifiability of retrogressive measures. The criteria include the reasonableness of the action; comprehensive examination and consideration of alternatives to the retrogressive action; the genuine participation of the affected groups in decision-making; the long-term adverse impact of the action and whether or not it deprives access to the minimum essential levels of rights; and the presence of independent national review.⁷⁸ However, despite the flexibility allowing States to justify retrogressive measures, the CESCR in General Comment Number 14 has further stated that any such measures which affect the minimum core content of Covenant rights is a violation of the Covenant.⁷⁹ The *Maastricht Guidelines* also provide that the adoption of deliberately retrogressive measures by States is a violation of their obligation under the Covenant.⁸⁰ These requirements for the justification of a retrogressive measure are more in line with the proportionality requirements entrenched in article 24 of the *Constitution*, and thus retrogressive measures limiting the entrenched SERs must be justified using the entrenched general limitation clause.

The adoption in the 2010 *Constitution* of the standard of progressive realisation does not leave the entrenched SERs bereft of content, but requires the Kenyan government to move expeditiously towards their realisation by taking immediate, comprehensive and targeted steps capable of their realisation. This obligation was affirmed by the High Court of Kenya in *Mitu-Bell Welfare Society v Attorney General*

⁷⁷ CESCR General Comment No 3 (1990) para 9; CESCR General Comment No 13 (1999) para 45; CESCR General Comment No 14 (2002) para 32.

⁷⁸ CESCR General Comment No 19 (2008) para 42. Retrogression must be justified by a reference to the totality of the rights in the Covenant taking into account the state's full use of the maximum of its available resources.

⁷⁹ CESCR General Comment No 14 (2002) para 48.

⁸⁰ *Maastricht Guidelines* guideline 14(e).

and further reiterated in the case of *Okwanda v The Minister of Health and Medical Services* as follows:⁸¹

Articles 21 and 43 require that there should be 'progressive realisation' 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.

A discussion of the limitations of the entrenched SERs under the new constitutional dispensation in Kenya is not, however, limited to the internal limitation clause espoused in the progressive realisation standard as discussed above. This prioritisation of some SERs in the *Constitution* is due to the important function they serve in a democratic society or because of the vulnerability of the particular societal group that they aim to protect. These prioritised SERs include the labour relation rights in article 41, consumer rights in article 46, the rights of children to free and compulsory basic education as well as basic nutrition, shelter and healthcare in article 53(1)(b) and (c),⁸² the rights of minorities and marginalised groups in article 56, and the rights of older persons in article 57. Despite the lack of internal qualifiers, these priority rights, as well as the other SERs with internal qualifiers, are subject to the general limitations clause contained in article 24 of the *Constitution*,⁸³ a clause which is discussed more elaborately in the section below.

⁸¹ *Mitu-Bell Welfare Society v Attorney General* High Court of Kenya at Nairobi Petition No 164 of 2011 21-23, 31; *Okwanda v The Minister of Health and Medical Services* High Court of Kenya at Nairobi, Petition No 94 of 2012 paras 15, 16.

⁸² See De Vos 1997 *SAJHR* 88 who argues, in the context of the South African *Constitution*, that in enumerating the rights of children as clear, near-absolute core entitlements, the *Constitution* acknowledges the necessity to provide the basic subsistence needs of children, the most vulnerable groups in any State.

⁸³ Heyns and Brand 1998 *LDD* 163.

3 Limitation of socio-economic rights under the general limitation clause

The incorporation of a general limitations clause in legal instruments, national or international, is a recognition of the non-absolute nature of rights. Limitation is thus a legitimate way in which legal instruments accommodate the democratic conflict between entrenched rights and competing social interests.⁸⁴ The non-absolute nature of human rights and the legitimacy of a limitations clause in a constitutional system were affirmed by the SACC in the case of *De Reuck v Director of Public Prosecution*,⁸⁵ where the Court acknowledged the importance of harmonious co-existence in society and noted the need for a balancing process should individual rights be in conflict.⁸⁶

However, it is important to emphasise that SER obligations can be limited by the State only in particular instances and in accordance with the provisions of the legal instrument containing the rights, so as to enhance the culture of justification and accountability for the use of public power. The following criteria must generally be met both at the national and international levels for the restrictions on rights to be legal: the objectives justifying such limitation must be legitimate; the limitation must be prescribed by law; and the limitation must not be disproportionate, meaning that it must not exceed the aim envisioned by the particular limitation.⁸⁷ The restriction on limitation is based on the principle that the exercise of public power derives its

⁸⁴ Cheadle "Limitation of Rights" 30-1. The first national constitution to engender the limitation of rights was the *German Basic Law (German Constitution of 23 May 1949)*. For a comprehensive analysis of limitation under the German Basic Law, see Pati 2005 *Berkeley J Int'l L* 234-342.

⁸⁵ *De Reuck v Director of Public Prosecution (Witwatersrand Local Division)* 2002 12 BCLR 1285 (CC) para 89.

⁸⁶ As above. See also *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 930 (CC) para 57; *S v Mamela* 2000 3 SA 1 (CC) para 32. In *Mamela*, the Court affirmed the need for a balancing exercise based on the proportionality principle, holding that the more serious the impact of limitation, the more stringent the criteria for its justification and the more onerous the requirements for its justification. (The justifications must be persuasive and compelling.)

⁸⁷ De Schutter *International Human Rights Law* 241. See also *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

force from the relevant legal instrument, be it a treaty or a constitution, and must, therefore, be justified with reference to that particular legal instrument.⁸⁸

The entrenchment of a general limitation clause is not a new concept in the Kenyan constitutional jurisprudence, with the 1963 *Independent Constitution* having contained a limitations clause.⁸⁹ A reading of the limitation clause, however, indicates that it was not meant to be a general limitations clause *per se*, but was only a reference to the internal limitations within the specific rights in the Bill of Rights. The internal limitations were, however, to be construed restrictively as they were meant to operate to curtail the enjoyment of rights only in instances where the exercise of rights prejudiced the rights and freedoms of others or the public interest.⁹⁰ In *Changanlal v Kericho Urban District Council*, a case dealing with the compulsory acquisition of private property, the Court for example held that such an acquisition was subject to the payment of compensation and no legislation would pass constitutional muster if it took private property without compensation.⁹¹

With the promulgation of the new *Constitution* in 2010, this tradition of the incorporation of a general limitation clause was continued in article 24, which provides clear grounds for the legitimate limitation of rights. It provides that rights can be limited only in accordance with the law, and only to the extent that is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom. Further safeguards are provided to ensure that the limitations of rights are legitimate, and they include:⁹²

⁸⁸ Woolman and Botha "Limitations" 34-7.

⁸⁹ See *Constitution of Kenya*, 1963 s 70.

⁹⁰ Internal limitations included those related to the compulsory acquisition of private property (s 75) and arbitrary search or entry (s 76(2)). See generally Mutakha-Kangu 2008 *LSKJ* 1 who contends that due to the pervasive nature of the internal limitations in the Bill of Rights, it has been described as a bill of exceptions.

⁹¹ *Changanlal v Kericho Urban District Council* 1965 EA 370.

⁹² 2010 Kenyan *Constitution* a 24(1).

- (a) the nature of the right or fundamental freedom;⁹³
- (b) the importance of the purpose of the limitation;⁹⁴
- (c) the nature and extent of the limitation;⁹⁵
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 24(2) further provides safeguards where a limitation is contained in legislation and it provides that such limitation is not valid unless it specifically expresses the intention to limit a particular right in a clear and specific manner, as well as the nature and extent of that limitation.⁹⁶ It not only calls for the strict construction of legislative provisions limiting rights, but also prohibits any limitations that have the effect of derogating from the core or essential content of rights leading to the rights being ineffective or illusory.⁹⁷ It places the burden of proof as to the legitimacy of a limitation on the authority or organ imposing the limitation in question.

Due to the similarities between the provisions of the general limitation clause and limitation clauses contained in international and regional human rights instruments as well as in comparative national jurisdictions such as South Africa, it is necessary

⁹³ See Woolman 1997 *SAJHR* 108-110, who contends that this factor forms an important component of the limitation clause as it determines the level of scrutiny a given limitation will receive and that the more important a right is to the overall constitutional project, the stricter the scrutiny on its limitation.

⁹⁴ See Woolman 1997 *SAJHR* 109-110. He states that this limitations factor is a threshold question and not a balancing question. He argues that: "If the objective of the limitation cannot justify the infringement of a fundamental right, then the limitation inquiry ends. There need be no comparison of the competing interests at play".

⁹⁵ Woolman 1997 *SAJHR* 110-111 is of the view that this should be the last factor to be considered by the courts in a limitation analysis as it involves a cost-benefit analysis which is intended to ensure that the limitation of rights "does not impose costs or burdens upon the rights-holder(s) which far outweigh the benefits said to flow to other members of society". He argues that it should be the last inquiry as it places the courts under the greatest political pressure due to the need for them to revisit the compromises of the competing social interests struck by the political branches of the State.

⁹⁶ The *Constitution*, a 24(2)(a)-(b).

⁹⁷ The *Constitution*, a 24(2)(b)-(c).

that in trying to understand and interpret these provisions the courts should look for inspiration from such comparable jurisdictions.

An analysis of the interpretation and application of general limitation clauses in some of these jurisdictions is undertaken below with the aim of providing a general guide to Kenyan courts in the use of the general limitation clause in the adjudication of SERs and further to support the proposal that Kenyan courts adopt a proportionality test to ensure stringent scrutiny of government action aimed at limiting SERs in the Kenyan context.

3.1 Limitations of socio-economic rights in the international sphere

At the international level, the ICESCR acknowledges the possibility of the limitation of the SERs entrenched therein. The limitation clause is contained in article 4, which provides that SERs can be limited as provided by law, and that such limitation must be compatible with the nature of the rights, and must be done only for the purpose of promoting the general welfare in a democratic society. In its interpretation of article 4 of the ICESCR, the CESCR stated in its General Comment Number 14 that "the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States and that any State which imposes restrictive measures on the enjoyment of rights 'has the burden of justifying such serious measures in relation to each of the elements identified in article 4'".⁹⁸ The CESCR emphasised that:⁹⁹

Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

⁹⁸ CESCR General Comment No 14 (2002) para 28.

⁹⁹ CESCR General Comment No 14 (2002) para 28.

The CESCR further contended that measures limiting rights must be proportionate and that where several choices are available, the measure least restrictive to the full enjoyment of rights must be adopted.¹⁰⁰ It also emphasised that limitation measures must be resorted to for a limited period of time only, and that they must be subject to review.¹⁰¹

Article 5 of the ICESCR further prohibits the destruction of SERs or the imposition of limitations exceeding the extent envisioned by the Covenant.¹⁰² The Covenant goes further to espouse the principle of the permeability and interdependence of rights by foreclosing the use of its provisions as a pretext to limit or lower the level of protection of any other rights provided for in other treaties or national law.¹⁰³ Article 5(2) is thus a saving provision aimed at preserving the sanctity of laws.¹⁰⁴

The *Limburg Principles* also provide that these articles (articles 4 and 5 of the ICESCR) were meant to protect rights rather than to permit the imposition of limitations, and calls for their strict interpretation.¹⁰⁵ It interprets the provision 'determined by law' as referring to a national law of general application, which must be clear and accessible to everybody, must be consistent with the Covenant, and must not be arbitrary, unreasonable or discriminatory.¹⁰⁶ It further requires that adequate safeguards as well as effective remedies be put in place to protect and to provide the requisite redress should the limiting law be abused or used illegally.¹⁰⁷ For the limitation to be compatible with the nature of the rights, it should not be interpreted or applied in such a manner as to jeopardise the essence of the right in question or to render the rights ineffective or illusory.¹⁰⁸ The *Limburg Principles* further state that the 'general welfare' requirement in article 4 of the ICESCR should be interpreted to ensure that limitations are aimed at furthering the economic, social

¹⁰⁰ *CESCR General Comment No 14* (2002) para 29.

¹⁰¹ *CESCR General Comment No 14* (2002) para 29.

¹⁰² ¹ICESCR a 5(1).

¹⁰³ ICESCR a 5(2).

¹⁰⁴ Sseyonjo *Economic, Social and Cultural Rights* 102.

¹⁰⁵ *Limburg Principles* principles 46-69.

¹⁰⁶ *Limburg Principles* principles 48-50. See also Sseyonjo *Economic, Social and Cultural Rights* 100-101.

¹⁰⁷ *Limburg Principles* principles 50-51.

¹⁰⁸ *Limburg Principles* principle 56.

and cultural well-being of the people as a whole, meaning that a proper proportionality test must be undertaken if the limitation is to be justified.¹⁰⁹ The proportionality test must be undertaken within the context of a democratic society characterised by pluralism, tolerance and broad-mindedness, taking into account the views of minority groups and preventing the arbitrary, totalitarian imposition of limitations on minority groups by the majority.¹¹⁰

The interpretation of article 4 of the ICESCR in the *Limburg Principles* is informed by the work of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, especially the *Siracusa Principles on the Limitation and Derogation of the Provisions in the ICCPR*.¹¹¹ Though based on the ICCPR, the Siracusa Principles provide general interpretive principles relating to the justification of limitations that have application across all the international treaties allowing for the limitation of rights. Some of the principles include: the prohibition of limitations that jeopardise the essence of the rights; the strict interpretation of limitation clauses in favour of rights, and in accordance with the nature of the right; the compatibility of limitations with the objects and purpose of the Covenant; the non-discriminatory and non-arbitrary application of limitations; the provision of safeguards and remedies against the abusive use of limitations; necessity as the basis of limitations on justifiable Covenant grounds; and, the proportionate pursuit of legitimate aims responsive to public needs in accordance with the Covenant.¹¹²

The CESCR has not substantively expounded on the interpretation of article 4 in a General Comment.¹¹³ However, guidance can be sought from the work of the Human Rights Committee, especially its General Comment Number 27, where it provides that permissible limitation must be provided by law and the law must determine all the conditions under which the right may be limited.¹¹⁴ It further provides that the

¹⁰⁹ *Limburg Principles* principle 52. See also Sseyonjo *Economic, Social and Cultural Rights* 101.

¹¹⁰ Sseyonjo *Economic, Social and Cultural Rights* 101.

¹¹¹ ECOSOC 1985 www.uio.no (*Siracusa Principles*).

¹¹² *Siracusa Principles* principles 1-14.

¹¹³ A reference was made to a 4 by the CESCR in *CESCR General Comment No 14* (2002) paras 28, 29.

¹¹⁴ *CCPR General Comment No 27* (1999) paras 11-12.

limitation must be necessary in a democratic society for the protection of the Covenant-acknowledged purposes, must not impair the essence of the right, must not confer unfettered discretion on the authority charged with their execution, must conform to the principles of proportionality, must be appropriate to achieve their intended purpose, and must be the least intrusive among the available options.¹¹⁵

The conditions under which the limitation of rights is permissible at the international level have been affirmed by several judicial and quasi-judicial bodies. The Inter-American Court in an *Advisory Opinion on the Interpretation of the Word "Law" in Article 30 of the American Convention on Human Rights* has affirmed the importance of guarantees and safeguards to fetter the discretion of governments in the application of limitations so that the inviolable attributes of the individual are not impaired.¹¹⁶ The European Court on Human Rights has also held that even though States could legitimately limit rights, they must do so in a manner which is compatible with their international law obligations, and such limitations must be subject to review by the treaty-monitoring mechanisms.¹¹⁷ It further held that in undertaking these review functions, the Court must ascertain the necessity of the limitation, especially with regard to an existing pressing social need, and the proportionality of the limitation in relation to the purpose sought to be achieved.¹¹⁸ Similarly in the *Observer and Guardian v United Kingdom*, the European Court held that rights are subject to a number of exceptions, which must be narrowly interpreted, and the necessity for limitation convincingly established.¹¹⁹ It stated that "necessary" must imply the existence of a pressing social need, and that even though States have discretion in the imposition of limitations; the same is subject to

¹¹⁵ *CCPR General Comment No 27* (1999) paras 13-16.

¹¹⁶ *The Word "Laws" in Article 30 of the American Convention on Human Rights* Advisory Opinion OC-6/86, May 9, 1986, Inter-Am Ct HR (Ser A) No 6 (1986) paras 22-24. The Court held that the legitimacy of a limitation is guaranteed in its passing through the national legislative process and the opportunity being given to the people, through their representatives to express their disagreements or to propose different optional initiatives.

¹¹⁷ *Open Door and Dublin Well Woman v Ireland* 64/1991/316/387-388, 23 September 1992 para 69.

¹¹⁸ *Open Door and Dublin Well Woman v Ireland* 64/1991/316/387-388, 23 September 1992 para 70.

¹¹⁹ *The Observer and the Guardian v The United Kingdom* Application No 13585/88, Judgement of 26 November 1991 paras 59(a), 60.

the overall supervision of the treaty-monitoring bodies.¹²⁰ The Court further held, in relation to proportionality, that it has to look at the limitation in question in the light of the national context as a whole. In doing this, the Court has to determine whether the limitation is proportionate to the legitimate aims being pursued, and whether the State's justifications are relevant and sufficient.¹²¹

From the above discussion, it is clear that limitation clauses in international legal instruments are aimed at enhancing the protection of rights and giving national governments adequate space to ensure that they are able to realise their international obligations, taking into account their unique domestic situation. However, due to the possibility of the illegal use of limitation clauses to detract from the full protection of rights, the prevailing practice in international law is for the restrictive interpretation of limitation clauses and the undertaking of a proportionality test to ensure that limitation clauses are adopted in a democratic manner and are aimed at enhancing the general welfare of the society as a whole. In undertaking SER adjudication, especially in instances when the political institutions of the State are seeking to limit the SERs entrenched in the 2010 Kenyan *Constitution*, the Kenyan Courts must take into account and be informed by the jurisprudence emanating from the international level on the limitations of rights.

3.2 Limitations of socio-economic rights in the regional sphere

The question of the limitation of rights in the African Human Rights System (AHRS) has raised some debate due to the lack of a general limitations clause in the African Charter and its *Protocol on the Rights of Women in Africa*, as well as the *African Children's Charter*, unlike other regional human rights instruments.¹²² Concerns about limitations are specifically greater in relation to the SERs in these instruments,

¹²⁰ *The Observer and the Guardian v The United Kingdom* Application No 13585/88, Judgement of 26 November 1991 paras 9 59(c).

¹²¹ *The Observer and the Guardian v The United Kingdom* Application No 13585/88, Judgement of 26 November 1991 para 59(d).

¹²² Viljoen *International Human Rights Law* 348-352; Ouguergouz *African Charter* 425.

as they do not contain internal limitations or claw-back clauses, as is the case with the Charter-entrenched CPRs. In response to this debate the African Commission has identified article 27(2)¹²³ as the general limitations clause and has developed limitations jurisprudence around the article.¹²⁴ The Commission has affirmed that a law limiting rights must be of general application,¹²⁵ and must be in conformity with the provisions of the African Charter.¹²⁶ It has then propounded a proportionality test which balances the nature and extent of the limitation imposed *vis-à-vis* the legitimate State interest aimed to be protected by the limitation. In the *Media Rights* case the Commission stated as follows:¹²⁷

The reasons for possible limitation must be founded in a legitimate State interest and the evils of limitation of rights must be strictly proportionate with, and absolutely necessary for, the advantages which are to be obtained. Even more important, a limitation may never have as a consequence that the right itself becomes illusory.

The Commission is thus basically contending that any use of the limitations clause must meet the basic requirements of legality, necessity and the prohibition of arbitrariness.¹²⁸ It has further found, when undertaking the proportionality analysis, that if there is more than one way of achieving the legitimate State objective, the measure that least limits rights must be adopted.¹²⁹ The Commission thus contends that the onus of proving the legitimacy of the limitation of a right is on the State, and that once the fact of the limitation of a right has been proven, it is up to the government in question to justify the reasonableness of that limitation.¹³⁰

¹²³ It provides that "[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest".

¹²⁴ See *Media Rights Agenda v Nigeria* 2000 AHRLR 200 (ACHPR 1998) (*Media Rights* case) para 68; *Prince v South Africa* 2004 AHRLR 105 (ACHPR 2004) (*Prince* case) para 43.

¹²⁵ *Media Rights* case para 71; *Prince* case para 44.

¹²⁶ *Media Rights* case para 66.

¹²⁷ *Media Rights* case paras 69-70; *Prince* case para 43.

¹²⁸ Ouguergouz *African Charter* 430.

¹²⁹ *Interights v Mauritania* 2004 AHRLR 87 (ACHPR 2004) para 82-85.

¹³⁰ *Media Rights* case para 73. The Commission states that the Nigerian government had not provided any evidence to justify its limitation of the freedom of expression. See also *Amnesty International v Zambia* 2000 AHRLR 325 (ACHPR 1999) para 50, where the Commission not only cautioned against a too easy resort to the use of limitation, but also found that the onus is on the State to prove that it is justified in resorting to the use of the limitation clause

The object and purpose of the legal instruments in the AHRS are to confer protection on individuals, and the limitations clause must be interpreted with this in mind. Ouguerouz argues that having the object and purpose of the African Charter in mind, article 27(2) should be given the most restrictive interpretation possible so as to enhance the protection of the rights entrenched in the Charter.¹³¹ In undertaking adjudication relating to the realisation of SERs, the Kenyan Courts may therefore have to take into account the regional jurisprudence on the limitation of rights emerging from the AHRS, especially the adoption of a proportionality approach aimed at ensuring that rights achieve their intended objectives.

3.3 Limitations of socio-economic rights under the 1996 South African Constitution

The article 24(1) limitations clause is very similar to section 36 of the 1996 South African *Constitution*.¹³² The section 36 clause has been subject to comprehensive judicial and academic interpretation over the years, and the jurisprudence emanating from that interpretation can be used to enhance the understanding of limitations in the Kenyan context. The SACC has utilised the limitations clause in a two-stage constitutional analysis which looks, first, at whether there has been a contravention of the guaranteed right, and secondly, whether the contravention is justified under the limitations clause.¹³³ Woolman characterises these two stages as follows: the fundamental rights stage - which entails an 'inquiry into the nature of the right limited and its importance in an open and democratic society based on freedom and equality'; and the limitation stage - which "directs our attention primarily, if not exclusively, to the reasonableness and justifiability of a limitation in an open and democratic society based on human dignity, freedom and equality".¹³⁴ Both of the two stages espouse a value-based approach, with the nature, scope and content of

¹³¹ Ouguerouz *African Charter* 432-433.

¹³² These grounds of limitation and the requirement that the court undertakes a proportionality test taking into account the necessity, suitability and appropriateness of limitations were first entrenched in the *German Basic Law* (1949) a 19, see Pati 2005 *Berkeley J Int'l L* 238.

¹³³ *S v Zuma* 1995 2 SA 642 (CC) 414; *S v Makwanyane* 1995 3 SA 391 (CC) para. 100. See also Woolman and Botha "Limitations" 34-3 - 34-4; Iles 2004 *SAJHR* 453-455; and Brand *Courts, Socio-economic Rights and Transformative Politics* 100-101

¹³⁴ Woolman 1997 *SAJHR* 108.

rights in the first stage being animated by the constitutional values of openness, democracy, human dignity, freedom, equality and equity;¹³⁵ while the second stage of the limitations analysis is also animated by these constitutional values.¹³⁶ In this scheme of things, the first part of the test involves the responsibility of the applicant¹³⁷ while the second part of the test burdens the person or authority who seeks to limit rights to justify the limitations.¹³⁸

In undertaking the first stage of the analysis, which basically involves the interpretation and development of the meaning, nature, content and extent of the right in question¹³⁹ and the assessment of whether the offending legislation¹⁴⁰ impairs or limits the defined content of the rights, the SACC has used an approach based on the text, the context and the foundational values.¹⁴¹ It involves the analysis of the right's text in context, which entails a consideration of the historical background of both the constitution and of the right; the reasons for its inclusion as a constitutional right; the concepts enshrined in the right, and their legal elaboration under national, international and comparative law; the other constitutional provisions, particularly other rights entrenched in the Bill of Rights; and, the foundational values.¹⁴² This stage entails the analysis of the internal

¹³⁵ The *Constitution*, aa 20(4)(a), 259(1).

¹³⁶ The *Constitution*, a 24(1). For an analysis of the value-based approach to a limitations analysis, see Woolman and Botha "Limitations" 16-29.

¹³⁷ During this first stage of the two-stage limitations analysis, the South African Constitutional Court has adopted an objective approach of unconstitutionality, which holds that the finding of invalidity is not dependent on the parties before the Court (the subjective approach). This is to prevent a situation where the law can be held invalid for one litigant and valid for another litigant. The theory also espouses a generous interpretation of *locus standi* rules to allow applicants who have not been directly affected by a limitation of rights to bring cases to court. See Woolman and Botha "Limitations" 42-43, note 5.

¹³⁸ See *Moise v Transitional Local Council of Greater Germiston* 2001 4 SA 491 (CC) para 19, which confirms that once a limitation is proven, the burden of justification rests on the party seeking to rely on the limitation, and the analysis of the justification will depend on the balancing of competing interests.

¹³⁹ Ackerman J in *Ferreira v Levin, and Vryenhoek v Powell* 1996 1 BCLR 1 (CC) para 252.

¹⁴⁰ For it to be legitimate, a limitation clause must be entrenched in a law of general application and not on a policy or executive act. This is to guarantee rights by giving only the legislature the power to limit rights. See Cheadle "Limitation of Rights" 30-8 - 30-9.

¹⁴¹ *Ferreira v Levin, and Vryenhoek v Powell* 1996 1 BCLR 1 (CC) para 46.

¹⁴² Cheadle "Limitation of Rights" 30-5; Woolman and Botha "Limitations" 34-19 - 34-32.

demarcations/qualification of rights and their circumscription of the scope of rights.¹⁴³

The second stage, which encompasses the proportionality test, entails the analysis of the reasonableness and the justification of the limitation, in the context of a democratic society based on human dignity, equality and freedom and using the factors listed in section 36(1) (similar to article 24(1) of the Kenyan *Constitution*).¹⁴⁴ Relying on Canadian jurisprudence in relation to section 1 of the *Canadian Charter of Rights and Freedoms*, Cheadle contends that this analysis should not be a balance between the importance of the right as against the purpose of the limitation, but an analysis of the propriety and viability of the means used to limit the right.¹⁴⁵ He quotes the Canadian case of *R v Oakes*, which not only calls for the proportionality test after a sufficiently significant objective of the limitation has been established, but also details three important components of the proportionality test, which are:¹⁴⁶

First, measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations... they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question. Third, there must be proportionality between the effects of the limiting measures and the objective which has been identified as of sufficient importance.

It is thus important that in determining the justifiability of legislation limiting rights, the Kenyan courts must take the above factors into consideration and ensure that the *raison d'être* of the respective entrenched rights in the Bill of Rights is achieved.

Interestingly, the general limitations clause has not been used in the South African jurisprudence on SERs, as evidenced by the *Grootboom* and the *Treatment Action*

¹⁴³ Currie and De Waal *Bill of Rights Handbook* 187.

¹⁴⁴ Cheadle "Limitation of Rights" 30-9 - 30-11; Woolman and Botha "Limitations" 34-26 - 34-27. They contend that for the respondent to succeed at the limitation stage, the respondent must satisfy all the limitation clause's requirements as provided in s 36(1). For an extensive analysis of the jurisprudence of the SOUTH AFRICAN CONSTITUTIONAL COURT in relation to the understanding of the factors involved in the proportionality analysis, see Woolman and Botha "Limitations" 34-47 - 34-103.

¹⁴⁵ Cheadle "Limitation of Rights" 30-11 - 30-12.

¹⁴⁶ *R v Oakes* 1986 26 DLR (4th) 200 227, quoted in Cheadle "Limitation of Rights" 30-11.

*Campaign*¹⁴⁷ cases.¹⁴⁸ This is due to the requirement that for a limitation on rights to be legitimate, it must be contained in a law of general application, which was not the case with the two decisions.¹⁴⁹ However, a limitation analysis was also not undertaken in the *Khosa* case, which dealt with the *Social Assistance Act* 59 of 1992, the Court deciding the case on the criterion of reasonableness.¹⁵⁰ The Court explicitly acknowledged the difficulty of applying section 36 in SER cases due to the internal limitation requiring the State "to go no further than to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation' of the rights".¹⁵¹ Justice Mokgoro, writing for the majority, was of the view that the use of either the reasonableness review or the proportionality analysis will achieve the same results, and she supported her finding as follows:¹⁵²

If a legislative measure taken by the State to meet this obligation fails to pass the requirement of reasonableness for the purposes of sections 26 and 27, section 36 can only have relevance if what is 'reasonable' for the purposes of that section, is different to what is 'reasonable' for the purposes of sections 26 and 27.

In the same judgment Justice Ngcobo asked if the standard of determining reasonableness under section 27(2) was a similar standard to that of determining reasonableness and justifiability under section 36(1), but did not suggest how the two sections could be used in the context of SER adjudication, preferring to state that an analysis using either of the sections would lead to the same conclusion.¹⁵³

Iles, however, argues that the reasonableness analysis under the internal limitation clauses is totally distinct from the limitation justifications required by section 36 of

¹⁴⁷ *Minister of Health v Treatment Action Campaign* (No 1) 2002 5 SA 703 (CC).

¹⁴⁸ Currie and De Waal *Bill of Rights Handbook* 594; Brand *Courts, Socio-economic Rights and Transformative Politics* 101, 120ff. Brand notes that the courts have interpreted the qualification of "reasonable legislative and other measures within available resources" as an internal limitation clause, and have thus developed a 'reasonableness standard' to scrutinise the positive SER obligations of the State, a standard which he terms as a varying "means-end effectiveness test".

¹⁴⁹ Currie and De Waal *Bill of Rights Handbook* 594.

¹⁵⁰ *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa* case).

¹⁵¹ *Khosa* case para 82. For an in-depth analysis, see generally, Iles 2004 *SAJHR* 448ff.

¹⁵² *Khosa* case para 82.

¹⁵³ *Khoss* case paras 105-107. See Woolman and Botha "Limitations" 34-37 fn 2, who conclude that Ngcobo J's analysis leads us nowhere.

the South African *Constitution*.¹⁵⁴ He contends that the internal limitation analysis as per the *Grootboom* reasonableness test is aimed at the examination of the plan for the realisation of rights: that is, how and when the right is to be realised; the order in which differing needs are to be prioritised; the resources to be expended towards the realisation of the right; the ultimate comprehensiveness of the plan; and how the plan is to be implemented.¹⁵⁵ In relation to a section 36 limitation he argues as follows:¹⁵⁶

Section 36 reasonableness is directed not at a plan for realising rights (as *Grootboom* reasonableness is) but at an examination of the reasonableness of measures that limit rights. Rights are not limited by plans that are designed to give effect to them. [SERs] are limited rather by a lack of available resources, an alternative policy emphasis by the State, or an omission of certain groups from a realisation plan. *Grootboom* reasonableness does not involve choosing one value from a cluster of incommensurable values as s 36 reasonableness sometimes does.

He concludes his argument by stating that the "*Grootboom* reasonableness test is concerned with whether a plan is capable of reasonably achieving a right and not, as in section 36 reasonableness, whether the limitation of the right is rationally achieving its purpose".¹⁵⁷

Many commentators have contributed to the debate on the applicability of a general limitations analysis in the context of internally limited SERs. Currie and de Waal argue that even though a law of general application can only feasibly limit the negative aspect of SER obligations,¹⁵⁸ such a law would be held to be unreasonable in the first stage of the interpretation analysis as the principle of reasonableness has been included in the demarcation of SERs, and that the courts would not have to

¹⁵⁴ Iles 2004 *SAJHR* 456-457.

¹⁵⁵ Iles 2004 *SAJHR* 456-457.

¹⁵⁶ Iles 2004 *SAJHR* 456-457.

¹⁵⁷ Iles 2004 *SAJHR* 456-457. See also Woolman and Botha "Limitations" 40-41, who point out the textual distinction between the internal limitation clauses and the general limitation clause, contending that while the internal limitation analysis relates to the specific right in question, the general limitations analysis entails a wider analysis that takes into account a whole range of factors that are unrelated to the right in question.

¹⁵⁸ See Currie and De Waal *Bill of Rights Handbook* 594, who argue that since most SER litigation concerned with positive obligations is likely to be due to omissions, s 36 analysis will be irrelevant due to the requirement of a law of general application.

proceed to undertake a general limitation analysis.¹⁵⁹ However, Pieterse, relying on the judgment of Budlender AJ in the *Residents of Bon Vista Mansion* case, contends that the application of section 36 is necessary in relation to the duty to respect SERs, if limitations of such duties are to pass constitutional muster.¹⁶⁰ He argues that violations of SERs should be analysed not only using the principle of reasonableness, but must also be justified with reference to an open and democratic society based on human dignity, equality and freedom, and that a proportionality test taking into account all the relevant factors should be undertaken.¹⁶¹

Pieterse's approach was seemingly taken up by the SACC in the *Jaftha* case.¹⁶² In this case, the court not only acknowledged the existence of negative SER obligations in sections 26(1) and 27(1) of the South African *Constitution*,¹⁶³ but also held that where the State limits those obligations, such a limitation must be justified under section 36.¹⁶⁴ The Court proceeded to undertake a limitations analysis under section 36 and held that the breach of section 26(1) was not reasonable and justifiable in terms of section 36 because of the importance of access to housing and its link to dignity, the seriousness of the infringement, and the existence of less restrictive means.¹⁶⁵

Liebenberg, affirming the importance of section 36 in relation to SERs, contends that:¹⁶⁶

[t]he State's purpose in limiting a right should not be solely for reasons of administrative convenience, cost-saving or a re-prioritisation of resources. Allowing these reasons to constitute sufficient grounds of limitation will strip the rights of all effect. In order to justify a limitation on these rights under section 36, the State will have to argue that the restriction based on resource constraints is reasonably

¹⁵⁹ Currie and De Waal *Bill of Rights Handbook* 594-595.

¹⁶⁰ Pieterse 2003 *SALJ* 45-46. The Court in *Bon Vista* did not engage in a 36 analysis despite the presence of a law of general application, *Water Services Act* 108 of 1997, because the respondents had not fashioned any arguments justifying the use of the limitation.

¹⁶¹ Pieterse 2003 *SALJ* 47.

¹⁶² *Jaftha v Schoeman* 2005 2 SA 140 (CC) (*Jaftha* case). The case involved the validity of the Magistrates' Court Act, which permitted the sale of a person's home in execution of a civil debt.

¹⁶³ *Jaftha* case paras 32, 33.

¹⁶⁴ *Jaftha* case para 34.

¹⁶⁵ *Jaftha* case paras 35-49; Woolman and Botha "Limitations" 33-35 - 33-46.

¹⁶⁶ *Khosa*, para 84.

required in the interests of the general welfare in a democratic society based on human dignity, equality and freedom. In addition, the nature and degree of the restriction must be carefully tailored to fit these purposes (the proportionality test).¹⁶⁷

The existence of this debate on the use of section 36 in SER cases was acknowledged by the Court in the *Khosa* case, but it did not provide any guidance on the same as this was unnecessary for the determination of the case.

This whole debate strangely rests squarely on the approach to interpretation and implementation of SERs that has been adopted by the courts in a particular domestic jurisdiction. In the South African context, the adoption of the reasonableness approach in the interpretation of SERs of necessity undermines the value of a section 36 analysis in instances where the State has failed to take adequate measures to realise progressively the right in question.¹⁶⁸ However, if the country's Constitutional Court had adopted the minimum core approach and given clearer content to the entrenched SERs, more stringent justifications would have been required in the instances where the State had failed to meet its minimum core obligations of providing the minimum essential goods and services, especially for the most marginalised and vulnerable groups.¹⁶⁹ This is due to the immediate nature of the minimum core obligations, and the developments in international human rights law to the effect that a lack of resources is no longer a justification for the non-fulfilment of these obligations.¹⁷⁰ This reasoning is supported by the arguments of Davis who, in analysing the *Khosa* decision, contends as follows:¹⁷¹

¹⁶⁷ Liebenberg "Violations of Socio-economic Rights" 424. See also Liebenberg *Socio-economic Rights Adjudication* 185-186 where she contends that a failure to provide basic socio-economic needs should be justified only if resources are demonstrably inadequate, and that such serious restrictions warrant a strict proportionality assessment using the criteria in the s 36 general limitation clause.

¹⁶⁸ See Iles 2004 *SAJHR* 454, who alludes to some of the difficulties associated with the reasonableness approach in the context of rights limitation by contending that the failure of the South Africa's Constitutional Court to engage in the task of defining the scope and content of SERs has led to the difficulty of the use of s 36 in SER limitations analysis.

¹⁶⁹ Iles 2004 *SAJHR* 458, who argues that if the Constitutional Court had adopted the minimum core approach, s 36 would have played a more meaningful role in justifying failures to realise the minimum core, while the internal limitation would serve to justify a failure to expand the realisation of SERs beyond the minimum core.

¹⁷⁰ *CESCR General Comment No 3* (1990) para 10 allows States to use the justification of resource constraints if they fail to realise their minimum core obligations, though it requires a high threshold which is fulfilled if a State is able to show that it has used all the resources at its disposal to satisfy its minimum core obligations as a matter of priority. However, the Committee has contended in the later General Comments such as *CESCR General Comment No 14* (2002) para 47 and *CESCR General Comment No 15* (2002) para 40 that the realisation of the minimum

Once section 27(1) and (2) are read together to determine the content of the right, it should follow that the right, as defined, is then subject to limitation if such limiting measures pass muster in terms of section 36. Thus, if the right taking account of the internal limitation is defined, a failure to grant the right to litigants should fall within the general limitation clause. The Constitutional Court, however, prefers a more extensive role for the internal limiter: one that conflates the two-stage enquiry, because it does not force the Court to define the right with any clarity.

Davis further argues that the reluctance by the courts to interpret sections 26(1) and 27(1) of the South African *Constitution* as constituting self-standing guarantee of the minimum core of SERs, and their relying heavily on sections 26(2) and 27(2) instead is a ploy to cushion the State from having to bear an excessive burden as well as to ensure that no direct claim can be made by a litigant against the State for the delivery of a minimum core of SERs.¹⁷²

3.4 Which way for the Kenyan courts – an approach proposed

As has been shown by the SERs limitation jurisprudence from South Africa, there are two ways in which domestic courts can deal with limitations in the adjudication of SERs. The first being the use purely of the internal limitations, and the second being the use of the proportionality test espoused under the general limitations clause. The first approach, which has been most frequently adopted in the South African context, has been severely criticised as failing to effectively engage with the purposes and values protected by the entrenched SERs, failing to engender the development of the normative content and scope of the entrenched SERs including their interrelationship with other constitutional rights, and providing a less stringent standard for the assessment of State action limiting SERs.¹⁷³ Further, due to the

core was non-derogable and failure could not be justified by reliance on the lack of the availability of resources.

¹⁷¹ Davis 2006 *SAJHR* 310 note 35.

¹⁷² Davis 2006 *SAJHR* 311-312.

¹⁷³ Liebenberg *Socio-economic Rights Adjudication* 146. She argues at 139-141 that the implications of a failure to develop the substantive content of SERs and of concentrating instead on the

failure to elaborate a clear normative content of SERs, this approach has conflated the traditional two-stage constitutional analysis in rights adjudication into a one-stage approach where the court analyses only the justifications of the State in relation to the internal limitation clauses, with the implication that SERs are both defined and limited with reference to the State's available resources.¹⁷⁴ The conflation of the two-stage constitutional analysis into one also muddles the allocation of the burden of persuasion and justification in SER litigation, and may be interpreted as requiring the claimants to persuade the courts that the measures adopted by the State for the realisation of SERs are unreasonable, a burden which is too heavy for claimants to fulfil as the requisite information in that regard is almost always with the State.¹⁷⁵ It has thus been argued that the failures of this first approach detract from the protection offered by the entrenched SERs, with the result that the transformative potential of the SERs in the South African Constitution have not been achieved.¹⁷⁶

The second approach, that of the use of the proportionality test entrenched in the general limitation clause, has been adopted chiefly in limitations jurisprudence at the international and regional level, as discussed in sub-sections 3.1 and 3.2 of this article, and has also been recommended by several prominent authors for use in the South African context, as discussed in subsection 3.3. In advocating the adoption of an expansive proportionality test in the adjudication of SERs in the South African context, Liebenberg argues as follows:¹⁷⁷

internal budgetary limitations of SERs is that the entrenched SERs are "both defined and limited by reference to the State's available resources". See also Stewart 2010 *PSILR* 492-495.

¹⁷⁴ Liebenberg *Socio-economic Rights Adjudication* 141, 175-183, 201-202. She argues at 201 that this disproportionate reliance on the State's justificatory arguments without the elaboration of the content and purpose of the SERs undermines the normative content of the SERs as constitutional rights and weakens significantly the jurisprudential framework upon which claimants can base their claim for the realisation of the SERs.

¹⁷⁵ Liebenberg *Socio-economic Rights Adjudication* 202-203; Brand *Courts, Socio-economic Rights and Transformative Politics* 103, note 79.

¹⁷⁶ Liebenberg *Socio-economic Rights Adjudication* 142, 146. In her analysis of reasonableness in the *Soobramoney* judgment, she argues as follows: "It is hard to imagine that legislators, State officials and medical personnel would be inspired by the *Soobramoney* judgment to take [the right to health] seriously in their budgeting and policy processes as well as the formulation of criteria for rationing access to medical intervention. By failing to engage seriously with health care as a human right, the [South African Constitutional Court] missed an opportunity to promote the transformative potential of [SERs]."

¹⁷⁷ Liebenberg *Socio-economic Rights Adjudication* 198.

[T]he 'exercise in proportionality' in the context of [SERs] claims must be informed by a proper analysis of the normative commitments of the relevant rights and the impact of the deprivation of the particular resource or service at issue to the claimant group. A rigorous analysis of this kind is essential for [SERs] to have substantive meaning to those marginalised by poverty.

In her analysis of the *Khosa* judgment Liebenberg has further indicated that even though the South African Constitutional Court has adopted the reasonableness approach, which relies chiefly on internal limitations in SER adjudication, the *Khosa* judgment incorporated a proportionality analysis.

Taking the above international, regional and national jurisprudence into account, this author thus proposes that the Kenyan courts adopt this second approach, that involving the use of the proportionality test, in undertaking limitations analysis in SER adjudication, so as to enhance the possibilities of the achievement of the transformative potential of the *Constitution*. In adopting the second approach, it is proposed that the Kenyan courts should opt for an adjudication approach which entails that the courts engage effectively with the purposes and values of SERs, elaborating on their content and scope as well as assessing critically and substantively the arguments proffered by the State for the limitation of SERs.¹⁷⁸ If Kenya adopts this implied minimum core approach, it will follow that a limitations analysis which engenders a proportionality test using all the factors provided for in article 24(1) of the *Constitution* will be necessary. The adoption of the minimum core approach, and thus a proportionality test taking into account article 24(1) of the *Constitution* in SER adjudication is supported by the requirements of article 24(2)(c) of the *Constitution*, which states as follows:

[A] provision in legislation limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

¹⁷⁸ See Liebenberg *Socio-economic Rights Adjudication* 173, 184, where she affirms that the minimum core approach is aimed at giving clear normative content to SERs and thus has the advantage of placing a weighty burden of justification on the State in instances of the limitation of SERs. For an elaborate discussion of the reasons why Kenya should adopt a minimum core approach, see Orago 2013b *AHRLJ* (forthcoming).

Commenting on the importance of this 'core or essential content' requirement in the context of the *Interim Constitution* of South Africa, Woolman argues as follows:¹⁷⁹

It tells the Court that no matter how pressing the government's objectives may be, there is a point beyond which the government may not go in limiting the rights enshrined in the Constitution. It serves this role by shifting the limitation clause analysis away from questions about the merit of the restriction's means and objectives and back to the detrimental effect the restriction may have on the right and the right-holders whose activities are being limited by law.

Taking this into account, it can be argued that the analysis of article 24 should form an intrinsic component of limitations analyses by the Kenyan courts in the adjudication of the entrenched SERs so as to enhance their protective value.

It serves to question how constitutional adjudication will work in this context. It is proposed that in adjudicating matters relating to SERs the courts have to adjust the traditional two-stage constitutional analysis and introduce an intermediate stage between the traditional right-interpretation analysis and the general limitation analysis, where the courts will consider the effects of the internal limitations on the right in question.¹⁸⁰ Taking this into account, the constitutional limitation analysis will thus commence at the first stage where the content of the right is determined and an analysis is undertaken of whether the impugned State action or legislation infringes on the SER in question. The analysis will then proceed to the intermediate stage, where the courts will undertake an analysis of whether the infringement of the right is saved by the internal limitation clause, that is, whether the State has already put in place sufficient reasonable measures aimed at the progressive realisation of the right in question, has prioritised the urgent needs of the most vulnerable and marginalised groups in society or whether the State has raised and proven the unavailability of resources to immediately realise the rights in question. If the State has already put in place sufficient measures aimed at realising the right or if it successfully shows that despite its prioritisation of the implementation of rights, the resources are inadequate to immediately realise the right in question, then the

¹⁷⁹ Woolman 1997 *SAJHR* 106-107.

¹⁸⁰ See De Vos 1997 *SAJHR* 93, who acknowledges the need for an expansion of the traditional two-stage limitations analysis for SERs that contain internal limitations.

limitations analysis stops there.¹⁸¹ However, for the immediate obligations that do not rely on the progressive realisation standard, such as the negative State duty to respect SERs¹⁸² and the requirement to realise the minimum essential levels of SERs for the vulnerable groups in society, as well as the unqualified SERs, the courts must proceed to the third stage of analysis and undertake an article 24 general limitations analysis, taking into account the factors enumerated therein.¹⁸³ By proceeding in this way the courts may ensure that the entrenchment of the SERs gives actual rise to the hope of enhancing the living standards of the Kenyan people – as key aspiration of the *Constitution*.

4 Conclusion

It is trite that human rights and fundamental freedoms are not absolute, and that they can be legitimately limited by the State in appropriate circumstances so as to achieve overall societal goals and aspirations. However, for limitations of rights to be legitimate they must meet the stringent requirements set out both under international law and national constitutional laws.¹⁸⁴ In Kenya, in the context of SER adjudication, the limitations are contained in internal limitation clauses and the general limitation clause in article 24.

This article set out to propose that Kenya adopts a proportionality approach in developing its limitation jurisprudence in the context of SER adjudication. The article

¹⁸¹ See Iles 2004 *SAJHR* 461-462 for a similar proposition.

¹⁸² See Woolman and Botha "Limitations" 35-36, where they argue, taking into account the holding of the SACC in the *Jaftha* case, as follows: "Where the State fails to honour its negative obligations under these rights...there is no reason for the court to filter its analysis of section 26(1) through section 26(2). Consequently, the question of the relationship between section 26(2) reasonableness and section 36 reasonableness does not arise, and the breach of section 26(1) may be justified under section 36." For commentaries concurring with this view, see De Vos 1997 *SAJHR* 93-94, who argues that the internal limitations "should therefore never be interpreted by the courts as an invitation to water down the negative obligations engendered by the rights"; Iles 2004 *SAJHR* 459-462; Pieterse 2003 *SALJ* 44-46.

¹⁸³ See Pieterse 2003 *SALJ* 46.

¹⁸⁴ See the 2010 Kenyan *Constitution* a 19(3)(c) which provides that the fundamental rights entrenched in the Bill of Rights "are subject only to the limitations contemplated in this Constitution". See also a 2(6) of the *Constitution*, which incorporates international law in ratified treaties into the Kenyan domestic system, and thus requires that a limitation of rights must also meet the standards set under international law.

found that two approaches can be used in the limitation of SERs, one being the use of internal limitation clauses based on the standard of progressive realisation to the maximum of available resources, and the other a proportionality approach based on a general limitation clause, which requires a stringent scrutiny of a State's justifications for the non-realisation of SERs. It was found that an analysis using the internal limitation has several weaknesses, such as the lack of elaboration of the content of SERs, the failure to sufficiently engage with the values and purposes underpinning the entrenchment of justiciable SERs in a constitution, and the conflation of the traditional two-stage constitutional analysis, with the result that claimants are overburdened in proving the unreasonableness of government measures for the realisation of SERs. Due to these and other challenges, the article argued for the adoption of the proportionality approach, an approach that has been adopted at both the international and regional levels in the adjudication of SERs, and which has been affirmed as a better approach in the achievement of the transformative potential of transformative constitutions.

The article further submits that should the Kenyan courts adopt the proportionality approach of limitations analysis, the traditional two-stage constitutional analysis method will have to be adjusted so as to introduce an intermediate stage where the effects of the internal limitation on the scope and extent of the State's obligation to realise the SER in question are analysed.

In conclusion, and in line with the arguments made in 1962 of former Chief Justice Earl Warren of the United States, the courts (also the Kenyan courts) must be vigilant in the protection of fundamental rights entrenched in the Bill of Rights for all persons at all times, and any legislative or executive action limiting the fundamental rights of any group of citizens must be given the strictest interpretation possible.¹⁸⁵

¹⁸⁵ Warren 1962 *USAFJAGB* 19.

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ILO Forced Labour Convention (1930) (No 29)

ILO Minimum Age Convention (1973) (No 138)

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List of abbreviations

AHRLJ	African Human Rights Law Journal
AHRS	African Human Rights System
Berkeley J Int'l L	Berkeley Journal of International Law
CEDAW	Convention on the Elimination of Discrimination against

	Women
CESCR	Committee on Economic, Social and Cultural Rights
CPRs	Civil and political rights
CRC	Convention on the Rights of the Child
ECOSOC	United National Economic and Social Council
FAO	Food and Agricultural Organisation of the United Nations
Hum Rts Q	Human Rights Quarterly
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ICCPR	International Covenant on Civil and Political Rights
ICHRP	International Council on Human Rights Policy
LDD	Law, Democracy and Development
LSKJ	The Law Society of Kenya Journal
PSILR	Penn State International Law Review
SACC	South African Constitutional Court
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SERs	Socio-economic rights
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
USAFJAGB	United States Air Force Judge Advocate General Bulletin

**LIMITATION OF SOCIO-ECONOMIC RIGHTS IN THE 2010 KENYAN
CONSTITUTION: A PROPOSAL FOR THE ADOPTION OF A
PROPORTIONALITY APPROACH IN THE JUDICIAL ADJUDICATION OF
SOCIO-ECONOMIC RIGHTS DISPUTES**

NW Orago*

SUMMARY

On 27 August 2010 Kenya adopted a transformative Constitution with the objective of fighting poverty and inequality as well as improving the standards of living of all people in Kenya. One of the mechanisms in the 2010 *Constitution* aimed at achieving this egalitarian transformation is the entrenchment of justiciable socio-economic rights (SERs), an integral part of the Bill of Rights. The entrenched SERs require the State to put in place a legislative, policy and programmatic framework to enhance the realisation of its constitutional obligations to respect, protect and fulfill these rights for all Kenyans. These SER obligations, just like any other fundamental human rights obligations, are, however, not absolute and are subject to legitimate limitation by the State. Two approaches have been used in international and comparative national law jurisprudence to limit SERs: the proportionality approach, using a general limitation clause that has found application in international and regional jurisprudence on the one hand; and the reasonableness approach, using internal limitations contained in the standard of progressive realisation, an approach that has found application in the SER jurisprudence of the South African Courts, on the other hand. This article proposes that if the entrenched SERs are to achieve their transformative objectives, Kenyan courts must adopt a proportionality approach in the judicial adjudication of SER disputes. This proposal is based on the reasoning that for the entrenched SERs to have a substantive positive impact on the lives of the Kenyan people, any measure by the government aimed at their limitation must be subjected to strict scrutiny by the courts, a form of scrutiny that can be achieved

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only by using the proportionality standard entrenched in the article 24 general limitation clause.

KEYWORDS: 2010 Kenyan Constitution; Kenya, Socio-economic rights; Limitation of rights; Internal limitations; Proportionality approach; Transformation.