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**SOCIOLOGICAL JURISPRUDENCE AS  
METHODOLOGY FOR REALISATION OF SOCIO-  
ECONOMIC RIGHTS UNDER THE CONSTITUTION  
OF KENYA**

**By**

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## INTRODUCTION

This article argues that the promulgation of the constitution of Kenya in 2010 has altered the *laissez fair* notion of law and state that has underpinned the state-citizen relationship for years. The new dispensation calls for a new paradigm in the nature and attitude of the state, from the negative minimalist view of the state to a positive view of the state which intervenes to bring about broader social restructuring, in accordance with principles of fairness, equality and social justice.<sup>1</sup>The Constitution has brought in a new perspective of law itself, law that seeks to establish justice – social, economic, cultural and political through an elaborate entrenchment of social, economic, cultural and political rights.<sup>2</sup>

The entrenchment of socio-economic rights 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.<sup>3</sup> Accordingly in order to achieve the ends of justice, the State has to evolve new social and economic policies. The Constitution further vests on the courts, powers to grant appropriate relief under Article 23 including declaration of rights, injunction, conservatory orders, a declaration of invalidity of any law that violates the Bill of Rights, compensation and orders of judicial review.<sup>4</sup> The aim of this paper is to propose a jurisprudential approach that may be adopted by the Kenyan courts in order to realise the wide range of socio-economic rights guaranteed under the constitution.

This paper begins by giving a background to the socio-economic provisions in the Constitution of Kenya 2010, juxtaposing it with the old constitution which did not provide for socio-economic rights. It captures the ‘historic’ and ‘revolutionary’ manner in which it has reconfigured the public sphere and laid much pre-eminence ‘on the Bill of Rights as one of the tools and vehicles through which society is to be transformed. The article then explores the history and essence of the sociological jurisprudence as a preferred theory for realisation of socio-economic rights envisaged in the constitution. It explains Historical perspectives of Sociological Jurisprudence, Development of sociological jurisprudence. Roscoe Pound on law as a tool of social engineering and Judicial decision-making: Cardozo’s sociological jurisprudence It then examines Kenyan Courts and sociological jurisprudence after 2010, Kenyan Courts and sociological jurisprudence after 2010. It then gives the Lessons learnt and makes some recommendations as to way forward for the Kenyan judiciary in deciding issues of socio-economic rights.

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<sup>1</sup>MO Miyawa ‘Judicial enforcement of socio-economic rights: A case for dialogic approach in crafting appropriate judicial remedies. LL.M thesis, University of Nairobi School of Law, 2014.

<sup>2</sup>Ibid

<sup>3</sup>R Langone The Science of Sociological Jurisprudence as a Methodology For Legal Analysis (2015) 773 *Touro Law Review* Vol. 17 No. 4.

<sup>4</sup>Lady Justice K Rawal The Immediate Realisation of Women and Children’s Rights: Lessons from the Kenyan Case of *C.K & 11 Others V Commissioner of Police/Inspector General of Police & 2 Others* Petition No. 8 of 2012

## BACKGROUND

In August 2010, Kenya adopted a new constitution which espouses a positive State duty to combat poverty and inequality as well as to promote social welfare, has adopted a substantive (redistributive) concept of equality, and has entrenched justiciable socio-economic rights (SERs).<sup>5</sup> Article 43 entrenches a majority of what is known in constitutional parlance as socioeconomic rights. In broad perspectives, entrenchment of such brand of rights in newly enacted constitutions such as Kenya's signifies a marked distinction from the eighteenth century constitutional design, for example, the American Constitution which has deep roots in classical liberal tradition predominantly fixated with conferring and regulation of public authority.<sup>6</sup> According to Orago, Kenya's Constitution is transformative 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.<sup>7</sup>

The Constitution has been lauded as 'progressive', 'historic' and 'revolutionary' for the manner in which it has reconfigured the public sphere and laid much pre-eminence 'on the Bill of Rights as one of the tools and vehicles through which society is to be transformed'.<sup>8</sup> The imprint of human rights is a predominant pillar etched throughout its legalistic text.<sup>9</sup> In the reconfiguration of public sphere, the 2010 Constitution is viewed on the one part, as an embodiment of a raft of constitutional mechanisms, methodologies and framework for a balanced and accountable creation, distribution, regulation and exercise of public power and on the other, its preoccupation with the individuals and communities<sup>10</sup> is seen in its unique formulation of the entrenched rights and freedoms.<sup>11</sup>

Today, a remarkable feature of international opinion is that socio-economic rights deserve constitutional protection.<sup>12</sup> This paradigm however, raises both theoretical and philosophical questions such as whether a democratic constitution should really protect the right to food, shelter, and medical care; whether 'socio-economic' rights belong in a Constitution; what these rights have to do with citizenship; whether they promote or undermine democratic deliberation and more importantly if such rights are created, what is the role of the courts.<sup>13</sup>

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<sup>5</sup>NW Orago, 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 (2010) PER vol. 16, n 5 Potchefstroom 2.

<sup>6</sup>Miyawa (n 1 above)

<sup>7</sup>Orago (n 3 above) 2.

<sup>8</sup> J Biegon and G Musila 'Introduction: Socio-economic Rights as One Promise of a New Constitutional Era' in J Biegon and G Musila (eds) *Judicial Enforcement of Socio-economic Rights Under the New Constitution: Challenges and Opportunities for Kenya* (2012) 3.

<sup>9</sup> JB Ojwang *Ascendant Judiciary in East Africa: Reconfiguring the Balance of Power in a Democratizing Constitutional Order* (2013) 36 Strathmore University Press, Nairobi.

<sup>10</sup>Article 19(2).

<sup>11</sup> It is provided in Article 21 that 'it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights'; and "the Bill of Rights applies to all law and binds all State organs and all persons'.

<sup>12</sup>Sunstein (n 3 above).

<sup>13</sup>Sunstein (n 3 above).

Given that some socio-economic claims such as the provision of affordable healthcare or construction of low-cost housing for the poor requires budgetary allocation, resource spending and execution of some form of programmatic actions by the government, the courts' determination of questions of non-conformity to human rights standards of such policies would imply that they would have to flex their authority in assessing executive and legislative decisions on resource distribution and policy choices (the polycentric nature of socio-economic claims).<sup>14</sup>

To realise the promise of an egalitarian society, however, Kenya needs to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political shall inform all institutions of national life. To achieve this, the analytical approach has to be abandoned in the interest of common goods because it is abstract, unnecessary, unreal and inconvenient to the emergence of new social order envisaged in the constitution. This calls for a new theoretical paradigm for reconciling conflicting social interests and values necessary for bringing peaceful social change through law.<sup>15</sup> Therein lies the allure of the sociological school jurisprudence which this article argues has relevance to the social and economic goals of the society.<sup>16</sup> Sociological jurisprudence does not inquire into what a legislator thought a century ago, but what she would have thought had she been aware of the present conditions.<sup>17</sup> In the context of constitutional law analysis, sociological jurisprudence requires an interpretivist jurisprudential philosophy. Contemporary community mores and values implies an "evolving standards of decency" philosophy. Accordingly, the meaning of the words in a Constitution must evolve as we evolve.<sup>18</sup>

Sociological thinking is a means-end analysis.<sup>19</sup> Sociological jurisprudence is a functionalist methodology in that it alters the emphasis 'from the content [conception] of the precept and the existence of the remedy to the effect [function] of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised'.<sup>20</sup>

Giddens also states that it is sociology which allows us to cast a critical focus on issues that may otherwise be interpreted simplistically or misinterpreted. Sometimes, its criticality makes it a 'discomforting' subject, as it 'challenges assumptions' and 'raises hackles that other academic subjects fail to reach'.<sup>21</sup> It can be clearly distinguished from other traditions of

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<sup>14</sup>Article 21 (n 10 above)

<sup>15</sup> Article 21 (n 10 above)

<sup>16</sup>Miyawa (n 24 above)

<sup>17</sup>Article 21 (n 10 above)

<sup>18</sup> Obviously, followers of the 'non-interpretivist' school of constitutional law, which presently dominates among Justices of the United States Supreme Court, strenuously disagree that the meaning of the words of the United States Constitution should evolve as we evolve. They also eschew interpretation of a statute beyond its "plain meaning." See Anthony Scalia, *A matter of interpretation: Federal Courts and the Law* (Princeton University Press 1997).

<sup>19</sup> 43

<sup>20</sup> BN Cardozo *The Nature of the Judicial Process* (1921) 69 Yale University Press.

<sup>21</sup> A Giddens *Modernity and self-identity* (1991) 7 Redwood City: Stamford University Press

legal research, such as the 'black letter' tradition. In sociological jurisprudence, Law is not merely a black letter. Rather, it is an instrument of social control. It originates and functions in a society and for society. The need for a new law, a change in existing law and the difficulties that surround its implementation cannot be studied in a better manner without the sociological enquiry.<sup>22</sup>

## Historical perspectives of Sociological Jurisprudence

Sociological jurisprudence is not, strictly speaking, a legal philosophy. Rather, it is a method which attempts to use the various social sciences to study the role of the law as a living force in society and seeks to control this force for the social betterment.<sup>23</sup> Law is an instrument of social control, backed by the authority of the state, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort. The sanction of law lies in social ends which law is designed to serve.<sup>24</sup> The sociological jurist has no preference for any particular type of precept but only for that which will do the most effective job. In philosophy he is generally a pragmatist. He is interested in the nature of law but only with reference to its use as a tool to serve society, and his examination into the law is always in connection with some specific problem of the everyday work of the legal order. Stated more succinctly:

The sociological jurists propose to study law in action on the basis of the hypothesis that the law in action bears some significant relationship to law in the books, and to proceed then to ascertain in what respects the hypothesis is or is not substantiated and requires qualification.<sup>25</sup>

Early in our Nation's history, law students (at that time, guilded into the profession) were taught that judicial decisions were derived from rules of law which were derived from first principles.<sup>26</sup> These 'natural law' theorists, such as Blackstone, as he described in his Commentaries, believed judges must look up and ponder the heavens to discover the first principles that would guide them to render just decisions.<sup>27</sup> This methodology, not surprisingly, was deeply grounded in Judaeo-Christian philosophy.

The natural law theory came into disfavour with the advent of the 18th century's 'scientific revolution' and the school of Legal Positivism became the vogue.<sup>28</sup> These empiricists

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<sup>22</sup> MO Miyawa 'Judicial enforcement of socio-economic rights: A case for dialogic approach in crafting appropriate judicial remedies. LL.M thesis, University of Nairobi School of Law, 2014.

<sup>23</sup> JA Gardner The Sociological Jurisprudence of Roscoe Pound (1961) 9 (Part I) 7 *Vill. Law Review* 1 Available at: <http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1>

<sup>24</sup> Gardner (n 37 above)

<sup>25</sup> Stone A critique of Pound's Theory of Justice (1935) 20 *Iowa Law Review* 531, 532-33.

<sup>26</sup> See HJ Berman & WR Greiner *The Nature and Function of the Law* (1980) 478 (4<sup>th</sup> ed.) The Foundation Press. In R Langone *The Science of Sociological Jurisprudence as a Methodology For Legal Analysis* (2015) 774 *Touro Law Review* Vol. 17 No. 4.

<sup>27</sup> See W Blackstone *Blackstone's Commentaries* (1803) George Tucker ed. in R Langone *The Science of Sociological Jurisprudence as a Methodology For Legal Analysis* (2015) 773 *Touro Law Review* Vol. 17 No. 4.

<sup>28</sup> Langone (n3 above)

rejected the notion that judicial decisions were components of immutable first principles. Influenced by the philosopher Thomas Hobbes' theory that men entered into a 'social contract' because life for man in a state of nature was 'short and brutish', the Positivists viewed all laws, whether legislative or judicial, as nothing more than commandments by the sovereign.<sup>29</sup> The threat of force by society is what compels conformance; that is the *sine qua non* of the law.<sup>30</sup>

This approach sneered at any value considerations in the law and its adjudication. The rejection of value consideration in judicial thinking resulted in decisions that sometimes lacked indicia of fairness. Judicial decisions were read by practitioners with an eye to simply plucking out useful phrases and arguing deductively from them. This led to criticism of Legal Positivism as slot machine justice, and "mechanical jurisprudence."<sup>31</sup> The school of Sociological Jurisprudence arose out of the disapproval of the "heartless" justice that was dispensed under the Legal Positivist regime.

## Development of sociological jurisprudence

Sociological jurisprudence expanded during the heyday of the American sociologist, Emile Durkheim, and the philosopher William James. Durkheim was a structural functionalist, who explored how social systems function. James explored how the attitudes of society affect our belief systems and shape our behaviour.<sup>32</sup> Thus, there are two aspects to sociological jurisprudence. One is the functional, Durkheimian perspective, which focuses on rule utilitarianism, in the Kantian sense. The other is the mores aspect, which focuses on value choices implicit in judicial decision-making. It is the latter aspect of this two-pronged methodology that Judge Cardozo alluded to in *The Nature of the Judicial Process*.<sup>33</sup> Durkheim's point of view was therefore certainly very liberating for a whole set of

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<sup>29</sup>Ibid).

<sup>30</sup> See J Austin *A Positivist Conception of Law*, in Feinbero& Gross 31-42; HLA. Hart *A More Positive Positivist Conception of Law*, in Feinbero& Gross 42-56. Holmes echoed this conception of law when he said, 'People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves and hence it becomes a business to find out when this danger is to be feared'. OW Holmes *The Path of the Law* (1897) quoted in Aldisert, supra note 2, at 27. He revealed the same positivistic sentiment during a response to a friend who told him to 'do justice'. Flabbergasted by the suggestion, Holmes responded that his job was not to do justice, but 'to play the game according to the rules'. Id. at 185. It seems, therefore, that the commentators who have characterized Justice Holmes as a sociologically oriented jurist, are wrong. In R Langone *The Science of Sociological Jurisprudence as a Methodology For Legal Analysis* (2015) 774 *Touro Law Review* Vol. 17 No. 4.

<sup>31</sup>Langone (n 3 above)

<sup>32</sup>Ibid)

<sup>33</sup> See HJ Paton *Categorical Imperative: A Study in Kant's Moral Philosophy* (1999) University of Pennsylvania. See also R Pound *An Introduction to the Philosophy of Law* (1999) 198-202 Transaction Publishers, originally published by Yale University Press in 1922.

theoreticians of normativity, who saw in it “the opportunity of freeing themselves from law in order to think about the social order.”<sup>34</sup>

The functionalist, or rule utilitarian aspect of sociological jurisprudence analyzes the social context in which lawsuits occur and how rules of law can affect social interaction. A decision is good to the extent that it educates its citizens as to appropriate social behavior and thereby helps people avoid social conflict in the future. In this sense, judges and lawyers act as social engineers by fashioning rules of conduct conducive to a more harmonious social existence. The social values aspect of the methodology focuses on identifying community values in judicial decisions.<sup>35</sup>

The great impetus to the movement in modern times was furnished by Rudolph von Jhering, who revolted against the jurisprudence of conceptions of the historical-metaphysical school.<sup>36</sup> Whereas juristic activity was cantered around speculation as to the nature of law, Jhering emphasised consideration of the function and end of law.<sup>37</sup> Jhering treats law in the broad context of society. The purpose of law is to secure the conditions of social life, and this determines the content of law. The conditions of social life include both physical existence and ideal values, but these are relative to the social order of the time and place.<sup>38</sup>

Rudolph Stammler began his critical philosophy with an attack upon economic and historic determinism.<sup>39</sup> He sought a systematic coordination of the various phenomena under a comprehensive principle, a formal method by which the changing content of empirical rules might be worked out. Stammler focused his attention on the relation of ethics to law rather than administration of justice by legal rules. Under his scheme, the jurist is confronted with a twofold problem: the existence of a rule of right and law; and the mode of effectively executing such a law. It is the duty of the state to study social phenomena and to use its findings for the attainment of just law.<sup>40</sup> He conceived of an ideal of social cooperation, whereby the individual is merged in the community.

Joseph Kohler's great postulate was that law is relative to the civilization of the time and place.<sup>41</sup> He denied any universal body of legal rules or institutions but insisted on the universal idea of civilisation. The mission of law is the advancement of civilisation through the forcible ordering of society. Law is relative to civilization. Changing with changed conditions, it is a means to and a product of civilization, which means the social development of human powers to their highest unfolding.<sup>42</sup> Kohler believed that the idea of civilisation

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<sup>34</sup> B Dupret, *Adjudication in Action*. First published in French as *Le Jugement en action*. *Ethnométhodologie du droit, de la morale et de la justice en Egypte*, by Librairie Droz, Geneva-Paris, 2006

<sup>35</sup> *Ibid*

<sup>36</sup> JA Gardner, *The Sociological Jurisprudence of Roscoe Pound* (1961) 7 (Part I) *Vill. Law Review* 1 Available at: <http://digitalcommons.law.villanova.edu/vlr/vol7/iss1/1> p 1

<sup>37</sup> Gardner (n 36 above) 2

<sup>38</sup> Gardner (n 36 above) 3

<sup>39</sup> Gardner (n 36 above) 3

<sup>40</sup> Gardner (n 36 above) 3

<sup>41</sup> Gardner (n 36 above) 3

<sup>42</sup> Gardner (n 36 above) 4

pervades an aggregate of individuals as a deterministically active force for its advancement. Thus the evolution of civilisation toward a higher state is inevitable. The two-fold purpose of law is to maintain the existing values of civilisation and to carry forward human development; therefore law must adapt itself to the tasks of the time and place to perform its proper function of furthering this ideal. But this can only be done by the formulation of the jural ideals of the time and place.<sup>43</sup>

### **Roscoe Pound on law as a tool of social engineering**

The most prominent of sociological legal jurisprudence is Roscoe Pound, former Dean of Harvard Law School. According to Pound, law is more than a body of rules. It is the knowledge and experience with which the juristic process is carried on. It not only includes rules, principles, concepts, and standards but also doctrines and modes of professional thought, skill, and art.<sup>44</sup>

The practical objectives of sociological jurisprudence have been formulated by Pound as follows: A study of the social effects of legal institutions, legal precepts and legal doctrines, of the law in action as distinct from the law in books; A sociological study as an essential preliminary step in lawmaking; A study to ascertain the means by which legal rules can be made more effective in the existing conditions of life, including the limits of effective legal action; An attempt to understand the actual growth of the law by a study of the judicial methods and modes of thought of the great judges and lawyers; A sociological legal history of the common law, for studying the past relations of law to then existing social institutions. Individualization of the application of legal rules so as to take account of the concrete circumstances of particular cases; The establishment of a 'Ministry of Justice' by the states to participate in this program.<sup>45</sup>

Pound has compared the sociological jurisprudence with other schools of legal thought and notes the following characteristics of adherents to the sociological school: they pursue a comparative study of legal phenomena as social phenomena and criticize these with respect to their relation to society. In particular they consider the working of the law rather than its abstract content; regard law as a social institution which may be improved by human effort and endeavor to discover and effect such improvement; lay stress upon the social ends of law rather than sanctions; urge that legal precepts be used as guides to socially desirable results rather than inflexible molds; and their philosophical views are diverse, usually positivist or some branch of the social-philosophical school.<sup>46</sup> Pound has frequently referred to law as 'experience developed by reason and reason tested by experience'.<sup>47</sup> Therefore, he goes to history and philosophy for much of the material which he studies in order to carry out the sociological program. In this field, Pound has made one of his major contributions to the law

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<sup>43</sup>Gardner (n 36 above) 4

<sup>44</sup>Gardner (n 36 above) 4

<sup>45</sup>Gardner (n 36 above) 4

<sup>46</sup>Gardner (n 36 above) 4

<sup>47</sup>Gardner (n 36 above) 4



as a means of social engineering: the classification of legal history into five stages and the discovery and specific formulation of the ends of law in each of these stages.<sup>48</sup>

Pound considers that today we are on the threshold of a new era in law and society. The boundless opportunities of past ages, which could be utilized in order to satisfy reasonable expectations, no longer exist.<sup>49</sup>

Security no longer means security of opportunity for free competitive acquisition. Men no longer claim only security of free opportunities for individual initiative. More and more they demand equality of satisfaction of wants and expectations which liberty itself cannot give them. They think of a full economic and social existence. ....

This complete change of conditions and the resulting change of attitude has put twentieth century law in a state of fluidity like that of third century Rome or seventeenth century Europe.<sup>50</sup> Therefore, a most important task lies ahead: to rationalise the judicial process as it exists today; to substitute a larger picture of the end of law; and to idealise more critically and along broader lines than in the past. This is the task of the jurist and teacher of law, to educate the judges to a new picture with the following content: a process of social engineering as a part of the whole process of social control; to set off the part of the legal order appropriate to government by principle from the part involving unique situations, requiring intuition and individualised application; to portray a balance between the needs of justice for the individual decision and generalized social claims; and to induce a consciousness of the role of ideal pictures of the social and legal order in both judicial decision and legislation.<sup>51</sup>

### **Judicial decision-making: Cardozo's sociological jurisprudence**

The dominant model of judicial decision-making is an outgrowth of rational choice theory: the judge is a rational actor who reasons logically from facts, previous decisions, statutes, and constitutions to reach a decision.<sup>52</sup> In this sense, the practicing lawyer, eager to know the grounds on which his cases will be decided so that he can argue them more effectively, and anxious lest sporadic judicial resort to amorphous social policies make the counselling of his clients more hazardous.<sup>53</sup> Legal doctrine and methodology have a great influence on the outcome of all court cases. The terms of constitutions and statutes, the dictates of case law

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<sup>48</sup>Gardner (n 36 above) 4

<sup>49</sup>R Pound Natural Law and Positive Natural Law (1952) 49 68 L.Q. Rzv. 330, 332. In Gardner (n 50 above) 14.

<sup>50</sup> Gardner (n 3 above) 16

<sup>51</sup>Gardner (n 36 above) 16

<sup>52</sup> RA Posner The Jurisprudence of Skepticism (1988) 86 *Michigan. Law Review* 827, 865; see D Simon A Third View of the Black Box: Cognitive Coherence in Legal Decision Making (2004) 71 *University of Chicago Law Review* 511, 512.

<sup>53</sup> R Pound The Spirit of the Common Law (1921) 170 In RA.

Daynard The Use of Social Policy in Judicial Decision-making 919 *Cornell Law Review* Vol. 56:919.

and the methodology for applying them in a lawsuit all limit the discretion of judges and direct the outcome of the case.<sup>54</sup>

As Roscoe Pound explained, the court would function as ‘a sort of judicial slot machine. The necessary machinery had been provided in advance by legislation or by received legal principles and one had but to put in the facts above and take out the decision below’.<sup>55</sup> Yet in many lawsuits, as argued by Pound, something else is crucial to the outcome. The unpredictability of the decision in some cases stems from the dynamic nature of the world. With new products, new processes, new financial instruments, new corporate forms, new modes of communications, and on and on, the legal system must continually adapt to new kinds of unanticipated disputes.<sup>56</sup> Sociological approaches to judicial decision-making introduce this argument\*\*\*

In his lectures on *The Nature of the Judicial Process*, Judge Cardozo identified and analysed the diverse elements that factor into judicial decisions, which includes history, logic, positivism, realism, and sociology.<sup>57</sup> He posited that sociology was the methodology of choice:<sup>58</sup>

From history and custom, we pass therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology.<sup>59</sup>

To begin, Cardozo rejected natural law theory, ‘The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.’<sup>60</sup> 28 Because a judge is called upon to choose from competing positions, she must think and act as a legislator: ‘[S]he ought to shape h[er] judgment of the law in obedience to the same aims which would be those of a legislator who was proposing to himself to regulate the question.’<sup>61</sup>

In this regard, Cardozo acknowledged a deep tension flowing from ‘a stream of tendency [in each of us], whether you choose to call it philosophy or not, which gives coherence and direction to thought and action.’<sup>62</sup> Therefore, a difficult job of the judge is to put aside his or

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<sup>54</sup> JNDrobak and DC North *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*. *Washington University Journal of Law & Policy* Volume 26 Law & The New Institutional Economics p 131.

<sup>55</sup> RA Daynard *The Use of Social Policy in Judicial Decision-making* 919 *Cornell Law Review* 56.

<sup>56</sup> *Understanding Judicial Decision-Making* 133 *Journal of Law & Policy* 26.

<sup>57</sup> Langone (n 3 above)

<sup>58</sup> Langone (n 3 above)

<sup>59</sup> Langone (n 3 above)

<sup>60</sup> Langone (n 3 above)

<sup>61</sup> Langone (n 3 above)

<sup>62</sup> Langone (n 3 above)

her own subjective feelings,<sup>63</sup> and rule according to ‘the opinions generally prevailing among the community regarding transactions like those in question’.<sup>64</sup>

The interpreter ... must above all things put aside his estimate of political and legislative values, and must endeavour to ascertain in a purely objective spirit what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him.<sup>65</sup>

An example of sociological jurisprudence is evidenced in *McPherson v. Buick*,<sup>66</sup> where Cardozo, writing for the New York Court of Appeals, held an automobile manufacturer liable for injuries resulting from a defective wheel.<sup>67</sup> When Cardozo wrote the decision in *McPherson*, automobiles were traveling farther and faster than ever before; automobiles had become the transportation of choice for most Americans; and injuries resulting from automobile accidents were dramatically rising. Cardozo later contrasted the legal method of analysis he employed with the method employed in the prior cases, as a ‘struggle’ between ‘utility’ and blind adherence to ‘logic’.<sup>68</sup>

Another good example of Cardozo's sociological jurisprudence at work is *Hynes v. New York Central Rail Co.*<sup>69</sup> That case involved an attractive nuisance, where a plank extended into the Harlem River on property owned by the railroad. The plank was used as a diving board by trespassing children. Electrical wires hung overhead that were attached to a wooden

## Kenyan Courts and sociological jurisprudence after 2010

Article 21 enjoins the state and its organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Article 21(3) specifically requires ‘all state organs and public officers to address the needs of vulnerable groups within society, including women and children. Consequently, women and children have been granted specifically proclaimed declared constitutional rights to enjoy equal protection before the law and be protected from all forms of human rights violations including sexual violence.’<sup>70</sup>

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<sup>63</sup>Langone (n 3 above)

<sup>64</sup>Langone (n 3 above)

<sup>65</sup>Langone (n 3 above)

<sup>66</sup> Plaintiff had purchased the vehicle from a retailer; as such, there was no privity of contract between plaintiff and the manufacturer.<sup>55</sup> Prior cases had created an arbitrary classification distinguishing items deemed ‘imminently dangerous’ from items deemed ‘inherently dangerous’ (i.e., items which could be made imminently dangerous by a negligent act).<sup>56</sup> For example, a loaded gun, mislabeled poison, defective hair wash, scaffolds, a defective coffee urn, and a defective aerated bottle were considered imminently dangerous; whereas a defective manufacture of a carriage, a bursting lamp, a balance wheel for a circular saw, and a boiler, were deemed inherently dangerous.

<sup>67</sup> Obviously, followers of the ‘noninterpretivist’ school of constitutional law, which presently dominates among Justices of the United States Supreme Court, strenuously disagree that the meaning of the words of the United States Constitution should evolve as we evolve. They also eschew interpretation of a statute beyond its ‘plain meaning’. See A Scalia A Matter of Interpretation

<sup>68</sup> B N Cardozo *The Growth of the Law* (1924) 77-80 Yale University Press.

<sup>69</sup>Langone (n 3 above)

<sup>70</sup>Rawal (n 5 above)

Consequently, the Constitution is a transformative document to the extent that it lays emphasises on the obligation of the state to actively intervene positively in furtherance of the rights and freedoms guaranteed to all its citizens.<sup>71</sup> This calls upon the judiciary under the constitution to be innovative and purposive when interpreting issues of human rights. The judiciary is a high-impact institution. When functioning properly it profoundly affects social well-being, facilitating economic development and shielding the individual from arbitrary State power. In countries transitioning from authoritarian rule to democracy, a judiciary empowered to vindicate the constitution is by consensus regarded as essential to democratic consolidation. Given the important role courts are believed to play, it is not surprising that sociologists and political scientists have in recent decades paid ever more attention to judicial affairs.<sup>72</sup> Jurisprudential questions such as to what extent, and in what contexts, judges utilise social science in reaching and bolstering their rulings do arise.<sup>73</sup>

Taking a leap from the analytical approach in judicial decision-making that has been the norm with Kenyan judges, it is no easy task. The nature and extent of the use of social policy in judicial decision-making is interesting from several perspectives. One is that of the practicing lawyer, eager to know the grounds on which his cases will be decided so that he can argue them more effectively, and anxious lest sporadic judicial resort to amorphous social policies make the counselling of his clients more hazardous.<sup>74</sup> A second perspective is that of the judge, wishing to decide cases 'according to law', but uncertain whether the spirit of 'sociological jurisprudence' defined social policies are part of the law that he must attempt to apply.

Still another perspective is that of the social critic who is concerned with the responsiveness of the judiciary to demands for change not yet embodied in legislation.<sup>75</sup> To some other scholars, judicial enforcement of rights are unwelcome and fraught with practical difficulties owing to 'democratic legitimacy' reservations and 'judicial competence' issues, all which reflect the doctrinal aspect of separation of powers.<sup>76</sup> In the context of socioeconomic claims enforcement, democratic legitimacy concerns ask how the judiciary, an unelected and unaccountable appendage of the government can alter formulated policy aims of popularly elected governments. Judicial competence concerns questions the practicability of courts as appropriate arena for ventilating and resolving grievances of victims of social welfare policy failings.<sup>77</sup>

These are all legitimate practical and philosophical questions, especially for a judiciary trying to move away from the analytical approach. However, the judiciary around the world has been at the forefront of safeguarding the rights and fundamental freedoms enshrined in the

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<sup>71</sup> See, G Musila *Testing the Standards of Compliance: A Modest Proposal on the Adjudication of Positive Socio-Economic Rights under the New Constitution*. (2011) 59.

<sup>72</sup> Musila (n 71 above).

<sup>73</sup> Musila (n 7 above).

<sup>74</sup> Daynard (n 55 above).

<sup>75</sup> Daynard (n 55 above).

<sup>76</sup> Daynard (n 55 above).

<sup>77</sup> Miyawa (n 1 above) 9.

Constitution.<sup>78</sup> But as demonstrated below, purposive courts around the world have been able to navigate the change.

As Liebenberg notes, the appropriate inter-relationship among the three arms of government in respect of implementation of socio-economic rights under the 2016 constitution has been described as a constitutional dialogue,<sup>79</sup> aimed at:

[P]rodding government to be more responsive to the needs of the poor in order to fulfil their constitutional rights and have access to economic and social resources and services. Taking this role seriously will require, in appropriate cases, decisions which have extensive policy and budgetary implications. However, in other cases, it may require judicial restraint and deference to the institutional strengths and skills of the other branches.

The Constitutional Court in South Africa has, in its decision-making adopted extra-judicial aspects of society to balance between the various competing interests in society, in line with Professor Roscoe Pound's sociological theory. This section juxtaposes the South African approach to Kenya's, noting the similarity in the constitutional guarantees of socio-economic rights. After the promulgation of the 2010 Constitution, emerging jurisprudence from the High Court shows the early steps the judiciary has made in grappling with these new rights.

While some notable cases have demonstrated the court's grasp of the transformative constitution that seeks to improve the human condition of Kenyans, others have remained trapped in the analytical approach, thus failing to see the clear interface between law and society. The majority of the decisions have dealt majorly with socio-economic rights with negative implications, whereby courts orders have been used to restrain continuous or intended breach of particular rights.<sup>80</sup> Some notable cases include *Mitu Bell*,<sup>81</sup> *Satrose Ayuma*<sup>82</sup> *Kenya Society for the Mentally Handicapped*<sup>83</sup> and *Moi Education Centre Co. Ltd.*<sup>84</sup>

*Mitu Bell Welfare Society v Attorney General & 2 others*,<sup>85</sup> is a trail-blazing case in which the High Court responded to the separation of powers question and complexity of dispensing distributive justice with an impressive sleight of hand. In what may be seen as a dialogic approach in crafting remedies for socio-economic rights breaches, the court was consciously aware of the tripartite scheme of governance in Kenya, and how best to craft an effective

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<sup>78</sup>Miyawa (n 1 above).

<sup>79</sup>Govindjee(n Govindjee, A'Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa: Walking the Tightrope between Activism and Deference?' (2013) 63 *National Law School of India Review*25(1) p 73.

<sup>80</sup>Miyawa(n 1 above) 9

<sup>81</sup>Nairobi Petition No. 164 of 2011 (Unreported)

<sup>82</sup>Miyawa(n 1 above) 9

<sup>83</sup>Kenya Society for the Mentally Handicapped v Attorney General and Others, Nairobi Petition No. 155A of 2011 (Unreported).

<sup>84</sup>Miyawa(n 1 above) 9

<sup>85</sup>Mitu-Bell Welfare Society v Attorney General & 2 others, Nairobi Petition No. 164 of 2011 (Unreported).

judicial remedy that safely navigates its fine power balance. In that case Justice MumbiNgugi analysed the case of the evicted squatters and found the government to be in breach of its obligation under article 21 and 43 of the Constitution.<sup>86</sup>

Instead of making the coercive declaratory orders that have been a commonplace tool in rights enforcement in Kenya, the judge was ingenious and opted for a dialogic approach. The judge did not make final orders but required the respondents, among them the Attorney General to report back to court, by way of affidavit, within sixty days, appraising the court of the existent government policies and programmes on housing and pertinent to slum dwellers and vulnerable groups.<sup>87</sup> The court also directed that civil society groups with expertise in housing and who were not party to the suit be incorporated, subject to consensus by the parties, and together with the claimant be furnished with the report on contemporary government programmes and policy on housing. Third, the court ordered the parties to negotiate amongst themselves in consultation with relevant state agencies on how to arrive at a compromise of redressing the petitioner's grievances of unlawful eviction. The fourth order of court required the parties to report back to court within ninety days from 11 April 2013 on the progress made towards resolving the petitioner's problems.<sup>88</sup>

Mitu Bell has appreciated the positive dimensions of article 43 claims which require that courts view these rights through the glass prism of distributive justice as opposed to corrective justice.<sup>89</sup> Few months later, the High Court in *Satrose Ayuma & Others versus The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others*<sup>90</sup> adopted the Mitu Bell's model of crafting remedies.

Moreover, the court's advice to the Attorney General to consider amendments to the Water Services Act, 2002 shows how courts provide additional fora for suggesting solutions to existing social policy deficiencies. The court reminds the government of its constitutional obligations, identifies flaws in legislation but leaves it open-ended for the government and parliament to enact such changes. By giving the government an opportunity to report back to court with existing or planned policy action and legal framework on evictions and accessible housing, the court is beginning a process of examination of the state's policies compliance with human rights obligations. The court leaves it to the government, to devise ways of providing social goods to the public. By such an approach the court appears to have been mindful of the demarcated boundaries for exercise of public power between the two arms of government. The reporting back mechanism means that the court's engagement with the parties is an iterative process in total disregard of *functus officio* doctrine by which judges are precluded from further engaging a matter once a judgment has been granted.<sup>91</sup>

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<sup>86</sup>Miyawa(n 1 above) 9

<sup>87</sup> MS Kende 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective' 137 *Chapman Law Review* 6.

<sup>88</sup>Kende (n 87 above)

<sup>89</sup>Kende (n 87 above)

<sup>90</sup>*Satrose Ayuma & Others v The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Others*

<sup>91</sup> Kende (n 87 above)

More cases have been decided by the courts since these two. In the case of Kenya Society for the Mentally Handicapped v Attorney General and Others,<sup>92</sup> the petitioner brought a case alleging that the economic and social rights of persons with mental disabilities had been violated. As the allegations were of general nature I stated as follows, [18]The court noted that:

...what the petitioner requires is for the Court to direct the State to take steps to adopt its proposals for reform and promotion of persons with disabilities. The Court's purpose is not to prescribe certain policies but to ensure that policies followed by the State meet constitutional standards and that the State meets its responsibilities to take measures to observe, respect, promote, protect and fulfil fundamental rights and freedoms and to a party who comes before the Court

In *Moi Education Centre Co. Ltd v William Musembi & 16 others*,<sup>93</sup> the judgment and decree of the High Court of Kenya (Mumbi Ngugi, J) delivered on 14<sup>th</sup> October 2014 by which she declared that: the demolition of the 1<sup>st</sup> to 14<sup>th</sup> respondents' houses and their forced eviction from the appellant's property without providing them and their children with alternative land or shelter is a violation of the fundamental right to inherent human dignity, security of the person, and to accessible and adequate housing; a violation of the fundamental rights of children guaranteed by Article 53 of the Constitution; and a violation of the rights of elderly persons guaranteed by Article 57 of the constitution.<sup>94</sup> The evictees averred that they peacefully coexisted with the appellant's school on the property until 10 May 2013 when

On appeal however, the Court of Appeal in its very analytical approach this made the following analysis: We begin with the question whether the amended petition adequately set out the evictees' grievances with reasonable degree of precision.<sup>95</sup> They were overly concerned that the 'Mutunga Rules' had not been followed, as under these rules, a petition should contain, among other things, the facts relied upon, the provisions violated, the nature of injury complained of and the reliefs sought.<sup>96</sup> They further found fault with the High court judgment because of what they considered to be based on a misapprehension of the impugned judgment. In their learned view, the mistake was that the evictees did not claim ownership of the property and therefore they had no valid claim against the absolute title of the respondent which in law is indefeasible. Without considering the human circumstances of the evictees and apportioning a duty on the state to fulfil its obligation as did the South African constitutional court in the *Grootboom* case, they dismissed their appeal, in a manner reminiscent of the analytical approach to decision-making of the old dispensation.

The Court of appeal still seems to be trapped in the positivist analytical box, where for example in the *Moi Educational centre* appeal, the appeal judges were immersed in how the

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<sup>92</sup> Kende (n 87 above)

<sup>93</sup> *Moi Education Centre Co. Ltd v William Musembi & 16 others* [2017] eKLR

<sup>94</sup> Kende (n 87 above)

<sup>95</sup> Kende (n 87 above)

<sup>96</sup> Kende (n 87 above)

pleadings had been done, about the pleadings not conforming to the ‘Mutunga’ rules, a concern that fits narrow analytical approach. They were held captive the capitalist reverence of the sanctity of title’ of the suit piece of land without problematising the status quo. This is contrary to Judge Cadozo’s call for approaches that honour ‘utility’ and avoidance of blind adherence to ‘logic’.<sup>97</sup> They abdicated their wider duty of placing obligation on the state that could pave way for possible renegotiation of the ‘status quo and its concepts such as the indefeasibility of the absolute title.

The highlighted case-law serve as a synopsis, dependably depicting the judiciary’s embryonic grapple with socio-economic rights contests in the period after promulgation of the new Constitution.<sup>98</sup> Economic and social rights approximate the basic goods and services necessary to secure a dignified existence. The terms themselves are indeterminate. However, they chart a path to protection that may diverge into a renegotiation of the legal rules of property. The indeterminacy of economic and social rights is not simply one of language; it belongs to law’s unpredictable relationship with experience.<sup>99</sup> Here lies the fundamental concern for the adjudication of economic and social rights. In enforcing the duty to respect, protect, or promote economic and social rights—indeed, in being a duty holder themselves—courts are called on to decide on the nature of such rights, their scope, and the obligations that flow from them. Facing the complexity of the myriad institutions that impact on the material terms of social life, they must discharge their role in enforcing the positive arrangements that determine who does what in order to secure economic and social rights.<sup>100</sup>

In this regard, some Kenyan courts, as in the Matu-Bell case<sup>101</sup> and in Savrose case<sup>102</sup> have discharged their adjudicatory mandate bearing in mind the purpose of law in the sociological sense as well as the interface between law and society. The high court cases show that they were aware of the enormous social problems that the poor in Kenya face and hence the balancing attitude towards their approach in adjudication.

## South African experience

The Constitution of the Republic of South Africa was introduced to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights. Boldly, it proclaims the desire to improve the quality of life of all citizens and the need to free the potential of each person living in the country.<sup>1</sup> The Bill of Rights represents the cornerstone of the South African constitutional project, enshrining the rights of

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<sup>97</sup>Cardozo (n 82 above).

<sup>98</sup>Miyawa(n 1 above) 17.

<sup>99</sup>KG Young ‘A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review’ (2010) 385-420 *International Journal of Constitutional Law* 8:3:1. Available at <https://doi.org/10.1093/icon/moq029>.

<sup>100</sup>Young (n 99 above).

<sup>101</sup>Young (n 99 above).

<sup>102</sup>Young (n 99 above).



all people and affirming the democratic values of human dignity, equality and freedom, upon which the country has been founded post-transition.<sup>103</sup>

Crucially, the drafters of the Constitution resisted the temptation to separate and distinguish between civil and political rights, on the one hand, and socio-economic rights, on the other. Recognising that these groups of rights are inherently linked and mutually supportive, the Constitution provides for an expansive range of socio-economic rights as part of the Bill of Rights.<sup>104</sup> This landmark inclusion of socio-economic rights as justiciable 'fundamental'<sup>105</sup> right was not without limitation. With a few notable exceptions, the State was only directed to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these socio-economic rights.<sup>106</sup>

The judicial authority of South Africa vests in the courts.<sup>107</sup> The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.<sup>108</sup> An order or decision issued by a court binds all persons to whom and organs of State to which it applies.<sup>109</sup> It is also well-known that the function to be performed by judges in South Africa includes an element of transformative adjudication,<sup>110</sup> requiring that those in judicial office must embrace the fundamental transition envisioned by the Constitution.<sup>111</sup>

The courts are, however, well aware that the duty to advance social justice rests mainly on the State, which carries the duty to protect socio-economic rights (and other matters) by regulating such rights through legislation and administrative conduct. In *Treatment Action Campaign*,<sup>112</sup> the Constitutional Court held, for example, that the government was better placed than the courts to formulate and implement policy on HIV but that it had failed to adopt a reasonable measure to achieve the progressive realisation of the right of access to health care services in accordance with section 27 of the Constitution.

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<sup>103</sup> Govindjee (n 79 above)

<sup>104</sup> Govindjee (n 79 above).

<sup>105</sup> Sections 25 and 26, Constitution.

<sup>106</sup> See for example, the so-called 'internal limitations' contained in sections 26(2) and 27(2), Constitution. In addition, the general limitations clause of the Constitution confirms that rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. Beyond such limitations, the legislature, executive, judiciary and all organs of State are bound by the Bill of Rights, which applies to all laws,<sup>11</sup> and the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

<sup>107</sup> Govindjee (n 96 above)

<sup>108</sup> Section 36, Constitution. See also, Section 7(3). Relevant factors listed in section 36 include the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the

<sup>109</sup> Govindjee (n 79 above)

<sup>110</sup> K Klare *Legal Culture and Transformative Constitutionalism* (19\*\*) 146 *South African Journal on Human Rights*.

<sup>111</sup> See for example, D Moseneke *The fourth Bram Fisher Memorial Lecture: Transformative adjudication* 18 *South African Journal on Human Rights* 309-3

<sup>112</sup> *Minister of Health v. Treatment Action Campaign*, 2002 10 BCLR 1033 (CC) Hereinafter, "TAC"

Professor Sandra Liebenberg has noted that the separation of powers doctrine is particularly liable to be invoked as a rigid device in socio-economic rights adjudication, allowing courts to avoid making decisions which are perceived to challenge the authority of the executive and legislative branches of government.<sup>113</sup>

This is particularly the case when the doctrine assumes an idealised form of separate terrains with strict demarcation between the roles of each branch instead of a functional and pragmatic device to facilitate responsive, accountable governance<sup>114</sup>.

In the few landmark socio-economic rights cases which have come before the Constitutional Court, the Court's decision-making has been the subject of intense scrutiny within the country and abroad. The Court's decisions in matters such as *Soobramoney*<sup>115</sup> *Grootboom*,<sup>116</sup> *TAC*<sup>117</sup><sup>118</sup> are by now well known. In *Grootboom*,<sup>119</sup> which involved the right to housing is one such case, the Court set out a novel and promising approach to judicial protection of socio-economic rights. This approach requires close attention to the human interests at stake, and sensible priority-setting, but without mandating protection for each person whose socio-economic needs are at risk.<sup>120</sup>

The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.<sup>121</sup> The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution. It suggests that such rights can serve, not to pre-empt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate. It also illuminates the idea, emphasised by the Court itself, that all rights, including the most conventional and uncontroversial, impose costs that must be borne by taxpayers.<sup>122</sup>

The Court acknowledged that there is a nexus between the government meeting socio-economic needs and people exercising their civil and political rights.<sup>123</sup> As South African scholar Pierre de Vos said, 'Starving people may find it difficult to exercise their freedom of speech ....'<sup>124</sup> *Grootboom* demonstrates that placing socio-economic rights in a Constitution

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<sup>113</sup>Govindjee (n 79 above)

<sup>114</sup> S Liebenberg 'Towards a Transformative Adjudication of Socio-Economic Rights' in Osode and Glover (eds.) 32.

<sup>115</sup> 1998 (1) SA 765 (

<sup>116</sup> 2001 (1) SA 46 (CC).

<sup>117</sup> 2002 (5) SA 721 (CC).

<sup>118</sup> 2004 (6) SA 505 (CC).

<sup>119</sup>2000 (11) BCLR 1169 (CC), available at 2000 SACLX LEXIS 126.

<sup>120</sup> Sunstein CR 'Social and Economic Rights? Lessons from South Africa' ( John M. Olin Program in Law and Economics Working Paper No. 124, 2001) p 1

<sup>121</sup>Sunstein (n 120 above)

<sup>122</sup>Sunstein (n 112 above)

<sup>123</sup>Sunstein (n 3 above)146

<sup>124</sup> P De Vos 'Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *South Africa Journal on Human Rights* 67, 71. In MS.

does not mean that every individual is entitled to assistance on demand. Instead, the Court analysed whether the overall government policy was reasonable. Cass Sunstein said, "[w]hat the South African Constitutional Court has basically done is to adopt an administrative law model of socioeconomic rights."<sup>125</sup>

The Constitutional Court concluded that all spheres of government were to cooperate and devise a coordinated public housing plan which properly took cognisance of the need to provide immediate relief and accommodation for persons in emergency situations. Access to immediate and temporary accommodation included the provision of water and other basic facilities. The State was ordered to revise its housing plan for the area concerned in order to ensure that the plan reasonably contemplated and provided for the various considerations raised.<sup>126</sup>

In *Soobramoney*, The Court held that the purpose of affording everyone the right not to be refused emergency medical treatment was to ensure that necessary and available treatment was provided immediately in order to avert harm. The type of long-lasting treatment sought by *Soobramoney* did not constitute an 'emergency in this context. The State had presented evidence demonstrating that additional funds and resources could not be allocated to the hospital.<sup>127</sup> Allowing the applicant and others in a similar condition to receive the dialysis treatment would collapse the already over-extended resources of the State and indeed the entire health care system itself. The difficult decisions regarding budgetary allocations were to be made by the State in a holistic fashion and the Court promised that it would be slow to interfere with rational decisions taken in good faith by authorities responsible for such matter.<sup>128</sup>

In the TAC case,<sup>129</sup> The High Court found that the government programme to combat HIV/AIDS fell short of the constitutionally mandated standard.<sup>130</sup> In a subsequent appeal, the Constitutional Court confirmed the High Court's finding: the government's policy relating to the limited use of Nevirapine at research and training sites constituted a breach of constitutional rights. Implicit in the Court's finding was that the waiting period before taking a decision to make the drug generally available was not reasonable within the meaning of section 27(2) of the Constitution. The Court also had to review the government's programme

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Kende 'The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective' (\*\*\*\*) 145 *Chapman Law Review* 6:137

<sup>125</sup> Govindjee (n 79 above) 70

<sup>126</sup> Govindjee (n 79 above) 70

<sup>127</sup> Govindjee (n 79 above) 70

<sup>128</sup> Govindjee (n 79 above) 70

<sup>129</sup> HIV/AIDS has been acknowledged to be a major challenge facing South African society and qualifies as a government priority. As a result, the government implemented a programme which consisted of establishing a series of testing and research centres. The Treatment Action Campaign (TAC) a non-government association, brought an application before the High Court to force the government to make the antiretroviral drug Nevirapine generally available (i.e. even outside testing and research centres) and to develop a coherent programme to deal with HIV/AIDS.

<sup>130</sup> The refusal to make Nevirapine generally available where attending doctors considered it medically indicated; and failure to set out a time frame for a national programme to prevent mother-to-child transmissions through the administration of Nevirapine.

to determine whether measures taken in respect of the prevention of mother-to-child HIV transmission were reasonable. Restricting the use of Nevirapine to research and training sites was held to be unreasonable because hospitals and clinics with testing and counselling facilities could easily be equipped to prescribe Nevirapine where this was medically necessary.

In *D. Khosa and Others v. Minister of Social Development and Others*<sup>131</sup> The applicants were destitute permanent residents (not citizens) of South Africa who would have qualified for social assistance (in terms of the Social Assistance Act 2004) but for the fact that this Act reserved social grants for 'citizens'. The main contention before the Constitutional Court was that the citizenship requirement in section 3 of the Social Assistance Act was inconsistent with section 27(1)(c) of the Constitution, in terms of which the State was obliged to provide access to social assistance to everyone.<sup>132</sup>

The Constitutional court held that the exclusion of permanent residents from the social assistance system was, therefore, held to be unfairly discriminatory and the applicants were considered to be part of a vulnerable group who were worthy of protection. Accordingly, the exclusion of permanent residents by section 3 of the Social Assistance Act was found to be inconsistent with section 27 of the Constitution. The Court's declaration of invalidity was coupled with reading in the words 'or permanent residents' into the relevant section so that permanent residents could apply for social assistance in future.<sup>133</sup>

## LESSONS LEARNT AND RECOMMENDATIONS

South African Constitutional Court which holds for other courts when called to respond to claims of economic and social rights has more substantively informed elements of transformation have been identified. The one unifying theme of transformation is that it problematises the status quo.<sup>134</sup> While being cognisant that making resource-management decisions difficult can threaten either a judicial usurpation of the representative branches or an abdication of the judicial role, courts should, however, acknowledge that they are adjudicating economic and social rights in their everyday application of private law. As claims Mark Tushnet, 'Every constitutional court...enforces some vision of social or economic rights'<sup>135</sup> when they negotiate the terms of property, contract, or tort law.<sup>136</sup>

For Kenyans to enjoy the benefit of the socio-economic, political and cultural rights guaranteed by the Constitution, the judiciary has to play the important role of interpreting them in a manner that gives meaning to those rights. This calls for a change in the

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<sup>131</sup> 2004 (6) SA 505 (CC)

<sup>132</sup> Govindjee (n 79 above) 73

<sup>133</sup> Govindjee (n 99 above) 73

<sup>134</sup> Young (n 99 above).

<sup>135</sup> Young (n 99 above)

<sup>136</sup> M Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in comparative constitutional law* (2008) 227.

adjudicatory approach, from the analytical to more flexible approaches that challenge the *status quo*. Sociological approach which recognises the interface between law and society, which navigates the challenges of different interests in society, is a useful tool. It has learned from the trail-blazing Constitutional court of South Africa.

Several lessons can be learnt from the Constitutional Court of South Africa. As Young suggests, the adjudication of economic and social rights by the South African Constitutional Court has taken place alongside a variety of styles of review. By this very variety, the South African jurisprudence on economic and social rights both extends and challenges the current prescriptions for courts in addressing these rights. While the overall posture of the Constitutional Court shows an affinity with a catalytic court, it engages in a range of individual and discrete forms of judicial review that are poised to facilitate the government's and the wider polity's efforts in realizing economic and social rights.<sup>137</sup> However, Kenya's judiciary faces the threat of pockets in decision-making which is still in bed with the analytical approaches and may lose the grasp of the necessary nexus between law and society in the realisation of the constitutionally entrenched socio-economic rights.

There is discordance in approaches to interpretation of the Bill of Rights by the courts. This is true especially between the more robust High Court which seems captures the spirit of the Constitution and is ready to engage extra-legal social aspects of society in decision-making and the conservative Court of Appeal still fascinated with analytical approach of yesteryears. It is recommended that the Kenyan judiciary develops a strong programme for all judges that will ensure that they are all at par in appreciating the transformative nature of the constitution and the requirement that the judiciary moves away from analytical approach to decision making and adopt social and constructive oriented approaches if the dream of realisation of socio-economic dream for the majority of Kenyans is a reality.

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<sup>137</sup>Young (n 99 above).

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