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Realising the right to development in Kenya under the 2010 Constitution through poverty alleviation, anti-corruption and public participation interventions

by

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Thesis submitted in fulfilment of the requirements for the degree

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in the School of Law, University of the Witwatersrand, Johannesburg, South Africa

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Declaration

I, Anthony Wambugu Munene, do hereby declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy (PhD) in the School of Law at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

_____ **5 December 2019**

Anthony W. Munene **Date**

Abstract

The political crisis that was precipitated by the 2007 General Election in Kenya revealed a country that had many unresolved governance problems, which revolved around economic and social inequality, poverty, corruption and marginalisation of certain areas and communities, and had affected the well-being of many Kenyans. The violence was halted following the adoption of the Kenya National Dialogue and Reconciliation (KNDR) accord that was premised on four agenda points: to end the violence; address the resultant humanitarian crisis; end the political crisis; and address long-term issues such as constitutional and legal reform.

The need for constitutional reform resulted in the promulgation of the Constitution of Kenya 2010 (Constitution), an instrument that is founded on a social transformation ideology of rights, welfare and empowerment of the people. It seeks to resolve the historical injustices that arose during previous constitutional orders. In a radical departure from its predecessors, the Constitution seeks to transform the governance structure to create a system of government that emphasises improvement in the well-being of Kenyans. For this purpose, it identifies several national values and principles of governance, among them being human dignity, non-discrimination and protection of the marginalised, integrity, transparency and accountability, participation of the people, and sustainable development. The Constitution therefore lays a basis for realisation of the right to development (RTD) in Kenya through alleviating poverty to give effect to human dignity and ensure non-discrimination and protection of the poor, combating corruption by setting standards of integrity, transparency and accountability in the public sector, and facilitating participation of the people in development to ensure its sustainability.

The RTD is an important right that espouses a concern for the protection, fulfilment and promotion of the holistic well-being of individuals and of "peoples" especially the marginalised and disadvantaged. Yet, it is also a controversial and misunderstood human right. The RTD has been misunderstood conceptually because of what its content and nature is, especially at the UN level where it was initially viewed as a claim by developing States against developed States. The political contestation on the RTD at the UN level led to controversy as to whether it is a human right. At the African regional level, the problem of defining its beneficiaries, among other challenges, creates difficulties for its realisation.

This study considers challenges to, and opportunities for, realising the RTD in Kenya. The study primarily answers the questions: (i) what is the status of the RTD in international law? (ii) is the RTD recognised in Kenyan law and policy? and (iii) can poverty alleviation, anti-corruption and public participation interventions facilitate realisation of the RTD in Kenya? In answering these questions, chapter 2 interrogates the status of the RTD in international law, chapter 3 determines if the right is recognised by Kenyan law and policy, and chapters 4, 5 and 6 examine poverty alleviation, anti-corruption and public participation interventions, respectively, as opportunities for realisation of the RTD in Kenya.

The study establishes that the RTD is a human right in international law. It finds that Kenya has assumed international obligations in relation to realisation of the RTD, and that the RTD is also recognised, with correlating obligations, in Kenyan law and policy through the Constitution and Kenya Vision 2030, respectively. By weaving through Kenya's international law obligations, its constitutional duties under the 2010 Constitution, as supported by legislation and case law, the study advocates for realisation of the RTD in Kenya through interventions that address Kenya's triple challenge of poverty, corruption and public participation in decision-making processes. The study therefore concludes that poverty and corruption are major obstacles for realisation of the RTD in Kenya and that public participation is of fundamental importance in realising it.

The study is significant and breaks new ground because it focuses on realisation of the RTD in Kenya under the new transformative Constitution, and with reference to the triple challenge of poverty, corruption and public participation. Also, the nature of the RTD that the study advocates is one that is sustainable, in line with the principle of sustainable development declared in the Constitution and contained in international standards that Kenya has committed itself to. Since the study's findings are based on a consideration of the general principles and law relating to the RTD as applicable to everyone, as opposed to a specific group, they are intended to provoke further research on specific aspects of the RTD in Kenya, particularly with respect to historically marginalised groups or specific groups of people such as women, children and persons with disabilities.

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Dedication

To my wonderful children:
Jeremy, Zindzi, Shaka and Sizwe

List of abbreviations

ACECA	Anti-Corruption and Economic Crimes Act
ACHPR	African Charter on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ACPU	Anti-Corruption Police Unit
AFFA	Agriculture, Fisheries and Food Authority
ASAL	Arid and Semi-Arid Land
AU	African Union
BEA	Basic Education Act
BoR	Bill of Rights
BWI	Bretton Woods Institution
CACS	Comprehensive Anti-Corruption Strategy
CESCR	Committee on Economic, Social and Cultural Rights
CEE	Centre for Environment Education
CGA	County Governments Act
CIPEV	Commission of Inquiry into the Post-Election Violence
CoE	Committee of Experts
CREC	Constitution and Reform Consortium
CSO	Civil Society Organisation
DPP	Director of Public Prosecutions
DRD	Declaration on the Right to Development
EACC	Ethics and Anti-Corruption Commission
ECDE	Early Childhood Development Education

EMIS	Education Management Information Systems
ERS	Economic Recovery Strategy
ESCAP	Economic and Social Commission for Asia and the Pacific
ESCWA	Economic and Social Commission for Western Asia
EWC	Endorois Welfare Council
FAO	Food and Agriculture Organization
FPE	Free Primary Education
GCB	Global Corruption Barometer
GDP	Gross Domestic Product
GER	Gross Enrolment Rate
HDI	Human Development Index
HIPC	Highly Indebted Poor Country
HIV	Human Immuno-deficiency Virus
HRC	Human Rights Council
HLTF	High Level Task Force
IBEA	Imperial British East Africa
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council of Human Rights Policy
ICJ	International Commission of Jurists
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IMF	International Monetary Fund

IPRSP	Interim Poverty Reduction Strategy Paper
IREC	Independent Review Commission
KACA	Kenya Anti-Corruption Authority
KACC	Kenya Anti-Corruption Commission
KESSP	Kenya Education Sector Support Programme
KHP	Kenya Health Policy
KHPF	Kenya Health Policy Framework
KHRC	Kenya Human Rights Commission
KIHBS	Kenya Integrated Household Budget Survey
KIPPRA	Kenya Institute of Public Policy Research and Analysis
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
LIA	Leadership and Integrity Act
MP	Member of Parliament
MTEF	Medium Term Expenditure Framework
MTP	Medium Term Plan
NAPEA	National Action Plan on Education for All
NARC	National Rainbow Coalition
NCOP	National Council of Provinces
NCPWD	National Council of Persons with Disabilities
NDP	National Development Plan
NEPAD	New Partnership for Africa's Development

NGCDFA	National Government Constituencies Development Fund Act
NHSSP	National Health Sector Strategic Plan
NLC	National Land Commission
NPEP	National Poverty Eradication Plan
OAU	Organisation of African Unity
OCHCR	Office of the High Commissioner for Human Rights
ODM	Orange Democratic Movement
OEWG	Open-Ended Working Group
PCA	Prevention of Corruption Act
PFMA	Public Finance Management Act
PHC	Primary Health Care
PNU	Party of National Unity
POEA	Public Officer Ethics Act
PPB	Public Participation Bill
PRSP	Poverty Reduction Strategy Paper
PSC	Public Service Commission
PWDs	Persons with Disabilities
RTD	Right to Development
SAPS	South African Police Service
SFSO	Swiss Federal Statistical Office
SID	Society for International Development
SSBF	Secondary School Bursary Fund
STI	Science, Technology and Innovation

TI	Transparency International
TJRC	Truth, Justice and Reconciliation Commission
UACA	Urban Areas and Cities Act
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNECA	United Nations Economic Commission for Africa
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations International Children's Emergency Fund
USAID	United States Agency for International Development
VDS	Vision Delivery Secretariat
WECD	World Commission on Environment and Development
WEF	Women Enterprise Fund
WHO	World Health Organization
WPA	Witness Protection Act
WWF	World Wildlife Fund
YEDF	Youth Enterprise Development Fund

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Chapter 1: Introduction

1.1 Background

For a long time, Kenya has been viewed worldwide as an institutionally strong and democratic country. However, the events that followed the elections of December 2007 impacted that view negatively and severely shook its developmental paradigm in a way not witnessed since it gained independence from Britain in 1963. The reality is that the country faces a wide range of challenges relating to development. Many of these challenges are as old as the Kenyan State but surfaced in a violent and frightening manner after the December 2007 General Election.[1] Behind the crisis that followed the 2007 General Election were tensions that encompassed a wide range of unresolved issues. Some of the unresolved issues have their genesis in the colonial State and spilled over into the independent State.[2] These issues include economic and social disparities, widespread poverty and corruption.[3]

As Hornsby observes:

> Kenya's history has not been one of war, military rule, mass murder or state collapse; neither has it been one of improving living standards, industrialisation, growing national pride and the establishment of a key role in the world economy. It has been rather a story of endurance: of political and economic structures inherited from colonial days, of unfulfilled promise and weighty historical baggage. It is a story that blends both politics and economics, a struggle to create and consume resources that involved

[1]On 27 December 2007, Kenya went into a General Election that saw the most hotly contested presidential election since independence. As late as October 2007, opinion polls had given Raila Odinga of the Orange Democratic Movement (ODM) 50 per cent of the vote and the incumbent Mwai Kibaki of the Party of National Unity (PNU) 15 per cent. The electioneering period had sharply divided the country along ethnic lines with most groups supporting ODM and the PNU mainly drawing its support from Central Kenya, Eastern Kenya and Nairobi. On 28 December 2007, the vote count showed Odinga to be leading with about a million votes but as the day progressed, in the early afternoon, the gap had narrowed to about 100,000 votes. Claims of vote rigging began at this point and by 30 December when Kibaki was declared winner by the Electoral Commission, violence erupted. While on the surface of it the violence would appear to have been about vote rigging, it emerged that among the young urban supporters of Odinga in Nairobi and Kisumu, the real cause was frustration of youth unemployment while in the Rift Valley, it was about resentment of the Kikuyu over land acquired upon independence from departing settlers. By the time a truce was brokered in February 2008, over 1,000 people had lost their lives. For a detailed historical account of these issues, see Charles Hornsby, *Kenya: A history since independence* (2013) 751-766.

[2]Morris Mbondenyi, "The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples Rights in the light of Kenya's 2007 political crisis" (2009) 9 *African Human Rights Law Journal* 183, 192.

[3]As above.

> Western powers and Kenyans in a complex web of relationships; a tale of growth stunted by political considerations, of corruption and of money.[4]

In pre-colonial Kenya, communities that occupied the territory formed themselves around ways of life and occupation that were unique to them linguistically and culturally. In many instances, their way of life and occupation was determined by the geographical area that they occupied.[5] As a consequence, communities such as the Kikuyu and Miji-Kenda who lived in arable areas developed agricultural economies; the Maasai and Samburu who occupied arid plains practised pastoralist forms of production; the Luo and Kisii who were found around the lake region adapted to a mixture of crop cultivation and livestock rearing; and the Ogiek who inhabited forestland thrived on hunting and gathering.[6] The common trend across the ecological divides was that production was primarily for communal subsistence rather than for individual benefit.[7] This pattern of living and working was replicated amongst all ethnic communities. The kinship system of community formed the basis of ownership of factors of production which included land and labour. Labour was largely cooperative within the family and larger community. There were little, if any, differences in the possession of wealth within these communities. Wealth in all its forms was a shared resource. The ideal of achieving and sustaining the common good ensured that individuals in ethnic communities did not slip into abject poverty.[8]

After 1963, when Kenya became independent from British colonial rule, that unity of purpose changed and the ideology of developmentalism became the theme of governance. Developmentalism implies achieving and sustaining economic growth before any deliberate attempt is made by the State to introduce and entrench a democratic culture for the governance of its subjects.[9] It is informed by the tension between economic growth and social justice and is justified on economic definitions of development. The economic definitions of development have found expression in the national development plans of successive governments in Kenya. This exclusively economic approach to development puts emphasis on growth of Gross Domestic Product (GDP) and ignores the social, cultural and political aspects of development and its fundamental principle of human dignity.

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[4]Hornsby (note 1 above) 1.
[5]Abdul Sheriff, "Social formations in pre-colonial Kenya" in Bethuel Ogot (ed), *Hadith 8: Kenya in the 19th century* (1985) 15.
[6]As above.
[7]As above.
[8]As above.
[9]Erik Reinert, *Developmentalism* (2010) 5.

At independence therefore, public policy priorities for development were aimed at facilitating expansion of the national economy.[10] At that time, Kenya pursued a development model that was guided by the philosophy of African socialism as expounded in the government's national development plan.[11] The main objective of the philosophy of African socialism was the achievement of freedom from want, disease and ignorance so as to achieve social justice, human dignity and economic well-being of the people of Kenya.[12] To secure this ideology, the power to control the use of resources for development was vested in the State.[13] The assumption was that the State was best placed to guarantee the effective use of both public and private resources in the development agenda of the country. The policy framework expressed the government's desire for rapid growth of the economy.[14] Access to education and health services, freedom and political participation, equality and non-discrimination were structured from an economic growth perspective.[15] Programmes of action aimed at poverty reduction, participation of the people in governance and sustainable development were by-products of the broader policy guidelines that targeted economic growth as an end of, and not as a means to, development.[16] The need for reconstructing the State for development through constitutional change then became necessary over time.

The human rights concern of the Kenyan State prior to 2010 was largely about civil and political rights at the expense of economic, social and cultural rights. While civil and political rights were expressly provided for in the constitutional order, economic, social and cultural rights were not protected and were not recognised even as derivative principles of State policy. The concept of civil and political rights to the political class became the acquisition, accumulation and retention of wealth and power through economic growth of the State.[17]

A struggle for a new constitutional order to replace the independence one (as variously amended since 1964) began in 1990 and culminated in the adoption of a new constitution on

[10]Allan McChesney, "The promotion of economic and political rights: Two African examples" (1980) 24 *Journal of African Law* 163, 170.
[11]Republic of Kenya, *African Socialism and its application to planning in Kenya: Sessional Paper No. 10 of 1965* (1965).
[12]As above, para 2.
[13]As above, para 31.
[14]As above, para 53.
[15]As above.
[16]McChesney (note 10 above) 170.
[17]Rhoda Howard, "Law and economic rights in Commonwealth Africa" (1985) 15 *California Western International Law Journal* 611.

27 August 2010. This constitution, the Constitution of Kenya 2010 (Constitution) creates opportunities for dealing with the problems of the post-independence constitutional order from a 'right to development (RTD) perspective. The Constitution, for the first time in the history of Kenya, recognises the need to nurture and protect the well-being of the individual, families, communities and the country.[18] Although the RTD is not explicitly recognised in it, the Constitution lays a basis for its realisation by stating national values and principles of governance that are to guide the conduct of public affairs.[19] These national values and principles which bind all State organs, State officers and public officers include sustainable development.[20] There are other national values and principles of governance in the Constitution that support realisation of the RTD in Kenya, namely participation of the people,[21] human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised,[22] integrity, transparency and accountability.[23] These values and principles of governance address issues that are the subject of chapters 4, 5 and 6 of this thesis.

Against the above background, this study interrogates the status of the RTD in international law, determines whether the RTD is recognised by Kenyan law and policy, and explores ways in which poverty alleviation, anti-corruption and public participation interventions can facilitate realisation of the RTD in Kenya. The choice of these three thematic areas is deliberate: poverty is the greatest obstacle to realisation of the RTD not only worldwide but also in Kenya; corruption has been a major obstacle to poverty reduction in Kenya since colossal sums of funds meant for the public good end up in the hands of a few people for their personal gain; and public participation is an important aspect of the RTD because meaningful participation by the beneficiaries of the RTD in the development process lies at the core of realising it.

The study adopts the view that realisation of the RTD in Kenya must be rooted in freedom from poverty and corruption, and entrenchment of public participation in the development process. This study is not a panacea to the problem of non-realisation of the RTD in Kenya but is intended to serve as a building block for future scholarly debate on the subject. The significance of this study is that it focuses on realisation of the RTD under the 2010 Constitution (a ground-

[18]Constitution of Kenya 2010, preamble para 5.
[19]As above, article 10.
[20]As above, article 10(2)(d).
[21]As above, article 10(2)(a).
[22]As above, article 10(2)(b).
[23]As above, article 10(2)(c).

breaking transformative Constitution) against Kenya's international law and constitutional obligations in that regard. Through its findings that are based on the principles and law relating to the RTD generally, the study advocates for realisation of the RTD through poverty alleviation, anti-corruption and public participation interventions. It is therefore hoped that the findings of the study will provoke further research on specific aspects of the RTD in Kenya particularly with respect to historically marginalised or specific groups of people.

1.2 Understanding development

The definition of development has been in a state of flux for a long time now. Definitions of development have shifted over time.[24] To some, it has been equated with economic growth and therefore synonymous with free markets.[25] Development seen this way is not necessarily what people want but rather that which is imposed by economic powers that dominate the market. On the other hand, others argue that development means progress beyond mere economic growth.[26] Development is difficult to define with precision due to its broad scope and therefore remains subject to controversy. Whereas the various definitions raise important debateable issues, this study focuses on the definitions of development that espouse an idea of the RTD.

Browning captures the definitional dilemma by acknowledging that the scope of development is broad and therefore it is not possible to define it with precision.[27] As such development will mean different things to different people across different geographical divides and periods of time. From a social origin perspective, a person from the developed world may view development as a phenomenon that distinguishes the developed world from developing nations.[28] From a development aid perspective, it may be seen as a humanitarian act by the developed world to assist developing countries implement their development programmes.[29] Development practitioners usually take the view that development is the use of social, economic and legal mechanisms so as to improve to bring about improved standards of living.[30] As a branch of knowledge, development has evolved to cover broad areas such as "human

[24]Koen de Feyter, *World development law: Sharing responsibility for development* (2001) 2.
[25]As above.
[26]As above.
[27]Rebecca Browning, "The right to development in Africa: an emerging jurisprudence?" (2011) <www.kenyalaw.org/kl/index.php?id=1990> (accessed 12 August 2015).
[28]As above, 2.
[29]As above.
[30]As above.

rights, infrastructure and planning, economics, political governance, health, a sustainable exploitation of the natural environment and international aid".[31] Browning's approach to understanding development demonstrates that it is difficult to define development with precision due to its complex and multi-dimensional nature.

The World Bank has taken the view that development encompasses the entire spectrum of change in any social system. The World Bank's approach affirms Browning's view that development is complex and multi-dimensional in the following terms:

> The challenge of development, in the broadest sense, is to improve the quality of life. Especially in the world's poor countries, a better quality of life generally calls for higher incomes but it involves much more. It encompasses, as ends in themselves, better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a richer cultural life.[32]

Whereas Sen also acknowledges the multi-dimensional nature of development, he takes a broader approach by arguing that development is about the freedoms that people enjoy in life. Sen argues that development is:

> … a process of expanding the real freedoms that people enjoy. Focusing on human freedoms contrasts with narrower views of development, such as identifying development with the growth of gross national product [GNP], or with the rise in personal incomes, or with industrialization, or with technological advance, or with social modernization. Growth of GNP or of individual incomes can, of course, be very important as *means* to expanding the freedoms enjoyed by the members of the society. But freedoms depend also on other determinants, such as social and economic arrangements (for example, facilities for education and healthcare) as well as political and civil rights (for example, the liberty to participate in public discussion and scrutiny). Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important rather than merely to some of the means that, inter alia, play a prominent part in the process.[33]

Sen approaches the complex and multi-dimensional objectives of development from the perspective of "functionings" and "capabilities". He argues that people develop if they have capability to function.[34] Sen's concept of functionings focuses on those things that a person

[31]As above.
[32]World Bank, *World Development Report: The challenge of development* (1991) 4.
[33]Amartya Sen, *Development as freedom* (1999) 3.
[34]As above, 75.

values doing and they vary from simple things like proper nutrition to complex ones like having self-respect and being involved in the affairs of his community.[35] Capabilities on the other hand refer to the freedom that a person has in terms of his choices in life, taking into account his personal characteristics and his command over available goods and services.[36]

Sen views development as a process of expanding the real freedoms that people enjoy. To him, the expansion of freedom is both constitutive (a primary end) and instrumental (a principal means) to development.[37] The constitutive role of freedom relates to the importance of enriching human life such as freedom from hunger, freedom from poverty as well as access to education and political participation. Development entails the expansion of these freedoms.[38] The instrumental role of freedom concerns the way different opportunities and entitlements contribute to the expansion of human freedom in general and thereby promote development.[39]

Sen's approach to development is a human rights-based one which sees good governance, participation and accountability within States as being about people and human dignity. As such, human development as an objective cannot be achieved without promoting basic human rights and addressing its human rights dimensions of good governance, participation and accountability.[40] Development is therefore both a physical reality and a state of the mind. The two aspects of development have in them combinations of social and economic processes which have the objectives of increasing the availability of life-sustaining goods and widening the distribution of those life-sustaining goods, raising the levels of living and expanding the range of economic and social choices available.[41]

Although the United Nations (UN) Charter[42] fails to define development, it refers in article 55 to development when spelling out its objectives for international social and economic cooperation. Article 55(a) provides that the UN shall promote "higher standards of living, full employment and conditions of economic and social progress and development". Article 56 of the Charter then places an obligation on UN member States to take "joint and separate action"

[35]As above.
[36]Amartya Sen, *Commodities and capabilities* (1985) 10-11.
[37]Sen (note 29 above) 80.
[38]As above.
[39]As above.
[40]Philip Alston & Ryan Goodman, *International human rights* (2012) 1517.
[41]Michael Todaro, *Economic development* (2003) 22-23.
[42]Adopted 24 December 1945, 1 UNTS XVI (1945).

to achieve the objectives set out in article 55. As a consequence, specialised agencies have been created in the UN system to deal with various issues such as health,[43] education,[44] agriculture[45] and the environment[46]. A common approach to development in the UN system led to the need for a coordination focal point. This in turn led to the creation of the United Nations Development Programme (UNDP) on 1 January 1966. The UNDP has developed a conceptual definition of development through its *human development report series* first published in 1990.

The human development concept developed by the UNDP was a reaction to the continued equation of development to economic growth only.[47] The UNDP human development reports define development as a process of enlarging people's choices. The reports recognise income as one, but not the only aspect of well-being.[48] As a process of enlarging people's choices, the human development paradigm has four main components. These are:[49]

i. *Productivity*: People must be enabled to increase their productivity and to participate fully in the process of income generation and remunerative employment. Economic growth is, therefore, a subset of human development models.

ii. *Equity*: People must have access to equal opportunities. All barriers to economic and political opportunities must be eliminated so that people can participate in, and benefit from, these opportunities.

iii. *Sustainability*: Access to opportunities must be ensured not only for the present generations but for future generations as well. All forms of capital – physical, human, environmental should be replenished.

iv. *Empowerment*: Development must be *by* the people, not only *for* them. People must participate fully in the decisions and processes that shape their lives.

[43]The World Health Organisation (WHO), which was founded on 7 April 1948 as a specialised agency of the UN serving as the directing and coordinating authority for international public health matters. See <www.who.int> (accessed 23 April 2014).
[44]The United Nations Educational, Scientific and Cultural Organisation (UNESCO), which was founded on 4 November 1946 as the UN agency responsible for promoting peace, social justice, human rights and international security through international cooperation on educational, scientific and cultural programmes. See <www.unesco.org> (accessed 23 April 2014).
[45]The Food and Agriculture Organisation (FAO), which was established on 16 October 1945 with a view to helping eliminate hunger, food insecurity and malnutrition, and reducing rural poverty. See <www.fao.org> (accessed 23 April 2014.
[46]The United Nations Environment Programme (UNEP), which was established on 15 December 1972 to act as a catalyst, advocate, educator and facilitator in the promotion of wise use and sustainable development of the global environment. See <www.unep.org> (accessed 23 April 2014).
[47]De Feyter (note 24 above) 4.
[48]As above.
[49]United Nations Development Programme, *Human development report 1995* (1995) 12.

The UNDP human development reports became a major reference point for the UN as it developed its *Agendas* for development in 1994 and 1997. In 1992, the UN General Assembly requested the UN Secretary-General to prepare an agenda for development.[50] This was to be a working counterpart to the UN agenda for peace released in the same year. The Secretary-General presented his Agenda in 1994, which was adopted by the General Assembly.[51] Thereafter, the General Assembly tasked an open-ended *ad hoc* Working Group that it set up, to discuss the text further. The Working Group's report was adopted by consensus in 1997.[52] This report did not fundamentally change the Secretary-General's. It only added a wish list for all interested parties: a traditional diplomatic method of achieving consensus.[53]

The 1994 Agenda confirmed that each State bears the primary responsibility for its development. The Secretary-General's report is categorical that although each State bears the primary responsibility for the development of its people, it is not the only actor in the development process. The State must therefore make strategic decisions for development through provision of competent leadership, formulation of effective national policy and involving relevant stakeholders in decision-making.[54] It must have the political will to act.[55] Capacities for designing, implementing and enforcing policy must be strengthened as well as adequate weight given to government's responsibility for development through political processes. As de Feyter observes, good governance is the single most important development variable within the control of individual States.[56]

The concept of development adopted in this study, is the one endorsed by the UN through the Declaration on the Right to Development (DRD).[57] The preamble to the DRD defines development as:

> a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active,

[50]UN General Assembly resolution 47/181, "An agenda for development" UN Doc. A/RES/47/181(1992).
[51]United Nations, Report of the UN Secretary General, "An agenda for development" UN Doc. A/48/935 (1994).
[52]UN General Assembly resolution 51/240, "Agenda for development" UN Doc. A/51/45 (1997).
[53]De Feyter (note 24 above) 6.
[54]United Nations (note 47 above) para 139.
[55]De Feyter (note 24 above) 7.
[56]As above.
[57]UN General Assembly resolution 41/128 "United Nations Declaration on the Right to Development" UN Doc.A/RES/41/128 (1986).

> free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

The DRD definition of development is adopted in this study because it captures development as being an all-encompassing process which cuts across all spheres of human life and incorporates human rights principles found in the definitions discussed above. Those human rights dimensions have a common factor: the well-being of the human person. The DRD definition also captures the essence of development as being the ability and freedom of people to meaningfully participate in the development process and fairly enjoy the benefits that accrue from it.

In line with article 10(2)(d) of the Constitution of Kenya 2010, this study also advocates for development that is sustainable. Sustainable development was first defined by the UN World Commission on Environment and Development (WCED) as being "development that meets the needs of the present without compromising the ability of future generations to meet their needs".[58] Sustainable development entails ensuring that the basic needs of all are met and that people are availed opportunities through which they can fulfil their aspirations for a better life.[59] The WCED definition is based on the realisation that sustainable development is not a fixed principle but is rather a process of change in which the exploitation of resources and institutional changes in governance must be consistent with the needs of the present generation as well as future ones. This means that realising sustainable development is dependent on political goodwill.[60]

The broad WCED definition of sustainable development opened up space for various definitions which have some sense of precision relevant to the time at which they were advanced, and which infuse human rights language into the sustainable development discourse. For example, the Swiss Monitoring of Sustainable Development Project identifies the human rights dimension of sustainable development as follows:

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[58]United Nations, "Our Common Future: Report of the World Commission on Environment and Development" UN Doc. A/42/427 (1987), para 27. The WCED was established by the UN in December 1983 to bring member States together to pursue sustainable development as a result of the UN General Assembly's concern about the heavy depletion of the world's environment and natural resources. See, UN General Assembly resolution 38/161, "Process of preparation of the environmental perspective to the year 2000 and beyond" UN Doc. A/RES/38/161 (1983).
[59]As above.
[60]As above, para 30.

> Sustainable development means ensuring dignified living conditions with regard to human rights by creating and maintaining the widest possible range of options for freely defining life plans. The principle of fairness among and between present and future generations should be taken into account in the use of environmental, economic and social resources.[61]

The Centre for Environment Education (CEE) defines sustainable development as "economic growth with protection of the environmental quality each reinforcing the other".[62] According to the CEE, sustainable development is aimed at improving human life and well-being with a view to preserving natural resources for future generations.[63] As such, sustainable development revolves around the improvement of the environment, economy and society.[64]

1.3 Problem statement

This study investigates the challenges of poverty, corruption and public participation that Kenya faces in realising the RTD as identified in section 1.1 above (section 1.1 provides a contextual background against which the problem statement in this section must be understood). At independence, the primary development agenda of the State was to ensure that the people of Kenya were free from the shackles of want, ignorance and disease.[65] The three social problems are core to the well-being of Kenyans and relate closely to the RTD. Whereas some strides have been made in tackling the problem of poverty through healthcare and educational programmes, the problem of corruption has rolled back the gains made on poverty alleviation. Additionally, the Constitution has declared public participation, which is a core principle in realisation of the RTD, to be a national value and principle of governance in the new constitutional order. Whereas the Constitution provides for public participation in governance issues, a legislative framework for its implementation has not been put in place.

Two cases have questioned Kenya's commitment to realisation the RTD for its peoples. Both cases were brought on behalf of minority indigenous peoples. The first case, *Centre for Minority Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (*Endorois* case),[66] was heard and determined by the African

[61]David Altwegg et al (eds), *Monitoring sustainable development* (2004) 12
[62]Centre for Environment Education, "Sustainable development: An introduction (2007) 1 *Internship Series* 9.
[63]As above.
[64]As above.
[65]Republic of Kenya (note 11 above) para 2.
[66](2009) AHRLR 75 (2009 ACHPR). This case is discussed later in this chapter.

Commission on Human and Peoples' Rights (African Commission) and the Kenyan government was found to have violated the right of the Endorois people to development. The African Commission was of the view that the Kenyan government violated the RTD of the Endorois people when it created a game reserve within their ancestral land without involving them in the development process that the land was alienated for.[67] The Commission further observed that for a State to implement the RTD it must fulfil five main criteria: that the RTD must be "equitable, non-discriminatory, participatory, accountable and transparent".[68]

The second case, *African Commission on Human and Peoples' Rights v Kenya* (*Ogiek* case),[69] was heard and determined by the African Court on Human and Peoples' Rights (African Court). In that case, the government of Kenya was similarly found to have violated the RTD of the Ogiek people when they were evicted from their ancestral homes in the Mau Forest without being consulted. The Court further found that the government of Kenya had failed to recognise that as an indigenous people, the Ogiek had a right to determine their development priorities through their active involvement in the process of determining those priorities. The *Ogiek* case reiterates the importance of active participation of the beneficiaries of the RTD in developing economic, social and cultural programmes affecting them.

In light of the problems of poverty, corruption and public participation, and the judicial pronouncements in the *Endorois* and *Ogiek* cases, it is arguable that there has been little effort by the Kenyan government to ensure realisation of the RTD as part of its obligations under the African Charter on Human and Peoples' Rights (ACHPR),[70] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)[71] and the Constitution. Whereas the old constitutional order provided no basis for concerted effort to realise the RTD, the new constitutional order provides a framework on which the right can be realised.

The Constitution imports international law into the Kenyan legal system. Article 2(5) of the Constitution provides that the general principles of international law are part of the law of

[67]As above, para 269.
[68]As above, para 277.
[69]Application No. 006/2012, Judgment of 26 May 2017, African Court on Human and Peoples' Rights. This case is discussed in detail later in this chapter.
[70]Adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev.5 (1981).
[71]Adopted 11 July 2003, entered into force 25 November 2005, OAU Doc. CAB/LEG/66.6 (2003).

Kenya. In this respect, it is arguable that the DRD is now part of the law of Kenya.[72] Article 2(6) declares treaties and conventions that Kenya has ratified to be part of its law. Consequently, the ACHPR and the Maputo Protocol are also part of the law of Kenya.[73] Furthermore, article 19(3)(b) of the Constitution provides that rights and fundamental freedoms not set out in the Bill of Rights (BoR) are not excluded from having the force of such rights and freedoms so long as they are recognised or conferred by law. Since the DRD, the ACHPR and the Maputo Protocol form part of the law of Kenya, it would follow that the RTD is a fundamental right recognised by the BoR. This study therefore attempts to address how the RTD can be realised in Kenya from the foundation that the new constitutional order lays through poverty alleviation, anti-corruption and public participation interventions.

1.4 Research questions

In addressing the research problem, the study primarily answers the following questions:

i. What is the status of the RTD in international law?

ii. Is the RTD recognised in Kenyan law and policy?

iii. Can poverty alleviation, anti-corruption and public participation facilitate realisation of the RTD in Kenya?

1.5 Objectives of the study

The objectives of this study are to:

i. Interrogate the status of the RTD in international law.

ii. Determine if the RTD is recognised by Kenyan law and policy.

[72]See chapter 3 below, section 3.3.1 for a discussion on the application of international law in Kenya.
[73]As above.

iii. Explore ways in which poverty alleviation, anti-corruption and public participation interventions can facilitate realisation of the RTD in Kenya.

1.6 Scope and limitations

This study investigates the possibilities for realising the RTD in Kenya. It focuses on poverty alleviation, anti-corruption and public participation as interventions that can be utilised under the 2010 Constitution in that regard. The study also interrogates the status of the RTD in international law and determines if it is recognised in Kenyan law and policy.

In order to establish the status of the RTD in international law, the study examines the evolution and nature of the RTD at the UN and African regional levels. At the UN level, the study examines the RTD provided for in the DRD. In addition, the UN Charter, UDHR, ICCPR and the ICESCR are considered as implicit sources of the RTD espoused by the DRD. Whereas there are other UN human rights instruments which recognise the RTD with respect to specific groups of people such as women and children, those instruments are not considered because the study limits itself to the general principles of the RTD that are applicable to everyone and is not focussed on these specific groups. With respect to the African regional level, this study examines the RTD protected by the ACHPR. The discussion is limited to the ACHPR because it deals with the general protection of the RTD in Africa. However, the Maputo Protocol, which is part of the ACHPR as a supplementary instrument adopted under article 66 and generally deals with protection of the rights of African women is considered only to the limited extent that it introduces the concept of sustainable development as a human right.[74] Furthermore, at the domestic level, the Constitution identifies sustainable development as one of Kenya's national values and principles of governance.[75] Therefore, this study is limited in scope in that the protection of the RTD at the UN and African regional levels relating to specific groups such as women, children and persons with disabilities in the relevant treaties on these groups is not considered in the study. Each of these categories of people can be the subject of a detailed study at the level of doctoral research. Venturing into any of them in this study would lose the narrow

[74]It should be noted that another supplementary instrument to the ACHPR, not considered due to the thesis' focus, is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons, adopted 21 January 2016, not yet in force, which obliges States Parties to ensure the right of older persons to actively participate in 'socio-economic development ' (article 17).
[75]Constitution of Kenya 2010, article 10(2)(d).

focus on the general RTD and the problems of poverty, corruption and public participation in Kenya.

In determining whether the RTD is recognised in Kenyan law and policy, the study focuses on the Constitution and the policy statements in Kenya Vision 2030 (KV2030). The study limits itself to these two documents because they provide key principles to guide the State towards meeting its international law obligations of realising the RTD in Kenya.

Whereas there are other problems in Kenya that affect realisation of the RTD, this study focuses on the triple challenge of poverty, corruption and public participation in decision-making processes, and their relation to realisation of the RTD. This is because the three problems are amplified by the national values and principles of governance in the Constitution as core themes of the new constitutional order. They are therefore selected for purposes of this study as being fundamental issues to be addressed in realising the RTD in Kenya. Further, with respect to the problem of poverty, the study focuses on the areas of education and healthcare on the assumption that a healthy and educated person is less likely to live in poverty than a person who is sickly and uneducated.

1.7 Literature review

This study is limited to realisation of the RTD in Kenya. For this reason, a review of literature on the RTD generally is not undertaken in this section. The study, however, does draw on literature on the RTD in general, where relevant. The literature reviewed in this section is limited to those on the RTD in Kenya and the three thematic areas identified for investigation.

A principal work that has a direct bearing on the RTD in Kenya is that of Ghai,[76] who interrogates the subject from the perspective of constitution making. At the general level, Ghai traces the problem with the RTD to be that it has remained within the province of debate among diplomats and international lawyers for a long time.[77] Consequently, it has had little impact on constitutional lawyers, political scientists and human rights activists to the detriment of its intended beneficiaries. This conclusion is reached on the basis that the debate on the RTD has

[76]Yash Ghai, "Redesigning the state for right development" in Bard Andreassen& Stephen Marks (eds), *Development as a human right* (2006) 140, 140-166.
[77]As above, 140.

been blinded by arguments on the legal status of the DRD and whether it binds member States of the UN.[78] That debate has often revolved around and been trapped in the politics of the North-South controversy that the RTD is a claim by developing countries on the resources of the developed world.[79]

Ghai uses the DRD as the basis of the RTD and although the piece is in direct relation to Kenya, the implications of its treaty obligations under article 22 of the ACHPR are not discussed. However, Ghai argues that in order to exploit the potential of the RTD, it is necessary to locate it in national politics and constitutions and laments that almost no attempt has been made in this approach.[80] He acknowledges that the State remains primarily responsible for what takes place at the national level. Ghai's work concentrates on the constitution as the primary means of securing the enjoyment of the RTD. This study goes beyond that and demonstrates that the wider State mechanisms such as ordinary legislation and policy statements of government are also crucial in the realisation of the RTD. This is done against the background of the Constitution and KV2030.

In addition, two main decisions speak directly to the RTD in Kenya; and are thus relevant to this study. The first is the *Endorois* case,[81] where the African Commission made recommendations on certain aspects of the RTD in Kenya. The Commission observed that the RTD is two-pronged: constitutive and instrumental.[82] It held that the RTD was useful both as a means and as an end. The violation of a procedural or substantive element of the right would amount to a violation of the whole right and therefore, fulfilling only one aspect will not satisfy the right.[83] The African Commission noted that realisation of the RTD requires fulfilling five main criteria namely equity, non-discrimination, participation, accountability and transparency.[84] The Commission stressed that equity and choice are important and over-arching themes of the RTD. The Commission concluded that had the Kenyan State allowed conditions for realisation of the RTD within the meaning of the ACHPR, the development of the Baringo Game Reserve would have increased the "capabilities" of the Endorois people, as they would

[78]As above.
[79]As above.
[80]As above.
[81]*Endorois* case (note 66 above).
[82]As above, para 277.
[83]As above.
[84]As above.

have had an opportunity of benefitting from the reserve. Their forced evictions had eliminated any choice as to the location of their homes.

The Commission further found that the refusal by government to register the Endorois Welfare Council (EWC) as a legal entity denied the Endorois community the right to fair and legitimate representation in matters relating to their well-being. The standards of the African Commission require that governments must consult indigenous communities especially when dealing with sensitive issues such as land.[85] Citing article 3 of the DRD, the African Commission reiterated that the burden of creating conditions favourable to a peoples' development rests with the State. The Commission in this case was dealing with the issue of the RTD of an indigenous people. The principles laid out on participation and choice partially cover the broad spectrum of the RTD. This study examines the RTD at the general level and the problems of its realisation in Kenya and, thereafter, identifies opportunities for realisation.

The second decision is that of the African Court in the *Ogiek* case.[86] In this case, the Court was called upon to determine if, among other things, the government of Kenya had violated the RTD of the Ogiek. The Court, in finding that the government had violated the RTD of the Ogiek through continuous evictions from the Mau Forest over a period of time, noted that the Ogiek had never been effectively consulted before the evictions were carried out with negative consequences on their economic, social and cultural development.[87] The Court placed further premium on the right of the Ogiek to participate in decision-making on matters relating to their development by invoking article 23 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[88] which provides that indigenous peoples must be actively involved in developing and determining development programmes affecting them. Like in the *Endorois* case, the issues covered on the RTD are restricted to participation of indigenous peoples in determining their development priorities.

A search for relevant literature reveals that Ghai's work and the two decisions of AU bodies are the only sources of information on the RTD in Kenya. The concept of the RTD as a human

[85]As above, para 281.
[86]*Ogiek* case (note 69 above).
[87]As above, para 210.
[88]UN General Assembly resolution 61/295, "United Nations Declaration on the Rights of Indigenous Peoples" UN Doc. A/RES/61/295 (2007).

right in Kenya is therefore under-researched and this study seeks to fill that gap with respect to its realisation.

While there are studies that deal with specific aspects of development in Kenya, their investigations and findings do not comprehensively deal with realisation of the RTD. These studies relate to poverty, corruption and public participation and are discussed below.

1.7.1 Poverty

Poverty is the most undignified of material conditions in human life.[89] It afflicts many people in the world. The lives of poor people and their heart-rending stories bring to the fore the impact of poverty on society. Sisule asserts that the Poverty Reduction Strategy Paper (PRSP) process in Kenya brought out this reality and made it to a limited extent easier to understand what Kenyans living in poverty go through.[90] This is because the real problems related to poverty are best understood by poor people. Sisule notes that a good starting point in the PRSP process was the involvement of stakeholders in the consultations that led to its formulation. Those stakeholders are identified as the private sector and civil society organisations (CSOs). While such initiatives are good, it must be ensured that those stakeholders are the voice of the poor since they are the most affected by poverty. Additionally, it is not enough just to involve poor people at the formulation stage but also at implementation and monitoring stages of both policy and legislative measures.

Nafula[91] identifies low productivity, insecurity, and poor governance[92] as the major causes of poverty in Kenya. Traditional farming methods, poor and inadequate extension services, high cost of inputs and lack of credit facilities heavily affect the economy which is largely agriculture dependent. Mismanagement and collapse of agricultural institutions further aggravate the situation especially in the rural areas. Insecurity manifests itself in the form of banditry, hijackings, stock theft, robbery, physical injury, rape and murder.[93] The result of this is loss of both food and capital, which renders many households poor because of insecurity.

[89]Tony Sisule, *Poverty in the eyes of poor Kenyans* (2001) 1.
[90]As above.
[91]Nancy Nafula *et al*, (2005) "Review of policy options for poverty reduction in Kenya" KIPPRA Discussion Paper No. 49.
[92]As above, 20.
[93]As above.

Poor governance manifests itself in lack of transparency and accountability in management of public resources and funds meant to benefit communities.[94] Mismanagement of bursary funds, co-operatives, relief food distribution, funds for women, youth and persons with disabilities are some of the visible problem areas that have had negative consequences on poverty reduction efforts. Because of poor governance, households and communities have been left without vital resources and services that would improve their well-being. Nafula identifies policy intervention areas that would aid poverty reduction initiatives. These include investing in human development, raising productivity of poor small-scale farmers, infrastructure development for the poor and the promotion of human rights and empowerment of poor people.[95] The legislative interventions that would be necessary to push those policy interventions forward in alleviating poverty are not considered.

Oiro[96] acknowledges that poverty is not a new phenomenon in Kenya.[97] In the early independence years, the government identified poverty as one of the four main problems to be addressed in the independence era to spur development. The other three problems that were identified were illiteracy, disease and ignorance, all of which have a relationship with poverty. Poverty has been the focus of several development plans, presidential commissions and task forces.[98] Half a century after independence, no solution to the problem of poverty is in sight. The government's main response to poverty has been the creation of an environment in which productive employment can be rapidly created.[99] The reasoning behind this is that the bulk of the population is poor and the only asset they possess is their own labour from which they can earn an income to sustain a decent livelihood. The authors therefore conclude that education, and employment in the agricultural and informal sectors can help alleviate the suffering associated with poverty.[100] The strategies for improving access to education and employment for the poor are not advanced by the authors.

[94]As above.
[95]As above, 41.
[96]Miriam Oiro *et al*, *Poverty and employment in Kenya* (2004).
[97]As above, 7.
[98]As above.
[99]As above, 8.
[100]As above, 22.

1.7.2 Corruption

Corruption is one of the major obstacles to development in Kenya. It undermines the rule of law and weakens the institutions of governance. These institutions are pivotal to sustained growth and development. Corruption also lowers the productivity of people, reduces administrative efficiency in government, and undermines the legitimacy of political order. Since independence, the Kenyan public has been treated to a myriad of sensational press reports of unbelievable corruption scandals.[101] In the recent past, it has grown bigger in terms of personalities and amount of money involved thereby igniting intense public interest and debate.

Kibwana,[102] in a multi-disciplinary study of the phenomenon of corruption in Kenya, examines the subject from its socio-economic background and concludes that in countries where the public enterprise is subordinated to the centralisation of power in the presidency and the capitalistic economic system, networks of corruption are easily created.[103] Kibwana also examines attempts that have been made at eradicating corruption by constitutional and legislative interventions, as well as judicial and quasi-judicial interventions.[104] This study goes further to examine corruption as a human rights issue and how in particular it has been an obstacle to realisation of the RTD in Kenya.

Anassi,[105] in a civic education handbook on corruption in Kenya, explores the issue of the phenomenon in both the public and private spheres of life. Anassi further addresses the way in which corruption, both grand and petty, is executed and proffers means through which the vice can be addressed. Anassi's study, although important in nature, is largely an awareness tool for the benefit of the larger public.

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[101]See for example, the Goldenberg scandal in which the government lost Kshs. 13.5 billion in fictitious foreign exchange claims for gold and diamond jewellery allegedly exported from Kenya, Republic of Kenya *Report of the Judicial Commission of Inquiry into the Goldenberg Affair* (2005); the Anglo-Leasing scandal in which 30 million euros were lost in a government procurement contract for a new passport printing system, BBC News "Kenyan officials charged over Anglo Leasing scandal" <www.bbc.com/news-world-africa-31733052> (accessed 26 November 2018); the National Youth Service scandal in which Kshs. 468 million was pilfered from the Ministry of Devolution and Planning, Standard Digital "The great NYS scam: The war so far" <www.standardmedia.co.ke/article/2001282331/the-great-nys-scam-the-war-so-far> (accessed 26 November 2018); the Afya House scandal where the Ministry of Health lost Kshs. 5 billion in various procurement contracts that were never honoured by suppliers, The Star "New audit confirms Sh5 billion Afya House scandal" <www.the-star.co.ke/news/2018/03/06/new-audit-confirms-sh5-billion-afya-house-scandal_c1725045> (accessed 26 November 2018).

[102]Kivutha Kibwana *et* al, The *anatomy of corruption in Kenya* (1996) 1.

[103]As above, 24.

[104]As above, 151-168.

[105]Peter Anassi, *Corruption in Africa: The Kenya experience* (2004).

Gathii[106] interrogates corruption as a good governance issue from donor perspectives and suggests a road map towards accountability to development partners. While this thesis also deals with the governance angle of corruption, it differs from the other works in that it addresses the phenomenon as an RTD issue.

1.7.3 Public participation

Effective development should not be imposed by forces from outside the community it affects. The key to successful development strategies are ownership of the process by the people it relates to through their participation in decision-making, from the formulation of those strategies, through to their implementation and evaluation. The RTD includes the "active, free and meaningful participation in development" by its beneficiaries.[107] The State has a duty to ensure effective and meaningful participation of the people in development within its territory. This duty requires the State to both receive and disseminate information and constantly communicate with the people. These consultations must be in good faith and with the objective of reaching a just and equitable agreement.[108]

Mbondenyi[109] discusses the right to participate in government of one's country within the meaning of article 13 of the ACHPR and within the context of the 2007 General Election in Kenya and the post-election violence that followed. The importance of the rule of law is identified in Mbondenyi's article as a vital element in ensuring the right to participate in government. It cannot be denied that political participation is relevant to development. This study differs from Mbondenyi's work in that it examines participation in the wider sense of ensuring enjoyment of the RTD including participation in decision-making processes by the people whom those decisions affect.

Musyoki,[110] in a study on linking rights and participation in Kenya, focuses on the role of CSOs in the PRSP process. He traces the struggle to participate in public affairs generally from the 1980s, when Kenya was a one-party state and the CSO struggles were characterised by

[106]James Gathii "Corruption and donor reforms: Expanding the promises and possibilities of the rule of law as an anti-corruption strategy in Kenya" (1999) 14 *Connecticut Journal of International Law* 407.
[107]DRD, article 2(3).
[108]*Endorois* case (note 66 above) para. 289.
[109]Mbondenyi (note 2 above) 183.
[110]Sammy Musyoki *et al, Linking rights and participation: Kenya country study* (2004).

underground movements.[111] Some actors in the development industry at that time took advantage of faith-based initiatives that attracted little government interference to launch their agenda. In the early 1990s, the practice of participatory development methodologies was established in Kenya and spread to being "mainstreamed" in CSO work.[112] Many constituencies within society such as women, pastoralists, people with disabilities and religious groups were increasingly involved not only in the search for solutions to meeting basic needs but also in addressing the causes of those needs.

This thesis explores development from a human rights perspective that involves beneficiaries of the RTD in interrogating the causes of under-development within the context of poverty, corruption and participation of the people. It then proposes opportunities for realisation of the RTD in Kenya. The study addresses participation broadly from an RTD perspective and particularly on "active, free and meaningful participation" of the people in development.

1.8 Methodology

This study is principally based on a desktop review of information on the RTD generally. The study employs descriptive, interpretive, comparative and prescriptive techniques of analysing information. This approach is taken so as to establish the status of the RTD in international law, determine whether the RTD is recognised by Kenyan law and policy and to advocate for the use of poverty alleviation, anti-corruption and public participation interventions as important means of realising the RTD in Kenya.

To establish the status of the RTD in international law, its evolution at the UN and African regional levels is historically described. The provisions of the DRD, ACHPR and Maputo Protocol are then described and interpreted for purposes of understanding their meaning in law. The *Endorois* and *Ogiek* decisions are similarly analysed for the same purpose. In determining whether the RTD is recognised in Kenyan law and policy, constitutional order in Kenya since independence is described and the relevant provisions analysed. The provisions of the relevant constitutions are then compared with Kenya's international law obligations with respect to the RTD. The same research techniques are applied to the provisions of KV2030. The

[111] As above, 4.
[112] As above, 5.

jurisprudence of the African Commission and African Court on the RTD is also analysed to determine Kenya's compliance with its international law obligations. Literature on the relationship between poverty, corruption and public participation has been analysed and a comparative analysis of South African jurisprudence used to gain an understanding of that relationship. Through a synthesis of international law principles, the provisions of the Constitution of Kenya 2010, KV2030 and comparative jurisprudence, the study prescribes how poverty alleviation, anti-corruption and public participation interventions can be used to realise the RTD in Kenya.

1.9 Organisation of the study

The study is divided into seven chapters. Chapter one is an introduction to the study. It lays out the basis of the entire study. It introduces the problem to be investigated, provides an understanding of the concept of development, and sets out the questions to be investigated and the aims of the study, identifies the scope and limitations of the study, reviews literature related to the study and describes the research methodology used.

Chapter two examines the status of the RTD in international law. It discusses the evolution of the right at the global level and the nature of the right, with reference to the DRD and ACHPR. The chapter also examines the legal obligations created by the RTD under each of these instruments with a view to establishing the international law obligations that Kenya has under the two instruments.

Chapter three focuses on the status of the RTD at the domestic level in Kenya. It traces the constitutional journey of the Kenyan State since independence. A background of the colonial State is set out and then the three post-colonial constitutional orders − the independence constitutional order, the republican constitutional order and the 2010 constitutional orders − are discussed in detail. The RTD is then located within the current constitutional and governance structure. The constitutional framework and policy statements relevant to the RTD are also examined.

The three chapters that follow focus on three problem areas that affect realisation of the RTD in Kenya. Chapter four interrogates the problem of poverty. It explores the connection between

the RTD and poverty and the principles that underlie the relationship between the two. Against that background, the problem of poverty and its impact on the RTD in Kenya is examined with reference to the core issues of education and healthcare.

Chapter five examines the problem of corruption. It explores corruption as a human rights issue and particularly with respect to the RTD. It interrogates how corruption affects realisation of the RTD generally and the international human rights framework aimed at combating corruption. It then focuses on corruption and realisation of the RTD in Kenya.

Chapter six investigates the problem of participation. The importance of participation in development by its beneficiaries is examined in this chapter as well as the role that people should play in decision-making and through what structures. The duty of the State to ensure participation in the process and the policy and legal framework for it is discussed. The issue of how to ensure full and quality participation is also addressed.

Finally, chapter seven summarises the findings of the study and advocates for realisation of the RTD in Kenya through poverty alleviation, anti-corruption and public participation interventions.

Chapter 2: The right to development in international law

2.1 Introduction

It is important to determine the legal status of the RTD in international law and especially whether it is a human right recognised by international law. This is because the RTD has been a controversial right among States and scholars ever since it was first mooted in the 1970s. It has sometimes been seen as a right of developing countries to be claimed from developed countries as "appropriate reparations for colonialism and other forms of exploitation of the South by the North" or as compensation for an international economic order that is unfavourable to developing countries and, at other times, it has been viewed as a claim to material conditions of individuals against their governments.[1] The controversies surrounding the RTD as set out in the DRD have, at the UN level, led to little progress in clarifying the content of the right and the implications of its recognition. At the African regional level, the binding nature of the ACHPR has brought another dimension to the nature of the RTD and its implication on States Parties. While the controversial nature of the RTD revolves around the status of the DRD in international law, the right has its basis and origin in numerous instruments of the UN.[2] These instruments, together with the DRD, form the normative standards of the RTD at the UN level and are essential in establishing the legal status, relevance and validity of the RTD in international law.

The aim of this chapter is to determine the status of the RTD in international law. It discusses the evolution of the RTD at the UN and African regional levels and the nature of the right, with specific reference to the DRD and ACHPR. The content, subjects, duties and justiciability of the RTD under these instruments is examined with a view to establishing the status of the right in international law. The discussion in this chapter also assists in establishing the international law obligations that Kenya has in relation to the RTD.

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[1]Philip Alston & Ryan Goodman, *International human rights* (2012) 1528.

[2]These include the: Declaration of Philadelphia, General Conference of the International Labour Organisation (1944); Charter of the United Nations (1945); Universal Declaration of Human Rights (1948); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); Declaration on Permanent Sovereignty over Natural Resources (1962); International Convention on Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Final Act of the International Conference on Human Rights, Tehran (1968); Declaration on Social Progress and Development (1969); Declaration on the Establishment of a New International Economic Order (1974); and Charter of Economic Rights and Duties of States (1974).

2.2 The evolution of the RTD in international law

2.2.1 United Nations level

In the 1970s, when developing countries initiated the debate on the RTD at the UN, their hope was that a human rights approach would strengthen their claims for a more equitable distribution of goods globally under a New International Economic Order (NIEO).[3] This debate led to the adoption, in 1974, of both the UN Declaration on the Establishment of a NIEO[4] and the Charter of Economic Rights and Duties of States[5]. The use of human rights language in these instruments led to questions as to whether an RTD existed, and if it did, what it meant. These instruments were meant to empower underdeveloped countries, but the developing world did not have the political nor economic power necessary to ensure their implementation.[6] As a result, by the end of the 1970s, these documents had lost relevance and the intended beneficiaries had become poorer.[7]

Currently, various instruments of the UN implicitly recognise the RTD and therefore provide a basis for implementation of the RTD that is set out in the DRD. However, this study limits itself to a consideration of general instruments of the UN which apply to everyone and all groups of people because the general principles therein also apply to the UN instruments that safeguard the rights of special interest groups such as women, children and persons with disabilities.

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[3]Fatsah Ouguergouz, *The African Charter on Human and Peoples Rights: A comprehensive agenda for human dignity and sustainable development in Africa* (2003) 310-311. The effects of World War II and decolonisation led to demands for a NIEO when newly independent nations realised that changing power relationships between nations had rendered economic structures and institutions irrelevant and therefore there was need to create new ones that were suitable to the needs of emerging independent States. The newly independent States depended on primary products as their main economic activity and could not therefore compete with developed countries most of them their former colonisers. This was the reason for their position that their underdevelopment was the result of unfair rules of international economic relations. See, Robert Brow, "The demands for a new international economic order" (1977) 7 *The Review of Black Political Economy* 309, 309. See also generally, Harry Johnson, "The new international economic order" (1976) *Selected Papers No. 49 University of Chicago*.

[4]UN General Assembly resolution 3201(S-VI), "Declaration on the Establishment of a New International Economic Order" UN Doc. A/RES/S-6/3201 (1974).

[5]UN General Assembly resolution 3281(XXIX), "Charter of Economic Rights and Duties of States" UN Doc. A/RES/29/3281 (1974).

[6]Serges Kamga & Charles Fombad, "A critical review of the jurisprudence of the African Commission on the right to development" (2013) 57 *Journal of African Law* 196, 197.

[7]As above.

At the outset, the UN Charter recognises the RTD implicitly by stating that one of the purposes of the UN is to "achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion".[8] The community of nations through this provision realises that working together is critical to solving problems that affect the social, cultural and humanitarian character of people and that in solving those problems, respect for human rights is fundamental. This approach is useful in improving the well-being of humankind. Because the improvement of well-being of people is a core objective of the RTD, this provision of the UN Charter on the importance of international cooperation, can therefore be seen as an implicit recognition of the RTD.

The UN Charter provides for international economic and social cooperation so as to create "conditions of stability and well-being".[9] Article 55 of the Charter emphasises that stability and well-being "are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". To give effect to the purposes of article 55, member States of the UN are under an obligation to act jointly and also separately in cooperation with the UN so as to achieve the objectives of article 55.[10] Article 55 of the Charter is relevant to realisation of the RTD because through it, the UN commits itself to promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;[11]

b. solutions of international economic, social, health and related problems; and international cultural and educational cooperation;[12] and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.[13]

[8]UN Charter, article 1(3).
[9]As above, article 55.
[10]As above, article 56.
[11]As above, article 55(a).
[12]As above, article 55(b).
[13]As above, article 55(c).

The basis laid in article 55 for recognition of the RTD by the UN is further supported by article 28 of the Universal Declaration of Human Rights (UDHR).[14] Article 28 of the UDHR entitles everyone to a social and international order in which the rights that it proclaims can be fully realised. In this regard, article 28 of the UDHR echoes the provisions of article 55 of the UN Charter in its implicit recognition of the RTD. The UDHR further implicitly recognises the RTD in several ways. It acknowledges that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services".[15] It also proclaims the rights of "everyone" to education,[16] and participation in cultural life of their community[17]. These are entitlements through which the full development of human potential can be achieved.

At the time the UDHR was adopted by the UN, the international community intended that a single covenant incorporating all the rights it set out would be negotiated to give those rights the force of an international treaty.[18] Although the immediate post-Second World War political environment had created unanimity in the international community that human rights were indivisible and interdependent as evidenced by the UDHR, that solidarity eventually gave way to the Cold War and States became divided in their support for the various rights.[19]As a result, in 1966, the UN adopted two international human rights instruments. These were the International Covenant on Civil and Political Rights (ICCPR)[20] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[21]. In the preambles of both the ICCPR and the ICESCR, the dominant theme of the UDHR - that "the ideal of all human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created where everyone may enjoy his civil and political rights as well as his economic, social and cultural rights"[22] - was restated.

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[14]Adopted 10 December 1948, UN General Assembly resolution 217A (III), UN Doc. A/RES/41/128 (1948). The UDHR was not adopted as a legally binding instrument. However, many of its provisions have gained force as rules of customary international law and others became the foundation of subsequent UN human rights treaties. See, Alston & Goodman (note 1 above) 142.
[15]UDHR, article 25(1).
[16]As above, article 26 (1).
[17]As above, article 27 (1).
[18]Paul Lauren, "The Universal Declaration on Human Rights: Launching and sustaining a revolution" (2008) *eJournal USA* 11. See also, Malcolm Shaw, *International Law* (2003) 261.
[19] Arjun Sengupta, "On the theory and practice of the right to development" (2002) 24 *Human Rights Quarterly* 837,839; Danwood Chirwa, "Towards revitalising economic, social and cultural rights in Africa" (2002) 10 *Human Rights Brief* 14.
[20]Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, UN Doc. A/6316 (1966).
[21]Adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, UN Doc. A/6316 (1966).
[22]UDHR, preamble para 2.

The two instruments guarantee all peoples the right to determine their economic, social and cultural development through the right to self-determination.[23] The ICCPR further protects ethnic, religious and linguistic minorities from being denied the right to the enjoyment of their culture and professing and practising their religion, and the use of their own language.[24]The ICESCR places a duty on every State Party, individually and through development cooperation, to progressively ensure the full realisation of the rights it recognises.[25] To ensure the expansion of people's capabilities and improvement of their well-being, the ICESCR protects "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions",[26] "to be free from hunger"[27], to enjoy "the highest attainable standard of physical and mental health"[28], and "to education"[29].

The idea of the RTD as a human right was, however, articulated for the first time by Keba Mbaye in 1972,[30] and until 1993, when the World Conference on Human Rights (Vienna Conference) was held, the RTD remained the subject of politically charged debate at the UN level.[31] The 1986 proclamation by the UN General Assembly of the RTD as a human right

[23]ICCPR & ICESCR, common article 1(1).
[24]ICCPR, article 27.
[25]ICESCR, article 2 (1). Development cooperation is a post-World War II phenomenon which arose in the context of decolonisation. It was equated with financial assistance from developed countries to developing ones so that the developing countries could compete in the world's financial and trade markets. Since the financial flows were from States to States, development cooperation was often referred to as Official Development Assistance (ODA). With the ongoing nature of globalisation and technological advancement development cooperation has witnessed an increase in the number of countries and organisations involved in international development and the areas of development support. The areas of support have become varied and include among others climate change, environmental protection, security, health and education. The forms of support have also gone beyond financial support and now include capacity building and policy change in the form of technical and technological assistance. These changes have rendered the traditional definition of development cooperation obsolete and a precise definition of development cooperation difficult. Alonso and Glennie argue that due to this difficulty of definition in changing times, the meaning of development cooperation can only be ascertained on the basis of four criteria. They argue that development cooperation can be defined as any activity that: (i) "Aims explicitly to support national and international development priorities"; (ii) "Is not driven by profit"; (iii) "Discriminates in favour of developing countries"; and (iv) "Is based on cooperative relationships that seek to enhance developing country ownership" of their own national development strategies. See generally, Jose Alonso & Jonathan Glennie, "What is development cooperation?" *2016 Development Cooperation Forum Policy Briefs*, (2015)<www.ipu.org/splz-e/nairobi16/policy-brief.pdf> (accessed 3 February 2017). On the dynamic nature of development cooperation see also, United Nations High Commissioner for Human Rights, *Frequently asked questions on a human rights-based approach to development cooperation* HR/PUB/06/8 (2006) (accessed 3 February 2017).
[26]ICESCR, article 11(1).
[27]As above, article 11(2).
[28]As above, article 12.
[29]As above, article 13.
[30]Keba Mbaye, "The right to development as a human right" (1972) *Human Rights Law Journal* 503.
[31]Stephen Marks, "The human right to development: Between rhetoric and reality" (2004) 17 *Harvard Human Rights Journal* 137. Due to being linked to the NIEO, the RTD became a political issue between developed and developing countries at the UN. Developed countries viewed the right to development as the NIEO, which they

through the adoption of the DRD did little in explaining that right. Instead, it had the effect of fuelling the controversies that already existed on the RTD.[32] The recognition of the RTD as a human right at that time was that of a right that integrated economic, social and cultural rights with civil and political rights in the manner conceived by the human rights movement before the Cold War. In terms of consensus on recognising the RTD, many intergovernmental conferences which followed the Vienna Conference seem to have put to rest the debate as to whether the RTD exists as a human right. These conferences held under the auspices of the UN include the International Conference on Population and Development (1994),[33] the World Summit for Social Development (1995),[34] the Fourth World Conference on Women (1995),[35] the World Food Summit (1996)[36] and the Second UN Conference on Human Settlements (1996).[37] However, the RTD at the UN level remains soft law, since it is explicitly recognised in the DRD but not yet embodied in a treaty.

Whereas the DRD recognises development as a multi-dimensional concept, it differs from the UN Agendas on development by introducing a human rights dimension. The DRD obliges all States to "take steps to eliminate obstacles to development resulting from the failure to observe civil and political rights, as well as economic, social and cultural rights".[38] This provision demystified the common argument in many post-colonial States in the 1960s and 1970s, that violations of human rights were excusable for the sake of economic development and that the realisation of human rights in those States was dependent on the transfer of resources from developed to developing countries.[39] The DRD adopts a holistic approach to development by incorporating the concept of human rights. Therefore, if human rights are part of the definition of development, then their violation constitutes lack of development.[40] But given the soft law nature of the DRD, perhaps its main value has been the mainstreaming of development

had rejected, disguised in human rights language. Due to this politicization of the RTD, there was no movement from hard-line political positions to practical dialogue on its implementation. See Kurshid Iqbal, *The right to development in international law: The case of Pakistan* (2010) 26-27.

[32]James Paul, "The human right to development: Its meaning and importance" (1992) 25 *John Marshall Law Review* 235

[33]United Nations, "Report of the International Conference on Population and Development" UN Doc. A/Conf.171/13 (1994).

[34]United Nations, "Report of the World Summit for Social Development" UN Doc. A/Conf.166/9 (1995).

[35]United Nations, "Report of the Fourth World Conference on Women" UN Doc. A/Conf.177/20/Rev.1 (1995).

[36]Food and Agriculture Organisation, "Report of the World Food Summit" FAO Doc. WFS 96/REP (1996).

[37]United Nations, "Report of the United Nations Conference on Human Settlements" (Habitat II) UN Doc. A/Conf.165/14 (1996).

[38]DRD, article 6(3).

[39]Koen de Feyter, *World development law: Sharing responsibility for development* (2001) 21.

[40]As above.

cooperation into the programmes of various UN development agencies and amongst States. The DRD particularly provides that "the realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations."[41] It further places a duty on States "to cooperate with each other" so as to ensure development and the elimination of "obstacles to development."

The UN Millennium Declaration[42] and the Millennium Development Goals (MDGs) adopted the same human rights language while setting out the millennial agenda for development up to 2015. While emphasising the need for people living dignified lives, it importantly provides that no effort shall be spared to free "men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected" by "making the right to development a reality for everyone and to freeing the entire human race from want".[43] The MDGs accentuate principles which are human rights related such as participation, national ownership and accountability. The MDGs and human rights principles are therefore "mutually reinforcing concepts".[44]

The successor to the Millennium Declaration is a resolution of the UN on sustainable development goals (SDGs) to be met by the year 2030.[45] In setting out the UN "plan of action for people, planet and prosperity",[46] this resolution sets out 17 SDGs and 169 targets which are aimed at realising the human rights of all people.[47] The 17 SDGs are complimentary to each other, indivisible and seek to balance three aspects of sustainable development namely the economic, social and environmental aspects.[48] The shared principles and commitments of UN member States in the SDGs resolution recognise the basis of the SDGs as being human rights and particularly the RTD in the following terms:

[41]DRD, article 3(2).
[42]UN General Assembly resolution 55/2, "United Nations Millennium Declaration" UN Doc. A/RES/55/2 (2000).
[43]Millennium Declaration, article 11.
[44]United Nations High Commissioner for Human Rights (note 25 above) 8. See also UNDP, *Human rights and the millennium development goals* (2006) 9.
[45]UN General Assembly resolution 70/1, "Transforming our world: the 2030 Agenda for Sustainable Development" UN Doc. A/RES/70/1 (2015)
[46]As above, preamble para 1.
[47]As above, preamble, para 3.
[48]As above.

> The new Agenda is guided by the purposes and principles of the Charter of the United Nations, including full respect of international law. It is grounded in the Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration and the 2005 World Summit Outcome. It is informed by other instruments such as the *Declaration on the Right to Development*.[49]

2.2.2 African regional level

At the African regional level, the RTD is guaranteed by the ACHPR. Its provisions are legally binding on States Parties. The ACHPR explicitly spells out the RTD as being the right of all peoples to "their economic, social and cultural development".[50] In its preamble, the ACHPR recognises that the African situation demands that particular attention be paid to the RTD.[51] Of relevance to understanding the nature of the RTD is the statement in the preamble that civil and political rights cannot be disassociated from economic, social and cultural rights in their conception as well as universality.[52] Importantly, it recognises "that the satisfaction of economic, social and cultural rights is a guarantee for enjoyment of civil and political rights".[53] These provisions of the preamble to the ACHPR reiterate that the RTD is a holistic right that cuts across all aspects of human life.

The evolution of the RTD at the African regional level can be traced to the 1960s when most African States gained independence. Independence of these States was accompanied by their demands for reform in the international economic order on the basis that their state of underdevelopment was a direct result of colonialism.[54] The early 1960s saw the birth of newly independent African States such as Nigeria (1960), Tanzania (1961), Uganda (1962), Kenya (1963) and Zambia (1964). Political emancipation was the primary consideration for those States at that time. Accordingly, the focus of the Organisation of African Unity (OAU) at its inception in 1963 was the concerns of newly independent States and liberation of the colonised ones.[55]

[49]As above, para 10. Emphasis added.
[50]ACHPR, article 22(1).
[51]As above, preamble para 7.
[52]As above
[53]As above.
[54]De Feyter (note 39 above) 2.
[55]Kofi Quashigah, *The African Charter on Human and Peoples Rights* (2002) 1.

Human rights concerns were not the direct concerns of African States at the time of formation of the OAU. The dominant themes in the preamble to the Charter of the OAU (OAU Charter),[56] its objectives[57] and principles,[58] were decolonisation, sovereignty, territorial integrity of States and non-interference with internal affairs of States. But at the same time, there were some indications towards respect for human rights. Thus, the OAU Charter reaffirmed its members' adherence to the UN Charter and the UDHR, but in the limited sense of the two instruments being a foundation for peaceful and positive cooperation amongst African States.[59] However, in seeking to achieve the ends of article 2(1), the drafters of the OAU Charter laid a basis for realisation of the RTD by urging member States to harmonise their policies in, among other things, economic cooperation, educational and cultural cooperation, health, sanitation and nutritional cooperation, and scientific and technical cooperation.

Post-independence Africa was turbulent and the political instability that came with that turbulence brought about corruption, economic deprivation, authoritarian governments and civil war.[60] Leaders lost touch with their people and their means of retaining power was through authoritarian rule and abuse of human rights. Political leadership became an obstacle to realisation of the RTD. However, despite the lack of emphasis on human rights at its inception, the OAU undertook in article 2(1) of its Charter "to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights".

Also, prior to the OAU's formation, some thought had been given to a human rights system for Africa. In 1961, at its Congress of Lagos, the International Commission of Jurists (ICJ) called for the formulation of an African Convention on Human Rights.[61] At another seminar in Dakar in 1978, the ICJ requested the OAU to do everything possible to establish a system of guarantees and verification of human rights in Africa.[62] By 1979, the ground had been sufficiently prepared for the Assembly of Heads of State and Government of the OAU to direct the Secretary-General to "organise as soon as possible in an African capital, a meeting of highly qualified experts to prepare a preliminary draft of an African Charter of Human Rights

[56]Adopted 25 May 1963, entered into force 13 September 1963, 1001 UNTS 45 (1963).
[57]As above, article 2.
[58]As above, article 3.
[59]OAU Charter, preamble para 8.
[60]Quashigah (note 55 above) 1.
[61]As above 2.
[62]As above.

providing for, among other things, the establishment of bodies to promote and protect human rights".[63] The ACHPR was thereafter drafted, adopted on 1 June 1981 and came into force on 21 October 1986.

The provisions of the ACHPR reflect the conservative environment in which they were drafted. The Charter was drafted in a conservative manner so that it could be accepted by African States that were not very transparent or democratic regimes then.[64] The ACHPR was drafted and adopted under the auspices of the OAU which followed the principle of non-interference in matters of States Parties. The OAU's successor, the African Union (AU), which was established in 2000 through the Constitutive Act of the African Union (AU Constitutive Act),[65] committed itself to the recognition of human rights and promotion of social, cultural and economic development.[66] One of the objectives of the AU is the promotion of sustainable socio-economic and cultural development coupled with the integration of African economies.[67] In carrying out its functions, the AU is guided by several principles which include the "promotion of social justice to ensure balanced economic development".[68] The AU seeks to ensure that the peoples of Africa fully participate in the "development and economic integration of the continent" through the establishment of a Pan-African parliament.[69] These provisions of the AU Constitutive Act mark a paradigm shift from non-interference in member State matters to a position of embracing human rights as a tool for dealing with Africa's development needs. In this respect, the AU established the New Partnership for Africa's Development (NEPAD) in July 2001. The establishment of NEPAD was based on Africa's need to address issues such as pervasive poverty, underdevelopment and the continued marginalisation of Africa in the world's economic order.[70] One of the objectives of NEPAD, therefore, is to place African countries "on a path of sustainable growth and development" through partnerships between African countries and between Africa and the rest of the world.[71]

[63]As above.
[64]As above 3.
[65]Adopted 1 July 2000, entered into force 26 May 2001, OAU Doc. CAB/LEG/23.15 (2000).
[66]AU Constitutive Act, preamble paras 8 & 9.
[67]As above, article 3(j).
[68]As above, article 4(n).
[69]As above, article 17(1).
[70]African Union, "NEPAD Planning and Coordinating Agency" <www.au.int/en/NEPAD> (accessed 13 February 2019).
[71]As above.

Following the establishment of the AU, there was a realisation that the ACHPR could through interpretation by the African Commission, be made to fall in line with contemporary expectations of the peoples of Africa that they shall have equitable access to public social goods and services such as healthcare, education, water and decent housing.[72] The ACHPR therefore, is a flexible document and with changing political environments can be interpreted in a liberal fashion.[73] One vehicle for liberal interpretation of the ACHPR is its article 60. Article 60 sets out guidelines of interpretation for the African Commission which require it, while interpreting the ACHPR, to draw inspiration from provisions of international human rights instruments on human and peoples' rights especially African ones on human and peoples' rights and also from the experiences of other international bodies dealing with human and peoples' rights issues. Article 60 of the ACHPR also applies to the African Court which was established under article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol)[74] by virtue of article 66 of the ACHPR which provides for the adoption of special protocols or agreements to supplement and become part of the ACHPR.

Another avenue for such interpretation is article 61 which requires the African Commission when determining principles of law, to take into consideration various conventions recognised by African States and African practices that are consistent with human and peoples' rights. Most African practices revolved around communal well-being and these provisions open up avenues for purposive interpretation of article 22 of the ACHPR. In addition, the ACHPR is grounded on the concept of human dignity, which is aimed at the protection of human and peoples' rights in Africa.[75] Human dignity is central to the development of human personality in all its facets and across changing times and environments. The ACHPR, therefore, like any other human rights treaty, requires dynamic interpretation in changing circumstances and a liberal approach that best protects its rights-bearers. The open textured language of article 22

[72]Bience Gawanas, "The African Union: Concepts and implementation mechanisms relating to human rights" in Anton Bosl & Joseph Diescho (eds), *Human right in Africa (*2009) 137.
[73]In *Social Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria (SERAC* case*)* (2001) AHRLR 60 (ACHPR 2001), the African Commission observed that the open-ended language of the ACHPR, for example, in not defining "peoples' rights", presented an opportunity for purposive interpretation of the Charter and the development of the Commission's jurisprudence on a case to case basis. The Commission, in this case, noted that "there is no right in the African Charter that cannot be made effective" (para 68).
[74]Adopted 10 June 1998, entered into force 1 January 2004, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).
[75]ACHPR, preamble para 2; articles 4 & 5.

of the ACHPR provides significant opportunities for its wide interpretation and realisation of the RTD within the diverse circumstances and societal attitudes in States Parties.

Pursuant to article 66 of the ACHPR, the Maputo Protocol was adopted as a supplementary binding instrument. The Maputo Protocol was adopted upon the realisation that whereas the ACHPR alive to the existence of discrimination against women, it did not sufficiently address the unique historical position of women as a marginalised group and was therefore ineffective in realising their rights.[76] The ACHPR recognises the rights of women in broad terms and the lack of specific detail led to its being ineffectual in their protection. Article 18(3) of the ACHPR requires States Parties to ensure that discrimination against women is eliminated and that the rights of women and children provided for in international instruments are protected.

In the 1990s, women movements realised that article 18(3) of the ACHPR was not adequate in protecting the rights of women in Africa as a special interest group. The reality on the ground was that gender inequality and discrimination against women was still deeply rooted in Africa and there was a need to recognise and address in detailed form, the problems facing women from a human rights perspective.[77] That reality is captured in the preamble of the Maputo Protocol which notes the concern of States Parties that "despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices"[78].

The problem of realising the rights of women including their right to equality and participation in the development process was the culturally based inequalities between men and women. These inequalities were evident in income distribution, access to education and political participation, among other issues.[79] The consequence was that development projects that did not advance the interests of women ended up violating their human rights.[80]

[76]Romi Sigsworth & Liezelle Kumalo, "Women, peace and security: Implementing the Maputo Protocol in Africa" (2016) *Institute for Security Studies Paper 295* 3.
[77]As above. See also Fareda Banda, "Women, human rights and development" in United Nations, *Realising the right to development* (2013) 149.
[78]Maputo Protocol, preamble para 12.
[79]United Nations, "The challenge of implementing the right to development in the 1990s" in United Nations (note 77 above) 52.
[80]As above.

The Maputo Protocol is a framework that recognises the special role that women play in sustaining African values that are based on human dignity. The States Parties in adopting the Protocol were determined "to ensure that the rights of women are promoted, realised and protected to enable them enjoy fully all their human rights".[81] The Protocol "aspires to guarantee comprehensive rights for women in Africa by providing family units, communities and nation States with duties and responsibilities that will ultimately result in human security and sustainable peace".[82] Human security and sustainable peace are crucial pillars for the realisation of human development.

With regard to the RTD, the Maputo Protocol provides that "women shall have the right to fully enjoy the right to sustainable development".[83] To facilitate the full enjoyment by women of the right to sustainable development, States Parties are enjoined to introduce gender perspectives to national development planning[84] and ensure that women participate in the generation and implementation of development policies and programmes.[85] The Protocol is the only binding international instrument that introduces a gender dimension to national development planning.

The adoption of the Maputo Protocol was a defining moment for African women with respect to realisation of the RTD, which is crucial to their empowerment. In that regard and additional to the specific right of women to fully enjoy the right to sustainable development, the Protocol recognises the rights of women to dignity,[86] "participation in political and decision-making" processes,[87] education,[88] social welfare,[89] health,[90] and a healthy sustainable environment.[91] All of these rights are critical in realisation of the RTD.

[81]Maputo Protocol, preamble para 14.
[82]Sigsworth & Kumalo (note 76 above) 3.
[83]Maputo Protocol, article 19.
[84]As above, article 19(a).
[85]As above, article 19(b).
[86]As above, article 3.
[87]As above, article 9.
[88]As above, article 12.
[89]As above, article 13.
[90]As above, article 14.
[91]As above, article 18.

2.3 The nature of the RTD in international law

2.3.1 The RTD under the DRD

Article 1 of the DRD States that:

> 1. The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
>
> 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

Article 1 contains three basic principles of the RTD which are elaborated by other articles of the DRD and from which its content can be established. These principles are summed up by Sengupta, the former UN independent expert on the RTD, as follows:

> first, there is a human right called the right to development which is inalienable; second, there is a particular process of "economic, social, cultural and political development" in which "all human rights and fundamental freedoms can be fully realized"; and third, the right to development is a human right by virtue of which "every human person and all peoples" are entitled to "participate in, contribute to and enjoy" that particular process of development.[92]

In summary, the content of the RTD is that it is "an inalienable human right"; "a right to the process of development"; and that right is premised on every human person's "entitlement to the process of development".[93] The DRD advances the RTD in terms of a human right,[94] and the development that is to be claimed as a human right is "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the

[92]United Nations, "Third report of the independent expert on the right to development, Arjun Sengupta, submitted in accordance with UN Commission on Human Rights resolution 2000/5", UN Doc. E/CN.4/2001/WG.18/2 (2001), para 4. See also, Felix Kirchmeier, *The right to development* (2006) 9.
[93]Iqbal (note 31 above) 59.
[94]DRD, article 1(1). See also Alessandro Sitta, "The role of the right to development in the human rights framework for development" <www.capabilityapproach.com/pubs/5_1_Sitta.pdf> (accessed 11 July 2014).

entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."[95]

The nature of the process of development contemplated by the DRD is centred on equity and social justice.[96] The majority of the population, who are usually deprived of the basic needs in life, must have their standards of living raised and their capacity to improve their lives strengthened. This conception of well-being is broad. It goes beyond the narrow view that human well-being depends on economic growth only and includes the existence of an environment in which the opportunities and capabilities of people to enjoy the benefits of development are expanded.[97]

The DRD is rooted in the notion that the RTD is a claim to a social order that is based on equity. It in that regard, the DRD requires States to take measures to realise the RTD and ensure among other things "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income."[98] The DRD further recognises the RTD as a human right that is inalienable which cannot be taken away. It is cast as a right to a process of economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. It is a human right which bestows on its beneficiaries an entitlement of participation and enjoyment of the process of development.[99] As Bedjaoui puts it, "the right to development is the most important human right or the alpha and omega of human rights, the first and last human right".[100]

Article 1(1) of the DRD identifies the right-holders of the RTD as being "every human person and all peoples". Under the DRD therefore, the RTD is both an individual and collective right.[101]The problem that arises with the wording of article 1(1) is the question as to whether a human right can be "collective". This problem arises from the politics around the existence of the RTD and the opposition to it as a claim by developing countries against developed countries. Yet, in their very nature, collective rights are human rights for the reason that the

[95]DRD, preamble para 2.
[96]Iqbal (note 31 above) 59.
[97]United Nations (note 92 above) para 9.
[98]DRD, article 8(1).
[99]As above, article 1(1).
[100]Mohammed Bedjaoui, "The right to development" in Alston & Goodman (note 1 above) 1530.
[101]Iqbal (note 31 above) 57.

ultimate beneficiary is the individual.[102] An argument in opposition to this view can only be based on political reasons as opposed to legal ones. As Sengupta observes:

> Those who would detract from the significance of the right to development by arguing that it is a collective right of the State or nation, in conflict with the individual rights foundations of the human rights tradition, are more often than not politically motivated.[103]

Further, article 2(1) places the human person at the centre of the RTD. It provides that "the human being is the central subject of development and should be the active participant and beneficiary of the right to development". The human person is therefore a central subject of the RTD in two ways. One is that of an active participant in, and the other is of a beneficiary of, the RTD.[104] This identification of the human person as the central subject of the RTD is important because a collective group acts through the individuals that constitute that group. It is for this reason that the DRD places a responsibility on "all human beings" to act "individually and collectively" to ensure that development is realised.[105] This responsibility is one that behoves all human beings to "promote and protect an appropriate political, social and economic order for development".[106] The UN Human Rights Commission's High-Level Task Force (HLTF)[107] on the RTD has defined it as "the right of peoples[108] and individuals to the constant improvement of their well-being and to a national and global environment conducive to just, equitable, participatory and human-centred development respectful of all human rights"[109].

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[102]Arjun Sengupta, "Conceptualising the right to development for the twenty-first century" in United Nations, *Realising the right to development* (2013) 76.

[103]As above. The argument that the right to development is a collective right of the State appears to be a misconstruction of the meaning of article 2(3) of the DRD which relates to the rights and duties of the State in developing policies for the implementation of the RTD.

[104]Sengupta (note 19 above) 843.

[105]DRD, article 2(2).

[106]As above.

[107]Following the adoption of the DRD by the UN General Assembly in 1986, various institutions were set up by the UN charged with advising on ways in which the RTD could be implemented These included an open-ended intergovernmental working group (OEWG) (1998), an Independent Expert (IE) (1988-2004) and a High-Level Task Force (2004-2010). The HLTF was established by the UN Commission on Human Rights on the recommendation of the OEWG so as to assist the OEWG carry out its mandate of monitoring and reviewing progress made in the promotion and implementation of the right to development through the provision of the necessary expertise for that purpose.

[108]The term "peoples" has been difficult to define at the UN level. At the Global Consultation on the Right to Development in 1990, "peoples" were deemed to be groups within a State such as indigenous peoples and minorities. See, United Nations, "Report of the Global Consultation on the Right to Development as a Human Right prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45" UN Doc. E/CN.4/1990/9/Rev.1 (1990), para 80. The OEWG on its part was of the view that the term "peoples" means the entire population of a State. See, United Nations, "Report of the Open-Ended Working Group on the Right to Development" UN Doc. E/CN.4/2001/26 (2001), para 44.

[109]United Nations "Report of the high-level task force on the implementation of the right to development on its sixth session" UN Doc. A/HRC/15/WG.2/TF/2/Add.2 (2010) 8.

The fact that the RTD has been cast as a human right has certain implications. When it is asserted that a subject (right-holder) has a specific right, it means that the subject is entitled to claim against another subject (duty-bearer) that his or her right be respected, protected or fulfilled. The other subject has a duty to respect, protect and fulfil that right.[110] This typology of duties in international human rights law has been elaborated on by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its' various general comments.[111]

The duty to respect human rights requires States to refrain from interfering with the enjoyment of human rights;[112] the duty to protect demands that the State takes measures such as legislation to protect right-holders from other parties interfering with their rights;[113] and the duty to fulfil envisages that the State will take action towards the realisation of those rights.[114] The duty to fulfil human rights can be further disaggregated into the duties to facilitate, promote and provide human rights. The duty to facilitate requires the State to take measures that ensure that individuals and communities are assisted to enjoy their rights.[115]The obligation to promote places a duty on the State to create and maintain conditions that ensure enjoyment of human rights.[116] Additionally, the State is under a duty to provide a specific right where individuals or communities are unable, for reasons beyond their control, to access a right within the means at their disposal.[117] The assignment of duties, considered subsequently in this section of the thesis, is particularly important for purposes of establishing accountability for realisation of human rights.[118]

To realise the RTD, the DRD assigns responsibilities to various actors. It captures the duty-holders in a broad manner. The responsibility to realise the RTD falls upon individuals and States. Article 2(2) requires individuals both individually and collectively, to take

[110]Sitta (note 94 above) 7.
[111]See, for example, United Nations, "Committee on Economic Social and Cultural Rights General Comment No. 12: The Right to Adequate Food (Art. 11)" UN Doc.E/C.12/1999/5 (1999), para 36; United Nations, "Committee on Economic Social and Cultural Rights General Comment No. 13: The Right to Education (Art. 13)" UN Doc. E/C.12/1999/10 (1999), paras 46 and 47; United Nations, "Committee on Economic Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)" UN Doc. E/C.12/2000/4 (2000), para 33; United Nations, "Committee on Economic Social and Cultural Rights General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant)" UN Doc. E/C.12/2002/11 (2002), paras 20, 21, 23 and 25.
[112]See for example, General Comment No. 14, para 34.
[113]As above, para 35.
[114]As above, para 36.
[115]As above, para 37.
[116]As above.
[117]As above.
[118]Sengupta (note 102 above) 72.

responsibility for realisation of the RTD by respecting the rights and freedoms of others. The aim here, in the words of article 2 of the DRD is to ensure "the free and complete fulfilment of the human being" by promoting and protecting "an appropriate political, social and economic order for development". In the same way, the State must commit to creating an environment of equity and social justice to make the RTD a reality for all.[119] The human person is recognised to function both individually and as a member of a community and to have a duty to his community in promoting the process of development.

Article 3 of the DRD, however, draws attention to the fact that the primary responsibility for realisation of the RTD lies with the State. States bear the primary duty of creating national and international conditions favourable to realisation of the right.[120] This also entails that State cooperation with other States ensures development and the elimination of obstacles to development.[121] The actions that States are required to take at both national and international levels are elaborated in various articles of the DRD. Article 2(3) creates a duty for States to develop appropriate national development policies that are aimed at realising the RTD through "the constant improvement of the well-being of the entire population". Under article 8, States are required to undertake at the national level, all measures necessary for the RTD and encourage popular participation in all spheres of the development process.[122] Article 6 obligates States to eliminate obstacles to development arising from failure to observe economic, social and cultural rights because the fulfilment, promotion and protection of those rights are essential to the realisation of the RTD.[123] Since the RTD involves the realisation of civil, political, economic, social and cultural rights, all the State obligations to realise these rights equally apply to the RTD. Therefore, the State is under a duty to respect, protect and fulfil the right to development.[124]

At the same time, the DRD recognises the challenges that developing countries will encounter in realising the RTD in their jurisdictions. As such, it places a premium on international cooperation as a solution to those problems. Article 4 therefore places a duty on the State, individually and in cooperation with other States, to formulate international development

[119]As above.
[120]DRD, article 3(1); See also, Sengupta (note 19 above) 853.
[121]DRD, article 3(3).
[122]As above, article 8(2).
[123]As above, article 6(3).
[124] Arjun Sengupta "On the theory and practice of development" in Arjun Sengupta *et al* (eds) *Reflections on the right to development* (2005) 61, 75.

policies that will facilitate the full realisation of the right.[125] The international cooperation envisaged is, in substance, development cooperation since the DRD recognises that "effective international cooperation is essential in providing these [developing] countries with appropriate means and facilities to foster their comprehensive development".[126]

One of the main arguments that has been advanced against the RTD as a human right is that it is not justiciable or capable of judicial enforcement because the DRD is not a legally binding instrument in international law.[127] The objection is raised by jurists of the positivist school of thought who hold the view that a right must be capable of judicial enforcement and sanctioned by legal authority such as legislation.[128] This argument does not take into consideration that there is a distinction between legal rights which flow from some legislative or common law source and human rights. Human rights, unlike legal rights, are moral and ethical claims which arise solely from the fact that the right-holder was born human.[129] According to Sengupta, "human rights precede the law and are not derived from law but from the concept of human dignity".[130] Human rights, therefore, do not necessarily need sanctioning by some legal authority to be valid. However, this does not mean that it is of no use to legislate human rights for purposes of judicial enforcement.[131]

Judicial enforcement of human rights is not the only method through which human rights can be implemented or fulfilled. The RTD is largely a right which can be implemented outside the judicial process through supervisory mechanisms to ensure that it is fulfilled.[132] This would include for example, reporting procedures.[133] It is sufficient in this regard that the DRD spells out the nature and content of the RTD and identifies the right-holders and duty-bearers. While the DRD is not legally binding in international law, that fact does not take away the responsibility of States to realise the RTD.

[125]As above, article 4(1).
[126]As above, article 4(2).
[127]Mesenbet Tadeg, "Reflections on the right to development: Challenges and prospects" (2010) *African Human Rights Law Journal* 325, 336.
[128]Sengupta (note 102 above) 74.
[129]Burns Weston, "Human Rights" quoted in Alston & Goodman (note 1 above) 491.
[130]As above.
[131]Sengupta (note 102 above) 76.
[132] As above. See also, Tadeg (note 127 above) 337.
[133] For further reading on UN human rights reporting procedures see, Alston & Goodman (note 1 above) 838-844.

As such, at the national level, States should implement the right by formulating appropriate development policies and designing the necessary development programmes to give effect to those policies.[134] At the international level, States must discharge their primary duty of creating favourable international conditions for implementation of the RTD.[135] That duty is progressive and States should "enact legislation, adopt legislative measures, engage in public actions", and "formulate schemes that empower beneficiaries at the grassroot level … to promote a process of development with equity and sustainable growth with whatever resources they have in a given framework of international cooperation".[136]

2.3.2 The RTD under the ACHPR

Article 22 of the ACHPR proclaims the RTD as a legally binding human right in the following terms:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

Article 22 of the ACHPR establishes the RTD as a collective right of 'all peoples". Although the term "peoples" appears several times in the ACHPR, it is not defined. Kiwanuka argues that this was a deliberate omission on the part of the drafters of the ACHPR.[137] The drafters of the ACHPR foresaw the difficult discussion on the precise meaning of the term "peoples" and chose not to ascribe any meaning to it because of its political connotations that varied from country to country.[138] This dilemma is captured in the *Endorois* decision[139] in the following terms:

> Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself

[134]Iqbal (note 31 above) 72
[135]As above, 73.
[136]Sengupta (note 124 above) 92.
[137]Richard Kiwanuka, "The meaning of 'people' in the African Charter on Human and Peoples Rights" (1999) 82 *American Journal of International Law* 82.
[138]Organisation of African Unity, "Report of the Rapporteur of the OAU Inter-ministerial meeting on the Draft African Charter on Human and Peoples Rights" OAU Doc. CAB/LEG/67/3/ Draft Rapt. Rpt II (1981) 4.
[139](2009) AHRLR 75 (2009 ACHPR).

> does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESCR do not define 'peoples'. It is evident that the drafters of the African Charter intended to distinguish between traditional individual rights where the sections preceding article 17 make reference to 'every individual', article 18 serves as a break by referring to the family. Articles 19 to 24 make specific reference to 'all peoples'.[140]

The African Commission noted that when compared to other regional human rights instruments, the, ACHPR is innovative and unique because it places emphasis on "peoples" rights. It goes beyond the scope of those other instruments and drawing from the three generations of human rights, associates the term "peoples" with collective rights.[141]

The African Commission also had occasion to deal with the definitional problem of the term "peoples" in the case of *Gunme and others v Cameroon* (*Gunme* case).[142] While acknowledging the controversial nature of the term "peoples" due to its political connotations,[143] the Commission drew from the work of a group of international law experts commissioned by UNESCO to "reflect" on the issue of the term 'people'. That group of experts concluded that:

> where a group of people manifest some of the following characteristics; a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life, it may be considered a 'people'.[144]

Using the foregoing as a guide, the African Commission was of the view that the notion of 'people' related to collective rights and that the collective rights guaranteed by the ACHPR "can be exercised by a people, bound by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds".[145] Accordingly, the RTD recognised by article 22(1) of the ACHPR is a right of "peoples" to development "with due regard to their freedom and identity".

The ACHPR is a unique instrument in human rights discourse through its establishment of the rights of "peoples" who may claim rights under it as collectivities.[146] Therefore, it is possible

[140]As above, para 147.
[141]As above, para 148.
[142](2009) AHRLR 9 (2009 ACHPR).
[143]As above, para 169.
[144]As above, para 170.
[145]As above, para 171.
[146]*Endorois* case (note 139 above) para 150.

for "peoples" to claim their RTD against the State as "indigenous peoples", "minorities" "pastoralists", people with "a common economic life" among other groupings that have a common identity.[147] In this regard, the African Court in the *Ogiek* case[148] was innovative in deciding whether the Ogiek were an indigenous population. By invoking articles 60 and 61 of the ACHPR, the court drew inspiration from the work of the African Commission through its Working Group on Indigenous Populations/Communities[149] and that of the UN Special Rapporteur on Minorities.[150] From these works, the Court concluded that for purposes of identifying an indigenous population:

> … the relevant factors to consider are the presence in priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.[151]

By virtue of articles 60 and 61 of the ACHPR, the African Court applied this criterion to determine that the Ogiek were "an indigenous population that is part of the Kenyan people, having a particular status and deserving special protection deriving from their vulnerability".[152]

The RTD proclaimed in article 22 of the ACHPR is a right to economic, social and cultural development. Article 22 places a duty on the State, to individually and in cooperation with

[147]As above, para 151.
[148]Application No. 006/2012, Judgment dated 26 May 2017, African Court on Human and Peoples' Rights.
[149]African Commission on Human and Peoples Rights "Advisory Opinion of the African Commission on Human and Peoples Rights on the United Nations Declaration on the Rights of Indigenous Peoples" <www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf> (accessed 19 August 2017) where the following criteria is adopted for identifying indigenous populations: "(i) self-identification; (ii) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival; and (iii) a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model." See para 12.
[150]United Nations "Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities" UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986). The report identifies an indigenous population as "indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued exercise as peoples, in accordance with their own cultural patterns, social institutions and legal systems". See, para 379.
[151]*Ogiek* case (note 148 above) para 107.
[152]As above.

other States, ensure the exercise of the RTD. Unlike the DRD, the ACHPR is not elaborate on the content of the RTD or the meaning of development or its facets ('economic', 'social' and 'cultural' development). However, the jurisprudence of the African Commission and the African Court offers some insight into the content of the RTD provided for in article 22 of the ACHPR.[153]

For example, in the *Endorois* case,[154] the African Commission was for the first time called upon to directly decide a matter in which violation of the RTD as proclaimed in article 22 of the ACHPR was alleged. In that communication, the complainants alleged that the government of Kenya, in violation of the ACHPR, the Constitution of Kenya and international law, had forcibly removed the Endorois people from their ancestral lands around Lake Bogoria in the Baringo and Koibatek districts of the Rift Valley province of Kenya without proper consultations and without adequate and effective compensation for their land.[155] This land was taken and used for purposes of establishing a national game reserve and tourist facilities by the government.[156]

In finding that the government of Kenya had violated article 22 of the ACHPR, the African Commission declared that "development is not simply the State providing for particular individuals or peoples but is about providing people with the ability to choose. Freedom of choice must be part of the right to development".[157] The Commission further observed that it was incumbent upon the State to allow affected persons to participate in making decisions crucial to the life of their community.[158] Finally, by invoking the provision in article 2(3) of the DRD that the RTD includes "active, free and meaningful participation in development", the Commission concluded that the result of development must be the empowerment of the people it benefits and that the capabilities and choices of its subjects must improve for the RTD to be realised.[159] The import of these findings of the African Commission is that realisation of the RTD entails expanding the freedoms of people to choose the direction that any development process affecting them takes. The ability of the people to choose their development priorities

[153]Chinedu Okafor, "'Righting' the right to development: A socio-legal analysis of article 22 of the African Charter on Human and Peoples Rights" in Stephen Marks (ed) *Implementing the right to development: The role of international law* (2008) 52, 55.
[154]*Endorois* case (note 139 above).
[155]As above, para 2.
[156]As above, para 3.
[157]As above, para 278.
[158]As above, para 282.
[159]As above, para 283.

through participation in the decision-making over the process is in turn predicated on their being empowered to participate. Finally, the result of such participation must result in an improved standard of living for the affected people.

Any conception of the RTD under article 22 must see peoples' participation in their own development as an irreducible minimum and the RTD as being inclusive of the rights to the means, process and outcomes of development.[160] Thus, in the *Endorois* case, the African Commission observed that the Endorois community was informed of the impending tourism related projects as an already decided matter and were not given an opportunity to shape the policies of, or have any role in, the game reserve.[161] The Commission therefore urged the Kenyan State to facilitate the right to effective participation of the Endorois people in development issues that concerned them in order to protect their RTD. By calling upon the State to ensure the "active, free and meaningful participation in development" by its' beneficiaries, the African Commission was clarifying that even if the beneficiaries of development were ignorant of their RTD, it was upon the State to educate them on it and keep them informed so as to ensure their inclusion in development projects that are directly linked to the right.[162]

In sum, the African Commission found the content of the RTD to be both constitutive (procedural) and instrumental (substantive),[163] and with five "important, over-arching themes", namely that it must be "equitable, non-discriminatory, participatory, accountable, and transparent with equity and choice".[164] Both the constitutive and instrumental elements of the RTD have to be fulfilled and the non-fulfilment of one results in violation of the right.

Further, in the *Ogiek* case,[165] the African Court dealt with the issues of consultation and involvement of beneficiaries of the RTD in the development process by government. The applicant alleged that the Ogieks' RTD had been violated by the government of Kenya when it evicted them from the Mau Forest complex which was their ancestral land without consulting them or seeking their consent to vacate the forest. The Mau Forest complex is an important

[160]Okafor (note 153 above) 56.
[161]*Endorois* case (note 139 above) para 281.
[162]Kamga & Fombad (note 6 above) 210.
[163]*Endorois* case (note 139 above) para 277.
[164]As above.
[165]*Ogiek* case (note 148 above).

water catchment area in Kenya but is at the same time considered to be sacred ancestral land by the Ogiek an indigenous minority group of about 20,000 people.[166] In finding that the government of Kenya had violated the RTD of the Ogiek people as provided for by article 22 of the ACHPR, the Court found that:

> In the instant case, the Court recalls that the Ogieks have been continuously evicted from the Mau Forest by the Respondent without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.[167]

In reaching this conclusion, the African Court, acting within the provisions of article 60 of the ACHPR, drew inspiration from article 23 of the UNDRIP which provides as follows:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

The jurisprudence of the African Commission and the African Court in the *Endorois* and *Ogiek* cases leads to the conclusion that the critical components of the RTD under article 22 of the ACHPR are participation of the people in making decisions that affect their development, their being constantly consulted by the State on development matters that affect them, their consent to State action that affects their well-being and their ability to choose development priorities.

Since the Maputo Protocol is part of the ACHPR,[168] it follows that the RTD protected by the ACHPR has to be sustainable in nature.[169] Article 19 of the Maputo Protocol introduces the concept of sustainable development to the African human rights law system by providing that

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[166]The Mau Forest complex covers 627,960 hectares of land and is the largest highland forest in East Africa with many rivers flowing from it into many water bodies including Lake Victoria. The forest complex supports the lives and livelihoods of most of the western region of Kenya which is inhabited by about 10 million people (a quarter of Kenya's population). Over time, people encroached on the complex and as a result of human activity such as agriculture, logging and settlement, reduced the complex to about a quarter of its original size and thereby affecting the water volumes and jeopardising the lives of millions of people who depended on the complex for their water needs. The government therefore moved to restore the complex by evicting all people who had encroached on the forest complex or settled in it, including the Ogiek who were indigenous inhabitants of the forest before the encroachment. See, African Wildlife Foundation, "The Mau Forest: Africa's water tower" <www.awf.org/landscape/mau-forest-complex> (accessed 29 December 2017).

[167]*Ogiek* case (note 148 above) para 210.

[168]See the discussion on the Maputo Protocol in section 2.2.2 above.

[169]See the discussion on sustainable development in chapter 1 above, section 1.2.

women have a right "to fully enjoy their *right to sustainable development*"[170]. In essence, it recognises a right to sustainable development which women have a right to fully enjoy in the same way as all other groups of people would.

With regard to duties to realise the RTD under the ACHPR, article 1 creates a general duty for States Parties to "recognize the rights, duties and freedoms" that it sets out, and enjoins them to take legislative or other measures to give effect to those rights, duties and freedoms. The measures envisaged by article 1 of the ACHPR are said to include:

> … providing for the protection and realisation of economic, social and cultural rights through constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness measures and administrative action as well as ensuring appropriate administrative and judicial remedies for violation.[171]

The general obligation under article 1 requires that, at the very least, the measures taken will result in the economic, social and cultural rights provided for in the ACHPR being readily available to the individual, that the benefits accruing from those rights will be adequate to meet all the requirements of the rights, that the rights shall be physically accessible and affordable to the beneficiaries especially the vulnerable and marginalised, and that the manner of provision of the rights shall be acceptable to the beneficiaries.[172] Because human rights are interdependent and indivisible, these principles are equally applicable to the RTD provided for in article 22 of the ACHPR.

It is important to note that it is not sufficient that States take "legislative or other measures to give effect" to the rights that the ACHPR recognises. The legislation or other measures that the State adopts must also be adequate for purposes of giving effect to those rights. In the *Ogiek* case, the African Court observed that through the adoption of the Constitution and the enactment of the Forest Conservation and Management Act[173] and the Community Land Act[174], the government of Kenya had taken some legislative measures to ensure enjoyment of rights

[170]Emphasis added.
[171]Africa Commission on Human and Peoples' Rights, "Principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples Rights" para 2. <www.achpr.org/instruments/economic-social-cultural/> (accessed 14 December 2017).
[172]As above, para 3.
[173]Act 36 of 2016.
[174]Act 27 of 2016.

recognised by the ACHPR.[175] However, the Court found that those enactments were fairly recent and that the government had failed to demonstrate that it had taken other measures to give effect to those rights.[176] On that basis, the Court held that the government of Kenya had violated article 1 of the ACHPR "by not taking adequate legislative and other measures to give effect to the rights enshrined under article 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter".[177]

The general duty under article 1 of the ACHPR also requires States Parties to take legislative and other measures that ensure the respect, protection, promotion and fulfilment of the rights, and freedoms that it enshrines. This typology of duties in relation to the ACHPR was elucidated upon by the African Commission in the *SERAC* case.[178] In that case, the Commission affirmed that:

> Internationally accepted ideas of various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – 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.[179]

In analysing this typology of duties, the African Commission basically restated the position taken by the CESCR in it various general comments. The Commission took the position that the duty to respect meant that States must refrain from interfering with the enjoyment of human rights,[180] the duty to protect meant that States must protect the beneficiaries of rights against interference with the enjoyment of their rights by other parties,[181] and the duty to fulfil meant that the State had an obligation to ensure that the rights were realised[182].

In addition to the general duty in article 1 of the ACHPR, article 22 places a specific primary duty to ensure realisation of the RTD on the State. Every African State Party to the ACHPR bears the duty to ensure that the RTD of all "peoples" within its territory is realised.[183] The

[175]*Ogiek* case (note 148 above) para 216.
[176]As above.
[177]As above, para 217.
[178]*SERAC* case (note 73 above).
[179]As above, para 44.
[180]As above, para 45.
[181]As above, para 46.
[182]As above, para 47.
[183]Chinedu Okafor "A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights" in United Nations, *Realizing the right to development* (2013) 373, 380.

duty placed on States is one to be carried out "individually or collectively, to ensure the exercise of the right to development".[184] In the *Endorois* case, the African Commission observed that the State bears the responsibility of ensuring peoples' development, by creating favourable conditions in that respect.[185] Further, the State is under a duty to ensure that beneficiaries of the RTD are not left out of the development process or from the benefits that accrue from that process.[186] The Commission agreed with the argument that the failure by the State to provide adequate compensation to the Endorois for the loss of their land, or to provide suitable grazing land for them, was an indication that the State had not adequately provided for the Endorois in the development process around their land and that as such, their RTD under article 22 of the ACHPR had been violated.[187]

The RTD is a progressive right with the effect that States have a duty, to ensure realisation of the right over time, within its available resources. However, there is an immediate duty placed on States to prudently invest and allocate its resources towards achieving this end. This was confirmed in the *Gunme* case,[188] where the complainants alleged that the government of Cameroon had subjected them to economic marginalisation.[189] They complained that lack of infrastructure and the relocation of a sea port from their region constituted a violation of their RTD under article 22 of the ACHPR.[190] The African Commission, in finding that the respondent State had not violated the complainants' RTD, noted that there is a duty on a State "to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights".[191] The Commission based this this finding on the explanations of the State which included statistical data that showed how it had allocated resources for the development of various socio-economic sectors in Cameroon. It noted that the possibility of the resources not reaching all parts of the country to the satisfaction of all and complaints arising form that fact. In the Commissions view, that possibility on its own did not support a finding of violation of the RTD.[192]

[184]ACHPR, art 22(2).
[185]*Endorois* case (note 139 above) para 298.
[186]As above.
[187]As above.
[188]*Gunme* case (note 142 above).
[189]As above, para 9.
[190]As above.
[191]As above, para 206.
[192]As above.

Like the DRD, the ACHPR creates duties of individuals towards realisation of the RTD under the ACHPR. The ACHPR places a duty on individuals towards the realisation of the rights it provides for, including the RTD, in article 27. Of relevance to the RTD is article 27(1) which provides that an individual has duties towards his society, the State, "other legally recognised communities," and the international community to ensure the enjoyment human rights by others.[193] The "peoples" identified as beneficiaries of the RTD in article 22(1) are "legally recognised communities" and therefore an individual is bound to assist those legally recognised communities in their pursuit of realisation of their RTD. Therefore, for example, where an individual is in possession of information that would help in realisation of the RTD of legally recognised communities, that individual is under a duty to avail that information to the intended beneficiaries to enable them to make informed decisions relating to their development.

Further, article 27(2) places a duty on the individual to respect the rights of others, the collective security and common interest of society when exercising their own rights and freedoms. In real terms, article 27(2) limits the exercise of the rights of an individual so as to give effect to the rights of others considering their collective security and common interests. Whereas the African Commission and the African Court have not elaborated on the individual duties created by the ACHPR especially in article 27, they have had occasion to elaborate on the nature of article 27(2) as a limitation clause on the exercise of rights guaranteed by it. In the *Ogiek* case for instance, the African Court was of the view that the cultural right of the Ogiek people to preserve the environment in the Mau Forest Complex for their survival, could be justifiably restricted so as to safeguard a "common interest" under article 27(2).[194] However, for such justification to succeed, the State, beyond merely asserting the existence of a "common interest" that justifies the restriction of a right, must show that the restriction is genuinely needed to protect that "common interest", and that the restriction is necessary and proportional to the "common interest" that is sought to be protected.[195] In this case, the Court found that the Kenyan State had not adequately shown that the eviction of the Ogiek from the forest was for the "common interest" of preserving the ecosystem of the forest so as to justify restricting the cultural rights of the Ogiek to access it, and neither was the restriction objectively and reasonably justifiable.[196]

[193]ACHPR, article 27(1).
[194]*Ogiek* case (note 148 above) para 188.
[195]As above.
[196]As above, para 189. For further reading on legitimate reasons for restricting rights and freedoms guaranteed by the ACHPR in terms of article 27(2), see the decisions of the African Commission in *Constitutional Rights Project*

The assigning of individual duties for realisation of human rights is not a concept that is unique to the ACHPR. For instance, the UDHR recognises that the individual has duties to his community because his community is solely in a position to facilitate "the free and full development of his personality".[197] Similarly, the ICCPR and the ICESCR were adopted upon realisation by States Parties "that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights" that they recognise.[198] The difficulty with assigning individual responsibility for human rights in international instruments however, is the risk of those responsibilities ringing hollow for lack of an accountability or enforcement mechanism. In the case of the ACHPR, this is true because only States Parties are accountable to the African Commission in terms of reporting on human rights obligations, and further, only States Parties have responsibility for enforcement of human and peoples' rights before the African Commission and the African Court.[199]

2.4 Conclusion

This chapter establishes that the RTD is a human right known to international law both at the UN and African regional levels. The RTD emerged in the 1970s as a concern of developing countries of the need to establish a NIEO that was more equitable in the distribution of global wealth and resources amongst nations. This led to the adoption of the UN Declaration on the establishment of a NIEO and the Charter of Economic Rights and Duties of States. However, the lack of enforcement mechanisms under these instruments rendered the human rights language in them irrelevant to the realisation of the RTD as a human right.

The adoption of the DRD by the UN in 1986 was a more focused attempt in elucidating the RTD as a human right. Its development at the UN level has been dogged by controversies as to its nature and whether it was a human right at all. This is despite the fact that the RTD proclaimed in the DRD can be traced to article 28 of the UDHR and the preambles of the UN Charter, ICCPR and ICESCR. The 1993 Vienna Conference managed to build consensus on

v Nigeria (2000) AHRLR 227 (ACHPR 1999), *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) and *Interights v Mauritania* (2004) AHRLR 87 (ACHPR 2004). For the African Court, see *Mtikila v Tanzania*, Application No. 011/2011, Judgement of 14 June 2013, African Court on Human and Peoples' Rights.

[197]UDHR, article 29(1).

[198]ICCPR & ICESCR, preamble common para 5.

[199]See, ACHPR, articles 49, 56 and 57. See also, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, articles 3 and 5.

the existence of the RTD as a "universal and inalienable human right", with the human person as its main subject. However, the soft law nature of the DRD remains an obstacle to its realisation due to lack of enforcement mechanisms at the global level. Notwithstanding this, the DRD is a useful guide in determining the content of the right.

The RTD recognised in the DRD is established as a human right to a process of development with equal opportunities for its beneficiaries. Article 2 of the DRD identifies the human person as the beneficiary of the RTD and asserts that the human person must be an active participant in the process of development. It also places responsibility for realisation of the RTD on individuals and States, but the primary responsibility lies with the State. States are required to develop appropriate development policies, ensure and facilitate popular participation in the development process and eliminate obstacles to development.

The ACHPR recognises the RTD in article 22 as a legally binding and enforceable right for all peoples to their economic, social and cultural development. It is a right that must be fulfilled by member States through national policy and legislation. The ACHPR provides that the RTD is a right to be claimed by "all peoples". The import of this provision is that the RTD under the ACHPR is a collective right that benefits individuals as members of a group of "people" who have a common identity such as minorities and indigenous peoples and the primary duty for its realisation is placed on the State even though individuals also bear some responsibility for its realisation. In the *Endorois* case, for example, the African Commission pronounced itself on the nature of the RTD. The Commission found the right to be about "peoples" freedom of choice and participation in matters relating to their well-being. By invoking the text of the DRD, the African Commission concluded that the RTD includes "active, free and meaningful participation in development". This demonstrates that there is a convergence of the nature of the RTD espoused by the DRD.

In conclusion, it is important to note that the analysis in this chapter on the status of the RTD in international law, and the correlating obligations on States (including Kenya) to realise it, is relevant to the assessment in the next chapter of Kenya's compliance with its international law obligations to realise the RTD. This chapter provides the context in which those obligations arise and how they ought to be discharged.

Chapter 3: The right to development in Kenya

3.1 Introduction

The 2010 Constitution of Kenya, unlike its predecessors, contains far-reaching provisions that seek to transform Kenyan society by focusing on the welfare of Kenyans and therefore laying a basis for realisation of the RTD locally. An analysis of the constitutions that Kenya has had since independence suggests that the pre-2010 constitutional order was largely designed to be little more than a regulatory framework for State affairs, whereas the current one is dominated by a social transformation ideology of rights, welfare and empowerment. Accordingly, Ojwang J. observed in the case of *Gathungu v Attorney-General*[1] that the 2010 Constitution is a social transformation document that seeks to address historical social injustices that the previous constitutional orders in the country had visited on its subjects.[2] The historical social injustices include limited realisation of the RTD.

The aim of this chapter is to determine the status of the RTD in Kenya by examining its basis as a human right recognised in the 2010 constitutional order. In doing so, the general obligations for realisation of the RTD that flow from the Constitution and supporting policy are identified. The chapter also considers if these obligations are in line with Kenya's international law obligations that arise from the discussion in chapter 2. The chapter therefore links the discussion on the nature of the RTD in chapter 2 with the next chapters, 4, 5 and 6, which focus on realisation of the RTD in Kenya within the context of poverty alleviation, anti-corruption and public participation.

The chapter also examines human rights in the pre-independence, independence, republican and 2010 constitutional orders in Kenya. An understanding of the historical context of constitutional order in Kenya is important because it demonstrates that, before the Constitution was promulgated, the constitutional paradigm was one about acquisition, exercise and retention of political power and not about rights, welfare and empowerment of the governed. It is additionally important because it shows that the RTD was never a concern at that point in time but is now a relevant and core value of the 2010 constitutional order. The opportunities for

[1](2010) eKLR.
[2]As above, 17.

realising the RTD under the 2010 Constitution must therefore be understood against the background of constitutional evolution in Kenya. The chapter finally locates the RTD in the 2010 constitutional order and interrogates the policy framework within which the constitutional promise of the RTD operates, namely KV2030.[3]

3.2 The evolution of the RTD in Kenya

Constitutional order in Kenya as known today generally spans four historical eras. These can be delineated as the pre-independence (1890-1963), the independence (1963-1964), the republican (1964-2010) and the 2010 constitutional orders.

3.2.1 The pre-independence constitutional order

The search for a constitutional order in Kenya that is based on justice, equality and the common good of the people can be traced back to as long as 1890 when the British started settling in Kenya after the Imperial British East Africa (IBEA) Company had explored the territory and found it suitable for colonial settlement.[4] The establishment of the British East African Protectorate, as Kenya was then called, heralded a colonially imposed legal system that facilitated the extraction of natural resources by the colonial regime for its benefit and subjugation of the Kenyan people. The governance crisis that Kenya suffered in the post-colonial State can be attributed to the illegitimate and exploitative colonial policies which were later perfected by subsequent regimes in the independent State.

The pre-independence phase of constitutional development was marked by the subordination of local people to colonial domination where colonial governance was by way of decree.[5] The colonial structures did not facilitate national transformation and development. They were not intended to create a strong nation capable of meeting the needs of the masses. The alienation of fertile land for occupation by settlers was a primary tool of subjugation. By 1915, about 4.5 million acres of arable land had been alienated by the colonial government to facilitate large scale farming and livestock rearing by the white settler community.[6]

[3]Republic of Kenya, *Kenya Vision 2030* (2007).
[4]Constitution and Reform Education Consortium, *Understanding the Constitution of Kenya, 2010* (2010) 1.
[5]As above.
[6]As above, 11.

The earliest constitutional problem that arose was in relation to land, when Kenya was a Protectorate of the British Crown between 1895 and 1920. The theory behind protectorate status was that a protectorate was a foreign territory over which the British Crown exercised external sovereignty and, in the case of "a colonial protectorate", like Kenya, the Crown also exercised some measure of internal governing authority.[7] In a colonial protectorate, the Crown exercised effective sovereignty without actual annexation of the territory.[8] One consequence of this theory was that land in the protectorate became Crown land on the basis that it was "vacant" and was allocated to a small section of the immigrant community whose population in the "White Highlands" never exceeded 3,600.[9]

The outbreak of the Mau-Mau rebellion in 1952, as a direct consequence of the land problem, precipitated the need for a new constitutional order. In the face of the insurgency, the first written constitution for Kenya was promulgated in 1954 (Lyttleton Constitution) and was followed in 1957 by the second one (Lennox-Boyd Constitution). These constitutions were marked by an absence of consensus among Kenya's racially defined political divide.[10] This lack of consensus among political leadership led the colonial authorities to work out in advance what they wanted to see implemented. Therefore, both in 1954 and 1957, the colonial regime literally imposed its own constitutional order without any input from the people of Kenya.[11]

The strategy of imposing non-negotiated constitutions in the colony did not last long. There was African resistance and refusal to accept both the 1954 and 1957 constitutions and this necessitated a different direction in constitution-making. The new direction in constitution-making came in the form of the Lancaster House conferences of 1960, 1962 and 1963.[12] These conferences were however undermined by political suspicion and divisions among the African representatives at the conferences. Consequently, the constitutions arrived at in the conferences were nothing more than vehicles of achieving self-internal rule without addressing the injustices that had been occasioned by colonialism such as the expropriation of land and marginalisation of some communities.

[7]Chanan Singh, "The Republican Constitution of Kenya: Historical background and analysis" (1965) *International & Comparative Law Quarterly* 878, 885.
[8]Owen Hood Phillips, *The constitutional law of Great Britain and the Commonwealth* (1952) 676.
[9]Singh (note 7 above) 886.
[10]Robert Maxon "Constitution making in contemporary Kenya: Lessons from the twentieth century" (2009) 1 *Kenya Studies Review* 11, 13.
[11]As above.
[12]Constitution and Reform Education Consortium (note 4 above) 14.

It was at the 1960 Conference that the idea of a BoR, entrenched in the constitution, first arose. At that time, it was evident that Kenya, like most African subjects of the British authorities at that time, was on its way independence. In pushing the agenda for a BoR entrenched in the constitution, the British government was of the view that it was critical to recognise and protect human rights in the proposed constitution.[13] This view was informed by the need to protect the land rights of the white settler community which had been persuaded by the British government to move into colonial Kenya and invest heavily in farming and other commercial ventures. However, a BoR was not incorporated immediately in the 1960 Constitution. It became a part of that constitution courtesy of a constitutional amendment later that year.[14] The BoR that was adopted guaranteed the traditional civil and political rights set out in the UDHR. The economic, social and cultural rights provided for in the UDHR did not feature in it. It was ironical that the British government was advancing an agenda for the protection of fundamental rights and freedoms through a justiciable BoR at that time. The irony is to be found in the English position on the subject at that time, which Jennings captures as follows:

> … in Britain we have no Bill of Rights; we merely have liberty according to law; and we think – truly, I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man.[15]

Although the African delegation did not oppose the idea of a BoR at the conference, their approach towards the protection of fundamental rights and freedoms in a BoR was similar to of Kamuzu Banda at the Nyasaland Constitutional Conference of 1962. At the Nyasaland Conference, while Banda did not object to a BoR, his position was that real protection of minorities depended on the goodwill of the majority.[16] The BoR in the 1960 Constitution therefore was a document meant to serve political expediency for the Africans and self-preservation for the settler community in Kenya. It had no provisions that were directed towards the well-being of its subjects generally, and therefore had no relation to the RTD.

At the 1962 Conference, it was agreed with regard to human rights, that a committee would be set up to consider and report to the conference on the provisions that would be included in the

[13]*Report of the Kenya Constitutional Conference 1960* (1960) (Cmnd 960) 9.
[14]Kenya (Constitution) (Amendment No. 2) Order in Council 1960.
[15]Ivor Jennings, *The approach to self-government* (2011) 20.
[16]*Report of the Nyasaland Constitutional Conference 1962* (1962) (Cmnd 1887) 20.

BoR.[17] The committee was presided over by Sir John Martin and included representation of the African and settler communities. At the conclusion of its work, the committee recommended substantial reformulation of the 1960 BoR. As was the case with the 1960 Constitution, the inclusion of a BoR in the 1962 Constitution was wholly attributable to the British authorities. They made this a pre-condition for independence. It seems that a BoR was not a priority issue for Africa representatives. Their prime concern was the transfer of power to an independent Kenyan State. The BoR in its origin cannot therefore be said to have been the enactment of a set of fundamental values that emanated from the Kenyan people and to which they subscribed. It was thus meant to be nothing more than a guard against political power in the hands of Africans, primarily to protect the interests of the European settlers. Further, British insistence on a BoR in the constitution cannot be seen as a genuine concern for human rights and the well-being of the African population, because the colonial State had been characterised by inhuman and degrading treatment of the colonised people. It is best seen as evidence of British concerns over the security of white settlers and their property in a newly independent State.[18]

The BoR in the 1962 Constitution was modelled on the Ugandan one. At its first meeting, the Martin committee agreed that its working document would be the BoR contained in the Uganda (Constitution) Order in Council, 1962.[19] The committee's rationale for this was that the Ugandan BoR was the most comparable model at the time and also that it was of special relevance because it was part of the constitution of a neighbouring State. On its part, the Ugandan BoR had been modelled around the Nigerian one contained in the Nigerian Constitution of 1959.[20] The fundamental rights and freedoms recognised and protected by the Nigerian constitution were Eurocentric in their formulation in that those rights and freedoms "drew heavily from, and reflected, the individualistic approach" found in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[21] These rights were limited to civil and political rights, with no reference to economic, social and cultural rights. Through the Nigerian constitution, the western conception of human rights was imported into Africa.[22] As was the case with the 1960

[17]*Report of the Kenya Constitutional Conference 1962* (1962) (Cmnd 1700) 19.
[18]Chris Peter, *Human rights in Africa: A comparative study of the Africa Charter on Human and Peoples Rights and the new Tanzanian Bill of Rights* (1990) 2.
[19]*Report of the Kenya Constitutional Conference 1962* (note 17 above) 19.
[20]Gaius Ezejiofor, *Protection of human rights under the law* (1964) London: Butterworth 178.
[21]Adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 221.
[22]Yash Ghai, "Independence and constitutional safeguards in Kenya (1967) 3 *East African Law Journal* 177, 192.

Constitution, there were no provisions in the 1962 Constitution that could form a basis for realisation of the RTD.

By the time the 1963 Conference was held, Kenya had gained the status of a British territory with internal self-government on 1 June 1963, awaiting the grant of independence on 12 December of the same year. The conference was primarily about how the British government would hand over power in the territory. The main decision taken at the 1963 conference was that the next constitutional milestone would be the granting of Dominion status to Kenya with the Queen remaining as the Head of State; and that Kenya would not become a Republic immediately after independence.[23] A number of amendments were made to the 1962 Constitution to make it durable and workable.[24] These amendments were mainly in the nature of giving character to the Dominion status under which Kenya would subsequently become independent.

A major change at this conference, that is relevant to realisation of the RTD was that government was assigned legislative and executive responsibility for the implementation of social development projects forming part of a National Development Plan (NDP) approved by Parliament and financed from central government funds.[25] For the first time in the evolution of constitutional order in Kenya, the need for social development of the people was recognised. It was also recognised that the State through central government bore the responsibility for implementation of social development programmes and that this was to be done through the framework of an NDP.[26] This Constitution, which was the predecessor of the Independence Constitution of the same year, therefore laid a basis on which the RTD could be realised in independent Kenya.

3.2.2 The independence constitutional order

Kenya became independent on 12 December 1963 under a constitution (Independence Constitution) that was negotiated in London. Its content was heavily influenced by the departing colonial power in order to secure the economic and property interests of its white

[23]Singh (note 7 above) 899.
[24]*Report of the Final London Conference: Independence Constitution 1963* (1963) (Cmnd 2156) para 32.
[25]Singh (note 7 above) 899 – 900.
[26]As above.

settler subjects who were to remain in the independent State.[27] The British government "renounced all rights of governmental authority and legislation in Kenya and removed all limitations to the competence of the legislature through the Kenya Independence Act, 1963 and the Kenya Independence Order in Council of the same year".[28]

The Independence Order in Council proclaimed that by the provisions of the Independence Act, Kenya had attained independence from Britain. The Independence Constitution was contained in the second schedule to the Independence Order in Council. It was a detailed document with a strong basis in the principles of parliamentary governance and the protection of minority groups. The fact that the Independence Constitution was detailed is best explained by the situation obtaining at the time of its formulation. Because the British government was about to transfer power to the local communities, an acrimonious debate ensued as to how this was to be done. Minority groups were determined to secure their interests against the background of their relatively insecure position in a newly independent State. For purposes of self-preservation, those minority groups demanded constitutional measures that protected them, and other means of sharing in political power after the grant of independence.[29]

The Independence Constitution was also an embodiment of mistrust amongst politicians. The result of this mistrust was the establishment of a weak form of government was established, as compared with the colonial one which was based on the concentration of power around the executive.[30] Three broad themes ran through the constitution: regionalism to safeguard the interests of minority African groups; safeguards for minority settler interests relating to land; and control on the exercise of political power. The Independence Constitution provided for a Westminster-style multi-party democracy and a decentralised system of governance.[31] It had a two-chamber parliament with a House of Representatives and a Senate.[32] The Queen was the Head of State[33] and the Prime Minister, Head of Government.[34] The Independence Constitution, which was negotiated without participation of the people was however, a

[27]Constitution and Reform Education Consortium (note 4 above) 14.
[28]Yash Ghai & John McAuslan, *Public law and political change in Kenya* (1970) 178.
[29]Yash Ghai, "Constitutions and political order in East Africa" (1972) 21 *International and Comparative Law Quarterly* 403, 410.
[30]As above, 410.
[31]Independence Constitution, chapters II and VI.
[32]As above, section 34(2).
[33]As above, section 72.
[34]As above, section 75.

progressive document in terms of dispersal of governmental authority.[35] It provided clear checks and balances to the exercise of State power.[36] In the *Gathungu* case, the Court described the Independence Constitution as an elaborate document marked by delicate checks and balances to public power.[37]

Soon after independence, implementation of the constitution became problematic. The fundamental problem was that the British executive authority on which the Independence Constitution was modelled, emanated from popular participation and was based on an unwritten constitution. [38] The lack of popular participation in the making of the Independence Constitution gave room for the sectarian interests of the political elite that participated in its making, to find expression in the document. Within a year of enactment of the Independence Constitution, the ruling party under the leadership of Jomo Kenyatta, began dismantling it. This was not surprising because during the struggle for independence, Kenyatta had argued that dual executive authority was unsuitable for Kenya because traditional African societies were only familiar with undivided authority.[39] In line with that ideology, upon independence from British rule, government leadership began to destroy the constitution and thereby entrench centralised authority.[40] Lumumba and Franceschi identify this constitutional tragedy and sum it up as follows:

> Like most emergent states the colonial power adopted Kenya's Constitution at independence. Neither did the citizenry take part in its drafting nor was there a referendum to have the document endorsed by the public. As a result, the document lacked the legitimacy and moral authority from the people it sought to govern. Besides the colonial government can be said to have been naïve to impose a document on independent Kenya during the sunset days of colonialism and without an established tradition of the numerous democratic principles that the document sought to introduce. Perhaps this best explains why there was a lack of full implementation of the values in this Constitution and often fell prey to mutilation to serve the selfish interests of the political class. Contrary to what the colonialist might have contemplated earlier, this in turn crippled the practice of Constitutionalism in independent Kenya.[41]

[35]Kenya Human Rights Commission, *Wanjiku's journey: Tracing Kenya's quest for a new constitution and reporting on the 2010 referendum* (2010) 11.
[36]Independence Constitution, chapters IV, V and VI.
[37]*Gathungu* case (note 1 above) 16.
[38]Bernard Sihanya "Restructuring the Kenyan Constitution and state, 1963-2010" (2010) 6 *Law Society of Kenya Journal* 1, 11.
[39]As above, 9.
[40]As above.
[41]PLO Lumumba & Luis Franceschi, *The Constitution of Kenya, 2010: An introductory commentary* (2014) 30.

With respect to human rights in the independence constitutional order, the first problem that the BoR should have dealt with was discrimination and distinctions based on race and land, and the social justice problems that had been brought about by such discrimination in the colonial era. This is because fierce political battles had been fought prior to the constitutional conferences on the subject of discrimination in the alienation of land.[42] Africans took the position that their land had been taken from them and allocated to European immigrants and they wanted it back.[43] However, the Independence Constitution failed to deal with discrimination and distinctions based on race and land. It therefore rolled back the gains that had been realised by the 1962 constitutional order, which had provisions that could enable realisation of the RTD in Kenya. Distinctions as to race hindered the African population's equality of access to social goods and services such as education and healthcare, which are essential in realising the RTD of any people. Land was an important factor of production which the African people had been dispossessed of in favour of the settlers thereby affecting their livelihoods. This in effect, restricted their opportunities of enjoying their RTD.

3.2.3 The republican constitutional order

In 1964, the Kenyatta government began dismantling the Independence Constitution. On 12 December that year, Kenya became a Republic.[44] Kenyatta had always believed that the 1962 Constitution was unnecessarily rigid and that some elasticity was needed to move the country forward.[45] It was therefore amended to abolish the office of the Prime Minister and create that of the President. The President became Head of State and Government, roles that had before then been shared between the Queen and the Prime Minister. Through an amendment of the constitution, and without the benefit of popular elections or a referendum, Kenyatta ascended to the presidency. At that point in time, an all-powerful presidency began its life and consolidated itself over half a decade of independent Kenya through numerous amendments to the constitution by a legislature that was under the control of the executive. The reality under Kenyatta, and later Daniel arap Moi, was that Kenya became increasingly dominated by the

[42]Singh (note 7 above) 909.
[43]As above.
[44]Constitution of Kenya (Amendment) Act No. 28 of 1964.
[45]Singh (note 7 above) 926.

institution of the presidency. In turn, the authority of the other organs of government became seriously weakened.[46]

As a consequence of this consolidation of power, on 10 November 1964, the Parliamentary opposition leader announced in parliament that the official opposition party had been dissolved and joined government. With that statement, Kenya became a *de facto* one-party State. The Constitution of Kenya (Amendment) Act, 1964[47] was subsequently debated and passed by both Houses of Parliament. That Act made substantial changes to the Independence Constitution resulting in a totally different constitution which came to be commonly referred to as the Republican Constitution. Thereafter, within a period of five years, drastic amendments were made so that by 1969, a strong centralised presidential system of governance had taken root. As noted by Ojwang, J. in the *Gathungu* case:

> … the **1969** Constitution had trimmed off most of the checks-and-balances [in the Independence Constitution], culminating in a highly centralized structure in which most powers radiated from the Presidency, stifling other centres of power, and weakening their organizational and resource-base, in a manner that deprived the electorate of orderly and equitable procedures of access to civil goods.[48]

The Republican Constitution described the character of the new State as "a sovereign Republic".[49] It further declared that the executive authority of the government was now vested in the President.[50] The President became both the Head of State and Head of Government. The President was vested with wide ranging power without seeking approval of parliament, among them being power to dissolve parliament,[51] appoint members of cabinet,[52] and dismiss members of cabinet.[53] Cabinet was composed of the President, the Vice-President (who was appointed by the President from amongst members of the cabinet) and ministers. The number of ministers to be appointed was left to the discretion of the President, unless Parliament fixed the number.[54] This consolidation and centralisation of power in the President as will be shown

[46]Charles Hornsby, "The social structure of the National Assembly in Kenya, 1963-83" (1989) 27 *Journal of Modern African Studies* 275.
[47]Act 28 of 1964.
[48]*Gathungu* case (note 1 above) 16.
[49]Republican Constitution, section 31.
[50]As above, section 72(1).
[51]As above, section 65(2).
[52]As above, section 75 (2).
[53]As above, section 75 (3).
[54]As above, section 76(1).

in chapter 5, would lead to State capture by a few elites and the entrenchment of corruption with adverse effects to realisation of the RTD.

Over the next 24 years, there was approximately one constitutional amendment each year so that by 1988, the basic structure of the original constitution had been fundamentally changed.[55] The far-reaching amendments reduced funding to the regions,[56] weakened safeguards to constitutional amendments,[57] increased presidential powers over the regions,[58] abolished the bicameral legislature,[59] consolidated executive power in the central government at the expense of the regional ones,[60] eliminated the role of parliament in the election of a president,[61]abolished multi-party democracy,[62] and weakened the independence of the offices of the Attorney General and the Auditor General.[63] The High Court in *Njoya v Attorney General*[64] decried the adulteration of the Republican Constitution over those years as follows:

> Since independence in 1963, there have been 38 amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from a parliamentary to presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of security of tenure for judges and other constitutional office holders (now restored), and the making of the country into a one party state (now reversed). And in 1969 by Act 5 parliament consolidated all previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments was to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.[65]

These fundamental changes never addressed the problems that had been caused by the colonial constitutional order but rather facilitated some small power elite to consolidate their hold on power and public resources. The land question was never addressed constitutionally. Once more, an opportunity to lay a basis for recognition of the RTD was missed. After the return to

[55]Jackton Ojwang, *Constitutional development in Kenya: Institutional adaptation and institutional change* (1990) 231.
[56]Constitution of Kenya (Amendment) (No. 2) Act 38 of 1964.
[57]Constitution of Kenya (Amendment) Act 14 of 1965.
[58]Constitution of Kenya (Amendment) Act 16 of 1966.
[59]Constitution of Kenya (Amendment) Act 40 of 1966.
[60]Constitution of Kenya (Amendment) Act 16 of 1968.
[61]Constitution of Kenya (Amendment) Act 45 of 1968.
[62]Constitution of Kenya (Amendment) Act 7 of 1982.
[63]Constitution of Kenya (Amendment) Act 14 of 1986.
[64](2004) eKLR.
[65]As above, 25.

multi-party politics in 1992, and until 2010, nothing much on the constitutional reform process had been achieved. Consequently, after the disputed 2007 presidential election, Kenya experienced widespread violence. The violence led to deaths, physical injuries, mental distress, loss of property and internal displacements. It brought to the surface Kenya's political, social and economic divisions that threatened its existence as a cohesive nation.[66] A constitutional dispensation that recognised the RTD by promoting the well-being of all Kenyans would have helped avert the crisis that unfolded after that election.

In relation to human rights in the Republican Constitution**,** it included a BoR comprising 18 sections. It was titled "Protection of Fundamental Rights and Freedoms of the Individual". The rights in it were focused on the individual and not groups of people or communities. Having been shaped around the European Convention on Human Rights, it guaranteed the traditional civil and political rights only. The rights protected in the BoR were: the "right to life";[67] the "right to personal liberty";[68] "freedom from slavery and forced labour";[69] protection from "inhuman treatment";[70] protection from deprivation of property";[71] protection against "arbitrary search or entry";[72] protection of the law;[73] "freedom of conscience";[74] "freedom of expression";[75] "freedom of assembly and association";[76] "freedom of movement";[77] and "freedom from discrimination".[78] The BoR assured every person in Kenya "the fundamental rights and freedoms of the individual regardless of his tribe, race, place of origin or residence, political opinion, colour creed or sex".[79] In *Wadhwa v City Council of Nairobi*,[80] the High Court emphasised that section 70 declared the rights of the individual as a human person "without any reference to any matter of nationality, citizenship or domicile".

[66]Kenya Human Rights Commission (note 35 above) 14.
[67]Republican Constitution, section 71.
[68]As above, section 72.
[69]As above, section 73.
[70]As above, section 74.
[71]As above, section 75.
[72]As above, section 76.
[73]As above, section 77.
[74]As above, section 78.
[75]As above, section 79.
[76]As above, section 80.
[77]As above, section 81.
[78]As above, section 82.
[79]As above, section 70.
[80](1968) EA 406.

Despite the fact that Kenya had been a State Party to the ICESCR[81] and the ACHPR,[82] the Republican BoR was never amended to recognise socio-economic rights or the RTD. They did not even appear as directive principles of state policy. Yet, at independence, the government had set out an African socialism manifesto which aimed at achieving "political equality, social justice, human dignity, freedom from want, disease and exploitation, equal opportunities and growing per capita incomes equally distributed."[83] The policy priorities of government over that period were aimed at providing a solid foundation for economic growth.[84] It has been argued that over time, "it became evident that the government's African socialism agenda was nothing more than a convenient doctrine for explaining and justifying its involvement in the process of economic growth" through being an actor in the market.[85]

The exclusive incorporation of a purely civil and political view of human rights in the Republican BoR ignored the material happiness of the individual which is crucial to human life, human dignity and human development.[86] Ironically, when socio-economic rights are not afforded legal protection and left to the will of the State, civil and political rights are rendered illusory.[87] For instance, the rights to vote or assembly will not mean much to a hungry poor man since his day to day survival is his main preoccupation and how the country is governed is of little concern to him. In the same manner, the RTD of poor people becomes restricted because the right to participate in their government becomes affected by hunger.

The greatest challenge that the legal system faced, especially during the crackdown on dissenting pro-reform voices in the *de jure* one-party state, was the enforcement of the BoR. The procedure for enforcing the BoR was provided for in section 84 of the Constitution. Section 84(6) provided that the Chief Justice *may* make rules of procedure on how the High Court was to be moved in any application for enforcement of the BoR. The lack of rules in the 1980s created a crisis when the High Court consistently ruled that it had no jurisdiction to hear human

[81]Acceded 1 May 1972.
[82]Ratified 23 January 1992.
[83]Republic of Kenya, *African socialism and its application to planning in Kenya: Sessional Paper No. 10 of 1965*(1965) 11-13.
[84]Allan McChesney, "The promotion of economic and political rights: Two African approaches" (1979-1980) 23-24 *Journal of African Law* 163, 170.
[85]As above, 171; See also, Edward Muriithi & Chris Mburu, "Economic and human rights issues" (1992) 43 *Nairobi Law Monthly* 1.
[86]Smokin Wanjala, "Law and protection of dignity of the individual in the under-developed state: The Kenyan example" (1993) *University of Nairobi Law Journal* 1, 2.
[87]As above.

rights cases for the reason that the Chief Justice had not made rules of procedure for enforcement of the BoR.[88] These decisions were made notwithstanding earlier decisions recognising jurisdiction to enforce human rights where no rules had been made. In such instances, the courts held that they could be moved through any procedure known to law.[89]

The decisions of the High Court negating its jurisdiction to hear cases brought to enforce the BoR were not only "difficult to rationalise but were also indefensible" because there had been a history of constitutional litigation for almost two decades after independence.[90] However, in 1990, l local and international pressure culminated in the return of the country to and the courts also returned to their earlier position that they had jurisdiction to enforce the BoR.[91] This position was further strengthened on 17 September 2001 when, for the first time, the Chief Justice made rules under section 84(6) of the Constitution setting out the procedure for enforcing the BoR, namely the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001.[92]

3.2.4 The 2010 constitutional order

The political crisis and violence that followed the 2007 elections and the Kofi Annan-led mediation talks that were held to resolve the crisis provided the best chance for constitutional, political and institutional reform that would resolve the immediate tensions, provide long term solutions to the crisis and lay the ground for recognition of the RTD through improved recognition of human rights generally. One of the fundamental mechanisms that emanated from his process was the Constitution which committed Kenya to its obligations under international law by declaring international law to be part of Kenyan law.[93]

[88]See for example, *Kuria v Attorney-General* High Court Miscellaneous Civil Case No. 551 of 1988 (unreported); *Mbacha v Attorney-General* High Court Miscellaneous Civil Case No. 356 of 1989 (unreported).
[89]*Benoist Plantation v Felix* (1956) 21 EACA 104.
[90]See Gibson Kuria &Algeisa Vasquez, "Judges and human rights: The Kenyan experience" (1991) 35 *Journal of African Law* 142; Algeisa Vasquez "Is the Kenyan Bill of Rights enforceable after 4 July 1989?" (1990) 20 *Nairobi Law Monthly* 20; Wachira Maina, "Justice Dugdale and the Bill of Rights" (1991) 34 *Nairobi Law Monthly* 27; Kathurima M'Inoti, "The reluctant guard: The High Court and the decline of constitutional remedies in Kenya" (1991) 34 *Nairobi Law Monthly* 34.
[91]See for example, *Imunde v Attorney-General* High Court Miscellaneous Civil Application No. 180 of 1990 (unreported); *Matiba v Attorney-General* High Court Miscellaneous Civil Application No. 666 of 1990 (unreported).
[92]Legal Notice 133 of 2001.
[93]See Constitution of Kenya 2010, article 2(5) & (6).

The KNDR negotiations, as the Annan-led talks came to be known, led to the enactment of the National Accord and Reconciliation Act.[94] The Act created the Grand Coalition Government as a short-term measure to end the violence. In order to achieve lasting peace and prosperity, the KNDR charged the government with four agenda items.[95] These agenda items were: ending the violence and restoring the enjoyment of human rights, addressing the humanitarian crisis that had arisen, agreeing on a power-sharing formula to resolve the political crisis, and *"addressing the long-term issues including constitutional, legal and institutional reforms, transitional justice, land reform, tackling youth unemployment, poverty and inequality, consolidating national unity and cohesion and addressing accountability"*.[96] The last agenda item is important as it is a strong basis for recognition of the RTD.

The parties to the KNDR agreed to establish various bodies to oversee action on the four agenda items. These bodies were an Independent Review Commission (IREC) into the 2007 elections,[97] a Commission of Inquiry into the Post-Election Violence (CIPEV)[98] and the Truth, Justice and Reconciliation Commission (TJRC).[99] It was also agreed that in order to address these issues meaningfully, fundamental constitutional reform was required to resolve all legal, institutional, policy and political causes of conflict. In 2008 therefore, the Constitution of Kenya (Amendment) Act[100] and the Constitution of Kenya Review Act[101] were enacted by parliament. These pieces of legislation provided the legal framework for producing a new constitution for Kenya. The Constitution of Kenya Review Act established a Committee of Experts (CoE) to lead the drafting of a new constitution based on all previous efforts to enact one. Views previously documented were also considered. Members of the public were asked to submit further views on what the content of the new constitution should be. The CoE produced a draft constitution in May 2010 which was adopted by parliament on 1 April 2010 without amendments.[102]

[94]Act 4 of 2008.
[95] Kenya Human Rights Commission (note 35 above) 14.
[96]As above. Emphasis added.
[97]For detail see, Republic of Kenya, "Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007", (2008).
[98]For detail see, Republic of Kenya, "Report of the Commission of Inquiry into Post-Election Violence", (2008).
[99]For detail see, Republic of Kenya, "Report of the Truth, Justice and Reconciliation Commission", (2013).
[100]Act 6 of 2008.
[101]Act 9 of 2008.
[102]Kenya Human Rights Commission (note 35 above) 15.

The Proposed Constitution of Kenya adopted by parliament was subjected to a national referendum on 4 August 2010 and ratified by the people with a 68.5% vote in favour. It was promulgated into law by the President on 27 August 2010. The Constitution derives its character, through a complex and protracted law-making process, from the history of popular grievance or complaints from the people about the limitations of the 1969 Constitution.[103] On the popular grievance character of the Constitution, the High Court in *Mwai v Kenya National Examinations Council & 3 others*[104] stated:

> When the Constitution was adopted, the framers knew, and clearly had in mind, the different status of persons in the society and the need to protect the weak from being overrun by those with ability. They had in mind the history of this country, both the differences in endowment either by dint of the region where one came from or as a function of other factors, which might necessitate special protection.[105]

The promulgation of the Constitution was one of the most significant achievements in the governance of Kenya since independence. After the promulgation of the Constitution, on 27 August 2010, the greatest challenge in any constitution-making process came to bear on the country: the challenge of implementation.[106] A major phase in the implementation of a constitution is the formulation of policy and legislation to breathe life into it, and the enactment of legislation through which it will be implemented. In adopting the Constitution, the people of Kenya committed themselves to, *inter alia*, "nurturing and protecting the well-being of the individual, the family, communities and the nation".[107] Several of its provisions therefore provide a framework for realisation of the RTD.

The Constitution has the potential to radically transform Kenya's political and socio-economic structure.[108] It seeks to protect and promote the rights of the citizen in a very elaborate manner. The Constitution, in this regard, introduces an extensive BoR that seeks to protect the social, economic, cultural, civil and political rights of Kenyans.[109] The Constitution has restored the supremacy of the people in the constitutional architecture of the State by placing the people at the centre of governance. It seeks to deal with the problem of marginalisation and the complex

[103]*Gathungu v Attorney-General* (note 1 above) 16.
[104](2011) eKLR.
[105]As above 9.
[106]Paul Mwangi "Watch out lest those who betrayed the First Republic do it to the Second" (13 September 2010) *The Daily Nation* 13. See generally, Yash Ghai *Kenya's new constitution: An instrument for change* (2011).
[107]Constitution of Kenya 2010, preamble, para 5.
[108]Kenya Human Rights Commission (note 57 above) 37.
[109]Sihanya (note 38 above) 3. See also, *Mwai v Kenya National Examinations Council* (note 104 above) 6.

land question, among other things. This makes the 2010 Constitution favourable to realisation of the RTD.

The Constitution incorporates a detailed BoR, which has been proclaimed to be an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies.[110] It gives guarantees for a wide range of rights and fundamental freedoms. The purpose of recognising and protecting human rights and fundamental freedoms in the constitution is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.[111] Article 19(3) of the Constitution further states that the fundamental rights and freedoms in the BoR:

(a) belong to each individual and are not granted by the State.

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

Article 19(3) of the Constitution confirms that the rights it guarantees and incorporates by operation of other laws are vested in the human person by virtue of his humanity and are not granted by the State. Similarly, the State cannot take them away but can only limit them in the manner provided by the Constitution.[112]

The BoR is the longest chapter in the Constitution. It comprises of 41 articles as compared to the 18 sections in the BoR of the Republican Constitution. It sets out rights and freedoms of the people and provides a framework for implementing them, so that the people benefit from those rights and freedoms. It protects all the rights and freedoms in the previous constitution and introduces a wide range of others, including social, economic and cultural rights. To give efficacy to the BoR, the Chief Justice has made rules for enforcement of the human rights under the Constitution. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[113] reflect the values of the Constitution in the protection of

[110]Article 19(1).
[111]Article 19(2).
[112]Lumumba & Franceschi (note 41 above) 128.
[113]Legal Notice 117 of 2013.

human dignity, of access to justice and of marginalised persons. The rules require that they "be applied with a view to advancing and realising the rights and fundamental freedoms enshrined in the Bill of Rights", and the "values and principles in the Constitution."[114] In doing so, the courts "shall pursue access to justice for all persons including the poor; illiterate; uninformed; unrepresented; and persons with disabilities".[115]

Since human rights are basic standards or entitlements without which people everywhere cannot live in dignity as human beings, and are inherent, universal, inalienable and indivisible, international human rights standards are an important benchmark in the protection of human rights domestically. The Constitution has incorporated international law obligations into the domestic law of Kenya, as explained further below. International human rights obligations will therefore play a critical role in the enforcement of the BoR and the evolution of human rights legislation and jurisprudence in Kenya.[116] In effect, Kenya has accepted the idea of international human rights law being universally applicable and as a consequence, relevant to Kenyan society.

3.3 The nature of the RTD in Kenya

As explained in the preceding chapter of this thesis, international human rights law on the RTD enjoins States to take legislative and other measures to ensure realisation of the right by its subjects. In Kenya, the fundamental possibility for realisation of the RTD is to be found in the Constitution and KV2030.

The Constitution provides a general framework for realisation of the RTD by declaring that in enacting it, the people of Kenya were committed to "nurturing and protecting the well-being of the individual, the family, communities and the nation".[117] The well-being of people individually and collectively is the very basis of the RTD. The Constitution as is demonstrated in section 3.3.1 below implicitly sets out an elaborate framework for realisation of the RTD.

[114]As above, rule 3(3).
[115]As above, rule 3(7).
[116]Kenya National Commission on Human Rights (note 35 above) 4.
[117] Constitution of Kenya 2010, preamble para 5.

KV2030, on the other hand, is a long-term development blueprint that that covers the period 2008-2030. This blueprint aims at "providing a high quality of life" for all Kenyans by 2030.[118] It provides a framework for economic, social and political development for the well-being of Kenyans as demonstrated in section 3.3.2 below. Although KV2030 does not deal with the issue of cultural development, its approach of economic, social and cultural development is one that is largely aimed at realisation of the RTD.

3.3.1 Constitutional basis

In order to locate the RTD within the Constitution, an understanding of the position of international law in Kenya is important. This is because the Constitution implicitly recognises the RTD by importing the general rules of international law into the Kenyan legal system (it states that the general rules of international law shall form part of the law of Kenya); and provides that any treaty or convention ratified by Kenya forms part of the law of the country.[119] This means that through these provisions, the DRD and ACHPR form part of the law of Kenya. It should, at the outset, be noted that article 2 of the Constitution pronounces the supremacy of the Constitution and declares that it "binds all persons and all State organs at both levels of government."[120] Consequently, the international legal obligations created by the DRD, and ACHPR are binding on all persons in Kenya, and the national and county governments. Additionally, the BoR in the Constitution guarantees various rights that facilitate implementation of the RTD as will be shown below.

The text of the Constitution suggests Kenya is a monist State in international law.[121] The monist theory of international law in seeking to establish the relationship between international law and municipal law posits that there is no distinction between the two so that they form part of the same legal system. Municipal courts can therefore enforce international law norms directly when resolving any dispute locally without their domestication through legislation.[122] The

[118] Republic of Kenya (note 3 above) 1.
[119]Constitution of Kenya 2010, article 2(5) and (6).
[120]Article 2(1). See also, *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney-General* (2011) eKLR 2.
[121]*David Macharia v Republic* (2011) eKLR 15; Tom Kabau & Chege Njoroge, "The application of international in Kenya under the Constitution of Kenya 2010: Critical issues in the harmonisation of the legal system" (2011) 3 *CILSA* 293, 294.
[122]For a detailed discussion on the relationship between international law and municipal law, see generally Tom Kabau & John Ambani, "The Constitution of Kenya 2010 and the application of international law in Kenya: A case of migration to monism or regression to dualism?" (2013) 1 *Africa Nazarene University Law Journal* 37;

question as to whether the Constitution makes the Kenyan legal system purely monist has been a point of argument among scholars.[123] The courts, on the other hand, have found little difficulty in finding that international law automatically applies in Kenya for as long as it is not inconsistent with the Constitution. For example, in *Re Zipporah Wambui Mathara,*[124] the High Court considered the provisions of the ICCPR and held that by virtue of the provisions of article 2(6) of the Constitution, international treaties and conventions that Kenya has ratified are part of its law.[125] This was the first decision made by the courts with regard to the position of international law in the new constitutional order. This was in September 2010 a month after the promulgation of the Constitution. Two months later the High Court sitting as a constitutional court in the *Gathungu* case, affirmed that the general rules of international law and treaties ratified by Kenya were now part of its law under the new Constitution.[126]

Also, in *Beatrice Wanjiku v Attorney General,*[127] the Court observed that:

> Before the promulgation of the Constitution, Kenya took a dualistic approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular **Article 2(5)** and **2(6)** gave new colour to the relationship between international law, international instruments and national law.[128]

In the same case, the Court went on to emphasise the importance of international law in the Kenyan legal system for the reason that its application is grounded in the supremacy clause of the Constitution. The Court stated that:

> Modern constitutions contain freestanding provisions that regulate the relationship between international law, customs and treaties, and national law. For example, the Constitution of South Africa has specific provisions separate from the supremacy clause, **Articles 231, 232 and 233**, which deal with the application of international law. In our case, the international law provisions are part of the supremacy

Nicholas Orago, "The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective" (2013) 13 *African Human Rights Law Journal* 415, 416; John Coyle, "Incorporative statutes and the borrowed treaty rule" (2010) 50 *Virginia Journal of International Law* 655, 656.

[123]Kabau & Chege (note 121 above) 294; Maurice Oduor, "The status of international law in Kenya" (2014) 2 *Africa Nazarene Law Journal* 97; Lumumba & Franceschi (note 41 above) 72-75.

[124](2010) eKLR.

[125]As above, para 9.

[126]*Gathungu* case (note 1 above) 17.

[127](2012) eKLR.

[128]As above, para 17.

> clause. **Article 2(5)** and **(6)** regulates the relationship between international law and national law in two ways. First, by placing international law within the supremacy clause, the supremacy of the Constitution is emphasized in relation to international law. Second, the application of international law in Kenya is clarified to the extent that it is not left in doubt that international law is applicable in Kenya.[129]

In finding that articles 2(5) and (6) of the Constitution left no doubt that international law is applicable in Kenya, the Court affirmed that both binding and soft international law were part of the law of Kenya. Therefore, in terms of articles 2(5) and (6), the provisions of the DRD and ACHPR are part of the law of Kenya in so far as their provisions are not inconsistent with the Constitution as envisaged by article 19(3). Similarly, the rights that they guarantee are by implication, rights guaranteed under Kenyan law. The RTD recognised by these instruments is one such right. The theme of human well-being that runs in the two instruments resonates with the human dignity philosophy of the BoR. The *Beatrice Wanjiku* case confirms the above contention, in which Majanja, J. expressed himself as follows, with respect to article 19(3):

> I think a purposive interpretation and application must be adopted when considering the effects of **Articles 2(5)** and **2(6)** … I would also draw on the authority of **Article 19(3)** which is the part of the Bill of Rights that recognizes rights other than those protected by the Bill of Rights provided they are not inconsistent with the Constitution. These rights would be founded not only on specific statutes but also international treaties and conventions.[130]

Therefore, articles 2(5), 2(6), 19(2)[131] and 19(3) of the Constitution lay the foundation for realisation of the RTD in Kenya. Realisation of the RTD under the Constitution is further supported by a tapestry of rights and correlating duties set out in the BoR as demonstrated below.

To give effect to human rights including those provided for in international law such as the RTD, article 21 of the Constitution addresses the issue of implementation of human rights and fundamental freedoms. It makes it "a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms" enshrined

[129]As above, para 22.
[130]*Beatrice Wanjiku v Attorney General* (note 127 above) para 21.
[131]Constitution of Kenya 2010, article 19(2). Article 19(2) is particularly relevant to realisation of the RTD because it provides that: "The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings".

in the BoR.[132] Article 21 thus incorporates the duties placed on States by international law standards to "respect, protect, promote and fulfil" human rights. The State is further under an obligation to tale legislative and other measures ("including the setting of standards") so as to progressively realise socio-economic rights.[133] Sate organs and public officers have a duty to ensure that the needs of marginalised and vulnerable groups in society are addressed.[134] Finally, article 21 also places a duty on the State to enact and implement legislation that enables fulfilment of "its international obligations in respect of human rights and fundamental freedoms."[135] These provisions reinforce Kenya's obligations under the ACHPR to take legislative measures to realise the RTD.[136] However, the wording of article of article 21(4) is restrictive and falls short of the requirements of article 1(1) of the ACHPR that the State shall "adopt legislative or *other measures*" to give effect to the rights that it recognises. In the *Ogiek* case[137] the African Court emphasised that it was not only important to take legislative action, but also other measures to fulfil the obligations set out in article 1(1).[138] The Court observed that while Kenya had recently enacted the 2010 Constitution, the Forest Management and Conservation Act[139] and the Community Land Act[140] that facilitate the Ogieks' enjoyment of the rights and freedoms recognised by the ACHPR, it had not been demonstrated that other measures had also been taken to give effect to those rights.[141] For this reason, the Court found that Kenya had violated article 1 of the ACHPR "by not taking adequate measures to give effect" to several rights that are enshrined in it, among them the RTD recognised under article 22.[142] This shortcoming can be remedied by the State taking action such as adoption of policy or setting of standards that facilitate realisation of the RTD.

Further, article 28 of the Constitution is also important for realisation of the RTD. It ordains that every person has an inherent dignity and the right to have that dignity respected and protected. Human dignity lies at the heart of human rights discourses including their

[132]As above, article 21(1).
[133]As above, article 21(2).
[134]As above, article 21(3).
[135]Article 21(4).
[136]For a discussion on the international obligations created by the ACHPR, see chapter 2 of this thesis, section 2.3.2.
[137]Application No. 006/2012, Judgment dated 26 May 2017, African Court on Human and Peoples' Rights.
[138]As above, para 215.
[139]Act 34 of 2014.
[140]Act 27 of 2016.
[141]As above, para 216.
[142]As above, para 217.

enforcement and realisation. In the case of *Susan Kariuki v Nairobi City Council*,[143] the High Court observed that in interpreting the BoR, the Court was under a duty to interpret it in a manner that promotes the values of an open and democratic society that is based on human dignity.[144]

A clean and healthy environment is important in realising the RTD since such an environment facilitates people's achievement of their full potential and their ability to live a dignified life.[145] Article 42 of the Constitution recognises that a clean and healthy environment ensures the realisation of sustainable development because the right "includes the right to have the environment protected for the benefit of present and future generations".[146] Article 69 provides that such protection means that the State shall "ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits".[147]

Additionally, the economic and social rights protected by article 43 of the Constitution, include the right to "the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare",[148] "accessible and adequate housing, and to reasonable standards of sanitation",[149] "be free from hunger, and to have adequate food of acceptable quality",[150] "clean and safe water in adequate quantities",[151] "social security",[152] and "education",[153] are all essential in ensuring the expansion of one's capabilities which is critical to realisation of the RTD. The same is true of the right to language and culture,[154] and access to justice[155].

[143](2011) eKLR.
[144]As above, 7.
[145]United Nations, "Report of the United Nations Conference on the Human Environment" UN Doc. A/Conf.48/14/Rev.1 (1972), principle 1.
[146]Constitution of Kenya 2010, article 42 (a).
[147]Article 69(1)(a); See also, Joel Bosek, "Implementing environmental rights in Kenya's new constitutional order: Prospects and potential challenges" (2014) 14 *African Human Rights Law Journal* 489, 496.
[148]Constitution of Kenya 2010, article 43(1)(a).
[149]As above, article 43(1)(b).
[150]As above, article 43(1)(c).
[151]As above, article 43(1)(d).
[152]As above, article 43(1) (e).
[153]As above, article 43(1)(f).
[154]As above, article 44.
[155]As above, article 48.

Finally, of relevance to realisation of the RTD, is the specific application of rights to certain groups of persons who had been historically marginalised and had no voice in governance or participation in decision-making. These are children,[156] persons with disabilities,[157] youth,[158] minorities and marginalised groups[159] and older members of society[160]. The protection of the rights and welfare of the marginalised groups of people is one of the fundamental aspects of the RTD as demonstrated in chapters 4 and 6 of this thesis.

3.3.2 Policy basis

KV2030 is a policy of the government of Kenya that seeks to create a cohesive, equitable and just society by focusing on the economic, social and political well-being of the nation.[161] By focusing on the economic, social and political aspects of development, it recognises realisation of the RTD as a critical component of development planning in Kenya.

KV2030 is a long-term development plan covering the period 2008 to 2030. It was adopted upon the recommendation of the National Economic and Social Council (NESC) that there was need for a long-term vision to guide the development of Kenya up to the year 2030. It is driven by a collective aspiration for a better society by 2030. Vision 2030 was developed through an all-inclusive stakeholder consultative process.[162] The process of developing it was launched by President Kibaki on 30 October 2006, when he advocated a consultative approach that would involve ordinary Kenyans. This was done through workshops with stakeholders from the public service, private sector, civil society and the media. Eight provincial forums were held to give ownership of the document to the Kenyan people. The objectives of these forums were to provide a good understanding of the country's development problems and the necessary strategies to achieve the desired results by the people involved in implementing KV2030. Commenting on the process of crafting KV2030, President Kibaki noted that:

> From the very beginning, it was found imperative to involve a broad cross-section of the Kenyan population in the formulation of Vision 2030, in order to ensure national ownership of the Vision… The

[156]As above, article 53.
[157]As above, article 54.
[158]As above, article 55.
[159]As above, article 56.
[160]As above, article 57.
[161]Republic of Kenya (note 3 above) ii.
[162]As above, vii.

> consultative process was launched in October 2006, after which numerous open forums were held in all eight provinces, attracting interest and enthusiastic participation.[163]

The aim of KV2030 is to create a globally competitive and prosperous country with a high quality of life by 2030.[164] It seeks to transform Kenya into a newly industrialised, middle income country providing a high quality of life to all its citizens in a clean and secure environment.[165] The development plan stemmed from the successful implementation of the Economic Recovery Strategy (ERS), which saw rapid growth from 2002, when the GDP grew from 0.6% rising to 6% in 2007.[166]

The ERS laid the foundation for a globally competitive and prosperous nation. It entailed carrying out bold economic and structural reforms between 2003 and 2007.[167] The ERS had a four-pronged strategy to advance development in Kenya. It sought to restore economic growth at the macroeconomic level; rehabilitate and expand infrastructure; enhance equity and poverty reduction; and improve governance.[168] These four pillars were identified as the appropriate avenues of pulling the economy out of recession and beginning the journey "toward a broad-based equitable economic recovery underpinned by improved efficiency in public service delivery".[169]

To ensure that economic growth was shared amongst all Kenyans, a number of fiscal interventions, structural reforms and regional development initiatives were implemented to reduce poverty and inequality. The poverty and inequality reduction interventions that were implemented included the introduction of free primary education, increment in the allocation of resources for core poverty alleviation programmes and the construction of over 1000 health facilities coupled with the deployment of health workers and medical supplies:[170] These interventions cumulatively led to a decline in the incidence of poverty from 56.8% in 2000 to 46% in 2006.[171]

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[163]As above, ii.
[164]As above vii.
[165]As above.
[166]As above.
[167]As above, 1.
[168]As above, 2.
[169]As above.
[170]As above, 3-4.
[171]As above, 4.

On improving governance, the ERS focused on the problem of corruption, the poor state of performance in the delivery of public services and the minimal involvement of the private sector in poverty reduction. A number of governance reforms were implemented in the ERS period to this state of affairs. These reforms included legislative interventions in the fields of anti-corruption, ethics, public procurement and public financial management, administrative enforcement of anti-corruption programmes, enhanced capacity in the investigation and prosecution of corruption cases, and privatisation of inefficient State corporations.[172]

At the end of the five year term of the NARC government that implemented the ERS, there was discontent that while the country had performed well on the economic front and made progress on the realisation of civil and political rights, it had made little progress in the promotion of socio-economic rights.[173] The key issues that were flagged as critical issues at the end of the ERS period were failure to complete the constitutional review process, failure of the fight against corruption, social and geographic inequality, deteriorating human security, and stagnation of poverty reduction efforts.[174]

These issues were rolled over into the long-term KV2030 which largely seeks to ensure continued macroeconomic stability and minimising institutional risks related to corruption and human insecurity. KV2030 is based on three pillars, namely; the economic pillar, the social pillar and the political pillar.[175] The economic pillar aims at providing prosperity to all Kenyans through economic development by achieving a GDP growth rate of 10% over the planned period. The key sectors that will drive the economic pillar strategy are tourism, agriculture, trade, manufacturing, business process off-shoring, and financial services.[176] The social pillar seeks to build a just and cohesive society with social equity in a clean and secure environment. The social interventions targeted under the social pillar relate to education, health, water and sanitation, environment, housing and urbanisation, gender, youth and vulnerable groups, equity and poverty elimination, and science, technology and innovation (STI).[177] The political pillar aims at realising a democratic political system (founded on issue-based politics) that respects the rule of law and protects the rights and freedoms of every individual in Kenya. In this

[172]As above.
[173]Youth Agenda, *Kenya Vision 2030: A critical review by Kenya's youth* (2009) 6.
[174]As above.
[175]Republic of Kenya (note 3 above) vii.
[176]As above, 28-76.
[177]As above, 78-129.

respect, strategic attention will be given to the rule of law, electoral and political processes, democracy and public service delivery, transparency and accountability, public administration and service delivery, and security, peace-building and conflict management.[178]

The three pillars of KV2030 are based on a vision of achieving: macroeconomic stability; continuous reforms in governance; equitable opportunities for the poor to create wealth; investing in the country's infrastructure; reform of the energy sector; investment in science, technology and innovation at the workplace; reformation of the land administration regime; creating a globally competitive workforce; establishing a society that is free from danger and fear; and building an efficient, motivated and well-trained public service.[179] The overarching theme of KV2030 is the creation of a globally competitive and prosperous nation with a high quality of life by 2030.[180] That theme is driven by strategies that move the economy up the value chain, invest in the people of Kenya and move the country into the future as one nation.[181] These strategies target transformation of the country's governance into a democratic political system that is issue-based, people-centred, result oriented and accountable.

In its lifespan, KV2030 will be implemented through five-year mid-term plans (MTPs). The Vision Delivery Secretariat (VDS) which is housed in the Office of the President is responsible for coordinating the various actors in enhancing timely implementation of KV2030 flagship projects. KV2030 is currently in the 3rd MTP of its implementation and considerable progress has been made towards achieving its development goals. During the 1st MTP for example, the land reform programme achieved some progress based on implementation of the National Land Policy of 2009.[182] These achievements include the enactment of the Environment and Land

[178]As above, 130-133.
[179]As above, vii-ix.
[180]As above.
[181]As above.
[182]Republic of Kenya, *Sessional Paper No. 9 of 2009 on National Land Policy* (2009)

Court Act,[183] National Land Commission Act,[184] Land Act[185] and Land Registration Act.[186] These pieces of legislation were meant to consolidate the many "inconsistent and incompatible" land laws that existed and to simplify the land administration system.[187] The rationale behind these reforms is to be found in the National Policy which contextualises land as having been the reason for the struggle for independence and yet remains a "politically sensitive and culturally complex" issue.[188] The policy therefore seeks to "guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity."[189] As a consequence of the policy, over the same period 58,009 poor and landless households were settled, and 435,650 land title deeds were processed, registered and issued to the rightful owners.[190] The 2018 report of the VDS referred to above, further documents various other measures of implementation of KV2030 over the first 10 years of its existence, and the impact that they have had on the lives of Kenyans economically, socially and politically.

3.4 Conclusion

The aim of this chapter was to establish if the RTD is a human right known to Kenyan law and policy. In doing so, the development of constitutional order from the colonial era up to the Constitution of Kenya 2010 was investigated, as were the obligations that are created under the law and policy for realisation of the RTD.

The colonial constitutional order was the beginning of the violation of human dignity in Kenya, through discriminatory laws and practices and the deprivation of people's land, which was the single most important factor of production and source of livelihood. The colonially imposed legal system led to non-recognition of the RTD and rights relevant to its recognition, and

[183]Act 19 of 2011. This legislation gives effect to article 162(2) of the Constitution by establishing a specialist court with the status of the High Court to determine disputes relating to the environment, and the use, occupation and title to land.
[184]Act 5 of 2012. This law clarifies the functions and powers of the National Land Commission established under article 67 of the Constitution to among other things "manage public land on behalf over national and county governments." In its short title, it is stated that the Act also seeks "to give effect to the objects and principles of devolved government in land management and administration".
[185]Act 6 of 2012. The purpose of this legislation is to give effect to article 68 of the Constitution by revising, consolidating and rationalising land laws and providing for "the sustainable administration and management of land and land resources".
[186]Act 3 of 2012. This Act revises, consolidates and rationalises the registration of titles to land and gives "effect to the principles and objects of devolved government in land registration."
[187]Republic of Kenya (note 182 above) para 2.
[188]As above, para 1.
[189]As above, para 3.
[190]Republic of Kenya, *Kenya Vision 2030: Marking 10 years of progress (2008-2018)* (2018) 8.

consequently to subjugation of the people, a majority of whom were left destitute in their homeland.

That position did not change in the independent State (prior to 2010). This is borne out by the examination of the Independence and Republican Constitutions. Upon independence, an African elite group took over political power and perpetuated the ills of the colonial State. During this period, the legal system and institutions were controlled through centralised political power lorded over by an all-powerful presidency at the apex of the executive. The human rights system was based on the protection of civil and political rights and, even then, the systems for their enforcement or implementation were emasculated by the executive and remained ineffectual.

There is, however, a promise of socio-economic transformation in the 2010 Constitution, which has radically changed the governance structure and the human rights law regime through an expansive BoR. The Constitution places the people at the centre of governance. It has been hailed as a transformative document which promises the economic, political and social well-being of the people of Kenya. The RTD is located primarily in the Constitution because the provisions of the DRD and ACHPR are now part of domestic law and the Constitution contains a robust BoR and other provisions supportive of human development. Further, the policy statements in KV2030 provide support to this legal position.

The main finding of this chapter, therefore, is that the RTD is recognised Kenyan law and policy and can be realised through the constitutional provisions in the BoR, which include international human rights law standards and the policy position of KV2030. However, poverty, corruption and public participation remain critical challenges that Kenya faces in realising the RTD. These challenges are considered in the next three chapters, against the background of Kenya's international law, constitutional and policy obligations for realisation of the RTD.

Chapter 4: Poverty and the right to development

4.1 Introduction

Poverty is generally defined as the lack of the basic necessities of life and opportunities for human development.[1] It manifests itself in the form of deprivation of well-being, lack of respect and the loss of dignity. Poverty is not just about hunger, lack of shelter, lack of clothing, being sick or even illiterate. It is also about lack of education, lack of access to healthcare, and lack of employment, amongst others. Poor people are invariably vulnerable to situations beyond their control. They are treated badly both by the State and society and driven to the periphery of voice and power in those institutions.[2] Generally, poverty is viewed as "the lack of basic capabilities to live in dignity".[3]

This multi-dimensional nature of poverty is the result of poverty meaning different things to different people across different geographical areas and generations. This study adopts the working definition of poverty by the CESCR which recognises the multi-dimensional nature of poverty. While conceding that there is no "universally accepted definition" of poverty, the CESCR's position is that "poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights".[4]

This chapter examines the problem of poverty as a challenge to realisation of the RTD in Kenya. The chapter examines the meaning and nature of poverty in broad terms. It then investigates poverty as a human rights issue and discusses poverty as an obstacle to realisation of the RTD in Kenya with specific reference to education and healthcare. Education and healthcare are a point of reference on the assumption that a healthy and educated person is less likely to live in poverty than a sickly and uneducated one. As the UNDP observes, the process of human development is about enlarging the choices that people have, and the most critical of

[1]Nancy Nafula *et al*, *Review of the policy options for poverty reduction in Kenya* (2005) 7.
[2]Irene Hadiprayitno, *Poverty, the right to development and human rights law* (2004) 3.
[3]United Nations, *Statement adopted by the Committee on Economic, Social and Cultural Rights on 4 May 2001 on substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights* UN Doc. E/C.12/2001/10 (2001) para 7.
[4]As above, para 8.

those choices are about people's ability to live long and healthy lives, be educated and live a decent life.[5]

Education and good health are therefore necessary means of breaking out of poverty. The knowledge and training acquired through education empowers its recipients thereby offering them opportunities for a better future and more control over their lives. Living in poverty on the other hand, exposes people to serious health risks. It is not uncommon to find people living in poverty affected by high mortality rates and low life expectancy. Pregnancy and childbirth amongst such populations are also risky because health services are inaccessible, inadequate, ill-equipped or non-existent.

4.2 Understanding poverty

There is consensus in the international community that poverty is a multi-dimensional phenomenon that goes beyond economic deprivation and extends to the social, cultural and political aspects of life.[6] Poverty is a deprivation which manifests itself through lack of income, hunger and malnutrition, ill-health, lack of access to education, homelessness and inadequate housing, unsafe environment and social exclusion.[7] Poverty as described above has three dimensions: "income poverty, human development poverty and social exclusion." Income poverty relates to those people who have a disposable income that is less than the minimum level of income required to lead a sustainable life.[8] Human development poverty means the lack of access to basic goods and services, such as food and nutrition, basic education and reasonable housing, which make it possible to live a meaningful life.[9] Social exclusion refers to a person's inability to have an adequate social existence within the setting of the society in which he lives, and to meaningfully participate in its affairs.[10] Where a person is afflicted by

[5]UNDP, *Human development report 1990* (1990) 10.
[6]United Nations, "Implementation of General Assembly resolution 60/251 entitled "Human Rights Council": Report of the independent expert on the question of human rights and extreme poverty, Arjun Sengupta" UN Doc. A/HRC/5/3 (2007), para 6.
[7]As above, para 8.
[8]As above.
[9]As above.
[10]As above.

all three forms of poverty, that person is said to be living in extreme poverty.[11] The subsequent sub-sections elaborate on these dimensions.

4.2.1 Income poverty

Income poverty relates to those situations where a person is unable to meet basic needs due to lack of an income or purchasing power.[12] It is defined in absolute or relative terms. Absolute income poverty is generally based on "a minimum daily amount of calorie intake from food necessary for survival in a reasonably healthy condition, supplemented by some minimum amount of non-food items regarded as essential for a decent social existence".[13] Relative income poverty considers the social and cultural contexts within which a country perceives capacity to meet basic needs.[14] Therefore, one may be considered income poor even where basic needs for a decent living have been met, because his or her income does not accommodate certain socio-cultural expectations of his or her society. For one not to be income poor under the relative income poverty definition, their income must not only "cover subsistence and essential consumption, but also … satisfy the needs defined by socio-cultural norms and standards, in relation to other members of the society".[15] Similarly, while one may be considered income poor in one country, he might not be so considered, in another.[16] Additionally, one may be considered income poor depending on the income percentile he falls in, if that percentile is considered in a particular country, to fall within the meaning of income poverty.[17] For example, one may fall among the 10% of people globally who live below the International Poverty Line (IPL) and thus be categorised as income poor.[18] Comparatively, it is estimated that in Sub-Saharan Africa 41.1% of the population live below the IPL[19] and in Kenya 37.7%.[20]

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[11]United Nations, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development: Report of the independent expert on the question of human rights and extreme poverty, Arjun Sengupta" UN Doc. A/HRC/7/15 (2008), paras 13 & 23.
[12]Arjun Sengupta, "Extreme poverty and human rights – A mission report on the United States", 6 January 2007, 3 <www.ssrn.com/abstract=961230> (accessed 30 December 2018).
[13]United Nations (note 11 above) para 24.
[14] s above, para 25.
[15]Sengupta (note 12 above) 3.
[16]United Nations (note 11 above) para 25.
[17] As above.
[18]See, World Bank, *Poverty and shared prosperity 2018: Piecing together the poverty puzzle* (2018) 42. Using the 2011 purchasing power parity (PPP), the world Bank has set the IPL at income or consumption of less than US$ 1.90 a day.
[19]As above.
[20]As above, 44.

4.2.2 Human development poverty

This dimension of poverty refers to the ability of people to live the lives that they value with freedom of being, and doing what they value.[21] Human development has been defined to mean the "expansion of people's freedom and capabilities to lead lives that they value and have reason to value".[22] These freedoms and capabilities are both processes and outcomes of social arrangements on development.[23] For example, high literacy levels are an indication of freedom for ignorance or lack of education.[24] Poverty arises where people lack essential freedoms and capabilities, and as a consequence have low income, inadequate education or poor health.[25] Human development poverty therefore, is the deprivation of human development.[26]

4.2.3 Social exclusion

Social exclusion focuses more on social relations than on the individual. This dimension of poverty, while distinct from income and human development poverty, "is an essential component of the concept of deprivation of well-being".[27] Social exclusion affects income and human development poverty just as much as they influence social exclusion.[28] The fact of one being income poor or suffering human development poverty, is more likely to render him socially excluded; and social exclusion has the likely effect of one remaining income or human development poor. Social exclusion occurs where the poor or other marginalised groups are kept at the periphery of society due to their social status. This leads to their inability to participate in society, discrimination and denial of their rights in society.[29] Social exclusion therefore results in the continued marginalisation and discrimination of the poor, making poverty on one hand, and social exclusion on the other, mutually reinforcing issues. It has been observed that:

> People living in poverty are typically victims of discrimination on grounds such as birth, property, national and social origin, race, colour, gender and religion. Patterns of discrimination keep people in

[21]United Nations, (note 11 above) para 26.
[22]UNDP, *Human development report 2011* (2011) 1.
[23]United Nations (note 11 above) para 27.
[24]As above.
[25] World Bank, *Handbook on poverty and inequality* (2009) 2-3.
[26]Sengupta (note 12 above) 3.
[27]United Nations (note 11 above) para 28.
[28]As above.
[29]As above, para 29.

> poverty which in turn serves to perpetuate discriminatory attitudes and practices against them. In other words, discrimination causes poverty but poverty also causes discrimination.[30]

Ultimately, poor people lose confidence in public authorities and have little confidence in institutions that should ideally assist in alleviating their suffering, because of the shame and stigma associated with poverty. Poor people are not to be blamed for the situation they find themselves in and therefore States must formulate and adopt legislation and policies that are aimed at eliminating the conditions that sustain and increase poverty levels and that also ensure the enjoyment of human rights by people living in poverty.[31] These conditions include discrimination of poor people and their lack of participation in decision making.

4.2.4 Extreme poverty

Extreme poverty has been defined to mean that it is a "composite of income poverty, human development poverty and social exclusion and encompasses the notions of lack of basic security and capability deprivation, over prolonged periods of time"[32]. Extreme poverty therefore relates to the most vulnerable section of society because they suffer the three forms of poverty identified above. According to Sengupta:

> Extreme poverty can … be identified with people suffering from income poverty (being below an agreed minimum disposable income or expenditure required for leading a sustainable life) and people suffering from human development poverty (without access to, or availability of, certain goods and services to make it possible for them to lead a meaningful life) as well as people in social exclusion (without basic security to lead an adequate social existence, dependent on the structure of social relationships).[33]

The definition of extreme poverty illustrates the overlaps and interdependence between the concepts of income poverty, human development poverty and social exclusion, although analytically, these are distinct terms. Because of their distinct characteristics, the methods of addressing the problems that they respectively raise are different and require the deployment of different levels of resources.[34] Due to the limited resources available for poverty eradication

[30]United Nations, "Report of the independent expert on the question of human rights and extreme poverty" UN Doc. A/63/274 (2014) para 29.
[31]As above, para 7.
[32]United Nations, "Report of the independent expert on the question of human rights and extreme poverty, Arjun Sengupta" UN Doc. A/HRC/7/15 (2008), para 31.
[33]As above.
[34]As above, para 32.

under its distinct heads, the concept of extreme poverty becomes useful. The concept of extreme poverty becomes a building block to which resources are directed as a first step towards taking care of the most vulnerable in society, namely those who suffer all the three forms of poverty.[35] This is a readily acceptable approach to dealing with the problem of poverty. It enables States to easily accept the responsibility of adopting measures to eradicate extreme poverty.[36]

Sengupta observes that by using the extreme poverty approach, the numbers of people to be considered is much smaller than it would be when each category of poverty is considered.[37] This way, it is easier for society to identify with extreme poverty and the need to concentrate limited resources on the most vulnerable in society. He states that:

> Following Rawlsian principle of justice, which emphasizes the need to concentrate on the most vulnerable sections of society, it should be therefore possible to appeal to people's sense of justice and persuade them to accept the obligations associated with the elimination of extreme poverty, which makes a small section of the population extremely vulnerable, suffering from the loss of all liberties or freedom of action.[38]

The logical conclusion from Sengupta's observation is that extreme poverty is not just about the severe adverse effects of poverty. It is also about the denial of basic human rights, which calls for the adoption of government policy that addresses the problem of poverty with a view to eradicating extreme poverty.

Despite the above categorisation of poverty, the contemporary challenge of poverty eradication is common to all the categories. It falls upon individual States and the international community to improve the life situation of the poor.[39] However, the multi-dimensional nature of poverty makes its eradication a complex endeavour. Eradication of poverty requires the establishment of partnerships within and between States through the investment of resources to make those partnerships work for the benefit of the poor. Durable solutions to eradicate poverty can be found by putting in place mechanisms that recognise people living in poverty as holders of

[35]As above, para 34.
[36]As above.
[37]As above, para 36.
[38]As above.
[39]Hadiprayitno (note 2 above) 137.

human rights.[40] Because poor people have no voice and are hardly seen in decision-making processes, practical measures must be taken by the State to ensure respect, protection and fulfilment of the rights of the poor.[41]

The practical measures envisaged in this regard include reaching out to poor people, and due to their disadvantaged and vulnerable position in society, empowering them through a human rights approach to poverty alleviation.[42] These measures are not acts of charity or of humanitarian assistance since they are based on universal human rights principles and standards.[43] On their part, the human rights principles and standards place certain duties on States to formulate policy that gives effect to their international human rights obligations and thus regard poverty as a human rights issue. It is therefore generally accepted that "anti-poverty policies are more likely to be effective, inclusive, equitable and meaningful to those living in poverty if they are based on international human rights".[44]

4.3 Poverty as a human rights issue

As early as 1944, the community of nations had realised that poverty was a danger to humanity. In that year, at the General Conference of the International Labour Organization (ILO), it was reaffirmed that one of the fundamental principles on which the ILO was founded is that "poverty anywhere constitutes a danger to prosperity everywhere".[45] The Conference noted that the fight against want was essential for the peaceful coexistence of nations. The Conference further declared that "the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort … [where there is] free discussion and democratic decision with a view to the promotion of the common welfare".[46] It thus identifies a connection between poverty and human rights (particularly the RTD dimension of well-being), and the need for consultation in addressing poverty related issues.

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[40]United Nations, "Report of the independent expert on the question of human rights and extreme poverty, Magdalena Sepulveda Carmona, on the draft guiding principles on extreme poverty and human rights" UN Doc. A/HRC/15/41 (2010) para 8.
[41]As above, para 9.
[42]As above, para 11.
[43]As above, para 13. See also UN *Human rights and poverty reduction: A conceptual framework* (2004) 1-2.
[44]United Nations (note 3 above) para 13.
[45]ILO, *Declaration concerning the aims and purposes of the International Labour Organization, adopted at the 26th session of the ILO, Philadelphia,* 10 May 1944, article 1(d).
[46]As above, article 1(d).

In 1948, the UN gave a more direct affirmation that poverty was a human rights issue. In the preamble of the UDHR, the UN proclaims that a world in which all human beings enjoy freedom from want is one of the highest aspirations of people.[47] Further, article 25(1) of the UDHR provides that:

> Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Also, common paragraph 3 of the preambles to the ICCPR and the ICESCR confirms that poverty is a human rights issue by:

> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created where everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Since freedom of the person and the interdependence of rights is a defining component of the RTD, by implication, poverty is of particular concern to realisation of the RTD because it impedes people's freedoms to enjoy their human rights. Because the ICCPR and the ICESCR are the products of the UDHR, it would follow that poverty violates the rights that these instruments proclaim. In its substantive provisions, the ICESCR echoes the provisions of the UDHR by placing a duty on States Parties to "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions".[48] States Parties are also required to "recognize the fundamental right of everyone to be free from hunger".[49] This implicitly presents poverty as a substantive human rights concern of a binding nature. From its experiences of dealing with the reports of States Parties and its interactions with them, the CESCR is of the view that poverty is a denial of human rights.[50]

[47]UDHR, preamble para 2.
[48]ICESCR, article 11(1).
[49]As above, article 11(2).
[50]United Nations (note 3 above) para 1.

Although the ACHPR does not explicitly mention the issue of freedom from want in its preamble or substantive text, it is implicit from paragraph 9 of its preamble which imports the human rights principles of the "declarations" and "conventions" of the UN, that poverty is also a concern of the ACHPR especially under the RTD provided for in article 22. In the *Endorois* case,[51] the African Commission drew from article 2(3) of the DRD in stating that the RTD includes "active, free and meaningful participation in development" in concluding that development should result in the empowerment of its beneficiaries.[52] Consequently, it held that it was not sufficient that the Kenyan government provided food aid to the Endorois, if the provision of that aid had not improved the capabilities and choices of the Endorois to enjoy the RTD.[53]

Due to their status and lack of voice in decision making, poor people are unable to access an adequate standard of living and all the rights associated with such a standard of living. Their status of poverty therefore violates their human rights. Since poverty is a violation of human rights, poverty reduction must be addressed as a human rights issue and not an act of charity. Poverty eradication policies and programmes should be designed in such a way as to respect, protect and promote the rights of poor people. Economic growth should be pro-poor with national budgets supporting human dignity concerns. All forms of discrimination should be eliminated and environmental resources and social capital for poor communities protected.[54]

Freedom from poverty is an important human interest, which means that people must have access to safe food and water, clothing, education and basic healthcare "in order to live well" or "to live at all".[55] Poor people lack secure access to sufficient quantities of these basic needs. Despite the great importance of these basic needs for human life, there is no agreement as to whether people have a human right to those needs.[56] International, regional and domestic systems of law give recognition to various human rights and the content of those rights and their corresponding duties depend on the legislative, judicial and executive bodies of government that maintain and interpret the laws in question.

[51](2009) AHRLR 75 (ACHPR 2009).
[52]As above, para 283.
[53]As above.
[54]UNDP, *Poverty reduction and human rights* (2003) 2.
[55]Thomas Pogge, "Severe poverty as a human rights violation" in Thomas Pogge (ed) *Freedom from poverty as a human right: Who owes what to the very poor?* (2007) 11.
[56]As above, 13.

To gain legitimacy, those governmental bodies must have the capacity to create moral obligations and give them the force of law.[57] The reason for this is that governments do not grant human rights.[58] These rights accrue to human beings by virtue of their being human. The State machinery is then encumbered with a moral obligation to give effect to these rights, and to protect and promote human dignity. In a sense, those basic needs that alleviate poverty are human rights which the State ought to recognise and is under a duty not to deprive any person access to these basic needs.[59]

Since poverty is a violation of human rights, it must be addressed as a problem of society using the human rights paradigm. This would be particularly effective if the international human rights framework is adopted as a core strategy. It has been suggested that:

> If … poverty were declared to be abolished, as it should with regard to its status as a massive, systematic and continuous violation of human rights, its persistence would no longer be a regrettable feature of the nature of things. It would become a denial of justice. The burden of proof would shift. The poor, once recognized as the injured party, would acquire a right to reparation for which governments, the international community and, ultimately each citizen would be jointly liable. As strong interest would thus be established in eliminating, as a matter of urgency, the grounds of liability, which might be expected to unleash much stronger forces than compassion, charity, or even concern for one's own security, are likely to mobilize for the benefit of others.[60]

Approaching poverty from the dimension of human rights violations elevates poverty from the status of social problem to that of a "moral catastrophe".[61] The human rights violations approach endorses the parity and interdependence of basic social and economic rights with fundamental civil and political rights. That parity and interdependence of rights is the foundation of the RTD since their concerns are the total well-being of the individual and his community. Poverty is therefore a violation of the RTD. If poverty is a violation of the RTD, there is need to develop legal remedies that empower the poor to claim their rights to human dignity, equality, livelihood and reasonable standards of well-being. In this regard, Hadiprayitno rightly observes that the "recognition of the relationship between poverty and the

[57]As above.
[58]As above.
[59]Elizabeth Ashford, "The duties imposed by the human right to basic necessities" in Pogge (ed) (note 55 above) 183.
[60]Tom Campbell, "Poverty as a violation of human rights: Inhumanity or injustice?" in Pogge (ed) (note 55 above) 55 (quoting Pierre Sané).
[61]As above, 56.

denial of human rights is integral to the right to development, which emphasizes the indivisibility and interdependence of human rights".[62]

At the Global Consultation on the Right to Development as a Human Right,[63] the issue of extreme poverty was discussed as a specific example of a human rights problem that affects development. It was noted that extreme poverty is a demonstration of the violation of the whole corpus of human rights, civil and political, as well as economic, social and cultural.[64] The situation of poverty renders affected persons incapable of fulfilling their individual and collective obligations.[65] These would include obligations to themselves, their families and the State. For example, a person affected by extreme poverty is most likely to be unable to feed and house himself and his family, or even pay taxes. It was also noted that experience shows that people faced by extreme poverty should be involved in finding solutions to the problem of poverty because they are best suited to effectively expose their problems and make their concerns known.[66] Participation of the extremely poor is therefore critical for realisation of their human rights and particularly the RTD to secure their well-being.

As noted by the UN independent expert on the question of human rights and extreme poverty, urgent efforts must be made to realise all human rights because "long-lasting advances in the eradication of extreme poverty can only be achieved once measures recognize persons living in extreme poverty as subjects with rights and as potential agents of change".[67] The independent expert further notes that such efforts must give priority to the protection of people living in poverty as marginalised and disadvantaged individuals and groups in society.[68] The approach of protecting the poor as a group inevitably facilitates realisation of their RTD.

4.4 Poverty and the RTD in Kenya

The preceding section demonstrates that the problem of poverty is a human rights issue. It shows that extreme poverty is a denial of human rights, particularly the RTD. In this section,

[62]Hadiprayitno (note 2 above) 139.
[63]See generally, United Nations, "Global consultation on the right to development as a human right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45", UN Doc. E/CN.4/1990/9/Rev.1 (1990).
[64]As above, para 108.
[65]As above.
[66]As above, para 110.
[67]United Nations (note 40 above) para 8.
[68]As above, para 11.

poverty is discussed in relation to the RTD in Kenya by first contextualising the problem as addressed through policy and the basis for addressing it set out by the Constitution. Against the background of constitutional and international law obligations, it then investigates the role of education and health in realising the RTD in Kenya. The assumption here is that an educated and healthy population is less likely to be severely affected by poverty.

The primary development goal of Kenya has been to achieve all-inclusive and sustainable improvement in the standards of the welfare of all its subjects as is evident in its various national development plans. In the early years of independence, poverty was identified as one of Kenya's main developmental challenges.[69] Statistical data shows that poverty levels in Kenya fell from 46.8% in 2005/2006 to 36.1% in 2015/2016.[70] However, socio-economic inequalities that exist, if not addressed could slow down or hinder future development.[71] For instance, the 2015/16 survey shows that the levels of extreme poverty currently stands at 8.6% which translates to about 3.9 million people, with 3.2 million of them residing in rural areas.[72] Additionally, the 36.1% poverty level is still well below the 28% target that the government had committed to achieve in its 2014 report to the African Commission.[73] The CESCR has raised concern about the high number of people living in poverty in Kenya and recommended the intensifying of poverty reduction strategies that take care of the most disadvantaged and marginalised in society.[74] This means that there is a serious need for concerted effort in effectively allocating resources in a manner that addresses poverty in Kenya and the inequalities in society that arise from it.

[69]Mary Omosa, *Research utility and national development goals: The interplay between poverty alleviation strategies and social science research in Kenya* (2006) 2.
[70]Kenya National Bureau of Statistics, *Basic report on well-being in Kenya: Based on the 2015/16 Kenya Integrated Household Budget Survey* (2018) 56.
[71]As above, 12.
[72]As above, 44.
[73]Republic of Kenya, *Combined 8th-11th report on the African Charter on Human and Peoples' Rights* (2014) para 122.
[74]United Nations, "Committee on Economic, Social and Cultural Rights: Concluding observations on the combined second to fifth periodic reports of Kenya", UN Doc. E/C.12/KEN/CO/2-5 (2016) paras 41-42. Several other UN treaty monitoring bodies have raised the issue of poverty and how it its impact on specific groups of people. For instance, the Committee on Elimination of Discrimination against Women has raised concern about high levels of poverty amongst women and their continued exclusion from decision-making with regard to rural development. See, United Nations, "Committee on the Elimination of Discrimination against Women: Concluding observations on the eighth periodic report of Kenya", UN Doc. CEDAW/C/KEN/CO/8 (2017) para 42. With regard to development in marginalised areas, the Committee on Elimination of Racial Discrimination has recognised the measures taken by government through legislation and establishment of special measures (such as the Equalisation Fund) to address inequalities between different groups and counties through the provision of funds for marginalised regions to generate development opportunities and reduce inequalities. See, United Nations, "Committee on Elimination of Racial Discrimination: Concluding observations on the fifth to seventh periodic reports of Kenya", UN Doc. CERD/C/KEN/CO/5-7 (2017) para 17.

For many years, the government has pursued several policies aimed at poverty alleviation. In the 1960s, the policies that the government pursued were founded on the assumption that economic growth would translate into poverty alleviation.[75] Poverty eradication at the time was seen as being the same thing as raised incomes, and that this would lead to a prosperous economy whose benefits would trickle down to all Kenyans and rid the country of poverty, disease and ignorance.[76] This focus existed prior to the push by the Bretton Woods Institutions (BWIs)[77] for Highly Indebted Poor Countries (HIPCs) to formulate and implement Poverty Reduction Strategy Papers (PRSPs) to access development assistance.[78] The preparation and implementation of deliberate poverty reduction strategies marked a policy shift from pursuing not only economic growth but also high and sustainable growth with redistribution. The high economic growth registered in Kenya in the early independence years did not reduce poverty in any significant way. In fact, it increased despite high economic growth because of high inequality among the people. That inequality subsists even today.

In 1999, the government prepared the National Poverty Eradication Plan (NPEP) covering the period from 1999 to 2015 as a deliberate initiative to jump start poverty reduction efforts. It benchmarked the government's determination to address the problem of poverty not only as a political and moral obligation but also on economic principles that recognised the critical role and potential contribution of the poor to national development.[79] In the NPEP, the government committed itself to the eradication of poverty, the achievement of universal primary education, access to health services for all and the social integration of disadvantaged people. The NPEP

[75]As above.
[76]Republic of Kenya, *National Development Plan 1966-1970* (1966).
[77]The Bretton Woods Institutions were created in 1944 in Bretton Woods, New Hampshire to address critical issues of the international financial system and promote international economic cooperation in the post-World War II setting. They are the International Monetary Fund (IMF) which works to maintain global financial stability through technical assistance, training and financial aid to member States, and the World Bank (WB) which provides financial and technical assistance to developing countries so as to reduce poverty in those countries.
[78]Lineth Oyugi, *Effects of economic growth on poverty reduction: Experiences from Botswana, Kenya and Namibia* (2008) 10. The PRSPs regime was introduced in 1999 by the BWIs as an accountability framework for domestic poverty reduction efforts in developing countries especially the highly indebted and poor ones. They were also intended to be a means of coordinating development assistance between the governments of those countries and their development partners and a condition-precedent to access to debt relief and favourable funding from the BWIs. PRSPs broadly laid out a country's economic and social policies that would promote its growth and reduce poverty within its jurisdiction. The BWIs expected that the PRSPs submitted to them would include: (i) descriptions of the participatory processes that were used to generate them; (ii) a comprehensive situational analysis of poverty levels and the condition of people living in poverty; (iii) budgetary priorities for economic, structural and social policies to reduce poverty; and (iv) targets, indicators and methods for monitoring and evaluating progress made in reducing poverty. See, International Monetary Fund, "Poverty reduction strategy papers" <www.imf.org/external/np/prsp/prsp.aspx> (accessed 4 January 2018).
[79]As above, 11.

has three major features: a charter of social integration; improved access to essential services by low-income households that lack basic health, education and safe drinking water; and a strategy for broad economic growth.[80] Each of these features sets out an agenda for action by government, civil society, and the private sector and development partners.

To put the NPEP into operation, the Interim Poverty Reduction Strategy Paper 2000-2003 (IPRSP)[81] was prepared. The IPRSP identified the fundamental development objective for Kenya as being the achievement of "a broad-based, sustainable improvement in the welfare of all Kenyans" through the mobilization of all available resources and the deployment of those resources effectively and efficiently to fight poverty.[82] It set out the measures necessary to improve economic performance and actions needed to reduce poverty. Importantly, the I-PRSP shifted budgetary focus towards poverty reduction programmes and the empowering of the poor by providing them with means to access income generating opportunities, ready access to means of production, the provision of basic services and equal protection of the law.[83]

To empower the poor in the development process, the government invoked a participatory process to develop a Poverty Reduction Strategy Paper (PRSP) for the period 2001-2004.[84] This PRSP informed the development of a pro-poor Medium Term Expenditure Framework (MTEF) budget that linked policy planning and budgeting and thereby ensured harmonised financing for poverty reduction.[85] The participatory process was premised on the belief that it was the poor who best understood, on first-hand experiences, the causes, nature and extent of poverty.[86] It was for this reason that the 2001 PRSP was founded on the principles of giving voice to the poor;[87] participation and ownership of the poor in the development of poverty reduction strategies;[88] transparency, openness and accountability;[89] and the equitable distribution of natural resources and development initiatives.[90]

[80]As above.
[81]Republic of Kenya, *Interim Poverty Reduction Strategy Paper 2000-2003* (2000).
[82]As above, para 1.1.
[83]As above, para 1.2.
[84]Republic of Kenya, *Poverty Reduction Strategy Paper 2001-2004* (2001).
[85]As above, paras 1-4 and 11.
[86]As above, para 1.
[87]As above, para 7.
[88]As above, para 8.
[89]As above, para 9.
[90]As above, para 10.

In 2003, the government prepared the Economic Recovery Strategy for Wealth and Employment Creation (ERS) 2003-2007.[91] The ERS identified rapid economic growth, strengthening institutions of governance, rehabilitation and expansion of physical infrastructure and investment in human resource as critical interventions needed to spur poverty reduction.[92] To reduce poverty, the ERS focused on the provision of free primary education, improved access to basic health, development of arid and semi-arid areas and upgrading living standards of the urban and rural poor. In so doing, it was projected that implementation of the ERS would result in the reduction of poverty levels by five percentage points down from the 56.8% that existed then.[93]

KV2030 was adopted in 2007 as a successive development policy to the ERS.[94] It seeks to make Kenya a newly industrialised country that provides a high quality of life for all of its citizens by 2030.[95] In its social pillar, the KV2030 seeks to create social equity and reduce poverty. It particularly emphasises the creation of social equity and wealth creation opportunities for the poor. The main strategic thrust in this direction is through raising "the levels of income, education, individual health, longevity and access to basic needs of all Kenyans";[96] reducing "inequality in access to public services and income opportunities across gender, social status and regions";[97] and "increasing the amount, efficiency impact of devolved funds and by increasing public participation and voice of the poorest members of local communities so that development issues of concern to such members can be channelled into public policy".[98]

Since independence, government has initiated several policies and programmes to tackle poverty with little progress being realised. This reality is captured in KV2030 as follows:

> At independence in 1963, Kenya inherited a highly unequal and inequitable society on many fronts. There was inequity in entitlement to political civil and human rights, and large disparities in incomes and access to education, health and land, as well as basic needs, including clean water, adequate housing and

[91]Republic of Kenya, *Kenya Economic Recovery Strategy for Wealth and Employment Creation 2003-2007* (2003).
[92]As above, 1.
[93]As above, 3.
[94]Republic of Kenya, *Kenya Vision 2030* (2007).
[95]As above, vii.
[96]As above, 156.
[97]As above.
[98]As above, 157.

> sanitation. Since then, considerable progress has been made towards resolving these problems, particularly in education and, more recently, in access to improved health services and clean water sources. But much more remains to be done to provide Kenyans with equal opportunities so that every Kenyan has an equal chance to realise his or her potential in life.[99]

The war on poverty in Kenya is, however, far from being won; hence, it remains as one of the priority areas in the government's development agenda.[100] Since independence, the country has initiated policies and programmes to tackle poverty with little progress realised. This reality is captured in KV2030 as follows:

> At independence in 1963, Kenya inherited a highly unequal and inequitable society on many fronts. There was inequity in entitlement to political civil and human rights, and large disparities in incomes and access to education, health and land, as well as basic needs, including clean water, adequate housing and sanitation. Since then, considerable progress has been made towards resolving these problems, particularly in education and, more recently, in access to improved health services and clean water sources. But much more remains to be done to provide Kenyans with equal opportunities so that every Kenyan has an equal chance to realise his or her potential in life.[101]

In its first report to the African Commission on its obligations under the ACHPR,[102] the Kenyan government acknowledged that poverty was a major impediment to both the fulfilment of the basic needs and realisation of the potential of many Kenyans, especially women and children.[103] The government reported that it faced numerous challenges in its efforts to implement the rights entrenched in the ACHPR. It cited poor political and economic governance, corruption and inequitable allocation of resources as the reasons that impeded its poverty reduction goals.[104] In its next report,[105] the government reported that it had adopted KV2030 which was founded on, among other principles, the enhancement of equity in society and the opening up of opportunities for the poor to create wealth.[106] The government recognised that no society can be socially cohesive when a significant part of its population suffers extreme poverty.[107] For this reason, the government had introduced the principle of equity in all of its

[99]As above, 126.
[100]Wycliffe Oparanya, "Message from the Minister at the National Poverty Eradication Stakeholders Forum" (17 October 2011) *The Daily Nation* 23.
[101]Republic of Kenya (note 94 above) 126.
[102]Republic of Kenya, *Initial report on the African Charter on Human and Peoples Rights* (2006).
[103]As above, para 6.
[104]As above.
[105]Republic of Kenya, *Combined 8th-11th report on the African Charter on Human and Peoples' Rights* (2014).
[106]As above, para 16.
[107]As above.

economic, social and cultural programmes, with emphasis on investment in "semi-arid districts, communities with high incidence of poverty, unemployed youth, women and vulnerable groups".[108] The African Commission commended Kenya for adopting KV2030 and noted that it covered aspects that were relevant to the realisation of human rights, such as " access to adequate social amenities, including housing, water and sanitation infrastructure, and the need to improve human settlement systems".[109]

Currently, government policies and strategies for improving the livelihoods of, and economic opportunities for poor people are set out in KV2030. In that regard, KV2030 aims at creating "a just and equitable society without extreme poverty".[110] Equity entails equal treatment for all, equality of opportunity and the full realisation of the potential of all people without hindrance on account of poverty, poor education or parental background.[111] Social justice is geared towards ensuring that all persons access basic human needs regardless of their differences on account of economic disparity, gender, race, age or disability.[112] Social justice is, therefore, about eradication of extreme poverty as well as the creation of equality of opportunity for all. The realisation of equity and social justice under the Constitution will require a different policy and legislative environment which the State has not been able to create since independence. Hence, in 2008, the CESCR noted with concern that there existed serious disparities in Kenya in the enjoyment of economic, social and cultural rights and that this had led to ethnic tensions and the post-election violence experienced that year.[113] The CESCR recommended that Kenya addresses the "disparities in the enjoyment of economic, social and cultural rights, including in access to land, which particularly affect poor people in urban areas".[114]

In this regard, the Constitution addresses the issues of equity and social justice by providing that that "human dignity, equity, social justice, inclusiveness, equality, human rights, non-

[108]As above.
[109]African Commission on Human and Peoples Rights, "Concluding observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya", adopted by African Commission on Human and Peoples' Rights at its 19th Extra-Ordinary Session held from 16 to 25 February 2016 in Banjul, The Gambia, para 13(i).
[110]Republic of Kenya (note 94 above) 129.
[111]Amukowa Anangwe, "If Kenyans want equity and social justice for everyone, they should embrace socialism" (22 August 2010) *The Standard* 17.
[112]As above.
[113]United Nations, "Consideration of reports submitted by States parties under articles 16 and 17: Kenya, concluding observations of the Committee on Economic, Social and Cultural Rights", UN Doc. E/C.12/KEN/CO/1 (2008) para 12.
[114]As above.

discrimination and protection of the marginalised" are national values and principles of governance.[115] The framers of the Constitution had the need for social transformation in mind when they crafted this provision. It calls for the reconstitution of social, political and economic order. Article 10(2)(b) envisions a society that embraces and enhances the above values and principles of governance and the protection of the poor and disadvantaged groups.

The High Court has given recognition to the value of article 10(2)(b) in relation to poor people. In *Mitu-Bell Welfare Society v Attorney General*,[116] the Court had to deal with the violent eviction of the residents of an informal settlement located next to Wilson Airport in Nairobi. On the values espoused in article 10(2) (b) in relation to poor people, the Court pronounced itself as follows:

> …when the state or a state agency such as the 2nd respondent demolishes the homes of poor citizens such as the petitioners who live in informal settlements such as Mitumba village, when it does so after a seven day notice, without giving them alternative accommodation, it violates not only the rights of the petitioners but the Constitution itself and the obligations that it imposes on the state, both at Articles 21 and 43, but also the national values and principles of governance set out in Article 10 which include '***human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized***'.[117]

In another eviction case, *Osman v Minister of State for Provincial Administration*,[118] the Court observed that:

> …people living without the basic necessities of life are deprived of human dignity, freedom and equality. Democracy itself is enhanced when citizens have access to the basic necessities of life… the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to build a society which is based on social justice and in which the potential of each person is freed.[119]

And in the *Mwai* case,[120] the Court stated that:

[115]Constitution of Kenya 2010, article 10(2)(b).
[116](2013) eKLR.
[117]As above, para 54.
[118](2011) eKLR.
[119]As above 7.
[120](2011) eKLR.

> In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socio-economic needs of the people of Kenya, *including those who are poor, in order to uplift their human dignity*. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2) (b).[121]

Poverty eradication initiatives must, therefore, include the formulation and implementation of policies that minimise the differences in income opportunities and access to social services across different social, political and geographical divides.[122] These policies should primarily address the effects of poverty on education and healthcare. They should focus on provision of quality education and provision of access to essential healthcare in an equitable manner.[123] The education and health sectors have been identified for discussion for two main reasons. First, as stated earlier in this chapter, education and health are the basic means by through which people living in poverty can get out of their situation.[124] With particular reference to Kenya, the two areas, in addition to poverty, were identified early in the independence years as key areas that Kenya needed to address in its development agenda.[125] The latter justification is still relevant today.

4.4.1 Education and the RTD

Education facilitates a person to access opportunities that improve the well-being of the person and enables that person to participate meaningfully in the affairs of their community.[126] Lack of education therefore isolates people living in poverty from mainstream society. The lack of formal education means limited ability to communicate and lack of access to information on public policies that affect the poor.[127] This leads to further social exclusion of people living in poverty and hinders their realisation of human rights. Education plays an important role in human development. It empowers people to improve their well-being through increasing their productivity and potential to achieve higher standards of living.[128] Education provides people

[121]As above, 6. Emphasis added.
[122]Republic of Kenya (note 94 above) 11.
[123]As above, 15.
[124]See section 4.1 above, 88.
[125]See generally, Republic of Kenya (note 76 above).
[126]As above, 31.
[127]United Nations (note 11 above) para 29.
[128]Oyugi (note 78 above) 14.

with the means to understand and participate effectively in various activities in life by providing literacy, knowledge, skills and ability to take on new opportunities.[129] Education secures the full human personality and the pursuit of human rights and dignity. It is considered a basic human right and need because of its importance to human development.

Education is perhaps the most reliable human development undertaking that is capable of moving the poor from the circumstances of hardship that poverty produces.[130] It leads to the realisation of other rights such as those to health and meaningful participation in the public life of a nation. It can provide access to opportunities previously unavailable to the poor. Illiteracy and inadequate schooling are some of the key dimensions of poverty that lead to reduced earnings, social exclusion and non-participation in public affairs. This in turn reduces the capabilities of people to exploit their potential to the fullest extent possible.

Education has been entrenched as a human right in several international instruments and domestic law. The enjoyment of human rights is predicated on some level of education because an educated person is able to appreciate his rights and claim them and at the same time it inculcates some sense of tolerance to the status of other people and their views on various issues.[131]Kenya, by virtue of being a State Party to the ICESCR and ACHPR has assumed international law obligations relating to education. These obligations have also been domesticated by the Constitution and legislation.

At the UN level, the foundation of education as a human right is the UDHR which recognises everyone's right to education and emphasises the need for education to be free at the basic stages.[132] The UDHR prescribes that education should be directed towards developing the human personality fully.[133] The DRD also recognises access to basic education as one of the measures necessary at the national level for the realisation of the RTD.[134] The ICESCR, on its part, enjoins States Parties to recognise the right of everyone to education in terms that favour realisation of the RTD. It provides that:

[129]Kenya National Commission on Human Rights, *The state of human rights report 2003-2004* (2005) 58.
[130]As above.
[131]Faranaaz Veriva & Fons Cooman, "The right to education" in D Brand & C Heyns *Socio-economic rights in South Africa* (2005) 57.
[132]UDHR, article 26(1).
[133]As above, article 26(2).
[134]DRD, article 8(1).

> The States Parties to the present Covenant recognise the right to education. *They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society*, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.[135]

The ICESCR then sets out parameters that can be used to determine the extent to which the right to education has been realised in any State. These parameters are that there shall be compulsory and free primary education for all; accessible secondary education for all including technical and vocational training; accessible higher education for all on the basis of capacity; and pursuit of the development of a system of schools at all levels and the continuous improvement of the material conditions of teaching staff.[136]

In elaborating on these parameters, the CESCR has developed a framework for expanding people's capabilities through education. The CESCR General Comment No. 13 on the right to education[137] gives in detail, normative content to the parameters identified above on which States are to advance the cause of education at various levels. General Comment No. 13 prescribes that "education in all its forms and at all levels shall exhibit the following essential features:"[138]

a) *Availability:* functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party.

b) *Accessibility:* educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of a State party.[139]

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[135]ICESCR, article 13(1). Emphasis added.
[136]As above, article 13(2).
[137]United Nations, *Committee on Economic, Social and Cultural Rights General Comment No. 13: The Right to Education (Art 13)* UN Doc. E/C. 12/1999/10 (1999).
[138]As above, para 6.
[139]The aspect of accessibility has three overlapping dimensions:
> "(i) Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras 31-37 on non-discrimination).
> (ii) Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a "distance learning" programme);
> (iii) Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13(2) in relation to primary, secondary and higher education: whereas primary education shall be available 'free to all', States parties are required to progressively introduce free secondary and higher education;"

c) *Acceptability:* the form and substance of education, including curricula and teaching methods, have to be acceptable … to students and, in appropriate cases, parents.

d) *Adaptability:* education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

The CESCR has also implicitly recognised that the right to education facilitates realisation of the RTD. It describes the right to education as an important human right that enables the realisation of other human rights.[140] The right to education is about empowerment of people and is fundamental in lifting economically and socially disadvantaged people out of poverty.[141] Because the right to education results in people acquiring knowledge and processing it for their use and benefit, it empowers them to participate in the affairs of their society.[142] The common objective of education in the UDHR and the ICESCR that is relevant to realisation of the RTD is that education should result in the "full development of the human personality" by directing education towards a person's "sense of dignity", enabling peoples' effective participation in society and promoting ethnic, racial and religious tolerance.[143]

Under the ICESCR, Kenya, as a State Party,[144] is under a duty to ensure that the right to education is progressively realised to the maximum of its available resources.[145] The right to education is to be enjoyed without distinction of any kind, including social origin.[146] While welcoming the fact that Kenya had adopted the Basic Education Act (BEA),[147] the CESCR, however noted with concern, that Kenya had not availed sufficient funds to develop school facilities and employ qualified teachers with a view to ensuring that the enjoyment of the right to free primary education is effective.[148] The CESCR was further concerned that the inadequacies in the public school system have led to the mushrooming of ostensibly "low-cost" private school that have led to segregation and discriminatory access to education, which particularly affects disadvantaged children, such as those from poor backgrounds.[149]

[140]Unite Nations (note 137 above) para 1.
[141]As above.
[142]As above.
[143]As above, para 4.
[144]Kenya acceded to the ICESCR on 1 May 1972.
[145]ICESCR, article 2(1).
[146]As above, article 2(2).
[147]Act 13 of 2013.
[148]United Nations (note 74 above) para 57.
[149]As above.

At the African regional level, the ACHPR provides that "every individual shall have the right to education".[150] States Parties to the ACHPR are under an obligation to adopt measures that give effect to the rights they set out.[151] The African Commission takes education as provided for in these instruments, to be crucial for development and fighting marginalisation. The Commission's position is that:

> Education is a fundamental right that affects the growth, development and welfare of human beings, particularly children and youth. As a human right, education is the primary vehicle by which economically and socially marginalised children and adults can lift themselves out of poverty and obtain the means to participate fully in their community.[152]

The Commission sets the minimum core obligation of the State as being to ensure that all children are availed an opportunity to enjoy "their right to free and compulsory primary education" and to take measures to ensure that children from disadvantaged or vulnerable groups receive free primary education.[153] Further as a minimum, the State is under an obligation to implement policies that reduce costs of primary education and among other things provide free textbooks, transportation and meals to encourage the attendance of poor children at school.[154]

For the State to fulfil the obligations it assumes under international human rights law regarding education, it must consider the best interest of learners.[155] Generally, the State must ensure that there is no discrimination at all in the access to educational opportunities,[156] and more specifically, the State is under a duty to ensure that the educational system it adopts assists disadvantaged groups such as the poor,[157] and to remove obstacles that impede "educational access of girls, women and other disadvantaged groups".[158]

At the domestic level, the Kenyan Constitution amplifies the role of education in development by laying a foundation for an education that leads to the full development of individuals, which

[150]ACHPR, article 17(1).
[151]As above, article 1.
[152]African Commission on Peoples' and Human Rights, "Principles and guidelines on the implementation of economic, social and cultural rights in Africa", para 69.
[153]As above, para 71(a).
[154]As above, para 71(b).
[155]United Nations (note 137 above) para 7.
[156]As above, para 43.
[157]As above, para 53.
[158]As above, para 55.

in turn leads to the fulfilment of other rights. It spells out national values and principles of governance of "human dignity, equity, social justice, inclusiveness, equality, human right, non-discrimination and protection of the marginalised".[159] And then in article 43(1)(f), the Constitution declares that every person has the right to education. Part 3 of the Constitution provides for specific application of rights. The purpose of Part 3 is to take care of certain groups of persons who have been historically marginalised or are vulnerable. Article 52 identifies the purpose of Part 3 to be elaborating "certain rights to ensure greater certainty as to the application of those rights and fundamental freedoms to certain groups of persons". Under Part 3, the Constitution declares, among other things, that every child has the right to "free and compulsory basic education";[160] "[a] person with any disability is entitled … to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interest of the person";[161] "[t]he State shall take measures, including affirmative action programmes, to ensure that the youth … access relevant education and training";[162] and "[t]he State shall put into place affirmative action programmes designed to ensure that minorities and marginalised groups … are provided special opportunities in educational and economic fields".[163]

These constitutional promises, if effectively implemented through appropriate legislation and policies, will combat poverty and contribute to realisation of the RTD. The initial step towards this goal was through the enactment of the BEA. The purpose of the Act was to give effect to article 53 of the Constitution and to promote and regulate free and compulsory basic education.[164] Among the guiding principles and values of the legislation is the "right of every child to free and compulsory basic education",[165] and "equitable access for the youth to basic education and equal access to education or institutions".[166]

Every development plan in Kenya since independence has emphasised the role of education in development. The Ministry of Education continually gets the highest budgetary allocation in

[159]Constitution of Kenya 2010, article 10(2)(b).
[160]As above, article 53(1) (b).
[161]As above, article 54(1) (b).
[162]As above, article 55(a).
[163]As above, article 56(b). In *Mwai* case (note 120 above) 7, the court while applying the CESCR General Comment No. 13 standard on accessibility of education, reiterated that the requirements on accessibility are of crucial importance for safeguarding the rights of the *most vulnerable of people.* (Emphasis added).
[164]As above, preamble.
[165]As above, section 4(a).
[166]As above, section 4(b).

each government financial year ranging between 35-45%.[167] The ERS emphasised the importance of education by reiterating that education is a crucial determinant of earning power and, therefore, an important escape route from poverty.[168] In the ERS, the government committed to channel many resources to education to enable people take advantage of available and emerging opportunities.

When the National Rainbow Coalition (NARC) formed government in January 2003, it introduced the Free Primary Education (FPE) programme.[169] The initial phase of this programme was marked with many logistical and administrative problems due to an exponential rise in student enrolment without a corresponding expansion of physical facilities and teaching staff. The introduction of FPE was a remarkable achievement for that saw primary school enrolment record a gross enrolment rate (GER) of 103% for public, private and community schools.[170] With the introduction of FPE, many aspects of improving access to education were improved. The 103% increase on gross enrolment was largely due to the re-entry of dropout students into various levels of primary school other than the entry level.[171] The majority of these re-entry cases had been because of income poverty that locked out a large number of people due to lack of school fees.[172]

For education to have a meaningful impact on development, it must aim at equipping people with certain levels and quality of training.[173] Education is an opportunity that enables capability. Higher and quality levels of education are, therefore, important indicators of its realisation.[174] However, the increased student enrolment in primary schools that resulted from the introduction of the FPE programme brought with it challenges of retention and transition

[167]As above 59.
[168]As above.
[169]For detailed explanation of FPE, see Republic of Kenya, *National Action Plan on Education for All 2003-2015*(2003); Republic of Kenya, *Sessional Paper No. 1 of 2005: Policy Framework for Education, Training and Research* (2005).
[170]Kenya National Commission on Human Rights (note 129 above) 64. GER is a UN statistical measure used to determine the total number of students enrolled in school at the different levels of education and is used to show the ratio of the number of students who live in a country to those who qualify for the particular level of education. UNESCO defines GER as the "number of students enrolled in a given level of education, regardless of age, expressed as a percentage of the official school-age population corresponding to the same level of education". See UNESCO Institute for Statistics, "Gross enrolment ratio" <www.uis.unesco.org/en/glossary-term/gross-enrolment-ratio> (accessed 9 January 2018).
[171]As above.
[172]As above.
[173]As above, 66.
[174]As above.

from primary to secondary school.[175] This remains a major challenge in the education sector because higher education enhances the capability of people to position themselves for employment opportunities and increases their capacity for the enjoyment of other human rights. Affordability and availability of places for secondary education are key factors in meeting the challenge of accessing higher education.[176]

Even with the introduction of FPE, 52% of pupils dropped out of school in 2003.[177] This shows that there is more that keeps children out of school besides affordability. Poor quality of education, poor school environment, poor infrastructure and low staffing levels may lead to disinterest in learning for many children. Statistics at that time recorded a poor secondary school GER at 42% that was below the government target of 70% under the National Action Plan on Education for All, 2003-2015 (NAPEA).[178] However, between 2012 and 2016 the primary school GER dropped from 106% to 104% whole that for secondary school rose from 88% to 89%.[179] Over the same period, the primary to secondary school transition rate rose from 65% to 81%.[180] This is the result of the government's efforts in realising SDG 4 on inclusivity in learning opportunities through pro-poor budget making that is designed to achieve universal access to basic education.[181] The CESCR has raised concern about the increased numbers of children dropping out of school despite government efforts to have children who have dropped out return and complete their education.[182] In this regard, the CESCR recommended that measures be taken to address the root causes of children dropping out of school and strategies developed to avoid school drop-out, and where it occurs, strategies to bring the learners back to school are developed.[183]

In 2005, the Kenya Education Sector Support Programme (KESSP) was developed to implement national policy on education, research and training over the period 2005 to 2010.[184]

[175]As above.
[176]As above.
[177]As above.
[178]Republic of Kenya, *National Action Plan on Education for All, 2003-2015* (2003) 50.
[179]Kenya National Bureau of Statistics, "Economic survey 2017" <www.knbs.or.ke/downloads/economic-survey-2017> (accessed 9 January 2018).
[180]As above.
[181]Development Initiatives, "Analysis of Kenya's budget 2017/18: what's in it for the poorest people?" <www.devinit.org/wp-content/uploads/2017/03/analysis-of-Kenya's-budget-2017-18-what's-in-it-for-the-poorest-people.pdf> (accessed 9 January 2018).
[182]United Nations (note 74 above) para 59.
[183]As above, para 60.
[184]Republic of Kenya, *Policy Framework of Education, Training and Research in Kenya in the 21st Century* (2005).

The KESSP was based on four programme development objectives, namely: equitable access to basic education; enhanced quality learning; increased opportunities for higher education; and strengthened management of education. The government's strategic thought in the KESSP is to enhance access, at all levels, to quality education.[185] This, the government will achieve by ensuring non-discrimination in education; promoting full realisation of the right to education; protecting the gains made in the education sector; and enforcing the minimum prescribed education standards in an accountable and transparent manner.[186]

In 2014, the National Education Sector Plan (NESP)[187] was adopted to build on the KESSP. The main object of the NESP is the delivery of "quality basic education for Kenya's sustainable development".[188] The plan acknowledges that quality education is fundamental to human development and freedom from poverty.[189] As such, the provision of quality education is necessary to reduce regional inequalities and reduce poverty.[190] The NESP is the government's commitment to its international, regional and domestic obligations on education and a vehicle for delivering on the BEA, KV2030 and the Constitution in that regard.[191] To assist government meets its obligations, the NESP identifies the challenges that face the education sector as being among others, the inefficient use of resources and regional disparities in access to education, overcrowded classrooms and high teacher-pupil ratios that compromise quality of education and inadequate provision of resources and educational infrastructure in historically marginalised areas.[192]

Kenya's development, therefore, is dependent on the provision of meaningful education which targets the improvement of UPE and the promotion of equity in access to education.[193] The gains made in access to education through the introduction of UPE must be intensified through maintaining high standards of quality especially in marginalised areas. Government must also

[185]Kenya National Commission on Human Rights (note 129 above) 82.
[186]As above, 62.
[187]Republic of Kenya, *National Education Sector Plan* (2014).
[188]As above, x.
[189]As above, para 8.
[190]As above.
[191]As above.
[192]As above, para 30.
[193]Institute of Economic Affairs, "Education policy as an agenda for Elections 2017" (2017) *Policy Brief of Education* 1.

direct more resources towards ensuring that all children complete primary education. Such an investment will enable Kenya to build a durable basis for sustainable development.[194]

4.4.2 Health and the RTD

There is a close link between poverty and ill health. Poverty means an increase in healthcare costs due to the prevalence of disease or lack of ability to access basic healthcare. The prevalence of disease is caused by lack of education on preventable diseases and nutrition, and once disease is contracted, the lack of resources to cure it. Sick people are not economically productive and as a result, poverty is intensified.[195] Good health reduces the economic and social vulnerability of poor people. It creates a healthy and productive labour force for the nation to create broad-based growth and enhances productivity and self-reliance.[196] Good health is a critical pillar in ensuring individual, household, and community and country prosperity. Bad health on the other hand, is both a cause and consequence of poverty. Sick people are more likely to become poor and poor people are more vulnerable to disease since their capability of pursuing and attaining higher levels of "functionings" are themselves very limited.[197] Sick people are unlikely to participate effectively in matters relating to the improvement of their living conditions. Poor health is therefore an impediment to enjoyment of human rights.

While a State cannot be expected to guarantee good health for its people, it is obliged to create conditions under which the health of individuals is protected and enhanced.[198] Such conditions include access to health-related information, availability of safe drinking water, adequate sanitation, clean and healthy environment and freedom from poverty. The State is obligated to put in place effective mechanisms for preventing and controlling problems that may stand in the way of creating conducive conditions for health.

The right to health was first conceptualised as a fundamental human right by the WHO in 1946. The WHO Constitution[199] declares as a basic principle, that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without

[194]As above.
[195]Oyugi (note 78 above) 15.
[196]United Nations (note 3 above) paras 23 and 24.
[197]Kenya National Commission on Human Rights (note 129) 76.
[198]As above.
[199]Adopted 22 July 1946, entered into force 7 April 1948, 14 UNTS 185, UN Doc. A/RES/131 (1946).

distinction of race, religion, political belief, economic or social condition".[200] The WHO Constitution also declares that "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".[201] The right to health as a human right in international human rights law has found expression in the UDHR,[202] ICESCR,[203] ACHPR.[204] Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health conducive to living a life of dignity. In achieving this standard, States must bear in mind that health is a state of physical, mental and social well-being and not just the absence of disease.[205] The critical question as to State compliance with health needs must be answered by using the obligations set out by article 12(2) of the ICESCR. The aspects of healthcare needs, that article 12(2) envisages, are the reduction of stillbirth rate and infant mortality coupled with the healthy development of the child, improvement of environmental and industrial hygiene, prevention, treatment and control of diseases, and creation of conditions that ensure access to medical services.

The CESCR General Comment No. 14 on the right to the highest attainable standard of health[206] defines the right to health as "fundamental human right indispensable for the exercise of other human rights", including the RTD.[207] As such, "every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity." It identifies the normative content of right as not being the right to be healthy but to be about freedoms and entitlements.[208] "The freedoms include the right to control one's health and body, including sexual and reproductive freedom, the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation".[209] On the other hand, "the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health".[210]

[200]As above, preamble para 2.
[201]As above, para 1.
[202]UDHR, article 25.
[203]ICESCR, article 12.
[204]ACHPR, article 16.
[205]WHO Constitution, preamble para 1.
[206]United Nations, "Committee on Economic, Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12)", UN Doc. E/C. 12/2000/4 (2000).
[207]As above, para 1.
[208]As above, para 8.
[209]As above.
[210]As above.

The CESCR has elaborated on the duties of States under article 12 of the ICESCR as being duties to ensure the availability, accessibility and quality of health services for all persons especially those who are vulnerable or marginalised.[211] In General Comment No. 14, the CESCR observes that the right to health in all its forms and levels should contain the following essential elements:[212]

(a) *Availability:* Functioning public health and health-care facilities, goods and services, as well as programmes, have to available in sufficient quantities within the State party…

(b) *Accessibility:* Health facilities, goods and services have to be accessible to everyone without discrimination within the jurisdiction of the State party…[213]

(c) *Acceptability:* All health facilities, goods and services must be respectful of medical ethics, and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) *Quality:* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water and adequate sanitation.

At the African regional level, the ACHPR guarantees the individual the right to the best attainable standard of physical and mental health[214] and requires States to take the necessary measures to protect the health of their people and to ensure that the people receive medical

[211]Ebenezer Durojaye, "The approaches of the African Commission on the right to health under the African Charter" (2013) 17 *Law, Development and Democracy* 393, 395-396.
[212]United Nations (note 206) para 12.
[213]The aspect of accessibility has four overlapping dimensions:
"(i) Non-discrimination: health facilities, goods and services have to be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.
(ii) Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS.
(iii) Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principles of equity, ensuring that these services, whether privately or publicly provided, are affordability by all.
(iv) Information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information does not extend to personal health data which must be treated with confidentiality." As above, para 12(b).
[214]ACHPR, article 16(1).

attention when they are sick.[215] The ACHPR is not detailed in the nature of the obligation placed on States with relation to health as compared to the ICESCR but at the very minimum the State must provide curative medical services to its people when they fall sick.[216]

The African Commission's principles and guidelines on the implementation of economic, social and cultural rights, provide that the right to health is an inclusive right which includes health care and other underlying determinants to health but does not include a right to be healthy which is more of a biological condition and the State can have no control over it.[217] The right to health requires an effective and integrated health system that responds to national and local priorities and that health system must be accessible to all.[218] The State is under an obligation that at the very minimum, it will ensure among other things, the right of access to health facilities and services on a non-discriminatory basis especially for vulnerable and marginalised groups,[219] ensure provision of essential drugs to all those who need them,[220] and "[p]rovide education and access to information concerning the main health problems in the community".[221]

At the domestic level, the Constitution domesticates Kenya's international law obligations through article 43 which protects the right of every person "to the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare".[222] Under its provisions on specific protection of rights, the Constitution protects the health rights of children, and minorities and marginalised groups.[223] It places the State under an obligation to ensure that the right is fulfilled through enabling policy.[224]

With reference to the constitutional protection of the right to health, Kenyan courts have observed that the people of Kenya have a legitimate expectation that the State formulate and implement policies necessary to give effect to the right to health. For example, in the *Okwanda* case,[225] the petitioner had in 1996 been diagnosed with diabetes mellitus, an illness that requires

[215]As above, article 16(2).
[216]Durojaye (note 211 above) 397.
[217]African Commission on Human and Peoples' Rights (note 129 above) para 61.
[218]As above, para 62.
[219]As above, para 67(a).
[220]As above, para 67(b)
[221]As above, para 67(e).
[222]Constitution of Kenya 2010, article 43(1) (a).
[223]As above, articles 53(1) (c) and 56(e).
[224]As above, article 21(2).
[225](2013) eKLR.

proper care, diet and medication. His case was that the cost associated with managing the illness was prohibitive since he had long left active service in the trade union movement and he therefore had no means to take care of himself. In February 2013, he was diagnosed with a life-threatening terminal disease, benign hypertrophy which calls for special medical care and attention due to his advanced age. He sought the enforcement of his right to health under article 43 of the Constitution. Although he did not succeed in his plea on the ground that there was not sufficient evidence to show that the State had violated his right to the highest attainable standard of health, the Court observed that "it was not unreasonable for the petitioner and other concerned Kenyans to demand that a concrete policy framework be rolled out and implemented to address the containment and treatment of various health afflictions".[226]

Further, the courts have implicitly acknowledged that the right to health is important in realising the RTD through improving the well-being of disadvantaged and marginalised people. With respect to such people, the Court in the *Okwanda* case observed that:

> … the success of our Constitution depends on the State delivering tangible benefits to the people, particularly those living at the margins of society. The incorporation of economic and social rights set out in Article 43 sums up the desire of Kenyans to deal with issues of poverty, unemployment, ignorance and disease. Failure to deal with existing conditions will undermine the whole foundation of the Constitution[227]

This dictum of the court demonstrates the potential of the constitutional promise of healthcare for disadvantaged and marginalised people, such as the poor, which would increase their capabilities and contribute to realisation of the RTD in Kenya.

The health imperatives that should guide action in the health sector were first elaborated in the Kenya Health Policy Framework (KHPF) 1994-2010.[228] This policy framework was based on an analysis of the health situation in 1994 to provide guidance on the focus that the sector needed in maximising the provision of healthcare. The KHPF elaborated the overarching health policy imperatives for the country. These were: ensuring equitable allocation of government resources to reduce disparities in the health sector; increasing cost effectiveness in resource allocation and use; managing population growth; enhancing the regulatory role of government

[226]As above, para 24.
[227]As above.
[228]Republic of Kenya, *Kenya Health Policy Framework 1994-2010* (1994).

in the provision of healthcare; and creating an enabling environment for increased participation by the private sector and community-based organisations in the financing and provision of healthcare.[229]

Four medium term strategic plans were defined to guide the implementation of these policy objectives. These were the KHPF implementation plan 1994-1999; the 1st National Health Sector Strategic Plan (NHSSP-I) 2000-2004; the 2nd National Health Sector Strategic Plan (NHSSP-II) 2005-2010; and KV2030 Health Sector Plan 2008-2012. These plans focused on health promotion and provision of comprehensive support of the different phases of human life cycle. It was expected that they would result in the scaling up of community-based healthcare, expanding the role of community health workers, and reducing the geographical and financial barriers to accessing healthcare.[230] Implementation of the KHPF resulted in a huge allocation of funds and human resources in the public health sector. Better medical services over the period saw improvement in health indicators such as infectious diseases and child health.[231] However, during the KHPF plan period, the incidence of non-communicable diseases increased rolling back the gains made in the health sector. The Kenya Health Policy 2014-2030 (KHP)[232] was therefore formulated in 2014 as a way of building on the gains made under the KHPF. This policy was formulated after the coming into force of the Constitution and seeks to consolidate the gains made under the KHPF in an "equitable, responsive and efficient manner".[233]

While the KHP is heavily guided by the values and principles of the Constitution, it recognises the thrust of Vision 2030 that seeks to see Kenya emerge as a globally competitive and industrialised middle-income country by 2030.[234] Health is an important component of the social pillar of Vision 2030 since a healthy workforce is a necessity for driving the economy. By drawing from the Constitution and Vision 2030, the KHP aims at attaining "the highest standard of health in a manner responsive to the needs of the Kenya population".[235]

The KHP considers the objectives of devolved governance in designing its own objectives. Among the objectives of the KHP are:

[229]Kenya National Commission on Human Rights (note 129 above) 76.
[230]Republic of Kenya (note 94 above) 93.
[231]As above.
[232]Republic of Kenya, *Kenya Health Policy 2014-2030* (2014) 4.
[233]As above.
[234]As above, 5.
[235]As above.

> … the promotion of democracy and accountability in the delivery of healthcare; facilitating powers of self-governance to the people and enhancing their participation in making decisions in matters of health affecting them; recognising the right of communities to manage their own health affairs and to further their development; protection and promotion of the health interests and rights of minorities and marginalized communities, including informal settlements such as slum dwellers and under-served populations; and promotion of social and economic development and the provision of proximate, easily accessible health services throughout Kenya.[236]

The KHP is sensitive to the State's obligation to attain the highest possible standards of health for the Kenyan population in an all-inclusive, balanced and rational manner.[237] Accordingly, the policy seeks to "eliminate communicable conditions, halt and reverse the rising burden of non-communicable conditions and mental disorders, reduce the burden of violence and injuries, provide essential healthcare, minimise exposure to health risk factors, and strengthen collaboration with private and other sectors that have an impact on health".[238] These policy objectives are supported by seven policy orientations revolving around organisation of service delivery; health leadership and governance; health workforce; health financing; health products and technologies; health information; health infrastructure; and research and development which aimed at facilitating the development of comprehensive health investments, health plans and service provision.[239] In seeking to ensure "equity, efficiency and social accountability in the delivery of health services," the KHP offers guidelines on how to improve the status of healthcare in Kenya in line with the provisions of the Constitution, KV2030 and its international human rights law obligations".[240]

In its second report to the CESCR,[241] the government implicitly linked KV2030 and the achievement of its goals, to realisation of the RTD in the following terms:

> The Kenya Vision 2030 on which the country anchors its national development plans recognises that the achievement of its development goals is contingent upon a healthy working resource which should be partly achieved through the provision of quality, efficient and acceptable health care systems. Its goal for

[236]As above, 3.
[237]Agnes Kibui *et al*, "Health policies in Kenya and the new Constitution for Vision 2030" (2015) 2 *International Journal of Scientific Research and Innovative Technology* 127, 129.
[238]Republic of Kenya (note 232 above) 31-35.
[239] As above, 36.
[240]Kibui (note 237 above) 129.
[241]United Nations, "Committee on Economic, Social and Cultural Rights consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Combined second to fifth reports of States parties due in 2013, Kenya", UN Doc. E/C.12/KEN/2-5 (2013).

> the health sector is to "provide equitable and affordable health care at the highest affordable standards to her citizens".[242]

In the same report, the purpose and focus of the KHP is described as follows:

> … the Kenya Health Policy (2012-2030) aims at "attaining the highest possible health standards in a manner responsive to the population needs". The Policy seeks to achieve this goal through supporting provision of equitable, affordable and quality health and related services at the highest attainable standards to all Kenyans … The focus of the Policy applies a human rights based approach, a strategy that will enable rights holders enjoy the highest possible level of health and consequently ensuring that they are able to participate in development activities maximally as envisaged in Kenya Vision 2030.[243]

The CESCR while noting these measures raised concern about the inadequate budgetary allocations that the government had made to the health sector which resulted in limited access to healthcare by disadvantaged and marginalised persons.[244] The problem of inequitable access to healthcare appears to be a major impediment for enjoyment of the right to health by the poor and therefore a violation of the RTD in Kenya.

4.5 Conclusion

The aim of this chapter was to investigate poverty as an obstacle to realisation of the RTD in Kenya. Poverty is a critical issue in realisation of the RTD. The Kenyan situation requires action in developing legislative frameworks and policy that will improve access to education and health services to the poor. The foundation for this is to be found in the national governance value in article 10(2)(b) of the Constitution that in managing the affairs of the State, government shall protect human dignity of its subjects, promote social justice, be inclusive and protect the marginalised.

Poverty manifests itself in the deprivation of well-being, lack of respect and loss of human dignity. In Kenya, the poor have for a very long time been at the periphery of access to public goods and services and have had little voice in governance issues with negative results in social spheres including rising insecurity. Poverty eradication efforts have not been successful largely

[242] As above, para 168.
[243] As above, para 172.
[244] United Nations (note 113 above) para 51.

due to the lack of involvement of poor people in addressing their plight. They have remained marginalised in the making of decisions that affect them. The minimum basics that should help lift people out of poverty are access to quality healthcare and education, as these two are the basic minimums for expanding people's capabilities. The challenges of access to these basic minimums have to be seriously addressed in order to realise the RTD in Kenya.

The main proposition in this chapter is that the national values and principles of governance in article 10(2)(b) of the Constitution, with support of appropriate legislation and policy based on international human rights law standards, are the building blocks from which poverty has to be fought with a view to expanding the capabilities and freedoms of people in Kenya. The fight against poverty, so as to realise the RTD in Kenya, requires intensified efforts by government at eradicating poverty with a view to reducing the high number of people living below the poverty line. This requires that government deploys the maximum of its available resources to development programmes. However, pervasive corruption, especially in the public sector, militates against poverty alleviation initiatives. Further, for development programmes to be meaningful in realising the RTD, it is imperative that people living in poverty participate in those programmes at the formulation and implementation stages. Their participation in this manner makes those development programmes meaningful. The following two chapters of this thesis explore how anti-corruption and public participation interventions can facilitate realisation of the RTD in Kenya.

Chapter 5: Corruption and the right to development

5.1 Introduction

Corruption is a worldwide phenomenon that has increasingly become a threat to societies where it is rampant. It is an obstacle to human development, a contributor to poverty and therefore a danger to humanity's political, economic, social and cultural well-being. Corruption is systemic in Africa and has the effect of eroding efforts made to realise good governance, yet good governance itself is essential in combating corruption.[1] Corruption is usually the result of abuse of public power and it thrives in societies where people are unaware of, or underestimate, their potential to fight the vice for the benefit of all.[2]

Corruption can, generally, be defined as the abuse of public office for private gain.[3] It includes bribery and extortion which would ordinarily involve two parties, and other types of malfeasance that a public official can execute alone such as fraud and embezzlement.[4] The appropriation of public assets for private use and embezzlement of public funds for private gain have direct adverse effects on the development of any country where it is rife.

In Kenya, corruption is rampant despite numerous pieces of legislation having been enacted to deal with it.[5] The levels of corruption have reached high levels of concern that have attracted international attention. The CESCR, for instance, has raised concern about pervasive corruption in the country's public sector and further observed that corruption cases especially those involving prominent public officials are not properly investigated, with the result that there are few convictions in comparison with the high number of cases reported to the Ethics and Anti-Corruption Commission (EACC).[6]

Corruption in Kenya has a big impact on persons living in poverty and harms them disproportionately because it diverts funds from those public services that they need access to

[1]Commission for Africa, *Our common future: Report of the Commission for Africa* (2005) 36.
[2]Society for International Development, "Why corruption prevails and what can be done to eliminate it" (2005) 2 *Kenya Dialogues Project Policy Working Paper* 6.
[3]World Bank "Helping countries combat corruption: The role of the World Bank" (2014) <www1.worldbank/publicsector/anticorrupt/corrupt/corrtn.pdf> (accessed 21 December 2017)
[4]Cheryl Gray & David Kaufmann, "Corruption and development" (1998) *Finance and Development* 7.
[5]These enactments are discussed later in this chapter.
[6]United Nations, "Committee on Economic, Social and Cultural Rights concluding observations on the combined second to fifth periodic reports of Kenya", UN Doc. E/C.12/KEN/CO/2-5 (2016) para 17.

in order to live a dignified life.[7] According to Transparency International (TI), the poor are hard hit by corruption in the public service where they are twice as likely as the affluent to pay a bribe to access services in courts, public utilities such as water and electricity, and to obtain identification documents or permits.[8] As Hope laments:

> … in countries where corruption is embedded in their political economy, such as Kenya …, there are low governance scores, weak governance institutions, and this translates into sluggish economic performance and lower rates of growth as economic efficiency is impaired. These economic costs of corruption, in turn, fall disproportionately on the poor.[9]

These challenges call for innovative ways of tackling corruption under the 2010 constitutional dispensation so as to advance development for the people of Kenya. This chapter examines corruption as an obstacle to realisation of the RTD. It explores the meaning and nature of corruption before discussing its emergence as a human rights issue. Thereafter, the chapter examines the effect of corruption on realisation of the RTD Kenya. Comparative case law from India and South Africa, which establishes the value of using a human rights approach in dealing with the problem of corruption, is examined to emphasise the need for such an approach in Kenya.

5.2 Understanding corruption

A comprehensive definition of corruption is not easy due to its complex and multifaceted nature and the many forms it takes in different societies.[10] Defining corruption is difficult because whereas different societies may have a common understanding of good and bad, when it comes to corruption, one may interpret the same conduct as natural in one instance and corrupt in another, depending on the society where it takes place or the societal norms under which one has been brought up.[11] Some commentators argue that a universal definition is not possible and

[7]Commission for Africa (note 1 above) 36.
[8]TI, *Global corruption barometer: Kenya"*, <www.transparency.org/gcb2013/country/?=kenya> (accessed 18 February 2017).
[9]Kempe Hope, "Kenya's corruption problem: Causes and consequences" (2014) 52 *Commonwealth and Comparative Politics* 493, 507. See also Kempe Hope, *Corruption and governance in Africa: Swaziland, Kenya, Nigeria* (2017) 79.
[10]Ken Obura, "Towards a corruption free Kenya: Demystifying the concept of corruption for the post-2010 anti-corruption agenda" in Morris Mbondenyi *et al* (eds), *Human rights and democratic governance in Kenya: A post-2007 appraisal* (2015) 240.
[11]Eugen Dimant, "The nature of corruption: An interdisciplinary perspective" (2013) *Economics Discussion Papers No. 2013-59*. <www.economics-ejournal.org/economics/discussionpapers/2013-59> (accessed 18 February 2017).

at best only guidelines as to what corruption entails should be attempted to suit the circumstances and context in which corruption is being dealt with.[12] This section considers the definitions of corruption at the UN and African regional levels because Kenya is a State Party to relevant UN and African regional treaties defining corruption: the United Nation Convention against Corruption (UNCAC)[13] and the African Union Convention on Preventing and Combating Corruption (the AUCPCC)[14]. Further, Kenya is a signatory to the AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Amended African Court Protocol).[15]

5.2.1 The UNCAC definition

The UNCAC is the only globally agreed framework for combating corruption from which States Parties draw inspiration in crafting their anti-corruption laws. However, it does not define corruption or corrupt practices.[16] It outlines a broad range of acts that constitute corruption rather than defining it. As such, the UNCAC allows flexibility for future interpretation. It is therefore a general guide to the principles of good management of public affairs.

Chapter III of the UNCAC places obligations on States Parties to criminalise certain acts as being corrupt acts through legislation or other measures. These acts are: "bribery of national public officials",[17] "bribery of foreign public officials and officials of public international organizations",[18]'embezzlement, misappropriation or other diversion of property by a public official"[19] "trading in influence",[20] "abuse of functions" of public office,[21] "illicit

[12]Ulrich Alemann, "The unknown depths of political theory: The case of a multidimensional concept of corruption" (2004) 42 *Crime, Law and Social Change* 25, 26.
[13]Adopted 31 October 2003, entered into force 14 December 2005, 2349 UNTS 41, UN Doc. A/58/422 (2003). Kenya ratified the UNCAC on 9 December 2003.
[14]Adopted 11 July 2003, entered into force 5 August 2006, 43 ILM 1 (2004). Kenya ratified the AUCPCC on 3 February 2007.
[15]Adopted by the Twenty Third Ordinary Session of the African Union Assembly on 27 June 2014. Kenya became a signatory to the Amended African Court Protocol on 27 January 2015. The Protocol is yet to come into force.
[16]Kenneth Mwenda, *Public international law and the regulation of diplomatic immunity in the fight against corruption* (2011) 20.
[17]UNCAC, article 15. Article 2 defines public official to mean "any person holding a legislative, executive, administrative or judicial office of a state party", "any person who performs a public function or provides a public service, as defined in the domestic law of the state party", or "any other person defined as a 'public official' in the domestic law of a state party".
[18]As above, article 16.
[19]As above, article 17.
[20]As above, article 18.
[21]As above, article 19.

enrichment",[22] "bribery in the private sector",[23] "embezzlement of property in the private sector",[24] "laundering of proceeds of crime",[25] and "concealment" of property acquired through corrupt acts.[26]

The UNCAC is intended to promote and strengthen measures to prevent and combat corruption more efficiently and effectively at domestic and international levels. It seeks to promote integrity and accountability and ensure the proper management of public affairs and property. The UNCAC addresses the cross-border nature of corruption by providing for international cooperation and the return of proceeds of corruption. This is because corruption has increasingly become an international phenomenon with proceeds of corruption being transferred from one country to another.[27]

Article 1 of the UNCAC identifies its objectives as being:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption including asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

From the objectives of the UNCAC, it can be concluded that it was intended to be a comprehensive, functional and effective international instrument that considers the many forms of corruption. The UNCAC establishes common guidelines that unify international legislation on anti-corruption.[28] In so doing, it provides latitude for State Parties to frame their anti-corruption policy and law within an international framework that considers their varying legal, cultural, social and political differences. Substantively, the UNCAC provides a framework for

[22]As above, article 20.
[23]As above, article 21.
[24]As above, article 22.
[25]As above, article 23.
[26]As above, article 24.
[27]Antonio Argandona, "The United Nations Convention against Corruption and its impact on international companies" (2006) *IESE Business School Working Paper No. 656* 2.
[28]As above, 4.

measures of preventing corruption,[29] and criminalising it,[30] international cooperation,[31] asset recovery,[32] and technical assistance and information exchange.[33]

5.2.2 AUCPCC definition

Unlike the UNCAC, the AUCPCC explicitly and in detail defines corruption by declaring that corruption means "the acts and practices including related offences proscribed by this Convention".[34] Article 4(1) of the AUCPCC identifies the following as acts of corruption and related offences:

(a) the solicitation or acceptance, directly or indirectly, by a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

(b) the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

(c) any act or omission in the discharge of his or her duties by a public official or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;

(d) the diversion by a public official or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;

(e) the offering or giving, promising, solicitation, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

(f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over

[29]UNCAC, part II.
[30]As above, chapter III
[31]As above, chapter IV.
[32]As above, chapter V.
[33]As above, chapter VI.
[34]AUCPCC, article 1(1).

the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

(g) illicit enrichment;

(h) the use or concealment of proceeds derived from any of the acts referred to in this Article, and

(i) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or any other manner in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this article.

The extensive definition of the corrupt acts that constitute corruption in the AUCPCC was the result of the reality of the harm that corruption was causing African nations. At the adoption of the AUCPCC, African leaders were convinced that there was "need to formulate and pursue, as a matter of priority, a common penal policy aimed at protecting society against corruption".[35] As such, the AUCPCC represents a regional consensus on what African States should do in the areas of prevention and criminalisation of corruption, international cooperation and asset recovery.[36] Whereas the AUCPCC is more elaborate than the UNCAC in its definition of corrupt acts, the two instruments substantially address the same issues.

5.2.3 Amended African Court Protocol definition

The Amended African Court Protocol empowers the African Court of Justice and Human Rights (ACJHR) to try persons for the offence of corruption.[37] Article 28I of the Protocol sets out in detail the acts that amount to corruption which the Court will try if they are of a serious nature that affects the stability of a State. These acts incorporate the definitions in the AUCPCC stated above. Additionally, the Protocol clothes the Court with criminal jurisdiction. It also inverts the traditional burden of proof and presumption in criminal law in so far as illicit enrichment is concerned. If a public official or any other person makes a significant increase

[35] As above, preamble para 9.
[36] Kenya Human Rights Commission, *Lest we forget: The faces of impunity in Kenya* (2011) 24.
[37] Amended African Court Protocol, article 28A. The ACJHR is not yet operational since the Amended African Court Protocol has not come into force

in his or her assets and that public official cannot explain that increase in relation to his or her income, that person is guilty of illicit enrichment.[38]

5.3 Corruption as a human rights issue

For a long time, the relationship between corruption and human rights received little attention because it was not a priority issue in bilateral relations between States and neither was it an issue in international and national development policy. In the 1990s however, the BWIs introduced a good governance agenda into international development policy in which corruption was identified as a major concern because it impedes development especially in developing countries.[39] This good governance agenda in development was meant to address the emergence of authoritarian rule, economic decline and political instability in many African States.[40] Authoritarian rule, economic decline and political instability in most of these States was invariably caused or sustained by corruption.[41] The premise of this intervention by the BWIs was that rampant corruption in any State would prevent it from fulfilling its obligation to respect, protect and fulfil the human rights of its people and therefore fail in being efficient in governance.[42]

In justifying this approach, the World Bank observed that "[a]n effective state is vital for the provision of goods and services – and the rules and institutions – that allow markets to flourish and people to lead healthier, happier lives. Without it, sustainable development, both economic and social, is impossible."[43] On its part, the IMF attached importance to "[p]romoting good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper.[44] Further, Olaniyan captures corruption as a human rights issue in the following terms:

[38]As above, article 28I (2).
[39]James Gathii, "Defining the relationship between human rights and corruption" (2009) 31 *University of Pennsylvania Journal of International Law* 125, 127.
[40]As above, 132.
[41]As above, 143.
[42]As above, 127.
[43]World Bank, *World Development Report* (1997) 1.
[44]International Monetary Fund, "Interim Committee Declaration on Partnership for Sustainable Global Growth" (1996) <www.imf.org/external/np/exr/dec.pdf> (accessed 22 December 2017).

> … the link between corruption and human rights, especially economic, social and cultural rights, is direct and strong and can hardly be contested. While human rights law grants to individuals basic rights to live with dignity, and freedom to explore ways towards development and prosperity, corruption, especially large-scale corruption, impedes the full realisation of these fundamental objectives. Corruption systematically drains the state's 'maximum available resources', precipitating poverty, unnecessary debt burden, and economic crisis which inevitably magnify dispossession, hunger, disease, illiteracy, and insecurity.[45]

From the foregoing, it is evident that corruption has negative consequences on the enjoyment of human rights. It leads to massive human rights violations and loss of confidence in government when the livelihoods of people are imperilled to the extent of even loss of life. In this respect, the UN High Commissioner for Human Rights has acknowledged corruption as a human rights concern by saying:

> Let us be clear. Corruption kills. The money stolen through corruption every year is enough to feed the world's hungry 80 times over. Nearly 870 million people go to bed hungry every night, many of them children; corruption denies them their right to food, and, in some cases, their right to life. A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promises of "freedom from fear and want".[46]

The concerns of the UN High Commissioner for Human Rights about corruption are indicative of the direct impact that corruption has on development. Corruption, as she suggests, depletes the resources necessary for States to fulfil their human rights obligations.[47] Corruption disrupts the provision of public goods and services to the people who need them. It inhibits public access to wealth, income and opportunity thereby undermining the principles of equal treatment, equality before the law and non-discrimination.[48] These principles are essential to the realisation of the RTD. It is also significant that while corruption violates the rights of all of those affected by it, it has a disproportionate effect on people who belong to groups that are exposed to particular risks such as minorities, PWDs, women, children and the poor.[49]

[45]Kolawole Olaniyan, "The African Union Convention on Preventing and Combating Corruption: A critical appraisal" (2004) 4 *African Human Rights Law Journal* 74, 76.
[46]Navi Pillay, quoted in United Nations, *The human rights case against corruption* (2013) 3 (italics omitted).
[47]Christof Heyns & Magnus Killander, "The African regional human rights system" in Gomez Isa & Koen de Feyter (eds), *International protection of human rights: Achievements and challenges* (2006) 521.
[48]Lyal Sunga, *In-depth study on the linkages between anti-corruption and human rights* (2007) 8.
[49]International Council on Human Rights Policy, *Corruption and human rights: Making the* connection (2009) 7.

Babu notes the effect of corruption on development and the impact that corruption has on poverty in the following words:

> Corruption is a global problem which poses a serious threat to the development of a country and its people. States, developed or developing, are equal victims of this problem. Corruption, apart from affecting the public at large, also causes reduced investment, lack of respect for rule of law and human rights, undemocratic practices and diversion of funds intended for development and essential services, affects government's ability to provide basic services to its citizens. Most importantly, corruption has the greatest impact on the most vulnerable part of a country's population, the poor.[50]

The relationship between corruption and poverty is also aptly captured by Mullei as follows:

> Corruption and corrupt leaders deepen poverty and make it difficult for ordinary people to get ahead as a result of their own efforts. There is increasing evidence that costs of corruption disproportionately affect the poor, who not only suffer from lack of services and efficient government, but who are also powerless to resist the demands of corrupt officials.[51]

Corruption, therefore, is primarily a human rights-based governance issue. It is symptomatic of failure of institutions and the larger framework of social, judicial, political and economic checks and balances needed to govern effectively.[52] When formal institutions are weakened by corrupt practices, it becomes difficult to enforce policies and laws that aim at ensuring accountability and transparency. Combating corruption is a fundamental requirement for achieving development goals in poor and developing countries. Anti-corruption initiatives are therefore critical in improving governance and the lives of people and in particular those of poor people.[53] The threats and risks of corruption must increasingly be considered when designing national development programmes. This is because corruption causes distortion of government expenditure by diverting public resources away from pro-poor expenditure such as health and education, towards large capital projects where bribes are higher and rampant.[54]

[50]Rajesh Babu, "The United Nations Convention against Corruption: A critical review" (2006) 1.
[51]Andrew Mullei, *The link between corruption and poverty: Lessons from Kenya* (2000) 29.
[52]United Nations Development Programme, *Corruption and development* (2008) 5.
[53]As above, 6.
[54]As above.

UN and regional bodies have thus recognised the harmful effects of corruption on the enjoyment of human rights. In addition to the view of the UN High Commissioner for Human Rights stated above, the UN Human Rights Council (HRC) recognised in resolution 7/11 that:

> …transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, including women and members of vulnerable and marginalized groups, is the foundation on which good government rests and that such a foundation is an indispensable condition for the full realization of human rights, including the right to development.[55]

> ...the fight against corruption at all levels plays an important role in the promotion and protection of human rights and in the process of creating an environment conducive to their full enjoyment.[56]

> …effective anti-corruption measures and the protection of human rights are mutually reinforcing and that the promotion and protection of human rights is essential to the fulfilment of all aspects of an anti-corruption strategy.[57]

The HRC also recognised in resolution 23/9 that corruption hinders the effective promotion and protection of human rights as well as the achievement of "internationally agreed development goals".[58] It thus emphasised the need for international cooperation in the fight against corruption at all levels because it "contributes positively to the promotion and protection of human rights".[59] In the context of pervasive corruption, the duty of States to deploy the maximum available resources for the progressive realisation of socio-economic rights is affected.[60] This is further explained by Jayawickrama as follows:

> …where corruption is pervasive, all human rights suffer: the prevalence of corruption requires that civil and political rights be restricted, and when national resources are diverted from public use, Governments become unable to fulfil their social, economic and cultural rights obligations.[61]

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[55] United Nations, Human Rights Council resolution 7/11 "The role of good governance in the promotion and protection of human rights" UN Doc. A/HRC/RES/7/11 (2008), preamble para 4.
[56] As above, preamble para 10.
[57] As above, preamble para 12.
[58] United Nations, Human Rights Council resolution 23/9 "The negative impact of corruption on the enjoyment of human rights" UN Doc. A/HRC/23/L.19 (2013), preamble para 5.
[59] As above, preamble para 7.
[60] Article 2(1) of the ICESCR places an obligation on every State Party to take steps "to the maximum of it's of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly, the adoption of legislative measures".
[61] Nihal Jayawickrama quoted in United Nations, "Report on the United Nations Conference on anti-corruption, good governance and human rights" UN Doc. A/HRC/4/71 (2007) para 15.

Since human rights are indivisible and interdependent, corruption impacts on all human rights including the RTD. The DRD notes the concern of the UN General Assembly of "the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights".[62] In that respect, the DRD requires States to "take steps to eliminate obstacles to development resulting from the failure to observe civil and political rights, as well as economic, social and cultural rights".[63] The implication here, is that the failure of a State to facilitate enjoyment of the whole corpus of human rights through the elimination of obstacles to development, is a violation of the RTD

The embezzlement and misappropriation of public funds hampers the ability of the State to provide essential services and public good which are essential to the enjoyment of human rights.[64] This particularly affects the RTD because States are supposed to "undertake, at the national level, all necessary measures for the realization of the right to development and … ensure … equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income".[65]

Corruption further results in discriminatory access to essential public services for the economic and political disadvantage persons and groups. Usually, disadvantaged and marginalised groups or people such as the poor are most dependent on public services for their livelihood and survival.[66] Corruption also weakens public institutions and erodes the values of the principle of the rule of law. It negatively affects the making of decisions that are supposed to be made in the public interest thereby damaging governmental legitimacy. Loss of public support and trust for the State and government institutions exposes the State to anarchy. When corrupt practices like electoral fraud and illicit funding of political parties take root, people lose confidence in government, at times with violent and fatal consequences.[67]

Corruption and underdevelopment are linked and tend to reinforce each other. Corruption thrives where there is widespread poverty, gender imbalance, few checks on the exercise of

[62]DRD, preamble para 10.
[63]As above, article 6(3).
[64]United Nations (note 58 above) 4.
[65]DRD, article 8(1).
[66]United Nations (note 58 above) 4.
[67]As above.

public power and a weak civil society.[68] At the same time, efforts to tackle these problems are themselves hindered by corrupt practices. Where corrupt practices such as favouritism, nepotism, embezzlement and pilferage of public funds and property are endemic, corruption becomes a way of life and this creates a vicious cycle that requires systematic and long-term interventions to break.

Anti-corruption efforts are, therefore, more likely to succeed if corruption is dealt with as an institutional problem rather than as a problem of individuals.[69] A systemic approach to the problem of corruption ensures that institutions and appropriate laws crafted with the participation of people affected by corruption are established.[70] It would be expected that in such a set-up, robust anti-corruption agencies backed by an independent judiciary and strong national human rights institutions are facilitated by government to fight corruption. Institutions of the State and appropriate laws may, however, on their own, not be effective in dealing with corruption without strong engagement of the civil society and the culture of integrity in the public service. An engaged civil society ensures accountability in government especially where there is a strong legal framework and an open political system.[71] All these parameters will in turn largely depend on a human rights approach to anti-corruption initiatives. The human rights of people and the duties of the State to protect, respect and fulfil them must be at the centre of those initiatives especially the human rights principles of non-discrimination and equality, participation and inclusion, accountability, transparency and the rule of law.[72]

Moyo notes that the existence of corruption, impedes a State's ability to fulfil its obligations to protect, respect and fulfil human rights.[73] Because corruption leads to illegal diversion of public resources meant for a country's development in sectors such as education and health, it becomes difficult or impossible for it to realise the RTD.[74] In the African context, a State Party to the ACHPR violates the RTD when it fails "to adopt effective anti-corruption measures".[75] In other words, for a State to protect the RTD it must strengthen its capacity to prevent or punish corruption. When corruption is curbed the State is then in a position to fulfil its

[68]United Nations Development Programme (note 52 above) 14.
[69]United Nations (note 58 above) 5.
[70]As above.
[71]As above.
[72]As above.
[73]Khulekani Moyo, "An analysis of the impact of corruption on the realisation of the right to development" (2017) 33 *South African Journal on Human Rights* 193, 210.
[74]As above.
[75]As above.

obligation to avail the maximum available resources for realisation of socio-economic rights and by extension, the RTD.[76]

Corruption as a human rights issue is also evident in the UNCAC and the AUCPCC. Although the UNCAC does not explicitly address corruption as a human rights issue, most of its principles are human rights principles. These principles include integrity, transparency and accountability;[77] and equality before the law.[78] These human rights principles are valuable when applying the UNCAC within the domestic context of States Parties. On the other hand, the AUCPCC explicitly recognises that corruption is a human rights issue. The main objectives of AUCPCC break new ground in international law by directly linking corruption with violation of human rights in the context of development. These objectives are to:

1. Promote and strengthen the development in Africa by each State party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors.[79]

2. Promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption and related offences in Africa.[80]

3. Coordinate and harmonize the policies and legislation between State Parties for the purposes of prevention, detection, punishment and eradication of corruption on the continent.[81]

4. *Promote socio-economic development by removing obstacles to enjoyment of economic, social and cultural rights as well as civil and political rights.*[82]

5. Establish the necessary conditions to foster transparency and accountability in the management of public affairs.[83]

With its potential to reduce or even eliminate opportunities for corruption, the AUCPCC is an ideal guide on how States Parties can comprehensively reform their national laws for the benefit of their subjects' development. States Parties, and thus Kenya, must establish and

[76]As above, 212.
[77]UNCAC, articles 7 and 10.
[78]As above, article 11.
[79]AUCPCC, article 2(1).
[80]As above, article 2(2).
[81]As above, article 2(3).
[82]As above, article 2(4). Emphasis added.
[83]As above, article 2(5).

strengthen relevant institutional and legal mechanisms locally if the fight against corruption is to be won and their human rights obligations under the AUCPCC discharged.[84]

5.4 Corruption and the RTD in Kenya

5.4.1 The pre-2010 experience

Anti-corruption initiatives in Kenya have had little success since independence. Many interventions have been recommended, there have been public campaigns to raise awareness about corruption and its consequences, there have been anti-corruption institutions and legal reforms to improve controls in public administration, the government has signed and ratified regional and international anti-corruption treaties, but empirical studies show that the intended changes have not happened.[85]

The reality that corruption is systemic in Kenya is documented in a survey on national ethics and corruption carried out by the EACC in 2015. In that survey, the EACC set out to document and measure the nature and extent of corrupt practices and unethical conduct that the Kenyan public encounters on a daily basis.[86] The findings were based on information on the levels of corruption and unethical behaviour, services in the public sector most prone to corruption, the effectiveness of existing anti-corruption initiatives, access to anti-corruption services and sources of information on corrupt practices and ethics.[87] The survey found that 74% of the respondents perceived that there were high levels of corruption in the country with 94 per cent of them being of the view that that the giving and receiving of bribes was the leading form of corruption followed by embezzlement of public funds at 59.1% and misappropriation of public funds at 54.8%.[88] The survey also established that 62% of the respondents held the view that greed was the leading cause of corruption and unethical behaviour in the public service and

[84]Olaniyan (note 45 above) 85.
[85]International Council on Human Rights Policy, *Corruption and human rights: Challenges and opportunities* (2009) 8.
[86]Ethics and Anti-Corruption Commission, "National Ethics and Corruption Survey, 2015 Report" (2016) <www.eacc.go.ke/National-Ethics-and-Corruption-Survey-2015-Report-4March2016.pdf> (accessed 9 March 2018) xii.
[87]As above.
[88]As above, executive summary para (a). Embezzlement refers to the dishonest acquisition and transfer of public funds or resources by a public officer for personal use and misappropriation to the misallocation or wrongful use by a public officer of public funds placed under his care. As above, para 3.1.2.

appreciated that corruption caused poverty (34.8%) and underdevelopment (26.3%).[89] As has been established earlier in this work poverty and underdevelopment are phenomena that violate human rights.

The problems related with corruption in present day Kenya began with colonialism.[90] Under colonial rule, natives were illegally, and through the use of force, deprived of their land and what they witnessed consequently was the extreme prosperity of the European settlers who acquired that land.[91] This was coupled with the shock of an alien economic system from Europe that was already operating with some degree of corruption.[92] The highly centralised form of government inherited from the colonial State, its economic policies and socio-cultural set up accelerated the rise of corruption as a way of life in the independent State especially within the governmental bureaucracy.[93]

Corruption generally thrives where there is a highly centralised government and power is concentrated in the hands of a few people. This allows the wielders of political power, their associates, their relatives, their cronies and those who are wealthy enough to bribe them, shape national policy to further their own interests. Policy makers may therefore set policy to favour themselves and their investments, allocate public land or public corporations to themselves and also rig elections to hold the State captive to them. Such a scenario engenders long-term corruption because it becomes very difficult to get genuine regime change through free and fair elections.

The 1964 Republican Constitution of Kenya created a highly centralised government structure that concentrated enormous power in the executive headed by an imperial president. In 1964 and 1965, the civil service changed from its composition of 95% non-Kenyans to consist almost entirely of Kenyans. At that time, a majority of the population had little experience or knowledge of both political and economic affairs. The consequence of this was that a small and well-educated African elite took control of both the political and economic affairs of the nation through a highly centralised system of governance. Effectively, in 1964 and 1965, the

[89]As above, executive summary para (b).
[90]Kivutha Kibwana *et al*, *The anatomy of corruption in Kenya* (2006) 21.
[91]As above.
[92]As above.
[93]As above, 24.

executive by decree created an inexperienced administrative cadre which was unaware of the effect of corrupt practices on themselves and their country.[94]

To address the problem of inexperience in the civil service, the Ndegwa Commission of 1971 was established to "transform the public service from an organisation merely geared towards administering public affairs into an instrument of development management.[95] One of the key recommendations of the Commission was that civil servants be allowed to participate in private enterprise, which later turned out to be a great incentive for corruption in the public service.[96]

This recommendation of the Commission laid the ground for public servants to engage in private business while in active service. The argument was that this was a good strategy in indigenising the private sector which had been dominated by foreigners. The Commission justified this strategy as being an important complement to other efforts to Africanise the Kenyan economy.[97] This was an appealing political position since it was projected as a vehicle for addressing racial disparities and encouraging the development of a more inclusive society. But by the end of the 1970s, it had become evident that this arrangement was not achieving its intended purpose of indigenising business but rather producing and encouraging the abuse of public office.[98] Involvement of public servants in private business while in active service, it emerged, was inherently in conflict with the proper management of public affairs.[99]

The Report of the Ndegwa Commission[100] became the foundation of State capture by an African elite who facilitated the acquisition by government of discretionary powers that were used to influence the formulation and implementation of laws that allowed access to and pilferage of public resources and the capture of private enterprises for individual benefit rather than development of the Kenya economy in the public interest. As the World Bank noted, this State capture by a small African elite manifested itself in "the sale and purchasing of parliamentary votes and presidential decrees to private interests; the sale of civil and criminal court decisions to private interest; corrupt mishandling of Central Bank Funds; illegal

[94]David Himbara, *Kenyan capitalists, the state and development* (1994) 115.
[95]As above, 117.
[96]As above, 122.
[97]As above.
[98]As above.
[99]As above.
[100]Republic of Kenya, *Report of the Commission of Inquiry (Public Service Structure and Remuneration Commission) 1970-1971*(1971).

contributions by private actors to political parties and the channelling of state funds for personal use".[101]

The political environment in newly independent Kenya was conducive for the growth of corruption and the years after the Ndegwa Commission Report, beginning from 1972, marked the commencement of grand corruption and economic crime in Kenya.[102] During that period, a new neo-colonialist bourgeoisie formed and aggressively pursued capitalistic goals that they had been unable to pursue during the colonial era. With enormous political and economic power in their hands, they interacted with international elites who were anxious to invest and do business in Kenya and therefore created policies that best suited their interests.[103]

The State capture that provided an environment for corruption to thrive, took place within a neo-patrimonial system of governance which is characterised by the centralisation of power, the exercise of patron-client politics and personalised rule.[104] Neo-patrimonialism is the modern-day variant of patrimonial rule in which the whims of the ruler always supersede formal laws.[105] Patrimonial rule is distinguished from rational legal authority in which exercise of power is based on respect for institutions and the law.[106] Bratton and van de Walle describe neo-patrimonialism as a system of governance where some individual rules by personal prestige and power and ordinary people are treated as extensions of the 'big man's' household, with no rights or privileges other than those bestowed by the ruler. Authority in patrimonial systems of governance is entirely personalised, shaped by the ruler's preferences rather than any codified system of laws.[107]

The neo-patrimonial system of governance is about personalised rule and is therefore susceptible to manipulation and abuse. The political leader in a neo-patrimonial system exercises wide discretion in decision making and applies illegitimate means to get quicker results and higher benefits.[108] Formal institutions of the State are hardly respected, and they

[101]World Bank, *Anticorruption in transition: A contribution to the policy debate* (2000) 9.
[102]Himbara (note 94 above) 122.
[103]As above.
[104]Morris Odhiambo, "Corruption and regime consolidation in a neo-patrimonial system" in Joseph Kivuva & Morris Odhiambo (eds), *Integrity in Kenya's public service* (2010) 7.
[105]As above.
[106]As above.
[107]Michael Bratton & Nicholas van der Walle, *Democratic experiments in Africa: Regime transitions in comparative perspective* (1997) 61.
[108]Odhiambo, (note 104 above) 7.

usually work for the personal whims of the individual leader. The retention of political power is the main agenda for most neo-patrimonial leaders. Because of disrespect for the formal institutions of governance, corruption becomes a central feature of a neo-patrimonial system and provides an avenue for consolidation of political power. Political power in turn avails public assets necessary for political patronage.[109]

The primary cause of corruption can be attributed to a condition in society where the key institutions of the State that are meant to support the rule of law and good governance are deliberately undermined to the point where they do not uphold the rule of law or act in the best interests of a country.[110] In Kenya, the undermining of key State institutions was undertaken during the one-party State to the extent that they were weakened by centralised and personalised presidential power leading to poor institutional governance.[111] Poor institutional governance in turn largely contributed to the creation of an environment within which corruption thrived and reached devastating levels.[112]

The exercise of centralised and personalised presidential power led to the ascendancy of predatory forms of neopatrimonialism with a stranglehold on economic and political power through which corruption thrived and influenced decision-making in government.[113] Corruption became so pervasive and entrenched that Kenyan society adapted to it. According to Hope:

> Individuals, as well as those in authority and/or influence, tended to shift their loyalties and allegiances to the ruling regime for reasons of both personal survival and economic gain. The system of patronage therefore thrived and corrupt behaviour cascaded down to the society at large.[114]

An environment was therefore created for corruption to become rampant. Corruption became a way of life especially where transactions with government or with public officials were concerned. These transactions became more about securing personal and private objectives than about the public interest and thereby corroded the public's confidence in government.[115]

[109]As above, 9.
[110]Hope (note 9 above) 494.
[111]As above.
[112]As above. 495.
[113]As above.
[114]As above.
[115]As above.

For instance, under the Moi regime, a system of looting authorised by the presidency emerged through which it is estimated that the country lost Kshs. 635 billion in the twenty-four years that it was in power.[116] The post-Moi governments found this system of corruption so entrenched and soon got caught up by it despite having been elected on pledges of being committed to good governance and the rule of law.[117] During the Kibaki regime, the National Treasury conceded that that the country was losing approximately Kshs. 270 billion annually to corruption, a sum equal to 25 to 30% of the government's budget for the 2010/2011 Financial Year.[118] In terms of socio-economic cost, this amount would have been sufficient to fund free primary and secondary education for 18 years, purchase anti-retroviral (ARV) and malarial drugs for 10 years and drill 135 million boreholes to provide safe drinking water to hundreds of thousands of Kenyans.[119]

The colonial State had appreciated the dangers of corruption and enacted the Prevention of Corruption Act (PCA)[120] in 1956. The Act did not define corruption and one had to refer to the Penal Code[121] to establish what acts that were punishable as acts of corruption.[122] Sections 99 to 107 of the Penal Code largely dealt with abuse of office thereby leaving out many forms of conduct that would amount to corruption. In 1997, following pressure from development partners notably the BWIs,[123] the Kenya Anti-Corruption Authority (KACA) was established under section 11B of the PCA through the exercise of powers conferred upon the president by that section of the law.[124]

The KACA was short-lived. Three years after its establishment, the High Court declared it unconstitutional. This was in the case of *Gachiengo v Republic*,[125] where the Court narrowly interpreted the constitution and declared the PCA inconsistent with the constitution in as far as the establishment of KACC was concerned. The applicants in the case had been charged by KACA with several counts of abuse of office. KACA had obtained the relevant consent from

[116]Michaela Wrong, *It's our turn to eat: The story of a Kenyan whistle-blower* (2009) 184-185.
[117]Hope (note 9 above) 496.
[118]As above, 501.
[119]As above, 502.
[120]Chapter 65, Laws of Kenya (now repealed).
[121]Chapter 63, Laws of Kenya.
[122]As above, sections 99-107 (now repealed).
[123]Republic of Kenya, *Report of the Task Force on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya* (2015) xxxi.
[124]See, Legal Notice 10 of 1997.
[125](2000) eKLR.

the Attorney General to prosecute them as required by the PCA. The applicants challenged the legality of their prosecution on the ground that the law creating the KACA was unconstitutional because it created a body that purported to prosecute offences under the PCA. Their argument was that prosecutorial powers were exclusively vested in the Attorney General by section 26 of the then constitution. They asked the Court to determine two issues namely, if the Attorney General's consent to their prosecution was valid under the constitution and whether the provisions of the PCA establishing the KACA were constitutional.[126] In finding that section 11B of the PCA was unconstitutional, the Court held that:

> When [section] 11B was inserted into [the Prevention of Corruption Act], the provisions of [section] 26 of the Constitution remained unamended. Under [section] 26 of the Constitution the Attorney General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings and to take over or discontinue criminal proceedings instituted or undertaken by any person or authority… From the foregoing; it is crystal clear that … [section] 11B of [the Prevention of Corruption Act is] in direct conflict with [section] 26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under [section] 11B of [the Prevention of Corruption Act] offends the Constitution ... That is unconstitutional.[127]

The *Gachiengo* decision set a bad precedent where suspects in corruption cases could hide behind narrow interpretations of the constitution to evade prosecution. The decision of the Court effectively declared that KACA, its activities and programmes were unconstitutional. The decision failed to apply the "intention of the legislature" principle of interpretation of statutes.[128] The Court failed to contextualise the mischief that the PCA sought to cure by establishing the KACA and donating to it prosecutorial powers. The Court ought to have purposively interpreted section 26 of the Constitution with regard to prosecution of acts of corruption and considered the interest of the people of Kenya in eradication of corruption, which was the intention of parliament when establishing the KACA.[129] This intention is evident in the preamble of the PCA where it is stated that the PCA was enacted for the purposes of preventing corruption in Kenya.

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[126]As above, 1-2.
[127]As above, 4.
[128]For detailed discussion on the "intention of the legislature" principle of interpretation of statutes, see Stephen Gageler, Legislative Intention" (2015) *Monash University Law Review* 1.
[129]John Tuta, "Evolution of Anti-corruption policy and institutional framework" in Ludeki Chweya (*et al*) (eds), *Control of corruption in Kenya* (2005) 72.

Subsequent to the *Gachiengo* decision, the government established the Anti-Corruption Police Unit (ACPU) to take the anti-corruption agenda forward.[130] The ACPU did not only lack sufficient resources to operate or an institutional structure within which to work effectively but also lacked legal backing which answered the question of legality raised in the *Gachiengo* case, although it had inherited all the cases that the defunct KACA had been investigating.[131] An advisory board was set up to advice the ACPU on how to carry out its investigative function. This board remained largely inactive because of the lack of a legislative framework on which its existence was based.[132] Another problem with the ACPU as an investigative body on corruption matters was its lack of independence from other government offices. The ACPU was headed by the Commissioner of Police who was an appointee of the President and who in the conduct of corruption-related offences was answerable to the Director of Criminal Investigations.[133]

Despite these hiccups, the ACPU received more complaints than its predecessor, KACA, had received in its life-time and produced more follow-up reports on the complaints that it received than KACA had. However, none of these cases ever resulted in a conviction and many others were never prosecuted.[134] For instance, in *Republic v Attorney General ex parte Kipngeno arap Ngeny*,[135] the applicant was a powerful minister in the Moi government who was charged with high level corruption under the PCA after being investigated by the ACPU. The Attorney General initiated prosecution of the minister in 2001, nine years after the alleged corrupt acts had taken place. The High Court stopped the intended prosecution on the ground that the long unexplained delay in prosecuting the minister was oppressive and vexatious.[136]

The difficulties created by the *Gachiengo* decision for the anti-corruption agenda in Kenya, were somewhat cured when the Anti-Corruption and Economic Crimes Act (ACECA)[137]

[130]As above, 77.
[131]As above.
[132]As above.
[133]As above.
[134]As above, 78-79.
[135]High Court Civil Application No. 406 of 2001 (unreported).
[136]Gathii (note 39 above) 161.
[137]Act 3 of 2003. In its preamble the ACECA is introduced as legislation that provides for the prevention, investigation and punishment for corruption, economic crime and related offences. It established the Kenya Anti-Corruption Commission (KACC) as the body mandated to implement the law through investigation of corruption and economic crime, assisting law enforcement agencies in related investigations and educating the public on the dangers of corruption and economic crime with a view to enlisting public support in combating the vices. The Act broadly defines corruption to include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust and dishonesty in tax and public office election matters. It defines economic crime on the

repealed and replaced the PCA. In its anti-corruption agenda, the ACECA was to be supported by the Public Officer Ethics Act (POEA).[138] The ACECA and the POEA came into operation on 2 May 2003. The other critical legislation in the fight against corruption was the Witness Protection Act (WPA)[139] which became operational on 1 September 2008.

In addition to these developments, Kenya signed and ratified the UNCAC contemporaneously on 9 December 2003, becoming the first State Party to it. The stated intention of doing so was to undertake several anti-corruption initiatives aimed at ensuring total compliance with the UNCAC and to ensure implementation of the government's policy of zero-tolerance to corruption.[140] The NARC government had largely been elected in 2002 on an anti-corruption platform. Before the 2002 elections, rampant corruption had led to high costs of doing business for local and foreign investors, poor returns on investments, breach of the rule of law, poor tax revenues, market distortions, widened fiscal deficits that resulted in macroeconomic instability and a rise in poverty levels with persons living below the poverty line rising from 46% of the population in 1990 to 56% in 2002.[141]

To give effect to the UNCAC and also pursuant to its electoral pledges on corruption, the NARC government launched its Comprehensive Anti-Corruption Strategy (CACS) in 2005.[142] An action plan was circulated with it as a show of commitment to fighting graft and improving on fiscal transparency. The strategy identified five areas of action that constituted its pillars. These areas were:[143]

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other hand as being fraudulent acquisition and disposal of public property, tax evasion and dishonesty relating to the maintenance or protection of public revenue.

[138]Act 4 of 2003. The POEA was enacted to advance the ethics of public officers. It provides a code of conduct for them and requires financial declarations from certain categories of public officers. These are those public officers who work for government departments, the parliamentary service, local authorities, state corporations and public universities. The code of conduct established by the POEA demands efficiency, honesty and professionalism in the public service. Public officers are required by the code to uphold the rule of law in the course of their work, not to improperly enrich themselves by virtue of their positions, to disclose any conflicts of interest that arise in the course of duty and to be politically neutral.

[139]Chapter 79 Laws of Kenya. The WPA seeks to provide for the special protection of witnesses especially in criminal cases where such witnesses have important information and face the potential risk or intimidation due to their cooperation with the prosecution and law enforcement agencies. Protection is also extended to relatives of such a witness where they are at risk. It establishes the Witness Protection Agency which is charged with establishing and maintaining a witness protection programme.

[140]Republic of Kenya, "Country statement at the 3rd session of the Conference of States Parties to the United Nations Convention against Corruption" (2009), para 2.

[141]Republic of Kenya, "Country statement at the 1st session of the Conference of States Parties to the United Nations Convention against Corruption" (2006) para 5; Jessica Schultz, *The UNCAC compliance review process in Kenya* (2010) 1.

[142]Republic of Kenya, *Government of Kenya comprehensive anti-corruption strategy* (2005).

[143]As above, annex 1.

1. Enactment of necessary legislation to establish a legislative platform on which to anchor the war on corruption.

2. Vigorous enforcement of anti-corruption laws through investigation of offences of corruption and economic crimes as well as recovery of corruptly acquired property.

3. Identification and sealing of corruption loopholes through institution of effective public-sector management controls.

4. National public education aimed at stigmatizing corruption and inducing behavioral change.

5. Implementing macroeconomic and structural reforms to reduce the incidence and demand for corruption by scaling down the role of the public sector and bureaucracy.

In 2005, the Kenya National Commission on Human Rights (KNCHR) began questioning extravagance in government and how it affected the well-being of Kenyans. The KNCHR came into operation in 2003 having been established under the KNCHR Act, 2002.[144] The KNCHR was established for the purposes of the better promotion and protection of human rights.[145] It was charged with, among other things, informing and educating the public on human rights so as to enhance respect for human rights by means of continuous programmes of research, publication and symposia.[146] In carrying out its mandate, the KNCHR was to have regard to all applicable international human rights standards and particularly the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of everyone.[147]

In a 2005 publication, the KNCHR detailed how the new NARC government which had been elected on a campaign pledge of zero tolerance of corruption spent approximately Kshs. 878 million on the purchase of luxury cars mainly for the personal use of cabinet ministers and their assistants.[148] The study found that in the 2004/2005 Financial Year, Kshs. 870 million had been allocated for various social projects to the poorest 31 constituencies in Kenya under the

[144]Act 9 of 2002. This legislation was repealed by the Kenya National Commission on Human Rights Act, 2011(Act 14 of 2011) which was enacted to give effect to article 59(4) of the Constitution of Kenya, 2010. The major change in the law is that the Kenya National Commission on Human Rights established by the 2011 legislation is an independent constitutional commission under article 59(1) of the Constitution, unlike its predecessor which was a statutory commission.
[145]As above, preamble.
[146]As above, section 16(c).
[147]As above, section 17(c).
[148]Kenya National Commission on Human Rights, "Living large: Counting the cost of official extravagance in Kenya" (2005) <www.knchr.org/Portals/0/EcosocReports/Living_Large.pdf> (accessed 10 March 2018).

Constituency Development Fund (CDF).[149] If the CDF Committees in these 31 counties had opted to buy the same set of luxury vehicles, they would have to forgo all the projects they were funding for that year. This amount of money would have been sufficient to see 25,000 children through the entire eight years of primary school education[150] and provide ARV treatment for 147,000 human immunodeficiency virus (HIV) positive people for one year.[151]

This extravagance in the use of public funds amounts to misappropriation of public funds especially in a country where poverty is rampant. It results in resentment of government institutions by the public and erodes the confidence of external financiers such as the BWIs who provide external support to development initiatives.[152] Ironically, two years earlier in the 2003 ERS, the Minister for Planning and National Development had reminded Kenyans that as they moved from a State controlled economy to a market-oriented one in the 1990s, corruption and wastefulness in the public sector had undermined and slowed down the macro-economic reforms undertaken to facilitate that shift for the benefit of the people.[153]

The conversation that the KNCHR had started within its mandate in this report was about government expenditure as a human rights concern.[154] The ICESCR sets out the human rights ideal of human beings living a life free from fear and want.[155] This freedom can only be found where everyone enjoys not only civil and political rights buts also economic, social and cultural rights.[156] It is for this reason that the ICESCR places an obligation on States Parties to fulfil the range of economic, social and cultural rights that it proclaims through appropriate legislative, administrative, budgetary and other measures so as to fully realise those rights to the maximum of their available resources.[157] Where a sizeable proportion of State resources is diverted to the unnecessary luxurious comfort of a few individuals at the expense and serious deprivation of poor and other vulnerable people, as happened in this case, grave human rights concerns emerge.[158] The use of State resources in this manner fails the test of State obligations to fulfil human rights and is therefore a violation of those rights, particularly the RTD. Following its

[149]As above, 5.
[150]As above, 9.
[151]As above, 10.
[152]As above, 6.
[153]Republic of Kenya, *Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007* (2003) v.
[154]As above, 8.
[155]ICESCR, preamble para 3.
[156]As above.
[157]As above, article 2(1).
[158]Kenya National Commission on Human Rights (note 148 above) 8.

consideration of Kenya's initial report on implementation of the ICESCR, the CESCR raised concerns about corruption, which in its view had adverse effects on the realisation of human rights. In recommending that Kenya intensifies efforts to prosecute corruption cases, the CESCR regretted that:

> … despite the State party's "zero tolerance" policy, corruption and patronage still adversely affect the realization of economic, social and cultural rights and there have been few prosecutions for corruption in the State party.[159]

National efforts prior to the CESCR's observation included a conference on the human rights dimensions of corruption organised by the KNCHR in March 2006. The conference brought together African CSOs and national human rights institutions to explore the human rights aspects of corruption.[160] The conference was part of a broad strategy of the KNCHR to demonstrate the links between corruption, human rights and poverty. The KNCHR observed that the theme of the conference was important because corruption seriously undermines the protection and enjoyment of human rights in that:

> … it seriously inhibits the full realisation of economic, social and cultural rights. Grand corruption in particular diverts resources from the intended public use in realisation of rights to decent livelihoods into private bank accounts. Besides creating sudden and extreme income inequalities, the diversion of these kinds of resources causes massive human deprivations. It also causes distortion of government expenditure by diverting public resources from pro-poor expenditure, such as health and education, towards large capital projects where bribes are higher.[161]

The Nairobi Declaration and Plan of Action adopted at the end of the conference recognised that corruption undermined the protection and promotion of human rights by causing massive human deprivation especially affecting the poor and vulnerable members of society.[162] The participants of the conference therefore reaffirmed their peoples' right to a corruption-free

[159]United Nations, "Consideration of reports submitted by States parties under articles 16 and 17: Kenya, concluding observations of the Committee on Economic, Social and Cultural Rights", UN Doc. E/C.12/KEN/CO/1 (2008) para 10.
[160]Kenya National Commission on Human Rights, "The human rights dimensions of corruption" (2006) <www.knchr.org/Portals/0/EcosocReports/Human%20Rights%20Dimensions%20of%20Corruption.pdf> (accessed 10 March 2018) 1.
[161]As above.
[162]As above, appendix 1 para 4.

society and agreed to work progressively towards the recognition of corruption and economic crimes as crimes against humanity.[163]

The KNCHR anti-corruption campaign was aimed at getting Kenyans to see that their inability to achieve meaningful development was closely linked to the inability of government to prudently use public resources to realise the most basic needs of a majority of Kenyans.[164] Kiai observes that corruption constitutes a shocking violation of human rights which sucks public funds into private hands and perpetuates discrimination against the poorest in society.[165] He concludes that this situation can be arrested through the recovery of looted funds, access to information held by government especially information on government finance, procurement and contracting and a vigilant citizenry that is informed and ready to challenge abuse of power.[166]

In furtherance of the CACS, Kenya became a State party to the AUCPCC on 2 March 2007. The country's commitment to combating corruption through the AUCPCC and the UNCAC was stated at the 2009 Doha Conference of States Parties to the UNCAC by the head of the Kenyan delegation in the following words:

> At the regional level, I am glad to report that Kenya ratified the African Union Convention on Preventing and Combating Corruption on 2 March 2007. In this regard, Kenya is working closely with other AU members in combating corruption. However, as States Parties to the AU Convention we must courageously move forward to operationalize it alongside the UNCAC.[167]

With the abovementioned legislative, policy and international human rights law interventions, it is ironical that Kenya prior to the 2010 constitutional order still struggled with corruption as an obstacle to development especially after the election of the NARC government. During the NARC government's term, corruption soared to the extent that governance became severely undermined leading to conflict in the 2007 elections, poverty increased due to pilferage of

[163]As above, para 13(2).
[164]Maina Kiai, "Entrenching accountability" in Kenya National Commission on Human Rights (note 140 above) 10.
[165]As above.
[166]As above, 11-12.
[167] Republic of Kenya (note 140 above) para 7.

public funds, investor confidence was destroyed reducing economic growth, and crime increased in the form of terrorism, drug trafficking and money laundering.[168]

In 2009, the British government while acknowledging that it was Kenya's second largest bilateral donor at that time, disclosed that only 30% of its aid was channelled through the Kenyan government due to concerns about corruption and conceded that if corruption and governance issues were adequately addressed, British aid to Kenya would be much higher.[169] In its pledged support to help combat corruption, the British government took the approach of helping to improve accountability and transparency in government, funding civil society efforts to create awareness and increase demands for accountability and ensuring that British aid was only used for its intended purpose which it identified as being poverty reduction.[170]

One of the reasons that may be attributed to this state of affairs is the failure to elevate the fight against corruption in Kenya to the level of a human rights issue especially as a violation of the RTD. Corruption should be elevated to a human rights issue because it depletes resources that would otherwise go to improving the lives of everybody and particularly the most vulnerable in society. Corruption in this sense affects the ability of the State to meet the basic needs of its citizens.[171] On making combating corruption a human rights concern, Gathii observes that:

> …if we understand corruption as a nationwide problem, disabling the government from meeting the millions of Kenyans' rights to health, education and housing, we can start to address injustices at a much broader and generalized level. The category of human rights violations should be expanded to cover women, children, minorities and the disabled.[172]

It is worth noting that prior to the promulgation of the 2010 Constitution, the High Court was alive to the fact that corruption had a negative impact on the lives of Kenyans. This was at a time that persons suspected of high-level corruption sought to use the court process to bar their prosecution for technical reasons or under the guise that such prosecution would violate their rights to a fair trial. In the case of *Christopher Murungaru v Kenya Anti-Corruption*

[168]British High Commission Nairobi, *Towards a better future: Working with Kenya against corruption* (2009) 2.
[169]As above. The study by the British High Commission in Nairobi revealed that about 34,000 Kenyans die from malaria annually yet the Kshs. 40 billion lost in Kenya's biggest grand corruption scandal, the Goldenberg scandal, would have been sufficient to provide the entire population with anti-malarial nets and make Kenya almost malaria free.
[170]As above, 6-7.
[171]Gathii (note 39 above) 174.
[172]As above, 178.

Commission (No. 2),[173] for example, the plaintiff, a former powerful minister in the NARC government was served with a notice under section 26 of the ACECA by the KACC requiring him to furnish it with a statement detailing his properties and dates of their acquisition and of his bank accounts. Section 26 of the ACECA requires the government to serve such a notice on anyone it reasonably suspects of corruption or economic crime. The plaintiff sought to have section 26 declared unconstitutional on the ground that it violated his right to a fair trial. In finding section 26 of the ACECA constitutional and not in violation of the plaintiff's right to a fair trial, the Court stated:

> …the massive and debilitating cancerous nature of corruption in Kenya has impoverished and continues to impoverish the great majority of the Kenyan masses and leads to…a run-down infrastructure, inadequate health services and mediocre and inadequate educational facilities. It has led to spiral inflation and unemployment.[174]

However, this holding of the Court was made *obiter dictum* and therefore the human rights approach to combating corruption was not effectively developed. It is hoped that in the post-2010 dispensation, the human rights approach will find judicial implementation when dealing with corruption cases.

5.4.2 The post-2010 experience

Article 10(2)(c) of the Constitution declares that "good governance, integrity, transparency and accountability" are some of the national values and principles of governance. The drafters of the Constitution were informed by endemic corruption in the management of public affairs that had for many years brought governance into disrepute and hindered development since independence.[175] As Lumumba and Franceschi observe:

> These principles and values, it is hoped, will go a long way in curbing vices such as corruption, tribalism, nepotism, oppression, impunity, and lack of integrity, hatred, greed and violations of human rights, political and economic injustices and division. The desired end result is better service delivery to the people which in turn should lead to marked developments in all sectors of the economy.[176]

[173](2006) eKLR.
[174]As above, 82.
[175]PLO Lumumba & Luis Franceschi, *The Constitution of Kenya, 2010: An introductory commentary* (2014) 106.
[176]As above.

This constitutional promise of good governance, integrity, transparency and accountability in governance is given further backing from a human rights perspective by a raft of provisions in the BoR. The BoR is proclaimed as "an integral part of Kenya's democratic state" and as "the framework for social, economic and cultural policies".[177] The importance of the BoR in the architecture of the Constitution is then set out as being to recognise and protect human rights and fundamental freedoms so as "to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings."[178]

Article 21(1) of the Constitution places a "fundamental duty" on the State and its organs to "observe, respect, protect, promote and fulfil the rights and fundamental freedoms" in the BoR. The State must also take measures whether legislative, policy or otherwise to ensure the progressive realisation of socio-economic rights.[179] In performance of these duties, the State is expected to take into account the needs of vulnerable groups especially "women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities".[180] These duties implicitly call upon the State to ensure that public resources meant to ensure that these duties are achieved, are not diverted to private hands.

To realise the RTD in Kenya, the substantive rights to human dignity,[181] access to information[182] and socio-economic rights[183] must be brought to bear and play a central role in the anti-corruption agenda. Human dignity lies at the centre of the full realisation of all human rights and the achievement of the full potential of the human person, a critical component of the RTD. Access to information held by the State is important for the enforcement of human rights and it is therefore imperative that the State makes public any important information affecting the nation. Access to information is important for development discourse in any society.[184] Availability of information contributes to growth and development, and the safeguarding of the well-being of society. Socio-economic rights are by their nature heavily

[177]Constitution of Kenya 2010, article 19(1).
[178]As above, article 19 (2).
[179]As above, article 21(1).
[180]As above, article 21(3).
[181]As above, article 28.
[182]As above, article 35.
[183]As above, article 43.
[184]Lumumba & Franceschi (note 175 above) 174.

affected by corruption since they are heavily dependent on the availability of public resources.[185]

Beyond the BoR, the provisions of chapter six of the Constitution on leadership and integrity are critical for combating corruption. The Constitution decrees that the authority of a State office is a public trust which must be exercised in a manner that respects people and brings about public confidence in the integrity of the office.[186] As a guiding principle of leadership and integrity, public service must be selfless and solely based on the public interest and accountability to the public for one's decisions and actions.[187] For this purpose, the Constitution demanded that parliament enacts law to establish an ethics and anti-corruption commission to ensure compliance with and enforcement of the constitutional provisions on leadership and integrity.[188] The Constitution also required parliament to enact legislation that would establish mechanisms for the effective administration of its provisions on leadership and integrity especially with respect to public officers.[189]

To fulfil these constitutional demands, parliament enacted the Ethics and Anti-Corruption Commission Act (EACC Act)[190] and the Leadership and Integrity Act (LIA).[191] The EACC Act was enacted to establish the EACC pursuant to the requirements of article 79 of the Constitution of Kenya 2010. The EACC replaced the KACC established under the ACECA and was conferred with powers to educate the public and create awareness on its mandate, undertake preventive measures against unethical and corrupt practices and conduct investigations either on its own initiative or upon a complaint being made about unethical or corrupt practices.[192] The EACC was also vested with powers to fight corruption under the ACECA[193] and the LIA. The LIA on the other hand, was enacted by parliament to give effect to the provisions of chapter six of the Constitution on leadership and integrity as demanded by

[185]Gathii (note 39 above) 174. See also, Constitution of Kenya 2010, article 20(5).
[186]Constitution of Kenya 2010, article 73(1).
[187]As above, article 73(2).
[188]As above, article 79.
[189]As above, article 80.
[190]Act 22 of 2011.
[191]Act 19 of 2012.
[192]EACC Act, section 13(2). The EACC in elaborating its powers and functions describes its core mandates as being to "combat and prevent corruption and economic crime in Kenya through law enforcement, preventive measures, public education and promotion of standards and practices of integrity, ethics and anti-corruption". See, EACC, "About EACC: Vision and Mission" <www.eacc.go.ke/default.asp?pageid=3> (accessed 9 March 2018).
[193]ACECA, section 33(b). The EACC is under this provision vested with powers to carry out any function, transaction, investigation, prosecution or civil proceedings carried out by or on behalf of the defunct KACC.

article 80 thereof. It establishes mechanisms for the administration of the constitutional guidelines on leadership and integrity in the public service.[194]

Whereas the courts have recognised the statutory mandate of the EACC to combat corruption, as a mandate that flows from an anti-corruption theme in the Constitution, they have failed to enforce that mandate from a human rights perspective. For example, in *Ethics & Anti-Corruption Commission v National Cereals & Produce Board,*[195] the Court of Appeal invoked the "unequivocal and consistent anti-corruption theme that runs in our entire Constitution" in allowing the EACC to participate as an interested party in the appeal.[196] The EACC had sought to be joined as a party in the appeal and adduce further evidence despite the fact that it had not been a party in the proceedings in the High Court that precipitated the appeal.[197] The EACC relied on its statutory mandate to combat corruption under the EACC Act in seeking to be joined as a party so as to adduce evidence that the transactions that were subject matter of the case were forgeries and did not originate from the alleged source.[198] The Court held that the EACC not only had a fundamental statutory mandate to fight and combat corruption, but also a constitutional one.[199] The Court observed that:

> The applicant is established by the ***Ethics & Anti-Corruption Act, No. 22 of 2011***. Act No. 22 of 2011 itself is enacted pursuant to ***Article 79 of the Constitution*** which requires Parliament to enact legislation to establish and independent ethics and anti-corruption commission and with the mandate of ensuring compliance with and enforcement of chapter six of the Constitution on leadership and integrity. By virtue of the provisions of its constituting Act the applicant is empowered among other things to conduct investigations pertaining to alleged corruption on its own initiative or complaint made by any person; to monitor the practices and procedures of public bodies to detect corrupt practices; to institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or proceeds related to corruption; to undertake preventive measures against unethical or corrupt practices; and to request and obtain professional assistance or advice from such persons or organizations as it considers appropriate.[200]

Further, in making its decision, the Court reminded itself of its duty to apply the national values and principles of governance set out in article 10 of the Constitution when applying or

[194]LIA, section 4.
[195](2014) eKLR.
[196]As above, 5.
[197]As above, 2.
[198]As above.
[199]As above, 4.
[200]As above.

interpreting it, "among them good governance, integrity, transparency and accountability".[201] The Court regrettably missed the opportunity to link the fight against corruption to the national values of principles of governance relating to "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised"[202] which are important values and principle for realisation of the RTD.

In the case of *Kamau v Ethics & Anti-Corruption Commission*,[203] the Court of Appeal had another occasion to deal with the issue of corruption in Kenya. In that case, the Court reaffirmed its commitment to upholding the values and principles of good governance, integrity, transparency and accountability when applying and interpreting the Constitution. To its credit, the Court, for the first time, appreciated the values of human rights, equity, equality and social justice as being also important in the war against corruption.[204] The Court stated that:

> At the heart of the last four values [good governance, integrity, transparency and accountability] lies an obligation to undertake a concerted and sustained fight against corruption. Otherwise put, corruption is one of the most pernicious practices that undermine the values of good governance, integrity, transparency and accountability, human dignity, human rights, equity and equality, and social justice.[205]

However, this recognition of corruption as a human rights issue was not developed further and was not considered in the main determination. In this case, the appellant was a former Cabinet Secretary for Transport and Infrastructure. He had been charged with the offence of abuse of office based on recommendations from the EACC to the Director of Public Prosecutions (DPP). The recommendation was made at a time when the EACC had no commissioners in office due to their resignation.[206]The Court found therefore found that the EACC was properly constituted at the time the recommendation to the DPP was made,[207] and therefore prohibited his prosecution on that ground.[208] However, the Court left future prosecution a possibility, "on the basis of a properly constituted EACC and within the dictates of the Constitution and the law".[209]

[201]As above. These four values and principles are set out in article 10(2)(c) of the Constitution.
[202]Constitution of Kenya 2010, article 10(2)(b).
[203](2017) eKLR.
[204]As above, 15.
[205]As above.
[206]As above, 18.
[207]As above, 14.
[208]As above, 19.
[209]As above.

Comparatively, courts in India and South Africa have used the human rights approach in enforcing anti-corruption law. The Supreme Court of India has held that the public interest protected by anti-corruption law outweighs the interests of a person convicted under those laws. This was in the case of the *State of Maharashtra v Balakrishna Kumbhar*,[210] where the respondent, a Superintendent of Central Excise in Mumbai had been convicted by a Special Judge for corruption-related cases under the Prevention of Corruption Act, 1988. Upon conviction, the competent authority put him under suspension from work pending appeal. The High Court of Bombay passed an order suspending the conviction pending appeal effectively allowing the respondent to resume duty. On an appeal by the State against the High Court's order, the Supreme Court set aside the order of suspension of conviction pending appeal on the basis of the nature of corruption as a crime. The Supreme Court stated that:

> Corruption is not only a punishable offence but also undermines human rights, indirectly violating them, and systematic corruption, is a human rights violation itself, as it leads to systematic economic crimes. Thus, in the aforesaid backdrop, the High Court should not have passed the said order of suspension of sentence in a case involving corruption.[211]

Also, in South Africa, the Supreme Court of Appeal has had occasion to pronounce itself in a similar case. In *Lebogang Phillips v The State*,[212] the appellant, a constable in the South African Police Service (SAPS) was convicted on a charge of soliciting and receiving a bribe in contravention of the Prevention and Preventing of Corrupt Activities Act, 2004. The appellant was a first offender, 35 years old and had served the SAPS flawlessly for nine years. He was married with three children. As a result of the conviction, he lost his employment. In sentencing the appellant to four years' imprisonment, the court stated:

> The purpose of the Act, among others, is '[T]o provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; …'. There is no doubt that corruption and corrupt activities undermine constitutional rights and further the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and credibility of governments…'[213]

[210]Criminal Appeal No. 1648 of 2012, <www.indiankanoon.org/doc/92963982/> (accessed 11 March 2018).
[211]As above, para 14.
[212][2016] ZASCA 187.
[213]As above, para 10.

The above reasoning of the Indian and South African courts suggests that a human rights perspective of anti-corruption initiatives that addresses the socio-economic costs of corruption is crucial; and is thus the missing component to the judicial approach to combating corruption in Kenya.

Despite all of the legislative interventions and the mechanisms that have been established to combat corruption, the problem of corruption persists in Kenya as a systemic problem that goes beyond individuals.[214] The UN through the Committee on the Rights of the Child acknowledges that Kenya has increasingly availed more resources to social sectors since 2005 but raises concern that despite its efforts to eradicate corruption, the vice remains pervasive and continues to divert resources that are essential in implementing the rights of the child in Kenya.[215] These observations are true of all other human rights in Kenya, including the RTD.

The effect of widespread and systemic corruption in Kenya is that the government has failed to meet its international and domestic human rights obligations. The obligation under the ICESCR to ensure that it realises socio-economic rights to the maximum of its available resources, is one example. The CESCR has raised concern that the pervasive nature of corruption in Kenya's public sector impedes the realisation of economic, social and cultural rights in the country.[216] To address this concern, the CESCR recommended that the government strengthens anti-corruption processes so as to ensure that Kenya increases the level of public funding at both national and county level with a view to ensuring the progressive realisation of economic, social and cultural rights.[217] Since all human rights are indivisible, this concern and the recommendation on how to cure it are applicable to all other human rights in Kenya, particularly the RTD.

While the constitutional framework on good governance in Kenya supports a human rights approach to combating corruption, the legislative framework to give effect to it does not

[214]Hope (note 9 above) 494.
[215]United Nations, "Committee on the Rights of the Child: Concluding observations on the third to fifth periodic reports of Kenya", Un Doc. CRC/C/KEN/3-5 (2016), para 11(c).
[216]United Nations, "Committee on Economic, Social and Cultural Rights concluding observations on the combined second to fifth periodic reports of Kenya" UN Doc. E/C.12/KEN/CO/2-5 (2016), para 17. The African Commission has similarly raised concern about corruption being a serious problem in Kenya. See African Union, African Commission on Human and Peoples' Rights: Concluding observations and recommendations on the initial report of the Republic of Kenya" (16-30 May 2007), para 37.
[217]As above, para 18.

explicitly address this. This position exists even though the Report of the TJRC[218] identifies corruption as being a violation of human rights in Kenya. The TJRC found that corruption was endemic in Kenya despite the fact that there had been growing awareness of its consequences and negative impact on development.[219] The TJRC also established that corruption was a gross violation of human rights to the extent that some people who had made efforts to fight corruption had lost their lives.[220] Further, the TJRC found that corruption disproportionately affected vulnerable people such as the poor, minorities, indigenous people, women, children and persons with disabilities because although they were a majority of the population, they have little power to defend themselves against violation of their human rights.[221] Finally, the TJRC concluded that poor people were greatly affected by corruption because it diverts resources meant for crucial development initiatives to lift them out of poverty and that corruption also undermined public services on which the poor depend to meet their basic needs.[222]

The fight against corruption must therefore take into consideration its constitutionally facilitated human rights dimension to complement the statutory mechanisms that exist. The starting point in this respect is the standards set out in international human rights law. By virtue of article 2(6) of the Constitution, which decrees that any treaty or convention that Kenya has ratified is part of the law of Kenya, the UNCAC and the AUCPCC which were ratified before 2010 are now part of the law of Kenya. In realising the RTD through fighting corruption, the AUCPCC is of particular relevance. The AUCPCC binds States Parties to "[p]romote socio-economic development by removing obstacles to the enjoyment" of human rights, including the RTD.[223] Deliberate efforts must be made to realise this value of the AUCPCC through the BoR in the Constitution when enforcing it. The remedies available for enforcing the BOR are expansive and can be useful in the recovery of wealth acquired as proceeds of corruption and would be more effective than the mere imprisonment of culprits under the relevant penal

[218]Republic of Kenya, *Report of the Truth, Justice and Reconciliation Commission* (2013). The TJRC is one of the institutions created under the National Accord and Reconciliation Act, 2008 as an agenda 4 mechanism to deal with the long-term issues that brought about the 2007-2008 post-election violence. Established in 2008, the TJRC was tasked with the responsibility of investigating, analysing and reporting on gross violations of human rights and historical injustices that occurred in Kenya between 1963 and 2008 and making recommendations on how to redress those human rights violations and historical injustices.
[219]As above, para 255.
[220]As above, para 256.
[221]As above para, 257.
[222]As above para, 258.
[223]AUCPCC, article 2(4).

sanctions provided for in the anti-corruption legislation. The enforcement provisions of the BoR empower courts to grant any relief it deems fit including but not limited to declarations of rights,[224] injunctions,[225] conservatory orders,[226] orders of compensation,[227] and orders of judicial review.[228] This novelty in the Constitution can be used to give appropriate remedies regarding corruption cases especially where recovery of embezzled public funds and assets is concerned.[229] Recovery remedies would benefit society in general and not just the person who brings the action.

In order to achieve the goals of KV2030, it is imperative that government and all Kenyans adhere to the national values and ethics enshrined in the Constitution. Such adherence is central to Kenya achieving global competitiveness and the prosperity that it aspires to.[230] The responsibility of moulding this culture is not just a responsibility for government but for all Kenyans because the Constitution 2010 which sets out the national values and principles of governance binds all persons and State organs.[231] Through this, a country whose people enjoy freedom from corruption will be a reality through governance based on "the essential values of human rights, equality, freedom, democracy, social justice and the rule of law".[232]

5.5 Conclusion

The purpose of this chapter was to understand the nature of corruption and its impact on the realisation of the RTD in Kenya. Corruption has been appreciated as being a complex phenomenon which is difficult to define with precision because of its multifaceted nature and varying forms across societies. However, it is generally viewed as a vice that goes against the

[224]Constitution of Kenya 2010, article 23(3)(a).
[225]As above, article 23(3)(b).
[226]As above, article 23(3)9(c).
[227]As above, article 23(3)(e).
[228]As above, article 23(3)(f).
[229]For instance, in March 2018, the EACC reported that in the 2016/2017 Financial Year, it recovered public assets in the form of cash amounting to over Kshs. 13 million, preserved public assets worth Kshs. 1.3 billion, recovered land and immovable assets worth Kshs. 242 million and through covert investigations averted the possible loss of public funds estimated at Kshs. 6.2 billion. See KNA Nairobi, "EACC recovers billions obtained through fraud" (6 March 2018) *MyGov* 28. This amount is more than sufficient to cater for the Kshs. 5.5 billion budgeted to cater for free primary healthcare, health insurance for the elderly and persons with disabilities and free maternal healthcare in the 2017/2018 Financial Year. See Development Initiatives, "A summary of Kenya's budget from a pro-poor perspective" <www.devinit.org/post/a-summary-of-kenyas-budget-201718-from-a-pro-poor-perspective/> (accessed 8 March 2018).
[230]Republic of Kenya (note 123 above) xix.
[231]Constitution of Kenya 2010, article 2(1).
[232]As above, preamble para 6.

common good since it diverts public assets and funds into private hands, invariably those of public officials. One profound consequence of corruption is that it adversely affects the economic and social well-being of people and endangers their lives through exposure to illiteracy, ill-health and poverty among other vagaries when the State as a result of corruption is not able to provide essential services that would avert those situations.

It has been demonstrated in this chapter that corruption leads to the State being unable to meet the essential service needs of its people and, as a consequence, it breaches its obligations to respect, protect and fulfil the human rights of its subjects. When the livelihoods of people are imperilled, they lose confidence in government; and democracy, rule of law and institutions of governance are weakened. Corruption leads to increased poverty and inequality which hinders enjoyment of human rights and, in particular, realisation of the RTD. Corruption is therefore a human rights issue that has a direct impact on governance.

Corruption remains a problem in Kenya that hinders its development agenda. This is despite the fact that the country has had an elaborate legal regime that criminalises corruption. Kenya's highly centralised system of governance prior to the coming into force of the Constitution contributed to the entrenchment of corruption in the public sector with the result that public funds and assets ended up in private hands at the expense of the public. Indeed, the report of the TJRC identifies corruption as a historical injustice and a major violation of human rights in Kenya. As such, corruption is a violation of the RTD in Kenya.

Corruption, therefore, has been a major contributor to poverty in Kenya and since both poverty and corruption have been identified as violations of the RTD, participation of the people in addressing these obstacles to their RTD, is essential for its realisation. The following chapter explores that possibility.

Chapter 6: Public participation and the right to development

6.1 Introduction

The 1990s witnessed an emergence of the concept that the people are a major resource for the development of Africa.[1] At the United Nations Economic Commission for Africa (UNECA) International Conference on Popular Participation in the Recovery and Development Process in Africa (1990 Arusha Conference), held in Arusha, Tanzania, it was recognised that there is an inherent relationship between people and, development and that the success of the development process in Africa depended on the effective participation of the people in that process.[2] This initiative of a UN body although specific to Africa is a reflection of the global determination of the peoples of the UN "to promote social progress and better standards of life in larger freedom".[3]

The involvement of people in the process of their development is important not only as a principle of good governance but also as a means of marshalling all resources that are needed for development and ensuring sustainability of the development process.[4] However, a real challenge arises as to the practicalities of how to involve the people in their development through implementable and realistic ways that result in realisation of fundamental human rights such as the RTD, and also affirms the dignity of the human person as anticipated by the UN Charter.

The Constitution sets out an elaborate framework for participation by the people of Kenya in "the management, protection and conservation of the environment",[5] the business of parliament,[6] the management of devolved government,[7] the management of public finances,[8] and the process of policy making.[9] This framework seeks to enhance self-governance by

[1]United Nations Economic Commission for Africa, "Report of the International Conference Popular Participation in the Recovery and Development Process in Africa", UN Doc. E/ECA/CM.16/11 (1990) para 8.
[2]As above.
[3]UN Charter, preamble para 1(4).
[4]United Nations, *A guide to the application of public participation in planning and policy formulation towards sustainable transport development* (2003) 3.
[5]Constitution of Kenya 2010, article 69(1) (d).
[6]As above, article 118(1) (b).
[7]As above, article 174(c).
[8]As above, article 201(a).
[9]As above, article 232(d).

recognising the right of the people to participate in the making of decisions that affect them and of communities to manage their local affairs and pursue their development.[10] This framework is very wide and seeks to guarantee the place of the people in governance generally and the realisation of human rights in Kenya.

This chapter limits itself to public participation in decision-making processes that seek to realise the RTD in Kenya. The chapter first explores the meaning of public participation generally. Public participation as a human rights issue is then discussed in detail before an analysis of public participation and the right to development in Kenya is undertaken. For comparative purposes, the chapter draws from South African case law on public participation, which Kenyan courts have heavily relied on in developing their own.

6.2 Understanding public participation

Public participation has variously been referred to as "popular participation", "local participation", "community participation", "peoples' participation", and "citizen engagement", among other terminologies. These terminologies often refer to similar concepts and principles.[11] In this thesis, the terms are used interchangeably to refer to public participation. This section aims at providing an understanding of the meaning of public participation, its importance in development and the methods of and participants in public participation. This section deals with a general understanding of public participation. The human rights perspectives of public participation are thereafter discussed in section 6.3 below. However, some of the treaties referred to in 6.3 also address issues discussed in this section but from a human rights perspective.

6.2.1 Meaning of public participation

In its widest sense and in the context of development, public participation is an important instrument for development of society especially sustainable development since people in the society concerned are involved in decision-making and as such own their development

[10]As above, article 174(d).
[11]Geoffrey Rono, "Public participation process in the devolved system of governance in Kenya" (2017) 5 *International Journal of Economics, Commerce and Management* 547, 551.

process.[12] Participation would therefore mean that the community is able to organise itself in such a manner that it assumes responsibility for the resolution of its problems and, in most instances, is facilitated by the State for this purpose. That being so, it would follow that development cannot be realised if the people do not participate in decision-making and implementation. Cheetham observes that:

> Community participation occurs when a community organizes itself and takes responsibility for managing its problems. Taking responsibility includes identifying the problems, developing actions, putting them into place and following through.[13]

Public participation connotes the involvement of all people who have an interest in a development project or can be affected by the project in the formulation and implementation of the project.[14] Public participation would entail the provision of information to those who have an interest or are affected by the project, consultation with them through the lifespan of the project, and their direct involvement in all aspects of decision-making on the project.[15] This type of engagement means that the interested or affected are part of, and take part in the whole process of development.

Public participation has also been described as a practice where there is consultation and involvement of members of the public in setting the agenda, making decisions and formulating policy for institutions responsible for development.[16] It has also been defined as a process in which individuals, organisations and government entities that are affected or interested in a certain decision, are consulted and included in the making of that decision.[17] Generally then, public participation is a process that ensures that people play a role in decision-making where the decisions being made impact on their lives and well-being. The basic idea of public participation is that people who have an interest in the decision-making process of a public body must be involved in that process.

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[12]Zaheb Zaden & Nobaya Ahmed "Participation and community development" (2010) 2 *Current Research Journal of Social Sciences* 13.
[13]Nicole Cheetham, "Community participation: What is it?" (2002) 14 *Transitions* 4.
[14]Rono (note 11 above) 552.
[15]As above.
[16]Gene Rowe & Lynn Frewer, "Evaluating public-participation exercises: A research agenda" (2004) 29 *Science, Technology & Human Values* 512, 512.
[17]Rajendra Ramlogan, *Sustainable development: Towards a judicial interpretation* (2011) 163.

At the 1990 Arusha Conference, the delegates voiced a strong belief that popular participation essentially meant that the people were empowered "to effectively involve themselves in creating structures and in designing policies and programmes that serve the interests of all as well as effectively contribute to the development process and share equitably in its benefits".[18] In the delegates' view, for public participation to be effective:

> … there must be an opening up of political process to accommodate freedom of opinions, tolerate differences, accept consensus on issues as well as ensure the effective participation of the people and their organizations and associations. This requires action on the part of all, first and foremost the people themselves. But equally important are the actions of the State and the international community, to create the necessary conditions for such an empowerment and facilitate effective popular participation in societal and political life.[19]

Essentially, the foregoing discussion illustrates that public participation is a principle that those people affected by decisions of public bodies have a right to be involved in the decision-making process, and that their input must be considered when the decision is being made. It is for this reason, for example, that States Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[20] considered that for purposes of giving effect to the right to an environment adequate for one's health and well-being, a citizen must have access to information and an entitlement to participate in decision-making.[21] The Aarhus Convention is the only legally binding instrument that addresses the concept of public participation. However, it does not define the term. The Aarhus Convention is a special convention of the European Union dealing with environmental matters and is relevant to this discussion as a special convention that the African Commission and African Court can consider under article 61 of the ACHPR. Its provisions on how to conduct public participation are relevant to getting an understanding of what participation in development under international law entails.

[18]United Nations Commission for Africa (note 1 above) para 11. The Arusha Conference was a rare meeting of African governments, non-governmental organisations, peoples organisations and UN agencies to deliberate on the role of popular participation in the development processes in the continent. Since once of the objectives of the was to gain an understanding od the role of peoples' participation in development, the insights from the proceedings are relevant and useful to the discussion in this chapter.
[19]As above.
[20]Adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447 (1998).
[21]As above, preamble para 8.

6.2.2 Purpose and value of public participation

Public participation brings with it the benefit of awareness of a society's problems and the solutions available for surmounting those problems. At the same time, it has the potential of raising the confidence and self-esteem of people who have previously had no voice in society and thereby enabling them to live a dignified life and realise their own potential.[22] Participation of the public in decision-making therefore provides opportunity for new and creative thinking in the design and implementation of development programmes because it involves many and diverse shades of opinion including those of marginalised and disadvantaged people.[23] Importantly, participation helps in identifying and deploying resources in an efficient and effective manner. This ensures equity in the entire development process because communities become involved in decision-making which leads to quality collective decisions that are appropriate and sustainable and owned by the people.[24] Khwaja made the following observation in 2004 on sustainability of development and its link with participation:

> The past several decades of development funding (e.g., World Bank in Africa) has demonstrated the failures of top-down approaches to development. Not only does the provision of public goods remain low in developing nations, most projects suffer from a lack of sustainability. A possible reason for these failures is attributed to the lack of local participation.[25]

In the 1990s, the concept of people's participation emerged as a concern of development strategists. Thinking began to change from development that was principally capital-centred to development that involved the people. Effective ways of involving the people had to be devised so as to strengthen the principle that development is a process concerning people, and people had to participate in that process.[26] At that time, the UNDP noted that:

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[22]Zaden & Ahmed (note 12 above) 13.
[23]As above. See also, Peter Oakley, *Peoples participation in development projects: a critical review of current theory and practice* (1995) 6, where the author notes that there is no homogenous society because of divisions as to class, occupation, gender and culture among other attributes. This diversity when brought together is useful in reaching decisions that are beneficial to the whole in an equitable manner.
[24]As above. See also, Musambayi Katumanga, "Multi-partism and the political economy of exclusion in Kenya" in Kimani Njogu (ed), *Citizen participation in decision making: Towards inclusive development in Kenya* (2013) 15, where the point is made that participation is about citizenship and the collective identifying of societal goals and the making of decisions about the wellbeing of society which results in the human security of the individual because the whole society is safe.
[25]Asim Khwaja, "Is increasing community participation always a good thing?" (2004) 2 *Journal of the European Economic Association* 427.
[26]Oakley (note 23 above) 1.

> The implications of widespread participation are profound-embracing every aspect of development. Markets need to be reformed to offer everyone access to the benefits they can bring. Governance needs to be decentralized to allow greater access to decision-making. And community organizations need to be allowed to exert growing influence on national and international issues.[27]

Development is a transformative process that moves society from traditional ways of thinking and of dealing with essential services such as health and education to modern thinking that reflects the present circumstances of society.[28] Therefore, the mere increase in supply of capital or the efficient allocation of resources is necessary but not sufficient for the development or transformation of society. The benefits flowing from such an arrangement will most likely benefit a section, especially the owners of capital, and not the whole of society.[29] To achieve transformation of society, development must be participatory. The process has "to encompass transparency, openness and voice in both public and corporate settings".[30] As Stiglitz observed:

> Processes, not just outcomes, are key to this broader interpretation of participation. The stress on processes is a natural outgrowth not only of the increasing emphasis on equity, but also our greater recognition of *agency* problems. That is to say, we now recognize the great importance of potential discrepancies between the actions taken by a party (the government, for example) and the interests of those the party is supposed to serve.[31]

Members of a society are stakeholders in their development process and as such should be involved in the "design, delivery, monitoring and improvement of products and services, including those that have political, economic and social ramifications".[32] This participation should be continuous and systematic towards the achievement of a common vision through interactive communication. Participation is therefore not a perfunctory exercise but rather one that is "*participatory, inclusive, open, multi-voiced, non-patronizing, non-dominating, transparent and genuine engagement with communities and civil society actors"*.[33]

The concept of public participation therefore envisages a process where those affected by or interested in a public decision are sought out and facilitated in being part of the decision-

[27]United Nations Development Programme, *Human Development Report 1993* (1993) 2.
[28]Joseph Stiglitz, "Participation and Development: Perspectives from the Comprehensive Development Paradigm" (2002) 16 *Review of Development Economics* 163, 165.
[29]As above, 164.
[30]As above, 165.
[31]As above.
[32]Kimani Njogu, "Natural resource governance and multi-stakeholder dialogue" in Njogu (note 24 above) 33.
[33]As above 33-34.

making. Their contribution is crucial in giving the decision legitimacy and making it sustainable in the development agenda of a society. By making the decision-making process open, accountable and transparent, public participation brings a human rights perspective into development processes. With respect to environmental issues, the preamble to the Aarhus Convention has recognised the value of public participation. That recognition is equally applicable to public participation generally. The Convention recognises that:

> … improved access to information and participation in decision-making enhance the quality and implementation of decisions, contribute to public awareness of environmental issues, gives the public opportunity to express its concerns and enables the authorities to take due account of such concerns.[34]

Public participation is therefore inherently valuable and useful as a means of development. It is inherently valuable to development where there is clarity on the procedure for such participation, the procedure is followed and the interested or affected parties are able to participate in the process.[35] It is useful where the process of involving the public leads to good and beneficial decisions and which are easy to implement.[36]

6.2.3 Nature and form of public participation

While there is little doubt that public participation in governance is critical for societal transformation, the vexing and more difficult question relates to how the public will participate because the process is more important than the outcome. When can it be said that the public has participated in the making of decisions in matters that affect them? This question is important because it is not humanly possible for everyone in any given society to actively participate in decision-making. The question revolves around the nature of public participation and the forms that it may take.

Article 6(2) of the Aarhus Convention is instructive, as it provides guidelines as to the form public participation may take. It states that the public must be adequately, timeously and effectively informed, early in the decision-making process, of, among other things: the activity

[34]Aarhus Convention, preamble para 9.
[35]Ramlogan (note 17 above) 164.
[36]Rowe & Frewer (note 16 above) 520-521.

about which a decision is to be made,[37] the nature of the various decisions that can be made,[38] the public authority that is responsible for the making of the decision,[39] and the proposed process of decision-making[40]. Information on the proposed decision-making process would include details of things such as the date of commencement of the process, opportunities for the public to participate, time and venue of public hearings, the public authority form which relevant information can be obtained, the public body to which comments or queries can be submitted, and the timelines for submission.[41]

At a broad level, therefore, the participants must have access to public information, be consulted by the relevant public body and be involved in policy-formulation and decision making.[42] This process goes through three stages: information, where the public is properly informed on the process; consultation, where the public is consulted on policy issues; and decision-making, where the public makes some input in decision-making on policy and its execution.[43] In many countries, the public has for a long time been disengaged from policy-making and are often unaware of their right to information or the duty of the State to consult them on policy-making processes. In such situations, it becomes imperative to begin with raising the awareness levels of the people so as to making their participation meaningful.[44] In the case of development projects, it is not only useful to involve the public through information, consultation and decision-making but also involve them in the implementation and evaluation of public policy.[45]

The public may be involved in developmental processes in a number of ways or at different levels. The public may participate as passive recipients of information from public bodies, or as persons from whom an opinion is sought through questionnaires or focus groups, or they may participate actively either directly or through representation in the decision-making process itself.[46] True public participation must therefore entail empowerment of the public to

[37]Aarhus Convention, article 6(2)(a).
[38]As above, article 6(2)(b).
[39]As above, article 6(2)(c).
[40]As above, article 6(2)(d).
[41]As above.
[42]United Nations, *Report of the Expert Group Meeting on citizen engagement and the post-2015 agenda* (2013) 6.
[43]As above.
[44]As above, 7.
[45]As above.
[46]Rowe & Frewer (note 16 above) 515.

have an input in the decision-making process. The relevant public body then becomes obligated to implement the decision made through the participatory process because that decision is derived from the power of the people.

The most appropriate type of public participation in each case will depend on what the relevant public body wishes to achieve, and the type of public policy or decision being made. In many cases however, financial cost implications are paramount considerations.[47] What is important to note is that whichever method of participation is chosen, at the end of the process, after a decision has been made, the public ought to be informed how their participation impacted on the outcome of the process.[48] It is critical that the output of the process impacts policy and is seen to do so. This ensures that a perception does not arise that the process was meant to legitimise decisions made through other processes or to give the impression of participation without there being an intention to act on the decision made by the public.[49]

The nature and form of public participation has been the subject of judicial determination in South Africa and Kenya. In *Doctors for Life International v The Speaker of the National Assembly* (*Doctors for Life* case).[50] This case related to the role of the public in the legislative process.[51] The applicant complained that the National Council of Provinces (NCOP) had passed certain pieces of health legislation[52] without inviting written submissions from the public or holding public hearings as required by its constitutional duty to facilitate public involvement in law-making. Nqcobo, J while appreciating that it is impossible to define the forms of facilitating appropriate public participation stated:

> What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.[53]

[47] As above, 551.
[48] As above.
[49] As above.
[50] 2006 (6) SA 416.
[51] As above para 120.
[52] The four pieces of legislation in question were the Choice of Termination of Pregnancy Amendment Act, 38 of 2004; the Sterilisation Amendment Act, 3 of 2005; the Traditional Health Practitioners Act, 35 of 2004; and the Dental Technicians Amendment Act, 24 of 2004.
[53] *Doctors for Life* case (note 50 above) para 129.

The test then is that the public must be afforded reasonable opportunity to participate in decision-making for one to conclude that there was public participation in the decision reached. Reasonableness is an objective standard which calls for each case to be considered in context of its circumstances; for instance, the nature and purpose of the decision to be made and the time and expenses involved in reaching the decision. In *Minister of Health v New Clicks South Africa (Pty) Ltd* (*New Clicks* case)[54] Sachs, J observed that:

> The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.[55]

While the reasonableness test gives the State and its institutions considerable discretion in determining how to fashion and facilitate public participation, the process must be real and not a mere exercise to cosmetically fulfil constitutional obligations. This aspect of public participation is captured by Sachs, J in the *Doctors for Life* case as follows:

> All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolic and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislators must have the benefit of all inputs that will enable them to produce the best possible laws.[56]

In *Government of the Republic of South Africa v Grootboom*,[57] the Constitutional Court held that the reasonableness test that is applied to State action protects human dignity. The court was of the view that in evaluating the reasonableness of State action, the inherent dignity of the human person must be considered.[58] This means that with respect to public participation, the public has a right to reasonable State action in facilitating their participation having due regard to their dignity as human beings. According to Liebenberg, this would mean that the

[54]2006 (1) BCLR 1 (CC).
[55]As above, para 630.
[56]*Doctors for Life* case (note 50 above) para 235.
[57]2000 (11) BCLR 1169 (CC).
[58]As above, para 83.

State considers the nature of the process of participation in question, as well as the "historical, economic and social context" in which the process arises.[59]

The essence of public participation is aptly captured in *Poverty Alleviation Network v President of the Republic of South Africa*[60] where legislation which had the effect of altering the boundary between the Eastern Cape and KwaZulu-Natal provinces of South Africa was challenged on the ground that the law-making process did not satisfy the constitutional duty of facilitating public participation. Nkabinde, J held that:

> …engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision.[61]

Finally, in the case of *Merafong Demarcation Forum v President of the Republic of South Africa* (*Merafong* case),[62] the South African Constitutional Court observed that the obligation to fulfil public participation in decision-making should be innovative and therefore fulfilled in different ways.[63] In that case, the applicants challenged the validity of a constitutional amendment that changed provincial boundaries including the one between the Gauteng and North West provinces. One part of the Merafong City Local Municipality was in the process moved from Gauteng to North West where the other part of the same municipality was located before the constitutional amendment. The applicants contended that the Gauteng Provincial Legislature had failed to comply with the constitutional obligation to facilitate public participation in the process leading to the amendment. Van der Westhuizen J held that the legislature had discretion in determining how to fulfil that obligation but that in exercising that discretion, the legislature must ensure that the public is afforded some meaningful opportunity to be heard.[64] The judge further stressed that a reasonable method and degree of public participation depends on a number of factors including the nature and importance of the legislation and the intensity of its impact on the process.[65]

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[59]Sandra Liebenberg, "Social-economic rights: revisiting the reasonableness review/minimum core debate" in Stu Woolman & Michael Bishop, *Constitutional conversations* (2008) 305, 322.
[60]2010 (6) BCLR 520 (CC).
[61]As above, para 33.
[62] 2008 (10) BCLR 968 (CC).
[63] As above, para 27.
[64] As above.
[65] As above.

Kenyan courts have also addressed the issue of the nature of public participation with the aid of South African case law. In the case of *Robert Gakuru v The Governor Kiambu County*,[66] the petitioners who were business persons in the Kiambu County of Kenya sought to have the Kiambu County Finance Act, 2013 declared unconstitutional on among other grounds that there had been no public participation in its enactment as required by the Constitution of Kenya 2010. Their contention was that no consultations took place and no invitations had been made by the county government before the Act was passed. It later emerged that the county government had placed an advertisement in a local newspaper, but the proposed legislation had only been mentioned in the title of the advertisement there was not much mention of it in the body of the advertisement. The advertisement also contained other unrelated issues. The Court found that in the circumstances, there was no attempt to exhort the public to participate in the process of enactment of the Finance Act and that the county government did not facilitate the public to participate in its formulation. In finding the Act unconstitutional for lack of public participation, Odunga, J drew heavily from the *Doctors for Life* case, and concluded that:

> In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and quantitatively.[67]

Public participation, therefore, is that process through which people are involved in the public affairs of their society and in the making of decisions that affect their lives and these decisions may be legislative, policy-based or otherwise. It must be understood as a problem-solving and decision-making process which includes many approaches of identifying problems that face the people, opportunities for solving them, developing alternatives of solving those problems and making decisions as to which of those alternatives best suits their needs.[68]

Generally, public participation entails a transparent and accountable process where the State and its agencies disclose relevant information and are responsive and answerable to the people.[69] This empowers the people to exchange views and influence decision-making as the

[66](2014) eKLR.
[67]As above, para 75. See also, paras 53-64, 66-69 and 76 where the judge extensively relies on the *Doctors for Life* case in discussing the nature and form of public participation.
[68]The Institute for Social Accountability, *Public Participation framework in the county assembly* (2015) 7.
[69]Kenya School of Government, "Basic requirements for public participation in Kenya's legal framework" (2015) *Kenya Devolution Working Paper 2* 1.

government engages "people in thinking, deciding and playing an active part in the development and operation of services that affect their lives".[70] In sum, public participation is a process anchored in the principle and practice of stakeholder engagement.

6.3 Public participation as a human rights issue

At the United Nations level, the principle of participation has been an important feature in human rights law and especially with reference to the RTD. It has been of significance in giving meaning to international human rights instruments and has been a constant theme in many declarations, recommendations and resolutions of the UN.[71] It is in this context that Manouchehr Ganji, the UN Special Rapporteur on the realisation of economic, social and cultural rights in his 1969 study observed that:

> … the basic principle governing the question of human rights in development should be the participation of the people in deciding their own style of individual and corporate life in general, and in particular their participation in decision-making in connection with development programmes, in the implementation of those programmes and the benefits derived from them.[72]

The UDHR introduced the principle of participation into human rights language by providing that "everyone has the right to take part in the government of his country, directly or indirectly or through freely chosen representatives".[73] The right to participate in the government of one's country is expansive and goes beyond mere political participation in periodic elections and includes participation at all levels of government that ensure good governance.[74] Because the UDHR provides for people having voice in government beyond participating in elections, it lays a foundation for the realisation of other rights through efficient and accountable institutions.[75]

The ICCPR buttresses this position by declaring that every citizen shall have the right and opportunity to "take part in the conduct of public affairs, directly or through freely chosen

[70]The Institute for Social Accountability (note 68 above) 1.
[71]Report of the Secretary-General, "The emergence of the right to development" in United Nations, *Realizing the right to development* (2013) 14.
[72]Quoted in Report of the Secretary-General (as above) 14.
[73]UDHR article 21(1).
[74]Morris Mbondenyi, "The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in light of Kenya's 2007 political crisis" (2009) 9 *African Human Rights Law Journal* 183, 186.
[75]As above.

representatives".[76] The public affairs envisaged by article 25(a) of the ICCPR include participation in decision-making with respect to development. The State is under an obligation to take legislative and other measures to ensure that the public participates in decision-making where development is concerned.[77] The taking of such legislative measures must flow from the fact that the ICCPR recognises the right to public participation as being equal to all other human rights, inalienable and derived from the inherent dignity of the human person.[78]

In elaborating on article 25(a) of the ICCPR, the UN Human Rights Committee holds the following view on the meaning and nature of "conduct of public affairs":

> The conduct of public affairs, … is a broad concept which relates to the exercise of political power and in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.[79]

The Committee further notes that the public may directly participate in the conduct of public affairs when they take "part in popular assemblies which have the power to make decisions" on issues that affect their locality or by taking part in bodies established to represent the public in consulting with government.[80] The public may also participate in public affairs when they exert influence on decision-making processes by involving themselves in public debates and "dialogue with their representatives" or through their capacity to organise themselves to advance their interests on matters affecting them.[81]

Whereas the ICESCR has no express provision on the right to participation in public affairs, the CESCR has read the principle of participation into various rights set out in the ICESCR. In a number of its general comments, the CESCR has elucidated the principle of participation as being a central principle in development issues and pronounced that broad and inclusive participation must be undertaken in planning and decision-making when implementing those

[76]ICCPR, article 25(a).
[77]As above, article 2(2).
[78]As above, preamble paras 1 and 2.
[79]United Nations, *Human Rights Committee General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service* UN Doc. CCPR/C/21/Rev.1/Add. 7 (1996) para 5.
[80]As above, para 6.
[81]As above, para 8.

rights. The CESCR begins by elaborating on the general nature of the reporting duties of States to the treaty monitoring bodies by explaining that the reporting duties are intended to assist each State Party in fulfilling its obligations under the ICESCR and to achieve a variety of objectives.[82] One of the objectives that the reporting obligation seeks to achieve is facilitating public scrutiny of government policies that relate to economic, social and cultural rights and encourage the involvement of various sectors of society in the formulation, implementation and evaluation of those policies.[83]

With respect to implementation of various rights guaranteed by the ICESCR, the CESCR requires that there be participation in several ways. With respect to the right to education under article 14, for example, States Parties are required to adopt plans to realise the right and that in drawing up those plans, the participation of all sections of civil society is vital.[84] In implementing the right to adequate food under article 11, States Parties must ensure that in formulating and implementing national strategies on the right to food, there is full compliance with the principles of participation of the people among other principles.[85] On the right to health, it is a core obligation under article 12 of the ICESCR that States Parties adopt and implement national public health strategies and plans of action that address health concerns of the entire population and ensure that those strategies and plans of action are "devised, and periodically reviewed, on the basis of participatory and transparent" processes.[86] With regard to the right to water under articles 11 and 12 of the ICESCR, States Parties have a core obligation to adopt and implement national water strategies and plans of action that address the needs of the whole population through participatory processes, and periodically review them.[87] States Parties ought to facilitate the right to work guaranteed by article 6 of the ICESCR by formulating and implementing national employment strategies that fully respect the principle of participation by interested groups.[88] The rights to education, food, health, water and work,

[82]United Nations, *CESCR General Comment No. 1: Reporting by States Parties*, UN Doc. E/1989/22 (1981) para 1.
[83]As above, para 5.
[84]United Nations, *CESCR General Comment No. 11: Plans of Action for Primary Education*, UN Doc. E/1992/23 (1999), para 8.
[85]United Nations, *CESCR General Comment No. 12: The Right to Adequate Food*, UN Doc. E/C.12/1999/5 (1999), para 23.
[86]United Nations, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health*, UN Doc. E/C.12/2000/4 (2000) para 43(f).
[87]United Nations, *CESCR General Comment No. 15: The Right to Water*, UN Doc. E/C.12/2002/11 (2003) para 37(f).
[88]United Nations, *CESCR General Comment No. 18: The Right to Work*, UN Doc. E/C.12/GC/18 (2006) para 42.

among other rights, are of fundamental importance to the livelihoods and well-being of people and therefore critical to realisation of the RTD.

In addition to the standards under ICESCR, the soft law provisions of the DRD set out the principle of participation as a key factor in realising the RTD in an elaborate manner. From the outset, the DRD recognises that "development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on *the basis of their active, free and meaningful participation* in development".[89] The DRD declares the RTD as an inalienable human right and confers a right on "every human being and all peoples" to participate and contribute in the development process.[90] In recognising that the human person is the "central subject of development", the DRD prescribes that as such the human person must participate in realising the right to development and equally benefit from it.[91] The DRD recognises the special place of women in society and particularly places a duty on States to ensure their active participation in the development process.[92] Finally, the DRD places a general duty on States to facilitate popular participation, not only as an important factor in realising the RTD but also for the full realisation of all human rights.[93]

The right to participate emphasises the involvement of the beneficiaries of development at all stages of the process from formulation, implementation through to monitoring and evaluation of development programmes. The duty cast on States by the DRD is one of creating an enabling environment for meaningful participation by the beneficiaries of the right to development in the development process.[94] This is important because such an approach not only ensures equity in the distribution of the benefits of development but also creates equal opportunities for all and thereby addresses the problem of social exclusion.[95]

Social exclusion is a violation of human rights which reinforces and entrenches poverty because either by design or through unintended consequences of public action, the poor are

[89]DRD preamble, para 2. Emphasis added.
[90]As above, article 1(1).
[91]As above, article 2(1).
[92]As above, article 8(1).
[93]As above, article 8(2).
[94]Kurshid Iqbal, *The right to development in international law: The case of Pakistan* (2010) 85.
[95]Irene Hadiprayitno, "Poverty" in United Nations (note 71 above) 143.

prevented from making choices about their lives or using their capabilities to get out of poverty.[96] As Hadiprayitno observed:

> The entitlement of participation as stipulated in the Declaration on the Right to Development seeks to advance social inclusion, in particular promoting the central role of individuals and peoples in the decision-making on and evaluation of development processes.[97]

At the African regional level, the ACHPR explicitly provides for every citizen the right to freely participate in the government of his country and they can do so either directly or through their freely chosen representatives.[98] The State is under a general duty to adopt legislative and other measures to ensure that each of its citizens participates in government.[99]

In its principles and guidelines on the implementation of economic, social and cultural rights in the ACHPR, the African Commission notes that despite numerous initiatives to promote development in Africa, mechanisms established to ensure the effective protection and promotion of economic, social and cultural rights continue to be inadequate in many African countries.[100] Consequently, the African Commission has set out as a guideline that for every right protected in the ACHPR, national plans and policies "should be devised, and periodically reviewed, on the basis of participatory and transparent" processes.[101] The national plans and policies developed through these processes should take into account all other national plans including those related to poverty alleviation and they should ensure that the special needs of members of vulnerable and disadvantaged groups are met.[102]

In the context of development, while article 22 of the ACHPR which provides for the RTD does not explicitly refer to the principle of participation as being of central importance to realisation of the right, the jurisprudence of the African Commission has placed participation at the core of realisation of the RTD. For instance, in the *Endorois* case,[103] the Commission

[96] As above. On social exclusion and poverty also see the discussion in chapter 4 above, section 4.2.3.
[97] As above.
[98]ACHPR, article 13 (1). For a detailed discussion on the import of article 13 of the ACHPR see generally, Mbondenyi (note 74 above).
[99] ACHPR, article 1.
[100]African Commission on Human and Peoples' Rights, "Principles and guidelines on the implementation of economic, social and cultural right in the African Charter on Human and Peoples Rights", preamble para 13 <www.achpr.org/instruments/economic-social-cultural/> (accessed 23 March 2018).
[101]As above, para 26.
[102]As above.
[103](2009) AHRLR 75 (2009 ACHPR).

placed particular significance on the principle of participation of the people in development.[104] In this case, the main complaint with regard to the RTD was that the government of Kenya, when creating a game reserve in the ancestral lands of the Endorois people, had failed to adequately involve them in the process.[105] The complainants' case was that although there had been some consultations about creation of the game reserve, those consultations were in bad faith because they had not been about achieving agreement on the project with the Endorois, or obtaining their consent about it.[106]

The government in response had alleged that the Endorois were well represented in the decision-making process because they were represented in the county councils by duly elected representatives, meaning that the Endorois had been availed representation in the forum where development matters were decided upon.[107] It however turned out that these elected representatives had a disadvantage in their engagement with government because they were illiterate and had a totally different understanding of land use and ownership, from that of the government. In fact, the EWC, a body the Endorois considered to be their true representative, had been denied registration by the government.[108] The complainants argued the refusal to register the EWC denied the Endorois their right to fair and legitimate consultation when the game reserve was being created, and that therefore the consultations that took place were "illegitimate consultations".[109]

In determining the issue of participation, the Commission noted that its own standards required governments to consult indigenous peoples like the Endorois, in a form appropriate to the circumstances, when dealing with sensitive issues such as land.[110] The Commission therefore found that the consultations that the government had undertaken were inadequate and could not be considered to be effective consultation.[111] The Commission was of the view that with respect to indigenous peoples, the State must consult those communities and give them an opportunity to shape their developmental policies and play a role in their implementation.[112]

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[104]Nicolas Schrijver "Self-determination of peoples and sovereignty over natural wealth and resources" in United Nations (note 71 above) 100.
[105]*Endorois* case (note 103 above) para 269.
[106]As above, para 274.
[107]As above, para 276.
[108]As above, para 280.
[109]As above.
[110]As above, para 281
[111]As above.
[112]As above.

The Commission agreed with the complainants that it was incumbent upon the State to "conduct the consultation process in such a manner that allowed the representatives [of the people] to be fully informed… and participate in developing parts crucial to the life of the community"[113]. The Commission further stated that since article 2(3) of the DRD proclaims that the RTD includes "active, free and meaningful participation in development", the result of development must therefore mean empowerment of the community so that the capabilities and choices of the community are improved to realise the right to development.[114] The State must therefore empower beneficiaries of the RTD to effectively participate in development. It has a duty to actively consult those beneficiaries. The Commission noted that:

> This duty requires the state to accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with objectives of reaching an agreement.[115]

On the evidence before it, the Commission was convinced that the consultations that had taken place were not sufficient because the State "did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve and commencing their eviction", and also because the State did not impress upon them that the decision to create the reserve, meant that they would lose all their rights to return to their land, including the right to freely access grazing land and medicinal salt licks for their cattle.[116] The Commission finally concluded that where there are development projects that would have a major impact on communities, the State not only had the duty to consult the community "but also to obtain their free, prior and informed consent".[117]

In an effort to implement the recommendations of the African Commission in the *Endorois* case, President Uhuru Kenyatta on 19 September 2014, appointed a Task Force to look into various aspects relating to implementation of the decision.[118] The Task Force is comprised of

[113]As above, para 282.
[114]As above, para 283.
[115]As above, para 289.
[116]As above, para 290.
[117]As above, para 291.
[118] Republic of Kenya, "Gazette Notice 6708 of 2014, Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights in Communication 276/2003 (Centre for Minority Rights Development of behalf of the Endorois Welfare Council v Republic of Kenya)", 26 September 2014.

State officials only with no representation of the interested community, the Endorois.[119] Its mandate includes studying the decision of the Commission and providing guidance on its political, security and economic implications, examining the potential environmental impacts on Lake Bogoria and its surroundings if the decision was implemented, examining the practicability of restitution of the lake and its surroundings to the community taking into account that the lake has been classified as a World Heritage Site by UNESCO, and assessing the amount of compensation payable to the community for losses suffered and for settlement of royalties owed from economic activities on and around the lake.[120]

While the establishment of the Task Force is a positive step towards finally resolving the grievances of the Endorois, there are at least three issues that militate against the decision of the African Commission, particularly with respect to the right to effective and meaningful participation and realisation of the RTD. First, in its mandate, there is no requirement that the Task Force consults with the Endorois, either through the EWC or any other representatives chosen by the community. The African Commission had recommended that the State engages in dialogue with the Endorois for the effective implementation of its recommendations.[121] Second, the Endorois as the interested community were never consulted when the Task Force was being established. Best practices would have required that they be consulted from the very beginning of the decision-making process, in this case the establishment of the Task Force.[122] Lastly, the Task Force is solely comprised of government officials. This not only offends best practices because the State was a party in the case before the Commission and was found to be in violation of the RTD of the Endorois which includes the right to participate in decision-marking. One practical way of achieving inclusivity in the process would have been to appoint the CSOs that represented the Endorois before the Commission, or their appointees to serve on the Task Force. In 2016, the *Endorois* case drew the attention of the CESCR, which noted the establishment of the Task Force but regretted that despite its establishment, the Endorois are not represented on it, and further, that they have not been sufficiently consulted on its work.[123] Consequently, the CESCR recommended that Kenya should set up a mechanism that will

[119]The Task Force membership is made up of the Solicitor General (Chairperson), the Principal Secretary, Ministry of Lands, the Principal Secretary, Ministry of Sports, Culture and the Arts, the Secretary, Kenya National Commission on Human Rights, and the County Secretary, Baringo County. The ancestral land of Endorois that was the subject matter of the proceedings at the African Commission is situated in Baringo County).
[120]Republic of Kenya (note 117 above) para 1.
[121]*Endorois* case (note 103 above) recommendation (f).
[122]See, Aarhus Convention, article 6(2) on the guidelines for facilitating effective participation.
[123]United Nations, "Committee on Economic, Social and Cultural Rights: Concluding observations on the combined second to fifth reports of Kenya", UN Doc. E/C.12/KEN/CO/2-5 (2016) para 15.

facilitate and monitor the implementation of the African Commission's decision, with the active participation of the Endorois.[124]

Later, in the *Ogiek* case,[125] the African Court fortified the place of participation in realising the RTD by reading the right to participation provided for in article 23 of the UNDRIP into article 22 of the ACHPR.[126] Article 23 of the UNDRIP provides that:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

The main complaint regarding the RTD in the *Ogiek* case was that the RTD of the Ogiek community had been violated by their eviction from their ancestral land in the Mau Forest by the government of Kenya, which had not consulted them when making the decision on their eviction. Further, it was complained that the government had not consulted the Ogiek, or sought their consent on matters relating to their economic, social and social life within the forest.[127] It was the Ogieks' case that as an indigenous people, they had a right to determine their development priorities and strategies, to be actively involved in the development of economic and social programmes that affected them, and where possible, to administer those programmes through their own institutions.[128] The State contended that it had not violated the RTD of the Ogiek because it had consulted the Ogiek through their democratically elected representatives and established several task forces to review the legal frameworks and reports relating to the situation in the Mau Forest.[129]

In a short assessment of the arguments, the Court had no difficulty in finding that the RTD of the Ogiek had been violated. The Court held that the continuous evictions of the Ogiek from the Mau Forest had been carried out without the government *effectively consulting* them, and eventually, the evictions had adversely affected their economic, social and cultural

[124]As above, para 16.
[125]Application No. 006/2012, Judgment of 26 May 2017, African Court on Human and Peoples' Rights.
[126]As above, para 209.
[127]As above.
[128]As above.
[129]As above, para 206.

development.[130] Additionally, the Court found that the Ogiek had not been *actively involved* in the development of economic and social programmes affecting them.[131] Essentially, the Court was confirming the African Commission's position in the *Endorois* case, that whatever form participation takes, the consultation and involvement of the affected people, which comes with it, must be meaningful. The African Court has therefore, implicitly recognised public participation as being a central component of the RTD protected by the ACHPR.

6.4 Public participation and the RTD in Kenya

The preceding section demonstrates that public participation is a human rights issue that is critical to the realisation of the RTD. In the Kenyan context, public participation is recognised by the Constitution, several pieces of legislation and a proposed piece of legislation that seeks to provide a general framework for the carrying out of public participation.

6.4.1 Constitutional basis

The Constitution of Kenya 2010 is a transformative document when compared to the constitutions that preceded it.[132] It emphasises the importance of the people of Kenya in the scheme of governance and vests all sovereign power in the people.[133] For the avoidance of doubt in this respect, the Constitution declares participation of the people as a national value and principle of governance.[134] Because the centralised system of governance that preceded this Constitution had alienated the people of Kenya from participation on matters relating to how they were governed, the Constitution of Kenya 2010 provided for a decentralised government to compliment the national government and give voice to the people in matters of governance.[135] The Constitution provides that sharing and devolution of power is a national

[130]As above, para 210. Emphasis added.
[131] As above. Emphasis added.
[132]*Gathungu v Attorney General* (2010) eKLR 13.
[133]Constitution of Kenya 2010, article 1(1).
[134]As above, article 10(2) (a).
[135]Philip Adede, "An analysis of the concept of public participation in Kenya" (2017) 1 *International Journal of Law and Policy* 46, 47; PLO Lumumba & Luis Franceschi, *The Constitution of Kenya, 2010: An introductory commentary* (2014) 511-513. Article 6(1) of the Constitution of Kenya 2010 provides for the division of the territory of Kenya into counties as specified in its First Schedule. The First Schedule divides the country into 47 counties namely Mombasa, Kwale, Kilifi, Tana River, Lamu, Taita Taveta, Garissa, Wajir, Mandera, Marsabit, Isiolo, Meru, Tharaka-Nithi, Embu, Kitui, Machakos, Makueni, Nyandarua, Nyeri, Kirinyaga, Murang'a, Kiambu, Turkana, West Pokot, Samburu, Uasin Gishu, Elgeyo Marakwet, Nandi, Baringo, Laikipia, Nakuru, Narok, Kajiado, Kericho, Bomet, Kakamega, Vihiga, Bungoma, Busia, Siaya, Kisumu, Homa Bay, Migori, Kisii, Nyamira and Nairobi City.

value and principle of governance[136] and dedicates a whole chapter to establish an elaborate framework of devolved government.[137]

The concept of devolved government is the most fundamental innovation of the Constitution of Kenya 2010. The basic principle behind this innovation was bringing governance back to the people.[138] Through a multi-level system of governance, the national government ceded certain functions to the devolved units.[139] Consequently, the national government and the county ones are distinct but however interdependent in their operations and must therefore "conduct their mutual relations on the basis of consultation and cooperation".[140] The Constitution identifies the objectives of devolved governance as being among others:

(a) to give powers of self-governance to the people and enhance participation of the people in the exercise of powers of the State and in making decisions affecting them;[141]

(b) to recognise the rights of communities to manage their own affairs and to further their development;[142]

(c) to protect and promote the interest and rights of minorities and marginalised communities;[143]

(d) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;[144]

(e) to ensure equitable sharing of national and local resources throughout Kenya;[145]

These constitutional provisions establish devolved governance as the core for realisation of the RTD in Kenya. No objectives are set by the Constitution in this regard for the national government and the provisions on principles on executive authority are silent in this respect.[146] The reason for establishing the devolved units of governance as the focal point for realisation

[136]Constitution of Kenya 2010, article 10(2) (a).
[137]As above, chapter 11.
[138]Lumumba & Franceschi (note 135 above) 511. The Independence Constitution 1963 had similar provisions of devolved government. It created eight regional governments which were however dismantled through a series of constitutional amendments immediately after independence and before devolution had taken root.
[139]Constitution of Kenya 2010, fourth schedule.
[140]As above, article 6(2).
[141]As above, article 174 (c).
[142]As above, article 174(d).
[143]As above, article 174(e).
[144]As above, article 174(f).
[145]As above, article 174(g).
[146]See for comparative purposes, Constitution of Kenya 2010, article 129.

of the RTD was the failure of highly centralised government created by the several preceding constitutions to do so since independence. The human rights language used is similar to that used both in the DRD[147] and the ACHPR.[148]

The Constitution enjoins the county governments while implementing the objectives set out in article 174, to be guided by the principle that they "shall have reliable sources of revenue to enable them to govern and deliver services effectively".[149] The people are then empowered through article 174 to have an input in decision-making as to how this revenue shall be utilised for the common good bearing in mind the peculiar circumstances of each county. Article 174 also captures a critical component of the RTD, namely, the protection and promotion of the rights and interests of marginalised communities through their participation in decision-making on their development. Article 260 of the Constitution of Kenya 2010 defines "marginalised community to mean:

> (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
>
> (b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
>
> (c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer community, or
>
> (d) pastoral persons and communities, whether they are-
>
> a. nomadic; or
>
> b. a settled community that because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

Public participation in decision-making is about eliminating social exclusion and empowering people to contribute to overall wellbeing of their society. For public participation to be effective in reaching sustainable decisions, the process must be widely inclusive with a view to having as many affected people as possible contribute to their development process. For this reason,

[147]DRD, preamble paras 2 & 6; articles 1(1) & 2(1).
[148]ACHPR, article 22(1).
[149]Constitution of Kenya 2010, article 175(b).

the Constitution demands that "every county government shall decentralise its functions and the provision of its services to the extent that it is efficient and practicable to do so".[150] The Constitution places a duty on county governments to ensure, facilitate and build capacity of the people to be involved and participate in county governance.[151] County governments are expected to:[152]

> (a) Create mechanisms of engagement by ensuring and coordinating the participation of communities and locations in governance; and
>
> (b) Build capacity by assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers.

The courts have established that public participation is a national value in the Constitution that expresses the sovereignty of the people and is a fundamental aspect of Kenya's democracy. For instance, in *Re Mui Coal Basin Local Community* (the *Mui Coal Basin* case),[153] the High Court confirmed the constitutional basis of public participation as follows:

> As our case law has now established, public participation is a national value that is the expression of the sovereignty of the people as articulated in Article 1 of the Constitution. Article 10 makes public participation a national value as a form of expression of that sovereignty. Hence public participation is an established right in Kenya: a justiciable one – indeed one of the corner stones of our new democracy. Our jurisprudence has firmly established that courts will strike down any laws or public acts or projects that do not meet the public participation threshold. Indeed, it is correct to say that our Constitution, in imagining a new beginning for our country in 2010, treats secrecy on matters of public interest as anathema to our democracy.[154]

In the *Mui Coal Basin* case, the Court also established that the county governments had a constitutional role in public participation. The question in the case was whether the failure to include the Kitui county government in the concessioning of the coal mining project resulted in secrecy around the concessioning process, and therefore inadequate public participation.[155] The Ministry of Energy had offered the concession to a Chinese company on 20 August 2011,

[150]Constitution of Kenya 2010, article 176(2).
[151]As above, function 14, schedule 4 part 2.
[152]Republic of Kenya, *County public participation guidelines* (2016) 1.
[153](2015) eKLR.
[154]As above, para 88. See also, *Mwangi v Minister of State of Provincial Administration & Internal Security* (2014) eKLR, where the Court observed that whereas the concept of public participation enshrined in the Constitution is a difficult one, the courts must give effect to it "both before and after legislative enactment" (para 85).
[155]As above, paras 86 & 89.

when county governments had not come into existence under the Constitution. County governments only came into existence under the new constitutional dispensation after the 2013 General Election.

The petitioners in the case argued that whereas the Constitution provided for the active participation of citizens in the running of county affairs and all matters affecting the public interest, the local people had not been involved in the coal mining project in the manner envisaged by the Constitution.[156] The petitioners particularly took issue with the fact that the local people, including the county government, had not been involved in the negotiations that led to a Benefits Sharing Agreement and other aspects of coal mining.[157] In response, the respondents took the view that there was no requirement that the county government was to be consulted in the concessioning of minerals because all minerals constitutionally belonged to the national government.[158] Further, they argued that the national government was under an obligation to utilise the minerals for the benefit of the people of Kenya, and not just the benefit of the local community in which the minerals were located.[159] They further argued that in any event, at the time of concessioning of the project, the county government of Kitui did not exist.[160]

In determining the role of county government in public participation, the Court stated that:

> With the dispensation of the new Constitution, we now have a devolved government in Kenya. At the national level public participation is enshrined in Article 10 of the Constitution as part of our national values. At the county level, **Article 174 (c)** provides that ***the objects of the devolution of government are to give powers of self-governance to the people and enhance participation of the people in the exercise of the powers of the State and in making decisions affecting them.*** It is, therefore, the Constitutional expectation that counties will be the forums where public participation is perfected on some of the most pressing issues.[161]

On the basis of this observation, the Court held that when there is an issue about the prospecting and concessioning of minerals that could potentially affect the lives of the local community, the local county government must be consulted even if the project is a national government

[156]As above, para 34.
[157]As above.
[158]As above, para 64.
[159]As above.
[160]As above.
[161]As above, para 102.

project.[162] The Court observed that this is the logical consequence of the two-tier system of governance that the Constitution establishes.[163] The Court therefore ruled that the national government must, "as a consequence of the requirement of public participation, involve County Governments when it comes to negotiations for all contracts or partnerships to exploit natural resources".[164] The *Mui Basin* case establishes that realisation of the RTD is based on the national value of public participation, and that public participation is an expression of the sovereignty of the people established by article 1 of the Constitution.[165] Further, public participation is a justiciable constitutional right against which the validity of all public development projects can be determined.[166] Therefore, any public development project that fails to meet the threshold of public participation is unconstitutional and amenable to invalidation by the courts for violating the right to public participation and the RTD.

6.4.2 Legislative framework

To facilitate participation of the people in governance and decision-making as demanded by the Constitution, the legislature has passed four critical pieces of legislation and a Bill has been introduced in the Senate to give effect to the constitutional framework for public participation. These are the County Governments Act (CGA),[167] Public Finance Management Act (PFMA),[168] Urban Areas and Cities Act (UACA),[169] National Government Constituencies Development Fund Act (NGCDFA),[170] and Public Participation Bill (PPB).[171]

The CGA was enacted to give effect to chapter 11 of the Constitution on devolved government.[172] Part VIII of the CGA provides a framework for involvement of the people in county matters. Among the principles of public participation in counties that the CGA identifies are the timely access to information relevant to policy formulation and implementation;[173] reasonable access to the process of formulation and implementation of policy particularly the

[162]As above, para 104.
[163]As above.
[164]As above, para 106.
[165]As above, para 88.
[166]As above.
[167]Act 17 of 2012.
[168]Act 18 of 2012.
[169]Act 13 of 2011.
[170]Act 30 of 2015.
[171]Senate Bill 4 of 2018.
[172]CGA, preamble.
[173]As above, section 87(a).

approval of development proposals, projects and budgets;[174] protection and promotion of the rights of minorities and marginalised groups and safeguarding their right of access to information;[175] and the guarantee of redress for interested or affected persons with emphasis on traditionally marginalised groups including women, the youth and disadvantaged communities.[176] The CGA establishes modalities and platforms for the people to be involved in governance. This include, technology based platforms, town hall meetings, budget preparation and validation forums, development project sites, and citizen forums at county and decentralised units.[177] For public participation to be meaningful for a county and its constituents' development, the county governments are required to establish mechanisms to facilitate communication with the public and the public's access to information relating to their development.[178] For accountability purposes, the governor of each county is required to submit a report annually to the county assembly on the state of public participation in the affairs of the county government.[179]

The PFMA was enacted to provide for the effective management of public finances by the national and county governments.[180] The PFMA provides that in implementing it, regulations may be made to facilitate public participation in the management of public finances and participatory governance. The anticipated regulations may provide for: "structures for participation";[181] "mechanisms, processes and procedures for participation";[182] "public meetings and hearings";[183] "*special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups*";[184] "*matters with regard to which community participation is encouraged*";[185] and "rights and duties of members of community".[186]

[174]As above, section 87(b).
[175]As above, section 87(c).
[176]As above, section 87(d).
[177]As above, section 91.
[178]As above, sections 94-96.
[179]As above, section 92(2).
[180]PFMA, preamble.
[181] As above, section 207(a).
[182] As above, section 207(b).
[183] As above, section 207(e).
[184] As above, section 207(f). Emphasis added.
[185] As above, section 207(g). Emphasis added.
[186] As above, section 207(h).

The UACA was enacted to give effect to article 184(1)(c) of the Constitution, which requires that national legislation be enacted to provide for participation by residents in the governance of urban areas and cities.[187] The Boards created to run these cities and urban areas under section 13 of the UACA are under an obligation to ensure that residents participate in decision-making, and in the activities and programmes of their areas of jurisdiction.[188] The UACA empowers residents of an urban area or city to deliberate and make proposals to the relevant bodies on "the provision of services";[189] "proposed issues for inclusion in county policies and county legislation";[190] "proposed national law and policies";[191] "the proposed annual budget estimates of the county and of the national government";[192] "*the proposed development plans of the county and of the national government*";[193] and any other matter of concern to citizens".[194]

The NGCDFA establishes a National Government Constituencies Development Fund which supports development projects at the constituency level on matters that fall within the functions of the national government under the Constitution.[195] The projects supported must be community-based so as to ensure that the benefits that flow from them are available to wide cross-section of the inhabitants of a particular area.[196] A community is defined to mean "residents of a particular geographical area or region defined as a constituency, ward, location, sub-location or village and having common interests".[197] The objects of the NGCDFA are among other things, to: provide for public participation in determining and implementing identified national development projects at the constituency level;[198] "promote the national values of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized";[199] provide for sustainable development in Kenya;[200] provide a legislative and policy framework for the progressive realisation of socio-

[187] UACA, preamble.
[188] As above, section 21(1) (g).
[189] As above, section 22(1) (a) (i).
[190] As above, section 22(1) (a) (ii).
[191] As above, section 22(1) (a) (iii).
[192] As above, section 22(1) (a) (iv).
[193] As above, section 22(1) (a) (v). Emphasis added.
[194] As above, section 22(1) (a) (vi).
[195]NGCDFA, section 24(a). Part 1 of the Fourth Schedule to the Constitution sets out in detail the functions of the national government.
[196]As above, section 24(b).
[197]As above, section 2.
[198]As above, section 3(d). Kenya is divided into 290 constituencies for purposes of election of members of the National Assembly as provided for by article 89(1) of the Constitution.
[199]As above, section 3(e).
[200]As above, section 3(f).

economic rights;[201] provide for a public finance system that promotes an equitable society through expenditure that makes provision for marginalised groups and areas;[202] provide a framework for citizen-led development that assists the national government in planning and prioritising it resources;[203] and provide a platform for citizen participation in public service delivery.[204]

The Fund established by the NGCDFA consists largely of funds that are not less than 2.5% of the national government's entire share of revenue as divided by the annual Division of Revenue Act.[205] Disbursement of monies from the Fund is based on specific project request from the constituencies.[206] These projects are to be identified in open-forum public meetings held in every ward in the constituency where matters of development in the ward and constituency are deliberated in the first year of commencement of a new Parliament.

The PPB[207] seeks to provide a general framework for effective public participation and to give effect to the constitutional principles of democracy and participation of the people.[208] The principal objective of the proposed law is to give effect to all the constitutional provisions that are aimed at enhancing, promoting and facilitating public participation in governance processes.[209] The purpose of this provision is to enhance public awareness and community ownership of public decisions. The PPB proposes that public participation shall be guided by the principles that the public and communities affected by a decision shall have a right to be consulted and involved in the decision-making process, and that effective mechanisms for involvement of the public that would be affected by or interested in a decision will be provided.[210] To this end, participants shall have equal access to information that they need to meaningfully participate in decision-making, their views will be taken into consideration,

[201]As above, section 3(g). This legislation is meant to fulfil the constitutional requirement that the State shall take legislative measures to achieve the progressive realisation of the economic and social rights guaranteed under article 43 of the Constitution. See, Constitution of Kenya 2010, article 21(2).
[202]As above, article 3(i).
[203]As above, section 3(l).
[204]As above, section 3(n).
[205]As above, section 4(1)(a). Article 218(1) of the Constitution requires that at least two months before the end of each financial year, a Division of Revenue Bill is introduced in Parliament to divide revenue raised by the national government between the national and county levels of government.
[206]As above, section 5(2).
[207]The PPB is still proposed law awaiting passage by the Senate. See, Republic of Kenya, "Senate Bills-2018", <www.kenyalaw.org/kl/index.php?id=7937> (accessed 7 January 2019).
[208]PPB, preamble.
[209]As above, section 3.
[210]As above, section 4.

appropriate feedback mechanisms will be developed and sustainable decisions that recognise the needs and interests of the public will be promoted.[211]

The proposed law identifies authorities that will be responsible for the development of guidelines for conduct and oversight of public participation.[212] These are: for the Parliament, the relevant House committee of the National Assembly or Senate responsible for public participation;[213] for the judiciary, the Chief Justice;[214] for independent commissions or offices, boards, authorities or any other public body, the chief executive officers;[215] for government ministries, the cabinet secretary;[216] for county assemblies, the county assembly committee responsible for public participation;[217] and for county governments, the county secretary.[218] These responsible authorities are expected to develop specific guidelines for undertaking public participation within the institutions for which they are responsible.[219] These specific guidelines must include the general guidelines set out in the Schedule to the proposed law and any specific guidelines that are peculiar to the circumstances of their institutions.[220] Where the responsible authority fails to develop guidelines, the general guidelines shall apply as if they were the specific guidelines developed by that authority.[221] The responsible authorities are required to develop and publish specific guidelines on public participation within three months of commencement of the legislation.[222] The PPB places a duty on the responsible authorities to prepare annual reports within three months of the end of the financial year.[223] These reports shall describe all the activities and outcomes of public participation,[224] any complaints made against the institution in respect of public participation, action taken to remedy those complaints, and the period within which the complaint was addressed.[225]

[211]As above.
[212]As above, section 5(1).
[213]As above, section 5(1)(a).
[214]As above, section 5(1)(b).
[215]As above, section 5(1)(c).
[216]As above, section 5(1)(d).
[217]As above, section 5(1)(e).
[218]As above, section 5(1)(f).
[219]As above, section 6(1).
[220]As above, section 6(2).
[221]As above, section 6(3).
[222]As above, section 7(1).
[223]As above, section 8(1) and (2).
[224]As above, section 8(3)(a).
[225]As above, section 8(3)(b).

The Schedule to the PPB provides details of the nature of public participation envisaged by the proposed law. The responsible authorities are required to provide for reasonable and meaningful opportunities for public participation.[226] To determine what reasonable opportunity is, the responsible authorities shall consider the nature of the legislation or decision to be made,[227] the importance of the legislation or decision to be made,[228] and the intensity of the impact of the legislation or decision.[229] Before conducting public participation, the responsible authorities shall identify the purpose of the engagement, the level of engagement required, urgency of the matter, the number and circumstance of interested and affected parties, and the ability of the intended participants to access the necessary information and venue.[230] Adequate notice shall be given to the public so that they are able to participate. This notice shall be through a mechanism that has wide reach such as television stations, websites, community radio stations and traditional media such as newspapers.[231]

Stakeholders of any public participation process shall be afforded equal access to the process and opportunity to influence the intended decision,[232] measures will be taken to ensure that PWDs participate in decision-making,[233] and where the intended participants are not conversant with the national languages, provision will be made for interpretation for those people who wish to participate in their local language.[234] Additionally, before any public participation process is undertaken, the responsible authorities shall prepare a programme which identifies the specific purposes of the consultation, the target group to be consulted, the length of the consultation, whether submissions will be written, oral or both and the issues for consultation.[235] Thereafter, public participation will be undertaken within a realistic timeframe for consultation with reasonable time being allocated for each stage.[236]

In relation to documentation for the process, the responsible authorities shall ensure that the documents to be used in the consultation are simple and concise, provide summaries of issues

[226]PPB Schedule, clause 1(1).
[227]As above, clause 1(2)(a).
[228]As above, clause 1(2)(b).
[229]As above, clause 1(2)(c).
[230]As above, clause 3.
[231]As above, clause 4.
[232]As above, clause 5(1).
[233]As above, clause 5(2).
[234]As above, clause 5(3).
[235]As above, clause 6.
[236]As above, clause 8.

for consultation and clearly frame the questions to be addressed.[237] The responsible authorities should also publish and distribute the documents for consideration widely through among other means, hard copies, televisions, advertisements, websites, community radio stations and traditional media.[238] They must also ensure that the documents are published and distributed in a language and form that can be used by the public.[239]

The responses from the public shall be carefully and independently analysed and the final decision made widely available to the public together with the reasons for the decision made. There must be disclosure of all relevant information to assist the public understand and evaluate the decision.[240] Finally, the responsible authorities are under a duty to undertake and encourage action that builds trust and credibility in the public participation amongst the participants.[241]

The common principle of public participation in the legislation (including the proposed legislation), is that the public must be informed about decisions that affect them, they must be consulted and involved in the decision-making process, empowered to be involved in that process, and the State must collaborate with them in that process.[242] All these are principles enunciated in the *Endorois* case. In the *Endorois* case, the African Commission emphasised that a government must effectively consult with affected or interested communities on development issues and there must be an adequate consultation process for it to be considered as an effective process.[243] It is upon the State to consult the participants in a manner that allows for the participants to be fully informed of the decision to be made.[244] The Commission also emphasised that this right to active and meaningful participation flows from article 2(3) of the DRD.[245] The duty of ensuring effective participation of interested or affected people requires the State to accept and disseminate information pertaining to decisions to be made and to facilitate constant communication between the parties.[246]

[237]As above, clause 9.
[238]As above, clause 10(a).
[239]As above, clause 10(b).
[240]As above, clause 11.
[241]As above, clause 12.
[242]The Institute for Social Accountability (note 68 above) 8-9.
[243]*Endorois* case (note 103 above) para 281.
[244] As above, para 282.
[245]As above, para 283.
[246]As above, para 289.

The African Commission held that in this case, the consultation with the Endorois people was not adequate because the State did not obtain prior consent of the affected community before designating their land as a game reserve and consequently evicting them from it.[247] The Commission found that the government of Kenya had not impressed upon the Endorois community that they would be denied all rights of return to their land once it was designated as a game reserve, including access to grazing land and the medicinal slat licks for their cattle that were located in that land.[248] The State therefore is under a duty to not only consult the affected community "but also to obtain their free, prior and informed consent" to the decision being made.[249]

In the *Ogiek* case, one of the applicant's complaints was that the government of Kenya had failed to recognise the RTD of the Ogiek people and particularly their right to determine their development priorities and strategies, to be involved in economic and social programmes affecting them and to administer those programmes through their own institutions.[250] The government's response to this complaint was that the Ogiek community had been consulted through many means including through their elected representatives, several taskforces to review the legal framework designating their land as a game reserve, reports applicable to the situation and views of the public.[251]

The African Court held that indigenous people like the Ogiek had a right to determine and develop their development priorities and strategies for realising their RTD, and to be involved in the development of economic and social programmes affecting them.[252] The Court further held that as far as it is practicable, the Ogiek must be involved in the administration of those programmes through their own institutions.[253] The Court found "that the Ogieks have been continuously evicted from the Mau Forest by the [State], without being effectively consulted" and that those evictions had adversely affected their economic, social and cultural development.[254] Additionally, the Court found that the Ogiek had "also not been actively

[247]As above, para 290.
[248]As above.
[249]As above, para 291.
[250]Ogiek case (note 125 above) para 202.
[251]As above, para 206.
[252]As above, para 209.
[253]As above.
[254]As above, para 210.

involved in developing and determining health, housing and other economic and social programmes affecting them."[255]

The legislative measures set out above are very detailed and appear to fulfil Kenya's obligation under article 1(1) of the ACHPR which requires States Parties to adopt legislative measures to give effect to the rights it recognises such as the RTD. However, it is doubtful that these measures are adequate in giving effect to the RTD since Kenya has not adopted other measures such as institutionalising and carrying out civic education, so that Kenyans understand what public participation means and entails. In the Ogiek case, the African Court added the concept of "adequacy" to the duty to "adopt legislative and other measures" to give effect to rights. It is for failure to take "adequate" legislative and other measures that the Court found Kenya to have violated certain rights of the Ogiek people, among them the RTD.[256]

6.4.3 Implementation methods

The principles of public participation set out in the Constitution, legislation and the jurisprudence of the African Commission, the African Court and Kenya courts ought to guide implementation of public participation in Kenya. The discussion in the preceding section points to the fact that whereas the prescriptions of what amounts to effective public participation is known with certainty as evidenced by the case law, the methods of participation cannot be prescribed with precision and would depend on the circumstances of each case.

The South African jurisprudence on public participation has had influence on Kenyan jurisprudence, as the High Court has applied the reasoning of Van der Westhuizen J in the *Merafong* case when dealing with the question of public participation in public procurement. In *Republic v Independent Electoral and Boundaries Commission,*[257] the manner in which the supplier of election materials and ballot papers for the presidential election held on 8 August 2017 was sourced, was challenged on among other grounds that there had been no public participation as required by article 10 of the Constitution. The Court held that public participation plays a central role in the legislative, policy as well as executive functions of

[255]As above.
[256]As above, para 217.
[257](2017) eKLR.

government and that for these functions, government must craft and implement meaningful programmes of public participation and stakeholder engagement.[258]

The decision in the Merafong case was also relied upon in the *Mui Coal Basin* case, where the petitioners contested a concession made to a Chinese company on a project to explore coal deposits within the Mui Basin of Kitui County and determine if they were commercially viable. It was contended that the government had made the concession without adequate participation of the local community. In that case the High Court was called upon to determine if the consultation that had been undertaken amounted to public participation of the local community. The Court applied the reasoning in the *Merafong* case and held that the methods of public participation must be innovative and that for public participation to be sufficient, it must at the minimum entail the following six principles:[259]

i. Government has a duty to craft programmes of public participation that resonate "with the nature of the subject matter". In crafting the modalities of participation, government must consider "the quantity and quality of the governed to participate in their own governance".

ii. Public participation must be innovative and malleable "depending on the nature of the subject matter", culture of the people, logistical constraints and other factors. No single modality can be prescribed for determining if public participation has been achieved or not.

iii. Whatever method of public participation is adopted, "it must include access to and dissemination of relevant information".

iv. Public participation does not mean "that everyone must give their views on an issue". However, the process must be inclusive and diverse. Clear and intentional attempts to lock out *bona fide* stakeholders renders the public participation ineffective and illegal. The subsidiarity principle applies in determining inclusivity of the process so that in any process, the people affected most by a policy, legislation or action must have a

[258]As above, paras 189-190.
[259]*Mui Coal Basin* case (note 153 above) para 97.

bigger say in that policy, legislation or action and their views must be deliberately sought and considered.

v. While the right to public participation does not guarantee that every "individual's views will be taken as controlling" views, there is a duty on government to take into consideration all views in good faith.

vi. "The right of public participation is not meant to usurp the technical role" of government in decision-making but to enrich the views of its views on any matter with the views of those who will be most affected by the decision to be made.

The Court applied these six principles in determining that the public participation programme crafted for the coal mining project had met the threshold of public participation subject to continued engagement of the people as the project progressed until its conclusion.[260] On the basis of the evidence before it, the Court found that government had facilitated public participation in that the relevant ministry had organised regular public meetings to educate the local community on the importance and progress of the project, the ministry had hired staff from the local community to serve as a communication link between the ministry and the local community, the ministry had formed a Liaison Committee to represent the interest of the local community and the ministry had facilitated the Liaison Committee and other stakeholders such as government experts and parliament to visit the sourced company in China as part of due diligence.[261] The report of the due diligence visit showed that great insights had been gained by the delegation and many fears had been allayed about the Chinese investor who appeared to have sufficient capacity to extract coal and facilitate an integrated development of the coal industry in Kitui County.[262]

In response to this uncontroverted evidence, the petitioners alleged that the public participation undertaken was not adequate. The Court held that it was not possible to categorically determine in any case that public participation was adequate or sufficient. It stated that:

[260]As above, para 98.
[261]As above.
[262]As above.

> … the courts look at the *bona fides* of the public actor, the nature of the subject matter, the length and quality of engagement and the number of mechanisms used to reach as many people as possible. Looked at against these parameters it is difficult to say that the Government did not meet its burden to involve the public in the Coal Mining Project.[263]

The six principles set out in the *Mui Coal Basin* case therefore should guide the practice of conducting public participation in Kenya because the forms of facilitating an appropriate degree of participation is capable of infinite variation. As was stated by the Court in *Republic v County Government of Kiambu ex parte Robert Gakuru*,[264] "what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to reasonable opportunity will depend on the circumstances of each case".[265]

However, the prevalent practice has been that the State and State organs have invariably used newspaper advertisements as the preferred means of facilitating public participation. Those advertisements usually refer broadly refer to the constitutional requirements to involve the public in decision-making over various matters. Some advertisements usually set out details of when and where public hearings will be conducted but do not provide details on how to obtain the information necessary to meaningfully participate.[266] In other instances, the advertisements merely detail the nature of the decision to be made and the mode of submission of views by members of the public and stakeholders without making provision for public hearings.[267] It is important to note that no mention is made as to how the views presented will be processed and feedback given. These omissions are inconsistent with the duty to facilitate public participation. They appear illusory and are at best a perfunctory attempt to comply with constitutional requirements. This problem can be addressed through policy that sets out a detailed programme for the conduct of public participation.

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[263] As above, para 99.
[264] (2016) eKLR.
[265] As above, para 50.
[266] See for example the Standard Newspaper of 19 February 2019 which at page 11 carries an advertisement by the Mandera County Government inviting members of the public to give their inputs on its 2019 County Fiscal Strategy Paper (CFSP). The advertisement identifies the dates, timings and venues for proposed public hearings. Members of the public and interested stakeholders are provided with an email address at which to forward their views. The advertisement does not give details of how one can obtain the proposed CFSP.
[267] In the newspaper cited above, the National Assembly by advertisement invites members of the public to give their views on the Law of Contract (Amendment) Bill, 2019 through email or hand deliveries. The public is not informed on how to obtain copies of the Bill. No provision is made for public hearings.

6.5 Conclusion

The aim of this chapter was to examine the link between public participation and realisation of the right to development in Kenya. The right to participate in decision-making in the governance process is a fairly new legal concept in Kenya having found its first expression in the Constitution of Kenya 2010. It has been entrenched as a national value and principle of governance in article 10(2)(a) of the Constitution. It is one of the transformative features of the constitution which supports decentralised government which is intended to be a constitutional tool of development. It empowers the people through an elaborate constitutional framework to demand to be heard in the process of decision-making on matters that affect their lives.

Public participation entails the community organising itself in managing their problems within a constitutional and statutory framework that enjoins the government to facilitate such participation. The benefit of this is that quality and sustainable decisions on developmental issues can be arrived at because it involves the people who experience their own local problems and who are best placed to address them with the assistance of the State. At the same time, it places historically marginalised communities and groups at the centre of contributing to their development issue. It empowers them by giving them voice in decision-making and thereby facilitating their ability to live a dignified life in which they can realise their full human potential.

Public participation is therefore about processes of achieving development and not just about the outcomes. By engaging the people directly affected by developmental problems such as women, the youth, PWDs and marginalised communities, the outcomes are bound to benefit the wider society and not just a section of it. The State is under an international and domestic obligation to seek the views of the people on matters of development and this should be a continuous engagement which is transparent and accountable.

While there are no universally accepted models of how the public is to participate, the widely accepted position is that the people must be given a reasonable opportunity to be involved in decision-making. Since reasonableness is an objective standard, whether the public was given a reasonable opportunity to participate will depend on the nature of the decision being made and the circumstances within which it is being made such as time and financial constraints. But

whatever the circumstances, participation must be real and not a perfunctory exercise to fulfil constitutional or statutory obligations.

Public participation is an international human rights law concern as evidenced by its recognition in, inter alia, the UDHR, DRD and ACHPR. The objective of these instruments is to achieve social inclusion. The African Commission in the *Endorois* case and the African Court in the *Ogiek* case − both cases affecting Kenya − have emphasised the important role of public participation in the making of decisions that affect development and the necessity of the people being informed about the nature of the decisions that need to be made so that they are able to make informed decisions. The right to participation in Kenya must be understood in light of the *Endorois* and *Ogiek* decisions since article 22 of the ACHPR is part of Kenyan law by virtue of article 2(6) which makes treaties that Kenya has ratified to be part of Kenyan law. The right to participation is largely to be found in legislation that supports devolved government. Devolved government was meant to bring governance back to the people with a view to improving their livelihoods and wellbeing including promoting social economic development. The objectives of devolved governance in the constitution are in essence the foundation upon which realisation of the RTD will be built.

For the RTD to thrive, the public must have access to information about the decisions to be made by the State at all times. The people must be consulted and engaged continuously in a substantive way and not so as to merely fulfil legal obligations of the State. The main proposition in this chapter therefore is that public participation is a core right through which the RTD can be realised in Kenya.

Chapter 7: Conclusion − Realising the right to development in Kenya

7.1 Overview

This study sought to answer the following three questions: (i) what is the status of the RTD in international law? (ii) is the RTD recognised in Kenyan law and policy? and can poverty alleviation, anti-corruption and public participation interventions facilitate realisation of the RTD in Kenya? To answer these questions, the study interrogated, in respective chapters as set out below, the status of the RTD in international law and in Kenyan law and policy, and the way in which poverty alleviation, anti-corruption and public participation interventions can facilitate its realisation in Kenya.

Primarily, the study investigated the challenges that Kenya faces in realising the RTD, a right that, as the study ascertained, is established in international law and incorporated into domestic (Kenya) law and policy. The choice of the subject of the study was predicated on the fact that the Constitution of Kenya 2010 incorporates the general rules of international law and treaties that Kenya has ratified, into domestic law. This means that the DRD and ACHPR, that provide for the RTD, form part of the law of Kenya and the State is under an obligation to ensure its realisation for the benefit of its people. The study was also based on the assumption that realisation of the RTD in Kenya must be founded on freedom of Kenyan people from poverty and corruption, and the respect, promotion and fulfilment of their right to participate in decision-making.

The study began by introducing, in chapter 1, realisation of the RTD in Kenya as the problem under investigation and providing an understanding of the concept of development. The chapter also identified the abovementioned research questions that guided the study and set out the study's objectives. It further identified the scope of the study and its limitations, reviewed the available literature on the RTD in Kenya and on poverty, corruption and public participation, and described the research methodologies to be utilised.

In chapter 2, the study sought to establish the status of the RTD in international law (thus sought to answer the first research question). It discussed the evolution of the right at the UN and African regional levels. The nature of the RTD under the DRD and the ACHPR; particularly,

its content, subjects and duties were examined. The chapter established that the RTD is a human right recognised and protected in international law by the DRD and the ACHPR, amongst others.

The analysis and assessment of the RTD as a human right in international law in chapter 2 was utilised in chapter 3, with a view to determining whether the RTD is recognised in Kenyan law and policy (thus sought to answer the second research question). Against the background of chapter 2, the constitutional and policy basis of the RTD in Kenya was examined in chapter 3. The chapter examined the development of constitutional order in Kenya, and the protection of human rights in the four constitutional orders that were identified. The study then focused on the 2010 Constitution and KV2030 (a policy that supports the Constitution), with particular reference to the status of the RTD in domestic law. The chapter determined that the RTD is recognised by the Constitution and KV2030 and that its realisation in Kenya is dependent on addressing the challenges of poverty, corruption and public participation. These challenges were investigated in the next three chapters.

Chapters 4, 5 and 6 sought to answer the third research question. In chapter 4, the study examined the problem of poverty as a challenge to realisation of the RTD. It provided an understanding of the meaning and nature of poverty, investigated poverty as a human rights issue and discussed poverty as an obstacle to realisation of the RTD in Kenya. The chapter focused on education and health as critical sectors that play a central role in realisation of the RTD. It found that poverty is a denial of the totality of human rights, and particularly of the RTD. It also found that the rights to education and health are basic minimums required to combat poverty in Kenya, and hence realisation of the RTD. Chapter 5 addressed the problem of corruption and provided an understanding of the meaning of corruption found in the UNCAC, AUCPCC and Amended African Court Protocol. It identified corruption as a violation of human rights, especially the RTD. It examined the Kenya experience with the issue of corruption both before and after the promulgation of the 2010 Constitution. The chapter established that combating corruption is critical for realisation of the RTD in Kenya. In chapter 6, the study examined the concept of public participation. It provided an understanding of the meaning of public participation, its purpose and value, and nature and forms. The chapter established that public participation is a human rights issue and that it is a necessary means for realising the RTD in Kenya. The chapter also outlined Kenya's experience with implementation of public participation.

This final chapter summarises the main findings in the substantive chapters and then advocates for the realisation of RTD in Kenya through poverty alleviation, anti-corruption and public participation interventions. The prescription made for realisation of the RTD through the three interventions are based on Kenya's international law obligations and the provisions of the 2010 Constitution.

7.2 Research findings

7.2.1 The RTD in international law

At the UN level, the RTD is principally a creation of the DRD. The DRD recognises the RTD as an inalienable human right which entitles every human person and all peoples to participate in development, to contribute to it, and to enjoy economic, social, cultural and political development. When every human person and all peoples enjoy economic, social, cultural and political development, all human rights and fundamental freedoms are fully realised. The RTD recognised by the DRD has its genesis in the UN Charter. The UN Charter states that one of the principal objectives of the UN is to achieve international cooperation in finding solutions to economic, social, cultural and humanitarian problems. The international cooperation anticipated by the UN Charter is expected to promote and encourage respect for human rights and fundamental freedoms for all without any discrimination. The UN Charter also seeks international economic and social cooperation that creates stability and well-being of the peoples of member States through the "promotion of higher standards of living, employment and economic and social development."[1]

The RTD recognised by article 1 of the DRD is a human right that is inalienable, that relates to a process of economic, social, cultural and political development, and entitles everyone and all peoples to participate in, contribute to, and enjoy the development process. The preamble to the DRD describes the development process as being a process that aims at the constant improvement of the well-being of everyone based on their active, free and meaningful participation in the process, and the fair distribution of the benefits that result from development.[2] Article 1(1) of the DRD identifies the human person and all peoples as being the right-holders of the RTD. The RTD is therefore both an individual and collective right

[1]Chapter 2 above, 24-26.
[2]As above, 34.

under the DRD. Article 2(1) however clarifies that the human person is the central subject of the RTD, who must be an active participant in, and beneficiary of the right. The clarification of the human person as being an active participant and beneficiary of the RTD is important because collectivities act through their individual members and collective rights are meant to benefit the collectivity in question generally, and the individuals who belong to it.[3]

Because the RTD is cast as a human right by the DRD, correlative duties to respect, protect and fulfil it are thereby created. These duties are the responsibility of a duty-bearer. As elaborated by the CESCR, the duty to respect means that the duty-bearer shall refrain from interfering with the rights of the right-holder, the duty to protect means that the duty-holder shall take measures to ensure that third parties do not interfere with the rights of the right-holder, and the duty to fulfil means that the duty-bearer will take action to ensure that the right-holder enjoys his rights.[4] The DRD identifies the duty-bearers of the RTD as being individual persons and the State. Article 2(2) places a duty on individuals, both individually and collectively, to take responsibility for realisation of the RTD by respecting the rights of others. Article 3 clarifies that the State bears the primary duty to create national and international conditions favourable to realisation of the RTD. Article 3(3) anticipates cooperation between States so at to realise the RTD. Such cooperation is meant to ensure development and eliminate any obstacles to it. Article 2(3) requires the State to develop appropriate national policies that are aimed at realising the RTD through the constant improvement of the well-being of its people. Article 6 places a duty on the State to eliminate obstacles to development brought about by failure to observe economic, social and cultural rights which are essential to realisation of the RTD. Finally, article 8 requires that at the national level, the State shall take measures to encourage popular participation in the development process.[5]

When the idea of a human RTD was mooted, it faced many objections especially at the UN level. One of the arguments advanced against the RTD as a human right under the DRD is that the DRD is not a legally binding instrument capable of judicial enforcement. However, judicial enforcement is not the only mechanism available for the implantation of human rights. Human

[3]As above, 35-36.
[4]As above, 36-37.
[5]As above, 38

rights can be realised outside the judicial process through such means as reporting procedures at the international level and implementation of State policy at the domestic level.[6]

At the African regional level, article 22 of the ACHPR establishes a legally binding human right of all peoples to their economic, social and cultural development. It creates a duty on States Parties, individually and collectively, to ensure exercise of the right. The ACHPR, unlike the DRD, does not elaborate on the concept of development that is to be claimed as a human right.[7] This lacuna has been filled by the jurisprudence of the African Commission and the African Court which have elaborated on the content of the RTD. In the *Endorois* case, the African Commission observed that development was not simply a matter of the State providing material things for its people, but about providing them with the ability to choose how to live. It declared that freedom of choice is part of the RTD. Therefore, it is the duty of the State to allow people to participate in the making of decisions that affect the development of their communities. Drawing from article 2(3) of the DRD that the RTD includes active, free and meaningful participation in development, the Commission concluded that the result of development must be empowerment of the people and the improvement of the capabilities and choices. The *Ogiek* case further emphasised that the beneficiaries of the RTD must be consulted and involved in the development process. From the two cases, it can be concluded that the critical components of the RTD under the ACHPR are participation of the beneficiaries of the RTD in the development process, constant consultation between the State and the beneficiaries on development matters that affect them and consent of the people to State action that affects their well-being and ability to choose their development priorities.[8]

Article 22 of the ACHPR identifies the right-holders of the RTD as being "all peoples". The ACHPR does not define the term "peoples". Drawing from the work of a group of international law experts commissioned by UNESCO on the issue of peoples' rights, the African Commission in the *Endorois* case concluded that a "people" means a group of people who manifest characteristics such as "a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity and ideological affinities, territorial connection, and a common economic life." The Commission was therefore of the view that the term "peoples" related to collective rights and that the collective rights protected by the ACHPR can be

[6]As above, 38-39.
[7]As above, 40.
[8]As above, 40-43.

exercised by a group of "people bound by historical, traditional, racial, ethnic, cultural and economic" identities, among other bonds. Accordingly, the RTD guaranteed by the ACHPR is a right of peoples to development with due regard to their freedom and identity as indigenous peoples, minorities, pastoralists and people with a common economic bond, among other groups that have a common identity.[9]

With respect to duty-bearers, article 1 of the ACHPR places a general duty on the State to recognise the rights that it protects, including the RTD, and take legislative and other measures to give effect to those rights. According to the African Commission, the measures envisaged include constitutional rights and institutions, legislative, policy and budgetary measures, educational and public awareness, administrative action, and judicial and administrative remedies. In the *Ogiek* case, the African Court qualified this duty by holding that it is not sufficient for the State to merely take these measures, but that the measures taken must be adequate to give effect to the RTD.[10]In addition to the general duty in article 1, article 22 creates a primary duty for the State, individually and collectively, to ensure realisation of the RTD. In the *Endorois* case, the African Commission held that the State bears the responsibility of ensuring a peoples' development by creating conditions that are favourable to development. The State is also under a duty to ensure that beneficiaries of the development process are not left out of the process or the benefits that accrue from it. Chapter II of the ACHPR also creates duties for individuals with respect to realisation of the rights it protects, including the RTD. Article 27(1) implicitly creates a duty for the individual to ensure realisation of the RTD. It provides that an individual has a duty towards his "society, the State, other legally recognised communities and the international community" to ensure the enjoyment of human rights by others.[11]

The foregoing summary leads to a finding that the RTD is a human right recognised as such in international law by the DRD and ACHPR. It has correlating State obligations which are binding on Kenya because Kenya is a State Party to the ACHPR. However, in the *Endorois* and *Ogiek* cases, the African Commission and the African Court respectively, found Kenya to be in violation of its obligations under the ACHPR to give effect to the RTD.

[9]As above 44.
[10]As above, 45-46.
[11]As above, 47-48.

7.2.2 The RTD in Kenya

The Constitution of Kenya 2010 has been described as a transformative document which seeks to address past social injustices and lay a foundation for a society founded on the idea of human rights, welfare and empowerment. It is described as a transformative constitution against the background of previous constitutional orders which did not place a premium on human rights. The 2010 Constitution is the product of popular grievance against previous constitutional orders and a protracted law-making process. The framers of the Constitution had in mind the different status of people in society and therefore put in place mechanisms to protect the weak from being overrun by those with ability. In that regard, the Constitution introduces an extensive BoR that protects the economic, social, cultural, civil and political rights of Kenyans. To supplement the BoR, the Constitution spells out national values and principles of governance which bind all State organs, State officers, public officers and all persons when they apply or interpret it; enact, apply or interpret any law; or make or implement public policy decisions. Among the values identified and which are core to the RTD are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.[12]

The 2010 Constitution is supreme and binds all persons and all State organs at the national and county levels of government. For the first time in Kenya's constitutional order, it unequivocally imports general rules of international law and treaties that Kenya has ratified into Kenya's legal system and declares that they form part of the law of Kenya. The Constitution also provides that the BoR does not exclude rights and fundamental freedoms that are recognised or conferred by law, as long as they are consistent with it. This means that the DRD and the ACHPR are part of the law of Kenya and the RTD that they recognise is therefore a human right recognised by the BoR. The RTD is therefore recognised by the Constitution at three levels. First, in terms of article 2(5), the general principles of international law, such as the DRD are part of the law of Kenya. Second, under article 2(6), all treaties that Kenya has ratified such as the ACHPR, form part of the law of Kenya. Finally, under article 19(3), the BoR incorporates rights that it does not expressly recognise, as long as they are recognised or conferred by other law that is not inconsistent with the Constitution. This provision implicitly recognises the RTD. These

[12]Chapter 3 above, 70-71.

findings are confirmed by the decisions of the High Court in *Re Zipporah Wambui Mathara, Gathungu v Attorney General*, and in *Beatrice Wanjiku v Attorney General*.[13]

With respect to duty-bearers, the obligations of States to realise the RTD identified in chapter 2 of this thesis apply to Kenya because the DRD and the ACHPR are part of the law of Kenya as demonstrated above. In addition to the international law obligations, article 21 of the Constitution makes it a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms enshrined in the BoR. Also, by virtue of article 19(3), the RTD is a right known to Kenyan law and it binds the State under article 21. Article 21 also implicitly places a duty on the State to fulfil the RTD by calling upon it to address the needs and vulnerable groups in society and to enact and fulfil legislation that enables fulfilment of Kenya's international obligations in respect of human rights and fundamental freedoms.[14]

Finally, article 28 of the Constitution impliedly recognises the RTD by providing that every person has inherent human dignity and the right to have that dignity respected and protected. The respect for human dignity is a core value of the RTD. In the case of *Susan Kariuki v Nairobi City Council*, the Court held that when interpreting the BoR, it was under a duty to interpret it in a manner that promotes an open and democratic society that is based on human dignity.[15]

The RTD is also implicitly recognised in the policy statements of KV2030. KV2030, the long-term development plan covering the period 2008-2030, provides a framework within which the RTD can be realised. It seeks to create a country that is globally competitive and prosperous with a high quality of life by year 2030. The policy detail of KV2030 is based on three pillars: economic, social and political. The economic pillar's objective is to ensure that Kenyans become prosperous through economic development marked by a GDP growth rate of 10 per cent over the plan period. Its social pillar seeks to build a just and cohesive society through interventions in health, education, water and sanitation, youth and vulnerable groups, equity and poverty elimination. Finally, the political pillar is about realising democratic governance

[13]As above, 74
[14]As above, 75-76.
[15]As above.

based on the rule of law, human rights and fundamental freedoms. This policy detail implicitly recognises the RTD and lays a basis for its realisation.[16]

The RTD is therefore recognised by Kenya law and policy. It applies directly through the ACHPR and the DRD which are part of the law of Kenya, and implicitly, as a right conferred by other law under article 19(3) of the Constitution and the policy statements of KV2030.

7.2.3 Poverty and the RTD

Poverty has been acknowledged as a human rights concern internationally by the ILO. At its General Conference of 1944, the ILO reaffirmed that one of the fundamental principles on which it was founded was the realisation that poverty in any one place constitutes a danger to prosperity everywhere. The ILO drew a connection between poverty and human rights by recognising that the fight against want must be aimed at the promotion of the common welfare of people.[17]

At the UN level, the UDHR gives a more direct affirmation that poverty is a human rights issue. Paragraph 2 of the preamble to the UDHR sets the standard of freedom from want as being one of the highest aspirations of people. Article 25(1) then provides for the right of everyone to an adequate standard of living that guarantees his health and well-being together with that of his family. Common paragraph 3 to the preambles of the ICCPR and the ICESCR further confirms that poverty is a human rights issue. It acknowledges the ideal of freedom from want set out in the UDHR and declares that that ideal can only be achieved where conditions are created within which everyone can enjoy their civil and political rights as well as their economic, social or cultural ones.[18] It can therefore be concluded that since the ICCPR and the ICESCR are products of the UDHR, poverty is a violation of the rights that the two instruments proclaim.[19]

Further support to the view that poverty is a violation of human rights is to be found in article 11 of the ICESCR. Article 11(1) creates an obligation on States to recognise the right of everyone to an adequate standard of living. This right extends to the family of the right-holder

[16]As above, 80-81.
[17]Chapter 4 above, 90.
[18]ICCPR and ICESCR, preamble common para 3.
[19]As above, 91.

and include the rights to adequate food, clothing and housing and to the continuous improvement of living conditions. States are also required under article 11(2) to recognise the right of everyone to be free from hunger. The ICESCR therefore implicitly recognise a right to be free from poverty. The CESCR in its statement adopted on 4 May 2001 also confirmed that poverty is a denial of human rights.[20]

At the African regional level, the ACHPR declares that at the time of its adoption member States were convinced of the need to pay particular attention to the RTD and that all human rights were interdependent in their conception and universality. States Parties also affirmed that they would adhere to the principles of human and peoples' rights contained in the instruments adopted at the UN level. This means that although the ACHPR does not explicitly refer to freedom from want in any of its provisions, it implicitly recognises that poverty is a human rights issue in the same manner as the UDHR, ICCPR and ICESCR.[21]

In Kenya, the primary development goal since independence has been the achievement of an all-inclusive and sustainable improvement in the well-being of Kenyans through among other things, poverty reduction. This is evident in the poverty alleviation strategies developed in the National Development Plan of 1966, the National Poverty Eradication Plan, the Interim Poverty Reduction Strategy Paper of 2000, the Poverty Reduction Strategy Paper of 2001, the ERS of 2003 and KV2030. In addition, the Constitution emphasises that Kenya will be governed through national values and principles that include protection of marginalised groups such as the poor. The courts have upheld this value in relation to poverty and people living in poverty in the cases of *Mitu-Bell v Attorney General*, *Ibrahim Osman v Minister of State for Provincial Administration* and *Mwai v Kenya National Examinations Council*.[22]

In its first report to the African Commission on its obligation under the ACHPR, the government of Kenya acknowledged that poverty is a major obstacle to fulfilment of basic needs and realisation of the potential of many Kenyans, particularly women and children. The challenge of fulfilling these needs and realising the potential of Kenyans has been occasioned by poor economic governance, corruption and inequitable allocation of resources which impedes poverty alleviation programmes. In KV2030, the government also recognises that

[20]As above.
[21]As above, 91-92.
[22]As above, 94-99

since independence, poverty has been a problem that affects Kenya's development agenda. It attributes the problem of poverty to inequalities in the enjoyment of human rights particularly access to education, healthcare and land. While noting that considerable progress has been made in resolving these problems, a lot more needs to be done to provide Kenyans with equal opportunities to realise their potential in life. Consequently, KV2030 aims at creating a just and equitable society without extreme poverty. The CESCR has raised concern about the high number of people living in poverty in Kenya and recommended that poverty reduction be intensified to take care of the most disadvantaged and marginalised in society[23]

The RTD in Kenya can therefore be realised through enforcement of article 10(2)(b) of the Constitution of Kenya, 2010 to ensure protection of the disadvantaged and marginalised, among them the poor. As has been observed by the High Court, the success of the Constitution is dependent on the State delivering tangible benefits to the disadvantaged and marginalised in society by dealing with issues of poverty, among other things.[24] The Constitution can deliver those tangible benefits by ensuring the rights to education and health of the poor are protected, respected and fulfilled.[25]

7.2.4 Corruption and the RTD

There is a link between corruption and human rights because it diverts public resources that are meant to enable people live a life of dignity, especially through the realisation of economic, social and cultural rights, and thereby entrenches poverty. Corruption therefore hinders a State's ability to fulfil its obligation to respect, protect and fulfil the human rights of its people and makes the State inefficient in governance. Without an efficient State, the realisation of sustainable economic and social development is impossible. Further, human rights grant people the right to live in dignity through enjoyment of economic, social and cultural rights. The enjoyment of these rights enables people to develop and prosper. Corruption is however an obstacle to the full realisation of basic rights.[26]

[23]As above, 100-101.
[24]As above, 115.
[25]As above, sections 4.4.1 and 4.4.2.
[26]Chapter 5 above, 125-128.

In international law, the UNCAC and the AUCPCC are indicative that corruption is a human rights issue. The UNCAC has implicit recognition of this fact because while it does not directly link corruption and human rights, the principles on which it is founded such as integrity, transparency and accountability are human rights principles. At the African regional level, the AUCPCC on its part explicitly identifies corruption as a human rights issue. It declares one of its objectives as being to facilitate socio-economic development through the removal of obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights.[27]

Article 10(2)(c) of the Constitution of Kenya 2010 invokes the language of the UNCAC in declaring that good governance, integrity, transparency and accountability are national values and principles of governance. This provision was included in the Constitution because it was recognised that corruption in the public service had brought governance into disrepute and impeded development in Kenya since independence. In addition, the protection of human dignity lies at the core value of the BoR and the protection human dignity is critical to realisation of the RTD.[28]

The constitutional values and principles of good governance, integrity, transparency and accountability are given a human rights backing by various provisions of the BoR. Article 19(1) declares that the BoR is an integral part of Kenya's democratic State. It is also a framework for Kenya's economic, social and cultural policies. This provision must be read together with article 19(2) which recognises that the BoR is important for purposes of protecting human rights and fundamental freedoms, and in preserving the dignity of individuals and communities. This means that the BoR plays an important role in promoting social justice and the realisation of the potential of all people. In order to meet the obligations to observe, respect, protect, promote and fulfil human rights under article 21(1), the State must take measures to ensure the realisation of human rights. Those measures must ensure that public resources meant for that purpose are not diverted to private hands.[29]

In terms of enforcement of anti-corruption law, the courts have appreciated that when applying the law, they are bound by the values and principles of national governance set out in article

[27]As above, 131-132.
[28]As above, 146-147.
[29]As above, 147.

10 of the Constitution. They have held that the Constitution has an anti-corruption theme that runs through it. However, they have failed to give weight to the human rights link to anti-corruption law that is also found in the said article. This was evident in the cases of *Ethics & Anti-Corruption Commission v National Cereals & Produce Board* and *Kamau v Ethics & Anti-Corruption Commission*. The human rights approach to combating corruption has been useful in India and South Africa, as demonstrated in the cases of *State of Maharashtra v Balakrishna Kumbhar* and *Lebogang Phillips v The State* respectively. Despite elaborate legislation to support the anti-corruption theme of the Constitution, corruption is still pervasive in Kenya and hinders realisation of the RTD. This concern has been raised by the CESCR pervasive corruption in Kenya's public service that threatens realisation of human rights. It has therefore recommended that the government strengthens anti-corruption strategies so that State funding for development increases both at the national and county levels.[30]

By virtue of article 2(6) of the Constitution, the UNCAC and AUCPCC are part of the law of Kenya since Kenya has ratified them. The AUCPCC, for example, places a duty on Kenya to realise the RTD in Kenya by promoting socio-economic development and removing all obstacles to enjoyment of human rights, including the RTD. The State must ensure that it meets its obligations under the UNCAC and AUCPCC as well as those imposed by the Constitution with respect to corruption.

7.2.5 Public participation and the RTD

Public participation has been recognised as a human rights issue at both the UN and African regional level. At the UN level, it finds recognition in the UDHR which protects the right to take part in one's government. This right is expansive and goes beyond mere participation in periodic elections. It includes participation at all levels of government to safeguard good governance. The ICCPR protects the right of every citizen to take part in the conduct of public affairs either directly or indirectly. This includes participation in public matters that relate to development. The ICESCR has no express provisions on public participation. However, the CESCR in a number of its general comments has stated that public participation is a central principle of development. The CESCR has also demanded that in the development of national plans to give effect to the rights to education, health, food, water and work, there must be input

[30]As above, 151-152.

from the public. These rights are fundamental for realisation of the RTD. The DRD on its part, is explicit that development is a process in which the individual is a beneficiary and must actively, freely and meaningfully participate in that process.[31]

At the African regional level, the ACHPR explicitly protects the right of every citizen to freely participate in the government of his country either directly or indirectly. While article 22 which provides for the RTD does not explicitly deal with the issue of public participation, the jurisprudence of the African Commission and the African Court establishes it as an integral component of the RTD. In the *Endorois* case, the African Commission held that participation is a key component of the RTD which required consultation of the beneficiaries of development in the development process and in decision-making. The Commission invoked article 2(3) of the DRD which provides that participation must be active, free and meaningful. It went on to hold that participation must result in empowerment of the people and the expansion of their capabilities and choices. The African Court reached a similar decision in the *Ogiek* case.[32]

In Kenya, the Constitution does not provide a framework for public participation at the national level, but article 174 sets out the basis for such participation at the County level. The framework for participation at the County level has been given effect through legislation namely the CGA, PFMA, UACA and NGCDFA. Legislation proposed by the PPB seeks to provide a detailed framework for public participation generally both at national and county levels. In the absence of specific legislation on public participation, the Courts have declared that they have a duty to establish how public participation is to be carried out. In the *Mui Coal Basin* case, for example, the Court developed six principles that help in establishing if public participation is sufficient to meet the constitutional expectations of meaningful involvement of the public in development matters.

By virtue of article 2(5) and (6) of the Constitution, the principles of public participation in the UDHR, ICCPR, ICESCR, DRD and ACHPR form part of the law of Kenya. Those provisions complement public participation as a value and principle of governance set out in article 10 of the Constitution. From the jurisprudence of the African Commission and the African Court, it

[31] Chapter 6 above, 168-172.
[32] As above, 174-177.

is evident that public participation is a fundamental condition for realisation of the RTD generally and Kenya in particular.

7.3 Conclusion

This thesis has established that the RTD is a human right in international law and that it is recognised in Kenyan law and policy. It has demonstrated that through treaty law and principles of international law that are incorporated into Kenyan law by the Constitution, Kenya has assumed international obligations to ensure realisation of the RTD in Kenya. It has also established that the State has duties under the 2010 Constitution to facilitate realisation of the right. The thesis also establishes that poverty and corruption are obstacles to, and violations of, the RTD. Further, it finally finds that public participation is necessary for realisation of the RTD.

By weaving through Kenya's international law obligations, its constitutional duties under the 2010 Constitution as supported by legislation and elaborated by case law, opportunities for realising the RTD in Kenya have been shown. The findings in the thesis are based on the principles and law relating to the RTD generally and are intended to provoke further research on realisation of specific aspects of the RTD particularly with respect to historically marginalised and disadvantaged groups such as women, children and PWDs. They are also intended to provoke future research on other social services beyond education and health such as the right to work, and social security and assistance which are also important for poverty eradication and hence realisation of the RTD.

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