

**HUMAN RIGHTS AND ECONOMIC SYSTEMS:  
KENYA'S ECONOMIC POLICY AND THE REALISATION OF SOCIO-  
ECONOMIC RIGHTS**



**UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
YUNIBESITHI YA PRETORIA**

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by

Asihina Nenga Msumi

u21805408

prepared under the supervision of  
Professor Kwadwo Appiagyei-Atua

(University of Ghana)

and

Professor Magnus Killander

(University of Pretoria)

29 October 2021

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## **DEDICATION**

To my dad, **D** Ai Mwatenguri Msumi.

## ACKNOWLEDGMENT

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## Table of Contents

PLAGIARISM DECLARATION . . . . .	i
DEDICATION . . . . .	ii
ACKNOWLEDGMENT . . . . .	iii
ACRONYMS . . . . .	vi
CHAPTER ONE – INTRODUCTION . . . . .	1
1.1. Introduction . . . . .	1
1.2. Problem statement . . . . .	2
1.2.1. What is economic policy? . . . . .	2
1.2.2. Economic policy and socio-economic rights – the nexus . . . . .	3
1.2.3. Realisation of socio-economic rights in Kenya . . . . .	6
1.3. Research question . . . . .	9
1.4. Research methodology . . . . .	9
1.5. Literature review . . . . .	9
1.5.1. Economic policy and human rights in Kenya . . . . .	11
1.6. Scope and limitations . . . . .	14
1.7. Structure . . . . .	15
CHAPTER TWO – THEORETICAL AND LEGAL FRAMEWORK . . . . .	16
2.1. Introduction . . . . .	16
2.2. Theoretical framework . . . . .	16
2.2.1. Economic democracy . . . . .	16
Schweickart’s economic democracy . . . . .	17
Cunbers’ economic theory . . . . .	19
2.2.2. African economic humanism . . . . .	21
2.3. Legal Framework . . . . .	23
2.3.1. Municipal legal framework for socio-economic rights in Kenya . . . . .	24
2.3.2. International framework applicable to Kenya . . . . .	26
2.3.3. State obligations . . . . .	28
2.3.4. Human rights framework for economic policy in Kenya . . . . .	29
Progressive realisation . . . . .	32
Non-retrogression . . . . .	33
Maximum available resources . . . . .	33
Minimum essential levels / minimum core obligations . . . . .	34

Equality and non-discrimination . . . . .	35
2.4 Conclusion . . . . .	35
CHAPTER THREE – KENYA’S ECONOMIC POLICY AND THE REALISATION OF SOCIO-ECONOMIC RIGHTS . . . . .	37
3.1 Introduction . . . . .	37
3.2 Brief background of economic policy in Kenya . . . . .	37
3.3 The 2010 constitution and economic policy . . . . .	40
3.4 Vision 2030 – Kenya’s development blueprint . . . . .	43
3.5 The Third Medium Term Plan - The Big Four Agenda . . . . .	45
3.5.1 Macroeconomic plan under the MTP III . . . . .	46
3.6 Implications of the economic policy for the realisation of socio-economic rights in Kenya . . . . .	47
3.6.1 Fiscal policy . . . . .	47
3.6.2 Debt policy . . . . .	49
3.6.3 Reflections on the economic system . . . . .	50
Developmental rather than human rights approach . . . . .	51
GDP and trickle-down growth . . . . .	52
3.7 Conclusion . . . . .	52
CHAPTER FOUR - CONCLUSION AND RECOMMENDATIONS . . . . .	54
4.1 Introduction . . . . .	54
4.2 Recommendations . . . . .	55
4.2.1 Incorporate a rights-centred rather than developmental approach to progress . . . . .	55
4.2.2 Reform fiscal policy to align with socio-economic rights aims . . . . .	56
4.2.3 Reform debt policy and pursue monetary sovereignty . . . . .	58
BIBLIOGRAPHY . . . . .	59

## ACRONYMS

ACHPR	African Commission for Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRLR	African Human Rights Law Reports
CEQ	Commitment to Equity
CESCR	Committee on Economic, Social and Cultural Rights
COK	Constitution of Kenya
COVID	Coronavirus Disease
CRC	Committee on the Rights of the Child
EU	European Union
GDP	Gross Domestic Product
GNI	Gross National Income
GOK	Government of Kenya
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IMF	International Monetary Fund
KLR	Kenya Law Reports
KNBS	Kenya National Bureau of Statistics
KNDR	Kenya National Dialogue and Reconciliation
MMT	Modern Monetary Theory
MTP	Medium Term Plan
SERAC	Social and Economic Rights Action Centre
TWAIL	Third World Approaches to International Law
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax

## CHAPTER ONE – INTRODUCTION

Socio-economic rights are by their very nature ideologically loaded. The realisation of these rights involves the making of ideological challenges which, among others, impact on the very nature of the country's economic system

Justices J Gacheche, GM Dulu and AO Michelule in  
*John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others*<sup>1</sup>

### 1.1 Introduction

Socio-economic rights, which include education, social security healthcare and an adequate standards of living, are at the heart of human dignity and well-being. The realisation of socio-economic rights requires 'equitable economic systems [which] are vital to secure the resources necessary to realise human rights, address inequality and make communities, societies and countries resilient to crises'.<sup>2</sup>

This is even more important now as the world in general, and Kenya in particular, grapple with multiple emergencies, including the coronavirus disease (COVID-19) pandemic and the climate crisis. The onslaught of the COVID-19 pandemic caused the entire economy to grind to a halt as school closures and restrictions on movement were introduced and enforced, resulting in loss of livelihoods and millions of people pushed into poverty and precarity.<sup>3</sup> With respect to climate change, in Kenya in recent decades, 'long rains have been declining continuously ...and droughts have become longer and more intense ...'.<sup>4</sup> Experts are warning about a range of looming social, environmental and economic impacts as a result of the extreme changes, including increasing frequency of droughts, and the rising sea levels which will not only affect the marine life but also lead to the submerging of about 17% of the area at Kenya's coast.<sup>5</sup> This will lead to increased food insecurity, internal displacement and conflict among communities.

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<sup>1</sup> *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* (2011) Petition 15 of 2011 eKLR (High Court of Kenya).

<sup>2</sup> A Graham 'The COVID-19 pandemic and its impact on economic, social and cultural rights - Opportunities and avenues out of the crisis' (2021) 6 <https://www.gj-escr.org/publications/will-the-pandemic-force-the-shift-gj-escrs-new-publication-on-opportunities-and-avenues-out-of-the-covid-19-crisis> (accessed 25 October 2021).

<sup>3</sup> World Bank Group 'Socioeconomic Impacts of COVID-19 in Kenya on households: Rapid response phone survey, round 1' (2021).

<sup>4</sup> Government of Kenya (GOK) 'National climate change action plan (Kenya): 2018-2022' (2018) 11.

<sup>5</sup> As above 12 – 14.



Human rights can provide a conceptual framework, vocabulary and normative standards to inform economic theory and policies.<sup>6</sup> This also makes it instrumental in evaluating existing economic systems and policies (defined in the Problem Statement below), and reimagining alternative economic approaches that facilitate rather than undermine the realisation of socio-economic rights. The goal is that all policies centre the realisation of these rights.<sup>7</sup>

## 1.2 Problem statement

### 1.2.1 What is economic policy?

Economic policy refers to ‘the set of controls used by the government to control economic activity’ and includes monetary, fiscal and trade policies.<sup>8</sup> Related to this, the economic system is ‘part of the social system composed of institutions and customs related to the production, distribution, and consumption of goods and services’, characterised significantly by the property rights regime and extent of economic planning.<sup>9</sup> Examples of economic systems include capitalist, socialist, mixed systems.

The aim of strong economic policy is often economic growth and development. According to Dear den, growth and development are similar concepts, with economic development being the ‘sustained increase in the economic standard of living in a country’s population’ and economic growth defined as ‘the increase over time in the capacity of an economy to produce goods and services (ideally) to improve the well-being of its citizens’.<sup>10</sup> Dear den’s understanding of growth and development differs from definitions of economic growth which focus on gross domestic product (GDP) and gross national income (GNI) figures, embedding the neoclassical approach to economies (which is the basis for neoliberal policy),<sup>11</sup> and instead takes economic development as

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<sup>6</sup> Institute for Economic Justice et al ‘Building a field of economics and human rights: lessons from South Africa’ (2021) 7.

<sup>7</sup> As above 23.

<sup>8</sup> J Black et al *A Dictionary of Economics* (2009) <https://www.oxfordreference.com/view/10.1093/acref/9780199237043.001.0001/acref-9780199237043-e-3588?rskey=CEpWHD&result=889> (accessed 12 August 2021).

<sup>9</sup> As above.

<sup>10</sup> A Dear dorff *Terms of Trade: Glossary of International Economics* (2014) 122.

<sup>11</sup> R Bal akrishnan & D El son ‘Auditing economic policy in the light of obligations on economic and social rights’ (2008) 5 *Essex Human Rights Review* 2.

economic transformation resulting in better ‘well-being and economic capabilities’ of the people.<sup>1 2</sup> On its part, neoliberalism is characterised by the ‘expansion of markets and individualism which has led to increased rights, mobility and freedoms for corporations, and a corresponding reduction in collective action, state regulation and government intervention in the economy’.<sup>1 3</sup>

## 1.2.2 Economic policy and socio-economic rights – the nexus

Economic policy impacts on the realisation of human rights in various ways, some of which will be illustrated in this section. Firstly, the state requires resources to implement socio-economic rights and civil and political rights including access to justice and the right to security. Fiscal policy deals with how the state generates and spends revenue,<sup>1 4</sup> therefore a progressive fiscal policy will ensure that the state is spending enough on social services necessary for the enjoyment of socio-economic rights.

Secondly, economic policies are often founded on particular economic philosophies. Therefore, economic policies aligned with the predominant neoclassical economic philosophy as defined above (neoliberal capitalist policies) will embody the belief that ‘private ownership and market competition are likely to be the best mechanisms for maximising economic growth’,<sup>1 5</sup> This influences economic policy adopted with regard to the extent to which the state will remain involved in both the direct provision and the regulation of services essential for the realisation of socio-economic rights, such as education, healthcare and water provision. For instance, under a neoliberal capitalist system, economists maintain that state intervention in the economy, which can be in many forms, including regulation or taxation, distorts the market and discourages investment.<sup>1 6</sup> They, therefore, advocate for minimal state intervention – reduced regulations and tax cuts – which could jeopardise the realisation of socio-economic rights through reduced revenue available to finance social services or other services which contribute to the full enjoyment of these

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<sup>1 2</sup> Black et al (n 8) <https://www.oxfordreference.com/view/10.1093/acref/9780199237043.001.0001/acref-9780199237043-e-3582?rskey=rT3pPN&result=880> (accessed 12 August 2021).

<sup>1 3</sup> E Berkhout et al ‘The Inequality Virus: Bringing together a world torn apart by coronavirus through a fair, just and sustainable economy’ (2021) 21.

<sup>1 4</sup> D Rutherford *Routledge Dictionary of Economics* (2012) 223.

<sup>1 5</sup> Balakrishnan & Elson (n 11) 2.

<sup>1 6</sup> R Balakrishnan et al ‘Retinking Macro Economic Strategies from a Human Rights Perspective’ (2010) 53 *Development* 12.

rights such as judicial services where the court's budget is reduced. These policies could also lead to the possibility of rights abuses by non-state actors operating without a regulatory framework to ensure the people are protected, for instance from discrimination.

Thirdly, increasing evidence is demonstrating that the neoliberal capitalist approach that favours reduced state involvement and regulation, allowing private actors and markets to deliver services and self-regulate, is having a negative impact on the enjoyment of socio-economic rights,<sup>17</sup> and is inherently incapable of achieving the full realisation of these rights.<sup>18</sup> Human rights bodies have consistently flagged concerns with policies drawing from capitalist orientation. For example, when reviewing Egypt's compliance with its socio-economic rights obligations, the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that

healthcare expenditure as a percentage of the budget of the State party has declined significantly resulting in a fragmented and increasingly privatised healthcare system. It is also concerned that this results in a large percentage of the population, particularly those in vulnerable situations, being excluded from health insurance and deprived of access to health facilities, goods and services[...].<sup>19</sup>

Regarding the right to education in the same review on Egypt, the CESCR was concerned that

the State party has decreased the budgetary share of its expenditure on education, resulting in poor quality public education, particularly in rural areas and informal settlements, and exacerbating the problem of unequal access to education for children in vulnerable situations.<sup>20</sup>

The CESCR has raised similar concerns for South Africa with regard to health,<sup>21</sup> Togo with regard to sanitation services,<sup>22</sup> and Mali<sup>23</sup> and Kenya<sup>24</sup> with regard to education. These concerns have

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<sup>17</sup> Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston 'The parlous state of poverty eradication' (2020).

<sup>18</sup> R Balakrishnan et al *Rethinking Economic Policy for Social Justice: The radical potential of human rights* (2016) 9.

<sup>19</sup> UN Committee on Economic, Social and Cultural Rights (CESCR) 'Concluding observations on the combined second to fourth periodic reports of Egypt' (2013) para 21.

<sup>20</sup> As above para 22.

<sup>21</sup> CESCR 'Concluding observations on the initial report of South Africa' (2018) paras 63 – 64.

<sup>22</sup> CESCR 'Concluding observations on the initial report of Togo, adopted by the Committee at its fiftieth session' (2013) para 33.

<sup>23</sup> CESCR 'Concluding observations on the initial report of Mali' (2018) paras 51 & 52.

<sup>24</sup> CESCR 'Concluding observations on the combined second to fifth periodic reports of Kenya' (2016) paras 57 & 58.

been echoed by other human rights treaty monitoring bodies including the UN Committee on the Rights of the Child (CRC) when reviewing Ivory Coast,<sup>2 5</sup> Ghana,<sup>2 6</sup> Guinea,<sup>2 7</sup> with regard to education. The African Commission on Human and Peoples' Rights (ACHPR) has also flagged this concerning development. In its review of Uganda, the ACHPR highlighted

the increase in the establishment of private schools, which has been encouraged by the government, allegedly raises the concern of the government gradually releasing itself from the obligation to provide quality public education, which could result in discrimination against children from low-income households.<sup>2 8</sup>

Despite acknowledging that economic policy is fundamental for the realisation of human rights, a false dichotomy persists between human rights and economic policy.<sup>2 9</sup> While on one hand even economists like Curtis acknowledge that 'the theory and practice of socio-economic rights arguably offers the most penetrating challenge to neo-classical and neo-liberal economics',<sup>3 0</sup> on the other hand, the human rights framework and enforcement mechanisms seem hesitant to make prescriptive declarations on the economic policy to be adopted by states.<sup>3 1</sup> This has led scholars to critique the human rights system for failing to challenge the prevailing economic system relegating itself to operating within the bounds of the current structure of economic power, rather than seeking to transform it. Mutua, like a number of other scholars, has decried 'the limits of [human rights] language to deal with deeply embedded social inequities', concluding that the capacity of 'the language of rights to excavate social dysfunctions and distortions has completely failed'.<sup>3 2</sup> He concludes that the human rights community simply 'does not know how to talk about

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<sup>2 5</sup> UN Committee on the Rights of the Child (CRC) 'Concluding observations on the second periodic report of Côte d'Ivoire' (2019) para 47(e).

<sup>2 6</sup> CRC 'Concluding observations on the combined third to fifth periodic reports of Ghana' (2015) para 57(f) & 58(h).

<sup>2 7</sup> CRC 'Concluding observations on the combined third to sixth periodic reports of Guinea' (2019) para 38(c).

<sup>2 8</sup> African Commission on Human and Peoples' Rights (ACHPR) 'Concluding Observations and Recommendations on the 5th Periodic State Report of the Republic of Uganda' (2015) para 80.

<sup>2 9</sup> P Aston 'Extreme inequality as the antithesis of human rights' (2015)

<https://www.opendeocracy.net/en/openglobalrights-openpage/extreme-inequality-as-antithesis-of-human-rights/> (accessed 25 October 2021). See also Balakrishnan & Elson (n 11).

<sup>3 0</sup> J Curtis, 'Merging socio-economic rights and heterodox economics: Emancipatory and transformative potentials' (2016) *Series on Economics and Law in Conversation* 2.

<sup>3 1</sup> W Kaguongo 'Socioeconomic Rights: Lessons from Domestic Courts' *Human Rights Review* 13 (2012) 91; Institute for Economic Justice et al (n 6) 7.

<sup>3 2</sup> M Mutua 'The crisis of human rights – why TWAJL still matters' (2018) *Akademie der Künste* <https://youtu.be/tHVhNWK8zl> from 40:54 (accessed 29 June 2021).

money’ and has consequently failed ‘trying to contain and reengineer economic despotism.’<sup>3 3</sup> Nolan and Bohoslavsky echo these sentiments, highlighting that even though human rights practitioners have built on human rights language to develop critical tools to impact economic systems, it has ‘very definitely not resulted in the wholesale reconfiguration of dominant economic policy-making paradigms or tempering of their negative human rights impact’.<sup>3 4</sup>

The human rights movement has attempted to fill this gap by focusing advocacy on more equitable resource allocation and more progressive taxation. Recent human rights instruments such as the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol),<sup>3 5</sup> and interpretative guides from treaty bodies and experts such as the CRC, CESCR and the UN Independent Expert on debt and human rights have become increasingly more prescriptive on the question of the mobilisation and allocation of funds for public services necessary for the full enjoyment of socio-economic rights.<sup>3 6</sup> Some welcome this as a necessary progress to align economic matters with the realisation of human rights. Others however are uncomfortable with what they describe as the inflation of human rights into areas beyond its mandate and jurisdiction.<sup>3 7</sup> Others still assert that there is still room for a lot more to be done, especially on more systemic reflections on structural matters such as macroeconomic policy and the impact this has on the realisation of rights.<sup>3 8</sup>

### 1.2.3 Realisation of socio-economic rights in Kenya

In the years leading up to the adoption of the 2010 constitution, 47% of the Kenyan population lived in poverty, majority of the in rural areas.<sup>3 9</sup> Around this time, one fifth of Kenyans lived in

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<sup>3 3</sup> As above.

<sup>3 4</sup> A Nolan & J.P. Bohoslavsky ‘Human rights and economic policy reforms’ *The International Journal of Human Rights* (2020) 1248.

<sup>3 5</sup> See for example Article 10(3) which expressly mandates States to ‘take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.’

<sup>3 6</sup> S.K. Jameson & S. Aubry ‘States’ human rights obligations regarding public services: The United Nations normative framework’ (2020) <https://www.gj-escri.org/publications/states-human-rights-obligations-regarding-public-services-the-united-nations-normative-framework> (accessed 25 October 2021).

<sup>3 7</sup> J. Thielén ‘The inflation of human rights: A deconstruction’ (2021) *Leiden Journal of International Law*

<sup>3 8</sup> Institute for Economic Justice et al. (n 6) 8.

<sup>3 9</sup> World Bank Group ‘Kenya poverty and inequality assessment’ (2009) 12.

severe poverty and could not afford to buy the food required to meet minimum daily nutritional requirement even if they spent their entire budget on food<sup>4 0</sup> In 2009, World Bank reports flagged the troubling trend of rapidly growing inequality<sup>4 1</sup> while observing that ‘levels of inequality in Kenya are, not surprisingly, much higher than in formerly socialist and neighbouring Ethiopia and Tanzania ...’<sup>4 2</sup>

There had been a dip in school enrolment in the 1990s, but the introduction of free primary education in 2003 contributed to reversing this trend.<sup>4 3</sup> Access to safe water had a similar trend of stagnation until 2003, and then a shift towards improvement.<sup>4 4</sup> By 2009, estimates indicated 56.5% of the population had access to improved water sources.<sup>4 5</sup> Similarly, the decade ending in 2006 witnessed stagnation and decline in health related indicators in Kenya, partly attributed to extensive poverty.<sup>4 6</sup> The Kenyan government acknowledged that many times government policies were the drivers of severe inequalities persisting in Kenya, in particular the tendency to dedicate more resources to wealthier quintiles of the population rather than those already marginalised<sup>4 7</sup>

In response to this, and in an attempt to improve the living conditions of the people, following the promulgation of the 2010 constitution, parliament adopted Sessional Paper 10 of 2012 which sets out Kenya’s development agenda for the next 18 years, dubbed Kenya Vision 2030. This plan aimed to build on previous economic development plans which had had some success with reducing poverty and improving access to services, even though this progress was yet to reach far too many Kenyans. Vision 2030, consequently, aimed to achieve ‘a globally competitive and prosperous country with a high quality of life by 2030.’<sup>4 8</sup> The plan is founded on three pillars: economic – which aims to increase the economic growth rate to 10%, social – aiming to create ‘equitable social development in a clean and secure environment’, and political

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<sup>4 0</sup> As above 13.

<sup>4 1</sup> As above 15.

<sup>4 2</sup> As above 17.

<sup>4 3</sup> As above 22.

<sup>4 4</sup> As above 24.

<sup>4 5</sup> As above 29.

<sup>4 6</sup> As above 24.

<sup>4 7</sup> GOK ‘Kenya population situation analysis’ (2013) 243.

<sup>4 8</sup> GOK ‘Sessional Paper 10 of 2012 on Kenya Vision 2030’ (2012) ii.

pillar focusing on transforming the democratic system (The details of this plan and its efficacy thus far will be unpacked in Chapter Three.)

According to the World Bank, between 2015 and 2019 the Kenyan economy was growing exponentially, with an average growth rate of 5.7%<sup>4 9</sup> However, even with significant steps taken towards the implementation of the 2010 constitution the socio-economic conditions of a significant number of Kenyans still leaves a lot to be desired. While the national poverty rate dropped from 45.2% in 2005 to 36.1% in 2015, when disaggregated, urban poverty actually grew<sup>5 0</sup> According to the Institute for Economic Affairs – Kenya, it is estimated that as of 2019 three million Kenyans were still living in extreme poverty and the poverty escape rate is dismally low<sup>5 1</sup>

Following the latest census in 2019, the Kenya National Bureau of Statistics (KNBS) estimated that 11.6 million individuals dropped out of school and ‘7.1 million had never been to school’.<sup>5 2</sup> Further, ‘the most common mode of solid waste disposal was burning in the open’, government collection of waste only accounts for 6.3%<sup>5 3</sup> Only ‘22% of individuals aged 3 years and above used internet while 10.4 % used a computer’.<sup>5 4</sup> This is concerning in a country where provision of government services is gradually shifting online, and in 2020 for example, schooling was almost entirely online as a result of the COVID-19 pandemic.

Inequality remains a challenge in Kenya, in terms of gender, wealth status and region. For example, in 2015/6, the richest 10% of the population earned 46% of total earnings while the poorest 10% of the population earned less than 1% of total earnings.<sup>5 5</sup> Men consistently receive higher earnings than women, and women are more likely to be unemployed.<sup>5 6</sup>

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<sup>4 9</sup> World Bank Group ‘Kenya Overview’ (2021) <https://www.worldbank.org/en/country/kenya/overview> (accessed 09 September 2021).

<sup>5 0</sup> Djattari et al ‘Poverty and economic challenges: Policy gaps analysis’ (2020) 1.

<sup>5 1</sup> As above 3.

<sup>5 2</sup> Kenya National Bureau of Statistics (KNBS) ‘2019 Kenya population and housing census – Volume IV: Distribution of population by socio-economic characteristics’ (2020) 10.

<sup>5 3</sup> As above 11 & 317.

<sup>5 4</sup> As above 11 & 13.

<sup>5 5</sup> KNBS ‘Inequality trends and diagnostics in Kenya: Ajidnt report of the Kenya National Bureau of Statistics on multidimensional inequality’ (2020) 125.

<sup>5 6</sup> As above.

### **1.3 Research question**

In light of the above, this research will mainly seek to identify how far Kenya's economic policy is aligned with its human rights obligations, in particular towards the realisation of socio-economic rights as recognised in article 43 of the Constitution of Kenya, 2010.

To answer this question, this research will address the following sub-questions:

- i. What does the human rights framework provide regarding economic policy?
- ii. What is Kenya's economic policy under the 2010 Constitution vis-à-vis that of the ruling government?
- iii. What is the state of the realisation of socio-economic rights in Kenya through the implementation of its economic policy?

### **1.4 Research methodology**

This mini-dissertation relies on a qualitative research approach, with secondary research focusing on international and regional human rights treaties, interpretative documents and jurisprudence of the treaty bodies focusing particularly on state obligations regarding socio-economic rights. Kenyan statutes, plans and policies relevant to the country's economic system and policies, and the state of fulfilment of socio-economic rights are also reviewed, alongside qualitative and quantitative data and literature by scholars and think tanks on these subjects.

### **1.5 Literature review**

The discourse on the relevance of human rights to economic policy has evolved from initially only accepting a right to property, to then reluctantly incorporating civil and political rights and negative obligations, but is now advancing to understand and accept socio-economic rights and positive obligations on states to, among other things, be more involved in markets through delivery and regulation.<sup>5 7</sup> Curtis asserts that human rights is not neutral on matters of economic policy, although

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<sup>5 7</sup> J Curtis (n 30) 2



it is also not ‘completely prescriptive’, only providing limitations to economic approaches with detrimental impacts on human rights.<sup>5 8</sup> Similarly, economics is never neutral because it is constructed in specific socio-political and ethical contexts.<sup>5 9</sup>

Researchers across multiple disciplines have identified structural vulnerabilities created by the dominant economic system that left several countries ill-prepared to respond to the rapid shifts demanded by the COVID-19 pandemic, especially when it comes to the continued protection of socio-economic rights.<sup>6 0</sup> The pandemic hit a world already deeply divided by extreme economic inequality which is ‘the product of an exploitative economic system designed to benefit a wealthy and powerful few[...], built on neoliberal economics and the capture of politics by the elites.’<sup>6 1</sup>

This pre-existing leaning towards neoliberal logic explains the emphasis of initial government responses to the pandemic focusing on protecting businesses. The former UN Independent Expert on debt and human rights, Juan Pablo Bohoslavsky, highlighted this problem flagging the danger of states prioritising the protection of economies and businesses while showing a ‘lack of enthusiasm to reduce inequalities [or] ensure the realisation of economic and social rights of all’ as this could result in a skewed recovery where a large population of the world remains unable to access crucial quality services and to regain their livelihoods.<sup>6 2</sup>

Neoliberal economic theories have dominated and directed economic systems and socio-political structures for over three decades.<sup>6 3</sup> Curtis describes the impact of this system as ‘systematically privileging markets, finance and abstruse mathematical conceptions of human life over social values of solidarity, distributive justice, substantive equity and democracy’.<sup>6 4</sup> The elements he names are inextricably linked to the realisation of socio-economic rights at both global

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<sup>5 8</sup> As above 7.

<sup>5 9</sup> As above 8.

<sup>6 0</sup> AE Yamin ‘Truths and Lies about this Pandemic: What are the lessons for health rights and social justice?’ (2020) <https://www.gi-escr.org/covid-19-blog-all-posts/truths-and-lies-about-this-pandemic-what-are-the-lessons-for-health-rights-and-social-justice?q=alida%20yamin> (accessed 14 August 2021).

<sup>6 1</sup> Berkhout et al (n 13) 20.

<sup>6 2</sup> JP Bohoslavsky ‘COVID-19 - Economy or Human Rights? False Dilemma’ (2020) <https://www.gi-escr.org/covid-19-blog-all-posts/covid-19-economy-or-human-rights-false-dilemma?q=juan> (accessed 14 August 2021).

<sup>6 3</sup> Curtis (n 30) 2.

<sup>6 4</sup> As above.

and national level. Accordingly, this section now turns to a review of the literature on the intersection of economic policy and human rights in Kenya.

### **1.5.1. Economic policy and human rights in Kenya**

The eradication of poverty and the provision of basic services has been on Kenya's economic agenda since independence,<sup>6 5</sup> and are now embedded in Kenya's Vision 2030 and the Big Four Agenda, which embodies the priorities under the Third Medium Term Plan (MTP III) 2018 – 2022 of Vision 2030.

As observed above, while Kenya has succeeded in reducing overall poverty, urban poverty is still on the increase, where absolute poverty is the inability to enjoy one's socio-economic rights.<sup>6 6</sup> Economists at the Institute of Economic Affairs – Kenya attribute this partly to inefficient government interventions which distort the market.<sup>6 7</sup> Chiefly, they criticised the development approaches adopted for failing to ensure that all segments of the population benefitted from the recorded economic growth<sup>6 8</sup> In response to this, the economists recommend that 'government policies should support "growth from below" to sustain most people to escape from poverty' including through greater investment in agriculture, support for small businesses and safety nets 'building human capital and productivity'.<sup>6 9</sup> While these recommendations may be economically sound, they seem to have a bias for productivity and shifting the responsibility for getting out of poverty on the individuals, rather than seeking an approach more aligned with ensuring the structural shifts required to create a more just economy where people are able to thrive and enjoy their rights.

Few authors expressly connect questions of economic policy as a whole and human rights. It is more common to find literature on *elements* of economic policy such as taxation and budgeting and their relation to socio-economic rights. To further illustrate this, Waris and Latif observe that in the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR),

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<sup>6 5</sup> Jattari et al (n 50).

<sup>6 6</sup> As above 2

<sup>6 7</sup> As above.

<sup>6 8</sup> As above 13.

<sup>6 9</sup> As above.

fiscal matters were left to domestic governments to address and were assumed to have no relationship to financing the realisation of human rights.<sup>7 0</sup> This disconnect between thinking around human rights and thinking on fiscal policy, coupled with the entrenchment of the misconstruing of the concept of progressive realisation led to the marginalisation of socio-economic rights, especially among states with a more capitalist orientation.<sup>7 1</sup> These states instead centred the idea of benevolence from the state in the form of social welfare programs which would be funded *if* the state felt their budget could support it.<sup>7 2</sup>

At the national level, Waris and Latif summarise the framework for implementation of socio-economic rights under the Kenyan constitution as ‘legislation, budgetary allocation, and infrastructure’.<sup>7 3</sup> Once again, economic considerations for the realisation of socio-economic rights are limited to financing rather than a systemic reflection of the economic system and policy that would support the full implementation of the rights, even in light of progressive realisation.

Where authors do connect the realisation of socio-economic rights with a systemic analysis, it is often in the perspective of development. Muihua, for example, discusses the importance of the realisation of socio-economic rights for sustainable development in Kenya,<sup>7 4</sup> although he takes a broad approach to the drivers of sustainable development, he does not critique the interventions required to propel sustainable development, nor does he discuss the overall economic policy and system.

From the literature available, analyses on the state of the realisation of socio-economic rights scarcely evaluate the potential or impact of economic policy. Likewise, evaluations of economic policy and priorities, while they do include reviews of access to social or public services, these are rarely framed as rights with corresponding state obligations. This thesis seeks to contribute towards bridging this gap.

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<sup>7 0</sup> A Waris & LA Latif ‘Financing the progressive realisation of socio-economic rights in Kenya’ (2015) 8 *University of Nairobi Law Journal* 6.

<sup>7 1</sup> As above.

<sup>7 2</sup> As above 7.

<sup>7 3</sup> As above 14.

<sup>7 4</sup> K Muihua ‘Actualising Socio-Economic Rights for Sustainable Development in Kenya’ (2019).

However, a growing number of authors are now making the connection between economic policy and human rights. Balakrishnan in particular has done significant work on this topic and observes that within government, the relevance of human rights to economic policy is rarely seen. Human rights are seen as relevant to ministries of justice or housing but not to ministries of finance.<sup>7 5</sup> These authors acknowledge that human rights law is not economically neutral and although ‘human rights do not dictate a particular kind of economic policy in terms of the public or private provision of rights[ .]. they nevertheless require a state that is strong and charged with the duty and capacity to fulfil rights.’<sup>7 6</sup> At the same time, more and more human rights experts are expressly calling for greater investment in public services,<sup>7 7</sup> and demonstrating the consistent interpretation of human rights law to justify public provision of services necessary for the enjoyment of socio-economic rights<sup>7 8</sup> Which directly challenges the capitalist legacy of a limited state involvement in the market. This thesis adds nuance to these proposals by explore their legal basis and practicality.

Building up on these recent developments, civil society in South Africa launched a project to attempt a state-level analysis of the interaction between economic policy and human rights.<sup>7 9</sup> This project has established several important assertions such as the potential of human rights to ‘develop alternative measures of progress within economics’,<sup>8 0</sup> and the importance of ideological clarity when unpacking the interaction between economic policy and human rights.<sup>8 1</sup> The project has also demonstrated the fundamental need to go beyond analyses of elements of economic systems, such as budgets, to utilise human rights for ‘deeper confrontations [of] the assumptions

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<sup>7 5</sup> Balakrishnan et al (n 18) 15.

<sup>7 6</sup> J Curtis & R Balakrishnan ‘Advancing Human Rights through Economics an interview with Professor Radhika Balakrishnan’ (2016) <https://www.lse.ac.uk/sociodogy/assets/documents/human-rights/HR-SO-5.pdf> (accessed 18 September 2021).

<sup>7 7</sup> L Farha, et al ‘Covid-19 has exposed the catastrophic impact of privatising vital services’ (2020) *The Guardian*. See also ‘Enough is enough: a conversation with international human rights experts on privatisation and public services’ (2020) <https://static1.squarespace.com/static/5a6e0958f6576ebde0e78c18/t/5f96eb05acd4d05279028f13/1603726086648/2020-10-19-Event-Summary.pdf> (accessed 18 September 2021).

<sup>7 8</sup> Jameson & Aubry (n 36).

<sup>7 9</sup> Institute for Economic Justice et al (n 6).

<sup>8 0</sup> As above 21.

<sup>8 1</sup> As above.

underpinning orthodox macroeconomic policy'.<sup>8 2</sup> This is deemed necessary to challenge problematic economic approaches and practices which are

justified and underpinned by particular economic theories which in turn have been presented as being an uncontested 'truth' and have become hegemonic. If we are to contest these policies, we need to tackle the underlying theoretical arguments that are used to defend them

It is against this background that this study interrogates Kenya's economic policy and its impact on the realisation of socio-economic rights. This research attempts to fill some of the gaps in the literature, including developing the literature on the intersection of human rights and economic policy including the imperatives human rights law presents to direct economic policy, and looking at Kenya in particular, and presenting an analysis of the economic system and policy approach, the contribution to the realisation of socio-economic rights and recommendations for rights-aligned economic systems.

## **1.6 Scope and limitations**

This study focuses on the interaction between economic policy and socio-economic rights in Kenya. While acknowledging that there is a broad range of external and historical factors that impact on domestic economic policy this paper limits itself primarily to a discussion of domestic elements and to economic policy and the state of socio-economic rights since the adoption of the current Constitution of Kenya, 2010. The research is also limited to reflections on the economic system in Kenya, although due to limited literature with this focus, it may rely on literature with a broader purview

In as much as this paper focuses on the realisation of socio-economic rights, it recognises the interdependence and indivisibility of rights and acknowledges that the realisations of socio-economic rights advances civil and political rights and vice versa. The paper only focuses on socio-economic rights because these are more directly related with well-being metrics.

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<sup>8 2</sup> As above 22.

It is also important to clarify that this thesis does not seek to carry out an impact assessment of the economic policy, which would require complex analysis and determination of causality.<sup>8 3</sup> This would be too great an undertaking that cannot be effectively carried out within the limitations of this mini-dissertation.

## **1.7. Structure**

This dissertation is comprised of four chapters. The first chapter provides an overview of the problem and the questions the research seeks to answer. It also discusses the relevant literature on the topic, highlighting gaps and opportunities to deepen the discourse on the topic. Chapter Two unpacks the legal framework for socio-economic rights in Kenya and provisions of human rights law relevant to economic policy. It also explores relevant economic theories. Chapter Three embarks on a review of Kenya's economic policy under the 2010 constitution vis-à-vis the government's economic policy framework and assesses the extent to which these policies can lead to the realisation of socio-economic rights in Kenya. Chapter Four then draws conclusions on whether Kenya's economic policy is aligned with the realisation of socio-economic rights and making recommendations on the conditions necessary for economic policy to support the realisation of these rights.

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<sup>8 3</sup> Curtis & Balakrishnan (n 76).

## CHAPTER TWO – THEORETICAL AND LEGAL FRAMEWORK

### 2.1. Introduction

This chapter aims to provide the theoretical and legal framework informing and guiding this thesis. It is divided into two sections. The first section sets out the theoretical framework, unpacking selected theories that are relevant to connecting economic policy with human rights to advance the realisation of socio-economic rights, particularly in an African context. The second section sets out the legal framework for socio-economic rights in Kenya, covering the domestic and international law relevant to socio-economic rights, and the provisions of human rights law relevant to economic policy. This lays the foundation for a human rights audit of Kenya's economic policy since the adoption of the current constitution in 2010.

### 2.2 Theoretical framework

Theories are important for structuring coherent systems of thought and underpinning narratives which then shape policy and practice. This section presents economic theories which may not expressly make the connection with human rights framed as such, but do underpin values of prioritising the well-being of the individual and the communities they exist within. Attention here is centred on economic democracy, which focuses on democratising the economy and giving workers and the people a greater say in economic policy and practices. This theory is enhanced by the African economic humanism theory which centres African communitarian values in economic principles and policy.

#### 2.2.1. Economic democracy

Democracy can be defined as a system where everyone has a right to have a say in how the system is organised, whether directly or through their democratically elected representatives.<sup>8 4</sup> While some argue that some level of authoritarianism is necessary for development, citing countries like

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<sup>8 4</sup> 'Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/democracy> (accessed 19 October 2021).

China in their analysis, others argue that democratic development is not only possible but also necessary, particularly in Africa.<sup>8 5</sup>

Some authors identify the lack of democracy within economic systems as contributing to the persistent mismatch between economic policies and popular needs. For instance, Cumbers has stated that

Ordinary citizens have very little say in how the capitalist economy works. This applies at the macro level – how the economy as a whole functions, who controls it and makes the key decisions on investment, what to produce, how and what to tax, what to regulate and what is produced. And it applies at the individual level of accessing economic resources to lead decent lives, in a way that is fair to others and sustainable in caring for the planet and future generations.<sup>8 6</sup>

The following section outlines the economic democracy theory as postulated by Schweickart and elaborated by Cumbers, which advocates for greater infusion of democratic principles in the organisation and operation of the economy.

### *Schweickart's economic democracy*

Economic democracy, initially presented by Schweickart in 1992, and confirmed in his fifth iteration of the theory in 2011,<sup>8 7</sup> can be loosely described as a combination of the strengths of socialism, capitalism and cooperativism or in short 'a worker self-managed market socialism.'<sup>8 8</sup>

The basic elements of economic democracy as posited by Schweickart are:

1. Each productive enterprise is managed democratically by its workers;
2. The day-to-day economy is a market economy: raw materials and consumer goods are bought and sold at prices determined by the forces of supply and demand;
3. New investment is socially controlled: the investment fund is generated by taxation and dispensed according to a democratic, market-conforming plan.<sup>8 9</sup>

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<sup>8 5</sup> O Edgheji 'A Democratic Developmental State in Africa? A concept paper' (2005).

<sup>8 6</sup> A Cumbers 'Economic democracy: why handing power back to the people will fix our broken system' (2019) *The Conversation* <https://theconversation.com/economic-democracy-why-handing-power-back-to-the-people-will-fix-our-broken-system-126122> (accessed 19 September 2021).

<sup>8 7</sup> D Schweickart *After Capitalism* (2011).

<sup>8 8</sup> D Schweickart 'Economic Democracy: A worthy socialism that would really work' (1992) 56 *Science & Society* 18-19.

<sup>8 9</sup> As above 19.



Under an economic democracy, although workers control the production process, they do not own the means of production.<sup>9 0</sup> This is owned by the society. Schweickart further posits that it is essential to maintain the market economy primarily to avoid the risk inherent in Soviet socialism of over-concentrating power in one entity or person, which could promote authoritarianism and has proven to be inefficient.<sup>9 1</sup>

Human rights advocates may have some reservations advocating for the primacy of the market. Evidence shows that for some sectors, particularly those essential for the enjoyment of socio-economic rights, leaving it to market forces only to determine supply and prioritisation often accelerates the risk of potential violations or abuse of socio-economic rights as several, particularly marginalised, populations will be unable to access the services and consequently are excluded from enjoying these rights.<sup>9 2</sup> This is the case regardless of the nature of the actors delivering the services. Therefore, it is possible for non-profit or even state-owned enterprises to still operate in a way that advances market logic.<sup>9 3</sup> This has been the gripe, particularly with the advancement of market accountability as the response to governance failures in states such as Kenya.<sup>9 4</sup> However, Schweickart mitigates this risk by allowing for state regulation, including price controls, ‘when the market malfunctions’,<sup>9 5</sup> which arguably includes the market failing to serve certain populations.

The capitalist nature of the market is further mitigated by the third feature: the social control of investments.<sup>9 6</sup> Under an economic democracy, funds for public investment are generated by taxing capital and what to invest in is determined by the people, whether directly, or as is more often the case, through a representative legislature, rather than exclusively by the executive. This

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<sup>9 0</sup> As above 20.

<sup>9 1</sup> As above 21.

<sup>9 2</sup> See for example UN Special Rapporteur for extreme poverty and human rights, Philip Aston ‘Privatisation, extreme poverty and human rights’ (2018); *Guiding Principles on the human rights obligations of States to provide public education and to regulate private investment in regulation (Abidjan Principles)* (2019) Preamble.

<sup>9 3</sup> UN Special Rapporteur on the right to education, Kishore Singh ‘Protecting the right to education against commercialisation’ (2015).

<sup>9 4</sup> UN Special Rapporteur for extreme poverty and human rights, Philip Aston (n 92) 23. See also Global Education Monitoring Report Team *Accountability in education: meeting our commitments; Global education monitoring report, 2017/8* (2017) 49 - 53.

<sup>9 5</sup> Schweickart (n 88) 21.

<sup>9 6</sup> As above.

control or planning is not for the entire economy, only for new investments, and is particularly important for investments 'related to the provision of free goods and services, e.g. infrastructure, possibly schools, urban mass transit, basic research facilities ...'<sup>97</sup> To avoid the risk of inefficiency to the point of making the approach unworkable, democratic decisions on investments may be taken by the relevant legislature, with a process that includes public participation: hearing from experts as well as the general public, after which the legislature decides on what and how much to invest in these public goods.<sup>98</sup>

### *Cumbers' economic theory*

The economic democracy theory was recently updated by Cumbers, who also proposes three main pillars with some similarity to those presented by Schweickart. Cumbers' first pillar of economic democracy is individual economic rights, contrary to older models of economic democracy which focused on collective approaches.<sup>99</sup> For individual rights, his main intervention is the introduction of a universal basic income.<sup>100</sup>

Cumbers' second pillar is democratic collective ownership where 'the individual should also have ownership rights and control over the work they do and how it is used'.<sup>101</sup> Increasing democratic collective ownership within the economy could be achieved through more employee ownership, cooperative or mutual societies, and more democratic control of public entities. With respect to the wider transformative potential of greater employee ownership or representation in company boards,<sup>102</sup> the challenge with this proposal is that it presupposes an economy where majority of the workers are in formal employment which is not always the case. In Kenya for example, in 2020 83% of employed Kenyans worked in the informal sector.<sup>103</sup> In such contexts, the other forms of democratic collective ownership, such as cooperatives, are better suited

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<sup>97</sup> As above, 25.

<sup>98</sup> As above 25 – 26.

<sup>99</sup> Cumbers (n 86).

<sup>100</sup> As above.

<sup>101</sup> As above.

<sup>102</sup> As above.

<sup>103</sup> KNBS 'Economic Survey 2021 Highlights' (2021) 19.

A particularly important element of this second pillar is Cumbers' observation that the growing wave of 'remunicipalisation' or de-privatisation (the transfer of previously privatised services back to public ownership and management primarily taking place in the water sector around the world),<sup>104</sup> while important, is not enough where these public entities are operated in ways that still keep the public disconnected from and unaccountable to the people.<sup>105</sup>

Therefore, economic democracy requires not only that the workers should have a greater say in the running of the economy, but the people to be substantively and effectively involved as well. This aligns with recent developments in socio-economic rights where, for instance, under the right to education, the definition of a public school goes beyond merely those owned and managed by the state to include those 'effectively controlled and managed by ..genuine representatives of the population they serve; and not at the service of any commercial or other exploitative interests that undermines learners' right to education'.<sup>106</sup> This consolidates the movement in the education sector against the involvement of commercial interests in education which have been found to claw back the nature of education as a public good.<sup>107</sup> This movement has resulted in significant decisions taken by the World Bank<sup>108</sup> and the European Parliament<sup>109</sup> to prohibit any funding to private commercial education providers. China has recently followed suit with the introduction of regulations prohibiting for-profit commercial private tutoring.<sup>110</sup>

The third pillar is public participation at the level of policy making for the economy.<sup>111</sup> Initiatives such as participatory budgeting which go beyond the people merely being consulted on the state-drafted budget, to actually giving the people a percentage of the budget to allocate to their

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<sup>104</sup> Public futures global database <https://publicfutures.org/> (accessed 19 September 2021). See also Water remunicipalisation tracker <http://www.remunicipalisation.org/> (accessed 19 September 2021).

<sup>105</sup> Cumbers (n 86).

<sup>106</sup> Abidjan Principles (n 92) Guiding Principle 2 (b) & (c).

<sup>107</sup> UN Special Rapporteur on the right to education, Kishore Singh (n 93) para 62.

<sup>108</sup> World Bank Group 'IFC freeze on investment in K-12 private, fee-charging education' (2020) [https://www.ifc.org/wps/wcm/connect/industry\\_ext\\_content/ifc\\_external\\_corporate\\_site/education/](https://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/education/) (accessed 9 October 2021).

<sup>109</sup> European Parliament 'Resolution of 13 November 2018 on EU development assistance in the field of education' (2018/2081(IN)) [https://www.europarl.eu/doceo/document/TA-8-2018-0441\\_EN.htm?redirect](https://www.europarl.eu/doceo/document/TA-8-2018-0441_EN.htm?redirect) para 12 (accessed 9 October 2021).

<sup>110</sup> 'China bans commercial school tutoring in overhaul of \$100bn sector' *Business Day* (2021) <https://www.businesslive.co.za/bd/world/asia/2021-07-25-china-bans-commercial-school-tutoring-in-overhaul-of-100bn-sector/> (accessed 25 October 2021).

<sup>111</sup> Cumbers (n 86).

priorities, have been shown to produce better outcomes for socio-economic rights in some cases as the people prioritise investment in health and education in areas previously marginalised.<sup>1 1 2</sup>

While these theories present a progressive, workable approach to a more sustainable economy, they are distinctly Euro-centric and western in their perspectives and prescriptions. It is, therefore, necessary to augment this theoretical framework with a theory that captures the particularities of African context, as discussed in the next section.

## 2.2.2 African economic humanism

Reflecting on the state of the socio-economic and ecological condition in Africa, Fagunwa observes the crippling effect of the persistence of capitalistic 'colonial economic structures and values', citing this as a significant part of the cause of Africa's continued socio-economic struggles.<sup>1 1 3</sup>

In response to this condition, Fagunwa and others have presented *Ubuntu* and African humanism as the indispensable means by which one can reimagine African economies for just development. African humanism is widely associated with *Ubuntu* and its varied manifestations across the continent such as the *Gada* system in Ethiopia.<sup>1 1 4</sup> *Ubuntu* is mainly characterised by the notion of interconnectedness and interdependence of persons within the community, and therefore the communal having primacy over the individual.<sup>1 1 5</sup> It elevates the dignity and equality of the people and calls for solidarity.<sup>1 1 6</sup> However, Fagunwa adds the important qualification that these features are much less evident in present day Africa, with the destruction of these values precipitated by slavery and colonialism but accelerated in the post-colonial state and the stark inequality.<sup>1 1 7</sup>

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<sup>1 1 2</sup> M Touchton & B Wampler 'Improving social well-being through new democratic institutions' (2013) cited in Cumber (n 86).

<sup>1 1 3</sup> T Fagunwa 'Ubuntu: Revisiting an endangered African philosophy in quest of a pan-Africanist revolutionary ideology' *Genealogy* (2019) 1–2.

<sup>1 1 4</sup> As above 4.

<sup>1 1 5</sup> As above.

<sup>1 1 6</sup> As above.

<sup>1 1 7</sup> As above 6.

The essence of African economic humanism as put forward initially by Bhengu and later by Edozie, is a ‘community-based economy’ or ‘solidarity economy’.<sup>1 1 8</sup> Its three main precepts are ‘social prosperity over individual prosperity, respect for a natural social order over crass materialism and communal ownership over the mode of production’<sup>1 1 9</sup> Its emphasis is therefore on ‘human needs, interests and dignity’ based on complementarity and solidarity.<sup>1 2 0</sup>

This theory echoes the post-colonial economic discourse on African socialism advanced by several African leaders, including Nkrumah, and Nyerere.<sup>1 2 1</sup> Nkrumah, for example, sought to return to economic practices consistent with pre-colonial Africa, communalism in particular.<sup>1 2 2</sup> Edozie credits Nyerere as being the only African leader at the time of independence to implement an economic system that significantly embodied African economic humanist principles. She describes Nyerere’s *Ujamaa* as a combination of communalism (itself a form of African humanism) and socialism.<sup>1 2 3</sup> This theory is connected to the African renaissance theory which features two main strands of thought, one focusing on African history and culture (the Africanist perspective) and the other (which is more the focus of this paper) focusing on economic advancement aiming to centre the African nationalist values and the struggle against neo-imperialism and towards true (economic) independence.<sup>1 2 4</sup>

However, some authors have warned against a romanticisation of the pre-colonial Africa,<sup>1 2 5</sup> and an inadequate appreciation of the pervasiveness of the impact of colonialism and coloniality, and the persistence of neo-colonialism.<sup>1 2 6</sup> Equally, scholars also warn against the romanticisation of these post-colonial economic arrangements. *Ujamaa* and African socialism

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<sup>1 1 8</sup> M Bhengu ‘Deepening Africa’s economic development: An African perspective’ *The East African Community Regional Conference: Development, Growth and Power of the GDP: An African Philosophical Grounding* Kampala (2014) cited in RK Edozie ‘Pan’ Africa Rising: The cultural and political economy of Nigeria’s *Afri-capitalism* and South Africa’s *Ubuntu* business (2017) 87.

<sup>1 1 9</sup> As above.

<sup>1 2 0</sup> As above 84.

<sup>1 2 1</sup> RK Edozie ‘The philosophy of African economic humanism Ubuntu and Afri-capitalism as case studies’ in RK Edozie ‘Pan’ Africa Rising: The cultural and political economy of Nigeria’s *Afri-capitalism* and South Africa’s *Ubuntu* business (2017) 80.

<sup>1 2 2</sup> As above 84.

<sup>1 2 3</sup> As above 85.

<sup>1 2 4</sup> As above 86 – 87.

<sup>1 2 5</sup> Fagunwa (n 113) 3.

<sup>1 2 6</sup> S Tamale *Decolonisation and Afro-Feminism* (2020).

have since been determined to have largely failed in their attempts to transform African economies and societies for a variety of reasons including a disconnect between the plans and the local realities, and state capture by bureaucrats who still embodied capitalist principles.<sup>1 2 7</sup> African socialism (like several other development agendas since) has also been criticised for failing to ‘articulate an effective concept of rights that positively link human rights to development in relation to [the African] culture and history’.<sup>1 2 8</sup> Therefore, any attempts to draw from these theories will need to interrogate and correct for the elements that precipitated their failure.

African economic humanism adds to the theory of economic democracy set out above because it takes into account Africa’s unique context with respect to the relevance of slavery, colonisation and neo-colonialism in construction of the present economic order which was not covered in detail under economic democracy, despite the importance of economic democracy to the realisations of economic independence and by extension, human rights.<sup>1 2 9</sup> African economic humanism also acknowledges the existence of economic cultures and values independent of the colonial onslaught, although these could be better developed to address the features that frustrated the success of African economic approaches in the past and to resonate with the present day context and challenges. In this way, it contributes towards the attempt to reconstruct an economic system better suited to respond to these realities.

### 2.3 Legal Framework

Having examined the theories relevant to transformative economic approaches, this section now turns to a discussion of the relevant legal framework pertaining to socio-economic rights in Kenya, and provides an overview of the human rights law provisions relevant to economic policy. The Constitution of Kenya 2010 establishes the legal framework for socio-economic rights in Kenya

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<sup>1 2 7</sup> B Ibhawoh & JI Dibia ‘Deconstructing Ujamaa: The legacy of Julius Nyerere in the quest for social and economic development in Africa’ (2003) 8 *African Journal of Political Science*.

<sup>1 2 8</sup> K Appigyeyi-Atua ‘Bumps on the road: A critique of how Africa got to NEPAD’ (2006) 6 *African Human Rights Law Journal* 25.

<sup>1 2 9</sup> J Nassad ‘Economic democracy is the missing link in the struggle for human rights’ *Middle East Eye* (2021) <https://www.middleeasteye.net/opinion/arab-spring-US-economic-democracy-should-be-heart-our-global-struggle> (accessed 28 October 2021).

and incorporates international human rights law. For this reason, this section will discuss both the domestic and the international legal framework pertaining to socio-economic rights.

### 2.3.1. Municipal legal framework for socio-economic rights in Kenya

Socio-economic rights in Kenya were not included in the constitution until 2010 when a new constitution was promulgated. The constitution now not only expressly recognises economic and social rights,<sup>1 3 0</sup> it also makes them justiciable.<sup>1 3 1</sup> Article 43 of the constitution enumerates the rights to

- a) the highest attainable standard of health, which includes the right to healthcare services, including reproductive healthcare;
- b) to accessible and adequate housing and to reasonable standards of sanitation;
- c) to be free from hunger, and to have adequate food of acceptable quality;
- d) to clean and safe water in adequate quantities;
- e) to social security; and
- f) to education.<sup>1 3 2</sup>

These rights are made justiciable by virtue of article 22, and the same article expands the scope of who can file a case to defend all rights, including socio-economic rights. Article 22 of the constitution provides that:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

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

This expansion of *locus standi* is significant for protection of socio-economic rights through public interest litigation and strategic litigation because under the 1969 Constitution, ‘it [was] well established that only the Attorney General can sue on behalf of the public’.<sup>1 3 3</sup>

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<sup>1 3 0</sup> Constitution of Kenya (COK) (2010) article 43.

<sup>1 3 1</sup> As above article 22.

<sup>1 3 2</sup> As above article 43 (1).

<sup>1 3 3</sup> *Wangari Maathai v Kenya Times Media Trust Ltd* (1989) Civil Case 5403 of 1989 (High Court of Kenya).

With regard to the implementation of socio-economic rights, article 21(2) of the constitution provides that ‘the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43.’ This confirms that socio-economic rights under the Kenyan constitution are to be realised progressively.

The constitution also has provisions relating to the special application of rights to particular groups, including children, persons with disabilities, youth, minorities and marginalised groups and older members of society.<sup>1 3 4</sup> The constitution expressly protects the socio-economic rights of these groups who have historically been marginalised.

The Kenyan legal framework also incorporates international human rights law by virtue of articles 2(5) and 2(6) of the constitution. Article 2(5) provides that ‘the general rules of international law shall form part of the law of Kenya’, while article 2(6) states that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’. These provisions have evoked debates among scholars on whether they have transformed Kenya into a monist state or it remains dualist. The Supreme Court has settled this debate by affirming that while the provisions do not transform Kenya into a monist state, the entire monist-dualist debate is now moot because most recent treaties are non-self-executing and require additional legislative and administrative action.<sup>1 3 5</sup> With regard to human rights specifically, article 21(4) obligates the state to ‘enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.’<sup>1 3 6</sup>

Articles 21(4) and 2(6) are particularly relevant to the present discussion as they incorporate all global and regional human rights instruments that provide for socio-economic rights that have been ratified by Kenya. This includes the ICESCR, the Convention on the Rights of the Child, African Charter on Human and Peoples’ Rights (African Charter), African Charter on the Rights and Welfare of the Child (ACRWC) and the Maputo Protocol. The interpretive

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<sup>1 3 4</sup> COK (n 130) Chapter 4 Part 3

<sup>1 3 5</sup> *Mitu-Bell Welfare Society v Kenya Airports Authority and 2 Others* (2021) Petition 3 of 2018 (Supreme Court of Kenya) (Mitu-bell case) para 133.

<sup>1 3 6</sup> COK (n 130) article 21(4).



guidance given by the treaty monitoring bodies for these instruments also becomes persuasive or provides guidance to policy and law makers in Kenya as they play their role to implement socio-economic rights.

The Kenyan Supreme Court determined its first case on socio-economic rights in January 2021 on the right to housing. In this case, the Supreme Court interrogated the place of international law including treaties and their interpretive guides, and held that article 2(5) and (6) 'requires Kenyan courts of law to apply international law (both customary and treaty law) in resolving disputes before them provided that they do not contradict the constitution or any other law'<sup>137</sup>

On the question of whether to utilise guidelines, general comments and other interpretive guides when interpreting the bill of rights, the Supreme Court held that these guides are non-binding soft law instruments intended to 'breathe life' into the treaty provisions and the provisions of the Kenyan bill of rights.<sup>138</sup> They play an instructive role in filling the gaps in law and policy on how the state should implement and protect socio-economic rights.<sup>139</sup> Guidelines and general comments issued under particular treaties are incorporated by virtue of article 2(6). It would not be inconsistent with the constitution for a court to rely on these documents for guidance.<sup>140</sup>

This judicial direction is significant because the Supreme Court is the highest court in Kenya and its decisions are binding on all other courts in Kenya. Therefore, they are all permitted to incorporate international treaties and interpretive comments in the determination of human rights cases.

### **2.3.2 International framework applicable to Kenya**

The international human rights framework is found at both the regional level and the global level. At the regional level, the African Charter, adopted in 1981 and ratified by Kenya in 1992, expressly included a limited list of socio-economic rights, that is the individual rights to property (article

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<sup>137</sup> Mtumbell case (n 135) para 132.

<sup>138</sup> As above 142.

<sup>139</sup> As above.

<sup>140</sup> As above.

14), work (article 15), health (article 16), education and culture (article 17), and family rights (article 18), and the collective rights of peoples to dispose of their wealth and natural resources (article 21) and to development (article 22).<sup>1 4 1</sup> Although the African Charter does not mention them expressly, the rights to water and sanitation, food, housing and social security have been interpreted into the African human rights system by the African Commission in communications brought before it for adjudication.<sup>1 4 2</sup> Socio-economic rights have also been elaborated by the African Commission in the Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) and the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010).

In addition, socio-economic rights for specific groups are also recognized and protected under the African human rights system. The Maputo Protocol, which Kenya ratified in 2010, expressly recognizes women's rights to education and training (article 12), food security (article 15), adequate housing (article 16), health and reproductive rights (article 14), and economic and social welfare rights (article 13). Similarly, the ACRWC which Kenya ratified in 2000, provides for every child's right to education (article 11), and health and health services (article 14). Although they are yet to enter into force, the ACHPR Order Persons Protocol<sup>1 4 3</sup> and the African Disability Protocol<sup>1 4 4</sup> both incorporate socio-economic rights. The Order Persons Protocol recognizes the rights to social protection (article 7), health services (article 15), education (article 16), and recreation (article 17). The Disability Protocol recognises the rights to education (article 16), health (article 17), work (article 19), and an adequate standard of living including food, housing, water, sanitation, clothing and social protection (article 20).

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<sup>1 4 1</sup> Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004) preambular para 1.

<sup>1 4 2</sup> See for example *Soci al and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) 59 – 66 and *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009).

<sup>1 4 3</sup> Protocol to the African Charter on Human and Peoples' Rights on the rights of Order Persons in Africa (2016).

<sup>1 4 4</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018).

At the global level, the ICESCR (ratified by Kenya in 1972) sets out binding provisions regarding socio-economic rights, although, similar to the African system the treaties on the rights of women, the rights of the child, and others also include socio-economic rights.<sup>1 4 5</sup>

### 2.3.3 State obligations

Socio-economic rights impose the obligations to respect, protect, fulfil and promote, which entail both positive (requiring the state to do) and negative (requiring the state to refrain) elements. The obligations to respect prohibits states from undertaking acts or omissions that would limit or interfere with the enjoyment of socio-economic rights.<sup>1 4 6</sup> This obligation binds all branches and levels of government.<sup>1 4 7</sup> The obligation to protect requires states to ensure that all non-state actors including individuals and corporations do not interfere with or abuse socio-economic rights.<sup>1 4 8</sup> This includes enacting and enforcing regulations and remedies in the event of abuses.<sup>1 4 9</sup> The obligation to fulfil compels states to take positive steps to ensure that everyone is able to enjoy socio-economic rights.<sup>1 5 0</sup> This includes direct provision of services where they are necessary for the enjoyment of rights, prioritising marginalised and vulnerable groups.<sup>1 5 1</sup> The obligation to promote calls on states to increase general awareness on their rights and relevant information pertaining to their enjoyment of the rights and the states obligations with relation to the rights.<sup>1 5 2</sup> This requires promotional material and interventions such as publications and training, even for state officials.<sup>1 5 3</sup>

In general, the realisation of socio-economic rights requires the state to ensure that the rights or services necessary for the enjoyment of these rights are available, accessible, adequate,

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<sup>1 4 5</sup> See for example articles 10, 11, 12, 13 and 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (1979); articles 24, 26, 27, 28, 29, 30, 31 and 32 of the Covenant on the Rights of the Child (1989) and articles 24, 25, 27 and 28 on the Convention on the Rights of Persons with Disabilities (2007).

<sup>1 4 6</sup> Principles and Guidelines on the Implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights (2010) 11

<sup>1 4 7</sup> As above.

<sup>1 4 8</sup> As above.

<sup>1 4 9</sup> As above.

<sup>1 5 0</sup> As above 12

<sup>1 5 1</sup> As above.

<sup>1 5 2</sup> As above 11

<sup>1 5 3</sup> As above.

acceptable, and of good quality.<sup>1 5 4</sup> These obligations should be borne in mind as the state enacts and implements economic policies which would impact on the enjoyment of socio-economic rights.

### **2.3.4 Human rights framework for economic policy in Kenya**

Whether or not human rights are economically neutral is still a question under live debate. On one hand, some scholars cite paragraph 8 of CESCR's General Comment 3 on the nature of state parties' obligations which provides that the obligation to take steps towards the realisation of socio-economic rights 'neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question ...'.<sup>1 5 5</sup> It further states that the ICESCR is neutral with respect to the economic system which would be ideal for the realisation of rights.<sup>1 5 6</sup>

On the other hand, an increasing number of experts are demonstrating that human rights are actually not economically neutral and in some instances requires a particular economic policy, such as greater public provision of social services and stricter regulation of private actors in the said sector.<sup>1 5 7</sup> Some economists acknowledge that even simply 'framing economic policy in terms of human rights helps to change the terms of public debate on economic policy ...the elimination of poverty becomes ...the duty of the state' rather than a benevolent act of charity.<sup>1 5 8</sup>

Aligned with this, at the national level, the Kenyan constitution acknowledges that the bill of rights is the framework that should guide economic policies. Article 19(1) provides that 'the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies'.<sup>1 5 9</sup> Similarly, the constitution binds the state and all state organs to 'observe, respect, protect, promote and fulfil the rights and fundamental freedoms' recognised

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<sup>1 5 4</sup> As above 10.

<sup>1 5 5</sup> RD Falco 'Human Rights, Fiscal Policy and Economic Pluralism: Building Inclusive Recovery after COVID-19' (2020) 4 *Peace Human Rights Governance* 231 – 239.

<sup>1 5 6</sup> CESCR General Comment 3 'The nature of states' obligations under the Covenant' (1990) para 8.

<sup>1 5 7</sup> Curtis and Balakrishnan (n 76).

<sup>1 5 8</sup> Balakrishnan et al (n 18) 15.

<sup>1 5 9</sup> COK (n 130) article 19(1).

therein.<sup>160</sup> This, therefore, challenges the perception that human rights are outside the purview of the Treasury and the Ministry of Finance. They are also expected to be cognisant of human rights and ensure their actions advance rather than clawback the enjoyment of socio-economic rights.

Further, specifically regarding socio-economic rights, article 20 empowers the courts to interrogate the state's use of resources, to, among other things, uphold the principle that when allocating resources the state 'shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals'.<sup>161</sup> This discretion is however limited by the provision prohibiting courts and tribunals from interfering with state decisions regarding the allocation of resources primarily because the tribunal would have reached a different conclusion.<sup>162</sup> This balances the concern of legitimacy of courts getting too involved in policy making and resource allocation, and the so-called judicial overreach, judicial activism or the judicialisation of politics. Despite this balance, courts still occasionally shy away from making determinations on matters that would touch on economic policy when adjudicating on socio-economic rights citing separation of powers and lack of expertise, although determinations that impact budgetary allocations are made for other matters.<sup>163</sup>

In addition to the constitutional connection between human rights and economic policy and the obligations enumerated above, socio-economic rights also contain a number of principles elaborated by the various experts at regional and global level. These principles are discussed below with reflections on their implications for economic policy.

Some scholars, commentators and activists have developed the concept of a rights-based economy, which is intended to 'guarantee the material, social and environmental conditions necessary for all people to live with dignity...without reducing the ability of future generations to do so'.<sup>164</sup> They synthesise the relevant human rights principles to identify dignity, equity,

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<sup>160</sup> As above article 21(1).

<sup>161</sup> As above article 20(5)(b).

<sup>162</sup> As above article 20(5)(c).

<sup>163</sup> Kaguongo (n 31).

<sup>164</sup> K Donald et al *A Rights-Based Economy: Putting People and Planet First* (2020) 2.

solidarity, accountability and justice as the drivers of a rights-based economy.<sup>165</sup> They further provide examples of specific policies which would embody these human rights values and would be indispensable in a rights-based economy:

- i. Social protection for all, preferably through implementation of a universal basic income;
- ii. Just labour and wage policy, including a minimum living wage;
- iii. Ensuring universal public services;
- iv. Progressive, redistributive tax policy, including a wealth tax;
- v. Effective regulation of corporations to correct the power imbalances that make it possible for corporations to abuse rights, in particular through requiring mandatory human rights and environmental due diligence before and during investments; and
- vi. Restructuring the global economy through debt cancellation.<sup>166</sup>

Comparably, Balakrishnan, Heintz and Elson summarise the human rights principles relevant to economic policy considerations. Drawing from CESCR General Comment 3, they identify progressive realisation utilising the maximum available resources, non-retrogression, minimum essential levels of rights and equality and non-discrimination.<sup>167</sup> They further affirm that democratic principles of transparency, participation and accountability are also relevant to discussions on the connection between socio-economic rights and economic policy.<sup>168</sup>

These elements are relevant for economic policy because they impact how and what the government should prioritise in its economic policy, and the approaches taken to raise resources, allocate those resources and maintain momentum in a forward trajectory for the realisation of socio-economic rights. Some of these elements are discussed below

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<sup>165</sup> As above.

<sup>166</sup> As above 14 – 24.

<sup>167</sup> Balakrishnan et al (n 18) 16.

<sup>168</sup> As above.

### *Progressive realisation*

Progressive realisation is an acknowledgment that that socio-economic rights take time to be fully implemented.<sup>169</sup> This should not be framed as an excuse for states to stall the fulfilment of their obligations, but as ‘an obligation to move as expeditiously and effectively as possible’ towards full realisation of the rights.<sup>170</sup> While it is accepted that it may take time to implement everything necessary for the full enjoyment of socio-economic rights, there is an immediate obligation to take steps towards the full implementation of the rights, and these steps are to be ‘deliberate, concrete and targeted’ clearly towards meeting the obligations.<sup>171</sup> In addition, within the ICESCR there are some rights that are framed as immediately applicable, such as the right to free, compulsory basic education.<sup>172</sup>

The steps also require the state to take ‘all appropriate means’, which includes legislative and financial interventions,<sup>173</sup> availing judicial remedies,<sup>174</sup> and can be interpreted to include economic measures. There is also an obligation to monitor the extent of enjoyment of the socio-economic rights and design plans and interventions to ensure continuous improvement.<sup>175</sup> To take consistent steps forward in economic policy in accordance with the obligation to progressively realise socio-economic rights states would be required to, for example, ensure the progressive increase of the budgetary allocation and actual expenditure in sectors relevant for the enjoyment of these rights.<sup>176</sup>

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<sup>169</sup> CESCR General Comment 3 (n 156) para 9.

<sup>170</sup> As above.

<sup>171</sup> As above para 2.

<sup>172</sup> As above para 5.

<sup>173</sup> As above paras 3, 4 & 7.

<sup>174</sup> As above para 5.

<sup>175</sup> As above para 11.

<sup>176</sup> Balakrishnan (n 16) 17.

### *Non-retrogression*

Closely related to the obligation to take steps forward is the obligation against taking steps back unless the retrogression is justified ‘by reference to the totality of the rights...and in the context of the full use of the maximum available resources’.<sup>177</sup>

An example of a decision that could amount to a retrogressive measure is revising the tax policy to reduce revenue, cutting spending on public services necessary for socio-economic rights.<sup>178</sup> Also, the UN Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies warn that ‘any proposed economic reform that may result in impermissible retrogression’ for the realisation of socio-economic rights may amount to a violation for which the state would be held liable.<sup>179</sup> This confirms that even in times of economic distress when the state is considering economic policy reforms such as austerity measures, they must be cognisant of the prohibition of retrogression, unless it is permitted under the exceptional conditions.

### *Maximum available resources*

The CESCR affirms that even with limited resources, states should demonstrate an effort to ensure ‘the widest possible enjoyment’ of socio-economic rights.<sup>180</sup> The obligation to commit resources to realise socio-economic rights still holds even in times of adjustment or crisis, including economic recession, ensuring that marginalised and vulnerable groups are protected.<sup>181</sup> Resources also include those which the state will receive in the form of development assistance. States are obligated to ensure that these resources are also applied towards the maximum available for the realisation of socio-economic rights.<sup>182</sup>

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<sup>177</sup> CESCR General Comment 3 (n156) para 9

<sup>178</sup> Balakrishnan & Elson (n11) 6

<sup>179</sup> UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky ‘Guiding Principles on human rights impact assessments for economic reform policies’ (2019) Principle 10.

<sup>180</sup> CESCR General Comment 3 (n156) para 11.

<sup>181</sup> As above para 12.

<sup>182</sup> As above para 13.



In thinking about maximum available resources, both considerations of how the resources are mobilised and how they are applied are relevant. With respect to how they are mobilised, states should ensure their taxation systems are fair and just, and steps are taken to seal loopholes that deny the state potential revenue, such as regressive tax holidays, corruption and other illicit financial flows.<sup>183</sup> This should however be balanced to ensure that the taxation still respects other rights, including property rights and the power to tax cannot be used to arbitrarily confiscate private property.<sup>184</sup>

This obligation also prevails upon states the importance of rationalising debt servicing obligations to ensure they do not impede the resources required for the enjoyment of socio-economic rights, and the prudent use of resources, therefore avoiding economic arrangements that would result in an unsustainable drain on finances, such as public-private partnerships.<sup>185</sup>

### *Minimum essential levels / minimum core obligations*

The CESCR holds that it is necessary for states to ensure that minimum essential levels of all rights are enjoyed by all persons, for example essential primary healthcare, basic shelter and housing, and so forth.<sup>186</sup> To justify a failure to meet at least minimum core obligations related to socio-economic rights, a state would have to show that it has made ‘every effort to satisfy, as a matter of priority, those minimum obligations’.<sup>187</sup> This would take into account each state’s resource constraints. A concrete implication of this obligation would be for the state to establish a reasonable measure of poverty and indicators to ensure the state is able to collect accurate, disaggregated data on the number of inhabitants living below the poverty line, to enable it to craft and implement appropriate economic interventions, which will often require decisions on fiscal policy.<sup>188</sup>

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<sup>183</sup> Balakrishnan & Elson (n 11) 13.

<sup>184</sup> As above 6.

<sup>185</sup> M. Romero and J. Ravenscroft (eds) ‘History RePPeated - How public-private partnerships are failing’ (2018).

<sup>186</sup> Balakrishnan & Elson (n 11) 10.

<sup>187</sup> CESCR General Comment 3 (n 156) para 10.

<sup>188</sup> Balakrishnan & Elson (n 11) 12.

## *Equality and non-discrimination*

Socio-economic rights are to be enjoyed ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>189</sup> This includes the elimination of both formal and substantive, and direct and indirect discrimination. This may require affirmative action or other positive interventions.<sup>190</sup> States should also take steps to eliminate systemic discrimination and discrimination in the private sphere.<sup>191</sup>

Consequently, states should ensure for instance that trade and investment decisions, such as decisions to construct infrastructure, do not lead to the discriminatory disadvantage to those already marginalised, or undue advantage to those who are already privileged at the expense of the marginalised,<sup>192</sup> which could range from the destruction of communities or settlements for the construction of the infrastructure, to concentrating the infrastructure developments in already developed areas and not factoring in the infrastructure needs of rural or poorer communities.

## **2.4 Conclusion**

In conclusion, this chapter has discussed economic theories which could contribute to crafting an economic system that responds to the needs in Kenya. This would entail one that truly inculcates democratic principles in the economic sphere, giving the people a greater say in decisions made on economic policies and within industries, while prioritising collective well-being for both the present and the future generations, and maintaining a sustainable balance with nature. Elaborating on the legal framework has demonstrated that human rights law calls for more than a nominal inclusion of human rights ideals in economic discourse. The legal framework provides enough detail and imperatives to ensure human rights has a concrete influence on economic systems and policies.

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<sup>189</sup> ICESCR article 2(2).

<sup>190</sup> CESCR General Comment 20 ‘Non-discrimination in economic, social and cultural rights’ (2009) 3–4.

<sup>191</sup> As above 4–5.

<sup>192</sup> Balakrishnan & Elson (n 11) 11 & 17.

Having established the theoretical and legal framework pertinent to a discussion on economic policy and socio-economic rights, the following chapter analyses Kenya's economic policy under the 2010 constitution vis-à-vis the government's economic policy framework and assesses the extent to which these policies can lead to the realisation of socio-economic rights in Kenya.

## CHAPTER THREE – KENYA’S ECONOMIC POLICY AND THE REALISATION OF SOCIO-ECONOMIC RIGHTS

### 3.1. Introduction

As established in the foregoing chapters, human rights and economic policy interact in ways that are fundamental for the well-being and quality of life of the people. Building up on this, the present chapter briefly traces Kenya’s economic policy progression since its pre-independence days. This is followed by a discussion of Kenya’s economic policy as directed by the 2010 constitution and detailed in the country’s development agenda, Vision 2030, in particular the current MFP III (2018 – 2022). This discussion is considered in the context of the progress made towards the realisation of socio-economic rights in the country. This will be done through an audit of selected economic policies (fiscal and debt policies) to determine how far the economic policy is aligned with the requirements under the obligations corresponding to socio-economic rights.

### 3.2 Brief background of economic policy in Kenya

An evaluation of Kenya’s present economic policy necessitates a brief review of the steps that led to this position, particularly considering that 58 years after independence, Kenya still grapples with persistent socio-economic challenges, including poverty, lack of access to basic services and stark economic inequality.<sup>193</sup>

In the years of its colonisation, the economic policy in the land now referred to as Kenya was crafted for the express purpose of creating a privileged, wealthy, European minority.<sup>194</sup> Ndi reports that by 1950, 50% of the wealth in British Kenya was in the hands of the Europeans who made up only 0.5% of the population.<sup>195</sup>

Soon after gaining independence in 1963, the government of Kenya published Sessional Paper 10 of 1965 titled African Socialism and its Application to Planning in Kenya. This plan

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<sup>193</sup> Jattani et al (n 50).

<sup>194</sup> D Ndi ‘Kenya’s economy, past, present, future?’ (2018) *The Elephant* <https://youtu.be/2lP9lKUhsFU> (accessed 27 September 2021).

<sup>195</sup> As above.

highlighted the economic approach Kenya intended to adopt, which appeared to be a mix between African socialism and the market approach. For instance, the policy prioritised welfare services, progressive taxation policies where tax on low income earners was abolished, greater control of privately owned utilities, and nationalisation where ‘higher social benefits can be obtained’.<sup>196</sup> Simultaneously, the plan set out steps to ‘draw the entire nation into the market economy and [..] provide for a more equitable distribution of the benefits achieved’.<sup>197</sup>

The vision in this policy was, however, disrupted by the political intrigues and efforts to consolidate economic and political power by what Ochola described as the African elite who took over from the colonial elite.<sup>198</sup> Ochola further observes that the ‘bad leadership and poor governance’ that curtailed the achievement of equity and progress as hoped under the 1965 plan has created a systemic deficit on all subsequent development plans, with the only exception being the Economic Recovery Strategy adopted in 2003 under the Kibaki government, which took over after the 24-year Moi rule.<sup>199</sup>

In 1986, under Sessional Paper 1 of 1986 on Economic Management for Renewed Growth, the government of Kenya declared ‘Kenya’s economy is and will remain a mixed economy’.<sup>200</sup> However, the government also conceded that ‘the private sector must play the dominant role in revitalising Kenya’s economy’ partly because ‘only the private sector [..] can make and implement the myriad of decisions required to run an economy as complex as Kenya’s’.<sup>201</sup> Under this policy, the government’s role would be limited to maintaining a stable economic and political environment that enables businesses to thrive; providing infrastructure; deregulation and increasing reliance on market accountability and self-regulation; and provision of administrative and social services which cannot be left to private sector, this includes education, health and water

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<sup>196</sup> GOK ‘Sessional Paper 10 of 1965 on African Socialism and its Application to Planning in Kenya’ (1965) 50 – 55.

<sup>197</sup> As above 48.

<sup>198</sup> S Ochola ‘Assessment of Sessional Paper No 10, 1965 in the context of equity and development in Kenya’ *The IBP, SID & Kati Institute Equity Week* (2016) 3.

<sup>199</sup> As above 4.

<sup>200</sup> GOK ‘Sessional Paper 1 of 1986 on Economic Management for Renewed Growth’ (1986) 23.

<sup>201</sup> As above.

with the government acknowledging the challenge of ensuring that even if there is some private sector involvement, cost should not become a barrier to people accessing these services.<sup>202</sup>

This 1986 Sessional Paper formally incorporated the structural adjustment programs into the Kenyan economy which exemplifies the increasing influence of neoliberal-oriented policy advanced by the World Bank and International Monetary Fund (IMF) which required countries such as Kenya to adopt these economic policies as preconditions to receiving loans and financial support.<sup>203</sup> It is interesting, however, that in both the 1965 and 1986 plans, Kenya initially acknowledged that some sectors including education and healthcare could not be left to market forces and private sector. They needed to remain public or at least dominated by the public sector if they were to continue to ensure equality and non-discrimination in access to quality services.

As alluded to above, from 2002 to 2007 under the Economic Recovery Strategy, there was a significant increase in the economic growth rate, but this masked the underlying truth that unemployment had increased and the poor 'did not share in the growth, but they bore the brunt of inflation.'<sup>204</sup> For instance, the cost of living for low-income households rose by 70% compared to 40% for high-income households.<sup>205</sup> This attempted progress however was disrupted by the post-election violence in 2007/8<sup>206</sup> which was finally resolved when the two opposing parties agreed to a coalition government and to undertaking reforms to address the economic and social challenges which precipitated the violence, including poverty and inequality.<sup>207</sup> This ultimately led to the adoption of the 2010 Constitution.

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<sup>202</sup> As above 24.

<sup>203</sup> ADM Thuo 'Political economy and the local governance in Kenya during the pre-August 2010 Constitution: A synoptic review' (2013) *2 International Journal of Science and Research* 40 – 41.

<sup>204</sup> D Ndii 'Why you're struggling to make ends meet' (2014) *Daily Nation* <https://nation.africa/kenya/blogs-opinion/opinion/why-you-re-struggling-to-make-ends-meet-933798> (accessed 16 October 2021).

<sup>205</sup> As above.

<sup>206</sup> K Kanyinga and JD Long 'The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution' (2012) 55 *African Studies Review* 32.

<sup>207</sup> Kenya National Dialogue and Reconciliation (KNDR), mediated by Kofi Annan 'Statement of Principles on Long-Term Issues and Solutions' (2008) cited in Kanyinga and Long (n 206) 32 – 33.

### 3.3 The 2010 constitution and economic policy

As already demonstrated in Chapter Two, socio-economic rights come with a range of implications for economic policy. Therefore, by virtue of their inclusion in the Kenyan constitution, there are already constitutional implications for economic policy. However, the Kenyan constitution is unique in that it contains several other provisions with express directives and implied consequences for economic policy and planning in Kenya. This sub-section unpacks the economic policy implied in the Constitution of Kenya 2010, which will then be juxtaposed with the economic policy adopted by the current government under the present development plan, and finally provide an analysis of the alignment of these economic policies with the realisation of socio-economic rights.

The Kenyan constitution sets the foundation for ‘an egalitarian mixed economy’,<sup>208</sup> where ‘egalitarianism is understood to be the pursuit of human equality by addressing inequalities.’<sup>209</sup> Kibet suggests that the egalitarian affirmative action interventions are necessary as ‘a recognition of the fact that even with a properly regulated market-based economy, it is not realistic to assume that disadvantaged people and communities will work their way out of poverty’.<sup>210</sup>

On one hand, Kibet identifies within the constitution strong evidence of its overarching egalitarian principles in the national values and principles of governance espoused in article 10. This article binds all ‘state organs, state officers, public officers and all persons whenever any of them applies or interprets this constitution; enacts, applies or interprets any law or makes or implements public policy.’<sup>211</sup> These national values and principles include ‘...the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised...and sustainable development’.<sup>212</sup>

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<sup>208</sup> E Kibet ‘The Economy in the Constitution: An Appraisal of Kenya’s 2010 Constitution as an Economic Charter’ (2020) *African Journal of Comparative Constitutional Law* 30.

<sup>209</sup> Merriam Webster Dictionary <https://www.merriam-webster.com/dictionary/egalitarianism> (accessed 21 October 2021).

<sup>210</sup> Kibet (n 208) 15.

<sup>211</sup> COK (n 130) article 10(1).

<sup>212</sup> As above 10(2).

Further, in an effort to correct the years of skewed development and marginalisation of certain areas such as the arid and semi-arid and the rural areas, the constitution mandates the establishment of the Equalisation Fund into which 0.5% of all national revenue collected annually is to be deposited.<sup>2 1 3</sup> This money shall then be used 'only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation'.<sup>2 1 4</sup> This provision has a sunset clause which provides that it shall lapse 20 years after the effective date, but Parliament may suspend the effect of this clause for a determined number of years.<sup>2 1 5</sup>

Additional directives on the distribution of revenue are provided under article 203 which sets out the criteria to be considered when determining the equitable sharing of national revenue. The criteria includes giving consideration to the 'economic disparities within and among counties and the need to remedy them [and] the need for affirmative action in respect of disadvantaged areas or groups ...'.<sup>2 1 6</sup>

Finally, article 201 sets out principles of public finance and they include:

- a) openness and accountability, including public participation in financial matters;
- b) promotion of an equitable society, in particular –
  - i. fair distribution of the tax burden;
  - ii. equitable sharing of national revenue between national and county governments; and
  - iii. Expenditure promoting the equitable development of the country, including by making special provisions for marginalised groups and areas;
- c) Equitable sharing of the burdens and benefits of resources, including between present and future generations;
- d) Prudent and responsible use of public money;
- e) Clear and responsible fiscal management and reporting.<sup>2 1 7</sup>

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<sup>2 1 3</sup> As above article 204(1) &(2).

<sup>2 1 4</sup> As above.

<sup>2 1 5</sup> As above article 204(6) - (8).

<sup>2 1 6</sup> As above article 203(1)(g) &(h).

<sup>2 1 7</sup> As above article 201.



On the other hand, in upholding market economy principles, the 2010 constitution provides robust protection for property rights, which includes physical and intellectual property. Article 40 provides that ‘every person has the right, either individually or in association with others to acquire and own property of any description and in any part of Kenya’ and Parliament cannot pass a law that would make it possible to arbitrarily deprive any person of their property or diminish their enjoyment of it.<sup>2 1 8</sup> Under the same provision, a person can only be deprived of their property under strict conditions including where it ‘results from[a legal] acquisition of the land or an interest in land ..? or it is acquired by the state ‘for a public purpose or in the public interest’. In the latter situation, there must be ‘prompt payment in full, of just compensation ...and ..a right of access to a court of law’ for a person who had a right or interest in the land.<sup>2 1 9</sup> Scholars observe that this strong protection provides a foundation for a market based economy because land and property are the bedrock of private enterprise.<sup>2 2 0</sup>

The constitution does not shy away from limiting the market. For instance, according to Kibet, the fact that article 24 which discusses limitation of rights includes the proportionality principle implies that ‘communitarian or public interests such as consumer welfare and national economy trump narrower interests such as commercial interests of a few industry players.’<sup>2 2 1</sup> The constitution also endorses significant elements of state intervention in the form of price controls, regulation, production and distribution.<sup>2 2 2</sup> Regulation is common in market economies, but price control, production and distribution are more a feature of planned or command economies.<sup>2 2 3</sup> Kibet gives the examples of the Price Control (Essential Goods) Act and the Energy (Petroleum Pricing) Regulations both of which empower the government to set limits on the price sellers can charge for particular goods, including petrol and maize flour. The Kenyan government is also heavily involved in the provision of health services and education and in the agriculture and energy sectors.<sup>2 2 4</sup>

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<sup>2 1 8</sup> As above article 40(1) &(2).

<sup>2 1 9</sup> As above article 40(3).

<sup>2 2 0</sup> Kibet (n 208) 10.

<sup>2 2 1</sup> As above 13.

<sup>2 2 2</sup> As above 11.

<sup>2 2 3</sup> As above.

<sup>2 2 4</sup> As above.

Other forms of state intervention captured in the constitution include protection of labour rights<sup>2 2 5</sup> and consumer rights,<sup>2 2 6</sup> including the regulation of competition. Kibet explains that in a fully market economy, the principle of ‘buyer beware’ would be used to ensure buyers are careful as they engage in the market, but the introduction of consumer rights as rights in the constitution is a form of intervention which infringes on the freedom of the market.<sup>2 2 7</sup>

### 3.4 Vision 2030 – Kenya’s development blueprint

Kenya’s Vision 2030 was officially adopted under Sessional Paper 10 of 2012<sup>2 2 8</sup> (although it was introduced in 2008 when the Kibaki government came to power).<sup>2 2 9</sup> The formulation of this development plan was hailed as highly participatory and rigorous, involving a variety of stakeholders from across the country and beyond.<sup>2 3 0</sup> As introduced in Chapter One, Vision 2030 is anchored on three main pillars: economic, social and political, each with a specific target. These pillars are in turn established on a set of foundational elements, including macroeconomic stability; governance reforms; enhanced equity and wealth creation opportunities for the poor; [..and] human resource development’.<sup>2 3 1</sup>

The macroeconomic framework for the achievement of Vision 2030 focuses on economic growth and maintaining a growth rate of 10% to shift Kenya into a middle income country.<sup>2 3 2</sup> It highlights that macroeconomic stability in terms of consistent low inflation and interest rates, sustainable public debt and steady growth is critical for private sector growth and development.<sup>2 3 3</sup> It discusses the plans for a number of economic policies and how they will contribute to the progress towards attaining the Kenya envisioned. This section discusses selected elements of fiscal policy, including tax and expenditure, and debt policy as outlined in the macroeconomic framework, with some commentary on the orientation of the Kenyan economic system

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<sup>2 2 5</sup> COK (n 130) article 41.

<sup>2 2 6</sup> As above article 46.

<sup>2 2 7</sup> Kibet (n 208) 27.

<sup>2 2 8</sup> GOK Sessional Paper 10 of 2012 (n 48).

<sup>2 2 9</sup> <https://vision2030.go.ke/> (accessed 28 October 2021).

<sup>2 3 0</sup> GOK Sessional Paper 10 of 2012 (n 48) ii.

<sup>2 3 1</sup> As above.

<sup>2 3 2</sup> As above 7.

<sup>2 3 3</sup> As above 7.

The discussion on fiscal policy covers the approach to raising and spending revenues. Firstly, the government projects an increase in development expenditure in favour of priority areas of agriculture, infrastructure, health and education,<sup>2 3 4</sup> but at the same time plans to ensure that state expenditure is controlled to guarantee that public spending does not crowd out private sector investments.<sup>2 3 5</sup> The plan, therefore, advocates for limiting and rationalising expenditure to focus on the flagship projects steering the implementation of Vision 2030.

The government also intends to finance the expenditure required to meet the goals under Vision 2030 predominantly through tax revenue. The plan acknowledges that the scope for levying taxes has been limited by the trade liberalisation directives under the regional economic integration efforts, but the State remains cognisant of the risks of falling into a ‘race to the bottom’ with respect to taxes which would hurt the revenue base.<sup>2 3 6</sup> The plan also prioritises maintaining a low fiscal deficit and sustainable debt geared towards ensuring the right environment for trade, investment and private sector development.<sup>2 3 7</sup>

In terms of the investment and savings policy, Vision 2030 aims to grow public sector investment to over 9% of the GDP by strengthening revenue, restructuring development expenditure, increasing reliance on development partners for project financing, and some borrowing, particularly for infrastructure.<sup>2 3 8</sup> Correspondingly, the plan anticipates a steady increase in private sector investment to over 24% of GDP from 2020/21 – 2030, with foreign direct investment expected to be a significant portion of this increase.<sup>2 3 9</sup> This will require the state to facilitate an enabling environment through, among other things, streamlining the regulatory framework, strengthening the judiciary, strengthening human capital while ensuring labour market flexibility, corruption control and the protection of property rights.<sup>2 4 0</sup> The plan acknowledges that for sustainability, the larger share of investment financing needs to be generated domestically, which necessitates the need for growing national savings.<sup>2 4 1</sup>

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<sup>2 3 4</sup> As above.

<sup>2 3 5</sup> As above 7.

<sup>2 3 6</sup> As above.

<sup>2 3 7</sup> As above 8

<sup>2 3 8</sup> As above 9.

<sup>2 3 9</sup> As above.

<sup>2 4 0</sup> As above.

<sup>2 4 1</sup> As above 10

The macroeconomic plan also lists a number of structural reforms to be undertaken to spur the economy towards achieving the vision for the country. These reforms include improved governance, better systems for procurement and financial management, improving the environment for private sector competitiveness, and privatisation aiming to ‘promote accountability and efficiency and opening opportunities for private sector investment and new technology in the public enterprises’.<sup>2 4 2</sup>

### **3.5. The Third Medium Term Plan - The Big Four Agenda**

Vision 2030 is being implemented in phases, using medium term plans aligned with the terms of political leadership that is each election cycle. The MTP III covers the period from 2018 to 2020, the second and final term in office for President Uhuru Kenyatta, and its vision is ‘Transforming lives: Advancing socio-economic development through the “Big Four”’ – popularly referred to as the Big Four Agenda.

MTP III acknowledges that indeed there were gains under the second MTP, but nevertheless critical challenges still remain. It identifies ‘increase in prices of food and other basic items resulting in high cost of living’ and that a significant proportion of Kenyans still lack access to basic services such as electricity, affordable housing, universal healthcare and safe drinking water’, among other things, as factors that will have to be addressed by the present plan.<sup>2 4 3</sup> Consequently, the Big Four Agenda priority areas are manufacturing, food security, affordable housing and universal healthcare. In particular, the plan aims to provide 500,000 affordable housing units by 2022, provide universal health coverage (medical insurance), expand food production and supply and reduce food prices, and to improve value addition and increase manufacturing to 15% of the GDP.<sup>2 4 4</sup>

In addition to the four priorities under the Big Four Agenda, MTP III is also structured with goals and targets for the three pillars of Vision 2030. The social pillar of MTP III includes plans for healthcare, housing, education, water and sanitation, gender, youth and vulnerable groups,

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<sup>2 4 2</sup> As above 11.

<sup>2 4 3</sup> GOK ‘Vision 2030 Third Medium Term Plan 2018 – 2022’ (2018) (MTP III) 2.

<sup>2 4 4</sup> As above.

among others. All plans within these sub-sectors are designed with the overall aim of contributing towards attainment of the Big Four.

### **3.5.1. Macroeconomic plan under the MTP III**

The macroeconomic framework for MTP III aligns with the overall Vision 2030 macroeconomic framework,<sup>2 4 5</sup> summarised above. Between 2018 and 2021, the government is focusing on an ‘investment led, low deficit and low debt growth framework’.<sup>2 4 6</sup> In particular, the government aims to stimulate trade and investment primarily through scaling up efforts towards industrialisation. Towards this end, a stable macroeconomic environment, sustainable debt (including reducing the debt to GDP ratio), better expenditure management and conducive fiscal space are key.<sup>2 4 7</sup>

With regard to the fiscal policy, the government’s plan is to further lower the fiscal deficit (reducing the difference between how much the government spends vis-à-vis how much revenue the government generates) while balancing this with spurring economic growth through expenditure on productive areas aligned with the MTP III goals.<sup>2 4 8</sup> To grow the revenue, the government intended to implement reforms to tax policy and revenue administration while ‘shifting composition of expenditure from recurrent to capital expenditure’.<sup>2 4 9</sup> In addition to the review of tax policy, the government intended to mobilise additional resources through domestic and external borrowing.<sup>2 5 0</sup>

These interventions were expected to result in a growth rate of seven per cent by 2022,<sup>2 5 1</sup> however these projections have been severely affected by the large scale impact of the COVID-19 pandemic which caused a dramatic decline economic activity and consequently a reduction of economic growth.<sup>2 5 2</sup>

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<sup>2 4 5</sup> As above 6

<sup>2 4 6</sup> As above 11

<sup>2 4 7</sup> As above.

<sup>2 4 8</sup> As above.

<sup>2 4 9</sup> As above 12

<sup>2 5 0</sup> As above.

<sup>2 5 1</sup> As above 11

<sup>2 5 2</sup> World Bank Group (n 49).

### **3.6 Implications of the economic policy for the realisation of socio-economic rights in Kenya**

The economic order introduced by the 2010 constitution ushered in some important progress into the Kenyan economy such as entrenching the direct and indirect participation of the people into the process of budget making unlike previously where the executive was solely responsible for the development of the budget.<sup>2 5 3</sup> Building on this momentum both Vision 2030 and MTP III seek to generally improve the well-being of Kenyans and pundits have celebrated the significant steps forward.<sup>2 5 4</sup>

However, the plan has received some criticism. For instance, Kenyan economists such as Ndi described Vision 2030 as a ‘triumph of capital fundamentalism focusing on ‘growth above all else, fuelled by mega infrastructure projects’.<sup>2 5 5</sup> This section provides a critique of selected economic policies, focusing on fiscal policy including tax and expenditure policies, and debt policy to analyse their alignment with the efforts towards the realisation of socio-economic rights. The section will also provide reflection on the economic system to the extent that the system informs policy choices.

#### **3.6.1 Fiscal policy**

Fiscal policy refers to the measures that governments use to achieve their economic aims through taxation and government spending.<sup>2 5 6</sup> The fiscal policy framework under Vision 2030 declares the government’s intention to rely primarily on tax revenue to finance government expenditure and to ensure a sustainable fiscal deficit for a favourable environment for the private sector.<sup>2 5 7</sup>

The position within Vision 2030 and the MTP III to shy away from increased public spending even though acknowledging that is required in some instances aligns with Balakrishnan’s analysis that orthodox economists of the neoliberal orientation discourage state involvement in

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<sup>2 5 3</sup> D Ndi ‘Highway Robbery: “Budgeted Corruption” as State Capture - A case study of infrastructure spending under the Jubilee administration’ (2020) 7 – 8.

<sup>2 5 4</sup> Kenya Vision 2030 ‘Marking 10 Years of Progress - Kenya Vision 2030’ (2018) <https://youtu.be/BuxQnUwNeGs> (accessed 28 October 2021).

<sup>2 5 5</sup> Ndi (n 204).

<sup>2 5 6</sup> Encyclopaedia Britannica <https://www.britannica.com/topic/fiscal-policy> (accessed 24 October 2021).

<sup>2 5 7</sup> GOK Sessional Paper No. 10 of 2012 (n 48) 7.

economies because it distorts the economy and constricts the space for private actors who are forced to compete with the state.<sup>2 5 8</sup>

Similarly, the imperative within the development plans to manage the fiscal deficit through increasing capital expenditure while reducing recurrent expenditure is alarming because the services necessary for the enjoyment of socio-economic rights rely heavily on recurrent expenditure because they are dependent on a high number of people, for instance education requiring teachers and non-teaching staff and healthcare requiring doctors, nurses and other clinical and non-clinical staff to ensure quality health services are delivered. Contrary to orthodox economists, heterodox economists take the position that public expenditure is important for an economy that prioritises the well-being of the people, and budget deficits are permissible.<sup>2 5 9</sup>

Researchers recently established that Kenya's tax and expenditure policies combined were rather progressive, with the greatest tax burden being borne by the richest members of the society and the poorest were the net beneficiaries of the taxes as they received or benefitted the most from social welfare interventions such as cash transfers and subsidised education and healthcare.<sup>2 6 0</sup> This is important because, as Wariis observed, redistribution is a prerequisite for a rights-based society in Kenya,<sup>2 6 1</sup> and this will both improve the well-being of the people and improve what she terms the fiscal legitimacy of the state.<sup>2 6 2</sup>

However, the evidence also showed that while the policy resulted in reduced inequality, it increased poverty.<sup>2 6 3</sup> In particular, indirect taxes (such as value added tax (VAT), sales tax and service tax) were the greatest drivers of the poverty increase, although direct taxes (such as income tax) also contributed to this.<sup>2 6 4</sup>

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<sup>2 5 8</sup> Balakrishnan et al (n 16) 13.

<sup>2 5 9</sup> As above.

<sup>2 6 0</sup> DK Manda et al 'Fiscal incidence, inequality and poverty in Kenya: A CEQ Assessment' (2020).

<sup>2 6 1</sup> A Wariis et al 'Taxation and State Building in Kenya: Enhancing Revenue Capacity to Advance Human Welfare' (2009) 33.

<sup>2 6 2</sup> A Wariis *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights* (2013) 124.

<sup>2 6 3</sup> DK Manda et al (n 260).

<sup>2 6 4</sup> As above 19.

The situation has worsened in the wake of the COVID-19 pandemic. The pandemic already had a devastating effect on the livelihoods of the persons living in poverty, but the government has exacerbated the situation by introducing numerous taxes that disproportionately affect the poor.<sup>265</sup> This is connected to the runaway debt situation, which will be discussed in the next subsection. The upshot here is the reiteration of the need to restructure/redesign direct and indirect taxes in Kenya to ensure that the fiscal policy addresses both inequality *and* poverty in order to move the country towards the realisation of socio-economic rights.<sup>266</sup>

### 3.6.2 Debt policy

The issue of debt as a driver of poverty has been highlighted and addressed for decades. In a 1997 UN report debt is cited as a major international driver of violations of socio-economic rights.<sup>267</sup> Despite the Vision 2030 commitment to a 'sustainable public sector debt position'<sup>268</sup> which is reiterated in MFP III where the government commits to pursuing a 'low debt growth framework',<sup>269</sup> Kenya's debt has skyrocketed to dangerous levels. The National Treasury and Planning Department reports that as at June 2021 the debt to GDP ratio stood at 69.3% with 36.2% being external debt.<sup>270</sup> The debt service to revenue ratio stood at 50%.<sup>271</sup>

The Kenyan Parliament expressed alarm that the budgetary allocation to debt servicing has outpaced the allocations for development expenditure (for which debt is meant to finance) by over 200%.<sup>272</sup> This is likely to constrain funds available for necessary development and services, and the government is already increasing the price of essential goods and services in response to

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<sup>265</sup> R Warah 'COVID debt, and taxes are plunging millions of Kenyans into poverty' (2021) <https://www.ohchr.org/en/press-releases/2021/10/covid-debt-poverty-kenya/> (accessed 24 October 2021).

<sup>266</sup> DK Manda et al (n 260) 17.

<sup>267</sup> UN Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, El Hadji Guissé 'Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights) pursuant to Sub-Commission resolution 1996/24' (1997) para 31.

<sup>268</sup> GOK Sessional Paper No. 10 of 2012 (n 48) 7.

<sup>269</sup> GOK MFP III (n 243) 11.

<sup>270</sup> GOK 'Public Debt Management Report 2020/2021' (2021) 12.

<sup>271</sup> As above.

<sup>272</sup> B Anbani 'Kenya borrowed Sh60bn every month this year, CBK report shows' (2021) *Nation* <https://nation.africa/kenya/business/kenya-borrowed-sh60bn-every-month-this-year-cbk-report-shows-3483094> (accessed 24 October 2021).



conditions from lenders like the World Bank<sup>2 7 3</sup> similar to the SAPs, with additional austerity measures looming<sup>2 7 4</sup>

Monetary sovereignty is important and would be achieved when a country issues its own currency,<sup>2 7 5</sup> but it is undermined when a country incurs debt in a foreign currency that has to be paid back in the foreign currency.<sup>2 7 6</sup> This makes it difficult for the country to have economic sovereignty, which in turn can be considered a form of neo-colonialism<sup>2 7 7</sup>. As demonstrated above, Kenya is ‘heavily dependent on global financial markets to finance [its] budget’.<sup>2 7 8</sup> This has been the case since the 1980s when the structural adjustment programs rendered many ‘post-colonial’ countries ‘dependent on foreign currency and creditors’.<sup>2 7 9</sup> This has significantly undermined its monetary sovereignty and consequently made it more vulnerable to both foreign directives and conditionalities on the economic policies to be adopted<sup>2 8 0</sup> and to shocks in the global economy, such as the one occasioned by the pandemic.

### 3.6.3 Reflections on the economic system

In addition to an assessment of the specific economic policies above, this chapter also reflects on the underlying economic orientation in an effort to employ the human rights framework to assess the entirety of the economic system including the underpinning theories and assumptions.

From the language and priorities used in the policies and plans discussed above it can be inferred that as a mixed economy Kenya incorporates several elements of neoliberal capitalism

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<sup>2 7 3</sup> O Guguayu ‘Water bills set to rise on World Bank loan terms’ *Business Daily* (2021) <https://www.businessdailyafrica.com/bd/economy/water-bills-set-rise-on-world-bank-loan-terms-3470900> (accessed 24 October 2021).

<sup>2 7 4</sup> Warah (n 265).

<sup>2 7 5</sup> J Hckel ‘How to achieve full decolonization’ (2021) *Neoliberalist: Food Justice files* 67 – 69 <https://newint.org/features/2021/08/09/money-ultimate-decolonizer-fjf> (accessed 28 October 2021). See also NS Sylla ‘Modern Monetary Theory in the Periphery: What does MMT have to offer developing nations?’ (2020) <https://www.rosalux.de/en/news/id/41764/modern-monetary-theory-in-the-periphery> (accessed 15 October 2021).

<sup>2 7 6</sup> As above.

<sup>2 7 7</sup> Hckel (n 275).

<sup>2 7 8</sup> D Ndi ‘Thoughts on a Pandemic, Geoeconomics and Africa’s Urban Sociology’ (2020) *The Elephant* <https://www.theelephant.info/op-eds/2020/03/25/thoughts-on-a-pandemic-geoeconomics-and-african-urban-sociology/> (accessed 16 October 2021).

<sup>2 7 9</sup> Hckel (n 275) 69.

<sup>2 8 0</sup> Ndi (n 204).

Capitalism is defined as ‘an economy based on private enterprise .the use of markets not planning to allocate economic resources .production motivated by the profit motive.’<sup>2 8 1</sup> Flant described neoliberalism as permitting a very limited concept of social justice and welfare delivered by the state. Flant summarises a ‘neoliberal welfare state’ as ‘not inspired by social justice .compatible only with negative rights..and is not involved in the direct provision of welfare itself but is limited to a funding and a commissioning role’.<sup>2 8 2</sup> A detailed critique of neoliberal capitalism beyond the scope of this thesis, but scholars such as Appiagyei-Atua, have established that ‘neo-liberal economic policies have contributed significantly to the abuse of [socio-economic rights] in the less industrialised world’.<sup>2 8 3</sup> One possible reason why these policies do not contribute to improved well-being and the advancement of rights is because they are not aligned with human rights principles and goals in the first place.

The disconnect between human rights principles and the economic policy in Kenya is further illustrated in the apparent orientation towards a developmental rather than human rights approach to progress and the centrality of GDP growth as the measure of progress. These will be elaborated in turn below

### ***Developmental rather than human rights approach***

The Social Pillar under Vision 2030 incorporates comprehensive goals for education, healthcare, water and sanitation, housing and food security. The Big Four Agenda also prioritises healthcare (universal health coverage), affordable housing and food security and the entire MTP III, including the economic framework, is geared towards advancing on these aims. They are however considered as services and only a tenuous connection is made to their status as human rights as well. This suggests that the Kenyan government has taken more of a developmental approach rather than a human rights approach to the delivery of these services, and therefore could be seen to contribute to the slow progress towards the realisation of socio-economic rights.<sup>2 8 4</sup>

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<sup>2 8 1</sup> Rutherford (n 14) 73.

<sup>2 8 2</sup> R Flant *The Neo-Liberal State* (2009) 250.

<sup>2 8 3</sup> K Appiagyei-Atua ‘A rights-based critique of poverty production and its impact on human security in the less industrialised world’ *Journal of Human Security* (2008) 13.

<sup>2 8 4</sup> P Uin ‘On high moral ground: The incorporation of human rights by the development enterprise’ (2002) 17 *The Fletcher Journal of Development Studies*.

### ***GDP and trickle-down growth***

In the discussion on the macro-fiscal framework and growth strategy prospects, the focus is more on developing the industry, manufacturing trade and economy, with the appearance of an orientation towards trickle-down economics. This is confirmed by the National Bureau of Statistics which reported in 2020 that among the interventions the government of Kenya has introduced to address stark socio-economic inequality is ‘the pursuit of economic growth –that was supposedly to trickle down in order to reduce poverty and inequality’.<sup>2 8 5</sup> However, the 2020 National Report on Inequality notes that ‘income inequality and poverty remained high even when the economy achieved relatively high rates of economic growth’.<sup>2 8 6</sup> Therefore, as emphasised by numerous scholars,<sup>2 8 7</sup> investing in mega-infrastructure does not necessarily result in GDP growth, and GDP growth does not necessarily result in a better standard of living, especially for the poorest in the society. Often they are being left behind.

Therefore, the main premise of this paper is to advocate for an economic system that is, as Hckel puts it, ‘organised around human flourishing and ecological stability’ rather than one centred on GDP growth,<sup>2 8 8</sup> where rather than a cause of it, GDP growth is envisioned as a result of the enjoyment of rights.<sup>2 8 9</sup>

### **3.7. Conclusion**

In light of the above, this chapter concludes that the 2010 constitution, in addition to being a legal document, also sets Kenya on course to establish an egalitarian mixed economic system. The development plan that followed the promulgation of the constitution appears on the face of it to align itself with this position. However, upon closer analysis, it becomes apparent that the overall development agenda and the medium term plan adopted by the present government lean more towards a market economy that prioritises infrastructure development and facilitating a conducive

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<sup>2 8 5</sup> KNBS (n 55) 5.

<sup>2 8 6</sup> As above 6.

<sup>2 8 7</sup> See for instance Ndi (n 204); J Hckel *Less is more: How degrowth will save the world* (2020).

<sup>2 8 8</sup> Hckel (n 287) 184.

<sup>2 8 9</sup> J Hckel ‘Degrowth: a response to Branko Milanović’ (2020)

<https://www.jasonhckel.org/blog/2017/11/19/why-branko-milanovic-is-wrong-about-de-growth> (accessed 15 October 2021).

business environment in ways that result in a disconnect with human rights objectives and obligations.

As the world in general and Kenya in particular struggle to recover from the economic shock caused by the COVID-19 pandemic, it is important to be guided by the insights from Si meoni and Brett who, reflecting on African economies, affirm that we cannot ‘build back better’ because what existed was not for us nor was it working<sup>290</sup>. As demonstrated in Chapter Three, the Kenyan economy was originally designed to be an extractive enterprise to benefit a privileged minority at the expense of the majority, and despite efforts by the government to pursue the improvement of the people’s well-being, this legacy has persisted.

Beyond having a mixed economic model, the main question to consider is what elements of what models are being mixed together, and to what extent. Building up on this observation, the following concluding chapter addresses the concerns raised in this chapter by providing recommendations for the way forward to ensure an economic system and policy that spurs Kenya towards the full realisation of socio-economic rights.

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<sup>290</sup> C Si meoni and MBrett ‘Take Back Our Institutions’ (2021)  
<https://progressiveinternational/issuepri nt/98bf6846-33cd-45ea-ae9f-575d6e0c18dc-take-back-our-institutions/en> (accessed 15 October 2021).

## CHAPTER FOUR - CONCLUSION AND RECOMMENDATIONS

### 4.1. Introduction

This paper set out to interrogate the relationship between economic policy formulation and implementation and the realisation of socio-economic rights. Because economic policies are directed by the economic systems states align with, a discussion on economic systems was also incorporated into the work. Chapter One of the paper focused on an overview of the state of the realisation of socio-economic rights in Kenya and established the nexus between economic policy and human rights. The chapter also set out the research questions and methodology to guide the study, the gaps in the available literature that this paper sought to fill, and the limitations of the study. Chapter Two interrogated relevant economic theories and the legal framework for socio-economic rights in Kenya, setting out the implications of the rights framework on economic policy. Chapter Three focused on a case study of Kenya, providing a brief overview of the history of the economic system and policies, then conducting an in-depth analysis of the economic system and policy direction envisioned under the 2010 Constitution of Kenya and the development plans adopted under the present government to determine how far they align to realise socio-economic rights.

The paper has, thus far, established that the Constitution of Kenya 2010 sets the foundation for an egalitarian mixed economy, setting human rights as a core consideration in the development and implementation of economic policy. However, while the overall development goals appear to centre on human flourishing, the economic policies implemented in practice were found to have failed to achieve these ends due, at least in part, to the misalignment with human rights principles and obligations. In particular, the fiscal policies showed that tax and expenditure measures were contributing to increased poverty and the rapidly growing debt burden was also jeopardising the state's capacity to ensure the enjoyment of rights. Overall, the deep-rooted neoliberal capitalist elements of the system contribute to the nominal incorporation of human rights, and the focus on GDP growth at the expense of genuine progress in terms of well-being for the people. This concluding chapter makes recommendations towards formulating an economic policy orientation that is more aligned with the sustainable realisation of human rights.

## 4.2 Recommendations

Drivers of economic inequality and other conditions that make it difficult for everyone to enjoy their socio-economic rights are a result of deliberate policy choices made by governments. These choices may breach human rights commitments governments have made.<sup>291</sup> The disruption occasioned by the COVID-19 pandemic has provided Kenya with the impetus to reconstruct an economy that will work for the good of the people first and foremost. To address the misalignment between economic policy and the realisation of socio-economic rights, this thesis recommends the following measures.

### 4.2.1. Incorporate a rights-centred rather than developmental approach to progress

As emphasised by Uvin, development cannot be equated to the realisation of socio-economic rights, nor can the nominal and tokenistic incorporation of human rights as a subset of development result in the realisation of human rights.<sup>292</sup> Many times, this approach has the opposite effect of accelerating poverty and the denial of socio-economic rights. Kenya, therefore, needs to transform its development agenda to substantively centre human rights and utilise the human rights framework to design the systems necessary for the full enjoyment of socio-economic rights. In making this recommendation, this thesis is cognisant of the need to avoid the risk of repeating the error of incorporating human rights merely as rhetoric in domestic development plans and economic policy.

Connected to this is the need to reimagine an economic orientation in Kenya, and consequently the economic system and policies, it will be important to challenge the main preconception that guides state technocrats as established in Chapter Three: the centrality of GDP growth as the overall aim of economic policy and the assumption that it is the driver of positive change in the lives of the people, especially the poorest.

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<sup>291</sup> A Corkery 'Friends or foes? The role of human rights creating visions for economic justice' (2021) *Fight Inequality Alliance* <https://youtu.be/EcwPhqOM03s> from 12:29 (accessed 20 October 2021).

<sup>292</sup> Uvin (n 284).

The realisation of socio-economic rights are in fact a precondition for development.<sup>293</sup> As confirmed by Appiagyei-Atua, where socio-economic rights are denied, poverty is produced ‘which in turn disturbs the foundation for economic growth and development of a country’.<sup>294</sup> Consequently, Kenya should instead transition away from GDP as the measure of progress and explore the several other measures that have been suggested. In particular, the well-being economy advocated by Fioramonti,<sup>295</sup> Chrysopoulou<sup>296</sup> among others, is worth pursuing.

#### **4.2.2 Reform fiscal policy to align with socio-economic rights aims**

Once human well-being and flourishing (and of necessity, the realisation of socio-economic rights) is the focus of the economy, several other adjustments to the economic policies will flow from this change. To address the shortcoming identified in Chapter Three, this thesis recommends that Kenya urgently rationalise its taxation policy to make it truly progressive and prevent the incidence of taxes driving more people into poverty. For this, Kenya will need to redesign the tax policy to prevent the disproportionate burden that both direct and (especially) indirect taxes have on the poor. Further, Kenya, like several African countries, loses billions of shillings through illicit financial flows, including tax avoidance and outright evasion.<sup>297</sup> More targeted direct taxes on multinationals and measures to curb illicit financial flows will help to generate the resources required to ensure that the state can meet its obligations concerning socio-economic rights and do so without incurring significant debt or causing inflation.<sup>298</sup>

These improvements to the tax policy necessitate revisions to the expenditure policy also. To begin with, the Kenyan government should reconsider the economic principle that the government should always keep the fiscal deficit low by keeping state expenditure low, especially on recurrent expenditure. Heterodox economists and others have advocated for states seeking to pursue the realisation of socio-economic rights to accept higher fiscal deficits (the increase in the

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<sup>293</sup> K Appiagyei-Atua (n 283) 14.

<sup>294</sup> As above.

<sup>295</sup> L Fioramonti ‘Well-being Economy: A Scenario for a Post-growth Horizontal Governance System’ (2016).

<sup>296</sup> A Chrysopoulou ‘The Vision of a Well-Being Economy’ (2020) *Stanford Social Innovation Review* [https://ssir.org/articles/entry/the\\_vision\\_of\\_a\\_well\\_being\\_economy](https://ssir.org/articles/entry/the_vision_of_a_well_being_economy) (accessed 28 October 2021).

<sup>297</sup> United Nations Conference on Trade and Development (UNCTAD) ‘Tackling Illicit Financial Flows for Sustainable Development in Africa’ (2020).

<sup>298</sup> Hckel (n 279) 68.

state having higher levels of expenditure than revenue) as state spending is essential for the realisation of these rights.<sup>299</sup> This in particular will make it possible for Kenya to implement several progressive policies to guarantee socio-economic rights and achieve a better quality of life for everyone. This includes direct state provision of universal basic services necessary for the realisation of socio-economic rights, and exploring additional welfare interventions such as a universal basic income and/or job guarantees. It may be argued that such interventions may meet socio-economic needs but do not necessarily guarantee the enjoyment of socio-economic rights. However, as demonstrated in Chapter One, experts have reiterated the importance of state provision of services necessary for the enjoyment of socio-economic rights as a way of ensuring equality and non-discrimination, especially for marginalised communities.

However, while the direct state provision is important, the full realisation of socio-economic rights requires the establishment of entire systems within the state that creates a conducive environment for the full enjoyment of the rights. This will involve enacting conducive laws and policies that facilitate the realisation of socio-economic rights, enacting and enforcing regulations to govern standards and operations where the state and non-state actors are involved in services impacting the enjoyment of the rights, establishing structures for the state to monitor its actions and actions of non-state actors that may have an impact on the rights, and having structures to secure accountability for violations by the state or abuse by non-state actors, including establishing a well-trained, well-funded judiciary. This entire process also requires resources.

As an important overarching point, the Kenyan government must bear in mind the interdependence and indivisibility of rights, which affirms that the efforts to realise socio-economic rights cannot be done at the expense of civil and political rights. All policies and interventions must be designed to ensure that the full range of rights is respected, protected, fulfilled and promoted.

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<sup>299</sup> Balakrishnan et al (n 16) 12. See also Syla (n 275).



### **4.2.3 Reform debt policy and pursue monetary sovereignty**

To avoid the constraints to the realisation of socio-economic rights occasioned by diverting significant portions of revenue to debt servicing and being vulnerable to regressive conditionalities from lenders, the Kenyan government will need to more aggressively avoid the heavy reliance on debt to finance progress in the country. If the first recommendation here (regarding the orientation of the Kenyan economic system) is followed, there will be no need for the heavy debt incurred for the mega infrastructure developments as the focus will first shift to concrete well-being concerns for the people and establishing the systems to protect the well-being. Secondly, with the implementation of the measures under the second recommendation on fiscal policy, more resources will be generated domestically and expenditure rationalised to again reduce the need for over-reliance on foreign loans. These measures will not only increase the fiscal space for the realisation of socio-economic rights but will also go a long way in restoring monetary sovereignty to the country.

This thesis has attempted a comprehensive analysis of the mismatch between Kenya's economic policy and its commitment to socio-economic rights. There are, however, still some relevant discussions that could not be comprehensively dealt with within the limitations of this paper. In particular, this thesis has also exhibited the extent to which domestic economies are significantly impacted by external factors and interests such as international geopolitics. While an in-depth discussion on this phenomenon is beyond the scope of the present paper, this is an area future research could explore and unpack in greater detail. The country and several like it would also benefit from a more detailed exploration of the solutions and alternatives proposed.

In conclusion, Kenyan technocrats, politicians and activists need to embrace different approaches to conceptualising and achieving progress. Well-being through realising human rights should be at the core, and alternative economic approaches as the driving force if we will be able to overcome the scope of challenges we currently face.

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