

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

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**SUMMARY**

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

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

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