

**STRENGTHENING THE ROLE OF POLITICAL ACCOUNTABILITY IN THE
REALISATION OF THE RIGHT TO HOUSING IN SOUTH AFRICA**

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Declaration by Candidate

I, Carlos Joel Tchawouo Mbiada, hereby declare that this dissertation is original and has never been presented in any other institution before. I further declare that any secondary information has been duly acknowledged in this dissertation.

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Abstract

Key concepts: Right to housing, realisation, political accountability, judiciary, elections, ombudsman, constitutional limitations of powers, transparency, information community participation, and decentralisation.

The justiciable right to have access to adequate housing (right to housing) in the Constitution of the Republic of South Africa, 1996 (the Constitution) aims at redressing some of the injustices of the past. The Constitution obliges government to adopt reasonable legislative and other measures to realise this right. Pursuant to this obligation, several legislation and policies have been enacted and adopted to give effect to the right to housing. Despite the justiciable nature of this right, like other socio-economic rights, the self-restraint approach in judicial adjudication has limited the potential role that courts can play in realising the right to housing. This study argues against overreliance on courts in realising the right to housing and explores a holistic approach that can enhance the realisation of this right. This holistic approach finds expression in political accountability which encompasses a diverse range of mechanisms. This study establishes the link between political accountability and human rights and identifies mechanisms of political accountability which could be used to enhance the realisation of the right to housing. This study further investigates the extent to which the identified mechanisms are catered for in South African law and policies. It lastly makes recommendations on how to optimise political accountability in contributing towards realising the right to housing.

List of Abbreviations

ACHPR	African Charter of Human and Peoples' Rights
ANC	African National Congress
Afr. J. Legal. Stud	African Journal of Legal Studies
BNG	Breaking New Ground
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHRGJ Working Paper	Centre for Human Rights and Global Justice Working Paper
Col Hum Rts L Rev	Columbia Human Rights Law Review
DA	Democratic Alliance
ECOWAS	Economic Community of West African States
ECOSOC	Economic and Social Council
ESR Review	Economic and Social Rights Review
Habitat INTL	Habitat International
HSRC Review	Human Sciences Research Council Review
Hum Rts Rev	Human Rights Review
Hum Rts Br	Human Rights Brief
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights

ICSPCA	International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ILO	International Labour Organization
ICRSR	International Convention Relating to the Status of Refugees
ISFUP	Informal Settlements Formalization and Upgrading Programme
ISS Paper	Institute for Security Studies Paper
LRC	Legal Resources Centre
LGTAS	Local Government Turnaround Strategy
MEC	Member of the Executive Committee
MMC	Member of the Mayoral Committee
NCA	National Credit Act
PELJ/PER	Potchefstroom Electronic Law Journal/ <i>Potchefstroomse Elektroniese Regsblad</i>
PIE	Prevention of Illegal Eviction from Unlawful Occupation of Land Act
QUTLJJ	Queensland University of Technology Law and Justice Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal

SAPR/PL	South African <i>Publiekregl</i> / Public Law
SERI	Socio-Economic Rights Institute
UDHR	Universal Declaration of Human Rights
VIP	Ventilated Improved Pit toilet
WPWSS	White Paper on Water Supply and Sanitation

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D	The Convention on the Elimination of All Forms of Discrimination against Women of 1979	90
E	Convention on the Rights of the Child of 1989	90
F	International Convention Relating to the Status of Refugees of 1951	91
G	International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973 (ICSPCA)	91
H	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990	91
I	Vancouver Declaration on Human Settlements of 1976 (Vancouver Declaration)	92
J	UN Commission on Human Settlements Resolution 16/7 entitled: "The Realization of the Human Right to Adequate Housing"	92
K	UN Commission on Human Settlements Resolution 14/6 entitled "The Human Right to Adequate Housing" adopted on 5 May 1993	93
L	The UN Sub-Commissions on Prevention of Discrimination and Protection of Minorities Resolution 1995/27 entitled "Promoting the Realization of the Human Right to Adequate Housing" adopted on August 1995	93
M	United Nations General Assembly Resolution 42/146 entitled "The Realization of the Right to Adequate Housing" adopted on 7 December 1987	94
N	Economic and Social Council (ECOSOC) of the United Nations Resolution 1987/37 entitled "The International Year of Shelter for the Homeless" adopted on 28 May 1987	94
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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The Constitution of the Republic of South Africa, 1996, (the Constitution) guarantees a variety of justiciable socio-economic rights and imposes an obligation on government to adopt reasonable legislative and other measures to progressively realise these rights within the context of available resources.¹ The socio-economic rights guaranteed in the Constitution are critical to socio-economic transformation because they seek to meet the material needs of citizens. A central issue that has dominated the discourse on socio-economic transformation in post-apartheid South Africa is how to optimise the potential of constitutional socio-economic rights in poverty alleviation. Despite the government's commitment to the implementation of the socio-economic rights entrenched in the Constitution, progress is slow and millions of South Africans continue to live without access to basic needs. The purpose of this study is to investigate and explore how political accountability could be used to optimise the realisation of socio-economic rights in South Africa. Political accountability refers to a situation whereby one person accounts for his/her action to another person. Political accountability is achievable through a number of accountability mechanisms (judiciary, ombudsmen, decentralisation, public participation, transparency, information and elections).²

This study was stimulated by the numerous and incessant protests over poor service delivery occurring in the country.³ Atkinson groups service delivery protests into

¹ Chapter Two of the Constitution makes provision for justiciable socio-economic rights alongside civil and political rights. In order to improve the quality of life of all citizens, the Bill of Rights entrenches *inter alia*, the right to education, access to adequate housing, health care services, food, water, social security and social assistance. It is in this regard that the Constitution is perceived as one of the most progressive in the world. See for instance, Mubangizi J C "Prospects and Challenges" 1-14.

² See in general Schedler A "Conceptualizing Accountability" 13-28.

³ See Christmas A "Service Delivery Protests: Failure to Deliver or Failure to Communicate?" (2007) 9(4) *Local Government Bulletin* 1-2. The author argues that the most cited reason for protests is communities' concern about the slow or non-existent delivery of housing and basic services in their areas. See also Atkinson D "Taking to the Streets: Has Developmental Local Government Failed in South Africa?" 58; see Mofokeng M and Ndlangisa S *City Press* 2 who reported that there had been a tenfold surge in service delivery protests between 2004 and 2009. A resurgence of service delivery protests was also noticeable in the country in 2010; Gauteng, Mpumalanga and

three categories: municipalities that are not providing or are providing shoddy services; decision-making that is unresponsive and undemocratic, thereby undermining people's livelihoods and interests; and protests against perceived corruption, sudden enrichment and conspicuous consumption by municipal councillors and staff.⁴ Service delivery protests are a manifestation of citizens' dissatisfaction with the progress made in the realisation of constitutional socio-economic rights.

Despite the increase in the provision of housing from 52,9% to 54,9% over 11 years,⁵ the housing backlog still stands at 2.1 million units.⁶ North West, Gauteng and the Western Cape are the provinces that still have more people living in informal dwellings.⁷ Similarly, the national percentage of households with access to electricity has also increased from 77,1% in 2002 to 85% in 2013. However, there remains a high percentage of households without access to electricity estimated at 44,9% in Limpopo, and 23,9% of households in Eastern Cape that are still using wood and paraffin for cooking.⁸ Concerning water and sanitation, the number of households in South Africa with access to piped water and improved sanitation has increased steadily over the last decade, However, household satisfaction with the quality of water services has decreased while a considerable number of households lack access to toilet facilities and were still using bucket toilets: 10% in Eastern Cape, 7.7

North-West being the most affected provinces. In Gauteng, service delivery protests occurred in Orange Farm and Sharpeville. Disgruntled inhabitants protested to demand the provision of better services in the following areas: sanitation, housing, potable water and electricity. See Seale L *The Star* 4; Karabo K *Mail & Guardian* 6; Matlala G *et al. City Press* 4. In the North-West, protests erupted in Brits and were broadcast on ETV on 24 February 2010. People took to the streets to demand clean water and proper sanitation. In Mpumalanga, the township of Balfour was a theatre of violent protests for the month of January 2010. Recently, on 28 June 2013, in Cape Town, protesters blocked part of the N2 highway in protest against poor service delivery. Residents burned tyres, blocked the highway with objects, and threw human faeces onto the road. See News 24 2013 "Protesters Block Part of Cape Town Highway" <http://www.news24.com/SouthAfrica/News/Protesters-block-part-of-Cape-Town-highway-20130628>.

⁴ Atkinson (n 3) 53.

⁵ Statistics South Africa: 2013 General Household Survey 12.

⁶ See Moneyweb 2014 "Housing Backlog at 2.1 Million" <http://www.moneyweb.co.za/moneyweb-south-africa/housing-backlog-at-21-million-sexwale>.

⁷ Statistics South Africa: 2013 General Household Survey 12.

⁸ Statistics South Africa: 2013 General Household Survey 12.

% in Free State and 7.4% in Northern Cape. Moreover, more than one-quarter of households that share toilet facilities complained about poor hygiene.⁹

In addition to the housing backlog countrywide, there are some unscrupulous actors that have devised unlawful housing schemes in order to defraud housing beneficiaries thereby destabilising government's effort in the realisation of the right to housing. These housing schemes were made possible by the lenient and reckless lending of some financial institutions.¹⁰

In view of the housing crisis in South Africa and socio-economic rights in general, scholars have made propositions to improve the realisation of both these rights. However, the literature directed at improving the implementation of socio-economic rights programmes in South Africa has focused on how the courts could be used as a mechanism to implement these rights. There is therefore an over-reliance on the judiciary which is only one component of political accountability. This study, argues that judicial accountability in itself is insufficient as courts rely on the executive branch of government for the implementation of their rulings.¹¹ Beside this reliance on the executive, courts (and mainly the Constitutional Court) are often criticised for their reluctance to fashion a remedy that fosters the realisation of socio-economic rights.¹² In order to strengthen the powers of the judiciary in enforcing socio-economic rights, some experts propose that courts should grant remedies such as constitutional damages and structural interdicts, which would increase government accountability.¹³ Constitutional damages consist of awarding monetary compensation to those who have suffered a loss due to the violation of their constitutional rights.¹⁴ Structural interdicts involve the continued participation of the courts in the

⁹ Statistics South Africa: 2013 General Household Survey 13.

¹⁰ Tchawouo Mbiada C J "Security of Tenure at the Cross Road of Conflicting Interests: The Brusson Finance (Pty) Ltd Saga" forthcoming (2014) *Obiter* where I argue that the right to housing should have preference over any interests.

¹¹ It should be recalled that courts have the constitutional mandate to hold other spheres of government accountable through judicial review of their actions; see in this respect, sections 165 and 172 of the Constitution.

¹² See in general Tushnet M *Weak Courts Strong Rights* 243-255.

¹³ Swart M "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 *SAJHR* 214-240; Mbazira C "From Ambivalence to Certainty: Norms and Principles for the Structural Interdict in Socio-Economic Rights Litigation in South Africa" (2008) 24 *SAJHR* 1-28.

¹⁴ See Liebenberg S *Socio-Economic Rights* 406.

implementation of their orders.¹⁵ In line with this suggestion, courts have granted the remedy of structural interdicts in many instances.¹⁶ For example, in *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue*,¹⁷ having found the city of Johannesburg's housing policy unconstitutional, the South Gauteng High Court ordered the city of Johannesburg to report to the court on steps taken to address the deficiencies in its housing policy.¹⁸

For De Beer and Vettori, besides a structural interdict, personal accountability of government officials may also be used by the courts as a device for the delivery of socio-economic rights.¹⁹ They rely on the common law of delict which creates personal liability for state officials responsible for the failure to implement court orders.

Another suggestion to enforce the realisation of socio-economic rights is the use of meaningful engagement²⁰ as developed by the Constitutional Court.²¹ The concept

¹⁵ Mbazira (2008) 24 SAJHR 4.

¹⁶ It should be stressed that the High Courts are more prompt to grant such remedies than the Constitutional Court. See in this regard, Mbazira (2008) 28 SAJHR 1-28.

¹⁷ 2009 (1) SA 470 (W) (*Blue Moonlight 1*).

¹⁸ Although the Supreme Court of Appeal in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) 47 partially overruled the High Court's decision, the court *a quo* judgment is nevertheless relevant for the purpose of our study (*Blue Moonlight 2*). The Constitutional Court upheld the Supreme Court of Appeal's decision and held that the City of Johannesburg Metropolitan Municipality's housing policy is declared unconstitutional to the extent that it excludes persons evicted by private property owners from its emergency programme. See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC) 95 and 104 (*Blue Moonlight 3*). See also Dickinson G S "Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg" (2011) 27 SAJHR 466-495, who declares that the *Blue Moonlight* judgments that formulate a remedy for people evicted from private property is a welcomed addition to eviction jurisprudence.

¹⁹ De Beer R J and Vettori S "The Enforcement of Socio-Economic Rights" (2007) 10(3) *PER/PELJ* 2/159-26/159.

²⁰ Chenwi L and Tissington K *Engaging Meaningfully* 1-31; See also Chenwi L "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26(1) *SAPL* 128-156; Ray B "Engagement's Possibilities and Limits as Socio-Economic Rights Remedy" (2010) 9(3) *Washington University Global Studies Law Review* 399-425; Ray B "Residents of Joe Slovo Community v Thubelisha Homes and Others: The Two Faces of Engagement" (2010) 10(2) *Human Rights Law Review* 360-371; Liebenberg S "Engaging the Paradoxes of the Universal and Particular in human Rights Adjudication: the Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *African Human Rights Law Journal* 1-29; Van Der Berg S "Meaningful Engagement: Proceduralising Socio-Economic Rights further or Infusing Administrative Law with Substance?" (2013) 29 SAJHR 376-398 and Williams L A "The Right to Housing in South Africa: An Evolving Jurisprudence" (2014) 45 *Columbia Human Rights Law Review* 816-845.

of meaningful engagement is viewed as a mechanism which promotes the realisation of socio-economic rights in the country. Chenwi argues that the concept of meaningful engagement developed in the *Occupiers of 51 Olivia Road* case was unique as a remedy to vindicate socio-economic rights.²² In the *Occupiers of 51 Olivia Road* case, the Constitutional Court issued an interim interdict which enjoined the City of Johannesburg and the applicants to engage with each other meaningfully in an effort to resolve the occupancy dispute. For the court, meaningful engagement has the potential to contribute towards the resolution of disputes and to increase understanding and sympathetic care if both sides are willing to participate in the process.²³ This is particularly true in cases of eviction where many could be left homeless if there is no meaningful engagement.

Despite all these suggestions and attempts by courts to craft effective orders and efforts by the government to realise socio-economic rights, the country is still facing a huge backlog in the delivery of houses.²⁴ Moreover, all the suggestions cited herein relied heavily on the judiciary. An independent judiciary, which is one component or mechanism of political accountability, cannot alone contribute to the realisation of the right to housing. This study explores whether political accountability could be used to optimise the realisation of socio-economic rights in South Africa. This innovative approach would enable each mechanism of political accountability to be taken into account in the realisation process. The study advocates for a combination of all mechanisms of political accountability to be taken into account in the realisation of the right to housing.

²¹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2009 (9) BCLR 847 (CC) (*Joe Slovo*) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (5) BCLR 475 (CC) (*Occupiers of 51 Olivia Road*).

²² Chenwi L "A New Approach to Remedies in Socio-Economic Rights Adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*" (2009) 2 *Constitutional Court Review* 377-393.

²³ *Occupiers of 51 Olivia Road* (n 21) 14.

²⁴ According to the former Minister of Human Settlements Tokyo Sexwale in a media brief on 7 June 2013, government housing backlog stands at 2.1 million. See Moneyweb 2014 <http://www.moneyweb.co.za/moneyweb-south-africa/housing-backlog-at-21-million-sexwale>.

1.2 Problem Statement

The appalling living conditions in which many South Africans find themselves today are the consequences of previous apartheid policies.²⁵ Apartheid policies hindered the social and economic progress of blacks by providing them with inferior social services.²⁶ As a result, the post-apartheid regime inherited problems such as unemployment, inadequate housing, limited access to health care and poverty among the black population. The new constitutional era takes into account this reality. The Preamble of the Constitution recognises the injustices of the past and aims, *inter alia*, at establishing a society based on social justice and the improvement of the quality of life of all citizens.²⁷ The Preamble recognises that freeing formerly marginalised people from the legacy of apartheid without uplifting their social conditions is meaningless. It is in this context that the former President Nelson Mandela stated at the African National Congress (ANC)'s Bill of Rights Conference in 1991 that:

A simple vote, without food, shelter and health care is to use first generation rights as a smokescreen to obscure the deep underlying forces which dehumanise people. It is to create an appearance of equality and justice, while by implication, socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom. We must provide for all the fundamental rights and freedoms associated with a democratic society.²⁸

The post-apartheid government led by the ANC has committed itself to the provision of housing to all through the enactment of some pieces of legislation and adoption of

²⁵ Steyn I 2013 "Socioeconomic Rights in Post-Apartheid South Africa: How do They Articulate to Poor People's Material Expectation of Democracy?" <http://www.ddp.org.za/information-material/research-unit/research-themes/rights-and-citizenship/Socioeconomic%20rights%20in%20post-apartheid%20South%20Africa%20How%20do%20they%20articulate%20to%20poor%20peoples%20material%20expectations%20of%20democracy.pdf/view> 3.

²⁶ Steyn (n 25) 18.

²⁷ The preamble of the Constitution.

²⁸ Nelson Mandela "Address on the occasion of the ANC's Bill of Rights Conference" in a Bill of Rights for a Democratic South Africa: Papers and Report of a Conference convened by the ANC's Constitutional Committee, May 1991 as cited by Steyn (n 21) 2-3. In the same vein, Christiansen is of the opinion that the constitutional adjudication may be used to tackle socio-economic rights injustice in South Africa. See Christiansen E C "Using Constitutional Adjudication to Remedy Socio-Economic Rights Injustice: Comparative Lessons from South Africa" (2009) 13(369) *UCLA Journal of International Law and Foreign Affairs* 369-405.

various policies such as the Reconstruction and Development Programme (RDP),²⁹ the South African Housing Act³⁰ and the Breaking New Ground (BNG).³¹ This commitment has been on the agenda of political leaders and has been emphasised on many occasions. For instance, President Jacob Zuma, during his state of the nation address in 2009, stated that:

...the fight against poverty remains the cornerstone of our government's focus and the government dares not relax as long as there are South Africans who die from preventable diseases, survive without clean water, decent shelter or proper sanitation.³²

This commitment was reiterated in the Local Government Turnaround Strategy (LGTAS) which at the time targeted to eradicate by 2014, all existing informal settlements and provide them with social facilities and permanent basic services.³³ The above initiatives indicate that the government has policies to eradicate poverty and to accelerate change in respect of socio-economic rights in order to improve the livelihood of all South Africans. However, the adoption of these policies has not met the expectation of many South Africans. Millions of people are still living in inadequate housing in backyard dwellings, informal settlements and in abject poverty.³⁴ This assertion is supported by the general protests over poor service delivery in the country. People have been marching to demand the provision of housing, sanitation, electricity and potable water and generally, they demand better living conditions in townships and informal settlements.³⁵ The 2009 report on the state of local government attributes these protests to, among others, problems with political and administrative interface and lack of accountability.³⁶ Of significance was

²⁹ See the White Paper on Reconstruction and Development GN 353 in GG 16085 of 23 November 1994.

³⁰ 107 of 1997.

³¹ of 2004.

³² State of the Nations Address by His Excellency J G Zuma on 3 June 2009.

³³ The 2009 Local Government Turnaround Strategy 2013 <http://www.info.gov.za/view/DownloadFileAction?id=118277>.

³⁴ Per Chaskalson C J in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) 8 as cited by Yacoob J in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) 25, hereafter referred to as *Grootboom*.

³⁵ Atkinson (n 3) 56. See Gifford G *The Star* 2. It is reported that Thembisa residents were marching over false housing promises. 68 years old Newman Mkhumalo is reported to have been on the housing waiting list since 1990. He lives with his eight children and five grandchildren in a two-room shack.

³⁶ The 2009 Report on the State of Local Government in South Africa 2013 <http://www.info.gov.za/view/DownloadFileAction?id=1101004>.

the new trend in service delivery protests during the 2011 local elections.³⁷ People took to the streets to contest the nomination of candidates who had to represent their wards. In Ward 5 of Ermelo, for instance, people contested the ANC's list, alleging that the process which led to the adoption of the list was not transparent. Moreover, they contended that the nominees could not represent their needs.³⁸ This suggests that the provision of housing is affected by a myriad of factors which although diverse are interrelated.

As the provision of housing is hindered by diverse factors, the study investigates how political accountability may be used for the realisation of the right to have access to adequate housing.³⁹ The study investigates how political accountability could be used to foster the realisation of the right to housing. Political accountability refers to the obligation that one person is answerable to another under the threat of sanction.⁴⁰ The advantage of political accountability is that it is comprised of a number of elements which are all dealt with simultaneously so that the weakness of one element is compensated by the strength of another. The study captures all mechanisms of political accountability and then tests whether they are present in the South Africa context and argues that strengthened political accountability would significantly contribute towards the provision of housing.

1.3 Objectives of the Study

1.3.1 Research Question

The central question of this study is: what role could political accountability play in the realisation of the right to housing in South Africa?

1.3.2 Objectives of the Study

It is within the overall central question that this study aims to:

³⁷ The Star newspaper reported that according to a Thembisa resident Jeannette Shingange, residents marched to voice their concerns about the failed promise by President Jacob Zuma during a visit in the area that residents would be provided with RDP houses by November 2010; see Gifford *The Star* 2.

³⁸ See also Pillay U "In Conversation with Udeshe Pillay Key, Issues in the 2011 Government Elections" (2011) 9(1) *HSRC Review* 8-9.

³⁹ I am aware that the Constitution guarantees the right of access to adequate housing. However, for ease of reference, I shall use the right to housing.

⁴⁰ Schedler (n 2) 14.

- a demonstrate that the South African government has constitutional and international obligations to realise the right to housing of all its citizens;
- b critically analyse the meaning of political accountability, and the interconnectedness between political accountability and human rights;
- c extract from literature and the work of international organisations mechanisms for political accountability that are relevant to the realisation of the right to housing;
- d critically examine the extent to which identified mechanisms for political accountability are operationalised in South Africa; and
- e suggest proposals aimed at optimising and strengthening the role of political accountability in realising the right to housing in South Africa.

1.4 Assumptions and Hypothesis of the Study

This study is premised on the understanding that political accountability contributes to housing delivery in South Africa. The assumption is based on the fact that political accountability embodies a number of mechanisms some of which have critically been analysed as possible means to realising the right to housing. Moreover, the provision of housing falls within the realisation of citizens' welfare which political accountability seeks to achieve. The hypothesis is that the South African government must therefore respond to its obligations in terms of the Constitution by means of relevant legislation and other reasonable measures such as policies.

1.5 Literature Review

The inclusion of justiciable social and economic rights in the South African Constitution was not unanimously approved.⁴¹ The Constitutional Court summarised the justiciability debate and concluded as follows:

⁴¹ For a discussion regarding the entrenchment of enforceable socio-economic rights in the Constitution, see Mubangizi J C "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 2 *Afr. J. Legal Stud.* 1-19; Pieterse M "Eating Socio-economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited" (2007) 29(3) *Human Rights Quarterly* 796-822; Currie and de Waal *The Bill of Rights* 568-585; *In Re Certification of the Constitution of*

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to fair trial, the order it makes will often have such implications...In our view, it cannot be said that by including socio-economic rights, a task conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of separation of powers.⁴²

Based on this, the debate over socio-economic rights was then shifted to their realisation. The question was: how could the socio-economic rights entrenched in the Constitution be enforced to meet the goals of eradicating poverty and reducing the inequalities? Several scholars have proposed various ways of rendering effective the attainment of socio-economic rights.

One of the suggestions is that the court should adopt the concept of the minimum core obligation as developed by the Committee on Economic, Social and Cultural Rights (Committee on ESCR).⁴³ Bilchitz, the South African leading scholar advocating for the minimum core obligation, strongly urges for the adoption of this concept. In his view, the minimum core obligation which envisages that everyone receives a minimum right which should be uplifted progressively over time, is the

the Republic of South Africa 1996 10 BCLR 1253 (CC) 76-78; Scott G and Macklem P "Constitutional Ropes of Sand or Justiciable Guarantees?" (1992) 141(1) *University of Pennsylvania Law Review* 1-48; Cross F R "The Error of Positive Rights" (2000-2001) 48 *University of California Los Angeles Law Review* 857-924; and Seleane L C *Socio-Economic Rights in the South African Constitution* 48-49.

⁴² *In Re Certification of the Constitution of the Republic of South Africa* (n 41) 77. Similarly, Kratochvil when analysing various states' objections to the ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (ICESCR), concludes that the debate on the justiciability of socio-economic rights has become largely obsolete. Kratochvil J "Realizing a Promise: A Case for the Ratification of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights" (2009) 16 *Hum. Rts. Br* 30-35. See also Langford M "The Justiciability of Social Rights: From Practice to Theory" 3-45. The author posits that the justiciability of social rights is evidenced by the large number of judgments on these rights both in national and international jurisdictions. Socio-economic rights have been protected from intrusion and inaction by the state and non-state actors.

⁴³ See also Hassim S "Social Justice, Care and Developmental Welfare in South Africa: A Capabilities Perspective" 327-347 who argues that "...the goal of social policy (in combination with other policies), then is to move all citizens above the minimum level. This corresponds with the thicker notion of citizenship in political theory (and in the South African Constitution), in which social rights are seen as a necessary component of full and equal citizenship. There are also apparent synergies between this approach and the socio-economic rights approach taken by progressive legal scholars in South Africa in which a 'minimum core' of rights and entitlements is considered vital in a democracy." 330-331.

concept which would provide effective realisation of socio-economic rights.⁴⁴ The hub of the concept is that there are different stages of the fulfilment of a right and that a certain minimum level of realisation should be prioritised over a more extensive realisation of the right.⁴⁵ To this end, Bilchitz distinguishes two thresholds of interest in the provision of rights through the minimum core obligation. The first interest which he terms minimal interest, is the 'most urgent interest'⁴⁶ that frees people from threats. He contends that the adoption of the minimum core obligation would protect people's urgent threshold in survival as 'the inability to survive wipes out all possibility for realizing the sources of value in the life of a being.'⁴⁷ It follows that the minimal interest places an obligation on the state to ensure that 'individuals are not exposed to general conditions that threaten their survival'.⁴⁸

Once the first interest is met, Bilchitz argues that the second interest takes place. The second interest or maximal interest is concerned with the medium-and long-term goal of the realisation of rights. However, Bilchitz warns that meeting the maximal interest would be meaningless if the minimal interest is not met first. He contends that long-term interests cannot be protected if there is no obligation to meet the minimal interest. He justifies this contention by asserting that 'people will die in the interim and their right to adequate housing will be essentially meaningless'⁴⁹ while others will be unable to 'flourish' in the house they have received as a result of suffering incurred due to the failure to meet their minimal needs.⁵⁰

⁴⁴ See Bilchitz D "Towards a Reasonable Approach to Minimum Core: Laying the Foundation for Future Socio-Economic Rights Jurisprudence" (2003) 19 *SAJHR* 1-26; Bilchitz D "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance" (2002) 119(2) *SALJ* 484-501; Liebenberg S "South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?" (2002) 6(2) *Law, Democracy and Development* 159-191. She concedes with Bilchitz that the recognition of the minimum core obligation on the state is imperative in that it will enable the enjoyment of socio-economic rights entrenched in the Constitution. She further opines that without such recognition, the enjoyment of all other rights encapsulated in the Bill of Rights will be jeopardized 16.

⁴⁵ Bilchitz (2003) 19 *SAJHR* 12. See Bilchitz *Poverty and Fundamental Rights* 183-185.

⁴⁶ Bilchitz (n 45) 187.

⁴⁷ Bilchitz (n 45) 187.

⁴⁸ Bilchitz (n 45) 188. In respect of housing, Bilchitz argues that "formula can be made more concrete in order that individuals can at all times, have access to accommodation that offers protection from the elements, sanitary conditions and access to basic services such as sanitation and running water" 188.

⁴⁹ Bilchitz (n 45) 189.

⁵⁰ Bilchitz (n 45) 189.

Despite this suggestion, in the case of *Grootboom*, the Constitutional Court declined to make use of the minimum core obligation but ruled in favour of the reasonableness approach which should be used to interpret and enforce socio-economic rights.⁵¹ In terms of the reasonableness concept, the main enquiry that the court should endeavour to answer is whether the measures or programmes adopted by the government are reasonably capable of facilitating the realisation of rights.⁵² This approach provides the government with some discretion regarding the choice of policy adopted to give effect to socio-economic rights. In this regard, the court in *Grootboom* held that:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁵³

The court further provided a threshold which serves as a yardstick against which the reasonableness of the government's programme is assessed. To this end, the reasonableness of a programme in relation to socio-economic rights must:

- a be capable of facilitating the realisation of right;⁵⁴
- b be comprehensive, coherent and co-ordinated;⁵⁵
- c have human and financial resources;⁵⁶
- d be balanced and flexible;⁵⁷
- e make appropriate provision for short, medium and long term needs;⁵⁸
- f be reasonably conceived and implemented;⁵⁹

⁵¹ See in this regard, the *Grootboom* case (n 34) where this concept was first elaborated.
⁵² *Grootboom* (n 34) 41.
⁵³ *Grootboom* (n 34) 41.
⁵⁴ *Grootboom* (n 34) 41.
⁵⁵ *Grootboom* (n 34) 39 and 40.
⁵⁶ *Grootboom* (n 34) 39.
⁵⁷ *Grootboom* (n 34) 68, 78 and 95.
⁵⁸ *Grootboom* (n 34) 43.

- g be transparent so that its content must be known to the public;⁶⁰ and
- h make short-term provision for those whose needs are urgent and who are living in intolerable conditions or crisis situations.⁶¹

Further features upon which the reasonableness of the government's programme is premised include progressive realisation which was interpreted in *Grootboom* to mean that:

it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.⁶²

Another feature against which the reasonableness of a programme is assessed is the availability of resources. In this respect, the court in *Grootboom* held that the reasonableness approach 'does not require the state to do more than its available resources permit'⁶³ and that 'both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources'.⁶⁴ It follows that 'the availability of resources is an important factor in determining'⁶⁵ the reasonableness of a government programme. In the *TAC* case, in rejecting the contention of the government that the non-provision of Nevirapine was due to lack of resources, the court held that 'the cost of Nevirapine for preventing mother-to-child transmission is not an issue' and that 'it is admittedly within the resources of the state'.⁶⁶

The last feature that serves to assess the reasonableness of a government's programme is human dignity. In this respect, the court in the *Grootboom* case held

⁵⁹ *Grootboom* (n 34) 40-43.
⁶⁰ *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1033 (CC) (*TAC*) 123.
⁶¹ *Grootboom* (n 34) 44, 64, 68 and 99; *TAC* (n 55) 78.
⁶² *Grootboom* (n 34) 45.
⁶³ *Grootboom* (n 34) 46.
⁶⁴ *Grootboom* (n 34) 46.
⁶⁵ *Grootboom* (n 34) 46.
⁶⁶ *TAC* (n 55) 71-72.

that it was fundamental for the inquiry into the reasonableness of a government's programme that the inherent dignity of human beings be taken into account.⁶⁷ Further, that the 'Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned is determined without regard to the fundamental constitutional value of human dignity'.⁶⁸

It follows that the reasonableness of government's programme adopted to implement socio-economic rights is assessed against the above characteristics. Much emphasis for a government programme to pass the muster in terms of the reasonableness inquiry is put on the urgent relief for people living in desperate conditions. In *Grootboom*, for instance, the court found that although the government's housing programme was in some respects coherent and comprehensive, it was inconsistent with section 26 of the Constitution in that it failed 'to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions'.⁶⁹

The reasonableness concept has been under severe attack. It is submitted that the concept does not provide effective relief for the poor. After the ruling of the Constitutional Court in *Grootboom*, Pillay concedes that the ruling of the Constitutional Court in this case led to the development of the jurisprudence of socio-economic rights in South Africa.⁷⁰ However, she remarks that the judgment failed to meet the expectations of the litigants and those who expected a change in the government housing policy.⁷¹ In the same vein, Bilchitz when analysing the *Nokotyane* case, compares the reasonableness criterion to a 'graveyard' that will lead to people's death in the long term.⁷² Regrettably Mrs Irene Grootboom who brought the case died before accessing housing. Similarly, Mbazira argues that the plethora of socio-economic rights litigations may be attributed to some extent to the failure of the government to fully implement court orders made in a number of socio-

⁶⁷ *Grootboom* (n 34) 83

⁶⁸ *Grootboom* (n 34) 83.

⁶⁹ *Grootboom* (n 34) 99.

⁷⁰ Pillay K "Implementing Grootboom: Supervision Needed" (2002) 3(1) *ESR Review* 16-18.

⁷¹ Pillay (2002) 3(1) *ESR Review* 17. See also Brand D "Judicial Deference and Democracy in Socio-economic Rights Cases in South Africa" 175.

⁷² Bilchitz "Defending" 1-26.

economic rights cases.⁷³ He contends specifically that, 'had the government fully implemented the decision in *Grootboom*, it would have avoided subsequent litigation in the areas of housing, health and social security'.⁷⁴

Despite the above criticism, it is argued in favour of the reasonableness approach that, it gives the state enough flexibility to adopt any programme to realise socio-economic rights. By so doing, the reasonableness test accommodates the criticism against the justiciability of socio-economic rights. Budgetary concerns and arguments on the separation of powers are well incorporated within this test as they allow the government to adopt and implement any programme. The reasonableness approach strikes a delicate balance between the need to respect other spheres of government functions and the remedies granted by the courts in socio-economic rights litigations.⁷⁵ These remedies are less intrusive into the terrain of other political branches. In so doing, the courts enforce socio-economic rights while maintaining the doctrine of separation of powers and the control of the executive branch over budgetary considerations.⁷⁶

It is evident from the above that the reasonableness test developed by the courts to enforce socio-economic rights is informed by all concerns about the justiciability of these rights.⁷⁷ In this respect, Sunstein argues that the reasonableness approach stands as a powerful rejoinder to those who have contended that justiciable socio-economic rights may not be included in a constitution.⁷⁸ He praises the fact that the reasonableness concept maintains the balance between two conflicting arguments, affording protection against 'arbitrariness while also recognising the democratic pedigree of the agency and the simple fact of limited resources'.⁷⁹

⁷³ Mbazira C "Non-implementation of the Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer here to Stay?" (2008) 9(4) *ESR Review* 2-8.

⁷⁴ Mbazira (2008) 9(4) *ESR Review* 3.

⁷⁵ This approach is termed deference or self-restraint. See Mclean K *Constitutional Deference*.

⁷⁶ Brennan M "To Adjudicate and Enforce Socio-Economic Rights: South Africa proves that Domestic Courts are a Viable Option" (2009) 9(1) *QUTLJJ* 76.

⁷⁷ See also *Joe Slovo* (n 21) and *Nokotyana v Ekurhuleni Metropolitan Municipality*. 2010 (4) BCLR 312 (CC) (*Nokotyana*) where the Constitutional Court referred to the reasonableness concept as developed in *Grootboom*.

⁷⁸ Sunstein C "Social and Economic Rights" Lessons from South Africa" 2013 http://www.law.uchicago.edu/files/files/124.CRS_.pdf 1-15; 12.

⁷⁹ Sunstein (n 78) 12.

The notion of striking a delicate balance of the reasonableness approach is illustrated, for instance, in the case of *Mazibuko v City of Johannesburg*.⁸⁰ In this judgment, the Constitutional Court reaffirmed the principle that the concept of reasonableness enables one to assess 'whether a government programme is indeed reasonable'⁸¹ and that it should be 'institutionally inappropriate for a court to determine' what socio-economic rights entail.⁸² Accordingly, the court found that it was 'ill-placed to make these assessments for institutional and democratic reasons'.⁸³ By so doing, the court rejected the contention on behalf of the applicants that the right to water contains a minimum core obligation, 'must fail for the same reason that the minimum core failed in *Grootboom* and *Treatment Action Campaign No 2*'.⁸⁴

The reasonableness test therefore provides the desired balance between the objection to justiciability of social and economic rights on the one hand and the protection of these rights on the other. In this respect, Kende affirms that the striking feature of socio-economic rights jurisprudence is the courts' pragmatism in balancing its 'transformative role and concerns over the separation of powers'.⁸⁵ Similarly, for Sunstein, the distinctive feature of the reasonableness is the respect it has towards democratic prerogatives and the limited nature of public resources, while also paying special attention to those whose minimal needs are not met.⁸⁶ It is within this context that the reasonableness approach is praised for balancing the protection of rights with respect to democratic priorities and contains essential lessons for other jurisdictions in the quest for an approach to vindicate social rights.⁸⁷ By so doing, the

⁸⁰ 2010 (3) BCLR 239 (CC) (*Mazibuko*).

⁸¹ *Mazibuko* (n 80) 60.

⁸² *Mazibuko* (n 80) 61.

⁸³ *Mazibuko* (n 80) 62. With reference to the *Grootboom* and *TAC* cases, the court found that the orders made in these two cases illustrate the court's institutional respect for the policy-making function of the two other arms of government. The court did not seek to draft policy or to determine its content. Instead, the reasonableness test requires the government to revise its policy if found unreasonable; 63. This view also instructed the South Gauteng High Court in *Blue Moonlight 1* in which the court cautioned itself from improperly usurping the policy-making functions of government; 160.

⁸⁴ *Mazibuko* (n 80) 56.

⁸⁵ Kende M S *Constitutional Rights in Two Worlds* 260.

⁸⁶ Sunstein (n 78) 12.

⁸⁷ Pillay A "Courts, variable Standard of Review and Resource Allocation: Developing a Model for the Enforcement of Social and Economic Rights" (2007) 6 *European Human Rights Law Review* 616-636.

reasonableness approach fosters interrelationship among all branches of government while providing effective relief for socio-economic rights litigants.⁸⁸

However, it has been contended that the reasonableness approach is not only an attempt to respect the separation of powers and the allocation of resources but that it is premised on the concern about the limited role of the judiciary and the dangers of polycentricity.⁸⁹ However and regardless of the approach adopted by courts to enforce socio-economic rights, the issue at hand is whether judicial enforcement of these rights is effectively capable of remedying those whose rights have been infringed. This is argued in chapter three below.

In a bid to provide meaningful solution for judicial enforcement of socio-economic rights, Liebenberg, proposes that the concept of human dignity should be developed in the light of the transformative vision of the Constitution. She argues that the transformative character of the Constitution will be of no effect if limited to redress past wrong but should be "forward looking" in order to facilitate the construction of a new political, social and economic era based on democratic values, social justice and fundamental human rights.⁹⁰ According to her, the transformation vision envisaged by the Constitution is an on-going process through in a participative and deliberative approach in order to transform the past inequalities.⁹¹

Other writers have suggested that the courts should adopt robust remedies in the adjudication of socio-economic rights.⁹² This came as the result of court orders failing to provide significant relief to socio-economic rights litigants. Davis, for instance, argues that the reluctance of the Constitutional Court to provide suitable orders found an explanation in the administrative law approach to enforce socio-economic rights, the restrictive legal repertoire employed by the courts and the political and economic context in which legal practice is located, namely the doctrine

⁸⁸ Steinberg C "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence" (2006) 123(2) *SALJ* 264-284.

⁸⁹ Pillay (2007) 6 *European Human Rights Law Review* 622.

⁹⁰ Liebenberg (n 14) 26.

⁹¹ Liebenberg (n 14) 28-35.

⁹² Davis D M "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301-326; Swart (2005) 21 *SAJHR* 215-240 and. Tchawouo Mbiada (n 10).

of separation of powers.⁹³ Swart agrees with Davis that the reason why the enforcement of socio-economic rights has not been effective is the reluctance of the Constitutional Court to grant appropriate relief.⁹⁴

It has been suggested that granting a structural interdict would allow socio-economic rights litigants to be provided with a relief that will meet their expectations. Structural interdicts involve the continued participation of the courts in the implementation of their orders.⁹⁵ Structural interdicts may only be granted as a last resort when the courts are of the opinion that the government will not comply with their orders. Courts may grant a relief that requires the government to report back as to the progress made so far in order to comply with its constitutional obligations. Such relief would allow the courts to monitor the implementation of their orders and play a supervisory role in ensuring that the state complies with these orders.⁹⁶ By so doing, and according to Liebenberg, this would enable the transformation of the concept of socio-economic rights in order to redress the underlying causes of systemic poverty.⁹⁷ She concludes that the courts should strive to identify and redress rules that entrenched patterns of disadvantages of socio-economic rights. The court should therefore, craft effective remedies that will respond to the violation of socio-economic rights.⁹⁸

Trengove, on the other hand, proposes that in addition to a structural interdict, the courts should grant preventive damages against the state in favour of an independent state agency such as the South African Human Rights Commission (SAHRC) or private agency.⁹⁹ He is of the opinion that awarding preventive damages would enforce socio-economic rights by deterring future violations of rights by the state. On a similar note, Ebadolahi proposes that when a court grants structural interdicts in economic and social rights litigations, it should order government to

⁹³ Davis (2006) 22 *SAJHR* 304.

⁹⁴ Swart (2005) 21 *SAJHR* 215-240.

⁹⁵ Mbazira (2008) 24 *SAJHR* 1-28.

⁹⁶ For more in-depth about remedies, see Mbazira (2008) 24 *SAJHR* 1-28; Davis (2006) 22 *SAJHR* 301-326; Brennan (2009) 9(1) *QUTLJJ* 64-84.

⁹⁷ Liebenberg *Socio-Economic Rights* (n 14) 379.

⁹⁸ Liebenberg (n 14) 379.

⁹⁹ Trengove W "Judicial Remedies for Violation of Socio-Economic Rights" (1999) 1(4) *ESR Review* 13-18.

formulate a plan with the assistance of the SAHRC.¹⁰⁰ He is of the view that the involvement of the SAHRC in socio-economic rights cases, where a structural interdict is issued, would enhance judicial enforcement of socio-economic rights in South Africa.¹⁰¹

For De Beer and Vettori, personal accountability of state officials could be used to secure proper and effective service delivery. They relied on the personal liability as applied in the law of delict of officials who are in contempt of court.¹⁰² They also proposed, in the event of money order, that the government should be held liable for contempt of court for not complying with court orders.

It also recommended that the involvement of the community in the socio-economic rights discourse would foster their realisation.¹⁰³ The argument is that, when government engages meaningfully with community, it is likely that the government would carry out its constitutional obligations of realising socio-economic rights. The process of meaningful engagement enhances community participation and also raises community interest in their affairs.¹⁰⁴

Lastly, Pieterse proposes a theory of horizontal application of socio-economic rights that recognises, enforces and enables observance of private socio-economic obligations.¹⁰⁵ The author relies on the fact that the realisation of socio-economic rights depends not only on the state, but on private interactions and actions through a variety of formal and informal relationships. He suggests that the state should coordinate and regulate these private relationships in order to enable the realisation of socio-economic rights.¹⁰⁶ Another approach for the realisation of the right to housing which does not rely on courts is that of Tissington *et al.* embodied in their

¹⁰⁰ Ebadolahi M "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *New York University Law Review* 1565-1606.

¹⁰¹ Ebadolahi (2008) 83 *New York University Law Review* 1602-1606.

¹⁰² De Beer and Vettori (2007) 10(3) *PER/PELJ* 2/159-26/159.

¹⁰³ Chenwi and Tissington (n 20) 1-30; Liebenberg (2012) 12 *African Human Rights Law Journal* 1-29 and Williams (2014) 45 *Columbia Human Rights Law Review* 827.

¹⁰⁴ Chenwi and Tissington (n 20) 17-18.

¹⁰⁵ Pieterse M "Relational Socio-Economic Rights" (2009) 25 *SAJHR* 198-217.

¹⁰⁶ Pieterse (2009) 25 *SAJHR* 214-216.

recent report on housing delivery.¹⁰⁷ The authors after investigating the problems with housing delivery, make some recommendations that need to be taken into account by all spheres of government.¹⁰⁸ The report emphasises the fact that those recommendations depend on the collaboration and cooperation between government departments. This means that the effectiveness of these recommendations depend on the extent of the collaboration between government housing departments.

Overall, suggestions for the effective realisation of socio-economic rights have focused mainly (beside the horizontal application of socio-economic rights and inter-governmental co-operation) on the relief courts should grant in order to enforce these rights. These suggestions (structural interdict, human dignity, personal liability and preventive damages) rely on judicial accountability. As stated above (and argued in chapter 3 below), judicial accountability is weak in that the courts are

¹⁰⁷ Tissington K *et al* (2013) 'Jumping the Queue' Waiting Lists and other Myths: Perceptions and Practice around Housing Demand and Allocation in South Africa 80.

¹⁰⁸ It is recommended that the Department of Human Settlement should *inter alia*: investigate the usefulness, efficacy and cost of the National Housing Needs Register; provide an indication of the extent to which the National Housing Needs Register is actually being used by project planners to link 'demand' with housing supply; reconsider the restrictive clause in the Housing Act around sale and transfer of state-subsidised houses; report on what steps have been taken to address the myriad of challenges with the Housing Subsidy System; clarify the roles and responsibilities of accredited municipalities and provincial departments around housing allocation and delivery; investigate ways in which development planning processes, such as municipal Integrated Development Plan, can be linked more substantively to housing needs/demand capture processes and systems; and investigate the current *de facto* allocation processes at municipal level across the country.

Provincial housing departments should: among others, produce posters or other materials clearly detailing existing housing allocation processes in terms of prevailing systems and policies; investigate the influence of ward councillors and Community Liaison Officers in the housing allocation processes of current projects; and ensure that municipalities are linked up to the internet so that people do not have to go to regional offices to capture their housing needs data.

Municipalities should *inter alia*: produce posters or other materials clearly detailing existing housing allocation processes in terms of prevailing systems and policies. This could be undertaken jointly with the relevant provincial department; publish the selection criteria for specific housing projects within their jurisdiction, which should be prominently displayed at municipal offices and in locations within the vicinity of the project; ensure that they facilitate meaningful community engagement in the shaping of housing policies and, more importantly, in the planning of new housing developments which affect communities directly; investigate the establishment of oversight bodies (consisting of those not involved in setting selection parameters or managing data, and officials from appropriate government bodies other than the municipality); establish systems to deal with objections to allocation lists, after the lists have been pre-screened by municipalities and provincial departments; and ensure that they engage and communicate effectively with communities at settlement, community and neighbourhood level, and not just through the politicised structures of ward committees and ward councillors 82-86.

reluctant to venture into more drastic reliefs that may result in trespassing the terrain of other branches of government. This cautionary approach adopted by the courts is evident in their rulings.¹⁰⁹ Ebobrah, drawing from the experience of the Economic Community of West African States (ECOWAS), concludes that the realisation of socio-economic rights through the judiciary is a complex issue that invites diverse and innovative approaches.¹¹⁰ Such innovative approaches may include crafting creative remedies and for the purpose of this study, political enforcement of socio-economic rights.¹¹¹

It is within this context that this study proposes political accountability for the realisation of the right to housing in South Africa. It is worth mentioning that even though this study is grounded in law, yet it has various interrelationship aspects with other disciplines including political theories. The fact that this study explores all the mechanisms of political accountability should not be construed merely as a political effort. Moreover, the word political accountability may be misleading but it is a generic concept (encompasses a number of mechanisms) that enables a host of people to account for their actions and it is enforceable through legal instruments. Accountability suggests the obligation of individuals to provide information about and to justify their action to others, along with the imposition of sanctions for failure to comply.¹¹² Political accountability is divided into vertical and horizontal accountability. Mechanisms emanating from the definition of vertical and horizontal accountability are therefore mechanisms through which political accountability is ensured. These include: the judiciary, elections, constitutional limitations, ombudsman, decentralisation, community participation, transparency and information.¹¹³ All these

¹⁰⁹ In Canada, Roach affirms that socio-economic rights require more complex remedies than civil and political rights. See Roach K "The Challenges of Crafting Remedies for Violations of Socio-Economic Rights" 46-58. Ebadolahi also posits that judicial enforcement of economic and social rights is not sufficient by itself to guarantee socio-economic rights in South Africa. See Ebadolahi (2008) 83 *New York University Law Review* 1598.

¹¹⁰ Ebobrah S "Subregional Mechanisms for the Protection of Socio-Economic Rights in Africa: Reflections on the Budding Jurisprudence of the ECOWAS Court" (2010) 11(3) *ESR Review* 9-11.

¹¹¹ Ebobrah (2010) 11(3) *ESR Review* 11.

¹¹² Brinkerhoff W D "Accountability and Health Systems: Toward Conceptual Clarity and Policy Relevance" (2004) 19(6) *Health Policy and Planning* 371-379. See also Schedler "Conceptualizing Accountability" (n 2) 14.

¹¹³ Schedler "Conceptualizing Accountability" 14.

mechanisms are benchmarks against which political accountability is assessed and measured.

A few studies have addressed the issue of accountability in respect of public service delivery, albeit in a disparate fashion. For instance, while assessing the impact of accountability and ethics on public service delivery, Raga and Taylor conclude that adherence to accountable principles and appropriate training would result in effective and efficient public service delivery.¹¹⁴ For Schulz-Herzenberg, accountability can be achieved if greater attention is given to the selection of politicians. In such circumstances, elections can act as an accountability mechanism and sanctioning device as well.¹¹⁵ She is of the view that elections can act as an accountability mechanism when citizens decide to take into consideration past performance of government and their future expectations and sanction or reward political parties accordingly.¹¹⁶ On the other hand, it has been argued that accountability is one tenet of democracy, which if strengthened, will enhance the provision of services.¹¹⁷

According to Brinkerhoff, the problem with weak accountability lies in the fact that there is a disparity between sanctions on paper and the capacity to enforce them.¹¹⁸ For Bardhan, on the contrary, the lack of accountability is due to the non-existence of structures of local accountability in many developing countries.¹¹⁹ He further asserts that in such circumstances, the local government is at the mercy of local elites who may hamper the goal of achieving public service delivery.¹²⁰

Overall, it emerges from the literature that the realisation of socio-economic rights as provided in the Constitution, is ineffective for various reasons. The failure of the government to provide citizens with basic services has been attributed, among others, to weaknesses in the Constitutional Court's socio-economic rights

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- ¹¹⁴ Raga and Taylor 2010 [http:// www.thepublicmanager.org/articles/docs/kishore.pdf](http://www.thepublicmanager.org/articles/docs/kishore.pdf).
¹¹⁵ Schulz-Herzenberg "Elections and Accountability in South Africa" (2009) 188 *ISS Paper* 1- 26.
¹¹⁶ Schulz-Herzenberg (2009) 188 *ISS Paper* 6.
¹¹⁷ Tod B 2013 http://www.thepowerofhow.org/uploads/wysiwyg/documents/other_resources/snv/Strengthening_Accountability_for_Improved_Service_Delivery.pdf 271.284.
¹¹⁸ Brinkerhoff (2004) 19(6) *Health Policy and Planning* 375.
¹¹⁹ Bardhan P "Decentralization of Governance and Development" (2002) 16(4) *The Journal of Economic Perspectives* 185-205.
¹²⁰ Bardhan (2002) 16(4) *The Journal of Economic Perspectives* 193.

jurisprudence. Although lack of accountability and the deployment system may also impede the realisation of the right of access to housing, none of these studies have suggested political accountability as a possible solution to socio-economic delivery in South Africa. This study therefore questions and explores political accountability and the extent to which it could contribute towards improved housing delivery

1.6 Research Methodology

This research is qualitative in nature. The study is conducted by critically analysing written legal materials on the purport of political accountability in the realisation of human rights in light of the government's undertaking to provide housing to its citizens. Furthermore, the study critically reviews literature on political accountability in order to extract mechanisms that could possibly guide the South African government in its quest to realise socio-economic rights. In terms of political accountability, this study draws largely from the World Bank's concept of good governance which embodies all elements of political accountability. In addition, this study demonstrates that the objective of political accountability to provide a conducive environment for growth and economic development is consonant with the transformation vision of the Constitution to advance human rights and freedoms.

1.7 Scope and Outline of the Study

The study is divided into six interrelated chapters including the introduction and the conclusion. In addressing the research question posed in this study, Chapter 2 starts by analysing conceptual and theoretical perspectives on the concept of political accountability. The relevance of political accountability for human rights is also explored. This chapter defines and unpacks political accountability and critically analyses the components of political accountability and the challenges that hinder their effectiveness.

Chapter three discusses the normative framework of socio-economic rights in South Africa in respect of the right to housing. International, regional and national frameworks related to the right to housing are analysed in this chapter. These normative frameworks serve as the basis against which the government's mandate to realise the right to housing is assessed.

Chapter four focuses on judicial accountability in realising the right to housing in South Africa. It explores and analyses remedies granted by courts in the adjudication of socio-economic rights and the challenges in enforcing the right to housing. The chapter further demonstrates the limited capacity of courts to enforce the provision of housing.

Chapter five explores other mechanisms of political accountability within the South African context and assesses the extent to which each mechanism can contribute towards the realisation of the right of access to housing.

Chapter 6 offers recommendations aimed at optimising each mechanism of political accountability in realising the right to housing within the provisos of the South African legal system.

1.8 Limitations of the Study

Although the research focuses on the realisation of the right to housing, the fact that reference is made to socio-economic rights in general might raise some concerns. This is because although cases that have laid down the foundations of South African socio-economic rights jurisprudence emanate to a large extent from the right to housing, its interpretation and application have been extended to other socio-economic rights. This is why the discussion concerning judicial and institutional enforcement of the right to housing as explored in chapter four and five respectively could be extended to other socio-economic rights as reference is made to cases that go beyond the right to housing. Moreover, other socio-economic rights have also provided some principles in respect of remedies that are applicable to the right to housing. In addition, suggestions to remedy socio-economic rights violation are not limited to the right to housing but are also applicable to the entire socio-economic rights discourse. Concerning mechanisms of political accountability, the discussion in chapter 5 is limited to elections, ombudsmen and public participation.

1.9 Ethical Considerations

The research was conducted in adherence to the North-West University postgraduate policy on Plagiarism and other forms of Academic Dishonesty and

Misconduct which prohibits dishonest academic conducts. Pursuant to this policy, the researcher has acknowledged all work consulted that is not his.

1.10 Summary

This chapter laid the foundation upon which the research was conducted. It provided the background to the study, the problem statement, the objective of the study, the significance of the study, the research question and the scope and limitations of the study. This chapter also outlined the breakdown of the study and the methodology used.

CHAPTER TWO

THEORETICAL PERSPECTIVES ON POLITICAL ACCOUNTABILITY

2.1 Introduction

Although political accountability and human rights seek to improve human welfare and the quality of life of citizens,¹²¹ political accountability provides an enabling environment for the realisation of human rights. It is based on this common understanding that this study examines and analyses how political accountability can be used to optimise and enhance the realisation of the right to housing. The aim of this chapter is to analyse theoretical, philosophical and historical underpinnings of the concept of political accountability. While analysing the concept the study identifies the mechanisms from which to explore political accountability's role in contributing towards the realisation of the right to housing. In order to achieve this objective, this chapter is divided into three parts. The first part defines political accountability in order to extract major mechanisms of political accountability. This part defines and critically reviews the historical and philosophical dimensions, the evolution and understandings of political accountability. The second part establishes the link between political accountability and human rights and explains the importance of political accountability to human rights. The last part provides mechanisms that ensure political accountability in light of the benchmarks extracted from its definition.

2.2 Definition: Political Accountability

The concept of political accountability as traditionally conceived is constantly evolving, necessitated by the fragmentation of responsibility within the state.¹²² Any definition should therefore take into account such development. Political accountability is one component of the generic term of accountability which 'represents an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure is confusing'.¹²³ Despite its evolving and confusing nature, accountability aims at preventing and redressing the

¹²¹ See for instance Agere S *Promoting Good Governance* 6.

¹²² Scott C "Accountability in the Regulatory State" 48.

¹²³ Schedler "Conceptualizing Accountability" (n 2) 13.

abuse of power by subjecting power to the threat of sanctions thereby obliging power to be exercised in transparent ways so that those exercising power can justify their actions.¹²⁴ Accountability implies that some role players have the right to hold other actors to a set of standards, to assess whether they have discharged their responsibilities in light of these standards.¹²⁵ The standards in questions must be known and agreed upon by the power wielder so that accountability monitors may be able to hold the power wielder accountable if the standards are not met.¹²⁶ In order to achieve intended effects, institutions that provide information to those trying to hold politicians accountable and to impose sanctions on politicians must be established.¹²⁷

Political accountability describes a relationship where A is accountable to B if A is obliged to explain and justify his action to B.¹²⁸ Accountability in this sense has to 'do with answerability and enforcement'¹²⁹ so that those accountable could be sanctioned for their failures. Answerability imposes an obligation on public officials to inform about and to explain their actions while enforcement relates to the capacity of accounting agencies or the public to impose sanctions on those officials who have failed in their duties.¹³⁰ According to Schedler, the notion of answerability indicates that being accountable to somebody implies the obligation to respond to uncomfortable questions and by so doing involves the right to receive information and the obligation to provide all details.¹³¹ Accountability also implies the 'right to receive an explanation and the corresponding duty to justify one's conduct.'¹³² In this sense, the exercise of political accountability involves elements of monitoring, checks, oversight, and control.

¹²⁴ Schedler (n 2) 14.

¹²⁵ Grant W R and Keohane R O "Accountability and Abuses of Power in World Politics" (2005) 99(1) *American Political Science Review* 29-43.

¹²⁶ Rubenstein J "Accountability in an Unequal World" (2007) 69(3) *The Journal of Politics* 616-632.

¹²⁷ Grant and Keohane (2005) 99(1) *American Political Science Review* 30.

¹²⁸ Goetz A M and Jekins R *Reinventing Accountability* 15.

¹²⁹ Markowski R "Political Accountability and Institutional Design in New Democracies" (2006) 36(2) *International Journal of Sociology* 45-75.

¹³⁰ Schedler (n 2) 13.

¹³¹ Schedler (n 2) 14.

¹³² Schedler (n 2) 14.

Unlike answerability which implies information and justification, enforcement connotes that accounting actors do not just call into question but also impose sanctions for improper behaviour.¹³³ It has been argued in this respect that no accountability exists without the ability to punish wrong behaviour or outcomes thereof.¹³⁴ It means that for accountability to be effective, there should be enforcement mechanisms that deter political actors and public officials from abusing their powers. Schedler argues that although political accountability comprises elements of answerability and enforcement, it does not mean that in instances where one of these elements is absent accountability is diminished as a result.¹³⁵ Accountability will still exist with or without all these elements.

Political accountability as defined above is a multifaceted concept which takes different forms depending on the nature, context and the purpose for which accountability is sought. If one looks at the question of who is accountable, a number of public officials are involved: politicians, civil servants, the judiciary, military officers, bureaucrats, and their agencies.¹³⁶ In a narrow sense, the term political accountability covers only politicians. In a broader sense, political accountability deals with administrative and financial accountability,¹³⁷ asking the question to whom public officials are accountable? Depending of the subtypes of accountability, politicians are accountable to the electorate and to constitutional limitations of their powers whereas administrative officers are accountable to agencies or politicians.

Political accountability has been classified into two: vertical and horizontal or macro or micro accountability. Vertical accountability and macro accountability are one and the same thing. It is sometimes referred to as traditional accountability. Political accountability in this context refers to instances where political leaders are held accountable for their actions through periodic elections. Citizens in this form of accountability play direct roles in holding the power to account.¹³⁸ Political leaders are assessed and judged based on what they have promised and elections act as a sanctioning devise. Vertical accountability is associated with the electoral mandate

¹³³ Schedler (n 2) 15.

¹³⁴ Markowski R (2006) 36(2) *International Journal of Sociology* 47.

¹³⁵ Schedler (n 2) 18.

¹³⁶ Schedler (n 2) 22.

¹³⁷ Schedler (n 2) 22.

¹³⁸ Goetz and Jekins (n 128) 11.

given by electorates to politicians. For vertical accountability to exist, elections should therefore be free and fair so that electorates can use their voting power to keep politicians that performed satisfactorily and to sanction and jettison poor performers.

Horizontal or micro accountability refers to internal procedures set by professional or institutional bodies to monitor the work of public officials. In this case, civil servants are accountable to political leaders through standards set by various institutions. It is against these standards that civil servants are assessed. The criteria of accountability are influenced by the norms and standards agreed upon by these institutions. According to Samuel, this type of accountability at micro level has much broader applications in the context of specific services and supplements to traditional accountability.¹³⁹ The objective is therefore to ensure that public funds are used for the intended purposes and to avoid poor service delivery and mismanagement of public resources.¹⁴⁰ Horizontal accountability takes a variety of forms: executive agencies must explain their decisions to the legislatures; political leaders hold civil servants to account; bureaucracies are constituted according to accountability relationships so that subordinates answer to their superiors in a chain of command¹⁴¹ because their duties are to implement the decisions taken by politicians even if they are contrary to their subjective opinions.¹⁴² Moreover, accountability systems empower independent agencies, such as auditors-general, the public protector and anti-corruption agencies to scrutinise actions and decisions of bureaucrats and politicians.¹⁴³

The classification of political accountability into vertical and horizontal accountability is artificial because one might argue that when citizens use institutions such as the ombudsman to hold government accountable, such action falls under vertical accountability. Vertical relationship suggests instances where citizens exercise power against the state and this acknowledges the power imbalance that exists between actors. Elections make up one but not the only mechanism of vertical

¹³⁹ Paul S *Accountability in Public Services; Exit, Voice and Capture* 8. See also World Bank Report *Governance and Development 1992* (1992 World Bank Report) 22.

¹⁴⁰ Agere *Promoting Good Governance* (n 121) 44-45.

¹⁴¹ Goetz and Jenkins (n 128) 13. See also Lewin L *Democratic Accountability* 134-137.

¹⁴² Lewin *Democratic Accountability* (n 138) 132.

¹⁴³ Goetz and Jenkins (n 128) 11.

accountability. The institution of ombudsmen may justifiably be classified as vertical accountability. Regardless of the classification above, political accountability describes a relationship whereby someone, whether politician or public official, accounts for their actions. It is a web of relationships in which the right of information and explanations is seconded by the obligation to provide these under threat of sanction.¹⁴⁴ In the case of politicians, they are mandated by citizens to act on their behalf and their action is monitored through elections. Depending on their performance during their terms of office, they can be either re-elected or not elected during elections. Elections are therefore a method of enforcing accountability of elected officials. In the case of public servants, internal administrative control standards serve as the benchmark against which their actions are assessed.

2.3 Methods of Ensuring Political Accountability

Before examining methods that can be used to ensure political accountability, it is worth establishing the link between political accountability and human rights.

2.3.1 The Relevance of Political Accountability for Human rights.

At first glance, political accountability and human rights seem to focus on and achieve different objectives.¹⁴⁵ While human rights are largely based on individual rights with the government's obligations to respect, promote and fulfil them, political accountability is formulated as a guideline for states and other actors in society.¹⁴⁶ However, for political accountability and human rights to focus on and achieve their respective objectives, there should be a conducive environment. Democracy seems to provide this conducive environment. In this respect, the UN posits that democracy provides institutional advantages favourable to sustainable development, and that when based on the respect for human rights, they provide political incentives to governments to respond to the needs and demands of the people.¹⁴⁷ It is therefore

¹⁴⁴ Goetz and Jenkins (n 128) 13.

¹⁴⁵ Good governance is much broader than political accountability because it includes vertical and horizontal mechanisms of political accountability and also has some financial and political aspects. For ease of reference, the thesis is confined to political accountability *in lieu* of good governance in this section.

¹⁴⁶ Alfredsson G "The Usefulness of Human Rights for Democracy and Good Governance 24.

¹⁴⁷ UN Resolution 7/11 of 27 March 2008 "The role of good governance in the promotion and protection of human rights"

within a democratic environment that political accountability and human rights may achieve their objectives. Human rights and political accountability are mutually reinforcing and inextricably linked as they are based on the common principle of advancing human development and freedom. Their interconnectedness is stated as follows by the UN:

Good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable. Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures. On the other hand, without good governance, human rights cannot be respected and protected in a sustainable manner. The implementation of human rights relies on a conducive and enabling environment. This includes appropriate legal frameworks and institutions as well as political, managerial and administrative processes responsible for responding to the rights and needs of the population.¹⁴⁸

It means that political accountability is based on a set of acceptable standards which are indispensable conditions for the full realisation of human rights. Political accountability provides therefore an enabling environment for the realisation and promotion of human rights. Despite the above, Kjær and Kinnerup argue that the relation between political accountability and human rights depends on how political accountability is conceived.¹⁴⁹ They argue that when political accountability is used as normative ideal, there is tension as well as synergy between political accountability and human rights. When used as analytical tools, political accountability and human rights are complementary. When political accountability is used by donors in operational guidelines, there is a mitigated effect since successful governance programmes can be carried out while at the same time some human rights may be violated.¹⁵⁰

Concerning the conflicting relationship between political accountability and human rights, Kjær and Kinnerup posit that it can be traced back to liberal political thought.

¹⁴⁸ UN Good Governance and Human Rights 2014
<http://www.ohchr.org/en/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> 2014.

¹⁴⁹ Kjær M and Kinnerup K "Good Governance: How does it Relate to Human Rights?" 1.

¹⁵⁰ Kjær and Kinnerup (n 149) 8.

According to them, the tension occurs between civil and political rights and socio-economic rights. This is because in a neo-liberal view, political accountability involving the improvement of social and economic rights might conflict with the demands for the respect of liberty rights.¹⁵¹

Another tension arises when the asymmetries of powers and resources impinge on the meaning of liberty and equality on a regular basis, especially in circumstances where a large number of people are restricted from productively participating in political life.¹⁵² The last scenario which creates tension between political accountability and human rights is when donors emphasise political and civil rights rather than economic and social rights.¹⁵³ With regards the synergy between human rights and political accountability, Kjøer and Kinnerup concur with the UN's view stated above and posit that they are mutually reinforcing and that civil and political rights can be pursued within a participatory framework. The framework must make provision for democracy which will ensure that the state is accountable.¹⁵⁴ The relationship between human rights and political accountability based on the normative aspect of both concepts depends on how political and human rights are defined.

When used as analytical concepts, Kjøer and Kinnerup argue that political accountability is about democracy and to large extent accountability. They argue that the more a government is accountable toward its citizens, the more it is likely that that government will respect human rights.¹⁵⁵ The same can be said when the government promotes, protects and fulfils human rights. For them the effectiveness of accountability of a state towards its citizens depends on whether it derives resources from donors or from tax collection. If resources are raised by donors, they argue the state will be more accountable to donors than its citizens. Nevertheless they posit that in the analytical concept of good governance, the state comes closer

¹⁵¹ Kjøer and Kinnerup (n 149) 9.

¹⁵² Kjøer and Kinnerup (n 149) 9.

¹⁵³ Kjøer and Kinnerup (n 149) 9.

¹⁵⁴ Kjøer and Kinnerup (n 149) 10.

¹⁵⁵ Kjøer and Kinnerup (n 149) 10. See also Alfredsson G "The Usefulness of Human Rights for Democracy and Good Governance" (n 146) 26.

to its citizens and negotiates with its citizens for the provision of basic services and by so doing the government respects, promotes protects and fulfils human rights.¹⁵⁶

When political accountability is perceived from a donors' point of view, Kjøer and Kinnerup state that it is so because donors assume that sustainable economic and social development on the one hand and human rights, democratisation and political accountability on the other hand, are intertwined. Moreover, human rights, democracy and political accountability are perceived as mutually supportive and interdependent entities.¹⁵⁷ They argue that this assumption is misplaced because more often, governments in the pursuit of successfully managing donors' funding programmes hire experts to run these programmes without capacitating personnel responsible for service delivery programmes. As a result and based on the Ugandan experience, they state that the basic donor assumption regarding the relationship between political accountability and human rights is a potential assumption that needs not be in accordance with political realities. This is because 'capacity building does not necessarily improve human rights conditions, and because successful good governance programmes can co-exist with a recipient government that regularly violates human rights.'¹⁵⁸

From the above, it emerges that the set of standards upon which political accountability is premised are indispensable conditions for the realisation of human rights. Political accountability provides therefore an enabling environment for the realisation and promotion of human rights. The aim of political accountability is to control and curb abuse of political power by devising mechanisms to that effect so that those holding power can justify their actions. Political officials or public officials, as the case may be, are subjected to the threat of sanctions obliging them to exercise power in transparent ways.¹⁵⁹ As mentioned in paragraph 2.1 above, political accountability can be enforced through a number of mechanisms which are examined hereunder. For ease of reference, I shall classify these mechanisms into two: traditional and modern accountability mechanisms.

¹⁵⁶ Kjøer and Kinnerup (n 149) 11-12.

¹⁵⁷ Kjøer and Kinnerup (n 149) 12.

¹⁵⁸ Kjøer and Kinnerup (n 149) 15.

¹⁵⁹ Schedler Conceptualizing Accountability (n 2) 14.

2.3.2 Traditional Methods of Enforcing Political Accountability

Elections and constitutional limitations of political powers fall within this category.

2.3.2.1 Electoral Control

As mentioned above, elections are one method to enforce accountability of politicians. The idea of electoral control of politicians originates from the ancient city of Athens. The affairs of the city were governed by the assembled people¹⁶⁰ who met frequently throughout the year and everyone had the right to participate in governance issues by taking the floor.¹⁶¹ In this system, the assembly reserved the decision-making power and was a sovereign body making decisions in every sphere of government. Administrative functions, for instance, were handled by magistrates chosen by lot from a list of volunteers.

A magistrate's term was for one year during which he was periodically assessed by the Assembly and citizens were entitled to bring charges and demand his suspension. At the end of the year his performance and conduct were also subject to scrutiny in which case his accounts were audited and any citizens could charge him with inefficiency or abuse of authority.¹⁶² If his performance was satisfactory, he could continue in his functions. Similarly, officers of the court, councillors and generals were also elected but from the elite class and also subjected to similar scrutiny by the Assembly.¹⁶³ The feature of the Athenian representative system was therefore a selection by the Assembly, rotation in the office and citizens' political participation.¹⁶⁴ The Assembly had, in the Athenian democracy, the power to sanction magistrates or councillors by not re-electing them into office when the review of their past performance at the end of each year showed that it was not satisfactory.

Similarly, in modern times, politicians are also elected for a certain period to carry out the affairs of the country on behalf of citizens. Unlike the Athenian model where

¹⁶⁰ Moncrieffe J M "Reconceptualizing Political Accountability" (1998) 19(4) *International Political Science Review* 387-406.

¹⁶¹ Finley M I *Democracy Ancient and Modern* 19.

¹⁶² Jones A H M "The Athenian Democracy and Its Critics" (1953) 11(1) *Cambridge University Press* 1-26.

¹⁶³ Finley *Democracy Ancient and Modern* (n 161) 100-105.

¹⁶⁴ Moncrieffe J M (1998) 19(4) *International Political Science Review* 395.

the Assembly had the decision-making power, the electoral mandate enables elected officials to constitute the legislative and executive branches of government. The decision-making power lies with the elected officials. The tenure of the executive and legislative branches is temporary and subject to re-election. Elections are the method through which the electorate sanctions non-performers or rewards performing politicians for their actions in discharging their functions. Voters use their votes for the purpose of sanctioning the incumbent based on their performance.

In order to be able to exercise their sanctioning power, voters compare promises that political candidates 'make about the future, and use the vote only to choose the better candidate.'¹⁶⁵ Politicians are only accountable if voters discern whether politicians are acting in their best interest and sanction them accordingly so that those who acted in their best interests are re-elected and those who did not lose elections.¹⁶⁶ This is achievable because politicians care about being elected and re-elected. They also have some beliefs that promises made and policies adopted during their terms of office are more likely to make them win.¹⁶⁷ When voters are satisfied with the implementation of various policies (which promote socio-economic development of citizens), it is likely that they will re-elect the incumbents. Voters have thus one instrument (the vote in elections) to reach two goals: to select better policies that promote welfare and politicians and to induce them¹⁶⁸ to fulfil their promises. In the words of Manin, Przeworski and Stokes, politicians are accountable when:

What politicians and voters want coincides or when politicians care only about winning elections, and to win they must promise and implement policies that are best for the public.¹⁶⁹

There is therefore a trade-off between voters and politicians. When politicians pursue policies that enhance the welfare or socio-economic development of citizens, it is likely that voters would re-elect those politicians. If voters vote retrospectively by assessing the outcomes of politicians' terms of office before casting their votes,

¹⁶⁵ Manin B, Przeworski A and Stokes S C "Elections and Representation" 44.

¹⁶⁶ Manin, Przeworski and Stokes (n 165) 40.

¹⁶⁷ Kelly J M "Counting on the Past or Investing in the Future? Economic and Political Accountability in Fujimori's Peru" (2003) 65(3) *The Journal of Politics* 864-880 and Manin Przeworski and Stokes (n 165) 31.

¹⁶⁸ Manin Przeworski and Stokes (n 165) 45.

¹⁶⁹ Manin Przeworski and Stokes (n 165) 33.

Adserà, Boix and Payne strongly assert that elections should make policy makers accountable to the public.¹⁷⁰ This is because the threat of losing office in the next elections compels policy makers to deliver good services.¹⁷¹ Fox and Shotts make a distinction when voters evaluate politicians based on the policies they choose or the outcomes of the policies. In the latter scenario, they argue that politicians act as trustees and in the former case, politicians act as delegates.¹⁷² In any event and regardless of the above distinction, politicians are assessed based on the outcome of their policies (because policies are meant to improve and advance citizens' welfare); whether the welfare of the voters has positively been improved or not is what really matters. Elections are therefore a sanctioning device as well as an accountability mechanism that serves to hold politicians accountable for the results of their past actions.

However, in modern days, elections are conducted only within an electoral system. This is because the criteria by which voters select politicians affect the type of representation¹⁷³ which in turn also impacts on their accountability. There are a number of electoral systems each of them presenting different features. The thesis limits itself to the commonly used electoral systems: majoritarian, proportional representation and the mixed model.

The majoritarian electoral system is the oldest electoral system dating as far as the 12th century.¹⁷⁴ This category is divided into three: plurality, majority-plurality and the alternative vote.¹⁷⁵ Plurality systems known as "first-past-the-post" is used in single member constituencies in many countries.¹⁷⁶ Under this system, voters, divided into territorial single-member constituencies, cast one vote each and candidates with the

¹⁷⁰ Adserà A, Boix C and Payne M "Are You Being Served? Political Accountability and Quality of Government" (2003) 19(2) *The Journal of Law, Economics & Organization* 445-489.

¹⁷¹ Adserà, Boix and Payne (2003) 19(2) *The Journal of Law, Economics & Organization* 448.

¹⁷² Fox J and Shotts K W "Delegates or Trustees? A theory of Political Accountability" (2009) 71(4) *The Journal of Politics* 1225-1237.

¹⁷³ Fox and Shotts (2009) 71(4) *The Journal of Politics* 1226.

¹⁷⁴ Morris P "Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems" (1997) 18(3) *International Political Review* 297-312.

¹⁷⁵ Lijphart A *Electoral Systems and Party Systems* 18 and Lindberg S I "Consequences of Electoral Systems in Africa: A Preliminary Inquiry" (2005) 24 *Electoral Studies* 41-64.

¹⁷⁶ Countries such as Canada, India, New Zealand the United Kingdom and the United States.

most votes win. Candidates do not need to pass a minimum threshold of votes or an absolute majority to be elected.¹⁷⁷ Candidates in this system only need one more vote than their rivals. The aim of plurality systems is to create an overall majority for the leading party in order to produce an 'effective working parliamentary majority for the government'.¹⁷⁸ There is a variance of the plurality in which voters are divided into two-member constituencies. In this variance, voters have two votes and the two candidates with the most vote win.¹⁷⁹

Another variance of the plurality system is the two ballot majority-plurality formula. In this system, the rule is that an absolute majority that is 50 percent plus one of the votes is required for election on the first ballot. If the first ballot does not produce a winner, a second ballot is conducted between the candidates who get the highest number of votes. The candidate with the most votes wins, even if he does not get the absolute majority.¹⁸⁰ The aim of the two ballot majority-plurality system is to encourage broad cross-party coalitions.¹⁸¹ That is why the second ballot often opposes two candidates as the other candidates withdraw and form alliances with one of the candidates.¹⁸² However, Lijphart argues that the two ballot majority-plurality formula should be distinguished from the majority-runoff in which the second round of the elections is restricted to the top two candidates from the first round. The majority-runoff is used in direct presidential elections in France, Portugal, Finland, and Austria.¹⁸³ It is also used in legislative elections in Ukraine and Mali while the plurality runoff is used for the French National Assembly.¹⁸⁴

The last variance of the majoritarian system is the alternative vote which is used in the Australian House of Representatives and in Ireland's presidential elections. In this system, voters are asked to rank candidates in order of their preferences, if a candidate receives an absolute majority of first preferences, he/she is elected. Where no one gets over 50 percent after the first preference, then the candidate at the bottom with the lowest share of the vote is eliminated and his/her vote is

¹⁷⁷ Norris (1997) 18(3) *International Political Review* 299.

¹⁷⁸ Norris (1997) 18(3) *International Political Review* 299.

¹⁷⁹ Lijphart *Electoral Systems and Party Systems* (n 175) 18.

¹⁸⁰ Lijphart (n 175) 18.

¹⁸¹ Norris (1997) 18(3) *International Political Review* 300.

¹⁸² Lijphart (n 175) 18.

¹⁸³ Lijphart (n 175) 19 and Norris (1997) 18(3) *International Political Review* 300.

¹⁸⁴ Norris (1997) 18(3) *International Political Review* 300.

redistributed among other candidates. The process continues until an absolute majority is secured.¹⁸⁵

Concerning the proportional representation system, although its origins are often associated with four people after whom a number of variances of proportional representation are named,¹⁸⁶ it was developed in order to address the disadvantages of plurality and electoral majority systems.¹⁸⁷ It is argued specifically in this regard that the disproportional representation of parties in parliament associated with both plurality and majority systems contributed to the development of the proportional representation electoral system.¹⁸⁸ The development of a proportional representation electoral system was also influenced by the growing number of parties. The main objective of a proportional representation electoral system is to ensure equal and equitable representation of all parties¹⁸⁹ through a proportionate ratio between votes received and seats allocated.¹⁹⁰

It is in this respect that the proportional representation electoral system is praised for, amongst others, giving rise to a few wasted votes; translating votes into seats won; facilitating access to representation by minority parties; and encouraging parties to present inclusive and socially diverse lists of candidates.¹⁹¹ The system of proportional representation is the one used in both emerging and old democracies as it prevents disproportional results.¹⁹² There are a number of variances of the proportional representation list system. It is beyond the scope of this chapter to

¹⁸⁵ Lijphart (n 175) 19 and Norris (1997) 18(3) *International Political Review* 300.

¹⁸⁶ These four people are: Thomas Hare, Victor d'Hondt, Eguard Hagenbach-Bischoff and André Sainte-Laguë. See Farrell D M *Electoral Systems* 65; Farrell D M *Comparing Electoral Systems* 61 and Amy J D *Behind the Ballot Box* 85.

¹⁸⁷ The plurality electoral system is one which provides for the election of a single candidate as a representative of a constituency when he or she gets more votes than any other candidate in an election. The majority electoral system requires that a candidate who wins, must at least obtain an absolute majority of the votes or must have 50 percent plus one of the total number of votes. The disadvantages of the plurality and majority electoral systems are as follows: they produce distortion in party representation; lead to non-representation of small parties; exclude racial and ethnic minorities; and poor political integration. For a discussion on plurality and majority electoral system, see Amy (n 182) 27-63; Farrell (n 186) 13-63; Lakeman E *How Democracies Vote* 29-77 and Reynolds A and Reilly B *The International IDEA Handbook* 27-51.

¹⁸⁸ Amy (n 186) 65.

¹⁸⁹ Amy (n 186) 66; Farrell (n 186) 66 and Farrell (n 186) 61.

¹⁹⁰ De Villiers B "An Electoral System for the New South Africa" (1991) 16(2) *TWR* 43-71.

¹⁹¹ Reynolds and Reilly (n 187) 62-63. See also Farrell (n 186) 78.

¹⁹² Farrell (n 186) 66.

discuss all the different proportional representation electoral systems.¹⁹³ Nevertheless, it suffices to say that all types of proportional representation systems are based on a list system and on a formula used to calculate the allocation of seats.¹⁹⁴

In its simplest form, a proportional representation electoral system involves each party presenting a list of candidates to the electorate. The system can either confine the electorate to voting for the party list with the order of candidates determined by the party (closed list) or to choose between different candidates (open list) and or to alter the order in the list (ordered list).¹⁹⁵ In a proportional representation closed list system, each party nominates as many candidates as there are seats to be filled. The party decides the order in which it would want the candidates to be elected.¹⁹⁶ In an open list proportional representation electoral system, voters determine which candidates are elected by choosing their preferred candidates on the list.¹⁹⁷ In any event and regardless of whether the list is open, ordered or closed, the general feature is that voters vote for the party and parties receive seats in proportion to the overall share of the total, counted national vote.

Concerning the mixed model electoral system, this was developed in Germany in 1946,¹⁹⁸ and is now used in other countries such as New Zealand, Bolivia, Italy, Mexico, Venezuela and Hungary.¹⁹⁹ The mixed model electoral system was

¹⁹³ Some of the variances are the single-transferable-vote system, proportional representation list systems at the national level, proportional representation lists systems in variable multi-member districts; and proportional representation lists systems in multi-member districts with additional or compensatory seats at regional and or regional level, mixed member proportional representation system.

¹⁹⁴ Various formulas have been developed to allocate seats. However, the two leading formulas are the largest remainder formula and the largest average formula. In terms of the largest remainder system, the number of seats is divided into the total votes cast. Thereby, establishing a quota which will determine how many seats a party is entitled to. There are different types of quotas. The most common are the Hare and Droop quotas. In terms of the largest average formula, seats are allocated one by one by dividing the number of votes a party receives by 1, 2, 3, 4 and so on. There are also two types of largest average system in use: the d'Hondt method which is the most common and the Sainte-Laguë method which is mostly used by Scandinavian countries. See Farrell *Electoral Systems* 67; De Ville J and Steytler N *Voting in 1999* 49-53 and Steytler N, *et al. Free and Fair Elections* 7-9.

¹⁹⁵ Reynolds and Reilly (n 187) 61; Steytler *et al* (n 194) 6 and Farrell (n 186) 77-79.

¹⁹⁶ See Lakeman (n 187) 97 and Farrell (n 186) 77.

¹⁹⁷ Farrell (n 186) 84-85 and Lakeman (n 187) 98-99.

¹⁹⁸ Lakeman (n 187) 103.

¹⁹⁹ Reynolds and Reilly (n 187) 74.

developed in an attempt to combine the positive attributes of both majoritarian and proportional electoral systems.²⁰⁰ In this respect, it is argued that the mixed model electoral system provides the geographical representation and close constituency link attributed to the majoritarian system, coupled with the fairness and diversity or representation associated with the proportional representation electoral system.²⁰¹ In any event and regardless of the electoral systems in use, elections serve, as stated above, as a mechanism to hold politicians accountable for their past performances so that those that perform satisfactorily are re-elected and those that did not perform are not re-elected.

2.3.2.2 Constitutionalism and Political Accountability

The concept of political accountability cannot be limited only to elections. Modern constitutions make provisions for the separation of the legislature, executive and judiciary (judicial accountability is dealt with in chapter four). The judiciary is mandated to uphold the rule of law by guaranteeing legal as well as constitutional accountability. Constitutions design safeguards to weaken the authority of elected officials by 'fracturing the concentration of power'.²⁰² Constitutionalists argue that effective executive accountability can be achieved through constitutionally prescribed mechanisms.²⁰³ These prescribed constitutional mechanisms are checks and balances that each branch of government exercises towards one another.

The concept of the separation of powers was first articulated by Montesquieu in his book "The Spirit of Laws". According to Montesquieu, the separation of powers is necessary for any constitution that wants to prevent the abuse of power because every man invested with power is apt to abuse it. In order to curb or prevent the abuse of power, Montesquieu posits that 'it is necessary that power should be a check of power'.²⁰⁴ In other words, there should be a regulatory framework so that each branch of government, be it the executive, legislative or judiciary, has exclusive powers and carries out functions assigned to it. Taking the example of the Prince of

²⁰⁰ Reynolds and Reilly (n 187) 74.

²⁰¹ Amy (n 186) 90.

²⁰² Moncrieffe (1998) 19(4) *International Political Science Review* 401.

²⁰³ See for instance Havens M C and McNeil D M "Presidents, Impeachment, and Political Accountability" (1978) 8(1) *Presidential Studies Quarterly* 5-18.

²⁰⁴ Montesquieu *The Spirit of Laws* Translated by Thomas Nugent 173.

England who exercises all three powers (Executive, legislative and judicial), Montesquieu takes the view that there would be an end of everything if the same man or the same body exercises those three powers.²⁰⁵

In order to make separation of powers work, constitutions must allocate powers among all the branches of government and must provide mechanisms to prevent abuse of powers. As power is of an encroaching nature, Hamilton, Madison and Jay posit that it ought to be restrained from passing the limits assigned to it.²⁰⁶ Powers of government should be divided and balanced among all branches of government so that no one transcends their legal limits without being effectually checked and restrained by the other sites of power.²⁰⁷

The separation of powers, as envisaged by Montesquieu, emphasises strict limitations and divisions of powers of all branches of government without any encroachment. However, Hamilton, Madison and Jay argue that it does not prohibit control of power.²⁰⁸ The modern notion of separation of powers has departed from this traditional concept and allows checks and balances so that each branch is able to control and check the other branch thereby ensuring that no branch has absolute power. Besides the system of checks and balances (examined below), the basic instruments include legislative reviews of ministry's activities, periodic audit reports on public expenditure and the practice of questioning ministers in parliament on on-going activities.²⁰⁹

Power of government must be divided and balanced so that no branch of government may exercise its powers without being checked and restrained. In this sense, checks and balances achieve two goals: to create the link between branches of government and the power to control each other. In this respect, Persson, Roland and Tabellini argue that the separation of powers with the appropriate checks and balances improves the accountability of elected officials.²¹⁰ This is to say that checks and balances are also a mechanism that holds elected officials accountable. Unlike

²⁰⁵ Montesquieu *The Spirit of Laws* 173-174.

²⁰⁶ Hamilton A, Madison J and Jay J *The Federalist Papers* 251.

²⁰⁷ Hamilton, Madison and Jay (n 206) 254.

²⁰⁸ Hamilton, Madison and Jay (n 206) 247.

²⁰⁹ Agere (n 121) 42.

²¹⁰ Persson T, Roland G and Tabellini G "Separation of Powers and Political Accountability" (1997) *The quarterly Journal of Economics* 1163-1202. See also Agere (n 121) 41.

elections, checks and balances operate within branches of government. They are the power that each branch of government holds against the other.

The United States presidential regime provides a system of checks and balances in the constitution. The framers of the United States' constitution were concerned about granting unchecked powers²¹¹ to any branch of government. The branches of government are not independent of one another because the constitution sets up a system of checks and balances to help ensure that no one branch becomes too powerful. Each branch has powers that it can use to check and balance the operations and powers of the other branches. To check the power of the legislature, the United States President has been granted the power to veto legislation. This power to veto legislation reduces the risks of the majority to make imprudent laws in the 'heat of passion or in the midst of panic.'²¹²

The United States' constitution has given a counter-power to the legislature to override the executive veto with a two-third majority of vote in both the Congress and the Senate. This happens after reconsidering the vetoed legislation. In addition, the United States' constitution gives the President the power to sign treaties. But treaties become operative only if the Senate approves them with a vote of more than half of all senators.²¹³ Furthermore, the President has the power to appoint federal officials and judges, but the Senate must approve these appointments.²¹⁴ However, the Congress's biggest check against the President is impeachment. Impeachment is the right to charge the President of serious wrongdoing. More than half of the House members must vote to have the President impeached.²¹⁵ In this respect, Havens and Mcneil argue that impeachment and removal from office are viable and legitimate tools for an accountable executive.²¹⁶ The authors further argue that the use of impeachment ensures that the executive remained accountable to the people²¹⁷ for any serious wrongdoing.

²¹¹ Khan L A *A Theory of Universal Democracy* 29.

²¹² Khan (n 211) 29.

²¹³ Kowalski K M *Checks and Balances* 16.

²¹⁴ Kowalski (n 213) 16.

²¹⁵ Kowalski (n 213) 18.

²¹⁶ Havens and McNeil (1978) 8(1) *Presidential Studies Quarterly* 5-6.

²¹⁷ Havens and McNeil (1978) 8(1) *Presidential Studies Quarterly* 11.

Contrary to presidential regime that makes provision for checks and balances by virtue of the separation of the branches of government, parliamentary regime unifies the executive and the legislative branches as the head of government and his/her cabinet are all parliamentarians.²¹⁸ Parliament like in the United Kingdom enjoys absolute sovereignty to pass any laws. However, many nations that embrace this form of government subject the scrutiny of the legislative powers to body such as the courts to invalidate any laws made by Parliament.²¹⁹ Moreover, many of these nations unlike the United Kingdom have written constitutions which set the powers of all branches of government. Despite the above, parliamentary regime makes provision for two mechanisms of control: the notion of confidence and vote of no confidence.²²⁰ The notion of confidence is a procedure initiated by the government to request a general vote of confidence at the time of government investiture or in the context of legislative debates on policy issues.²²¹ Unlike a vote of confidence, a vote of no confidence is initiated by parliament. The vote of no confidence or motions of censure permits the majority in parliament to vote on the continuation in power of the government.²²²

From above, it is clear that in addition to constitutional arrangements of checks and balances, elections are a mechanism to hold politicians accountable for their past actions. Through elections, citizens can punish or reward incumbents by voting for or against them in the next elections. However the question that remains is to what extent electoral accountability is effective. The effectiveness of elections as an accountability mechanism is mainly questioned by those advocating for horizontal accountability (which is examined in the next section). They are sceptical about the degree to which elections are the instrument with which voters can punish or reward elected officials.²²³ The main reason behind this scepticism is that the effectiveness of vertical accountability presupposes the presence of a number of factors mainly that citizens can exercise their participatory rights to choose their representative

²¹⁸ Khan (n 211) 30.

²¹⁹ Khan (n 211) 31.

²²⁰ Huber D J "The vote of Confidence in Parliamentary Democracies" (1996) 90(2) *American Political Science Review* 269-282.

²²¹ Huber (1996) 90(2) *American Political Science Review* 271.

²²² Huber (1996) 90(2) *American Political Science Review* 270.

²²³ See for instance O'Donnell G "Horizontal Accountability in New Democracies" 30.

freely and can also freely express their opinion.²²⁴ These preconditions for electoral accountability are not limited to elections only but are general conditions for all elements of political accountability that ensure its effectiveness. Without democracy as stated above which provides a conducive environment, the pursuit of political accountability for effective housing delivery is futile.

Despite the above, there are a number of structural problems with elections as accountability mechanism: first elections hold only elected officials accountable. The vast majority of officials are appointed bureaucrats who are not directly accountable to voters (this aspect is dealt with in the next section); second, because elections occur once every few years and force diversity of opinions and evaluations into a single ballot, it is almost impossible for elections to reflect a clear accountability of elected officials; third the structure of the voting system limits accountability of elected officials and fourth elected officials have informational advantage over voters that limits elected officials accountability.²²⁵

Concerning the contention that because elections occur periodically it is impossible to hold elected official accountable, it is argued that because institutions of accountability operate periodically they provide elected officials with opportunities to avoid electoral responsibility for particular actions by grouping unpopular with popular actions.²²⁶ The argument is that a once-off evaluation of elected officials at the ballot box at an interval period is not enough to capture the outcome of elected officials' actions. This is because elections do not provide electors with opportunities to scrutinise in detail all actions of elected officials.

Regarding the argument that voters have limited information to evaluate incumbents, Ferejohn argues that elected officials fully enjoy an immense informational advantage over the voters that limits their accountability to voters.²²⁷ Manin, Przeworski and Stokes concur with Ferejohn when they assert that politicians know things and undertake actions that citizens cannot monitor. In their view, because

²²⁴ O'Donnell (n 223) 30-31.

²²⁵ Ferejohn J "Accountability and Authority: Toward a Theory of Political Accountability" 132. See also Ackerman J "Co-Governance for Accountability: Beyond "Exit" and Voice" (2004) 32(3) *World Development* 447-463.

²²⁶ Ferejohn (n 225) 132.

²²⁷ Ferejohn (n 225) 132.

politicians have their own goals and interests, once elected they may pursue these goals and interests and endeavour that voters 'do not know everything they need to know'.²²⁸ In this respect, the authors posit that 'if citizens do not have sufficient information to evaluate the incumbent governments, the threat of not being re-elected is insufficient to induce governments to act in the best interest of the public'.²²⁹ Electors therefore need to be sufficiently informed in order to be able to hold accountable elected officials. In the absence of such information, as stated by Manin, Przeworski and Stokes elections as a sanctioning device would be ineffective. Moreover, the brief media debates which have replaced discussions at party level, fail to present the issues in sufficient detail. In addition media briefings allow politicians to decide the critical issues the electorate needs to take into account in their evaluation.²³⁰

Another cited limitation to electoral accountability is that politicians are accountable to individuals or groups that have raised resources for their elections. In order to reward those that have financed their elections, it is argued that politicians can sell to interest groups policies that benefit the particular interest groups.²³¹ In this respect, Moncrieffe asserts that 'sectional interests exert tremendous influence on policy'.²³² External forces therefore limit the extent to which elections can hold accountable elected officials and at the same time the extent to which elections can be used as an instrument of accountability. The limited effect of elections as an accountability mechanism is summed up by Ackerman as follows:

The effectiveness of elections as mechanism of sanctions and control is weakened by the distance between political and civil society, the clientelistic nature of many political parties, the excess private funding for candidates, and the lack of public information about the general workings of the government and even less information about the specific [behaviour] of individual office holders.²³³

Besides the above limitations to electoral accountability, structural voting systems are also contributive factors that limit the effectiveness of elections. The structure of

²²⁸ Manin, Przeworski and Stokes (n 165) 29-30.

²²⁹ Manin, Przeworski and Stokes (n 165) 30.

²³⁰ Moncrieffe (1998) 19(4) *International Political Science Review* 398.

²³¹ Manin, Przeworski and Stokes (n 165) 34.

²³² Moncrieffe (1998) 19(4) *International Political Science Review* 398.

²³³ Ackerman (2004) 32(3) *World Development* 449.

the voting systems refers to conceptual and inherent hindrances associated with each electoral system. It is generally argued regarding these limitations that they are the by-products of the representation system which has from its inception departed from the original Athenian concept and practice of voting system.²³⁴ These structural challenges are limited to electoral systems examined above.

Concerning the majoritarian electoral system and in relation specifically to accountability, officials in that system are not accountable to minorities. Since the system is based on the rule of the majority, elected officials do not account to the minority section of the electorate. More generally, electoral heterogeneity makes it possible for officials to play off some voters against others to undermine their accountability to anyone.²³⁵

Regarding proportional representation in light with accountability, the system mostly is criticised for leaving too much power in the hands of senior party leadership.²³⁶ By so doing, elected representatives are more accountable to senior members than to the electorate. This is because party lists are drawn by senior party leaders who have the power to decide who is listed and the order in which each candidate appears in the list.

Finally, the mixed model system is mostly criticised for creating two distinct and conflicting classes of legislators: those who represent constituencies and those representing parties. It is argued that constituencies elected members will be close to their constituencies while list elected members will not be.²³⁷ The accountability of list legislators lies with the parties instead of the constituencies. In any event, the effectiveness of elections as a mechanism for political accountability lies in the structure of the electoral system itself coupled with the regularity of elections and the extent of voters' capacity and ability to use elections as a sanctioning device.

From above, it emerges that political accountability deals with enforcement, justification and sanction. The first part of this chapter first demonstrates that the

²³⁴ Moncrieffe (1998) 19(4) *International Political Science Review* 399.

²³⁵ Ferejohn (n 225) 132.

²³⁶ Reynolds and Reilly (n 187) 62. See also Farrell (n 186) 78; De Villiers (1991) 16(2) *TWR* 55.

²³⁷ Amy (n 186) 94.

implementation of human rights relies on a number of conducive elements of which political accountability plays a pivotal role. Without a sound political accountability legal frameworks and institutions, the implementation of human rights would be nugatory.

The chapter then deals with vertical or traditional accountability. This form of accountability reveals that elections and the constitutional prescripts of checks and balances are mechanism devised to control political accountability. As regards the enforcement through elections, voters use elections to reward satisfactory performing incumbents or sanction poor performing incumbents for their past actions. As such it has been demonstrated that elections are an effective device that hold politicians accountable. As elections are conducted within an electoral system, the features of the commonly used electoral systems are captured. The systems of checks and balances and motion of confidence and no confidence on the contrary are constitutionally provided to enable each branch of government to prevent the abuse of power by another branch.

The other variance of political accountability, horizontal accountability is also defined. Horizontal accountability (which is examined below) deals with various standards put in place to monitor and assess public officials performance. Despite the general view that elections are an effective tool for the control and enforcement of political accountability, the limitation of their effectiveness is examined. The fact that there are limitations signifies that there is a degree of effectiveness. Elections remain an electoral accountability control mechanism despite these limitations. Besides that, limitations to elections (less the structure of the voting systems) are no more than prerequisite conditions for elections. Participating in elections by itself presupposes that voters are informed and well-rounded about their needs.

Voters are not concerned about policies but about the impact of the policies in their daily lives. In relation to human rights, voters look at whether their lives have improved under the incumbent. Whether they have access to *inter alia* basic services, health care services, housing is what voters look at. Concerning the structure of voting systems, this is a challenge inherent to the mechanism of the voting system. It is not a challenge to elections as a mechanism of political control.

Elections remained a control mechanism of political accountability which is rendered ineffective as the result of the voting system. Despite the stance taken, the thesis examines modern concept of political accountability.

2.4 Modern Concept of Political Accountability: From Horizontal Accountability to Good Governance

As stated above, horizontal accountability refers to internal procedures set by professional or institutional bodies to monitor the work of public officials. The objective of this type of accountability is to ensure that public funds are used for the intended purposes and to avoid service delivery related issues and mismanagement of public resources. In this respect, independent agencies such as auditors-general and anti-corruption agencies are empowered to scrutinise actions and decisions of bureaucrats and politicians.²³⁸ Based on the above underlining, O'Donnell defines horizontal accountability as

The existence of state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or agencies of the state that may be qualified as unlawful.²³⁹

Horizontal accountability is concerned with the prevention and control of mismanagement of public funds. It may be understood as a form of accountability to third parties such as semi-autonomous agencies, independent evaluators, boards of stakeholders or commissioners, journalists, interested and affected communities, and clients which all act as horizontal accountees.²⁴⁰ In order for these agencies to qualify as horizontal accountability mechanisms, it is imperative that there is a formalised relationship between a public official and an independent agency, in which the official is obliged to explain his conduct and the agency has the authority to pass judgment and to impose some sort of sanction, formal or informal, to redress the unsatisfactory behaviour.²⁴¹ In any event, the concept of horizontal accountability which originated in England towards the end of the feudal period with the commercial

²³⁸ Goetz and Jenkins *Reinventing Accountability* (n 128) 11.

²³⁹ O'Donnell "Horizontal Accountability in New Democracies" (n 223) 38.

²⁴⁰ Schillemans T "Does Horizontal Accountability Work? Evaluating Potential Remedies for the Accountability Deficit of Agencies" (2011) 43(4) *Administration & Society* 387-416.

²⁴¹ Schillemans (2011) 43(4) *Administration & Society* 391.

classes demanding that the king accounts how their accumulated surpluses were spent has been refined.²⁴²

Today the concept of horizontal accountability plays a pivotal role in the recent concept of good governance. Good governance is assured through the accountability of public officials.²⁴³ This is to say that political accountability is encompassed in the generic term of "good governance". However, when regard is had at the principles of good governance, they are broader than the mechanism of political The features of good governance include the following: the political dimension which is how the people are governed; the institutional dimension which is how the country's affairs are administered and the technical dimension which deals the quality of management and institutional capacity.²⁴⁴ Part of the political dimension has been dealt with in the first part of this chapter.

2.4.1 *The Concept of Good Governance*

Like political accountability, the concept of good governance varies considerably in light of the views on governance by various international organisations. Since the early 1980s, governance, and increasingly *good* governance, have permeated development discourse and especially research agendas and other activities funded by public and private banks and bilateral donors.²⁴⁵ The emergence of governance can be traced at the country level to a disgruntlement with the state-dominated models of economic and social development prevalent throughout the socialist bloc and much of the Third World between the 1950s to the 1970s.²⁴⁶

Nevertheless, the concept was properly articulated by the World Bank in its 1989 report²⁴⁷ in the context of the exercise of political power in relation to the management of a country's affairs. The World Bank's interest in governance arises from its concern with the effectiveness of the development efforts it supports. The

²⁴² Moncrieffe (1998) 19(4) *International Political Science Review* 389.

²⁴³ Ackerman (2004) 32(3) *World Development* 448.

²⁴⁴ Agere *Good Governance* (n 118) 23.

²⁴⁵ Weiss T G "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges" (2000) 21(5) *World Quarterly* 795-814.

²⁴⁶ Weiss (2000) 21 (5) *World Quarterly* 796.

²⁴⁷ World Bank 1989 Report "Sub Saharan Africa: From Crisis to Sustainable Growth" (1989 World Bank Report). See also Mbao and Komboni "Promotion of good governance and combating corruption and maladministration: the case of Botswana" (2008) 12(1) *Law, Democracy & Development* 49-91.

huge economic debt crisis in Africa caused the World Bank to take an increased interest in the political and institutional environment before granting financial credit facilities.²⁴⁸ The World Bank argues that underlying the litany of Africa's developmental problems was a crisis of governance, characterised by patronage, corruption, clientelism and self-enrichment of African leaders and government officials.²⁴⁹ The World Bank further states that at the root of the crisis of good governance in many countries is the appropriation of the machinery of government by the elite to serve their own interests. This is coupled with the complicity of the donor community which tolerates impropriety - by failing to insist on scrupulous conduct by their own suppliers, by not ensuring that funds are properly used, by overlooking inadequate accounting and auditing systems, and by tolerating lax procurement procedures.²⁵⁰

Cognisant of the negative mitigating effects of its economic structural adjustment programmes in many countries, the World Bank suggests that in order to foster good governance, there should be a political renewal which means 'a concerted attack on corruption from the highest to the lowest levels, strengthening accountability by encouraging public debate, and by nurturing a free press'.²⁵¹ By so doing, the World Bank departed from its traditional approach with regards exclusive economic issues to embrace a more proactive action towards development by acknowledging the importance of effective political management. As a result, the older and more restricted conception of good governance as efficiency in financial accountability has evolved into a broader understanding of the way in which politicians exercise power and authority in an efficient, "sanitised" manner in order to advance the West-oriented welfare of their citizens.

The remedy to sustainable development is found in the World Bank's 1992 report. According to the World Bank, good governance is central in creating and sustaining a conducive environment which fosters strong and equitable development and which

²⁴⁸ Mbao and Komboni (2008) 12(1) *Law, Democracy & Development* 50.

²⁴⁹ 1989 World Bank Report 60.

²⁵⁰ 1989 World Bank Report 191.

²⁵¹ 1989 World Bank Report 6; Mbao and Komboni (2008) 12(1) *Law, Democracy & Development* 53.

is an essential complement to sound economic policies.²⁵² For the World Bank, in order to foster good governance, countries should focus on: accountability, transparency, the rule of law, decentralisation and the encouragement of citizen participation.²⁵³ These elements are summarised by the World Bank in its 1994 report as follows:

If sustainable development is to occur, the 1992 governance report concluded, a predictable and transparent framework of rules and institutions for the conduct of private and public business must exist. Good governance is epitomized by predictable; open, and enlightened policymaking (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions, and a strong civil society participating in public affairs; and all behaving under the rule of law.²⁵⁴

Good governance lays emphasis on accountability, transparency and the rule of law in order to produce an accountable government. Moreover, the emphasis on decentralisation and the encouragement of local government are pivotal with the concept of citizen participation. It means that these elements are mechanisms to ensure good governance. However, it is accountability that ensures 'congruence between public policy and actual implementation, and the efficient allocation and use of public resources.'²⁵⁵ Accountability is therefore central to good governance. In a context where no one accounts for his/her action, good governance is likely to be non-existent.

The World Bank defines good governance as the manner in which power is exercised in the management of a country's economic and social resources.²⁵⁶ The World Bank has identified three distinct aspects of governance: (i) the form of political regime; (ii) the process by which authority is exercised in the management of a country's economic and social resources for development; and (iii) the capacity of

²⁵² 1992 World Bank Report 1.

²⁵³ 1992 World Bank Report.

²⁵⁴ Governance, the World Bank's Experience Report 1994 (1994 World Bank Report) vii.

²⁵⁵ 1992 World Bank Report 14.

²⁵⁶ 1989 World Bank Report 60. See also (2000) 21(5) *World Quarterly* who gives an account in which manner various international organisations define the concept of good governance 797.

governments to design, formulate, and implement policies and discharge functions.²⁵⁷

Good governance entails the exercise of authority, control, management and power of government. It is a composite word which denotes how a country is governed; how the affairs of a country are administered and regulated; the functioning of a country's political systems in relation to the conduct of public affairs. Good governance presupposes the manner in which power is exercised in the management of a country's economic and social resources for development. To this end, good governance goes 'beyond building the capacity of public sector management to encouraging the formation of the rules and institutions which provide a predictable and transparent framework for the conduct of public and private business and to promoting accountability for economic and financial performance.'²⁵⁸

2.4.2 Mechanism in Ensuring Political Accountability

From above, it is stated that the concept of political accountability is central to the creation of a sustainable and conducive environment which fosters adherence to a number of principles included but not limited to transparency, decentralisation, sound accounting, financial, procurement systems, respect of the rule of law and the encouragement of citizens' participation in public governance. As stated earlier, this study prefers the use of political accountability which is more in line with the purpose of this dissertation. All elements forming the concept of political accountability are mechanisms against which political accountability is monitored and assessed in a given country. The level or the extent to which one or more of these elements is present determines the extent of the adherence to or deviation from political accountability. The examination of these elements is limited to horizontal accountability as elements of vertical accountability were examined above (see paragraph 2.3 and subsequent subparagraphs).

²⁵⁷

1994 World Bank Report xiv.

²⁵⁸

1992 World Bank Report 3.

2.4.2.1 Information and Transparency

Transparency and access to information are important to political accountability in general. Access to information enhances the credibility of political promises, and increases the ability of civil society organisations and affected communities to hold politicians and policymakers accountable. By so doing, it is likely that service delivery to poor people would be improved.²⁵⁹

Transparency is a prerequisite for successful beneficiary participation in programme design and implementation.²⁶⁰ Transparency assists governments in implementing policies by clarifying government policies and programmes. In this way, people may voice their opinions and those affected may have an opportunity to express their views. Without transparency there will be resistance to change and opacity in decision-making. Transparency implies therefore more openness from government officials and agencies thereby allowing the electorate a more accurate perception of government policy.²⁶¹ Thus it is an essential element in any effort to improve accountability and good governance. Transparency is also a deterrent to corruption. It underpins transparent public procurement and generally creates a climate in which the scope for public corruption is lower and the chances of exposure higher.²⁶² The relevance of transparency to human rights is that transparency in the formulation and implementation of public policies empowers the public to access social services and demand protection of their rights. Moreover, facilitating the public's access to information is a powerful tool in improving public spending and protecting human rights.

Access to information is also a key to good governance and political accountability. It is linked to the freedom of the press and citizens' right to have access to significant records. The press, however, plays an important role by exposing wrongdoing, encouraging accountable behaviour by public officials and politicians while discouraging corruption. It is generally accepted that a press that actively covers

²⁵⁹ World Bank 2004 Development Report 87-88.

²⁶⁰ 1994 World Bank Report 29.

²⁶¹ Moncrieffe (1998) 19(4) *International Political Science Review* 391 and 1994 World Bank Report 30.

²⁶² Moncrieffe (1998) 19(4) *International Political Science Review* 391 and 1994 World Bank Report 30.

politics is essential for good governance. Moreover, O'Donnell states that in addition to 'reasonably independent media' various research institutes play an important role by making data available to the public.²⁶³ The available information may put voters in a better position to hold elected officials accountable for their policy decision.²⁶⁴ Furthermore, information reduces the chance of making mistakes when casting votes and may increase political participation.²⁶⁵

However, government cannot afford transparency in all contexts. First the willingness to make public processes transparent depends on the culture, tradition, and attitudes towards openness in a given society. Second, government may legitimately withhold some information such as information on national security issues or information on governmental reform projects so as to prevent vested interests from combining to block reform.²⁶⁶

2.4.2.2 Public Participation

Political accountability envisages a more participatory approach in decision-making process which involves a wide range of actors including but not limited to local community. Local government community participation which is linked to decentralisation (examined below) is intrinsic to political accountability. It is argued in this respect that participatory development may be thought of as a local-level reflection of good governance.²⁶⁷ Inadequate citizen involvement in the decision-making process may affect the credibility of the process and the outcomes of the process such policies, legislation and the realisation of a project. The question that remains is whether increased citizens' participation would lead to positive political outcome. Nevertheless, active participation may result in more accountability since accountability and participation are linked.²⁶⁸ However, the manner in which public is engaged or involved in the decision-making process may limit citizen's involvement and affects at the same time the level of representation and accountability. In this

²⁶³ O'Donnell (n 223) 45.

²⁶⁴ Snyder Jr J M and Strömberg D "Press Coverage and Political Accountability" (2010) 118 (2) *Journal of Political Economy* 355-408.

²⁶⁵ Snyder and Strömberg (2010) 118 (2) *Journal of Political Economy* 370.

²⁶⁶ 1994 World Bank Report 31.

²⁶⁷ 1994 World Bank Report 42.

²⁶⁸ Moncrieffe (1998) 19(4) *International Political Science Review* 397.

respect, it is emphasised that if the electorate has limited influence on policy, it is likely that accountability would suffer as a result.²⁶⁹

Moreover, there is a widespread dissatisfaction with the capacities of states to exercise self-restraining functions effectively, and a growing interest amongst citizens to inform, monitor, or participate directly in the workings of these oversight institutions.²⁷⁰ In order to address this shortcoming, Goetz and Jenkins based on two case studies in India propose a system which would allow the public to exercise oversight function over state's activities. This proposition sometimes refers to as "hybrid, diagonal, or co-governance" goes beyond the consultation in the adoption or implementation of policies and entails a full engagement of citizens in monitoring and assessing the performance of public officials thereby exercising oversight functions. The authors rightly argue that this direct citizen engagement with the substantive work performed by institutions of horizontal accountability is novel in good governance discussions and represents a shift towards augmenting the limited effectiveness of civil society's watchdog function by breaking the state's monopoly over responsibility for official executive oversight.²⁷¹ The authors then argue for the effectiveness of 'hybrid' forms of accountability, it is imperative that citizens be given legal standing within institutions of public sector oversight, a continuous presence within the oversight agency's work, structured access to official documentary information, including spending records, and the right to issue dissenting perspectives and reports directly to legislative bodies.²⁷²

Echoing these authors, others have suggested "transversal accountability" and "empowered participatory governance" which enable community to participate directly in the leadership and operation of state pro-accountability agencies.²⁷³ The scope of participation is therefore extended beyond consultative process to involve deliberation at the society level over design and implementation of government

²⁶⁹ Moncrieffe (1998) 19(4) *International Political Science Review* 397.

²⁷⁰ Goetz A M and Jenkins R "Hybrid Forms of Accountability: Citizen Engagement in Institutions of Public-Sector Oversight in India" (2001) 3(3) *Public Management Review* 363-383.

²⁷¹ Goetz and Jenkins (2001) 3(3) *Public Management Review* 365 and 367.

²⁷² Goetz and Jenkins (2001) 3(3) *Public Management Review* 369.

²⁷³ See for instance Fung A and Wright E "Deepening Democracy: innovation in Empowered Participatory Governance" 2001 29(1) *Politics and Society* 5-41 and Awritzer L *Democracy and the Public Space in Latin America*.

policies. It emerges therefore that these authors advocate for a full co-governance for accountability where citizens and state's state officials work together. By so doing, citizens participate directly in the core functions of government themselves.²⁷⁴ This form of participation is therefore new and innovative because it empowers citizens with an oversight functions over the executive. This form of participation in the decisions-making process not only empowers citizens to be involved in the deliberation process but also gives them an oversight power to monitor the implementation phase. Citizens are therefore present at all the phases in the realisation of a project. This, as stated above, will certainly increase the accountability of public officials and the level of services.

2.4.2.3 Decentralisation/Local Government

Many countries have embarked on a decentralisation process for various reasons. The African continent is no exception to this trend save to say that its decentralisation process is mainly instigated by donors to counter economic inefficiencies and ineffective governance. Others countries on the contrary perceive the need for decentralisation as a solution to governance.²⁷⁵ The Western countries for instance see decentralisation as an alternative to provide public services in a more cost-effective way.²⁷⁶ Nevertheless, it is generally argued that the factor which plays a pivotal role in promoting decentralisation was the great advance in communication that occurred in the 1980s and 1990s in that many leaders were learning about how other countries facing with similar problems were decentralising.²⁷⁷ By so doing they embarked on the process of decentralisation without prior evidence on their utility but because it could help them to cope with the erosion of confidence in the centralised states.²⁷⁸

Siddle and Koelble listed non-exhaustive reasons behind the adoption of decentralisation by many countries. In their view, the most commonly cited motives are: political crises or pressures due to ethnic or regional conflicts which prompt

²⁷⁴ Ackerman (2004) 32(3) *World Development* 451.

²⁷⁵ Ahmad E and Brosio G "Does Decentralization Enhance Service Delivery and Poverty Reduction" 2.

²⁷⁶ Work R "Overview of Decentralisation Worldwide: A Stepping Stone to Improved Governance and Human Development" 5.

²⁷⁷ Manor J *The Political Economy of democratic Decentralization* 33.

²⁷⁸ Manor (n 277) 34.

leaders to widen political representation; fiscal crises; strengthening of power bases of established or new regimes; institutional pressures such as from donors; local demand; unification of the state, genuine desire for political and economic transformation, such as the transition to democracy, enhancing participation and improving service delivery and policy convergence.²⁷⁹ In any event and regardless of the motives, decentralisation is a common phenomenon which needs to be defined.

2.4.2.3.1 Defining Decentralisation

The UN states that decentralisation:

is a commonly regarded as a process through which powers, functions, responsibilities, and resources are transferred from central to local governments and/or to other decentralised entities. In practical terms, decentralization is a process of striking a balance between the claims of the periphery and the demands of the centre. Decentralization, when appropriately structured, provides an arrangement through which critical issues (such as those of national unity and indivisibility, how to safeguard national interests and ensure coordinated and even development, equity in the distribution of resources, diversity, and local autonomy) can be reconciled.²⁸⁰

The definition as suggested by the UN stresses the importance of the transfer of powers from the higher level of government to the lower level. This definition also emphasises the relationship between all levels of government and the fact that decentralisation is a process of public policy reforms and not as a description of the state of the political or fiscal systems at a point in time.²⁸¹

However, although this definition provides an insightful meaning of the decentralisation, there is difficulty in distinguishing the various types of decentralisation. This is due to the fact that the contents of decentralisation policies are highly determined by the type of state they seek to reform.²⁸² There are three broad types of decentralisation: political, administrative and fiscal which in turn have

²⁷⁹ Siddle A and Koelble T A *The Failure of Decentralisation in South African Local Government* 28-29. See also Manor *The Political Economy of democratic Decentralization* (n 277) 37-39.

²⁸⁰ UN Glossary online 2014
<http://www.unpan.org/DPADM/ProductsServices/Glossary/tabid/1395/language/en-US/Default.aspx>.

²⁸¹ Falleti T G "A Sequential Theory of Decentralization: Latin American Cases in Comparative Perspective" (2005) 99(3) *American Political Science Review* 327-346.

²⁸² Falleti (2005) 99(3) *American Political Science Review* 329.

some levels or forms of decentralisation: devolution, delegation and deconcentration.²⁸³

2.4.2.3.2 Forms and Types of Decentralisation

Various definitions of political decentralisation have been proposed. Political decentralisation generally refers to instances where political powers and authority are transferred to local government. This type of decentralisation embodied devolution which refers to the transfer of responsibility, decision-making power, resources and revenue generation to municipalities, regions, councils, and villages so that elected representatives are fully independent.²⁸⁴ Political decentralisation requires a constitutional, legal and regulatory framework to ensure accountability and transparency.

Falleti who supports this meaning defines political decentralisation as the set of constitutional amendments and electoral reforms designed to provide for the representation of sub-national polities. In his view, political decentralisation policies are designed to devolve political authority or electoral capacities to sub-national actors.²⁸⁵ For Scheinder political decentralisation focuses on conducting political activities such as participation, organisation, elections and representation at the local level as opposed to the national level.²⁸⁶ According to him, decentralised political systems are those in which political actors and issues are significant at the local level and at least partially independent from those at the national level.²⁸⁷ Under politically decentralised systems, citizens define interests and form identities on the basis of local concerns, and organisations such as parties and social movements operate locally and compete over local issues and in local elections.

²⁸³ Work (n 276) "Overview of Decentralisation Worldwide: A Stepping Stone to Improved Governance and Human Development" 6.

²⁸⁴ Work (n 276) 6 and Bergh S "Democratic Decentralisation and Local Participation: A Review of Recent Research" (2004) 14(6) *Development in Practice* 780-790.

²⁸⁵ Falleti (2005) 99(3) *American Political Science Review* 329.

²⁸⁶ Scheinder A "Who Gets What from Whom? The Impact of Decentralisation on Tax Capacity and Social Spending" (2006) 44(3) *Commonwealth and Comparative Politics* 344-369. For other definitions of political decentralisation see O'dwyer C and Ziblatt D "Does Decentralisation Make Government More Efficient and Effective?" (2006) 44(3) *Commonwealth and Comparative Politics* 326-343; and Treisman D *The Architecture of Government: Rethinking Political Decentralization* 23-25.

²⁸⁷ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 350.

Bergh argues that this type of decentralisation which she refers to as “democratic decentralisation” is directly linked to democracy and community participation.²⁸⁸ For Bergh, “democratic decentralisation” (which is similar to devolution) ‘refers to the transfer of powers and resources to authorities representative of, and downwardly accountable, to local populations, and can be considered an institutionalised form of participatory development’.²⁸⁹ In this sense, she argues that decentralisation and participation are interrelated and successful decentralisation requires some degree of local participation to ensure responsiveness of local government to the needs and that decentralisation enhances the opportunities for participation.²⁹⁰

Administrative decentralisation seeks to transfer the decision-making powers, resources and responsibilities for the delivery of selected number of public services from the central government to other levels of government and agencies.²⁹¹ It is in this respect that Falleti defines administrative decentralisation as a set of policies that transfers the administration and delivery of social services such as education, health, social welfare, or housing to sub-national governments.²⁹² It may entail the devolution of decision-making authority over these policies, but this is not a necessary condition. Scheinder on the other hand defines administrative decentralisation as the process of granting local jurisdictions autonomy from central control.²⁹³ This autonomy refers to general policy-making authority and personnel control, as well as control over what is done with public finances.

Administrative decentralisation is comprised of deconcentration, delegation and devolution. Scheinder argues that the categorisation of administrative decentralisation into deconcentration, delegation and devolution is no more than the multi facets of administrative decentralisation which is determined by the amount of autonomy granted by the central government. According to him, deconcentration involves the least amount of autonomy, delegation slightly more and devolution the most.²⁹⁴

²⁸⁸ Bergh (2004) 14(6) *Development in Practice* 781.

²⁸⁹ Bergh (2004) 14(6) *Development in Practice* 781.

²⁹⁰ Bergh (2004) 14(6) *Development in Practice* 781.

²⁹¹ Work (n 276) 6.

²⁹² Falleti (2005) 99(3) *American Political Science Review* 329.

²⁹³ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 348.

²⁹⁴ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 348-349.

Deconcentration refers to the transfer of responsibility from the central government to other branch offices while maintaining the same hierarchical level of accountability from local units to the central government which has been decentralised.²⁹⁵ Work further argues that deconcentration is the first step in a newly decentralising government to improve service delivery.²⁹⁶ This transfer changes the spatial and geographical distribution of authority, but does not significantly change the autonomy of the entity that receives the authority. It is therefore the process by which the central government assigned responsibility for certain services to its regional or local branch offices without any transfer of authority.²⁹⁷ The deconcentrated offices exercise their functions as mandated by the central government office to which they remain accountable to. The central government retains authority over the field office and exercises that authority through the hierarchical channels of the central government bureaucracy.²⁹⁸

Unlike deconcentration, in delegation the central government transfers responsibility for decision-making and administration of public functions to local government or semi-autonomous agencies or organisations that are not fully controlled by the central government but accountable to it.²⁹⁹ The local government to which responsibilities are transferred to is not always a branch or local office of the delegating offices. The main difference is that in delegation, the central government must exercise its control through the contractual relation that enforces accountability on the part of local government.³⁰⁰ In devolution, the central government allows quasi-autonomous local units of government to exercise power and control over the policy responsibility being transferred. The local unit is only accountable to the central government in so far as the central government can impose its will by threatening to withhold resources or responsibility that the local unit needs.³⁰¹

As regards fiscal decentralisation, it refers to the allocation of resources to local government. Fiscal decentralisation refers to the set of policies designed to increase

²⁹⁵ Work (n 276) 6.

²⁹⁶ Work (n 276) 8.

²⁹⁷ Bergh (2004) 14(6) *Development in Practice* 781.

²⁹⁸ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 349.

²⁹⁹ Bergh (2004) 14(6) *Development in Practice* 781.

³⁰⁰ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 349.

³⁰¹ Scheinder (2006) 44(3) *Commonwealth and Comparative Politics* 349.

the revenues or fiscal autonomy of local governments. Fiscal decentralisation policies can assume different institutional forms such as an increase of transfers from the central government, the creation of new sub-national taxes, or the delegation of tax authority that was previously national.³⁰² It is therefore a downward fiscal transfer, by which higher levels in a system cede influence over budgets and financial decisions to lower levels.³⁰³

Fiscal decentralisation differs according to the degree of the independent decision-making process that is exercised at local level.³⁰⁴ The forms of decentralisation (deconcentration, devolution and delegation) inform therefore the degree of fiscal decentralisation. The extent to which resources are allocated and the degree of autonomy conferred on the local government depends on the forms or level of decentralisation itself. In practice, arrangements for resources allocation are negotiated between the central and local government and depend on a number of factor including but not limited to the availability of resources and local fiscal capacities.³⁰⁵

In clear, the various forms and types of decentralisation emphasise the transfer of powers from the central government to the local sphere. The degree of decentralisation is assessed by the extent of the autonomy that the local sphere exercises *vis-à-vis* the central government. Depending on this autonomy, decentralisation can take the form of deconcentration, delegation or devolution. The three types of decentralisation (administrative, fiscal and political) remain unchanged though the thesis takes the view that administrative decentralisation operates in a deconcentrated manner as the powers are not transferred to local government but to sub-national offices.

The following definitions of the various type of decentralisation can be suggested: administrative decentralisation refers to the process by which the authority of executing and implementing policies is deconcentrated from the national government to lower level of government; fiscal decentralisation is the process whereby the

³⁰² Falleti (2005) 99(3) *American Political Science Review* 329.

³⁰³ Manor (n 277) *The Political Economy of democratic Decentralization* 6.

³⁰⁴ Bird R M and Vaillancourt F "Fiscal Decentralization in Developing Countries: An Overview" 3.

³⁰⁵ Work (n 276) 6.

national government allocates budgets to local government and grants its authority to raise resources from local sources; and political decentralisation is a process whereby elected local officials are being granted power whether partial or in full to govern a particular geographic area.

2.4.2.3.3 Objectives of Decentralisation

Decentralisation is generally understood as the transfer of power from the central government to the local level. Closely linked to citizens' participation, the idea behind decentralisation is that it moves decision-making processes closer to those affected by it. Decentralisation is therefore premised on the understanding that infrastructure and services can be provided more efficiently and effectively at a local level. Local government should therefore be empowered and strengthened to provide effective services. The move towards decentralisation is seen as a response to the failure of centralised states to deliver efficient services to the locale. The general call for decentralisation was therefore justified by the disenchantment with centralised states. The potential benefit of decentralisation is that the devolution of power from the central to local level would result in better services delivery and increased accountability.³⁰⁶ With regards accountability, this is more direct at local level because there is more vigilance on issues where more local stakeholders are involved. Concerning electoral sanction, it is argued that it may be more effective at the local level than at the central level where multi-faceted issues dilute responsibility.³⁰⁷ Siddle and Koelble group the objectives of decentralisation along promoting democracy, promoting legitimacy, public participation, responsiveness and efficiency, completion, and reducing corruption, improving communication and diffusing conflicts.³⁰⁸

As stated above, the idea is to strengthen local government powers and functions so as to ensure greater responsiveness and accountability for services that were

³⁰⁶ Bardhan (2002) 16(4) *Journal of Economic Perspectives* 185-186. See also Bardhan and Mookherjee "Pro-Poor Targeting and Accountability of Local Governments in West Bengal" (2006) 79 *Journal of Development Economics* 303-327; Heller P "The Politics of Democratic Decentralization in Kerala, South Africa, and Porto Alegre" (2001) 29(1) *Politics and Society* 137-163; Agrawal and Ribot (1999) 33 *The Journal of Developing Areas* 473.

³⁰⁷ Bardhan P "Governance Dilemmas in Service Delivery?" 74.

³⁰⁸ Siddle and Koelble (n 279) 35-39.

formerly provided by the central government. It is argued in this respect that when services are decentralised at local level, beneficiaries can better express their needs, control costs, and hold local authorities accountable for their actions.³⁰⁹ By doing so it strengthens the links between policymakers and citizens and results in greater accountability since local governments are potentially more accountable to their constituencies.³¹⁰ The requirement for a more decentralised government is a way of enhancing greater accountability and public participation and improving service delivery. This depends on (as examined the types and forms of decentralisation above) an understanding of the powers of various actors, the domains in which they exercise their powers, and to whom and how they are accountable. However, like national governments, local governments are also are vulnerable to capture and this might be easier for local elites on a local scale.³¹¹ It is argued in this respect with reference to poor countries that since political accountability is generally affected by corruption and capture by interest groups, local government are more likely to be captured by local elites.³¹² Local government is susceptible to being captured because of the poverty and lack of education of the vast majority of the population living in rural areas. With the capture of local government by elites, it is likely that considerable amount of services would be provided to the elites at the expense of the poor.³¹³ This would create disproportionate services and defeat the very purpose of decentralisation which is to expand and bring service delivery closer to people.

Closely linked to decentralisation being captured by local elites is clientelism. It refers to instances where politicians distribute publicly funded goods to selected members of the electorate in return for votes and political support. According to Campos and Hellman, it weakens political accountability by narrowing the range of constituents to whom politicians are responsive.³¹⁴ Through the selective distribution of services, clientelism also gives politicians a mechanism to punish voters who do not provide continuous support. Clientelism is common in many different types of

³⁰⁹ 1992 World Bank Report 20. See also Casey K W "Decentralization in Practice 60.

³¹⁰ 2004 World Bank Report 29.

³¹¹ 2004 World Bank Report 29.

³¹² Bardhan (2002) 16(4) *Journal of Economic Perspectives* 192. See also Campos J E and Hellman J S "Governance Gone Local: Does Decentralization Improve Accountability?" 239-240.

³¹³ Bardhan P (2002) 16(4) *Journal of Economic Perspectives* 193. See also Bardhan "Governance Dilemmas in Service Delivery?" (n 307) 75.

³¹⁴ Campos and Hellman (n 312) 341.

political systems but is more prevalent at local level. This is because at local level, local politicians are more likely to engage in clientelist forms to win elections and maintain political support networks. In such cases, politicians can more effectively identify individual voters for clientelist networks and more easily monitor their political support. Clientelism inverts the power role at local level so that instead of citizens holding local officials accountable, it allows politicians to shape constituencies to their own advantage by selectively providing public services and other benefits.³¹⁵ By so doing clientelism distorts the objective of decentralisation by providing inefficiencies and inequalities in public services because clientelist governments tend to favour investments that generate jobs, which can then be distributed to build patronage networks.³¹⁶

Another challenge to decentralisation is the unwillingness of the central government to transfer its power to the local government because those who hold power have little interest in decentralising it. In this respect the central government should have the political will and the capacity to drive the decentralisation process and entrench it. Importantly the bureaucracy of central government must be willing to facilitate the process of transferring power, authority, functions, responsibilities and the requisite resources.³¹⁷ This is why Manor warns for the tendency to blame local governments for failing to meet the objective of decentralisation because the failure should be attributed to the central governments whose lack of generosity has crippled local government at their inception.³¹⁸ According to him, if significant powers and resources are devolved onto elected officials at local levels, the decentralised local government is bound to fail.³¹⁹

The transfer of authority and power to local government does not signify that the central government should not have any monitoring role on the local government. Indeed Devas and Delay warn that in the absence of effective inter-municipal co-operation arrangements, an intermediate level of government is required to co-ordinate between the small municipalities and to ensure that certain large-scale

³¹⁵ Campos and Hellman (n 312) 341.

³¹⁶ Campos and Hellman (n 312) 341.

³¹⁷ Siddle and Koelble (n 279) 48.

³¹⁸ Manor J "Renewing the Debate on Decentralisation" (2006) 44(3) *Commonwealth and Comparative Politics* 283-288.

³¹⁹ Manor (2006) 44(3) *Commonwealth and Comparative Politics* 283-288.

services are provided.³²⁰ In their view, central governments have a continuing role in ensuring that services are delivered effectively and resources are properly used at local level. Central government must oversee the activities of local government through a number of mechanisms: setting and enforcing minimum services or performance standards; specifications and conditions about the use of transfers; requirements for approval of plans, budgets and major projects; appointment of staff; and external audit.³²¹

Another contention against local government performing certain functions is the inter-governmental tensions. It is clear from above that Devas and Delay emphasise on the role of local government to effectively deliver services and to properly use resources. However, the effectiveness of this envisaged role presupposes an unreserved willingness on the part of central government to relinquish its power to the local government. Without this clear manifest of political will, it is unlikely that tensions would arise between the central government and the local government. Quiet often there is a lack of cooperation among all levels of government resulting in lines of accountability being blurred.³²² This is generally the case when the central government is jealous of the power it reluctantly gives during the process of decentralisation.

Another cited challenge to decentralisation is the lack of capacity. According to the World Bank, the most serious problem with decentralisation is weak administrative capacity at local levels which leads to waste and corruption. The World Bank sadly observed that those who stand to gain from decentralisation are precisely those least able to manage increased responsibilities.³²³ Campos and Hellman concur with this view when they point out that decentralisation shifts the responsibilities of local government from purely implementing policy to both formulating and implementing policy which necessitates a wider range of skills and experience, which local politicians and bureaucrats may not have and which needs to be developed.³²⁴

³²⁰ Devas N and Delay S "Local Democracy and the Challenges of Decentralising the State: An International Perspective" (2006) 32(5) *Local Government Studies* 677-695.

³²¹ Devas and Delay (2006) 32(5) *Local Government Studies* 688.

³²² Siddle and Koelble (n 279) 50.

³²³ World Bank 1992 Report 22.

³²⁴ Campos and Hellman (n 312) 341.

In many developing countries, since national governments continue to struggle with reforming these systems given their relative inexperience and more modest resources, local governments are likely to continue facing this challenge. This is because local government suffer from human resource constraints, especially in poor rural areas and poor countries and therefore may not be able to execute certain functions. This is coupled with the fact that most often, resources allocation do not make provision for or take into account the capacity aspect.³²⁵ This is admittedly true in most developing countries and African countries in particular, which present peculiar conditions of multiple weaknesses in capacity in all sectors whether public, civil or private.³²⁶

The last challenge to decentralisation is financial constraints which are among the most pressing issues arising from decentralisation. The issue of financial or resources constraints depend on whether the local government is funded by the central government or from locally raised revenues. In any event, the problem now lies at the management of the resources which is chaotic in many developing countries. This is due to the weak financial management and accounting system which have eroded the confidence of citizens in the management of local governments.³²⁷

In view of the above challenges, the World Bank emphasises that local politicians and policymakers should bear the consequences of policy decisions and that there should be a clear delineation of roles and responsibilities of the different tiers of government.³²⁸ Decentralisation should not merely replace the functions of the central government departments. It should devolve the political decision-making power from the central government to the local government by creating an autonomous local government sphere with all powers. By autonomous local government we mean that local government should have political, fiscal and administrative decision-making powers that would enable them to raise resources for the design and implementation of developmental local programmes. If there is no

³²⁵ Campos and Hellman (n 312) 341.

³²⁶ Fauzya J M *Local Governance Capacity-Building for Full-Range Participation* 5.

³²⁷ Siddle and Koelble (n 279) 52.

³²⁸ 2004 World Bank Report 165.

real devolution of power and adequate devolution of resources, it is likely that local elections would not ensure genuine accountability even if elections are free and fair.

For the effectiveness of decentralisation, there should be cooperation among all spheres of government and the central government should support the decentralisation process. Moreover, local governments should be capacitated in order to be able to carry out their functions. In this case, decentralisation should work and enhance citizens' political voice in a way that results in improved services.³²⁹

Devas and Delay summarise the preconditions for a successful decentralisation are as follows: an appropriate structure of sub-national units, in terms of size of units and number of levels, balancing local identification, representation and choice with the scale required for efficient provision of services; political structures and processes that provide inclusive representation and voice, together with mechanisms for accountability; financial arrangements that provide adequate, reliable and buoyant resources with sufficient local discretion over use; supportive central–local relations, with commitment from the centre as well as sub-national levels to effective local governance; a vibrant and inclusive civil society that can engage effectively with local government to hold decision-makers accountable and prevent corruption.³³⁰

Nevertheless and in light of the above preconditions, the impact of decentralisation depends on how it is implemented. All these preconditions are intertwined so that the absence of one might thwart the whole process. For instance, the decentralisation of authority without adequate financial and human resources will result in the failure of local government. In addition, the question of whether decentralisation improves government effectiveness and accountability is a cumbersome one. The answer depends on the nature and extent of the decentralisation process itself. In clear, the success or failure of decentralisation depends on a combination of the various preconditions each of them playing a pivotal role. The next mechanism contributing towards political accountability are agencies charged with monitoring public power commonly known as ombudsman.

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2004 World Bank Report 129.

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Devas and Delay (2006) 32(5) *Local Government Studies* 692.

2.4.2.4 Ombudsman

It is demonstrated in this chapter that horizontal accountability is concerned with the prevention and control of mismanagement of public funds. The requirement for the establishment of an ombudsman to deal with maladministration participates to the control and prevention mechanism that horizontal accountability is seeking to achieve. By so doing, the ombudsman's office is therefore a mechanism to enforce political accountability. The emphasis on creating independent agencies that prevent and denounce unscrupulous behaviour participates to the effort of have a sound administration of public affairs. The establishment of ombudsman contributes to this effort. The main objective of the ombudsman is to improve the performance of the public administration and the enhancement of government accountability to the public.³³¹ Ombudsman is generally established by democratic states and operates as another check on the power of the executive/administrative branch in addition of the other constitutional check examined above.

2.4.2.4.1 Origin and Evolution of the Ombudsman

The ombudsman in its "classical" form has its modern roots in the office of *justitieombudsman* (ombudsman for justice) created in Sweden in 1809. Prior to this date, there was a kind of ombudsman appointed by the king Charles XII. After a military defeat to Russia in 1709, the Swedish king fled to Turkey for some years. As a result of the absence of the king, the administration of the country deteriorated. In 1713, the king appointed an official to monitor the conduct of the Swedish administration and the judiciary and name the official *Justitiekanslern* (chancellor of justice). The *Justitiekanslern* was empowered to commence legal proceedings against anyone who violated the law in the exercise of his/her functions.³³² When the king was deposed in 1809, the new constitution which was adopted divided the power between the crown and the parliament giving parliament some power to check on the exercise of the executive power. The 1809 constitution included the office of *justitieombudsman* appointed by parliament with the power to supervise the public administration and judiciary and to prosecute those who failed to carry out their

³³¹ Reif L C *The Ombudsman, Good Governance, and the International Human Rights System* 2.

³³² Reif (n 331) 5; Jane J E "The Ombudsman in Denmark and Norway" 145.