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**TYPESET BY WOUTER REINDERS
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REVISITING THE ROLE OF THE JUDICIARY IN ENFORCING THE STATE'S DUTY TO PROVIDE ACCESS TO THE MINIMUM CORE CONTENT OF SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA AND KENYA

Justice Alfred Mavedzenge*

Abstract

Although the realisation of the full scope of each socio-economic right is meant to be achieved progressively, Kenya and South Africa have an international obligation to immediately provide vulnerable persons with access to the minimum core of each of these rights. As revealed (again) by the COVID-19 pandemic, the two states are in violation of this obligation as millions of people in both countries are living in abject poverty, without access to the bare necessities. Attempts to enforce the government's minimum core obligations have failed at least three times in South Africa, and the Court of Appeal in Kenya has hesitated to enforce these obligations. Relying on the doctrinal review of jurisprudence from both countries and international law, this article proposes that, in order to enforce the minimum core obligations without violating the separation of powers doctrine, the judiciary must be perceived to have a primary role and a secondary role. The primary role of the court must be to enforce meaningful engagement between the state and the rights bearers in determining the quantitative aspects of the minimum core content of each right. Once the state has developed this core content, the court can review its reasonableness by measuring it against the qualitative minimum standards imposed by the right. In circumstances of urgent need, where the state has failed to develop a reasonable quantitative minimum core content and rights bearers are in danger of suffering irreparable harm, the court should invoke its secondary role which entails setting the quantitative minimum core content to be provided by the state as a temporary measure.

Keywords: COVID-19; minimum core content; socio-economic rights; Constitution of Kenya; Constitution of South Africa; right to housing; meaningful engagement

Résumé

Bien que la réalisation de toute l'étendue de chaque droit socio-économique soit censée être réalisée progressivement, le Kenya et l'Afrique du Sud ont l'obligation internationale de fournir immédiatement aux personnes vulnérables l'accès au

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minimum de chacun de ces droits. Comme l'a révélé (à nouveau) la pandémie COVID-19, les deux États sont en violation de cette obligation car des millions de personnes dans les deux pays vivent dans une pauvreté abjecte, sans aucun accès au strict minimum. Les tentatives visant à faire respecter les obligations fondamentales minimales du gouvernement ont échoué au moins trois fois en Afrique du Sud, et la Cour d'appel du Kenya a manifesté son hésitation à faire respecter ces mêmes obligations. S'appuyant sur l'examen doctrinal de la jurisprudence des deux pays et du droit international, cet article propose que, pour faire respecter l'obligation fondamentale minimale sans violer la doctrine de la séparation des pouvoirs, le pouvoir judiciaire doit être perçu comme ayant un rôle primaire et secondaire. Le rôle primaire des cours et tribunaux devrait être de garantir un engagement significatif entre l'État et les détenteurs de droits dans la détermination des aspects quantitatifs du contenu essentiel minimal de chaque droit. Une fois que l'État a élaboré ce contenu minimum, les cours et tribunaux peuvent en examiner le caractère raisonnable en le mesurant par rapport aux normes minimales qualitatives imposées par le droit. En cas de besoin urgent, lorsque l'État n'a pas réussi à élaborer un contenu essentiel minimal quantitatif raisonnable et que les titulaires de droits risquent de subir un préjudice irréparable, les cours et tribunaux devraient invoquer leur rôle secondaire qui consiste à fixer le contenu essentiel minimal quantitatif à fournir par un État comme mesure temporaire.

Mots clés: COVID-19; Contenu essentiel minimum; Droits socio-économiques; Constitution du Kenya; Constitution de l'Afrique du Sud; Droit au logement; Engagement significatif

Introduction

The novel coronavirus (COVID-19) pandemic forces us to reconsider and reflect (again) on how best socio-economic rights can be implemented, especially in Africa. In order to prevent the spread of COVID-19, the World Health Organisation (WHO) issued guidelines calling upon people to maintain social distance from each other and practise sanitary hygiene. Several governments introduced lockdown measures which required people to remain confined to their homes, as governments implemented measures to slow down the spread of COVID-19. These measures were based on the assumption that everyone enjoys access to socio-economic rights such as adequate housing, where they can confine themselves with adequate sanitation to practise sanitary hygiene. Yet, 1.6 billion people in the world live without access to adequate housing.¹ In South Africa, the Cape Town Project Centre estimates that there are 200 000 homeless

¹ Kuo, G. 'Yet another emerging global crisis: Homelessness' *Millennium Alliance for Humanity and the Biosphere* (2019) available at <https://mahb.stanford.edu/library-item/yet-another-emerging-global-crisis-homelessness/> [Accessed on 29 May 2020].

persons,² while Africa Check estimates that 5.4 million people³ live in informal settlements without access to adequate housing and sanitation. Statistics South Africa estimates that, in total, 17 million people are living in extreme poverty in South Africa, without access to the basic necessities for leading a dignified life.⁴ In Kenya, the World Bank estimates that 10 million people live in informal settlements and in poverty, without access to adequate housing and food.⁵

A clear pattern that emerged in these and other similarly situated countries during the peak of the COVID-19 pandemic was that, while the rich were able to comply with the stay-at-home orders, the poor struggled to comply, largely because they lacked decent housing, sanitation and access to adequate food.⁶ Governments responded with brutality against those failing to comply,⁷ while in some cases they provided the poor with makeshift temporary shelter, sanitation and food assistance.⁸ Thus, the COVID-19 pandemic brought to the fore the inequalities besetting these countries, and the centrality of socio-economic rights in the protection of global human security. Therefore, we need to rethink how socio-economic rights can best be enforced globally. This article, however, focuses on South Africa and Kenya because of the high levels of poverty in these jurisdictions, against the backdrop of progressive constitutional frameworks.

² Cape Town Project Centre 'Homelessness in South Africa' available at <https://wp.wpi.edu/capetown/projects/p2015/service-dining-rooms/background/homelessness-in-south-africa/#:~:text=According%20to%20a%20recent%20estimate,et%20al.%2C%202015> [Accessed on 30 September 2020].

³ Umraw, A. 'What the numbers say about South Africa's squatter camps' *Huffingtonpost* 14 June 2018, available at https://www.huffingtonpost.co.uk/2018/06/14/what-the-numbers-say-about-sas-squatter-camps_a_23459035/?guccounter [Accessed on 31 October 2020].

⁴ See Statistics South Africa 'Five facts about poverty in South Africa' available at <http://www.statssa.gov.za/?p=12075> [Accessed on 30 September 2020]. Also see the World Poverty Clock available at <https://worldpoverty.io/map> [Accessed on 29 May 2020].

⁵ World Bank 'Kenya Informal Settlements Improvement Project 2 (P167814): Combined Project Information Documents / Integrated Safeguards Datasheet (PID/ISDS)' available at <http://documents.worldbank.org/curated/en/364621576423240976/pdf/Project-Information-Document-Integrated-Safeguards-Data-Sheet-Kenya-Informal-Settlements-Improvement-Project-2-P167814.pdf> [Accessed on 20 May 2020].

⁶ For example, see Sparks, J. 'Coronavirus: The South African township where people just won't follow the lockdown rules' *Sky News* 29 March 2020, available at <https://news.sky.com/story/coronavirus-the-south-african-township-where-people-just-wont-follow-the-lockdown-rules-11965027> [Accessed on 29 May 2020].

⁷ See 'UN raises alarm about police brutality in COVID-19 lockdowns' *Aljazeera* 28 April 2020, available at <https://www.aljazeera.com/news/2020/04/raises-alarm-police-brutality-covid-19-lockdowns-200428070216771.html> [Accessed on 29 May 2020].

⁸ For example, see Tromp, B. & Kings, S. 'Ramaphosa announces R500-billion Covid-19 package for South Africa' *Mail & Guardian* 21 April 2020, available at <https://mg.co.za/article/2020-04-21-ramaphosa-announces-r500-billion-covid-19-package-for-south-africa/> [Accessed on 20 May 2020].

The 1996 Constitution of South Africa is regarded as one of the most progressive modern constitutions in the world, partly because it contains a comprehensive Bill of Rights that guarantees a wide range of socio-economic rights. Yet, according to Statistics South Africa, 17 million people are living in extreme poverty, without access to the basic necessities needed to lead a dignified life.⁹ Similarly, the 2010 Constitution of Kenya guarantees a wide range of socio-economic rights and, yet it is estimated that 10 million of its population live in extreme poverty, without access to basic social services such as adequate housing, food and health care.¹⁰ Therefore, the two jurisdictions present a paradox where, on the one hand, human dignity is constitutionally guaranteed¹¹ and yet, in reality, millions of people are living in extreme poverty without access to the most basic social services.

Both countries have ratified the International Covenant on Economic, Social and Economic Rights (ICESCR) and their constitutions require their courts to interpret constitutional rights in a way which promotes the implementation of the relevant international human rights standards, to the extent permitted by the constitutional text.¹² The United Nations Committee on Economic, Social and Cultural Rights (CESCR)¹³ has noted that each right that is recognised in the ICESCR imposes an immediate duty on the state parties to prioritise the provision of access to the minimum core content by all, even as the state pursues the full implementation of the rights on a progressive basis. The courts in South Africa¹⁴ have refused to enforce the minimum core obligation when they were petitioned to do so, while the Court of Appeal in Kenya¹⁵ has indicated that it is hesitant to enforce this obligation.

It is critical to acknowledge at the outset that socio-economic rights place upon governments the obligation to progressively implement the full scope of the right, and not only the minimum core content. However, as has already been argued by other scholars, including Lilian Chenwi, 'the minimum core represents a floor of immediately enforceable entitlements.'¹⁶ Enforcing state compliance with the minimum core

⁹ Statistics South Africa *op cit* note 4.

¹⁰ World Bank *op cit* note 5.

¹¹ Arising from the guarantee of socio-economic rights, alongside the guarantee of the right to the protection of human dignity in both constitutions. See s 10 of the Constitution of South Africa, 1996 and art 28 of the Constitution of Kenya, 2010.

¹² See s 39(1)(b) of the Constitution of South Africa, 1996 and art 2(6) of the Constitution of Kenya, 2010.

¹³ Mandated to interpret the ICESCR and provide recommendations to state parties, on the implementation of the rights recognised in the ICESCR.

¹⁴ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 30–33; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 60–61; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) paras 32–35.

¹⁵ *Kenya Airports Authority v Mitu-Bell Welfare Society* [2016] eKLR para 141.

¹⁶ Chenwi, L. 'Unpacking progressive realisation, its relation to resources, minimum core and

obligations is a necessary approach to enabling the most vulnerable, who live in abject poverty without access to the most basic livelihoods, to obtain the necessary state assistance for them to gain access to the basic necessities of human life, even as their government works to achieve the progressive realisation of the full scope of these rights.

In this paper, I endeavour to revisit and deepen the discussion on state compliance with the minimum core obligations by proposing a more specific judicial role in the enforcement of these obligations. The approach which I argue for in this paper seeks to strike a balance between the need for the judiciary to respect the separation of powers, while at the same time enforcing the obligation of the state to provide vulnerable members of society with access to the minimum core of these rights, so that they can (at least) have access to the basic necessities for leading dignified human lives.

In summary, I contend that the minimum core content of each socio-economic right has a qualitative and a quantitative dimension. In order to enforce the minimum core obligation without violating the separation of powers doctrine, the judiciary must be perceived to have a primary role and a secondary role. The primary role of the court must be to enforce meaningful engagement between the state and the rights bearers in determining the quantitative aspects of the minimum core content of each right. Once the state has developed this core content, the court can review its reasonableness by measuring it against the qualitative minimum standards imposed by the right. In circumstances of urgent need and where the state has failed to develop a reasonable quantitative minimum core content, the court should invoke its secondary role which entails setting the quantitative minimum core content to be provided by the state as a temporary measure, until the state develops a reasonable minimum core content. In order to illustrate the feasibility of this approach, I provide examples of how the right to adequate housing has been enforced in international law as well as in South Africa and Kenya.

Constitutional framework on socio-economic rights in South Africa and Kenya

In order to set the legal context for this argument, it is necessary to first provide an overview of the relevant constitutional framework of both Kenya and South Africa. Both the 1996 Constitution of South Africa and the 2010 Constitution of Kenya are transformative in nature. They were designed to facilitate the country's break with its past and foster its

reasonableness, and some methodological considerations for assessing compliance' 2013 *De Jure* at 753.

transformation into a society that is based on certain ideals.¹⁷ Karl Klare,¹⁸ in the context of South Africa, and Mark Mwendwa,¹⁹ in respect of Kenya, observe that features and mechanisms built into these constitutions are meant to trigger and guide the intended transformation.

These features include the recognition of a set of foundational constitutional values, whose role is to define the ideals of the desired society. These values include human dignity, equality and human freedom.²⁰ Thus, both the 1996 Constitution of South Africa and the 2010 Constitution of Kenya are meant to guide the respective societies' transformation into societies where all people live in human dignity and equality and are free. In order to foster the envisaged transformation, the constitutions contain Bills of Rights which guarantee a range of justiciable socio-economic rights.²¹ In Kenya, socio-economic rights are guaranteed in art 43 of the Constitution:

- (1) Every person has the right— (a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; (b) to accessible and adequate housing, and to reasonable standards of sanitation; (c) to be free from hunger, and to have adequate food of acceptable quality; (d) to clean and safe water in adequate quantities; (e) to social security; and (f) to education.
- (2) A person shall not be denied emergency medical treatment.
- (3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.

As was confirmed by the Kenyan courts in a series of cases,²² art 43 should be interpreted together with art 21(2), which states: 'The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43.' Thus, the full scope of each socio-economic right guaranteed in the Kenyan Bill of Rights is meant to be realised progressively, subject to the resources available to the state.

¹⁷ See Langa, P. 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* at 351–352; Mwendwa, M. 'The jurisprudence of Kenya's Court of Appeal on socio-economic rights' 2019 SSRN at 2.

¹⁸ See Klare, K. 'Legal culture and transformative constitutionalism' (1998) 14(1) *SAJHR* at 146–188.

¹⁹ Mwendwa op cit note 17.

²⁰ See s 1 of the Constitution of South Africa, 1996 and art 10(1) of the Constitution of Kenya, 2010.

²¹ See Liebenberg, S. *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010); Mwendwa op cit note 17.

²² See, for example, *Mitu-Bell Welfare Society v Attorney General and 2 Others* [2013] eKLR para 53; *Satrose Ayuma and 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme and 3 Others* [2015] eKLR para 110; *Mathew Okwanda v Minister of Health and Medical Services and 3 Others* [2013] eKLR para 15.

Likewise, the Constitution of South Africa guarantees socio-economic rights with the caveat that these rights are to be realised progressively, subject to resources available to the state. For example, s 26 of the Constitution states:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Except for the right to basic education,²³ various other socio-economic rights which impose upon the state the obligation to fulfil them are framed with the caveat that they are to be realised progressively, subject to the resources available to the state.²⁴ The assumption underlying the two constitutions is that the respective societies will progressively transform to become genuinely based on the values of human dignity, equality and human freedom as these socio-economic rights are fully implemented and become accessible to all.²⁵

In order to provide recourse for violations of these rights, the constitutions of both countries endow the respective judiciaries with extensive review powers. In both jurisdictions, the courts are required to provide appropriate relief in cases where human rights are threatened or violated.²⁶ Such relief or remedies include a declaration of rights, a declaration of invalidity, an injunction and an order for compensation. Both constitutions give the courts the flexibility to fashion remedies other than those expressly mentioned in the constitutions.²⁷ Such flexibility is granted in order to allow courts to craft and issue innovative remedies which adequately protect human rights. As Mwenda²⁸ argues in the context of Kenya, the courts have been given the discretionary power to ‘forge new tools [remedies] to ensure that the provisions of the Bill of Rights do not only remain mere aspirations’ but become a reality. The same has been said about judicial review in South Africa.²⁹ Thus, courts in both countries enjoy the power to fashion innovative remedies to enforce the duties of the state to comply with and fulfil all the constitutional rights, including socio-economic rights. However, both constitutions

²³ See s 29(1)(a) of the Constitution of South Africa, 1996.

²⁴ *Ibid* s 27(a).

²⁵ See Liebenberg op cit note 21; Mwenda op cit note 17.

²⁶ See art 23(2) of the Constitution of Kenya, 2010 and s 38 of the Constitution of South Africa, 1996.

²⁷ Regarding the position in Kenya, see *Communications Commission of Kenya and 5 Others v Royal Media Services Limited and 5 Others*, Sc Petition No. 14 of 2014 and *Satrose Ayuma* supra note 22. Regarding the position in South Africa see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19.

²⁸ Mwenda op cit note 17 at 15.

²⁹ *Fose v Minister of Safety and Security* supra note 27.

entrench the separation of powers principle that the legislature makes laws and budgetary allocations, the executive develops socio-economic policies, and the courts interpret and apply the law.³⁰ Therefore, as has been underscored by the courts in both jurisdictions, when interpreting rights and developing appropriate remedies to protect rights, the courts must respect the separation of powers doctrine and avoid usurping the functions of the other branches of government.

International law plays a significant role in both jurisdictions. In South Africa, the courts must consider the relevant international law when interpreting the meaning of rights and the obligations imposed by these rights upon the state.³¹ Whether or not a rule of international law is incorporated when interpreting constitutional rights depends on the weight or significance attached by the court to the relevant rule of international law. The Constitutional Court of South Africa has held that, although the weight to be attached to any particular rule of international law will vary from case to case, when interpreting constitutional rights the court must directly apply those principles of international law that are binding on South Africa.³² Thus, when interpreting constitutional rights, courts must incorporate the relevant international human rights standards, especially those that are binding on South Africa. In Kenya, the general rules of international law³³ and any treaty or convention ratified by Kenya form part of the domestic law.³⁴

Both Kenya and South Africa³⁵ have ratified the ICESCR, which is the main global treaty on socio-economic rights. Both countries are bound by the African Charter on Human and Peoples' Rights (the African Charter). Therefore, and as has been confirmed by the courts in both jurisdictions,³⁶ when interpreting the duties imposed by socio-economic rights upon the state, the courts must incorporate the standards recognised in the ICESCR and the African Charter, as interpreted by the CESCRC and the African Commission respectively. For instance, while interpreting the

³⁰ See art 1(3) of the Constitution of Kenya of 2010, as interpreted in *Kenya Airports Authority v Mitu-Bell Welfare Society* [2016] eKLR para 14. In South Africa, although the doctrine of separation of powers is not explicitly recognised in the Constitution, the courts have interpreted the Constitution to imply that there is separation of powers between the three arms of the state. See, for example, *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) paras 30–33; *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) paras 32–33; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) paras 110–111.

³¹ See s 39(1)(b) of the Constitution of South Africa of 1996.

³² *Government of the Republic of South Africa v Irene Grootboom* supra note 14 at para 26.

³³ Article 2(5) of the Constitution of Kenya, 2010.

³⁴ *Ibid* art 2(6).

³⁵ See the list of countries that have ratified the ICESCR available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4 [Accessed on 29 May 2020].

³⁶ *Satrose Ayuma* supra note 22 para 69; *Government of the Republic of South Africa v Irene Grootboom* 2001 (1) SA 46 (CC) paras 45–47.

obligations of the state in terms of the right of access to adequate housing in *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme (Satrose case)*,³⁷ Mumbi Ngugi J of the Kenyan High Court said:

I believe that the starting point would be a reference to the UN Committee on Economic, Social and Cultural Rights (CESCR) which has adopted two general Comments. I am convinced that these Comments are crucial in clarifying the interpretation of the right to adequate housing and the nature of the State Parties' obligations and I shall specifically focus on General Comment 4 on the right to adequate housing and General Comment 7 on forced evictions.³⁸

Similarly, the Constitutional Court of South Africa has referred to General Comments of the CESCR and has adopted some of the standards noted in those Comments, when interpreting constitutional rights.³⁹

The international legal obligation of the state to provide the minimum core

Each socio-economic right recognised in the ICESCR imposes minimum core obligations that must be met by the state parties. This was noted by the CESCR in General Comment No. 3 as follows:

A State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima-facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) [of the ICESCR] obligates each State party to take the necessary steps to the maximum of its available resources. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all

³⁷ *Supra* note 22.

³⁸ *Satrose Ayuma* *supra* note 22 paras 69 and 71.

³⁹ For example, see *Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 232–237. Also see *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC) para 12; *Jafitha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) paras 23–24.

resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴⁰

However, as noted by Kirsteen Shields,⁴¹ there is a lack of certainty about the actual meaning of minimum core obligations. Shields argues that there are multiple interpretations of the concept of minimum core, and this has given rise to scepticism regarding the utility of this concept.⁴² Inspired by Shields' observations,⁴³ I contend that there are at least two types of minimum core obligations. The first is the obligation of the state to ensure that its conduct does not deviate from certain cross-cutting principles. Such principles include non-discrimination when implementing the rights and abstinence from retrogressive conduct such as arbitrary interference with existing access to socio-economic rights.⁴⁴ This type of minimum core obligation falls under the rubric of 'obligations of conduct',⁴⁵ which scholars including Chenwi⁴⁶ rightly refer to as minimum duties of immediate application. The African Commission has also affirmed and applied this interpretation of the minimum core duties in its decision in *SERAC v Nigeria*,⁴⁷ when it held that:

[T]he minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources and prevent peoples' efforts to feed themselves. The government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.⁴⁸

⁴⁰ United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (14 December 1990) para 10.

⁴¹ See Shields, K. *The Minimum Core Obligations of Economic, Social, and Cultural Rights: The Rights to Health and Education* (2017) 2. Also see Young, K. 'The minimum core of economic and social rights: A concept in search of content' (2008) 33 *Yale International Law* 164.

⁴² Shields op cit note 41.

⁴³ Ibid.

⁴⁴ United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (14 December 1990) paras 1 and 9.

⁴⁵ Sepúlveda, M.M. *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003) 185.

⁴⁶ Chenwi op cit note 16 at 753.

⁴⁷ *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria Communication* 155/96 (2001) AHRLR para 60.

⁴⁸ Ibid paras 65–66.

The second type of minimum core obligation falls under the category of ‘obligations of result’.⁴⁹ Each socio-economic right is perceived to guarantee access to certain minimum essential elements, goods and services. For example, access to basic shelter is an essential element of the right to adequate housing, while compulsory, free primary education is a minimum element of the right to education.⁵⁰ It is the duty of the state to prioritise the immediate provision of access to the minimum essential elements of each socio-economic right for the most vulnerable persons in society.

Thus, in terms of the ICESCR’s minimum core concept, South Africa and Kenya have the obligation to ensure that both their conduct when implementing these rights and the quality of goods or services delivered when fulfilling these rights do not fall beneath the minimum bar. However, in this paper, I am more concerned about the duty of the state to provide vulnerable groups with access to the minimum essential elements, goods and services envisaged under each right.

Although the CESCR has noted that each socio-economic right imposes a duty on the state to ensure access to the minimum essential elements, these elements are not always identified, especially in respect of the right to adequate housing. However, the CESCR has identified clear normative standards imposed by each socio-economic right. The process of determining the minimum essential elements of the right must be informed by these normative standards. For example, the right to adequate housing implies the right to housing that is habitable, affordable, culturally sensitive and where the inhabitants enjoy adequate security of tenure.⁵¹ These normative standards must inform the determination of what are to be regarded as the minimum essential elements of the right to adequate housing. In practice, these normative standards should dictate the determination of the appropriate minimum size of housing units per square metres, the average income payable as rentals, the materials to be used when constructing the buildings, the amount of water in kilolitres to be allocated per person per day, and the frequency of refuse collection.

Although the realisation of the full scope of each socio-economic right is to be achieved progressively, the duty to achieve certain outcomes, including ensuring that everyone enjoys access to the minimum essential elements of each right, should be perceived as an immediate obligation.⁵²

⁴⁹ Ibid.

⁵⁰ See art 13(2)(a) of the ICESCR as interpreted in UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 13: The Right to Education (Art. 13)* (8 December 1999) para 57.

⁵¹ United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* (13 December 1991) para 8.

⁵² CESCR *General Comment No. 3* op cit note 44 para 10. Also see Pieterse, M. ‘Resuscitating

Thus, under international law, the state is obliged to immediately implement the right of access to these minimum essential elements.⁵³ In some instances, people already enjoy access to these minimum essential elements and they require the state to protect their existing access. However, in some instances, vulnerable groups who live in abject poverty cannot afford to access these minimums on their own. The state has an immediate obligation to provide the necessary goods and services to such vulnerable groups so that they gain access to these minimum essential elements.⁵⁴

It has been pointed out by scholars⁵⁵ that there is scepticism about the utility of the doctrine of minimum core because the ability of governments to deliver access to the minimum core is subject to resources available, with many governments reportedly facing resource constraints. As was confirmed by the CESCR,⁵⁶ the fact that the performance of this obligation by the state is subject to the available resources does not affect the existence of the legal obligation to provide vulnerable persons with access to these minimum core elements.⁵⁷ The obligation is there in the law, but what may be affected is the capacity of the state to fulfil the obligation. Thus, a shortage of resources is recognised as a permissible defence or ground for delaying the fulfilment of this obligation, but this does not mean that the obligation does not exist. However, the CESCR clarified that where the state 'attribute[s] its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'⁵⁸

Thus, both Kenya and South Africa have an international legal obligation to provide vulnerable groups with access to the minimum core elements of each socio-economic right. Yet millions of people are living in abject poverty, without access to even the bare necessities of life, such as housing and clean water for domestic use. There have been failed attempts

socio-economic rights: Constitutional entitlements to health care services' (2006) 22 *SAJHR* 473–481.

⁵³ CESCR *General Comment No. 3* op cit note 44 para 10.

⁵⁴ *Ibid.*

⁵⁵ See Young op cit note 41 at 121–122, where Young captures these views.

⁵⁶ CESCR *Concluding Observations on the Democratic Republic of the Congo (DRC)*, E/C.12/COD/CO/4 16, December 2009, para 24. Also see decision of the CESCR in *Mohamed Ben Djazia and Naouel Bellili v Spain* E/C.12/61/D/5/2015 and the *Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights* para 12.

⁵⁷ CESCR *Concluding Observations on the Democratic Republic of the Congo (DRC)*, E/C.12/COD/CO/4 16, December 2009 para 24. Also see the *Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights* para 12.

⁵⁸ CESCR *General Comment No. 3* op cit note 44 para 10. Also see CESCR *Concluding Observations on the Combined Initial and Second to Fourth Periodic Reports of Cambodia* UN doc E/C.12/KHM/CO/ (June 2009) para 38.

to judicially enforce the obligation of the state to fulfil the minimum core content of certain socio-economic rights. In light of this, there is a need to revisit the approach to enforcing this obligation and to fashion the role of the court differently.

Towards a different approach to enforcing the duty to fulfil the minimum core content

Attempts to enforce the obligation of the state to immediately fulfil the minimum core content of socio-economic rights have hit a brick wall, at least three times in South Africa.⁵⁹ In turning down the invitation to interpret the minimum core content and enforce the obligation of the state to provide access to the minimum core elements of certain socio-economic rights, the South African Constitutional Court has advanced three reasons, namely: there is no immediate right for everyone to access a minimum core⁶⁰ under each socio-economic right; the court does not have the technical competence⁶¹ and democratic legitimacy to determine the minimum core elements of these rights; and making such a decision would violate the separation of powers.⁶²

In Kenya, the courts are yet to pronounce upon the justiciability of this minimum core obligation of the state. However, given the similarities in the constitutional frameworks, as discussed earlier in this paper, the three objections raised by the South African Constitutional Court are likely to feature in the Kenyan courts when attempts are made to enforce the minimum core obligations of the state. For instance, the Kenyan Court of Appeal has already cautioned in *Kenya Airports Authority v Mitu-Bell Welfare Society*⁶³ that courts should be cautious not to undermine the separation of powers when enforcing the positive duties created by these rights. The obligation to provide vulnerable groups with access to the minimum core element of each right is one of the positive obligations of the state.

There is a need to revisit and engage with each of the objections made by the South African Constitutional Court, in order to rethink the best approach to enforcing the state's obligation to provide vulnerable persons with access to the minimum core elements of these rights. The arguments and propositions I make below should apply both in South Africa and Kenya because of the constitutional similarities discussed earlier in this article.

⁵⁹ *Minister of Health and Others v Treatment Action Campaign* supra note 14.

⁶⁰ *Ibid* para 34.

⁶¹ *Grootboom* supra note 14 paras 32–33. However, it should be noted that, in the *Grootboom* case, the court suggested that there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.

⁶² *Mazibuko v City of Johannesburg* supra note 14 para 61.

⁶³ [2016] eKLR para 141.

Is there a domestic obligation to immediately provide vulnerable groups with access to the minimum core?

In *Minister of Health v Treatment Action Campaign*,⁶⁴ the court was seized with an application requesting the court to issue an order compelling the state to make the anti-retroviral drug Nevirapine available to all public hospitals so that it could be accessible to all HIV-positive pregnant women who needed it, to prevent the transmission of HIV to the unborn child. The *amicus* in the case requested the court to declare that the socio-economic right to health care imposes a minimum core, which must be fulfilled by the state.⁶⁵ The court responded by holding that:

Although Yacoob J [who wrote the judgment in the *Grootboom* case, heard by the same court earlier] indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1) [right to access adequate housing].⁶⁶

In dealing with the issue of minimum core obligation, the court inquired into whether there is a duty on the state to ‘immediately provide everyone’⁶⁷ with access to the minimum core elements of each right, when these rights are all subject to ‘progressive realisation’.⁶⁸ The court’s reasoning was that there is no such duty because all these rights are framed and qualified by a caveat that the state must undertake reasonable measures, within the limits of the available resources, to achieve their progressive realisation.⁶⁹ The court explained that due to resource limitations, these rights are subject to progressive realisation and therefore it is impossible for the state to give everyone access to the minimum core of each right.⁷⁰

The court misinterpreted the nature of obligations of the state which arise from socio-economic rights. Whilst the realisation of the full scope of these rights is subject to progressive realisation because of resource limitations, the duty to ensure universal access to the minimum core

⁶⁴ *Minister of Health and Others v Treatment Action Campaign* supra note 14.

⁶⁵ *Ibid* paras 28–34.

⁶⁶ *Ibid* para 34.

⁶⁷ *Ibid* paras 32 and 34.

⁶⁸ *Ibid* paras 32–34.

⁶⁹ *Ibid* para 35.

⁷⁰ *Ibid*.

elements of these rights is an immediate legal obligation.⁷¹ It may not be technically feasible to provide ‘everyone’ with access to the minimum core of these rights, given the limited resources in developing countries such as South Africa and Kenya. However, as argued earlier, this does not mean that there is no immediate legal duty on the state to fulfil the minimum core, for those who are unable to access these on their own without the state’s assistance. In respect of access to adequate housing, the state owes a duty to immediately provide basic shelter and sanitation to those who are indigent and homeless. However, as is recognised in both the Constitution⁷² and international law,⁷³ the extent to which the state can fulfil this obligation is subject to the resources available. Where the state attributes its failure to meet this obligation to resource constraints, it must demonstrate that it has made every effort possible to use all available resources in an effort to satisfy, as a matter of priority, those minimum core obligations.⁷⁴ Therefore, resource limitations do not automatically erase the obligation of the state to immediately intervene where necessary, and to provide vulnerable members of society with access to the minimum core of each socio-economic right, so that they can access the minimum requirements of a dignified human life, such as basic shelter, water and basic sanitation.

The high levels of public sector corruption in both South Africa and Kenya suggest that government is not necessarily hamstrung by a shortage of resources from discharging the obligation to fulfil the minimum core content of these rights. For example, in 2017 alone, it is estimated that ZAR1 billion of public revenue was lost to corruption in South Africa.⁷⁵ In 2019, South Africa was ranked number 70 out of 180 countries on the global anti-corruption index.⁷⁶ Between 2013 and 2018, Kenya is estimated to have lost a staggering KSH567 billion of its public revenue to corruption.⁷⁷ In the light of such high levels of corruption, resource constraints cannot be a valid justification for the governments’ failure to fulfil their obligations to immediately provide vulnerable persons with access to the minimum core of these rights. However, we need

⁷¹ Bilchitz, D. ‘Giving socio-economic rights teeth: The minimum core and its importance’ (2002) 119 *SALJ* at 494.

⁷² See art 21(2) of the Constitution of Kenya, 2010 and s 26(2) of the Constitution of South Africa, 1996.

⁷³ CESCR *General Comment No. 3* op cit note 44.

⁷⁴ *Ibid* para 10.

⁷⁵ Georgieva, N. & Krsteski, H. ‘Corruption in South Africa: Genesis and outlook’ (2017) 5(4) *Journal of Process Management – New Technologies International* 51.

⁷⁶ Transparency International ‘Corruption Perception Index 2019’ available at <https://www.transparency.org/en/countries/south-africa#> [Accessed on 1 October 2020].

⁷⁷ See Kodongo, O. ‘Understanding the economic cost of corruption in Kenya: A visual history of corruption scandals in Kenya 2013–2018’ available at <https://www.theelephant.info/data-stories/2018/06/05/a-visual-history-of-corruption-scandals-in-kenya-2013-2018/> [Accessed on 1 June 2020].

to reconsider how this obligation can be enforced judicially, without undermining the separation of powers doctrine.

Revisiting the institutional competency and separation of powers argument

In the *Grootboom* case, the court was asked to determine the precise minimum core content of the right to adequate housing. In declining this request, the court gave three reasons, all of which related to the institutional competency of the court to make such decisions. Justice Zak Yacoob, who wrote the unanimous judgment of the court, said that the court lacked sufficient access to information on the diverse needs of the rights bearers, and, without such information, the court was not in a position to establish the minimum core content of the right.⁷⁸ The second reason was that the needs of the rights bearers were diverse, and therefore it was difficult for the court to establish a precise minimum core content applicable to everyone.⁷⁹ The third reason was that, given the diversity of the needs, it was not clear whether the minimum core content should be defined generally or whether it should be defined with regard to specific groups of people.⁸⁰ In *Mazibuko v City of Johannesburg*,⁸¹ Justice Kate O'Regan endorsed the above reasons given by the court in *Grootboom*, but she repackaged them as follows:

Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice.⁸²

The concerns raised by the court are legitimate because, as argued above, the courts must respect the separation of powers principle when interpreting obligations created by rights and when issuing remedies for the enforcement of these rights. However, the model of separation of powers recognised in both the Constitution of Kenya⁸³ and the Constitution of

⁷⁸ *Grootboom* supra note 14 para 32.

⁷⁹ *Ibid* para 33.

⁸⁰ *Ibid*.

⁸¹ *Mazibuko v City of Johannesburg* supra note 14 para 61.

⁸² *Ibid*.

⁸³ *Kenya Airports Authority v Mitu-Bell Welfare Society* supra note 15.

South Africa⁸⁴ enjoins courts to enforce state accountability, including the implementation of socio-economic rights. Therefore, we need to find an approach which upholds the separation of powers while effectively enforcing the obligation of the state to provide vulnerable groups with access to the minimum core elements of these rights.

Some scholars⁸⁵ have proposed that in order to enforce the minimum core obligation, without violating the separation of powers, the court must revamp the existing criteria for reviewing the reasonableness of measures adopted by the state to implement these rights, to include an inquiry into whether or not those measures derogate from the minimum core of the right. It has been suggested, for instance, by David Bilchitz⁸⁶ and Fons Cooman,⁸⁷ that where measures adopted by the state derogate from enabling people to gain access to the minimum core content, such measures must be deemed to be unreasonable.

Whilst I generally agree with this approach, I take the view that the approach needs to be enriched further by explaining fully the role of the court in determining the minimum core content. David Bilchitz argues that, because fundamental rights are usually stated in abstract terms, it is the role of the court to interpret the content of those rights by determining the specific principles which define the obligations of the state.⁸⁸ He further states:

Recognizing the role of the Constitutional Court [of South Africa] in defining general principles allows us to see how such a court can determine the content of a minimum core obligation. Thus, the role of the court in this respect would be to set the general standard that must be met in order for the state to comply with its minimum core obligation. An example would be for the court to hold that every person in South Africa must have access to accommodation that involves, at least, protection from the elements in sanitary conditions with access to basic services, such as toilets and running water.⁸⁹

Even if the court were to hold that the minimum core of the right of access to adequate housing is that the housing provided must ensure access to basic services such as toilets and running water, such an approach does not clarify the full scope of the minimum core content of the right

⁸⁴ *Glenister v President of the Republic of South Africa* supra note 30.

⁸⁵ Coomans, F. 'Reviewing implementation of social and economic rights: An assessment of the reasonableness test as developed by the South African Constitutional Court' (2005) 65 *ZaöRV* 167–196. Also see Bilchitz op cit note 71 and Liebenberg op cit note 21.

⁸⁶ Bilchitz op cit note 71.

⁸⁷ Coomans op cit note 85.

⁸⁸ Bilchitz op cit note 71 at 487.

⁸⁹ *Ibid* at 488.

to adequate housing, and subsequently does not capture the full scope of the role of the court. There would still be a need to provide the actual quantifications to answer questions such as: What is the acceptable minimum amount of water in kilolitres which the inhabitants should be entitled to access per day? What is the acceptable minimum size of the housing units? How many times should refuse be collected per week? Thus, the approach suggested by Bilchitz is a step in the right direction, but it is inadequate as it addresses only one dimension of the minimum core content.

The minimum core content of any socio-economic right should be perceived as having two dimensions to it, namely, the quantitative and the qualitative.⁹⁰ The qualitative dimension comprises the minimum normative standards created by the right. These should be derived from the general normative standards imposed by the right as well as from an analysis of the constitutional values which are served by these rights. Thus, whilst the full scope of every socio-economic right imposes certain normative standards, amongst these are some normative standards which must be regarded as minimum. Constitutional values are a useful tool for identifying these minimum normative standards.⁹¹ For instance, at both the international law level⁹² and the domestic law level,⁹³ it has been accepted that the ultimate purpose of socio-economic rights is to protect human dignity. Therefore, when identifying the minimum normative standards, the question must be: of all the normative standards which make up the full scope of the right, which ones are necessary for an individual to access the basic necessities of life for human dignity? For example, the CESCR⁹⁴ noted that, while adequacy of housing is determined in part by social, economic, cultural, climatic, ecological and other factors, there are certain normative standards which must be adhered to in any situation: the housing must be 'habitable' and 'affordable' and the inhabitants must enjoy 'adequate security of tenure'.⁹⁵ Therefore, these are the qualitative minimum standards to be complied with as part of the minimum core, because, without these, the basic elements of human dignity would be violated.

⁹⁰ This idea is also supported by Craven, M. 'Assessment of the progress on adjudication of economic, social and cultural rights' in Squires, J. et al (eds) *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (2005) at 39.

⁹¹ Young op cit note 41 at 126; Liebenberg op cit note 21 at 163–186.

⁹² See the preamble to the Universal Declaration of Human Rights and the preamble to the ICESCR.

⁹³ See *Satrose Ayuma* supra note 22 para 70 and *Government of the Republic of South Africa v Grootboom* supra note 14 para 23.

⁹⁴ United Nations Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* (13 December 1991) para 8.

⁹⁵ *Ibid.*

There is also the quantitative dimension of the concept of minimum core, which imposes the duty on government to meet certain quantitative minimum levels when providing access to these rights, for those who cannot afford to access them on their own. In respect of the right of access to adequate housing, such quantifications include the minimum size of housing units per square metre, the frequency of refuse collection per week, and the minimum amount of water in kilolitres to be made accessible per person per day. These quantifications must meet the minimum normative standards described above. For example, the designated minimum size of each housing unit per square metre, the frequency of refuse collection and the daily water allocation must be adequate to ensure that the housing is habitable.

By virtue of its policy-making functions under the separation of powers doctrine, the state should determine the quantitative aspects of the minimum core content. When doing so, it should be allowed a margin of discretion to arrive at any quantifications which are permitted by the resources available, as long as its choices do not derogate from the minimum floor of normative standards imposed by these rights. For example, when providing basic shelter to the homeless as part of the minimum core, the state should be allowed the margin of discretion to determine the size of the housing unit, the material to be used to build the walls, and the amount of daily water allocations, as long as the state's choices do not derogate from the minimum normative standards of habitability of housing.

In light of the above, the courts should be perceived to have a primary role and a secondary role in the enforcement of the minimum core obligation of the state. The primary role of the court should be (1) to enforce the obligation of the state to adopt or determine the quantitative aspects of the minimum core; and (2) to interpret the qualitative minimum core against which the reasonableness of the adopted quantitative core should be measured. To be considered 'reasonable', the quantitative aspects of the minimum core must comply with the minimum quality standards imposed by the right in question. In other words (and as elaborately argued by Bilchitz⁹⁶), the quantifications must be sufficient to meet the basic needs of the rights bearers. The secondary role of the court entails that, in specific circumstances of emergency and where the state has failed to set a reasonable minimum core content, the court must intervene (upon being petitioned) to set the quantitative aspects of the minimum content to be delivered to the rights bearers by government, but only as temporary relief. I explain these two roles in more detail in the paragraphs below.

⁹⁶ Bilchitz op cit note 71 at 488.

The envisaged primary role of the court

The court's primary role should be to enforce the duty of the state to meaningfully engage with rights bearers and stakeholders, and to determine the relevant minimum quantifications, such as the minimum size of the housing unit, the frequency of refuse collection per week, and the amount of daily water allocation per person. In practice, this entails issuing an order compelling the state to consult the rights bearers and relevant stakeholders to adopt policies which designate these quantifications. Once these policies have been adopted by the state and upon being petitioned, the court can review the reasonableness of the quantifications by assessing if, in light of the resources available to the state, they meet the substantive or qualitative minimum normative standards imposed by the right.

Already, in the South African jurisprudence, the conceptual foundation for this approach has been laid down. For example, in *Mazibuko*,⁹⁷ the South African Constitutional Court stated:

[The] positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following [two] ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness.

Therefore, where the state has not developed the minimum quantifications of the core goods and services to be delivered in order to provide access to basic housing to the vulnerable, the court's primary role should be to compel the state to engage with the public and stakeholders to do so, and if the state adopts quantifications that are unreasonable (inconsistent with the normative minimum standards imposed by the right), then the court should invalidate those measures and invoke its secondary role of setting a temporary content of the minimum core. Such an approach would achieve a balance between, on the one hand, the need to respect the separation of powers and, on the other, the need to ensure that the state fulfils its duty to deliver access to the minimum core content of these rights to the extent permitted by the resources available to the state. Furthermore, by insisting on meaningful engagement between the government and the rights bearers, the approach suggested in this paper promotes democratic deliberation and democratic accountability, with the court as a mediator, in the process of formulating policies on the minimum core content of these rights. Ensuring democratic deliberation and accountability during social policy formulation is important because it enables the people to contribute to policy making and to hold their

⁹⁷ *Mazibuko* supra note 14 para 67.

leaders accountable.⁹⁸ However, the proposition that the court must primarily enforce meaningful engagement raises certain feasibility questions, such as whether it would be legally permissible and practically possible to enforce meaningful engagement between the state and rights bearers in contexts like Kenya and South Africa.

Constitutional rules regulating state–citizen engagement in social policy formulation

The legal framework applicable in both South Africa and Kenya enjoins the state to meaningfully engage with the public when making decisions on social policy. Public participation in governance is recognised as a constitutional value and a principle of public administration in both jurisdictions. In South Africa, s 195(1)(e) of the Constitution states that ‘people’s needs must be responded to, and the public must be encouraged to participate in policy making’. The Constitutional Court of South Africa⁹⁹ has held that this principle binds all agencies of government to engage with the concerned public when making laws and public policies, to ensure that the needs of the public are taken into account when making those policies or laws. Similarly, in Kenya, art 10(1)(a) of the Constitution¹⁰⁰ states that public participation is one of the fundamental principles of governance, to be complied with by all agencies of government when making public policy or enacting laws. It is also critical to note that the obligation to consult the public is further cemented through the guarantee of the right to administrative justice,¹⁰¹ which, amongst other requirements, enjoins public authorities to consult individuals and/or groups before undertaking administrative action that affects their rights, including socio-economic rights.¹⁰² Therefore, when making policies or when undertaking administrative decisions which

⁹⁸ Ray, B. *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa’s Second Wave* (2016) 13. Also see Liebenberg op cit note 21 at 41.

⁹⁹ See, for example, *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 113.

¹⁰⁰ It states that ‘[t]he national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

...

- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

¹⁰¹ Article 47 of the Constitution of Kenya, 2010 and s 33 of the Constitution of South Africa, 1996.

¹⁰² For a more detailed discussion on this, see Kohn, L. & Corder, H. ‘Administrative justice in South Africa: An overview of our curious hybrid’ in Corder, H. & Mavedzenge, J. (eds) *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) at 132–134. Also see Abungu, C. ‘An overview of the framework governing administrative justice in Kenya’ in Corder, H. & Mavedzenge, J. (eds) *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) at 96–97.

affect the right of individuals to access the minimum core guaranteed to them by socio-economic rights, the governments in both South Africa and Kenya are obliged to meaningfully engage with rights bearers. What does meaningful engagement entail in practice?

The South African Constitutional Court has dealt with the concept of meaningful engagement in at least two cases about the enforcement of socio-economic rights. In *Occupiers of 51 Olivia Road v City of Johannesburg*,¹⁰³ the Constitutional Court was petitioned to rule on the legality of the proposal of the City of Johannesburg to demolish buildings which had been condemned as unsafe and unhealthy for human habitation. The evictions would leave more than 400 people homeless.¹⁰⁴ The court ordered the parties to meaningfully engage with each other in order to agree on measures which could be taken to (1) improve the living conditions in these buildings; and (2) provide suitable alternative housing to those who would be rendered homeless by the evictions.¹⁰⁵ Subsequently, the parties engaged with each other and agreed that the City would upgrade the buildings to make them safe and would provide suitable temporary housing for the affected residents. This agreement was presented to the court and was turned into an order by consent. In this case, the court defined meaningful engagement as 'a two-way process in which the City [of Johannesburg] and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.'¹⁰⁶

In *Residents of Joe Slovo Community v Thubelisha Homes*,¹⁰⁷ where the court was similarly petitioned to rule on the validity of a proposed large-scale eviction, the court offered an elaborate description of meaningful engagement by holding that:

What must be stressed, however, is that the process of engagement does not require the parties to agree on every issue. What is required is good faith and reasonableness on both sides and the willingness to listen and understand the concerns of the other side. The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. Mutual understanding and accommodation of each other's concerns, as opposed to reaching agreement, should be the primary focus of meaningful engagement. Ultimately, the decision

¹⁰³ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

¹⁰⁴ *Ibid* para 1.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* para 14.

¹⁰⁷ 2010 (3) SA 454 (CC).

lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.¹⁰⁸

In Kenya, a similar approach was applied by the High Court in *Kepha Omondi Onjuro v Attorney General*,¹⁰⁹ the *Satrose* case¹¹⁰ and *Mitu-Bell Welfare Society v Attorney General*.¹¹¹ In all these cases, the High Court of Kenya followed precedent from the South African Constitutional Court and issued structural interdicts which required the parties to engage with each other and to return to court with a plan addressing how the evictions were to be conducted, the nature of suitable alternative housing to be provided, and when such housing would be provided.¹¹²

This jurisprudence from South Africa and Kenya provides some understanding of the standards and practical steps which constitute meaningful engagement between the state and the rights bearers. Although the above standards were applied in relation to engagement between the public and the state in eviction cases, where there are clear procedural rules both in local legislation¹¹³ and in international law,¹¹⁴ these standards are also recognised by both constitutions¹¹⁵ as minimum standards of engagement applicable generally when government is making public policy and/or enacting laws. These standards also apply in instances where administrative action is taken, as indicated above. Therefore, it can be argued that the duty of government to meaningfully engage with the public when determining the quantitative aspects of the minimum core of socio-economic rights entails the obligation of public officials to inform the public about the intended government decision. Such information must be given timeously, it must be adequate, and it must be communicated in a way which is easy for the targeted audience to comprehend, in order for the public to make informed decisions and contributions during the consultations. Public authorities must show that they are open-minded by demonstrating that they robustly engaged with the views given by the public, before they made their decision. In essence, therefore, when determining the quantitative aspects of the minimum core of specific socio-economic rights, the duty of government to meaningfully engage means that the government must provide rights

¹⁰⁸ Ibid para 244.

¹⁰⁹ [2015] eKLR.

¹¹⁰ *Satrose Ayuma* supra note 22.

¹¹¹ [2013] eKLR.

¹¹² Ibid para 79. Also see *Satrose Ayuma* supra note 22 para 111.

¹¹³ For example, see the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

¹¹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions*, 20 May 1997, para 15.

¹¹⁵ See art 10(1)(a) of the Constitution of Kenya of 2010 and s 195(1)(e) of the Constitution of South Africa of 1996.

bearers with sufficient opportunity to make their input, and their views must be taken into account when making the final decision.

The envisaged secondary role of the court

In addition to the primary role suggested above, the court must also be perceived as having a secondary role or function when enforcing the duty of the state to fulfil the minimum core content of socio-economic rights. This function should entail that, in specific circumstances of emergency, where the state has not set a reasonable minimum core content and rights bearers are facing the danger of irreparable harm, the court must intervene (upon being petitioned) by issuing a *mandamus*, ordering the state to immediately engage with the rights bearers and to set the minimum core content. In addition, the court must set a temporary minimum core content to be delivered to the rights bearers by government. However, the minimum core set by the court in these circumstances must be temporary relief, which subsists until the state comes up with a reasonable minimum core content.

The legal basis for the envisaged secondary or emergency function of the court is that the judiciary is the last line of defence when fundamental rights are being violated.¹¹⁶ Therefore, where the state has failed to fulfil its duty to set a reasonable minimum core content, resulting in human rights violations, the state cannot use the doctrine of separation of powers as a shield to prevent the court from intervening to provide the necessary relief to the rights bearers.

In some cases in South Africa, the Constitutional Court has intervened and provided temporary relief to protect socio-economic rights. In *Residents of Joe Slovo*, where the government proposed the conducting of evictions in order to pave the way for the development of decent housing, the court instructed the government and the residents to meaningfully engage further and to agree on a timetable for the evictions and any other related concerns.¹¹⁷ That agreement had to be approved by the court before it could be implemented, and strict deadlines were set by the court regulating when the engagement should be completed and when an agreement (if any) should be tabled before the court. Furthermore, the court set the pre-condition that the evictions would be conducted only after providing the residents with temporary housing which met the following minimum standards:

The temporary residential accommodation unit must: be at least 24 square meters in extent; be serviced with tarred roads; be individually numbered for purposes of identification; have walls constructed with a substance

¹¹⁶ See, for example, CESCR *General Comment No. 3* op cit note 44 para 5.

¹¹⁷ *Joe Slovo* supra note 39.

called Nutec; have a galvanised iron roof; be supplied with electricity through a pre-paid electricity meter.¹¹⁸

Ordinarily, the above preconditions imposed by the court would appear to be too intrusive with respect to the separation of powers principle. For instance, the court stipulated the size of the housing units to be provided as alternative accommodation and it also stipulated the exact materials to be used to construct the walls. Ordinarily, as part of its policy-making function, the state should be left to decide on the size of the housing units and the materials to be used to build those housing units, as long as the chosen size and materials are consistent with the normative health and wellness standards imposed by the right to adequate housing. However, in this instance, the court practically took over the policy-making functions of the state by imposing these conditionalities, but as temporary measures, because the state had failed to make those decisions, and there was now an urgent need to protect the rights of the evictees who were at the risk of being provided with substandard alternative housing after the evictions.

Similarly, it can be argued that, because the courts in South Africa and Kenya have the primary responsibility to protect rights through issuing effective remedies, in circumstances of dire need and urgency the court can declare a minimum core content to be provided to the vulnerable groups by the state in the meantime, until the government develops a reasonable minimum core content.

Conclusion

If ever there was any doubt, the COVID-19 pandemic has exposed the centrality of socio-economic rights in human development and the protection of global human security. It is time for academics and judges to revisit the discussion on how best these rights can be enforced judicially, given that governments appear to be neglecting their obligation to fulfil these rights. Although the realisation of the full scope of each of the socio-economic rights is to be achieved on a progressive basis, state parties to the ICESCR have an obligation to immediately provide the vulnerable groups in society with access to the minimum core content of each socio-economic right. South Africa and Kenya are party to the ICESCR. In the event that a government attributes its failure to fulfil the minimum core obligations to resource constraints, it has the duty to show that it has done all it can to use the available resources to fulfil this obligation. Given the high levels of corruption in the public sectors of both Kenya and South Africa, it appears that resource constraints are not necessarily the reason for government's failure to deliver the minimum core of these rights for vulnerable groups in society.

¹¹⁸ *Joe Slovo* supra note 39 para 10.

There is a need to judicially enforce the obligations of government to immediately fulfil the minimum core for the poor. However, in order to succeed in this mission, there is a need to carve out a specific role for the judiciary, in order to ensure that a balance is achieved between respecting the separation of powers doctrine and enforcing the obligation of the state to fulfil the minimum core. In this article, I have argued that the courts should be perceived as having a primary role and a secondary role in the enforcement of the minimum core obligations of the state. The primary role of the court should be (1) to enforce the obligation of the state to meaningfully engage with the public and adopt or determine the quantitative aspects of the minimum core; and (2) to interpret the qualitative aspects of the minimum core against which the reasonableness of the adopted quantitative core should be measured. The secondary role of the court entails that, in specific circumstances of emergency and where the state has failed to set a reasonable minimum core content, the court must intervene (upon being petitioned) to establish the quantitative aspects of the minimum content to be delivered to the vulnerable groups, but only as temporary relief.

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