



# COVID-19 PANDEMIC AND SOCIO-ECONOMIC RIGHTS

*in Selected East and Southern African Countries*

JUSTICE ALFRED MAVEDZENGE (ED)

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Socio-Economic Rights*

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SOUTHERN AFRICAN COUNTRIES



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# Foreword

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The Konrad-Adenauer-Stiftung (KAS) Rule of Law Program for Sub Saharan Africa supports regional initiatives aimed at promoting respect for human rights, the rule of law and democracy. The outbreak of the novel coronavirus disease (Covid-19) and its spread across the globe has put several types of human rights at risk from at least two dimensions. First, the virus itself threatens the right to life and health. Second, some of the measures undertaken by countries in their attempt to mitigate the spread of this virus have also resulted in the breach of many other human rights. This is mainly because some of the Covid-19 disaster management measures undertaken by some countries do not meet the standards of necessity and proportionality.

Socio-economic rights are amongst the human rights which have been undermined by both the outbreak of Covid-19 and the responses by some states worldwide. This book seeks to highlight some of these effects with particular focus on East and Southern Africa. At present, it is not easy to determine or predict the gravity of the effects of Covid-19 on socio-economic rights. Nevertheless, it is crucially important for scholars especially in the aforementioned regions to analyse the manner in which these rights have been breached and to make practical recommendations on how best these rights can be enforced and protected in the future. This is especially important because combatting the spread of Covid-19 and future similar pandemics requires universal access to socio-economic rights such as the right to health care, the right to adequate housing, access to clean water and sanitation.

Our special gratitude goes to Dr Justice Alfred Mavedzenge for the conceptualisation and coordination of this project. We also wish to thank the Democratic Governance and Rights Unit of the University of Cape Town, the peer reviewers and all the authors involved, for their commitment in producing this book. We are indebted to Mr. Peter Wendoh, our Project Advisor at KAS for his diligent contribution and effort. I am confident that the recommendations suggested in this book will be considered by policy makers to strengthen the protection and promote the realisation of socio-economic rights, especially for the benefit of the most vulnerable persons in societies across East and Southern Africa.

**Dr Stefanie Rothenberger**

Director of the Rule of Law Program for Anglophone sub-Saharan Africa  
Nairobi



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# Introduction

Justice Alfred Mavedzenge\*

On 30 January 2020, the World Health Organisation (WHO) declared the novel coronavirus (Covid-19) as a 'Public Health Emergency of International Concern'.<sup>1</sup> The WHO issued guidelines encouraging people to observe social distancing and practice hygienic sanitation as means for preventing the spread of Covid-19.<sup>2</sup> In March 2020, the pandemic hit Africa as many countries on the continent began to register their first confirmed cases of the virus. Towards the end of March 2020, several countries on the continent declared states of emergency while others declared states of disaster in response to the Covid-19 pandemic.

As part of the Covid-19 disaster management measures, various African countries imposed stringent nation-wide lockdown measures which required people to confine themselves to their homes and only move around when absolutely necessary (stay-at-home orders). Commercial activities, including business operations were prohibited except for those designated as essential services. In some countries, government security forces as well as law enforcement agents were deployed to enforce public compliance with the lockdown measures.

In many ways, the Covid-19 pandemic illuminated the significance of universal access to socio-economic rights. At the same time, it exposed the existing inequalities regarding access to these rights. For instance, the WHO's Covid-19 prevention guidelines on hygienic sanitation and the stay -at-home orders issued by various governments were based on the assumption that everyone enjoys access to socio-economic livelihoods such as adequate housing, water and adequate food. Yet there are millions of people<sup>3</sup> who live in abject

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<sup>1</sup> World Health Organization 'Rolling updates on coronavirus disease' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>.

<sup>2</sup> World Health Organization 'Country and technical guidance' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance>.

<sup>3</sup> For example, prior to Covid-19, in SADC alone there were 41. 2 million people who lived without access to adequate food. See SADC Secretariat 'Synthesis report on the state of food and nutrition security and vulnerability in Southern Africa 2019' [https://www.sadc.int/files/7315/6284/6868/SADC\\_2019](https://www.sadc.int/files/7315/6284/6868/SADC_2019). South Africa alone is reported to have 16 million people living in extreme poverty, without access to the basic decencies needed to lead a dignified life. In Kenya it is estimated that there are 10 million people living in extreme poverty, without access to basic social

poverty without access to these livelihoods, and as a consequence, they struggled to comply with the stay-at-home orders<sup>4</sup> as well as with the WHO's hygienic sanitation guidelines.

At the same time, the lockdown measures had a drastic effect on access to livelihoods, especially for the economically vulnerable groups. For instance, informal traders were prohibited from trading, while in some countries, governments destroyed informal trading market stalls in the name of promoting health and sanitation.<sup>5</sup> This deprived certain groups of their access to livelihoods and as a result undermined their various socio-economic rights, including the right to adequate food.

Focussing on countries in East and Southern Africa, this book contains chapters which analyse the impact of the Covid-19 pandemic on the socio-economic rights of different groups in specific countries. It includes discussions on the impact of the pandemic on the socio-economic rights of immigrants in South Africa, the right to adequate housing in Zimbabwe and Kenya, the right to education in Zambia, the socio-economic rights of women in Botswana, Kenya and South Africa and the socio-economic rights of persons living with disabilities. Thus, the book provides nuanced analysis on how the Covid-19 pandemic affected these rights.

The book also makes recommendations on how best socio-economic rights can be enforced, to make them accessible to all people, including vulnerable groups. This is especially important at this juncture when countries are formulating policies to address socio-economic challenges created by the Covid-19 pandemic. An argument is made throughout this book that, more than ever, government policies must prioritise the implementation of socio-economic rights in order to protect the dignity of all persons, as well as to protect global human security.

Although the chapters in this book are written with specific reference to selected jurisdictions, the ideas discussed can be applied to address similar challenges in many other geographic contexts. This book is a culmination of a project of the Democratic Governance and Rights Unit of the University of Cape Town (DGRU) and the Konrad-Adenauer-Stiftung (KAS) Rule of Law Program for Sub-Saharan Africa. A call for abstracts on book chapter contributions

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services such as adequate housing, food and health care. See the World Poverty Clock available at <https://worldpoverty.io/map> viewed 29 May 2020.

<sup>4</sup> This has resulted in various states using force to enforce compliance. See 'UN warns against 'excessive force' in Covid-19 response' <http://www.channelafrica.co.za/sabc/home/channelafrica/news>.

<sup>5</sup> See for example the demolitions conducted by the Zimbabwean government. <https://www.theindependent.co.zw/2020/04/30/vendors-stalls-demolitions-illegal/>.

was issued. After a competitive process, the seven best abstracts were selected, and the selected authors proceeded to draft their chapters. In September 2020, a two-day virtual seminar was conducted during which each author had an opportunity to present their chapter and receive feedback from a panel of experts. The panel of experts comprised of eminent academics and practitioners namely, Professor Thuli Madonsela, Professor Reg Austin, Dr Musa Kika and Dr Nyasha Karimakwenda. After this seminar, the authors submitted revised chapters which were subjected to double-blind peer review. The DGRU and KAS Rule of Law Program for Sub-Saharan Africa are indebted to the panel of experts and the peer reviewers who found time, in the middle of the pandemic, to review the chapters presented in this book.





# Providing for the unwanted in a time of crisis: The socio-economic rights of migrant workers in South Africa during the Covid-19 pandemic

Tinashe Kondo\*

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## ABSTRACT

Migrants are amongst the most vulnerable groups in South Africa. They are often subjected to harsh forms of discrimination and excluded from government policy considerations. They have not fared differently under the Covid-19 responses by the government. This is because, while South Africa is a middle-income country, at least half its households struggle to meet their needs, particularly when there are market disruptions. Accordingly, a widely held view is that already sparse government resources cannot be spent on ‘foreigners’ who ‘voluntarily migrated’ to South Africa and ‘take up jobs meant for locals’. Assistance to unemployed migrants is viewed as insensitive to the plight of unemployed citizens who have no access social protection or jobs. Against this backdrop, this chapter assesses the response of the South African government to the socio-economic rights (SERs) of the migrant population. It further interrogates whether the South African government has used best practice labour and humanitarian standards to protect SERs of migrants during the Covid-19 pandemic.

## 1.1 INTRODUCTION

This chapter examines how the South African government has dealt with the socio-economic rights (SERs) of migrants during the pandemic. It argues that migrants, irrespective of their legal status, ought to be catered for in the government’s Covid-19 responses.<sup>1</sup> The exclusion of certain classes of immigrants such as refugees (although this has been partially cured by the courts), undocumented foreign workers (most of whom are involved in the informal sector), and documented foreign workers with a temporary stay has arguably had an adverse effect on the success of the government’s response to Covid-19. This is because there are costs in ignoring what has since become a significant part of the South African population – migrant workers and their families.

Their exclusion in government responses to the Covid-19 pandemic can have unintended consequences in the form of crime, non-compliance with lockdown rules which may lead to infections, and a resultant cost to the health care system. Therefore, an expansive approach in responding to the virus is not only important in reducing the deleterious impact of the virus on migrants as a group of marginalised and vulnerable people, but it is also essential for improving public health management generally. Covid-19 containment strategies cannot be effective if a section of the population is excluded.

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<sup>1</sup> International Red Cross and Crescent Movement ‘Note on the protection of migrants in the face of the Covid-19 pandemic’ [https://www.icrc.org/en/download/file/117261/public\\_note\\_on\\_the\\_protection\\_of\\_migrants\\_in\\_the\\_face\\_of\\_the\\_covid-19\\_pandemic\\_08.04.2020.pdf](https://www.icrc.org/en/download/file/117261/public_note_on_the_protection_of_migrants_in_the_face_of_the_covid-19_pandemic_08.04.2020.pdf) > (viewed 15 September 2020).

Using a socio-legal approach, it is highlighted in the chapter that by and large, the South African government has failed to adequately consider the rights and welfare of migrants in its Covid-19 responses. The chapter then demonstrates that there are a number of complex factors behind this. A significant problem has been the perception of migrant workers as not belonging to the host community. This is sometimes the result of a strong sense of nativism which commodifies migrants as opposed to considering them as part of the community. Migrant workers are often stigmatised and scapegoated for many of the challenges facing South Africa. This is often reflected in the waves of violent xenophobia that sweep through the country frequently.

The failure to provide for the needs of migrant workers in South Africa however, goes against South Africa's constitutional and international legal obligations. The infringed rights in this case, are those relating to access to health care, adequate food, social security and labour rights. The chapter concludes that in addition to improved strategies geared towards catering for the rights of migrants, there needs to be a broader attitude shift, in both the people and the state. This requires significant investment in education and training as well as public sensitisation. Importantly, however, it is vital to note that many of the challenges traversed in this chapter are global problems and must therefore be viewed from that prism.

## 1.2 THE MIGRATION CONTEXT IN SOUTH AFRICA

South Africa has a deep history of migration, dating as far back as the mid-19th century.<sup>2</sup> In earlier times, such migration was often to Johannesburg, the economic hub of South Africa, because of its once rich and abundant mines. This earned it the name Egoli – City of Gold. The profitability of many mines declined over the years, especially in the 1990s when many mines downsized. This coincided with the end of apartheid and apartheid-era African migration. It led to a decline in employment opportunities for African migrants who came from far and wide for opportunities in these mines.<sup>3</sup> Although the sector has since recovered to a limited degree over the years, overall employment numbers remain far below the levels experienced in the 1970s and 1980s.

Post-democratic migration in South Africa has taken on a different form. Migration into South Africa has been driven by several complex economic and

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<sup>2</sup> R Modi 'Migration to democratic South Africa' 2003 (38) *Economic and Political Weekly* 1759.

<sup>3</sup> J Crush 'Complex movements, confused responses: Labour responses in South Africa' 2011 (25) *Southern African Policy Brief* 3.

social factors.<sup>4</sup> One of the biggest drivers for this movement has been the need to attract skills to South Africa. This is because the democratic government has failed to develop critical skills needed to meet the needs of business.<sup>5</sup> This has spurred the demand for African immigrants possessing these skills,<sup>6</sup> particularly from neighbouring countries.<sup>7</sup> As noted above however, there are other factors that have driven migration. For instance, the economic downturn and lack of growth in countries around South Africa has also driven migration to South Africa.

Using Zimbabwe as an illustrative example, it can be shown that migration to South Africa has become a pressing issue. There have been three waves of migrants entering South Africa from Zimbabwe since 1990. These are: (1) during the 1990s, (2) from 2000 to 2005, and (3) from 2005 onwards.<sup>8</sup> The skill levels of these migrants has been variable. In earlier times, Zimbabwean migrants were highly skilled, while post 2005, there was an influx of lowly skilled workers. While unofficial claims stipulate that there are 2 million Zimbabweans in

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<sup>4</sup> F Rasool & C Botha 'The nature, extent and effect of skills shortages on skills migration in South Africa' 2011 (9) *SA Journal of Human Resource Management* 2.

<sup>5</sup> A Mateus, C Allen-Ile & C Iwu, 'Skills shortage: Interrogating the repertoire of discussion' 2014 (6) *Mediterranean Journal of Social Sciences* 64.

<sup>6</sup> It is important to note that while the paper focuses on migrants, sometimes, for accuracy, there is reference to 'immigrants'. While there are overlaps between these terms which are sometimes used interchangeably, this is not always accurate as they do not mean the same thing. The term 'migrant' refers to an individual that has willingly left their home or place of birth, in most cases, to search for employment. This generally includes those who move within a country (internal migration) and those that move from their countries of birth (international migration). This can often include refugees while the term 'refugee' does not always include migrants. An immigrant, on the other hand, is a person that willingly leaves their country of origin and legally enters another. They are then granted permission to permanently settle, and therefore have the legal rights to work without restriction. In summary, it can be noted that migration includes both legal and illegal movement into a jurisdiction and can also include intra-country movements. Immigration, on the other hand, involves inter-country and legal movement, often of a permanent nature (as in the case of permanent residents).

<sup>7</sup> Governments, naturally, favour immigration which is usually through accepted channels and often attracts the desired skills.

<sup>8</sup> J Crush, A Chikanda & G Tawodzera 'The third wave: Mixed migration from Zimbabwe to South Africa 2012 (59) *Southern African Migration Program* 1.

South Africa,<sup>9</sup> official estimates show that by 2016, there were an estimated 574 000 migrants from Zimbabwe and an overall total of 1.5 million migrants.<sup>10</sup>

In 2018, the statistician-general of South Africa, Risenga Maluleke, opined that the number of foreign-born people in South Africa had grown to 4 million.<sup>11</sup> Of this number, it is estimated that about 2 million migrants are of working age.<sup>12</sup> Given these numbers, one can appreciate the pressure brought by these migrants on scarce resources such as housing, health services, social protection and jobs. With the onset of the Covid-19 pandemic, these challenges were exacerbated.

Socio-economic support for migrants during a pandemic comes at a great financial cost. This raises questions about whether the government is able to afford making such payments. How can the state with a Constitution that encourages access for all balance its obligations to an expanding population together with the needs of a growing, unverifiable number of migrants? Particularly in the South African context, not only does the government have to deal with documented migrants, it has to also work with the issue of an even larger number of undocumented migrants – many of whom come to South Africa for economic reasons.<sup>13</sup>

Important, however, is the distinction between ‘economic migrants’ and refugees. In recent times, there has been a growing movement to conflate the two. The thinking in this regard is that ‘economic migrants’ can sometimes be viewed as ‘economic refugees’, thus potentially entitling them to benefits accruing to refugees. Despite the best intentions of such thinking, the concept of ‘economic refugees’ has not been solidified in international law. As a

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<sup>9</sup> There is a general lack of accurate data when it comes to the migration of Zimbabweans into South Africa due to the ineffective border control mechanisms. However, statistical evidence by some scholars seems to indicate that there are some 1.5 million Zimbabweans in South Africa. See T Polzer ‘Regularising Zimbabwean migration to South Africa’ 2009 *Migration Issue Brief* 2 – 5.

<sup>10</sup> A Mbiyozo, ‘Aligning South Africa’s Migration Policies with its African Vision’ 2018 *Institute for Security Studies Policy Brief* 117 5.

<sup>11</sup> N Khumalo 2019 ‘Millions of Zimbabweans living in South Africa? Data doesn’t back claim’ <https://africacheck.org/reports/millions-of-zimbabweans-living-in-south-africa-migrant-numbers-hard-to-pin-down-but-data-doesnt-back-claim> viewed 15 September 2020.

<sup>12</sup> F Mukumbang, A Ambe & B Adebisi ‘Unspoken inequality: How Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees and undocumented migrants in South Africa’ 2020 (19) *International Journal for Equity in Health* 1.

<sup>13</sup> S Croucher ‘South Africa’s illegal aliens: Constructing national boundaries in a post-apartheid state’ 1998 (21) *Ethnic and Racial Studies* 639–660.

result, at a domestic level, there is no provision for ‘economic refugees’ within the Refugees Act.<sup>14</sup>

Despite the polycentric issues that can be raised, it could still be argued that the government, can, within available resources, meet its obligations to migrants. It is plausible to argue that provision for the socio-economic rights (SERs) of migrants could easily have been made by resources lost through leakages in the system. Primarily, in South Africa, a major challenge has been that of corruption.<sup>15</sup> Consider this, if one takes into account the R 700 million required to pay for the Covid-19 social grant for refugees, it is far outweighed by the amount of money lost through corruption and fraudulent and exorbitant tenders that characterised the disbursement of the R500 billion economic stimulus package.<sup>16</sup> It is estimated that at least R 2.2 billion of these funds have already been looted.<sup>17</sup> Therefore, it could be argued that provision for non-residents could easily have been made by the stimulus package using resources lost in leakages.

Accordingly, one can say that the South African government could have been more pragmatic in its response to the Covid-19 pandemic. While perhaps others could argue that excluding certain classes of persons from the responses was being ‘pragmatic’, this line of thinking is, however, without merit. For example, it can be put forward that the government could have placed more emphasis on protecting the disaster funds from leakages such as corruption, and in turn, have spread the resources to a wider pool, including migrants. As a result, it is plausible to argue that, the government’s response, in as far as it relates to migrant workers, has been fraught with challenges.

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<sup>14</sup> See Refugees Act 130 of 1998.

<sup>15</sup> Corruption Watch 4 September 2020 ‘In South Africa, Covid-19 has exposed greed and spurred long needed action against corruption’ *Transparency International* <https://www.transparency.org/en/blog/in-south-africa-covid-19-has-exposed-greed-and-spurred-long-needed-action-against-corruption> viewed 14 October 2020 & G Oliver ‘South Africa’s Covid relief fund dogged by delays and corruption’ *The New Humanitarian* <https://www.thenewhumanitarian.org/news/2020/08/27/South-Africa-coronavirus-relief-fund-corruption> viewed 14 October 2020.

<sup>16</sup> See section 2 of this chapter for more details on this.

<sup>17</sup> Medical Brief 29 July 2020 ‘Corruption feeding frenzy involving 2.2 billion of pandemic relief funds’ <https://www.medicalbrief.co.za/archives/corruption-feeding-frenzy-involving-r2-2bn-of-pandemic-relief-funds/> viewed 14 October 2020.

### 1.3 THE RESPONSE OF THE SOUTH AFRICAN GOVERNMENT TO THE COVID-19 PANDEMIC

On the 15<sup>th</sup> of March 2020, President Cyril Ramaphosa addressed the nation on a matter he referred to as one ‘of great national importance’.<sup>18</sup> He noted that the world was going through a medical emergency graver than what had been experienced in the last century. Accordingly, there was a need for urgent and drastic measures to manage the disease, protect the people of South Africa and reduce the impact of the virus on the society and economy.

Given this, the President declared a national state of disaster in terms of the Disaster Management Act 57 of 2002, with various pieces of legislation and regulations being published in support of this declaration.<sup>19</sup> Pursuant to these disaster regulations, the government imposed an initial 21-day lockdown. The rationale behind this lockdown was that in order to save millions of South Africans from infection and to save hundreds of thousands of lives, a trade-off had to be made with the negative impact on livelihoods and the economy.<sup>20</sup> To mitigate the impact of the lockdown on the economy, the President crafted a three-phase economic response. In the first phase, the government focused on a range of measures to cushion business communities and individuals. This was done by announcing tax relief measures, releasing disaster relief funds, engaging in emergency procurement, supporting wages through the Unemployment Insurance Fund (UIF) and providing funding to small businesses.

In the second phase, the President announced an expanded Covid-19 economic and social relief package.<sup>21</sup> This was a mega package of R500 billion targeted at ‘(i) redirecting resources to fund the health response to coronavirus; (ii) providing direct support to households and individuals for the relief of hunger and social distress; and (iii) providing assistance to companies in distress and

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<sup>18</sup> President Cyril Ramaphosa 15 March 2020 ‘Measures to combat Coronavirus COVID-19 epidemic’ <https://www.gov.za/speeches/statement-president-cyril-rama-phosa-measures-combat-covid-19-epidemic-15-mar-2020-0000> viewed 14 September 2020.

<sup>19</sup> See for example, GG 43116 of 19 March 2020 Consumer and Customer Protection and National Disaster Management Regulations and Directions.

<sup>20</sup> President Cyril Ramaphosa 23 March 2020 ‘Escalation of measures to combat Coronavirus COVID-19 pandemic’ <https://www.gov.za/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23-mar> viewed 14 September 2020.

<sup>21</sup> President Cyril Ramaphosa (21 April 2020) ‘Outlines expanded Covid-19 Coronavirus economic and social relief’ <https://www.gov.za/speeches/president-cyril-ramaphosa-outlines-expanded-covid-19-coronavirus-economic-and-social-relief> viewed 14 September 2020.



seeking to protect jobs by supporting workers' wages'.<sup>22</sup> The third phase is an economic recovery plan aimed at stimulating the economy and putting people back to work.

What is clear thus far, as will be described in later sections in this chapter, is that most of these measures are aimed at improving the conditions for South African citizens to the exclusion of many classes of foreign nationals. Migrants such as refugees, undocumented workers and foreign workers with temporary stays have been directly or indirectly not been accounted for in the various packages put forward by the South African government. This has meant that the welfare of many foreign nationals has been neglected in the fight against Covid-19. Stigmatisation, exclusion and nationalism, however, should be avoided, especially in the context of a global pandemic. Accordingly, the response of the government of South Africa has been flawed.

#### **1.4 CITIZENSHIP, NATIVISM, BELONGING AND UBUNTU: INTERPLAY**

I am a woman. I need sanitary towels, and how am I going to maintain that dignity? So is my dignity sacrificed at this present moment? What exactly is happening to humanity, to Ubuntu? What's happening Africa? <sup>23</sup>

These were the words of Gugu Ncube, spokesperson for Friends of Migrants and Refugees in South Africa. Her plea for help raises very important questions in the context of this conversation. It compels us to consider how the concept of ubuntu is applied in this distinct debate on migrants and government Covid-19 responses, particularly in South Africa. In order to answer this question, it becomes important to consider what is meant by ubuntu. Ubuntu is an African philosophy of life which at its core represents personhood, humanity, humanness and morality.<sup>24</sup> Justice Mokgoro advocates that it is:

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<sup>22</sup> Tralac (3 July 2020) 'South Africa's policy response to the Covid-19 pandemic' <https://www.tralac.org/news/article/14617-south-africa-s-policy-response-to-the-covid-19-pandemic.html> viewed 14 April 2020.

<sup>23</sup> SABC News (23 April 2020) 'Foreign nationals feel excluded by SA government from receiving social relief grant' <https://www.sabcnews.com/sabcnews/foreign-nationals-feel-excluded-by-sa-government-from-receiving-social-relief-grant/> viewed 20 September 2020.

<sup>24</sup> D Lutz 'African ubuntu philosophy and global management' 2009 (84) *Journal of Business Ethics* 315.

[A] metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others.<sup>25</sup>

The phrase *umuntu ngumuntu ngabantu* is loosely translated as ‘I am because we are’. However, it could also be understood to mean that ‘a person is a person through other persons’.<sup>26</sup> The understanding to be given is therefore that a person’s existence is tied to that of a particular group. While there is no single meaning of the word ubuntu across languages in Africa, there is commonality in that ubuntu signifies humanness and the good treatment of others. Kwamangamalu avers that ubuntu is the collective consciousness of African people representing their desire to be sensitive to the needs of others, caring and patient.<sup>27</sup>

Despite the genuine concern that the interpretation of ubuntu in practice has been flawed, naïve and dangerous in attempting to use it in a mechanical way to solve current problems,<sup>28</sup> it would be an injustice not to consider this concept in the context of the treatment of migrants in the Covid-19 response by the South African government. This is because the Covid-19 crisis is a pandemic of a global scale which knows no race, gender, class, boundary or nationality. Ubuntu speaks to the fact that the injury of one person is the injury of all others. As noted by Ndebele and Sikuza:

The virus reminds us that we are all equally human in our mortality, and that we are interconnected and interdependent. We have to work together to keep each other safe: this is a truth as old as the very first human societies. Responding effectively to the crisis essentially requires that we practise what an ethic of Ubuntu has always invited us to practise, and that we practise it at multiple levels.<sup>29</sup>

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<sup>25</sup> Y Mokgoro ‘Ubuntu and the law in South Africa’ 1998 (1) Potchefstroom Electronic Law Journal 2.

<sup>26</sup> N Ndebele & J Sikuza (19 May 2020) ‘African foreign nationals are being ignored in the fight against Covid-19: Where is our ubuntu?’ Daily Maverick <https://www.dailymaverick.co.za/opinionista/2020-05-19-african-foreign-nationals-are-being-ignored-in-the-fight-against-covid-19-where-is-our-ubuntu/> viewed 20 September 2020.

<sup>27</sup> N Kwamangamalu ‘Ubuntu in South Africa: A sociolinguistic perspective to a pan-African concept’ 1999 (13) *Critical Arts* 26.

<sup>28</sup> E Venter ‘The notion of ubuntu and communalism in African educational discourse’ 2004 (23) *Studies in Philosophy and Education* 150.

<sup>29</sup> N Ndebele & J Sikuza (n26).

This is the sentiment that is shared by many migrants. Their belief is that the fact that they came to seek a better life in South Africa should not mean that they should not receive support from the government simply because they are deemed by the government as not belonging here. This has been an important issue for migrants in post-colonial Africa, and also globally, after World War 2.

“Belonging is about emotional attachment, about feeling ‘at home’.... Belonging tends to be naturalized, and becomes articulated and politicized only when it is threatened in some way.”<sup>30</sup>

This is the politics of belonging. Even within the context of a pandemic, belonging can be politicised. For instance, government aid can be deployed in a manner that benefits citizens and residents, to the exclusion of others. This goes against an interpretation of belonging that argues that it involves diverse forms of mobility, allowing people to be home away from home.<sup>31</sup> Rather, it favours an interpretation of belonging as a concept tied to the nation/state citizenship.<sup>32</sup> A passport is thereby employed as a technology in reinforcing these boundaries of belonging. While the nation/state is often the most perverse signifier of belonging, it is also important to note that it is not the only signifier. Belongingness can also be rooted in ethnic, racial, cultural and religious differences.<sup>33</sup> In many instances, these are often tied to the state, a major boundary signifier of belonging.

With the concept of the nation/state inevitably comes that of nativism. The term ‘nativism’ was coined in 1901, by Louis Dow Scisco, to describe the principles advanced by the anti-foreign American Party in the United States of America (USA).<sup>34</sup> This is representative of the unfavourable attitudes towards foreigners which have persisted in some form or the other in the USA.<sup>35</sup> While nativism is often then understood from this prism of how it evolved in the USA, it is vital to understand that the understanding of nativism in practice is diverse and often inconsistent.<sup>36</sup> A basic understanding of nativism would however be that the ‘native-born’ citizen enjoys preference in a state as compared to the ‘foreign born’.

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<sup>30</sup> N Yuval-Davis ‘Belonging and the politics of belonging’ 2006 (40) *Patterns of Prejudice* 197.

<sup>31</sup> M Savage, G Bagnall & B Longhurst *Globalisation and Belonging* (2004) 1.

<sup>32</sup> N Yuval-Davis *The Politics of Belonging: Intersectional Contestations* (2011) 46.

<sup>33</sup> Yuval-Davis (n30).

<sup>34</sup> A Guia ‘The concept of nativism and anti-immigrant sentiments in Europe’ (2016) European University Institute Working Paper MWP 2016/20 2.

<sup>35</sup> B Knoll ‘Understanding the ‘new nativism’: Causes and consequences for immigration policy attitudes in the United States’ (DPhil thesis, University of Iowa 2010) 1.

<sup>36</sup> H Betz ‘Facets of nativism: A heuristic exploration’ 2019 (53) *Patterns of Prejudice* 111.

This nativism expresses itself in many different forms. The most common and divisive expression of nativism is economic nativism. Here, the assumption is that foreign workers take jobs from locals.<sup>37</sup> As is often said on social media, foreigners literally snatch food from the tables of South Africans.<sup>38</sup> The other reason for economic nativism is that it is often alleged that foreigners depress wage levels within markets.<sup>39</sup> In South Africa, this debate is not new. The Minister of Employment and Labour, Thulani Nxesi, has recently stated that the government is drafting new regulations to limit numbers of foreign workers in South Africa. Potential industries being considered include; the hospitality sector, restaurants, security, farming and agriculture.<sup>40</sup> The Minister argued that the reason for this is that employers target ‘these foreign nationals’ with the intention of paying them starvation wages, making them work long hours and sleep on top of shops. This illustrates that even at government level in South Africa, there is the belief foreigners are driving down wages and taking employment opportunities away from South Africans. This then leads to a formalisation of economic nativism.

## 1.5 THE SOCIO-ECONOMIC RIGHTS OF MIGRANT WORKERS IN SOUTH AFRICA

It is important to state that migrants in South Africa enjoy protection in both domestic law and international law. International human rights law provides an extensive framework for the protection of migrants despite their immigration status, while domestic law stratifies nation/state rights which are dependent on individual citizenship and immigration status, to which undocumented migrant workers have limited rights.<sup>41</sup> Selected SERs as they relate to migrants in South Africa will be outlined below.

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<sup>37</sup> See J Goldstein & M Peters ‘Nativism or economic threat: Attitudes towards foreigners during the great recession’ 2014 (40) *International Interactions* 388.

<sup>38</sup> See generally, R Chaskalson, ‘Do Immigrants “Steal” Jobs in South Africa? What Does the Data Tell Us’ GroundUp <https://www.groundup.org.za/article/do-immigrants-steal-jobs-south-africa-what-data-tell-us/> viewed 2 December 2020.

<sup>39</sup> Betz (n34).

<sup>40</sup> Staff Writer (8 July 2020) ‘Government looking at new laws to limit the employment of foreigners in South Africa’ *BusinessTech* <https://businesstech.co.za/news/business/414413/government-looking-at-new-laws-to-limit-the-employment-of-foreigners-in-south-africa> viewed 15 September 2020.

<sup>41</sup> A Bloch ‘The Right to rights? Undocumented migrants from Zimbabwe living in South Africa’ 2010 (44) *Sociology* 234.

## 1.5.1 International standards

### 1.5.1.1 The right to access to health

International human rights law recognises the right of every person, to enjoy the highest attainable state of health. This entails that migrants, regardless of their status, are entitled to the right to the highest attainable standard of health. This agreement is enshrined in a number of international documents. South Africa is a state party<sup>42</sup> to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides in article 12 that the state must recognise ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>43</sup>

Article 12(2) of the ICESCR further provides that the state must take necessary ‘steps to achieve the full realisation of this right, including the prevention, treatment and control of epidemic, endemic, occupational and other diseases’. This provision applies to all people within a jurisdiction without permitting discrimination on the basis of factors such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>44</sup>

The contents of the ICESCR are also reinforced in the Preamble to the Constitution of the World Health Organisation. It provides that the ‘enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’. This standard includes access to ‘health-care services, such as testing, diagnostics, care and treatment and referral as well as prevention and health promotion-related activities for Covid-19’<sup>45</sup> for all migrants, documented or undocumented.

### 1.5.1.2 Labour rights

International law further protects the rights of migrant workers through international labour standards. These demand that migrant workers are provided with fair working conditions, including; health care, social insurance programmes, and other basic entitlements. This is often not achieved as most

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<sup>42</sup> South Africa signed the ICESCR on 3 October 1994 and ratified it in January 2015.

<sup>43</sup> See ICESCR art 12.

<sup>44</sup> See ICESCR art 2(2).

<sup>45</sup> World Health Organisation (17 April 2020) ‘Preparedness, prevention, and control of coronavirus disease (covid-19) for refugees and migrants in non-camp settings’ [https://www.who.int/publications/i/item/preparedness-prevention-and-control-of-coronavirus-disease-\(covid-19\)-for-refugees-and-migrants-in-non-camp-settings](https://www.who.int/publications/i/item/preparedness-prevention-and-control-of-coronavirus-disease-(covid-19)-for-refugees-and-migrants-in-non-camp-settings) viewed 16 September 2020.

migrants rarely benefit from equal treatment and often struggle to gain access to social rights in destination countries.<sup>46</sup> One of the primary reasons for this is that many migrants work lowly jobs in industries such as construction, domestic work, agriculture and the hospitality industry.<sup>47</sup> In addition to this, most of their work is seasonal or part-time. This makes them easy targets for exploitation and abuse. Because they are outsiders of the nation/state, lacking the right to vote, they do not have the political capital to put the government under electoral pressure, so as to improve their situations.<sup>48</sup> Furthermore, it is important to note that, even at a more basic level, migrant workers find it difficult to insist on fair wages and working conditions.

The South African government has an obligation to ensure the respect of human rights including rights at work and international labour standards. South Africa has ratified a number of Conventions of the International Labour Organisation (ILO). These include, the Forced Labour Convention 29 of 1930, the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, the Right to Organise and Collective Bargaining Convention 98 of 1949, Equal Remuneration Convention 100 of 1951, Abolition of Forced Labour Convention 105 of 1957, Employment and Occupation Convention 111 of 1958, Minimum Age Convention 138 of 1973 and the Worst form of Child Labour Convention 182 of 1999.<sup>49</sup> The government must therefore ensure that migrant workers are afforded their labour rights so as to realise these international labour standards.

### 1.5.1.3 The right to social security

The right to social security is established in various international instruments. The non-justiciable International Declaration of Human Rights first provided for this right. Thereafter, it was provided for in the ICESCR. Article 9 of the ICESCR provides that ‘everyone’ has the right to social security including social insurance. This is an essential feature to a decent work approach<sup>50</sup> and

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<sup>46</sup> International Training Centre (16 April 2020) ‘Labour migration at the time of Covid-19’ <https://www.itcilo.org/stories/labour-migration-time-covid-19> viewed 16 September 2020.

<sup>47</sup> See J Cole & S Booth *Dirty Work: Immigrants in Domestic Service, Agriculture, and Prostitution in Sicily* (2007) 1.

<sup>48</sup> C Negi ‘Human rights violations of migrants workers in India during COVID-19 pandemic’ 2017 *Santaniello International* 1.

<sup>49</sup> South Africa has also ratified other Conventions such as the Labour Inspection Convention 81 of 1947, the Maritime Labour Convention 2006, the Work in Fishing Convention 188 of 2007, and the Domestic Workers Convention 189 of 2011.

<sup>50</sup> W van Ginneken ‘Extending social security: Policies for developing countries’ 2003 (142) *International Labour Review* 279.

a vital vehicle for attaining social and economic development. If an effective social security system is pursued, it may have the effect of reducing poverty and inequality, and promoting social inclusion.<sup>51</sup> Accordingly, this right is vital to migrant workers who are often not protected. It is also important for securing equality of treatment in social security for migrant workers.

#### 1.5.1.4 The right to food

The right to food is a human right recognised under international human rights law. It protects the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition.<sup>52</sup> Accordingly, article 11 of the ICESCR provides for this right. It is one of four rights that is deemed to be at the core of the ICESCR – the right to housing, primary health care, basic education, and food.<sup>53</sup> The UDHR further recognises this right in article 25. This notwithstanding, the right to food is one of the most violated international rights. This is because the realisation of this right is dependant on the economic circumstances of a country and the political will to ensure the enforceability of internationally recognised human rights.

### 1.5.2 Domestic law

#### 1.5.2.1 The rights to health care, food and social security

The Constitution of the Republic of South Africa, 1996 (Constitution of South Africa) provides in section 27 that:

- (1) Everyone has the right to have access to—
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>51</sup> K Hirose, M Nikac & E Tamagno *Social Security for Migrant Workers: A Rights-based Approach* (2011) 1.

<sup>52</sup> C Frison & P Claeys 'The right to food in international law' in P Thompson et al (eds) *Encyclopedia of Food and Agricultural Ethics* (2014) 1.

<sup>53</sup> P van Esterik 'The right to food; right to feed; right to be fed. The intersection of women's rights and the right to food 1999 (16) *Agriculture and Human Values* 226.

As a result of South Africa's complicated past, the provisioning of these rights has been skewed in terms of factors such as health, gender and socio-economic status.<sup>54</sup> The realisation of these rights must be made more equitable. The government is directed to take all available 'reasonable legislative measures or other measures, within its available resources', to ensure that each of these rights is progressively realised. The content of and parameters in which this must take place are not easily ascertainable.<sup>55</sup> If there are concerns around<sup>56</sup> the failure of the state to realise the right, section 8 of the Constitution empowers the courts to make decisions on matters of policy, including budgetary appropriations.

### 1.5.2.2 Labour rights

It is important to note that the Preamble to the Constitution of South Africa provides that South Africa belongs to all who live in it. This is inclusive of documented and undocumented migrant workers. The government must respect and promote the rights of all workers.<sup>57</sup> The Constitution of South Africa entrenches certain core labour rights. These are enshrined in section 23 of the Constitution of South Africa. In particular, it provides that 'everyone has a right to fair labour practices' and that 'every worker has the right to form and join a trade union', participate in activities of a trade union and strike.<sup>58</sup>

In addition to the rights provided for in the Constitution, a number of pieces of legislation give effect to the rights of workers. Benjamin sets out the principle statutes in the table below:<sup>59</sup>

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<sup>54</sup> K Pillay 'Tracking South Africa's progress on health care rights: Are we any closer to achieving the goal? 2003 (7) *Law, Democracy and Development* 56.

<sup>55</sup> C Ngwenya 'Access to health care services as a justiciable socio-economic right under the South African Constitution' 2003 (6) *Medical Law International* 16.

<sup>56</sup> C Ngwenya 'The recognition of access to health care as human right in South Africa: Is it enough?' 2000 (5) *Health and Human Rights* 28.

<sup>57</sup> Section 7(2) of the Constitution provides that 'the state must respect, promote and fulfil the rights in the Bill of Rights'.

<sup>58</sup> See section 23(1)-(2) Constitution of South Africa, 1996.

<sup>59</sup> P Benjamin 'Informal work and labour rights in South Africa' 2008 (29) *Industrial Law Journal* 1580.



<b>Statute</b>	<b>Labour Protection</b>
Labour Relations Act 66 of 1995	Freedom of association, organisational rights, collective bargaining, right to strike, and protection against unfair dismissal
Basic Conditions of Employment Act 75 of 1997	Hours of work, annual leave, sick leave, maternity leave, severance pay, notice pay, sectoral determinations
Employment Equity Act 55 of 1998	Anti-discrimination and affirmative action
Skills Development Act 97 of 1998	Skills development and training
Unemployment Insurance Act 63 of 2001	Unemployment and maternity benefits
Compensation for Occupational Injuries and Diseases Act 130 of 1993	Compensation for work-related injuries and diseases
Occupational Health and Health and safety in the workplace Safety Act 85 of 1993, Mine Health and Safety Act 29 of 1996	Health and safety in the workplace

The protection afforded within these instruments is however not available to all workers. Only workers qualifying with the definitions of the legislation are entitled to protection. The Basic Conditions of Employment Act (BCEA) defines the employees capable of protection as:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer.<sup>60</sup>

A similar definition of any employee is provided in section 213 of the Labour Relations Act (LRA).

This definition excludes self-employed workers, as many migrants are. As noted earlier, the scope of the labour rights of migrants under domestic law is much narrower than that under international law. Undocumented migrant workers are at a distinct disadvantage in terms of these laws. This is because the

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<sup>60</sup> Section 1 BCEA.

Immigration Act 13 of 2002 disallows the employment of migrant workers who are not in the possession of a valid work visa. Section 2(2) of the Act provides that the Department of Home Affairs shall ensure that no foreign national is employed and that foreigners employed, are employed in positions that meet the conditions set out in their temporary residence visas (TRVs). However, the court in *Discovery Health Limited v CCMA & Others*<sup>61</sup> provided that it was possible that illegal migrant workers can be recognised as employees in terms of the LRA.<sup>62</sup> It was said that:

Taking into account the provisions of s 23(1) of the Constitution, the purpose, nature and extent of relevant international standards and the more recent interpretations of the definition of ‘employee’ by this Court, I do not consider that the definition of ‘employee’ in s 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by the common law may be an ‘employee’ for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for ‘employees’, the fact that Lanzetta’s contract was contractually invalid only because Discovery Health had employed him in breach of s 38(1) of the Immigration Act did not automatically disqualify him from that status.<sup>63</sup>

This is an important judgment in protecting the rights of undocumented migrant workers in South Africa. It interprets the Constitution in a manner that accords with international standards and protections. It also ensures that undocumented migrant workers are afforded the requisite substantial and procedural fairness. Documented migrant workers, however, should in theory, receive the same employment law protection as citizens. By and large, this is the case. However, there are certain instances where injustices occur.

## 1.6 THE (NON)REALISATION OF THE SOCIO-ECONOMIC RIGHTS OF MIGRANT WORKERS UNDER COVID-19

The South African government has failed to adequately protect the SERs of migrant workers during the Covid-19 pandemic for a number of reasons. Firstly, a significant number of undocumented migrants work in the informal sector. This is because they are yet to regularise their stay and are unable to find work in the formal economy. It is estimated that the informal economy (shadow economy)

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<sup>61</sup> (2008) *ILJ* 1480 (LC).

<sup>62</sup> (n61) at para 49.

<sup>63</sup> *Ibid.*

employs about 2 million people, just under 20% of the total employment.<sup>64</sup> Those in this sector did not qualify for pay-outs from the UIF because they were not formally employed.

Payments for UIF were made through the Covid-19 Temporary Employer Relief Scheme (C-19 TERS) administered through the Department of Labour Notice 215 of 2020 (C-19 TERS Notice).<sup>65</sup> Section 3.6 of the Notice provides that ‘qualifying employees will receive a benefit calculated in terms of sections 12 and 13 of the [Unemployment Insurance Act] UI Act...’.<sup>66</sup> These benefits, however, as provided in section 2.1.1(a) of the C-19 TERS Notice, were only paid to contributors who lost their income during the Covid-19 pandemic. This is in line with section 2 of the UI Act in which it stipulates that UIF benefits only accrue to contributors.

The above notwithstanding, South Africans who were in the informal sector and did not qualify for UIF however qualified for an unemployment grant (Covid-19 grant). This grant was paid out to individuals who were unemployed and not receiving any other form of social grant or UIF payment. The aim of this grant was to address the deepening poverty, increase in hunger and devastating human and social effects of the pandemic for citizens in the informal sector.

It is unsurprising that the decision to exclude non-citizens from the Covid-19 grant was challenged in the case of *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others*.<sup>67</sup> In this case, the Scalabrini Centre brought an application on an urgent basis for the court to determine whether asylum seekers and social permit holders had been lawfully excluded from receiving social assistance in terms of the distress grant for those affected by Covid-19.<sup>68</sup> It was argued that the exclusion was arbitrary, irrational and unreasonable and violated the constitutional rights to equality, dignity and social protection of lawful asylum seekers and special permit holders. The Minister of Social Development had announced that the grant would only be available to South African citizens, permanent residents and refugees who were affected by the Covid-19 disaster.

In analysing the matter, the court looked at various rights which were potentially affected by the decision of the state. These included, the right of

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<sup>64</sup> M Rogan & C Skinner (12 September 2019) ‘South Africa’s informal sector creates jobs but should not be romanticised’ *The Conversation* <https://theconversation.com/south-africas-informal-sector-creates-jobs-but-shouldnt-be-romanticised-122745> viewed 17 September 2020.

<sup>65</sup> It is important to note that this Notice has been amended several times.

<sup>66</sup> Act 63 of 2001.

<sup>67</sup> (22808/2020) [2020] ZAGPPHC 308.

<sup>68</sup> (n67) at para 6.

access to social assistance, the right to equality and the right to human dignity. In relation to SERs, the courts had to deal with the issue of the right of access to social security. As noted earlier, this right is provided for in section 27 of the Constitution which provides that ‘everyone has the right to have access to social security, including, if they are unable to provide for themselves and their dependants, appropriate social assistance’.<sup>69</sup>

The fundamental question to be determined in this regard was whether there was a just reason for the exclusion of asylum seekers and social permit holders. The court found that these classes of persons were also not able to escape the effects of Covid-19. They had also been subject to the lockdown imposed on South Africa and were unable to move because of the lockdown and other circumstances from their home country. For this reason, the court found that it was irrational and unreasonable to use a person’s immigration status as a criterion for the eligibility of the grant.

While the right to equality is a civil and political right (CPR), the court analysed this particular right in the context of SERs. The court quoted a section of *Khosa and Others v Minister of Social Development and Others*<sup>70</sup> that provided that:<sup>71</sup>

Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to ‘everyone’ being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.

In *Khosa*, Mokgoro J directly linked the right to social assistance with the right to equality. The court in *Scalabrini Centre* noted that based on the reasoning in the *Khosa* judgment, it could not be argued that only citizens, permanent residents or residents were entitled to the Covid-19 relief grant as it would be a direct violation of section 9(1) of the Constitution of South Africa.<sup>72</sup>

The court went on to clarify the persons referred to in the judgment. It noted that an asylum seeker was a person whose application for refugee status in terms of section 22 of the Refugees Act 130 of 1998 had not been finalised. They are then issued with an asylum visa which allows them to be in the country temporarily. Such persons were entitled in terms of section 21 of the same Act to make such application. In contradistinction, special permit holders are persons

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<sup>69</sup> Section 27(1)(c) Constitution of South Africa.

<sup>70</sup> 2004 (6) SA 505 (CC).

<sup>71</sup> (n70) para 42.

<sup>72</sup> (n70) para 27.

whose applications were lawfully processed by the state and granted lawful stay in South Africa. The court noted these as being:

- (1) The Angolan Special Dispensation Permit awarded to Angolans who previously had refugee status but were now awarded stay until 31 December 2021;
- (2) the Zimbabwe Exemption Permits are valid until December 2021 which were issued to undocumented Zimbabwean migrants to regularise their stay; and
- (3) the Lesotho Exemption Permit that is valid for four years beginning 1 January 2020 which was granted to Lesotho nationals studying, working or running businesses in South Africa.

Similar to the right to equality, the right to dignity is cross-cutting and indispensable to SERs. Accordingly, the court found that the right to dignity of qualifying asylum holders and special permit holders had been violated because the government failed to consider the desperate circumstances, in particular, socio-economic conditions that they found themselves in. The court gave the Minister of Social Development 5 days to quantify the cost of further extending the grant to these categories and another five days to publish amended regulations.

Since the judgment, the Department of Social Development has indicated that the cost estimate of making the Covid-19 grant available to qualifying asylum holders and special permit holders is pegged at around R700 million.<sup>73</sup> To date however, the process for receiving the grants has been slow, with the process further complicated by alleged xenophobic officials who make processing difficult.<sup>74</sup> It is, however, worth noting that the general sluggishness in the processing of the Covid-19 is not unique to qualifying foreign nationals, but also to citizens.

This case is of vital importance because it highlights the importance of the need for non-discrimination in the provision of social protection and social assistance to migrants. They find themselves in the most desperate positions as a result of the unfavourable conditions that unfold for foreigners in unfamiliar jurisdictions.

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<sup>73</sup> See K Ngoepe & WA Afrika (21 June 2020) 'Sassa to spend R700m providing refugees with the R350 Covid-19 relief grant' *IOL News* <https://www.iol.co.za/sundayindependent/news/sassa-to-spend-r700m-providing-refugees-with-the-r350-covid-19-relief-grant-49703342> viewed 16 November 2020.

<sup>74</sup> K Mafolo (23 October 2020) 'SA Human Rights Commissioner to speak to Labour Department on refugee Covid-19 grants' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-10-23-sa-human-rights-commissioner-to-speak-to-labour-department-on-refugee-covid-19-grants/> viewed 16 November 2020.

The second reason why it is argued that the South African government has not done enough to protect migrant workers is that those migrants who have regularised their stay and have valid visas allowing them to live and work in South Africa have found it difficult to access the UIF funds. These funds are essential to the realisation of their SERs. The Employment and Labour Department has confirmed this, stating that payments to foreigners take longer because of the multi-layered process used to capture their information.<sup>75</sup> In addition, claims by foreign nationals are also subjected to clearance from the Department of Home Affairs (DHA). The rationale for this is that checks by the DHA will help in ensuring that payment is made to authentic and deserving beneficiaries.

One restaurant asked for comment in May 2020, provided information that out of its 36 staff members, 12 had been paid, with none of the foreign nationals having received payment.<sup>76</sup> However, UIF Commissioner, Tebogo Maruping, has assured the public that contributing foreigners will have their claims processed. He noted that –

the Fund paid an amount of R 275 139 235 to 11 637 employers with 65 823 foreign national workers standing to benefit. This is in addition to 23 000 paid last week, and in total 88 823 foreign national workers have been paid to the tune of R375 139 235.<sup>77</sup>

To date however,<sup>78</sup> R1.6 billion has been paid to documented and declared foreign nationals.

Legally, the UIF is now mandated to make payments to foreign workers including migrants. This emerges from very important judgements which have shaped the legislative framework in this regard.

The first case is that of *Saddiq v Department of Labour (Vereeniging) and Others*.<sup>79</sup> This matter involved an asylum seeker who had been contributing to the UIF fund for three years and subsequently lost his employment. Despite his monthly contributions, when he approached the Department of Labour to claim his UIF benefits, he was prevented from submitting a claim on the basis that he did not have a valid South African identity number. On the 4<sup>th</sup> of July 2017, the Equality

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<sup>75</sup> Go-Legal (11 June 2020) ‘Unemployment Insurance Fund Covid-19 claims under the spotlight’ <https://www.golegal.co.za/foreign-national-uif-covid/> viewed 18 September 2020.

<sup>76</sup> J Mahlokwane (11 May 2020) ‘Restaurants frustrated by lack of UIF payments’ *IOL News* <https://www.iol.co.za/pretoria-news/restaurants-frustrated-by-lack-of-uif-payment-47810242> viewed 18 September 2020.

<sup>77</sup> Go-Legal (n75).

<sup>78</sup> This is as of 30 September 2020.

<sup>79</sup> Unreported judgment of the Equality Court for the sub-district of Emfuleni, held at Vereeniging, Case No EQ04/2017.

Court handed down a judgment which ordered that the complainant be paid the UIF benefits owed to him and that the respondent amend their system to allow asylum seekers to be compensated.

While the Court in the *Saddiq* case did not address whether Regulations 1 and 2 of the Regulations to the Unemployment Insurance Act 63 of 2001 were unconstitutional to the extent that they barred asylum seekers from claiming UIF benefits, this question was dealt with in the case of *Musanga and Others v Minister of Labour and Others*.<sup>80</sup> The applicants, similar to those in *Saddiq*, were prevented from submitting UIF claims following their dismissal, having contributed for many years. The reason for this was the same, namely that they lacked South African identity numbers. In dealing with the matter, the court came to the finding that the aforesaid regulations were unconstitutional. The approach in *Saddiq* was correct because the Equality Court was sitting as a magistrate's court and was prohibited in terms of section 170 of the Constitution from making a pronouncement on constitutional issues.

Accordingly, on the 14<sup>th</sup> of February 2020, Regulation 1 was amended in line with the directive of the High Court.<sup>81</sup> Section 2 of the Unemployment Insurance Amendment substitutes the words identity document in Regulation 1 of the Regulations with the text reading that:

'identity document' means a 13 digit bar-coded RSA identity document and or an RSA bar -coded passport, and includes valid foreign identity documents and passports, as well as permits and other identifying documents contemplated in or issued in terms of the Refugees Act, 1998 (Act No.130 of 1998).

This has led to a change in approach to the payment of foreign workers during the Covid-19 crisis. Nevertheless, bureaucratic procedures still impede the timeous processing of these payments. These should be streamlined by the government to ensure that migrant workers are not unnecessarily disadvantaged.

The third reason why the government has failed to protect migrant workers is that the C-19 TERS excludes employers who did not contribute to the fund and undocumented migrants. However, many migrant workers are employed as domestic and farm workers. As a result of the precarious nature of their employment, these are some of the worst affected individuals as there are high levels of non-compliance in these sectors by their employers.<sup>82</sup> This is because

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<sup>80</sup> Unreported judgment of the North Gauteng High Court (Pretoria), Case No 29994/18.

<sup>81</sup> See GG 43023 of 14 February 2020 GN R173.

<sup>82</sup> T Broughton (27 May 2020) 'Workers whose employers did not register them for UIF can now apply for funding' *Ground Up* <https://www.groundup.org.za/article/covid-19-workers-whose-employers-did-not-register-them-uif-can-now-apply-funding/> viewed 18 September 2020.

many employers do not register their workers for UIF. While there have been amendments to the regulations to include workers who should have received benefits, this remains difficult to administer as offending employers may be reluctant to provide documentation.

Furthermore, as noted above, undocumented migrants will not receive payment. This is because the amendments brought about by the *Saddiq*<sup>83</sup> decision only include those migrants that are documented. A generous interpretation of *Discovery Health Limited v CCMA & Others*<sup>84</sup> where it was held that an illegal immigrant could be considered as an employee, could lead us to the conclusion that there is nothing preventing an illegal immigrant, who is recognised as an employee, from claiming UIF. This is somewhat debatable and would need to be argued in a court of law to find an accurate legal position.

The fourth reason is that the government has not taken enough action to protect migrant workers and foreigners more broadly. There have been reports of destitute foreign nationals being turned away from shelters because they did not have a South African identity document. In several provinces, there were reports that food parcels that were distributed during the pandemic to avert hunger were only being given upon presentation of a South African identity document. In one report, a woman stated that:

The councillor was walking around the area registering people. When I asked that I also be registered, he said that was not possible because I am not a South African.<sup>85</sup>

While the government has denied that this is its official position, the failure to take strong action against such unsavoury practices put many foreign nationals at risk of hunger. A well-known dog walker in Sea Point, Cape Town, took his own life after suffering from poverty and hunger as a result of the lockdown and failing to receive social assistance.<sup>86</sup> The government has to take necessary action to ensure that the SERs of all who reside in South Africa, including migrants, documented, or undocumented, are protected and promoted, to prevent unnecessary loss of life and untenable living conditions.

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<sup>83</sup> *Saddiq* (n79).

<sup>84</sup> *Discovery Health* (n61).

<sup>85</sup> T Monama (17 April 2020) 'We're denied food parcels as we're not South Africans, claim foreigners' *IOL News* <https://www.iol.co.za/the-star/news/were-denied-food-parcels-as-were-not-south-africans-claim-foreigners-46824060> (viewed 18 September 2020).

<sup>86</sup> R Grobler (8 June 2020) 'Beloved Sea Point dog walker seemingly takes own life as lockdown drives him to poverty' *News24* <https://www.news24.com/news24/SouthAfrica/News/beloved-sea-point-dog-walker-seemingly-takes-own-life-as-lockdown-drives-him-to-poverty-20200608> viewed 18 September 2020.



Finally, the government, especially at the beginning of the Covid-19 pandemic, did not take sufficient steps to ensure that migrants, especially without a regularised stay, are not turned away from hospitals or Covid-19 testing centres. Some undocumented migrants could not obtain treatment because they did not have legal papers to be in the country.<sup>87</sup> This made it difficult for undocumented migrants to present themselves at hospitals and testing centres because they feared deportation. The healthcare system must operate outside of immigration laws and the pandemic cannot be used as a reason to hunt down illegal migrants.<sup>88</sup> It goes against section 27 of the Constitution as well as various international instruments that provide that everyone has the right to have access to healthcare. Prevention, testing and treatment should be made available to everyone regardless of nationality or immigration status.<sup>89</sup> This is vital in ensuring the human rights of everyone in South Africa as envisioned by the Constitution.<sup>90</sup>

Given the above arguments, it is important to note that, beyond the human rights dimension and the ensuing arguments for inclusion and non-discrimination, there are also equally forceful and related arguments, for which this debate would be incomplete without considering. These focus on matters such as public health goals in addressing the spread and effects of Covid-19 and the status of foreign nationals in South Africa. The main point here is that, without support, migrants would suffer the hard consequences of lockdown. They would be a risky group that will break lockdown regulations in search for survival. In turn, they would be arrested, putting pressure on the justice system. Consequently, this would exacerbate existing tensions between migrants and locals who believe that migrants are responsible for most of the crime in South Africa. Of course, these statements are in fact and principle not true.

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<sup>87</sup> R Adeola (20 April 2020) 'Letter: Migrants, undocumented or not, also need help during SA's Covid-19 crisis' *The Star* <https://www.iol.co.za/the-star/opinion-analysis/letter-migrants-undocumented-or-not-also-need-help-during-sas-covid-19-crisis-46922231> viewed 14 September 2020.

<sup>88</sup> S Ekambaram (29 April 2020) 'Covid-19 is not a reason to hunt down illegal immigrants' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-29-covid-19-is-not-a-reason-to-hunt-down-illegal-immigrants> viewed 18 September 2020.

<sup>89</sup> See A Mbiyozo (8 April 2020) 'Covid-19 responses in Africa must include migrants and refugees' *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-04-08-covid-19-responses-in-africa-must-include-migrants-and-refugees/> viewed 18 September 2020.

<sup>90</sup> The Constitution of South Africa as discussed above, provides that 'South Africa belongs to all who live in it' (Preamble). Naturally, this includes migrants, documented or otherwise.

It is estimated that only 7.5% of the prison population are foreign nationals.<sup>91</sup> Therefore, the notion of non-discrimination within the human rights arguments, has in fact underlying pragmatic, functional and practical reasons, beyond simply wanting human beings to be treated equally – such as ensuring the success of the Covid-19 measures and protecting the standing of migrants in a society where their presence is often challenged.

## 1.7 CONCLUSION

Migrants workers in South Africa have faced extra-ordinary challenges, both socially and economically during the Covid-19 crisis. The challenges of migrant workers in South Africa are not new. They are well documented, dating back several decades. By and large, as described in the earlier parts of this paper, they are based on the perception of citizens towards migrants. These attitudes are drawn from very controversial understandings of citizenship and belonging. This then translates into a culture of nativism at all levels, including individual, organisational, and national levels.

Nativism expressed through government apparatus is perhaps the crudest of these. Unpalatable perceptions are formalised through several government laws and policies which disenfranchise those who are foreign born. Migrant workers in South Africa, documented or otherwise, have suffered greatly. Their challenges have further deepened under the Covid-19 crisis.

As discussed in this chapter, migrant workers have been excluded from many of the social responses from government, and where they have been accommodated, the process to receive such assistance has been burdened with bureaucratic red tape. There is an urgent need for the government to ensure that the SERs of migrant workers are realised. It is suggested that all existing relief measures, where possible, be amended to include migrant workers. Furthermore, cumbersome processes for migrant workers to gain access to available packages such as UIF need to be streamlined to remove any unnecessary delays.

More broadly, however, there is a general need for a shift in the manner in which migrants are viewed in the country. The perceptions that migrants are a burden to the economy and put unnecessary pressure on scarce resources have to be rethought. These ideas are naïve and pose a danger to migration in a global economy. The consciousness that brought us to independence should be regained. Communities must embrace the value of ubuntu as fundamental to confronting our challenges. An awareness must therefore be created of the need

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<sup>91</sup> G Newham (15 November 2020) 'Do foreigners really commit SA's most violent crimes?' *Institute For Security Studies* <https://issafrica.org/amp/iss-today/do-foreigners-really-commit-sas-most-violent-crimes> viewed 15 November 2020.

for a deeper morality. Beyond this, the government must ensure that its domestic and international obligations towards the realisation of the welfare of migrants are fulfilled.

At an institutional level, the South African Human Rights Commission (SAHRC) needs to do more to ensure the promotion of the rights of migrant workers. The SAHRC expressed concern over practices such as the distribution of food parcels using South African IDs, which many migrant workers do not have. It has simply monitored the situation without instituting any particular interventions with the relevant authorities. The impact of overlooking migrants in social responses is that many were put at risk of hunger and needed stronger action in challenging government processes.

# The dual crisis of forced evictions and Covid-19 in Kenya: Rethinking judicial enforcement and civic engagement on the right to housing

Lily Mburu\*

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## ABSTRACT

Access to adequate housing is an ongoing challenge in Kenya. An estimated two thirds of the capital's population resides in informal settlements in Nairobi. The Covid-19 pandemic magnified the precarious state of access to adequate housing ensuing from forced evictions of the urban poor and demolition of their houses during the pandemic. Despite constitutional guarantees, the conundrum on enforcement of the right to housing has been compounded by government's failure to respect court orders prohibiting forced evictions, as exposed by the Covid-19 pandemic. This chapter examines the supervisory jurisdiction of Kenyan courts on the right to housing. An exploration of the role of

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civic engagement in the right to housing foreshadows the judicial analysis along with a recognition of the limitations of law in addressing the enforcement of socio-economic rights. This buttresses the argument advanced on the centrality of dialogue with rights claimants and civil society as a critical pathway towards enhancing enforcement of the right to housing. Lessons are gleaned from South Africa's jurisprudence on supervisory jurisdiction and proposals proffered on repositioning civic actors in the continuum of dialogue on the right to housing.

## **2.1 INTRODUCTION**

The novel coronavirus (Covid-19) pandemic and its profound impacts on the most vulnerable groups in society has considerably aggravated existing inequalities. The combination of Covid-19 with other crises that preceded the pandemic has revealed to a greater extent than usual, the magnitude of systematic deprivation for those on the margins of society. Forced evictions in Kenya is one such crisis whose multiplier effect was amplified during the pandemic. An underlying challenge has proven to be the chasm between the constitutionally guaranteed right to housing and the susceptibility of the urban poor to forced evictions. This chapter explores the integral role of civic engagement in enforcing the right to housing, predicated on recognition of the limitations of the law and legal strategies in this pursuit as well as an attempt to locate judicial enforcement within broader struggles for social justice. These struggles often precede litigation on socio-economic rights, subsist during litigation and outlive litigation outcomes. The chapter examines the supervisory role of Kenyan courts in enforcing the right to housing and makes a case to emphatically situate the voice of civic actors within judicial dialogue. Civic actors including marginalised groups claiming their rights in courts should not be treated as mere spectators and neither should their voices be dislocated in the dialogue between the judiciary and the executive.

### **2.1.1 The emergence of Covid-19 and state responses to the pandemic**

The World Health Organisation (WHO) declared the outbreak of Covid-19 as a pandemic on 11 March 2020, spurring global emergency responses to curb the unprecedented spread of the virus.<sup>1</sup> State responses to the pandemic included the enactment of 'emergency laws, nationwide lockdowns and restrictions on

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<sup>1</sup> World Health Organisation (11 March 2020) 'WHO Director-General's opening remarks at the media briefing on COVID-19' <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> viewed 15 July 2020.

movement.<sup>2</sup> In the early stages of the pandemic, the Kenyan government issued a number of public health and public order regulations as part of measures to contain the pandemic. These regulations included a dusk to dawn curfew, closure of international borders and restriction of internal movement across county borders.<sup>3</sup> These containment measures adversely affected low-income workers in both the formal and informal sectors of the economy leading to job losses.<sup>4</sup> As part of economic stimulus measures, the Kenyan government sought to cushion vulnerable groups from the adverse economic impacts of the pandemic by instituting tax reductions for workers in the lowest income tax brackets, reductions in commodity taxes and cash transfers targeting the elderly and other vulnerable groups.<sup>5</sup>

The Covid-19 pandemic has been described as a ‘systemic human development crisis’ with profound impacts on the socio-economic dimensions of development.<sup>6</sup> The urban poor are among vulnerable groups that were disproportionately affected by the pandemic through deprivation of shelter amid a ‘global increase in forced evictions’.<sup>7</sup> At the height of the pandemic in Kenya, state authorities forcefully evicted over 8,000 people from two informal settlements with hundreds of families forced to sleep outdoors for weeks, which in turn increased their exposure to Covid-19.<sup>8</sup>

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<sup>2</sup> Civicus (5 October 2020) ‘Civic freedoms and the Covid-19 pandemic: A snapshot of restrictions and attacks’ <https://monitor.civicus.org/COVID19/> viewed 7 October 2020.

<sup>3</sup> Kenya Law (7 April 2020) ‘Public legal information on Kenya’s response to COVID-19’ <http://kenyalaw.org/kenyalawblog/kenyas-response-to-covid-19/> viewed 15 July 2020.

<sup>4</sup> E Owino (19 June 2020) ‘Socioeconomic impacts of Covid-19 in Kenya’ *Devinit.org* <https://devinit.org/resources/socioeconomic-impacts-covid-19-kenya/> viewed 20 August 2020.

<sup>5</sup> M Chebii & P Oyunge (20 August 2020) ‘Kenya enhances its cash transfer programmes in response to the COVID-19 Pandemic’ *Fsdkenya.org* <https://fsdkenya.org/blog/kenya-enhances-its-cash-transfer-programmes-in-response-to-the-covid-19-pandemic/> viewed 20 September 2020.

<sup>6</sup> United Nations Development Programme (2020) ‘COVID-19 and human development: Assessing the crisis, envisioning the recovery’ [http://hdr.undp.org/sites/default/files/covid-19\\_and\\_human\\_development\\_0.pdf](http://hdr.undp.org/sites/default/files/covid-19_and_human_development_0.pdf) viewed 25 September 2020.

<sup>7</sup> Office of the United Nations High Commissioner for Human Rights (18 Aug 2020) ‘Ban evictions during Covid-19 pandemic, UN expert urges’ <https://reliefweb.int/report/world/ban-evictions-during-covid-19-pandemic-un-expert-urges> viewed 25 September 2020.

<sup>8</sup> J Nnoko-Mewanu & N Abdi (10 June 2020) ‘Nairobi evicts 8,000 people amidst a pandemic and curfew’ *Human Rights Watch* <https://www.hrw.org/news/2020/06/10/nairobi-evicts-8000-people-amidst-pandemic-and-curfew> viewed 20 July 2020.

Forced evictions of the urban poor living in informal settlements in Kenya has been a longstanding problem. Over 60% of the capital's population in Nairobi lives in these settlements commonly referred to as slums – which occupy a meagre 1% of the city's land mass and are characterised by makeshift structures, poor sanitation and limited access to basic amenities such as clean water and healthcare facilities.<sup>9</sup> Mombasa, Kenya's second largest city has similar urban development challenges with over 65% of the population living in informal settlements.<sup>10</sup> The looming threat of forced evictions is an all too familiar reality for slum dwellers whose pre-existing lack of security of tenure increased their susceptibility to evictions in the wake of the Covid-19 pandemic.

An ensuing challenge from the pandemic in Kenya was its 'securitisation' stemming from heavy handed and violent policing responses in enforcing government directives. This resulted in several deaths and injuries that disproportionately affected the urban poor facing multiple violations.<sup>11</sup> A critique of the early response by the Kenyan government to Covid-19 was its approach of addressing the pandemic as a 'law enforcement' problem instead of a public health one—the latter requiring a more nuanced approach in 'fighting the virus with the people, rather than fighting the people'.<sup>12</sup> Given the indispensability of housing in mitigating Covid-19 risks, the violent demolition of houses exemplifies how responses to the pandemic supplanted care with security.<sup>13</sup> Protests held in informal settlements to demand justice for victims of police brutality are also instructive of the securitisation approach.<sup>14</sup> Globally, civil society concerns on the pandemic being used as 'a pretext for imposing unjustified restrictions' led

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<sup>9</sup> Amnesty International (12 June 2009) 'Kenya: The unseen majority: Nairobi's two million slum-dwellers' <https://www.amnesty.org/en/documents/AFR32/005/2009/en/> viewed 25 September 2020.

<sup>10</sup> Amnesty International (5 October 2015) 'Driven out for development: Forced evictions in Mombasa, Kenya' <https://www.amnesty.org/download/Documents/AFR3224672015ENGLISH.PDF> viewed 25 September 2020.

<sup>11</sup> J Ashly (28 April 2020) 'Covid-19 boosts police power and brutality in Kenya' *Newframe* <https://www.newframe.com/covid-19-boosts-police-power-and-brutality-in-kenya/> viewed 20 July 2020.

<sup>12</sup> K Wairuri (3 June 2020) 'Kenya: We cannot police ourselves out of the pandemic' *Africanarguments.org* <https://africanarguments.org/2020/06/03/kenya-we-cannot-police-ourselves-out-of-the-pandemic/> viewed 15 July 2020.

<sup>13</sup> E Duncan (21 September 2020) 'Justifying and resisting evictions in Kenya: The discourse of demolition during a pandemic' *Tufts.edu* <https://sites.tufts.edu/reinventingpeace/2020/09/21/justifying-and-resisting-evictions-in-kenya-the-discourse-of-demolition-during-a-pandemic/> viewed 1 November 2020.

<sup>14</sup> Al Jazeera (8 June 2020) 'Never again': Protesters march against Kenyan police brutality' <https://www.aljazeera.com/news/2020/06/08/never-again-protesters-march-against-kenyan-police-brutality/> viewed 15 July 2020.

to calls for transparency and accountability of government responses in line with international human rights obligations.<sup>15</sup> Conducting forced evictions in the midst of the Covid-19 pandemic arguably contravened human rights obligations on the right to housing.

## 2.2 LEGAL STANDARDS ON THE RIGHT TO HOUSING

The 2010 Constitution of Kenya is described as being ‘transformative’ with the entrenchment of socio-economic rights having marked a significant departure from the post-independence constitution and heralding a promising era for the realisation of these rights.<sup>16</sup> Article 43(1)(b) of the constitution guarantees the right to accessible and adequate housing, and to reasonable standards of sanitation. This provision is subject to article 21(2), which provides that the state shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the socio-economic rights guaranteed under article 43.

Kenya has ratified the International Covenant on Economic Social and Cultural Rights (ICESR), which recognises the right to housing.<sup>17</sup> The rights under the covenant are applicable in conjunction with the obligation under article 2(1) requiring states to take steps towards progressive realisation of these rights subject to availability of resources and to take ‘all appropriate means, including particularly the adoption of legislative measures.’ The United Nations Committee on Economic and Social Rights (CESR) has set out normative standards of the right to housing in two general comments on the right to adequate housing and forced evictions.<sup>18</sup> These standards are applicable in Kenya pursuant to the constitutional recognition of ratified treaties and conventions as well as general rules of international law.<sup>19</sup>

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<sup>15</sup> Civicus (16 April 2020) ‘We are in this together, don’t violate human rights while responding to COVID-19’ <https://www.civicus.org/index.php/media-resources/news/4379-civil-society-s-call-to-states-we-are-in-this-together-don-t-violate-human-rights-while-responding-to-covid-19> viewed 15 July 2020.

<sup>16</sup> E Kibet & C Fombad ‘Transformative constitutionalism and the adjudication of constitutional rights in Africa’ (2017) 17 *AHRLJ* 340.

<sup>17</sup> Article 11 (1) recognises the ‘right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’

<sup>18</sup> United Nations Committee on Economic, Social and Cultural Rights (13 December 1991) ‘General Comment No. 4: The right to adequate housing (art 11 (1) of the Covenant)’ UN Doc E/1992/23 and ‘General Comment No. 7: The right to adequate housing (art 11 (1): Forced evictions)’ (20 May 1997) UN Doc E/1998/22.

<sup>19</sup> Article 2 (5) and (6) Constitution of Kenya 2010.



The CESR has advanced a broad interpretation of the right to housing that goes beyond merely providing physical shelter and encompasses ‘the right to live somewhere in security, peace and dignity’.<sup>20</sup> The Committee has stated that human dignity is foundational to all the rights expressed in the ICESCR and that the right to housing is interlinked with civil and political rights such as freedom of expression, freedom of association and public participation<sup>21</sup> Legal security of tenure is recognised as an important aspect of protecting persons against ‘forced eviction, harassment and other threats’ and state parties are required to take ‘immediate measures’ to confer security of tenure to persons lacking such legal protection.<sup>22</sup>

The CESR defines forced evictions as ‘the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’.<sup>23</sup> This definition precludes evictions that are conducted lawfully and in accordance with international human rights obligations.<sup>24</sup> Due to the nature of forced evictions, the state’s obligation under article 2(1) of the ICESCR on progressive realisation, ‘will rarely be relevant’ with respect to prohibition of forced evictions.<sup>25</sup> The resource obligation is however applicable in ensuring that those individuals who are evicted are provided ‘adequate alternative housing, resettlement or access to productive land’ in line with the requirement that evictions should not result in homelessness.<sup>26</sup> The obligation under article 2(1) on adoption of legislation is indispensable towards preventing forced evictions and meeting the state obligation to protect the right to housing. These legislative measures should provide security of tenure and establish strict regulations for conducting evictions.<sup>27</sup> Additionally, states are required to ensure that measures taken to prevent forced evictions apply to both state agents and private entities.<sup>28</sup>

International guidelines on forced evictions provide further elaboration on state obligations. An important distinction is made between the negative state duty to prevent forced evictions and the positive duty to take measures

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<sup>20</sup> CESR General Comment No. 4 (n18) para 7.

<sup>21</sup> (n20).

<sup>22</sup> (n20) para 8 (a).

<sup>23</sup> CESR General Comment No. 7 (n18) para 3.

<sup>24</sup> (n18) para 8.

<sup>25</sup> (n18) This is buttressed by the state obligation under the International Covenant on Civil and Political Rights (ICCPR) to refrain from arbitrarily interfering with a person’s home.

<sup>26</sup> CESR General Comment No. 7 (n18) para 16.

<sup>27</sup> (n18) para 9.

<sup>28</sup> (n18) para 9.

to address poor housing conditions. State failure to undertake the latter leads to violations in forced evictions.<sup>29</sup> Fulfilling the right to housing requires state facilitation of rights holders to ‘participate actively, freely and meaningfully in the design and implementation of programmes and policies affecting them’.<sup>30</sup> Prior to evictions being conducted for purposes of development planning, persons likely to be affected should be accorded appropriate notice of eviction, access to relevant information and an opportunity to propose alternatives to the eviction.<sup>31</sup> States are obliged to consider all the proposed alternatives and ‘opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons’ during the planning process.<sup>32</sup> Evictions should only be conducted if ‘unavoidable and consistent with international human rights commitments protective of the general welfare’.<sup>33</sup> Procedural requirements for safeguarding human rights during the course of evictions include: ensuring that evictions are not conducted in a way that violates human dignity, protecting the needs of vulnerable groups such as women and children, use of proportionate force and refraining from conducting evictions ‘in inclement weather, at night, during festivals or religious holidays, prior to elections, or during or just prior to school examinations’.<sup>34</sup> Moreover, provision of alternative accommodation should be provided immediately following the eviction.<sup>35</sup>

Although the African Charter on Human and People’s Rights does not explicitly provide for the right to adequate housing, the African Commission on Human and Peoples’ Rights (ACHPR) has interpreted the right to housing as being connected to other rights in the Charter such as the right to health, property and protections conferred on families. Accordingly, the ACHPR has relied on the CESR general comments on the right to adequate housing and forced evictions in its jurisprudence.<sup>36</sup> A resolution by the ACHPR on the

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<sup>29</sup> UN Human Rights Council (2017) ‘Guidelines for the implementation of the right to adequate housing: Report of the special rapporteur on the right to adequate housing as a component of the right to an adequate standard of living’ A/HRC/43/43, 2 (17).

<sup>30</sup> (n29) 3 (21).

<sup>31</sup> UN Human Rights Council, ‘Basic principles and guidelines on development based evictions and displacement: Annex 1 of the report of the Special Rapporteur on adequate housing’ para 37 [https://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf) viewed 1 November 2020.

<sup>32</sup> (n31) paras 38–39.

<sup>33</sup> (n31) para 40.

<sup>34</sup> (n31) paras 47–49.

<sup>35</sup> (n31) para 52.

<sup>36</sup> UN Office of the High Commissioner for Human Rights (2014) Fact Sheet No. 25 (Rev 1) Forced Evictions <https://www.refworld.org/docid/5566d6744.html> viewed 1 November 2020.

right to housing urges state parties to halt all forced evictions and to carry out evictions only as a last resort while ensuring compliance with international and regional standards.<sup>37</sup> State parties are also urged to take ‘concrete measures to confer security of tenure’ in consultation with affected individuals.<sup>38</sup>

Kenya lacks a comprehensive legislative framework on the right to housing. As discussed later in this chapter, Kenyan jurisprudence has primarily evolved through constitutional interpretation of the right to housing and is guided by international and regional standards. The Evictions and Resettlement Procedures Bill (2012) is yet to be enacted by Parliament. Forced evictions during the Covid-19 pandemic renewed calls for enactment of the bill, which establishes mechanisms to conduct evictions and resettlement in conformance with the Constitution and international principles.<sup>39</sup> Although The Land Laws (Amendment) Act, 2016 introduced procedures to govern evictions in Kenya, the amendments fall short of the constitutional safeguards envisaged under the Evictions Bill.<sup>40</sup>

### 2.3 THE DUALITY OF COVID-19 AND FORCED EVICTIONS IN KENYA

Inadequate access to housing in slums in Kenya is an underlying marker of systemic deprivation stemming from ‘decades of failure by the state to develop comprehensive and coherent policies to address lack of security of tenure and access to essential services’ in the slums.<sup>41</sup> The risk of forced evictions is heightened by lack of adherence to due process by both the government and private entities as well as the use of excessive force alongside other human rights abuses during evictions.<sup>42</sup>

In the midst of the Covid-19 pandemic, the first round of forced evictions was conducted on 4 May 2020 in a settlement known as Kariobangi where over 7,000 residents were evicted from their homes.<sup>43</sup> Despite the court having

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<sup>37</sup> African Commission on Human and Peoples’ Rights (2012) ‘Resolution on the right to adequate housing and protection from forced evictions’ paras I-II <https://www.achpr.org/sessions/resolutions?id=258> viewed 1 October 2020.

<sup>38</sup> (n37) para IV.

<sup>39</sup> D Kiprono (22 May 2020) ‘Revive Shabbir Bill to end these inhumane evictions’ *Amnestykenya.org* <https://www.amnestykenya.org/revive-shabbir-bill-to-end-these-inhumane-evictions/> viewed 1 October 2020.

<sup>40</sup> OA Angote ‘Evictions in Kenya: Which way under the new Constitution and the Land Laws (Amendment) Act 2016?’ (2018) 2 *Journal of Conflict Management and Sustainable Development* 83 <https://journalofcmsd.net/wp-content/uploads/2018/07/Justice-Angote.pdf> viewed 1 October 2020.

<sup>41</sup> Amnesty International (n10) 3.

<sup>42</sup> Amnesty International (n10) para 12.

<sup>43</sup> Ashly (n 12).

issued an injunction on the Kariobangi eviction pending determination of the full hearing, the government conducted the eviction in contravention of the court order.<sup>44</sup> The Kariobangi residents were rendered homeless in the middle of the Covid-19 pandemic and ‘during one of the worst rainy seasons Kenya has experienced in decades’. This was also exacerbated by their loss of livelihood due to the adverse economic impacts of the pandemic.<sup>45</sup> By conducting the eviction during the rainy season and without providing alternative accommodation to the affected persons, the eviction demonstrably flouted international and domestic standards on evictions. The double crisis of the forced evictions in Kariobangi during the pandemic was considerably fuelled by government defiance of a court order protecting the vulnerable slum residents against forced evictions. This defiance was further exemplified by the issuance of a declaration designating the land in Kariobangi as a ‘protected area’ pursuant to existing legislation,<sup>46</sup> thus sounding a death knell to the pre-existing legal claims by the slum residents in court.

A second wave of evictions of over 1,000 residents of the Ruai informal settlement was conducted late in the night on 15 May 2020, forcing the affected residents to ‘sleep outside in cold and rainy weather’ during the pandemic.<sup>47</sup> This took place despite a government moratorium on evictions that had been issued one week prior to the Ruai eviction.<sup>48</sup> The government failure to provide alternative housing to the evictees was compounded by the dusk to dawn curfew and prohibition of movement across cities.<sup>49</sup> To further illustrate the gravity of the violations, human rights activists engaged in advocacy against the Kariobangi eviction faced threats and intimidation.<sup>50</sup> The UN special rapporteurs on the

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<sup>44</sup> Nnoko-Mewanu & Abdi (n9).

<sup>45</sup> J Ashly (17 June 2020) ‘Kenyans desperate after mass shack evictions’ *Newframe* <https://www.newframe.com/kenyans-desperate-after-mass-shack-evictions/> viewed 1 October 2020.

<sup>46</sup> A Chepkoech (17 July 2020) ‘Fate of Kariobangi evictees sealed, state declares area protected’ *Nation.africa* <https://nation.africa/kenya/news/fate-of-kariobangi-etictees-sealed-state-declares-area-protected-1900620> viewed 1 October 2020. See section 3 (1) of The Protected Areas Act 24 of 1953 which empowers the executive to designate protection status to ‘any area, place or premises [that appears] necessary or expedient in the interests of public safety and public order that special precautions should be taken to prevent the entry of unauthorised persons.’

<sup>47</sup> Nnoko-Mewanu and Abdi (n9).

<sup>48</sup> M Kinyanjui (17 May 2020) ‘State breaks promise, leaves thousands homeless in Ruai’ *The Star Kenya* <https://www.the-star.co.ke/counties/nairobi/2020-05-17-state-breaks-promise-leaves-thousands-homeless-in-ruai/> viewed 1 October 2020.

<sup>49</sup> (n48).

<sup>50</sup> (n48).

right to housing and on the situation of human rights defenders subsequently urged the Kenyan government to cease evictions during the pandemic and to protect human rights defenders who faced threats for advocating for the rights of evictees.<sup>51</sup> This notwithstanding, the government forcibly evicted other marginalised groups during the pandemic while its own moratorium subsisted.<sup>52</sup>

The disregard for human dignity during forced evictions is rooted in a systemic lack of empathy for the poor and vulnerable. This is reflected in the sentiments of a Kariobangi evictee who was quoted in a news article questioning why the government could not ‘wait until the pandemic [was] over to destroy [their] homes and lives.’<sup>53</sup> As fittingly inferred:

[H]uman compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.<sup>54</sup>

Such dialogue was non-existent for the evictees of Kariobangi and Ruai settlements upon whom justice was severely eluded. As aptly stated, the Covid-19 pandemic ‘revealed the stark reality that the social contract between the rulers and the ruled is broken. While the evictions would have still been unjust in a non-pandemic world, the pandemic amplifies our perception of the injustice infinitely’.<sup>55</sup>

The magnitude of suffering and loss experienced by hundreds of families evicted during the pandemic necessitates a rethinking of ways to ‘soften the rough edges of justice’. Centering the voice of rights claimants in the dialogue between the

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<sup>51</sup> UN Human Rights Office of the High Commissioner (22 May 2020) ‘COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders’ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25901&LangID=E> viewed 1 October 2020.

<sup>52</sup> S Cheron & J Njoroge (17 July 2020) ‘State goes against own moratorium, kicks thousands out of forest’ *Nation Africa* <https://nation.africa/kenya/news/state-goes-against-own-moratorium-kicks-thousands-out-of-forest-1874044> viewed 1 October 2020.

<sup>53</sup> Ashly (n12).

<sup>54</sup> Amnesty International (n10) quoting the High Court of Kenya in *John Samoei Kirwa & 9 others v Kenya Railways Corporation* HCCC 65 of 2004.

<sup>55</sup> L Fransechi (20 June 2020) ‘When the law falls silent: Evictions in the time of Covid-19’ *Nation Africa* <https://nation.africa/kenya/blogs-opinion/blogs/dot9/franceschi/when-the-law-falls-silent-evictions-in-the-time-of-covid-19-494198> viewed 1 October 2020.

judiciary and executive towards enforcing the right to housing is explored as one such way. An analysis of the historical trajectory of litigation and civic engagement on the right to housing in Kenya is undertaken in the rest of this chapter.

## 2.4 LITIGATION AND CIVIC ENGAGEMENT ON THE RIGHT TO HOUSING

Ten years after Kenya's progressive Constitution was passed, the enduring challenge of constitutionalism abounds. Yash Ghai in his writing on constitutionalism, rightly cautions against an overreliance on the promise of delivery by constitutions given that they 'seldom represent any continuity in the development of public power'.<sup>56</sup> Constitutionalism is instead engendered by the sustained work around mobilisation and use of the constitution – an endeavour that extends beyond the confines of the judiciary to politics and other spheres such as civic associations.<sup>57</sup> Jill Cotrell and Ghai opine that constitutionalism entails –

[T]he inculcation of a culture of respect for and discipline of the law, acceptance of rulings by the courts and other bodies authorised to interpret the law, giving effect to judicial decisions, acceptance of the limits on government, respecting and promoting human and collective rights as well as participation and empowerment of the people.<sup>58</sup>

Admittedly, 'the primary locus for claiming [socio-economic] rights is outside of courts, in social movements and historical struggles'.<sup>59</sup> Whereas this may appear contradictory in examining judicial enforcement, one can acknowledge the instrumental utility of the law without having any 'illusions about the law providing an all-encompassing framework for [socio-economic] rights'.<sup>60</sup>

Kenyan courts have historically served as a 'critical platform for the political mobilisation of disadvantaged people to demand justice'.<sup>61</sup> Public interest

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<sup>56</sup> Y Ghai 'Constitutionalism: African perspectives' in P Kameri-Mbote & C Odote (eds) *The Gallant Academic: Essays in Honour of H.W.O. Okoth-Ogendo* (2017) 149.

<sup>57</sup> J Cotrell and Y Ghai 'Constitutionalising socio-economic rights: A lifeline for the millennium spirit' in UNDPs *Accelerating achievement of MDGs by ways and means of economic and social rights* (2012) 29.

<sup>58</sup> (n57) para 30.

<sup>59</sup> B Porter 'The crisis of ESC rights and strategies for addressing it' in J Squires et al *The road to a remedy: Current issues in the litigation of economic, social and cultural rights* (2005) 45.

<sup>60</sup> (n59).

<sup>61</sup> Kenyans for Peace with Truth and Justice (KPTJ) (2015) 'A guide to public interest litigation in Kenya' 45 <http://kptj.africog.org/wp-content/uploads/2015/03/PIL-24032015.pdf> viewed 30 August 2020.

litigation has however been ‘part of broader struggles, to draw attention to the underlying structural issues that result in injustice, inequality and poverty’.<sup>62</sup> The pursuit of legal action has also served to catalyse mobilisation of rights claimants in demanding accountability from local authorities towards the provision of basic services such as water and security.<sup>63</sup> Community mobilisation is a critical factor in forestalling or stopping forced evictions. It is those affected by evictions and their associations that signal impending evictions. They are the ones who face bulldozers while rallying broader support towards their cause and engage government authorities to consider alternative plans.<sup>64</sup> Former Chief Justice Bhagwati of the Indian Supreme Court made some pertinent remarks in this regard:

[S]ocial action litigation is a necessary and valuable ally in the cause of the poor, but it cannot be a substitute for the organisation of the poor, development of community self-reliance and establishment of effective organisational structures through which the poor can combat exploitation and injustice, protect and defend their interests, and secure their rights and entitlements.<sup>65</sup>

Civil society<sup>66</sup> in Kenya has played a critical role on the twin fronts of litigation and civic mobilisation on socio economic rights and the right to housing is no exception. Muungano wa Wanavijiji, a slum dwellers movement in Kenya is illustrative of the dynamism of civic engagement on the right to housing. Muungano wa Wanavijiji emerged as a grassroots resistance movement against forced evictions of slum residents in Nairobi in the late 1990s. The government of the time described as ‘Kenya’s most oppressive and brutal’, was responsible for pervasive and violent evictions across the burgeoning slums in the country.<sup>67</sup> The movement’s resistance to forced evictions was combined with advocacy and campaigns in partnership with civil society organisations (CSOs).<sup>68</sup> At the turn of the new decade, Muungano began its evolution into a federation of settlement-based community savings scheme, shaped by ‘peer-to-peer exchanges’

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<sup>62</sup> (n61).

<sup>63</sup> (n61) para 8.

<sup>64</sup> L Farha *Forced Evictions: Global Crisis, Global Solutions* (2011) 72.

<sup>65</sup> S Budlender, G Marcus & N Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 101.

<sup>66</sup> The term civil society is used here to encompass the various formations of civic associations including community based organisations, social movements, non-governmental organisations and informal associations.

<sup>67</sup> K Lines & J Makau *Muungano Nguvu Yetu (Unity is Strength): 20 Years of the Kenyan Federation of Slum Dwellers* (2017) 20.

<sup>68</sup> (n67) 35.

with slum dweller movements in South Africa and India.<sup>69</sup> The peer exchanges also catalysed the movement towards community data collection through enumeration in slums, addressing a prevalent challenge of dearth in data on slum dwellers.<sup>70</sup> The first enumeration conducted by Muungano in the Huruma informal settlement led to upgrading of the settlement in what is described as ‘one of Muungano’s most enduring achievements’.<sup>71</sup> Muungano’s approach was fashioned on the idea that negotiating solutions on behalf of slum residents required an accountable movement with ‘leadership that had not only political sway, but was also representative and accountable’.<sup>72</sup> Such internal governance structures are a prerequisite for effective dialogue with government authorities. Likewise, initiating saving schemes and self-driven enumerations demonstrated the agency of slum dwellers as opposed to being viewed as mere ‘consumers of state solutions’.<sup>73</sup> Through Muungano’s advocacy efforts, the Nairobi county government gazetted the densely populated Mukuru informal settlement as a Special Planning Area. This designation was a significant milestone in recognising that ‘conventional planning processes cannot adequately address the complex challenges’ in such a settlement.<sup>74</sup> Although Muungano was successful in litigating against forced evictions in the Mukuru settlement, their experience demonstrated that ‘prevention of evictions does not per se lead to the resolution of land conflicts between local residents and landowners’. Muungano consequently explored other strategies including research and advocacy campaigns aimed at securing tenure for the slum dwellers, which led to the declaration of the Mukuru as a Special Planning Area.<sup>75</sup>

Muungano’s participation in policy dialogues such as development of the Slum Upgrading and Prevention Policy is instructive of the interrelationship between community mobilisation and policy outcomes.<sup>76</sup> Their engagement with the state has also entailed influencing the design of slum upgrading interventions

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<sup>69</sup> (n67) 21.

<sup>70</sup> (n67) 21.

<sup>71</sup> (n67) 21.

<sup>72</sup> (n67) 25.

<sup>73</sup> J Weru ‘Community federations and city upgrading: The work of Pamoja Trust and Muungano in Kenya’ (2004) 16 *Environment & Urbanization* 47, 49.

<sup>74</sup> P Horn et al (June 2020) ‘Scaling participation in informal settlement upgrading’ Global Development Institute of the University of Manchester Working paper 15 <http://hummedia.manchester.ac.uk/institutes/gdi/publications/workingpapers/scaling-participation-horn-et-al.pdf> viewed 30 August 2020.

<sup>75</sup> (n74) para 19.

<sup>76</sup> H Jamii (2012) ‘Assessment of the realisation of the right to housing in Kenya 2011–2012’ 32 <https://www.humanitarianlibrary.org/sites/default/files/2013/07/assessment.pdf> viewed 30 August 2020.



anchored on the practice of community-centered development.<sup>77</sup> Muungano was also involved in the development of the Evictions and Resettlement Bill (2012), although the Bill is yet to be enacted by Parliament. The concerted efforts by Muungano wa Wanavijiji highlight the importance of elevating the voice of slum dwellers and their associations in policy dialogue as an avenue to address systematic deprivation. This correlates with Amartya Sen's capability approach, which focuses on enhancing the ability of individuals to pursue and realise a life that they value.<sup>78</sup> Sen states that political voice is integral towards enhancing quality of life and also enables the formulation of people-centered policies that address their deprivation as well as accountability of public officials.<sup>79</sup>

The realisation of socio-economic rights arguably hinges on the exercise of civil and political rights and policy makers' attempts to resolve the former must be subject to 'democratic scrutiny'.<sup>80</sup> A combination of civic mobilisation and litigation strategies thus offers the 'greatest potential to alter laws and policies'.<sup>81</sup> To what extent then is the voice of rights claimants and civil society well situated in the judicial dialogue towards enforcing rights, and more specifically, the right to housing? If civic engagement is good for the goose (policy dialogue), would it be tenable to deduce that it is similarly good for the gander (judicial dialogue)?

## 2.5 THE SUPERVISORY JURISDICTION OF KENYAN COURTS ON THE RIGHT TO HOUSING

Judicial interpretation of the constitutional right to accessible and adequate housing has been primarily with respect to forced evictions.<sup>82</sup> In the absence of comprehensive legislation governing forced evictions, courts have relied on international standards and jurisprudence from other countries to adjudicate eviction matters.<sup>83</sup> In the case of *Satrose Ayuma and 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme (Satrose Ayuma)*,<sup>84</sup> the petitioners who were evicted from their houses without prior consultation and provision of alternative accommodation, alleged violation of their right to housing and human dignity. Although the respondent had a legal claim to the land, the High

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<sup>77</sup> Lines and Makau (n67) 75.

<sup>78</sup> A Sen *Development as Freedom* (1999) 42.

<sup>79</sup> (n78) 88.

<sup>80</sup> (n78) 19.

<sup>81</sup> Budlender (n65) 106.

<sup>82</sup> Article 43 (1) b.

<sup>83</sup> Article 2 (6) of the Constitution provides for the 'direct application' of treaties or conventions ratified by Kenya.

<sup>84</sup> [2015] eKLR.

Court found that the eviction was unconstitutional and had failed to comply with international standards on evictions.<sup>85</sup>

One of the key challenges experienced by courts in adjudicating socio-economic rights is formulating appropriate remedies without usurping the role of the executive and legislature in resolving issues relating to public policy.<sup>86</sup> This raises the question of how courts can appropriately exercise their role by ‘finding solutions to large-scale social and economic challenges, which likely have eluded existing poverty reduction interventions.’<sup>87</sup> Structural interdicts also referred to as supervisory orders have been used in different jurisdictions to ‘enforce socio-economic rights without infringing on the doctrine of separation of powers’.<sup>88</sup> The structural interdict is described as an effective corrective measure juxtaposed against the limitation of traditional remedies in addressing systemic violations.<sup>89</sup>

Courts in Kenya have relied on article 23 of the Constitution to issue supervisory orders.<sup>90</sup> In the *Satrose Ayuma* case, the High court exercised its supervisory role by ordering that the government reports to the court within a timeframe of 90 days and provides existing and planned state policies on forced evictions detailing the extent to which they are in line with international standards along with a report detailing the measures put in place by the government towards realisation of the right to housing. The court also ordered that the petitioners and the first respondent responsible for the forced eviction meet within 21 days to design an eviction program in line with international standards on eviction, which was to be filed in court within 60 days.

<sup>85</sup> (n84) paras 80–84 where the Court relied on the UN ‘Basic principles and guidelines on development based eviction and displacement’ (2007) in its determination.

<sup>86</sup> J Weru, W Wanyoike & A di Giovanni ‘Confronting complexity: Using action-research to build voice, accountability, and justice in Nairobi’s Mukuru informal settlements’ in J Wouters et al *Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* World Bank Legal Review (2006) 6 at 249.

<sup>87</sup> (n86).

<sup>88</sup> Strathmore Law Clinic ‘Structural interdicts for socio-economic rights: What the Kenyan jurisprudence has missed’ 2019 (4) *Strathmore Law Review* 150.

<sup>89</sup> C Mbazir ‘From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa’ (2008) 24 *AJHR* 1, 5.

<sup>90</sup> Article 23 (3) provides as follows: ‘In any proceedings brought under Article 22 [which provides the right to seek redress for violations of fundamental rights and freedoms in the Bill of Rights] a court may grant appropriate relief, including—(a) a declaration of rights; (b) an injunction; (c) a conservatory order; (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and (f) an order of judicial review.’

In the case of *Moi University v Council of Legal Education (Moi University)*,<sup>91</sup> the court interpreted the constitutional requirement under article 23 of the Constitution for courts to grant ‘appropriate relief’ as being equivalent to an ‘effective remedy’ that serves to uphold the values underlying constitutional rights. The Court referred to the South African Constitutional Court’s position<sup>92</sup> on the latitude that courts may exercise to ‘fashion new remedies’ in order to enforce constitutional rights.

Fashioning such remedies is a vital endeavour given the factors contributing to non-enforcement of court remedies such as ‘complexity of the remedies or a lack of a culture of respect for rule of law, or because the remedy was not effective in addressing the rights violation.’<sup>93</sup> To this end, courts have used their supervisory jurisdiction in cases such as *Satrose Ayuma*. The defiance of court orders resulting from forced evictions during the Covid-19 pandemic points to wanton failure by the state to respect the rule of law and this necessitates expanding the contours of the supervisory role by the courts in order to enhance compliance with its orders.

The Court in the *Moi University* case outlined five stages of structural interdicts, which allow courts to follow up on declaratory and mandatory orders by supervising government compliance towards remedying constitutional infringements.<sup>94</sup> The court further stated that structural interdicts are useful in assisting public officials to understand their specific responsibilities with respect to provision of services and also apprising judicial officers of the difficulties experienced by these officials in complying with their duties.<sup>95</sup>

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<sup>91</sup> [2016] eKLR.

<sup>92</sup> *Fose v Minister of Safety & Security* (CCT14/96) [1997] ZACC 6.

<sup>93</sup> *Weru* (n86) 250.

<sup>94</sup> *Moi University* (n91) para 211: The five stages of structural interdicts: 1) the court issues a declaration on violation of constitutional rights, 2) the court mandates government compliance with constitutional obligations, 3) the government is ordered to prepare a report under oath on a pre-determined date; the report should outline the steps to taken towards remedying the violation thus placing the onus on the appropriate measures on the executive rather than the court prescribing a solution, 4) the court assesses if the report presented by the government addresses the constitutional violation – at this stage ‘a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated’, 5) a final order incorporating the government plan is issued and failure to comply with the order amounts to contempt of court.

<sup>95</sup> (n94).

Litigation on social and economic rights should be understood as a ‘practice for broadening democracy and empowering people at a grassroots level.’<sup>96</sup> With respect to the potential for judicial dialogue to embed the voice of civic actors, structural interdicts are said to be ‘deeply democratising.’<sup>97</sup> They ‘create spaces for dialogue between the court, the government and civil society actors. In this way, they strengthen and deepen accountability and participation.’<sup>98</sup>

The High Court cogently exerted its supervisory role in the case of *Mitu-Bell Welfare Society v Attorney General & 2 others (Mitu-Bell)*,<sup>99</sup> in a progressive judgment on forced evictions. The petitioners in this case were residents of Mitumba village who were forcibly evicted by the Kenya Airports Authority (the second respondent) despite having obtained interim orders from the court restraining the second respondent from evicting them. Mumbi J stated that such defiance of court orders demonstrably disregards the constitutional authority of the court, the petitioners’ rights and the sovereign will of the people as expressed in the Constitution.<sup>100</sup>

The petitioners in the case claimed violation of their right to dignity after having been brutally evicted and treated in an inhuman and degrading manner, in addition to violations of their socio-economic rights guaranteed under article 43 of the Constitution. The court found that it was ‘unreasonable, unconscionable and unconstitutional’ for the second respondent to give the petitioners seven days’ notice to vacate their homes, proceeding to demolish the homes without providing alternative accommodation and further exacerbating the violations by disregarding the restraining order by the court. The second respondent claimed that the houses in Mitumba village were located along a flight path near Wilson Airport as justification for the demolition. The court stated that while it recognises that there are instances when evictions are necessary for reasons of national security, due process remains an imperative.<sup>101</sup>

The court directed the respondents as follows: firstly, to submit state policies and programs on provision of shelter and access to housing for marginalised groups within 60 days of the ruling. Secondly, that these policies should be furnished to a specified civil society organisation, Pamoja Trust and any other relevant organisations with expertise on the area of housing for evaluation and thirdly, that the respondents engage Pamoja Trust and other CSOs towards identifying a resolution to the petitioners’ grievances. On the latter issue, the

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<sup>96</sup> LA Williams ‘The right to housing in South Africa: An evolving jurisprudence’ (2014) 45 *Columbia Human Rights Law Review* 816, 827.

<sup>97</sup> Mbazir (n89) 9.

<sup>98</sup> Mbazir (n89) 9.

<sup>99</sup> [2013] eKLR.

<sup>100</sup> *Mitu-Bell* (n99) para 29.

<sup>101</sup> *Mitu-Bell* (n99) para 61.

court directed the parties to report on the progress towards the resolution within 90 days of the court order.<sup>102</sup>

The High Court ruling presented a significant milestone in embedding the voice of civic actors in the dialogue between the court and the executive. The Court of Appeal however overturned this decision in a retrogressive ruling that rejected the exercise of supervisory jurisdiction. Prior to this appellate decision, the merits of which will be subsequently considered, the High Court reaffirmed the exercise of supervisory jurisdiction in a number of decisions.

In the case of *Kepha Omondi Onjuro & others v Attorney General & 5 others*,<sup>103</sup> the court upheld the legality of an eviction that was due to take place subject to a resettlement plan. The court directed that the resettlement be conducted in line with international standards on evictions and with the participation of stakeholders including a group of urban engineering professionals, CSOs including Pamoja Trust, Muungano wa Wanavijiji and the Kenya National Commission on Human Rights. The respondent was required to submit to the court a quarterly progress report on the resettlement project.<sup>104</sup> The court recognised the key role that these stakeholders had played in the resettlement planning that preceded the litigation, thereby repositioning civic actors in the continuum of dialogue on the right to housing.

In the case of *Daniel Ng’etich & 2 others v Attorney General & 3 others*,<sup>105</sup> on the right to health, the petitioners challenged the involuntary confinement of patients with infectious diseases who defaulted from treatment. The High Court directed the government to issue a circular to health facilities within 30 days clarifying that such confinement was not a legal requirement and further ordered the government to develop a policy within 90 days detailing policy measures on involuntary confinement and file this in court. The Ministry of Health issued the circular and developed an isolation policy as directed by the court.

Reverting to *Mitu-Bell*, the Court of Appeal in *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (Mitu-bell Appeal)*,<sup>106</sup> relied on the *functus officio* doctrine to deduce that issuance of a judgment ‘marks the end of jurisdictional competence of the court’ with the exception of granting interim orders.<sup>107</sup> It found that the High Court had erred in requiring the parties to file reports and affidavits after judgment, as this would potentially re-litigate the matter. The constitutional requirement for public participation and granting of appropriate

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<sup>102</sup> *Mitu-Bell* (n99) para 79.

<sup>103</sup> [2015] eKLR.

<sup>104</sup> *Kepha Omondi Onjuro* (n103) para 150.

<sup>105</sup> [2016] eKLR.

<sup>106</sup> [2016] eKLR.

<sup>107</sup> *Mitu-Bell* (n106) para 69.

reliefs did not permit the delegation of judicial functions by authorising other stakeholders to play a role in formulating appropriate remedies.<sup>108</sup>

The court faulted the involvement of civil society organisations in identifying an appropriate resolution to the petitioners' grievances as this was not a prayer sought by the parties. Involvement of experts in court proceedings was permissible only to the extent that such experts were enjoined to the proceedings as *amicus curiae*. Pamoja Trust, the civil society organisation invoked in the order was neither a party to the petition nor a friend of the court. Additionally, the court questioned the criteria used to select the organisation.<sup>109</sup>

The Court of Appeal also relied on the political question doctrine in finding that the High Court had overstepped its role in directing the respondents to file state policies on housing with the court, as policymaking was the province of the executive and legislature. The appellate court further noted that reliance on South African jurisprudence in the issuance of structural interdicts was akin to embedding borrowed legislation from other countries into Kenyan law. The court construed the UN Guidelines on Forced Evictions relied on by the trial court pursuant to article 2(5) and (6) of the Constitution which provides that general rules of international law shall form part of Kenyan law – as not being part of 'general rules'. The court interpreted general rules as customary rules of international law or *jus cogens* from which no derogation is permitted.<sup>110</sup> Based on the foregoing grounds, the court set aside the High Court decision in its entirety and having declared it *functus officio*, expunged its post-judgment supervisory powers.

The decision of the Court of Appeal raises serious jurisprudential questions on the supervisory role of courts in protecting the rights of the marginalised. There are divergent opinions on the question of upholding the doctrine of separation of powers. On one hand, it has been argued that the entrenchment of socio-economic rights in constitutions is itself a 'political decision' subsequently rendering the argument that courts encroach the province of the executive while adjudicating over these rights as untenable. Conversely, others view structural interdicts as being 'intrusive and politically incorrect'.<sup>111</sup>

Former Chief Justice Mutunga pointed out the need for Kenyan courts to be 'rigorous but creative' in embodying constitutional values such as social justice.<sup>112</sup> Urging towards decolonising jurisprudence in Kenya, Mutunga

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<sup>108</sup> *Mitu-Bell* (n106) para 75.

<sup>109</sup> *Mitu-Bell* (n106) para 94.

<sup>110</sup> *Mitu-Bell* 9n106) para 116.

<sup>111</sup> Strathmore Law Clinic (n88) 149.

<sup>112</sup> W Mutunga (11 June 2012) 'Elements of progressive jurisprudence in Kenya: A reflection' *Kenyalaw.org* <http://kenyalaw.org/kenyalawblog/elements-of-progressive-jurisprudence-in-kenya-a-reflection/> viewed 30 September 2020.

reiterates that this is not synonymous with adopting jurisprudence that is ‘insular and inward looking’ as it would be contradictory to constitutional values.<sup>113</sup> Rather, ‘decolonising jurisprudence requires South–South collaboration and collective reflection’.<sup>114</sup> In this regard, the Court’s view in the *Mitubell Appeal* that ‘foreign experiences, values and aspirations of other countries should rarely be invoked in interpreting the Kenyan Constitution’,<sup>115</sup> belies the decolonising jurisprudence that Mutunga refers to. The Court of Appeal adopted an overly mechanistic approach in interpreting the constitutional mandate of courts to grant remedies, potentially stifling the creativity of courts in dealing with the complexity of enforcing socio-economic rights. Consonant with the potentiality of courts engendering transformative constitutionalism, Mutunga posits that this entails recognising that ‘judicial officers do politics’ and that the judiciary, is an ‘institutional political actor’.<sup>116</sup>

The decision in the *Mitu-Bell Appeal* was appealed to the Supreme Court, in the first appeal of its kind on socio-economic rights to reach the Supreme Court.<sup>117</sup> The Supreme Court decision will be a watershed in shaping the trajectory of the supervisory jurisdiction of courts.

### 2.5.1 Lessons from South African jurisprudence

Kenya and South Africa have similar constitutional frameworks that are ‘transformative in nature’ and founded on values such as ‘human dignity, equality and human freedom’.<sup>118</sup> A notable difference in South Africa’s Constitution with respect to the right to housing is section 26(3), which ‘explicitly prohibits forced evictions in the absence of a court order after taking into consideration all the relevant circumstances’.<sup>119</sup> Courts in both countries have grappled with issuing appropriate remedies to protect socio-economic rights while upholding

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<sup>113</sup> W Mutunga ‘The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court’s decisions’ 2015 (1) *Speculum Juris* 6.

<sup>114</sup> (n113) 7, where Mutunga refers to the transformative Constitutions of India, South Africa and Colombia.

<sup>115</sup> *Mitu-Bell Appeal* (n110) para 124.

<sup>116</sup> W Mutunga (6 March 2020) ‘People power in the 2010 Constitution: A reality or an illusion?’ *TheElephant.info* <https://www.theelephant.info/op-eds/2020/03/06/people-power-in-the-2010-constitution-a-reality-or-an-illusion/> viewed 1 October 2020.

<sup>117</sup> Initiative for Strategic Litigation in Africa (21 May 2020) ‘*Mitu-Bell Welfare Society Appeal* case is fertile ground for the development of the right to remedy’ <https://www.the-isa.org/press-release-wej-mitu-bell-may-2020/> viewed 30 September 2020.

<sup>118</sup> J Mavedzenge ‘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’ (2020) *Journal for Comparative Law in Africa* (forthcoming).

<sup>119</sup> Angote (n40) 62.

the doctrine of separation of powers.<sup>120</sup> This judicial endeavour requires performing a ‘complex and unenviable balancing function’ in order to ‘accord an appropriate degree of deference’ to the executive and legislature in their policymaking and budgetary roles.<sup>121</sup> South African courts have employed the doctrine of meaningful engagement in the ambit of their supervisory jurisdiction on the right to housing. Meaningful engagement presents an important avenue of engendering ‘local knowledge’ into judicial decision-making.<sup>122</sup> Two key decisions will be examined to draw some lessons on the supervisory role of courts and the challenges thereto.

In *Occupiers of 51 Olivia Road v City of Johannesburg*<sup>123</sup> (*Olivia Road case*) over 400 occupiers of two buildings appealed a Supreme Court decision that upheld an eviction order issued against them by the City of Johannesburg due to safety reasons.<sup>124</sup> The Constitutional Court issued an interim order requiring the parties to meaningfully engage with each other towards making the building safe for habitation and file affidavits reporting on the outcome of the engagement on a date specified by the Court.<sup>125</sup> These affidavits were subsequently filed although a number of issues remained unresolved. While considering the substantive issues, the Court expounded on the rationale of having ordering meaningful engagement in the first place by noting that the City of Johannesburg ought to have been aware of the likelihood of the occupiers being rendered homeless as a result of the City’s eviction, yet did not attempt to meaningfully engage the occupiers. Further, that such engagement has ‘potential to contribute towards the resolution of disputes and to ‘increased understanding and sympathetic care if both sides are willing to participate in the process’.<sup>126</sup>

The court refuted the notion that it would be impractical to expect meaningful engagement when dealing with a large number of affected people – on the contrary, ‘the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.’<sup>127</sup> Cognisant of the power imbalances between parties in eviction matters and the potential intransigence that may vitiate such engagement, the court stated as follows:

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<sup>120</sup> Mavedzenge (n118).

<sup>121</sup> K Pillay ‘Implementing Grootboom: Supervision needed’ (2002) 3 *ESR Review* 289.

<sup>122</sup> (n121).

<sup>123</sup> *Occupiers of 51 Olivia Rd v City of Johannesburg* 2008 (3) SA 208 (CC) (South Africa).

<sup>124</sup> (n123) para 2: The High Court decision, which had been appealed to the Supreme Court by the City, had ‘ordered the City to produce a programme to cater for those people in desperate need, and interdicted the eviction of the occupiers on certain terms.’

<sup>125</sup> (n123) para 5.

<sup>126</sup> (n123) para 14.

<sup>127</sup> (n123) para 15.



People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be pro-active and not purely defensive. Civil society organisations that support the peoples' claims should preferably facilitate the engagement in every possible way.<sup>128</sup>

The court appropriately noted that 'secrecy is counter-productive to the process of engagement' and further that where public agencies initiate eviction without having exercised meaningful engagement, this would be a 'weighty consideration against the grant of an ejection order'.<sup>129</sup> The court consequently found that the Supreme Court had erred in granting the eviction order in the absence of meaningful engagement.<sup>130</sup>

The Constitutional Court in the *Olivia Road case* affirmed the important role that civil society can play to counterbalance the interests of parties in eviction matters during meaningful engagement. The court also recognised the right of access to information as a prerequisite for meaningful engagement. As aptly stated with reference to the South African context, the constitutional right of participation is 'an important aspect of democracy, and an important component of efforts to uplift and empower the poor in society'.<sup>131</sup> The *Olivia Road* decision therefore served to promote the participatory rights of the poor and uphold their dignity.<sup>132</sup> It has been opined that 'the meaningful engagement remedy further surmounts concerns around the separation of powers and issues of polycentricity in socio-economic rights adjudication'.<sup>133</sup>

The ordering of meaningful engagement prior to final judgment – also referred to as an 'interim structural interdict',<sup>134</sup> does however present a challenge arising from pending determination of the substantive entitlements of the parties and is compounded by unequal power relations between the parties. Although this risk was 'eliminated' in the *Olivia Road case* by dint of legal representation of the occupiers in the engagement, defining 'normative parameters' is imperative towards facilitating meaningful engagement.<sup>135</sup> In so doing, parties in dispute can rely on the normative grounds upon which a court's determination of their

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<sup>128</sup> (n123) para 20.

<sup>129</sup> (n123) para 21.

<sup>130</sup> (n123) para 23.

<sup>131</sup> L Chenwi (2015) 24 'Implementation of housing rights in South Africa: Approaches and strategies' *Journal of Law and Social Policy* 68, 79.

<sup>132</sup> L Chenwi 'A new approach to remedies in socioeconomic rights adjudication: Occupiers of 51 Olivia Road and others v City of Johannesburg and others 2009 (2) *Constitutional Court Review* 371, 381.

<sup>133</sup> Chenwi 2009 (n132) 382.

<sup>134</sup> Mbazir (n89) 18.

<sup>135</sup> Chenwi (n131) 80.

conflicting claims is premised, thereby setting the limits within which meaningful engagement is conducted.<sup>136</sup>

In *Residents of Joe Slovo Community v Thubelisha Homes (Joe Slovo case)*<sup>137</sup> the Constitutional Court in a similar determination as the *Olivia Road* case on a large-scale eviction, expounded that meaningful engagement facilitates consensus-building between the government and affected residents in finding solutions towards adequate housing. The ultimate goal is not to reach an agreement but rather that both parties demonstrate willingness to understand the respective concerns.<sup>138</sup> The Court adopted a different approach by issuing an engagement order along with the judgment and not prior, as was the case in *Olivia Road*. The detailed order outlined a range of issues upon which the government was required to consult upon including standards on the nature of alternative accommodation to be provided.<sup>139</sup>

Meaningful engagement is ‘capable of promoting social change on the ground as it creates a voice for the marginalised and impoverished’.<sup>140</sup> It also presents an opportunity for the involvement of civil society to monitor and report on the implementation of supervised eviction orders instead of limiting such reporting between the government and the Court.<sup>141</sup> This approach facilitates the ‘democratic processes of consultation and dialogue to occur in the realisation of socio-economic rights’.<sup>142</sup> It is noteworthy that this judicial endeavour is bolstered by South Africa’s expansive legal framework on housing, which inculcates meaningful engagement as a state obligation.<sup>143</sup>

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<sup>136</sup> Chenwi (n132) 385.

<sup>137</sup> *Residents of Joe Slovo Community v Thubelisha Homes* 2010 (3) SA 454 (CC) quoted in Mavedzenge (n118) 20–21.

<sup>138</sup> (n137).

<sup>139</sup> Williams (n139) 832.

<sup>140</sup> L Chenwi ‘Meaningful engagement in the realisation of socio-economic Rights: The South African experience’ (2011) *Southern African Public Law* 128, 130.

<sup>141</sup> Chenwi (n140) 154.

<sup>142</sup> Chenwi (n140) 155.

<sup>143</sup> Chenwi (n140) 136. Reference is made to sections 2 (1)(1) and 9 (2)(a) of the Housing Act 107 of 1997, which mandates all tiers of the government to ‘consult meaningfully with individuals and communities affected by housing development’ and ‘facilitate active participation of all relevant stakeholders in housing development’ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, ‘spells out a number of procedural standards to be followed when evicting unlawful occupiers.’ Additionally meaningful engagement is required for all evictions under the Act.

The Constitutional Court in South Africa is however said to be ‘ambivalent’ in adopting the broader use of structural interdicts in socio-economic rights cases compared to the willingness of High Courts to use this relief.<sup>144</sup> It is argued that the reticence of the Constitutional Court is occasioned by the deficit of parameters that would determine the circumstances under which issuing a structural interdict would amount to an appropriate remedy. The court has been criticised for neither articulating a principled position in rejecting structural interdicts nor determining the instances when they would be appropriate.<sup>145</sup> High courts on the other hand have resorted to using structural interdicts as a remedy to address systemic violations and ‘to counter government recalcitrance’.<sup>146</sup>

### 2.5.2 Possible challenges in improving the supervisory role of Kenyan courts

Unlike South Africa, Kenya lacks a robust legislative framework on the right to housing. As discussed in the preceding section, South Africa’s housing laws mandate state authorities to meaningfully engage with individuals likely to be affected by evictions. The constitutional provision prohibiting eviction in the absence of court orders undergirds South Africa’s legislative framework.<sup>147</sup> Although Kenyan jurisprudence on the right to housing has been largely beholden to international law principles, the failure by Parliament to enact the Evictions and Resettlement Procedures Bill (2012) is a drawback to strengthening legislative guidance for courts adjudicating eviction matters.

The constitutional guarantee of public participation is another critical area that necessitates legislative expression. Meaningful engagement presupposes substantive public participation and the absence of legislative safeguards not only creates ambiguity but also portends a continued formalistic approach in consulting rights claimants.<sup>148</sup> The High Court while adjudicating over contestations of public participation in policy making, pronounced that participation ‘ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates’.<sup>149</sup>

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<sup>144</sup> Mbazir (n89) 2-3.

<sup>145</sup> Mbazir (n89) 2-3.

<sup>146</sup> Mbazir (n89) 9-10.

<sup>147</sup> See Angote (n40).

<sup>148</sup> R Birgen & E Okoth (23 July 2020) ‘Our role in securing public participation in the Kenyan legislative and policy reform process’ *Naturaljustice.org* <https://naturaljustice.org/our-role-in-securing-public-participation-in-the-kenyan-legislative-and-policy-reform-process/> viewed 1 October 2020.

<sup>149</sup> *Robert N Gakuru & others v Governor Kiambu County & 3 others* [2014] eKLR para 7.

Similar to the challenge experienced by South African courts, the absence of norms and principles guiding the use of structural interdicts may dissuade Kenyan courts from readily employing this remedy. The outcome of the impending Supreme Court decision on the *Mitu-Bell* case will however be a key determinant in how jurisprudence on the supervisory role of courts will evolve.

## 2.6 CONCLUSION

The Covid-19 pandemic manifestly exacerbated the crisis of forced evictions in Kenya. A corollary has been an impetus to conscientiously rethink how systemic violations such as forced evictions can be better addressed. Whereas litigation remains an important avenue of protecting the poor and vulnerable against forced evictions, the overt government non-compliance with court orders seriously threatens to enfeeble the transformative potential of litigation. This chapter has examined the contours of the supervisory jurisdiction of Kenyan courts by foregrounding this with the dynamism of civic engagement on the right to housing.

The comparative analysis on the supervisory role of courts was somewhat limited in scope – this is an area that would benefit from more extensive scholarship. Comparative assessments on the complexities of judicial enforcement of socio-economic rights will serve to guide courts on the efficacy of employing the remedy of structural interdicts and navigating resultant challenges. This chapter has attempted to make a case for carving out a greater role for civic actors in the judicial dialogue on enforcing the right to housing. Whereas CSOs can play an important role as interlocutors, their engagement needs to be procedurally and normatively guided.

Strengthening the regulatory framework on the right to housing would go a long way to bolster judicial enforcement: the Kenyan Parliament should enact the long pending Evictions and Resettlement Bill (2012) which was geared towards entrenching a human rights-centred regulatory framework on evictions. Enactment of the Public Participation Bill (2019) is also recommended in order to provide legislative grounding for the exercise of meaningful engagement in enforcing socio-economic rights.

The ideology of transformative constitutionalism underpins the ideas proffered in this chapter. This can be inculcated through sustained scholarly exchange between academics, judges, civil society organisations and state officers.<sup>150</sup> The

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<sup>150</sup> Y Ghai (12 September 2014) 'Interpreting Kenya's transformative Constitution' *Avaaz Magazine* <https://awaazmagazine.com/previous/index.php/latest-issue/theatre-review/item/535-interpreting-kenya-s-transformative-constitution> viewed 1 October 2020.

Judiciary Training Institute in Kenya can serve as an important platform for holding such colloquia. The Kenya National Commission on Human Rights could potentially play a critical role in monitoring state compliance of supervisory orders and report independently to the courts. Similar recommendations have been made with respect to the South African Human Rights Commission.<sup>151</sup> There is need to further explore the efficacy of this approach.

The quest to strengthen the supervisory role of courts as advanced in this chapter presupposes respect of the rule of law by state duty bearers. In the absence of this, the endeavour may yet prove itself a herculean task towards enhancing protection of the right to housing.

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<sup>151</sup> M Ebadolahi 'Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa' (2018) 8 *New York University Law Review* 1565.

# An equality-sensitive approach to redressing the disproportionate socio-economic impact of Covid-19 on vulnerable groups in Botswana, Kenya, and South Africa

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## ABSTRACT

The coronavirus (Covid-19) pandemic has had a disproportionate impact on groups that have historically been subjected to systemic and structural discrimination based on specific identity characteristics such as race, gender and disability status. This is compounded in

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those cases where a person faces discrimination based on an intersection of multiple identity characteristics. Absent positive redistributive measures to help alleviate the impact of the Covid-19 pandemic on vulnerable groups, existing patterns of inequality and poverty will be exacerbated. In this chapter, Botswana, Kenya and South Africa are used as case studies to advance the argument that when designing and implementing laws and policies addressing the adverse socio-economic effects of the Covid-19 pandemic, the right to equality in each of these jurisdictions imposes a duty on the state to take an equality-sensitive approach. The equality-sensitive approach requires the state, when realising socio-economic rights, to target, prioritise and take positive redistributive measures in favour of vulnerable groups. Vulnerable groups are groups that are subject to systemic and structural socio-economic disadvantage because of historical, social, economic and political arrangements of power. Through a normative and doctrinal analysis of the relationship between the right to equality and socio-economic rights, the Chapter argues that, in all three jurisdictions, there is a positive duty to take an equality-sensitive approach. The chapter will show that while some Covid-19 pandemic relief in these jurisdictions has taken equality into account, this has been on an *ad hoc* basis and not at all in some cases, which is contrary to the states' duty to take an equality-sensitive approach.

### 3.1 INTRODUCTION

Across the globe, the Covid-19 pandemic has had a disproportionate impact on groups that have historically been subject to discrimination based on certain identity characteristics.<sup>1</sup> Those vulnerable to discrimination based on different aspects of their identity characteristics – such as race, gender and disability – tend to have insufficient access to social goods and services and are more likely to live in poverty.<sup>2</sup> This is compounded in those cases where persons are discriminated based on an intersection of multiple identity characteristics, for example, Black women living with disabilities.<sup>3</sup> Absent positive redistributive measures in favour

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<sup>1</sup> This has been acknowledged by various international treaty bodies, including the UN Committee on Economic, Social and Cultural Rights (17 April 2020) 'CESCR *Statement on COVID-19 pandemic and economic, social and cultural rights*' (CESCR COVID-19 Statement).

<sup>2</sup> See S Fredman 'Redistribution and recognition: Reconciling inequalities' 2007 23 *SAJHR* 214 (Redistribution and recognition); S Liebenberg & B Goldblatt 'The Interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' 2007 23 *SAJHR* 335 (Interrelationship between equality and socio-economic rights); M Wesson 'Equality and social rights: an exploration in light of the South African Constitution' 2007 *Public Law* 748; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 207.

<sup>3</sup> For an analysis of intersectionality theory see K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' 1989 *University Chicago Legal Forum* 139; PH Collins & S Bilge *Intersectionality* (2016); A Hancock *Intersectionality: An intellectual history* (2016).

of these disadvantaged groups, the Covid-19 pandemic will entrench existing patterns of inequality and poverty.

In this chapter, Botswana, Kenya and South Africa are used as case studies to advance the argument that: when designing and implementing laws and policies addressing the adverse socio-economic effects of the Covid-19 pandemic, the right to equality in each of these jurisdictions imposes a duty on the state to take an equality-sensitive approach. The equality-sensitive approach requires the state, when realising socio-economic rights, to target, prioritise and take positive redistributive measures in favour of vulnerable groups. Vulnerable groups are groups that are subject to systemic and structural socio-economic disadvantage because of historical, social, economic and political arrangements of power.<sup>4</sup> In all three jurisdictions, this includes women, children, the youth and people living with disabilities. These are groups which, due to the socio-economic disadvantage that attaches to their identity characteristics, are the worst affected by poverty and inequality.

The three jurisdictions were chosen for three substantive reasons. First, while the historical, social and economic forces which underly inequality in these jurisdictions differ, all three jurisdictions are grappling with deeply entrenched inequality and poverty.<sup>5</sup> Second, all three jurisdictions protect the right to equality in their constitutions and have adopted a substantive approach to this right, which recognises that to realise the right to equality, the state must take

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<sup>4</sup> This definition is broadly derived from a rich body of literature on the nature of disadvantage and the commitment to substantive equality. See for example J Wolff & A de-Shalit *Disadvantage* (2007) for an exploration of structural disadvantage; S Fredman 'Reimagining power relations: Hierarchies of disadvantage and affirmative action' 2017 *Acta Juridica* 124; S Fredman 14 'Substantive equality revisited' 2016 *ICON* 712; C MacKinnon 'Substantive equality: A Perspective' 2011 *Minnesota Law Review* 1.

<sup>5</sup> In South Africa see V Sulla & P Zikhali 'Overcoming poverty and inequality in South Africa: An assessment of drivers, constraints and opportunities' (World Bank Group 2018); Statistics South Africa (2017) 'Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015' <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> viewed 8 November 2020; S Terreblanche *A history of inequality in South Africa: 1652-2002* (2003). In Kenya see Kenya National Bureau of Statistics (2018) *Basic report on well-being in Kenya: based on the 2015/2016 Kenya integrated household budget survey* 44–45; [knoema.com/atlas/Kenya/topics/Poverty/Income-Inequality/GINI-index](http://knoema.com/atlas/Kenya/topics/Poverty/Income-Inequality/GINI-index) viewed 7 September 2020; V Miyandazi *Equality in Kenya's 2010 Constitution: Understanding the competing and interrelated conceptions* (forthcoming) Ch 7. In Botswana, see <https://www.worldbank.org/en/country/botswana/overview> and <http://www.statsbots.org/bw/poverty> both viewed 13 April 2020.



positive redistributive measures in favour of vulnerable groups.<sup>6</sup> Third, while South Africa and Kenya have justiciable socio-economic rights, Botswana does not. Botswana's approach to socio-economic rights allows us to test the scope of the equality-sensitive approach, showing that even in the absence of justiciable socio-economic rights, the right to equality can impose obligations on the state in its design and implementation of policies to realise socio-economic needs.

The aforementioned argument is advanced in four substantive sections. Section one sets out the meaning of an equality-sensitive approach. It explores three normative positions which underlie this approach, a commitment to a substantive rather than a formal conception of equality; the recognition that all rights give rise to both positive and negative obligations; and an understanding that the right to equality is inextricably linked with socio-economic rights. Section two provides the contextual and textual basis, in the constitution or otherwise, of the right to equality and its relationship with socio-economic rights in the three jurisdictions. Section three considers whether, and the extent to which, governmental policies responding to the pandemic, in the three jurisdictions, have taken steps to prioritise vulnerable groups. For this analysis, examples in the context of education, housing and access to social relief for non-citizens are used. Finally, the fourth section outlines what, at the abstract level, an equality-sensitive approach would require in ensuring the realisation of socio-economic needs in the context of alleviating the impact of the Covid-19 pandemic. Fearing the possibility of wide-scale austerity measures that could arise, it is argued that the equality-sensitive approach places an obligation on the three states to ensure that the most vulnerable are the least affected by such measures. Further, the chapter concludes by noting the importance of taking steps to protect against wide-scale corruption that, especially in Kenya and South Africa, has characterised the governments' Covid-19 pandemic management of funds.<sup>7</sup>

### 3.2 CONCEPTUAL UNDERPINNINGS OF THE EQUALITY-SENSITIVE APPROACH

The equality sensitive approach is rooted in three normative positions: a commitment to a substantive conception of equality, an understanding that all socio-economic rights impose positive and negative duties on the state, and that the right to equality and socio-economic rights are inextricably linked.

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<sup>6</sup> In South Africa see *Minister of Finance and Other v Van Heerden* (2004) 6 SA 121 CC 26 ('*Van Heerden*'). In Kenya see, *John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others* [2011] eKLR 9–10 ('*John Mwai*'). In Botswana see *Letsweletse Motshidiemang v Attorney General of Botswana* [2019] MAHGB-000591 16; *Moatswi & Another v Fencing Centre LTD* [2002] (1) BLR 262 (IC) 266F-G.

<sup>7</sup> See text to nn101–107.

On the first position, courts in all three jurisdictions have accepted a substantive approach to equality.<sup>8</sup> The best way to define substantive equality is to distinguish it from formal equality. A formal conception of equality is rooted in the classical liberal idea that ‘likes should be treated alike.’<sup>9</sup> Under this approach, all unequal treatment is arbitrary and irrational.<sup>10</sup> Formal equality extends to protecting an abstract notion of individual freedom requiring non-intervention from the state. It requires sameness in treatment even when this can have outcomes that create new patterns of inequality or perpetuate existing patterns of inequality.<sup>11</sup> Formal equality’s requirement of ‘sameness’ and ‘equal treatment’ is inimical to the recognition of positive duties towards realising equality by targeting and prioritising vulnerable groups.

By contrast, substantive equality is rooted in critical approaches to law and politics which sought to challenge the liberal ideal of formal equality of treatment, exposing that approach as having the capacity to entrench and perpetuate inequality.<sup>12</sup> Proponents of substantive equality showed how formal equality’s abstract individualism and legal neutrality masked the complex reality of inequality in which people had unequal access to resources or lacked ‘sufficient power to control or value their own lives’.<sup>13</sup> Thus, substantive equality requires a recognition of ‘human beings as rooted in their social context of concrete inequality and disadvantage. The law should recognise the unequal life chances occasioned by race, gender, socio-economic status and a host of other factors, which affect a person’s ability to compete on an equal footing’.<sup>14</sup> In essence, a substantive approach to equality recognises that in order to realise the right to equality, positive steps have to be taken in favour of some persons or groups – failing which the promise of equality is illusory.

The second normative basis for the equality-sensitive approach is that all socio-

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<sup>8</sup> See (n6).

<sup>9</sup> S Fredman *Discrimination Law* (2011) 8.

<sup>10</sup> (n9).

<sup>11</sup> Fredman (n9) 11–13.

<sup>12</sup> See S Fredman ‘Substantive equality revisited’ (2016) 14 *ICON* 712; C MacKinnon & K Crenshaw ‘Reconstituting the future: An equality amendment’ (2019) *Yale Journal Law Forum* 343; C MacKinnon ‘Substantive equality: A perspective’ 2011 *MLR* 1; C Albertyn ‘Contested substantive equality in the South African constitution: Beyond social inclusion towards systemic justice’ (2018) 34 *SAJHR* 441; C Albertyn & B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ 1998 (14) *SAJHR* 248; C Albertyn & J Kentridge ‘Introducing the right to equality in the Interim Constitution’ 1994 (10) *SAJHR* 149.

<sup>13</sup> Albertyn and Goldblatt (n12) 251.

<sup>14</sup> (n12).

economic rights impose both positive and negative duties on the state. It is now trite that all rights give rise to both these duties.<sup>15</sup> Negative duties relate to a state's duty to refrain from interfering with the enjoyment of rights, as well as a duty on the state to prevent private persons from interfering with the enjoyment of rights. At the other end of the spectrum, positive duties place an obligation on the state to promote and fulfil rights in relation to protecting people from 'want and need'.<sup>16</sup> Accordingly, the duty to promote requires the state to disseminate information and educate people on their rights, while the duty to fulfil requires the state to take positive measures to ensure the full realisation of rights. The effective realisation of all rights, requires a combination of negative and positive duties – the duties to respect, protect, promote and fulfil.<sup>17</sup>

Third, there is growing recognition of the relationship between the right to equality and socio-economic rights. This has brought to light the fact that socio-economic deprivation disproportionately affects individuals belonging to groups subjected to past and ongoing discrimination.<sup>18</sup> For instance, gendered forms of discrimination such as the application of harmful cultural norms that deny women access to land and lock them out of gainful employment by confining them to housework and childcare, have meant that women are most affected by poverty.<sup>19</sup> Additionally, the lack of reasonable accommodation in modes of public transportation, educational institutions and workplaces for persons with disabilities has left many of them unemployed, uneducated and, generally, more vulnerable to poverty. Supporting this position, the UN Committee on Economic Social and Cultural Rights (CESCR) observes that 'individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination'.<sup>20</sup> In this regard, Brodsky and Day posit that:

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<sup>15</sup> See S Fredman *Human Rights Transformed* (2008) 68; S Fredman *Comparative Human Rights Law* (2018) Ch 3.

<sup>16</sup> (n15); Liebenberg *Socio-Economic Rights: Adjudication* (n 2) 82–87; Fredman, *Comparative Human Rights Law* (n15) 66–67.

<sup>17</sup> See H Shue *Basic Rights* (1980) 51; *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* AHRLR 60 ACHPR 2001 [44]. On obligations of the state to respect, protect, provide and fulfil fundamental rights see the South African Constitution at section 7(2) and the Constitution of Kenya 2010, article 21(1).

<sup>18</sup> See (n2).

<sup>19</sup> Fredman 'Redistribution and recognition' (n2) 215, 218, 221, –223. For an in-depth analysis of the intersection between gender, inequality and poverty see M Campbell *Women, Poverty, Equality: The Role of CEDAW* (2018).

<sup>20</sup> CESCR (2 July 2009) General comment No. 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/20 [2].

The analytical risk of failing to take account of the particular effects [of discrimination] on a disadvantaged group is that the nature and extent of the harm of poverty-producing measures and their potential to reinforce pre-existing disadvantages and compromise fundamental interests may not be fully appreciated.<sup>21</sup>

From this basis, an equality-sensitive approach to the implementation of socio-economic rights places the achievement of greater equality at the centre of the realisation of socio-economic rights. It requires the continued recognition by state organs, policy makers and courts of the interconnection between the delivery of socio-economic rights and elimination of inequality. The equality-sensitive approach has ramifications for criteria set in the redistribution of socio-economic resources as well as the extent to which states, in times of emergency or disaster can take retrogressive measures in relation to vulnerable groups. On the former, the equality-sensitive approach obliges the state to prioritise vulnerable groups; with regards to the latter, the state is obliged to ensure that vulnerable groups are the least affected, socially and economically, during a disaster or emergency.

The equality-sensitive approach is in line with the statement by the Committee on Economic Social and Cultural Rights (CESCR) on the Covid-19 pandemic and economic, social and cultural rights.<sup>22</sup> In the statement, the CESCR stresses that ‘No one should be left behind in taking the measures necessary to combat this pandemic.’ In particular, the Committee has made it clear that:

State parties are under an obligation to devote their maximum available resources for the full realization of all economic, social and cultural rights, including the right to health. As this pandemic and the measures taken to combat it have had a disproportionate negative impact on the most marginalized groups, States must *make all efforts to mobilize the necessary resources to combat COVID-19 in the most equitable manner, in order to avoid imposing a further economic burden on these marginalized groups. Allocation of resources should prioritize the special needs of these groups.*<sup>23</sup>(Emphasis added)

Further buttressing the obligation to take specific, targeted measures in favour of vulnerable groups, the CESCR states:

All States parties should, as a matter of urgency, adopt special, targeted measures, including through international cooperation, to protect and mitigate the impact of the pandemic on vulnerable groups such as older persons, persons with disabilities, refugees and conflict-affected populations, as well as communities and groups subject to structural discrimination and disadvantage.<sup>24</sup>

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<sup>21</sup> G Brodsky & S Day ‘Denial of the means of subsistence as an equality violation’ 2005 *Acta Juridica* 149, 163.

<sup>22</sup> CESCR COVID-19 Statement (n1).

<sup>23</sup> (n22) para 14 .

<sup>24</sup> (n23) para 15.

Absent targeted measures in favour of disadvantaged groups, in the sense of their prioritisation in redistributing resources to respect, protect and fulfil socio-economic rights, a state's response to the Covid-19 pandemic could entrench existing disadvantage, violating rather than vindicating the right to equality. As will be seen below, the constitutions in all three jurisdictions allow for the equality-sensitive approach.

### **3.3 TEXTUAL BASIS OF THE EQUALITY-SENSITIVE APPROACH: DUTY TO PRIORITISE VULNERABLE GROUPS**

The text of the Kenyan Constitution and decisions by the South African Constitutional Court (SACC) recognise the importance of taking prevailing socio-economic disadvantage into account when designing policies to realise socio-economic rights. In Botswana, while socio-economic rights are not justiciable, that the state has taken several measures targeting vulnerable groups, is an indication of the awareness that the government has an obligation to consider socio-economic disadvantage when designing policies to realise socio-economic rights. Flowing from this, in this section of the chapter, we go one step beyond this to make the argument that, all the three jurisdictions' equality guarantees impose positive duties to take equality-sensitive approaches in the design and implementation of laws and policies to fulfil socio-economic rights.

#### **3.3.1 Textual basis: Reading the equality-sensitive approach in the constitutional texts**

##### **3.3.1.1 Kenya**

In Kenya, the wording of articles 43 and 20(5) of the 2010 Kenyan Constitution create a contextual link between socio-economic distributive measures and the right to equality. This particularly relates to the requirement in article 20(5)(b) that the state should give priority to vulnerable groups and individuals when allocating resources for realising the socio-economic rights listed in article 43 of the Constitution. The provision specifically states that in allocating resources for realising the socio-economic rights in article 43, 'the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals'.<sup>25</sup>

This requirement arguably adds a substantive equality component to the implementation of socio-economic rights in Kenya. Article 21(3) of the Kenyan Constitution emphasises this point by requiring all state organs and public officers

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<sup>25</sup> Emphasis added.

to address the needs of vulnerable groups in the Kenyan society, ‘including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities’. These provisions are over and above the general equality and non-discrimination guarantee under article 27 of the Kenyan Constitution, which, as earlier stated, supports a substantive conception of equality.<sup>26</sup>

Also notable is the fact that articles 2(5) and 2(6) of the Kenyan Constitution include customary international law as well as international treaties and conventions that the country has ratified as sources of Kenyan law. This recognition allows for the application of provisions in international covenants that Kenya is a party to, which oblige the state – in relation to socio-economic rights – to take special targeted measures in favour of vulnerable groups. This provides a good avenue for the application of an equality-sensitive approach. Such covenants include the Convention on the Rights of Persons with Disabilities, Convention on the Elimination of All Forms of Discrimination Against Women and Convention on the Rights of the Child.<sup>27</sup>

### 3.3.1.2 South Africa

In South Africa, it is accepted that the rights in the Bill of Rights, Chapter 2 of the South African Constitution, are interconnected, interdependent and mutually reinforcing.<sup>28</sup> Further, the SACC has acknowledged that the rights in the Bill of Rights must be interpreted and understood within South Africa’s social and historical context.<sup>29</sup> This is a context of racial, gendered and other forms of domination and oppression under colonial and apartheid rule. This history has culminated in deeply entrenched inequality, especially based on race, with the Black<sup>30</sup> majority being the worst off.<sup>31</sup>

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<sup>26</sup> *John Mwai* (n6).

<sup>27</sup> See status of ratification at [indicators.ohchr.org](https://indicators.ohchr.org)> viewed 7 September 2020.

<sup>28</sup> See for instance, *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) SA 45 (CC) [23]–[24] (Grootboom); Liebenberg & Goldblatt *Interrelationship between equality and socio-economic rights* (n2); P de Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ 2001 (17) *SAJHR* 258.

<sup>29</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 8 (Soobramoney); *Grootboom* (n28) para 25;

<sup>30</sup> The term ‘Black’ includes African, Coloured and Indian people, all groups that, though to varying degrees, were subject to colonial and apartheid domination and oppression.

<sup>31</sup> See (n5).

In *Grootboom*, Yacoob J held that human dignity, equality and freedom, foundational values to South Africa's constitutional democracy, are denied to those without food, clothing or shelter – illustrating a close link between the realisation of socio-economic rights and advancing equality.<sup>32</sup> In addition, the SACC in *Grootboom* held that in order to meet the reasonableness threshold applied to the right to housing,<sup>33</sup> government measures –

cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.<sup>34</sup> (Emphasis added)

This finding clearly requires the state to take existing inequality into account when designing and implementing socio-economic rights policies. However, it remains unclear whether this should be understood as creating a duty to prioritise and take positive redistributive measures in favour of vulnerable groups.

Some commentators have argued that the SACC merely requires the state to 'take account of the needs of the most desperate' not that they should be prioritised.<sup>35</sup> This reading of the relationship between the right to equality and socio-economic rights falls short of the equality-sensitive approach, an approach which creates a positive obligation to *prioritise* and *take positive measures* in favour of vulnerable groups. However, against the background of a commitment to substantive equality, a purposive, contextual and transformative interpretation of the text of the equality right and the state's obligations under section 7(2) of the South African Constitution leaves room for the recognition of an obligation to take an equality-sensitive approach in the context of socio-economic rights.<sup>36</sup>

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<sup>32</sup> *Grootboom* (n28) para 23. See also *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 40.

<sup>33</sup> Sections 26 (the right to housing), 27 (the right to healthcare, food, water and social security) and section 29(1)(b) of the South African Constitution require that the state take 'reasonable legislative and other measures, within its available resources' to realise these rights. In *Grootboom* (n28) para 33, the SACC held that this requires the state to pass legislation or other measures which are reasonable. For an analysis of reasonableness review see Liebenberg *Socio-Economic Rights: Adjudication* (n2) 151–157; Liebenberg & Goldblatt *Interrelationship between equality and socio-economic rights* (n2) on the relationship between the right to equality and reasonableness review.

<sup>34</sup> *Grootboom* (n28) para 44.

<sup>35</sup> See P de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* (2014) 715.

<sup>36</sup> On the approach to constitutional interpretation in South Africa, see *S v Zuma and Others* 1995 (2) SA 642 (CC) [14]–[15] (on a generous interpretation). *S v Mhlungu*

Section 7(2) of the South African Constitution imposes an obligation on the state to ‘respect, protect, promote and fulfil’ the rights in the South African Bill of Rights. Section 7(2) has been interpreted as conferring both negative and positive obligations on the state to take steps towards realising the rights in the Bill of Rights. The obligation in section 7(2) is a ‘promissory note’,<sup>37</sup> one in which the state promises that it will facilitate the enjoyment of rights in the South African Bill of Rights.<sup>38</sup> Section 7(2) has been relied on to impose a range of obligations on the state.<sup>39</sup> A core principle in section 7(2) cases is that a positive duty can be imposed on the state if it is necessary for the *effective* realisation of a right; in order to *give practical and meaningful* expression to a right; and when it is *essential* for the realisation of a right – meeting the obligations to ‘respect, protect, promote and fulfil’ and giving meaning and content to the rights in the Bill of Rights. While the SACC requires a measure of deference to how these obligations are met, it clearly sets the standard of *effectiveness* – not just anything will do. Thus, in *Women’s Legal Trust* for example, the case-by-case recognition of Muslim marriages was rejected for having enabled continued systemic violation of rights – it was not an effective tool towards meeting the state’s section 7(2) obligations.<sup>40</sup>

In the context of the Covid-19 pandemic, section 7(2) of the South African Constitution, read together with the equality right could be interpreted as placing a positive obligation on the state to take an equality-sensitive approach in socio-economic policies responding to the Covid-19 pandemic. This argument is rooted in section 9(2), of the South African Constitution. Section 9(2) provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

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& *Others* 1995 (3) SA 867 (CC) [3]–[8] (on purposive interpretation). *Soobramoney* (n29) [17] (where the SACC makes a connection between the purposive and generous approach to interpretation). See also, *S v Makwanyane and Another* 1995 (3) SA 391 [10] (Chaskalson P, describing the contextual approach). O’Regan J’s judgment in *Brink v Kitshoff* NO 1996 (4) SA 197 (CC) [40] (on the historical context within which the section 9 equality right must be interpreted).

<sup>37</sup> *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) [157].

<sup>38</sup> *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) [174] (My Vote).

<sup>39</sup> *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); *My Vote* (n38); *Women’s Legal Centre Trust v President of the Republic of South Africa and Others, Women’s Faro v Bingham* NO and *Others, Esau v Esau and Others* 2018 (6) SA 598 (WCC).

<sup>40</sup> *Women’s Legal Centre Trust* (n39) para 184.



Section 9(2) could be interpreted as imposing a positive obligation on the state to prioritise and take positive redistributive measures in favour of vulnerable groups if the failure to do so would not allow, ‘full and equal enjoyment of all rights and freedoms’. The barrier to the section 9(2) argument is the permissive language in this provision. The use of the term ‘may’ could be interpreted to mean that section 9(2) is a permissive clause and does not impose a *duty* to promote the achievement of equality *through* prioritisation and positive redistributive measures when realising socio-economic rights. This understanding of section 9(2) is supported by the language used by the SACC in its examination of the section. For example, in *Van Heerden*, the terms ‘authorise’ and ‘permit’ are used in several places to describe the nature of the obligation under section 9(2).<sup>41</sup>

However, provisions which first appear to be permissive can in some cases impose a positive duty to act. For example, in *Women’s Legal Trust*,<sup>42</sup> a South African High Court (SAHC) was faced with a ‘permissive’ provision, section 15(3) of the Constitution. Section 15(3) of the South African Constitution provides that the recognition of the right to freedom of religion, belief and opinion does not ‘prevent’ legislation regulating tradition or religious marriages. Through a purposive and transformative approach to interpretation, the court was able to look beyond the text and impose a positive obligation on the state to take positive action and enact legislation to regulate Muslim marriages.<sup>43</sup>

Recent SAHC cases, and in the context of the Covid-19 pandemic, have affirmed a similar approach to that suggested in this chapter.<sup>44</sup> In *Small Business Development*, Kollapen J held that when taking economic relief measures to help businesses adversely affected by the Covid-19 pandemic, the state must recognise the ‘uneven playing field’ and the ‘fault lines’ of ‘poverty, race and exclusion that continue to exist in our society’.<sup>45</sup> Having recognised these, he held that it should then calibrate its response ‘to deal with the impact of the crisis as well as the effect of historical disadvantage’.<sup>46</sup> This approach, according to Kollapen J, ‘is not only permissible at the level of principle, but warranted and necessary’.<sup>47</sup> These

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<sup>41</sup> *Van Heerden* (n6) paras 28, 33 and 69.

<sup>42</sup> *Women’s Legal Centre Trust* (n39).

<sup>43</sup> (n42) para 184.

<sup>44</sup> *Solidarity Obo Members v Minister of Small Business Development and Others; Afriforum v Minister of Tourism and Others* (21314/20); 21399/2020 [2020] ZAGPPHC 133 (Small Business Development); *Democratic Alliance v President of the Republic of South Africa and Others (Economic Freedom Fighters Intervening)* (21424/2020) [2020] ZAGPPHC 237 (Democratic Alliance Covid-Relief); *Democratic Alliance v President of the Republic of South Africa and Others* (21424/2020) [2020] ZAGPPHC 326.

<sup>45</sup> *Small Business Development* (n44) para 36.

<sup>46</sup> (n45).

<sup>47</sup> (n45).

findings were made in the context of a case in which the trade union, Solidarity, was challenging the validity of the Covid-19 pandemic economic relief criteria that, by allocating points for Black ownership, conferred an advantage to Black-owned businesses. Kollapen J found the impugned criteria permissible. In addition, his judgment alludes to there being an obligation on organs of the state to take positive measures in favour of disadvantaged groups when the failure to do so would entrench existing patterns or ‘fault lines’ of poverty and exclusion.<sup>48</sup>

While the *Small Business Development* judgment does not state the source of this obligation, it alludes to it being an aspect of the commitment to substantive equality. This can be seen in that the judge justified the policy’s use of racial criteria as being in accordance with the ‘general transformative trajectory of the Constitution in which the principle of equality finds centre place’. Moreover, it was held that ‘a race neutral response’ in this case would have had the effect of deepening existing patterns of disadvantage. For Kollapen J, ‘in a time of a crisis, when people are their most vulnerable, context matters’.<sup>49</sup>

This approach was affirmed in another SAHC case, *Democratic Alliance Covid-Relief*. This case concerned the use of gender, age and disability status in criteria for Covid-19 pandemic relief for businesses. Going further than Kollapen J, the judges in this case held that the state *must* take race, gender, youth and disability status into account when distributing the relief funds.<sup>50</sup> The court based its finding on the interpretive obligation in section 39(2) of the Constitution as well as section 9(2) of the South African Constitution. Section 39(2) obliges South African courts, when interpreting any legislation or when developing the common law, to ‘promote the spirit, purport and objects of the Bill of Rights’. Based on this provision, the court held that the provisions in the Disaster Management Act 57 of 2002 – the legislation under which Covid-19 pandemic regulations were promulgated – had to be interpreted in a manner that considered South Africa’s history, in particular, the ‘pattern of disadvantage in which race, class and gender are overlaid’.<sup>51</sup> In relation to section 9(2), the court held that –

The very presence of s 9(2) of the Constitution together with the range of socio-economic rights contained in sections 26, 27, 28 and 29 of the Constitution luminously illustrate its commitment to historical redress *and the priority that must be given to those most in need*.<sup>52</sup> (Emphasis added)

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<sup>48</sup> (n45).

<sup>49</sup> *Small Business Development* para 37.

<sup>50</sup> *Democratic Alliance Covid-Relief* (n44) para 55.

<sup>51</sup> (n44) para 48.

<sup>52</sup> (n44) para 50.

Overall, the approach suggested in the South African context aligns with the commitment to substantive equality in the sense that it requires all measures to combat the Covid-19 pandemic to take cognisance of the disproportionate impact that the pandemic has had on already vulnerable groups and seek to eliminate these by taking positive redistributive measures in their favour. This is mandated by a wholistic, purposive and transformative reading of sections 7(2) and 9 of the South African Constitution and their relationship with the other rights in the Bill of Rights. Further, when the courts interpret the provisions or legislation empowering the state to take measures to alleviate the impact of the Covid-19 pandemic, the section 39(2) interpretive obligation obliges the court to take this context into account. Any other approach would render the commitment to substantive equality nugatory.

### 3.3.1.3 Botswana

The Botswana Constitution provides that ‘no law shall make any provision that is discriminatory either of itself or in its effect’ on the grounds of race, tribe, place of origin, political opinions, colour, creed or sex.<sup>53</sup> The Botswana Constitution further provides that discrimination exists where privileges or advantages are accorded on a discriminatory basis. It specifically states that discrimination exists –

whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.<sup>54</sup>

As with Kenya and South Africa, the courts have interpreted these provisions as encompassing a substantive rather than just a formal approach to equality.

However, as noted earlier in the chapter, in stark contrast with the position in Kenya and South Africa, the Botswana Constitution does not provide for justiciable socio-economic rights.<sup>55</sup> It should be stated that this chapter, particularly as it relates to Botswana does not seek to explore whether Botswana should indeed have justiciable socio-economic rights. This chapter shows that, even in the absence of justiciable socio-economic rights, the right to equality, and particularly substantive equality, can be the basis of the equality-sensitive approach.

While the Botswana Constitution does not recognise socio-economic rights, the Botswana government has, in policy providing socio-economic resources,

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<sup>53</sup> Section 15(1) Constitution of Botswana [CAP 01:01].

<sup>54</sup> Section 15(3) (n53).

<sup>55</sup> BR Dinokopola ‘The justiciability of socio-economic rights in Botswana’ 2013 (57) *Journal of African Law* 114.

recognised socio-economic vulnerability and sought to redress it through targeted programmes. The World Bank reports that, 'Botswana is one of the few countries in Africa that fully funds social protection programs out of its own resources, dedicating 4.4% of its GDP to social spending'.<sup>56</sup> The Botswana government has set-up several socio-economic programmes geared towards assisting vulnerable groups.<sup>57</sup> Further, Botswana's new National Vision 2036 acknowledges that vulnerability needs to be addressed. It provides that 'social inclusion is central to ending poverty and fostering shared prosperity as well as empowering the poor, the marginalised people, to take advantage of burgeoning opportunities', and further that 'social protection will *continue* to be provided to support the most vulnerable members of the society'.<sup>58</sup>

In Botswana, the basis for the recognition of a duty to take an equality-sensitive approach is the prohibition of discrimination. The argument is that while there are no justiciable socio-economic rights, the prohibition of discrimination requires the state, in its policies, to prioritise vulnerable groups. This is because any policy that fails to consider underlying socio-economic disadvantage is a form of indirect discrimination. The neutrality of any policy in the implementation of socio-economic rights to material disadvantage will likely have a disproportionately harmful impact on vulnerable groups.

In the Covid-19 pandemic context, a key drawback to the recognition that the prohibition of unfair discrimination founds a positive obligation to prioritise and take positive measures in favour of vulnerable groups, is the fact that the Botswana Constitution provides for the derogation from fundamental rights and freedoms in certain circumstances. This includes during a state of emergency, the Covid-19 health pandemic being one. According to section 16(1) of the Botswana Constitution –

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 or 15 of this Constitution to the extent that the law authorizes the taking during any period when Botswana is at war or any period when a declaration under section 17 of this Constitution is in force, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during that period.

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<sup>56</sup> The World Bank (8 December 2015) 'Botswana Poverty Assessment: Despite significant decline in poverty, many, nearly half of them children, are still poor' <https://www.worldbank.org/en/country/botswana/publication/botswana-poverty-assessment-december-2015> viewed 2 September 2020.

<sup>57</sup> E Botlhale, L Mogopodi, B Mothusi & B Motshegwa (October 2015) A political economy analysis of social protection programmes in Botswana (Partnership for African Social and Governance Research Working Paper No. 001, Nairobi, 10).

<sup>58</sup> See <https://vision2036.org/bw/human-and-social-development> viewed 2 September 2020.

However, failing to take the vulnerability of disadvantaged communities into account is not reasonably justifiable, as the effects of the pandemic will only entrench disadvantage and vulnerability if active steps are not taken.

Nevertheless, the implementation of many of the measures to tackle the pandemic have failed to heed or adequately heed the promise of equality in these constitutions. This is particularly seen in relation to the rights to health, housing, food, education, and social security. Expounding on the harms of not recognising equality as an important ingredient in the implementation of socio-economic rights and addressing their violation and non-fulfilment, a number of contextual socio-economic challenges relating to the Covid-19 pandemic are discussed below. These challenges emphasise the need for an equality-sensitive approach, both in the realisation of socio-economic rights and in addressing rights violations.

### **3.3.2 The relationship between the equality-sensitive approach, progressive realisation and the minimum core approach**

A question which arises relates to the relationship between the equality-sensitive approach and the commitment to ‘progressive realisation’ and the ‘minimum core’ approach to realising socio-economic rights. The term ‘progressive realisation’ stems from article 2(1) of the International Covenant on Economic Social and Cultural Rights (ICESCR), which obligates every state party to the Covenant ‘to take steps... to the maximum of its available resources, with a view to *achieving progressively the full realisation* of the rights’ in the Covenant.<sup>59</sup> This language is found in both the South African and Kenyan Constitutions in relation to the realisation of socio-economic rights entrenched in those Acts. In the South African Constitution, sections 26(2), 27(2) and 29(2) all provide that

The state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation*’ of the rights to housing, healthcare, food, water, social security and education.

Likewise, Article 21(2) of the Kenyan Constitution mandates that ‘The State shall take legislative, policy and other measures, including the setting of standards, to achieve the *progressive realisation* of the [socio-economic] rights guaranteed under Article 43’.<sup>60</sup> Important to note is the fact that, while both South Africa and Kenya are parties to the ICESCR, Botswana is not.<sup>61</sup> Also, as earlier noted, socio-economic rights are not explicitly guaranteed in the Botswana Constitution.

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<sup>59</sup> Emphasis added.

<sup>60</sup> Emphasis added.

<sup>61</sup> See [indicators.ohchr.org](http://indicators.ohchr.org) viewed 7 September 2020.

On one end of the spectrum, the progressive realisation standard is important in recognising the resource constraints that states may face when realising socio-economic rights. However, on the other end of the spectrum, progressive realisation may be used, and is actually invoked, as an excuse by states for not meeting their obligations to provide and fulfil socio-economic rights, despite obvious inordinate delays, neglect and inattentiveness in fulfilling the same. This is largely why the CESCR felt that it was important to clarify that the standard of progressive realisation does not deprive states' obligation to fulfil socio-economic rights of all meaningful content.<sup>62</sup> This is because, according to the CESCR, state parties still have a *minimum core* obligation to ensure the satisfaction of, at the very least, minimum essential levels of each socio-economic right.<sup>63</sup> Therefore, the whole obligation is not postponed. as state parties have an obligation to take deliberate, concrete and targeted steps to realise socio-economic rights and not to take retrogressive measures.<sup>64</sup> Aside from the minimum core obligation, the CESCR has also noted that the standard of progressive realisation contains an immediate obligation of non-discrimination, which essentially means that the provision of socio-economic rights should not be done in a discriminatory manner and should be extended to unjustly excluded groups.<sup>65</sup>

The progressive realisation and minimum core approaches have been the subject of many debates. They have been criticised and supported in equal measure.<sup>66</sup> This chapter will not rehash what has already been extensively stated on the matter. It makes a unique and independent argument, which is that substantive equality, recognised in all three jurisdictions, places a duty on the governments of Botswana, Kenya and South Africa to prioritise the socio-economic needs and challenges faced by vulnerable groups when seeking to

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<sup>62</sup> UN Economic and Social Council (14 December 1990) General Comment No. 3: The Nature of States Parties' Obligations (art 2, para 1 of the Covenant) E/1991/23 [9].

<sup>63</sup> (n62) para 10.

<sup>64</sup> (n62) para 2.

<sup>65</sup> CESCR General Comment No. 20 (2009) para 7 provides that 'Non-discrimination is an immediate and cross-cutting obligation in the Covenant'; CESCR General Comment No. 13 (1999) para 43 recognises that state parties have an immediate obligation in relation to exercise of the right to education, when it is provided to some and not others.

<sup>66</sup> See for instance *Grootboom* (n28) paras 29-33 where the SACC explores the meaning of and rejects the standard of minimum core in relation to the right to housing in South Africa; D Bilchitz 'Giving socio-economic rights teeth: The minimum core and its importance' 2002 (19) *SALJ* 484; K Young 'The minimum core of economic and social rights: A concept in search of content' 2008 (33) *Yale Journal of International Law* 113; D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (2008) 162-221.

provide and fulfil socio-economic rights. This could be in the context of policies which seek to progressively realise socio-economic rights or those that seek to meet minimum core obligations. Essentially, our argument is that, for a state to meet its obligation to progressively realise or meet the minimum core, it must take an equality-sensitive approach. For example, in South Africa, the threshold for a state to meet its progressive realisation duty is that it should have a 'reasonable policy' towards realising the right.<sup>67</sup> In terms of the equality-sensitive approach, a policy which does not target and prioritise vulnerable groups cannot be said to be reasonable.

Having explored the normative and textual basis for, and implications of the equality-sensitive approach, in the next section, we critically explore whether, and the extent to which the three jurisdictions have actually applied an equality-sensitive approach in their responses to the Covid-19 pandemic.

### **3.4 WHAT HAVE THE GOVERNMENTS DONE OR NOT DONE TO PRIORITISE THE NEEDS OF VULNERABLE GROUPS?**

At the advent of the Covid-19 pandemic, all three jurisdictions introduced policies to help alleviate its socio-economic impact, some of which embody an equality-sensitive approach. This included measures which targeted vulnerable groups in the allocation of resources or used criteria such as race, gender, disability and rural status to prioritise the socio-economic needs of vulnerable groups.

In Kenya, the National Health Insurance Fund (NHIF) announced that it would support all Covid-19 infected policy holders and their declared beneficiaries who were admitted to the Ministry of Health's designated health facilities.<sup>68</sup> In addition, the Kenyan government introduced a 100% tax relief for all persons earning a gross income of less than Ksh 24,000 (US \$221) per month; income tax reduction from 30% to 25%; reduction of turnover tax from 3% to 1% for all micro, small, and medium-sized enterprises; reduction of the Value Added Tax from 16% to 14%; and cash transfers to listed poor and vulnerable persons such as the elderly, orphans and persons categorised as vulnerable members of society.<sup>69</sup>

Similarly, in South Africa, the government initiated a wide range of social and economic interventions to help vulnerable groups throughout the pandemic.

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<sup>67</sup> *Grootboom* (n28) para 33. See text of n33.

<sup>68</sup> See D Indeje (2020) 'NHIF to cover partial Covid-19 Expenses in designated government hospitals' *Khusoko* <https://khusoko.com/2020/07/29/nhif-to-cover-partial-covid-19-expenses-in-designated-government-hospitals/> viewed 8 November 2020.

<sup>69</sup> M Were (2020) 'Covid-19 and socioeconomic impact in Africa: The case of Kenya' (WIDER Background Note 2020/3, Helsinki: UNU-WIDER).

This includes temporary increases in social security payments for children, elderly persons on a pension as well as a Covid-19 pandemic grant that targeted unemployed persons.<sup>70</sup>

In Botswana, government measures included the establishment of a Covid-19 Relief Fund, a Wage Support Scheme to provide financial support to employees of certain industries and wage subsidies to businesses of up to BWP2,500 (US \$250) per month for citizen employees, as well as tax relief for businesses.<sup>71</sup>

However, in all three countries, there were some gaps in these policies, indicating that their governments did not consider that they had a *duty*, as opposed to an authority, to take an equality-sensitive approach when designing and implementing socio-economic policies to combat the Covid-19 pandemic. This is because, some of the relief failed to account for the specific vulnerability of some groups.

In South Africa, for example, the Covid-19 pandemic grant initially excluded asylum seekers and special permit holders. The grant targeted unemployed persons who did not receive any other form of social support. It was thus peculiar that asylum seekers and special permit holders were excluded as they too suffer from the similar disadvantages that the grant sought to help alleviate. Fortunately, the court ordered the inclusion of this group in the *Scalabrini* case.<sup>72</sup> In its judgment, the court took an equality-sensitive approach to the realisation of socio-economic rights, specifically holding that the right to equality and social assistance were ‘unequivocally linked’.<sup>73</sup> In a contextual analysis mandated by a commitment to substantive equality, the court held that asylum seekers had not escaped the negative consequences of the pandemic and lockdown.<sup>74</sup> For the court, the extension of social security also vindicated the rights to equality and dignity.<sup>75</sup>

Another area in which there was a clear failure in taking an equality-sensitive approach to realising and protecting the socio-economic rights is in the context of evictions that continued to occur during the Covid-19 pandemic. In Kenya, the first two weeks of May 2020 saw mass forced evictions without relocation or

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<sup>70</sup> See H Bhorat et al (2020) ‘Social assistance amidst the Covid-19 Epidemic in South Africa: An impact assessment’ (Development Policy Research Unit Working Paper 202006. Development Policy Research Unit, University of Cape Town) <[http://www.dpru.uct.ac.za/sites/default/files/image\\_tool/images/36/Publications/Working\\_Papers/DPRU%20WP202006.pdf](http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/Publications/Working_Papers/DPRU%20WP202006.pdf) viewed 8 November 2020.

<sup>71</sup> See <https://www.gov.bw/assistance-businesses> viewed 9 November 2020.

<sup>72</sup> *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Other* (22808/2020) 2020 ZAGPPHC 308 (18 June 2020) (*Scalabrini*).

<sup>73</sup> (n72) para 26.

<sup>74</sup> (n72) para 24.

<sup>75</sup> (n72) para 38.



compensation and demolition of houses for over 9,000 vulnerable persons living in Ruai and Kariobangi informal settlements located in Nairobi, Kenya's capital city.<sup>76</sup> The forced evictions took place in heavy rainfall, in the evening during Covid-19 pandemic curfew hours and without due notice – with a verbal notice being given two days before one of the evictions.<sup>77</sup> This left the evicted residents exposed to Covid-19 and sleeping out in the cold without alternative shelter, food, access to water and sanitation. Evictees could not even move back to their rural homes because of the national lockdown at the time, which restricted movement from county to county. The evictions being conducted during curfew hours, also meant that evictees were left exposed to arrests for violating the curfew and the Covid-19 prevention requirements such as social distancing and the wearing of masks. The evictions in Kariobangi area took place despite a court order prohibiting government authorities from conducting the evictions on the disputed land pending the hearing of an application with respect to allocation of the land – said to be public land – to the informal settlers.<sup>78</sup>

In all jurisdictions, schools had to shut down during the pandemic. This had a detrimental impact on realising the right to education, especially for the most vulnerable children. In Kenya, schools moved to digital education. This exacerbated the digital divide in access to education which greatly affects regions that lack electricity, internet connectivity and network resilience, as well as families without access to smart phones, laptops and televisions. In *Ndoria Stephen v Minister of Education & 2 others*, it was rightly pointed out that –

since independence children from geographically disadvantaged and marginalised areas [in Kenya] have been sidelined by policies that have denied them equal access to education to enable them to compete fairly for the few slots in secondary schools and public universities.<sup>79</sup>

This fact, in the case, was said to warrant higher allocation of funds to facilitate access to education in such areas. A couple of other issues noted in commission reports were raised that affect learners' access to education in Kenya's rural, remote and marginalised areas such as the North Eastern region. These include students having to travel long distances to access schools; the need for access to

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<sup>76</sup> See 'COVID-19 crisis: Kenya urged to stop all evictions and protect housing rights defenders' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25901&LangID=E> viewed 7 August 2020.

<sup>77</sup> (n76); J Wangui (8 June 2020) 'Kariobangi demolition victims sue State, want CSs fired' *The Nation* Nairobi.

<sup>78</sup> (n77); 'Court stops State from evicting 8000 families' <https://www.pd.co.ke/news/national/court-stops-state-from-evicting-8000-families-35452/> viewed 7 August 2020.

<sup>79</sup> *Ndoria Stephen v Minister for Education & 2 others* [2015] eKLR [7].

meals (mostly lunches) in schools to encourage attendance, as a substantial number of learners in marginalised areas come from poor backgrounds; the need for proper access to water and sanitation in schools; and the setting up mobile schools for pastoralist communities.<sup>80</sup> One such report, noting the access to education challenges faced by learners from marginalised areas, is the Kenya Truth Justice and Reconciliation Commission (TJRC) final report.<sup>81</sup> The report notes that there are marginalised areas in Kenya where children study under trees, ‘yet they are expected to compete favourably with the rest of students from other parts of [the] country who are endowed with all the facilities’.<sup>82</sup> The realisation of this fact has, over the years, led to the institution of measures to ensure equitable access to education by children from marginalised communities. For instance, the setting of admission quotas to secondary schools and public universities given to learners from marginalised and hardship areas, appreciating the harsh conditions in which they study. Worse still is the impact of the pandemic on learners who are persons with disabilities, particularly the deaf and blind. As Bhandari aptly observes ‘those who are already disadvantaged, due to economic or structural inequalities, ... suffer greater digital exclusion during the pandemic’.<sup>83</sup>

With the Covid-19 pandemic interfering with normal in-person learning, the incumbent Kenyan government’s 2013 general election manifesto promising laptops for every Class One learner, that was for a long time criticised for being ‘a misplaced priority’, now seems realistic.<sup>84</sup> However, the laptops project never quite took off, with only a relatively small number of learners getting tablets.<sup>85</sup> In the wake of the Covid-19 pandemic, the Kenyan government set up a Covid-19 ICT Advisory Committee on 21 April 2020 to co-ordinate ICT specific responses to combat the effects of the pandemic.<sup>86</sup> It is yet to report any tangible results.<sup>87</sup> However, already, the establishment of the Committee during the pandemic is not seen as ideal. Accordingly, some commentators have noted that the government can make better use of the money by, for instance, establishing and improving

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<sup>80</sup> (n79) para 8.

<sup>81</sup> TJRC (2013) *Report of the Truth, Justice and Reconciliation Commission* Volume IIB (Kenya TJRC 2013).

<sup>82</sup> (n81) 1–4.

<sup>83</sup> V Bhandari (August 2020) ‘Improving internet connectivity during Covid-19’ (Digital Pathways at Oxford Paper Series No. 4, Oxford) 2.

<sup>84</sup> See A Oduor (28 April 2020) ‘Jubilee laptops project that failed Kenyan child’ *The Standard* Nairobi.

<sup>85</sup> V Obara (26 February 2019) ‘How Uhuru’s Sh24.6 billion laptops project collapsed’ *The Nation* Nairobi.

<sup>86</sup> Kenya Gazette Notice No. 3236 in Vol CXXII-No 73 of 21 April 2020.

<sup>87</sup> See <https://ca.go.ke/about-us/who-we-are/ict-advisory-committee-on-covid-19/> viewed 27 August 2020.

internet access and network resilience, reducing internet tax and making sure that more households in rural and marginalised areas – where a disproportionate number of poor and vulnerable groups reside – have electricity.<sup>88</sup>

In South Africa, the closure of schools left over nine million pupils who relied on free school meals without access to food during this period. While the government and many NGOs distributed food parcels to families, the distribution was reportedly not broad enough. The failure to ensure that children had access to basic nutrition while learning from home or otherwise unable to be in school because of the Covid-19 pandemic, was a failure to take an equality-sensitive approach to protecting the rights of children to basic education and nutrition. In an urgent application brought by the Equal Education organisation against the Minister of Basic Education and eight of the nine provincial administrations in South Africa, the court affirmed the interrelatedness of the rights to basic education, basic nutrition and equality for children – an interrelatedness that required the provision of free school meals for all eligible children, including those still at home due to the phased opening of schools. The case concerned the roll-out of the National School Nutrition Programme (NSNP). Equal Education argued that the respondents had breached their constitutional and statutory obligation to ensure that the NSNP provides a daily meal to all qualifying learners whether they are attending school or are away from school due to the Covid-19 pandemic. In particular, that this failure had breached various rights in the South African Constitution, including the right to education (section 29(1)(a)); children’s rights to basic nutrition (section 28(1)(c)); and the right to sufficient food and water (section 27(1)(b)).<sup>89</sup>

In its judgment, the court noted the devastating effect of denying nine million school-going children at least one meal per day, leaving many hungry.<sup>90</sup> The court held that the state had both negative and positive obligations to the rights in the Bill of Rights. In this case, it had a duty to respect and protect entitlement to basic nutrition and education as fulfilled by the NSNP.<sup>91</sup> Accepting the NSNP as a form of positive redistributive measure under section 9(2) of the Constitution, the court held that once benefits have been conferred under this provision, they cannot be retracted at will.<sup>92</sup> Referring to General Comment 19 of the United Nations Convention on the Rights of the Child, the court held that, even in times of emergency such as a health pandemic, the state had a duty not to take deliberate retrogressive measures in realising the socio-economic rights of

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<sup>88</sup> For instance, Bhandari (n83) 12.

<sup>89</sup> *Equal Education and Others v Minister of Basic Education and Others* (22588/2020) [2020] ZAGPPHC 306 (17 July 2020) para 34.

<sup>90</sup> (n89) para 20.

<sup>91</sup> (n89) paras 44–54.

<sup>92</sup> (n89) para 56.

children. In instances of crises, regressive measures could only be considered after assessing all other options and ensuring that children are last to be affected, especially children in vulnerable situations.<sup>93</sup>

In Botswana, the government failed to make provision for access to online learning or adequate alternative access to education in public schools during the Covid-19 pandemic, which was exacerbated by Botswana undergoing three lockdowns, comprising of one national and subsequent lockdowns targeting specific areas, where schools were closed during these periods.<sup>94</sup> In terms of section 3 of the Emergency Powers Act (Cap 22:04) the Emergency (Covid-19) Regulations 2020 were promulgated after being affirmed by the Botswana National Assembly, which brought forth a state of emergency proclamation and a lockdown of one month during April 2020.<sup>95</sup> There was a further lockdown in the Greater Gaborone Zone in May 2020,<sup>96</sup> as well as another in the Greater Gaborone Zone from 12 June 2020 which ultimately was for a period of two weeks, but at the time, was stated to be ‘until further notice’.<sup>97</sup> All schools were closed during the lockdowns.<sup>98</sup> Thus, children who received education through the public-school system had their education disrupted, as adequate continuous learning was not provided for.

The government’s response to the effect of the pandemic on schools and learning failed to acknowledge that poor children in public schools were vulnerable and would be acutely affected by school closures. The Ministry of Basic Education stated that –

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<sup>93</sup> (n89) para 57.

<sup>94</sup> At the time of writing this paper.

<sup>95</sup> Botswana Emergency (COVID-19) Regulations 2020, sections 5(1) and (2). The former states that ‘During the state of public emergency declared by the President under the Emergency Proclamation, the President may declare a national lockdown for the whole of Botswana or a lockdown in a particular location or area of Botswana’. The latter then states that, ‘For the purpose of preventing, controlling and suppressing the spread of COVID-19, a lockdown is hereby declared with effect from 2<sup>nd</sup> April, 2020 at midnight until 30<sup>th</sup> April, 2020, for the whole of Botswana’.

<sup>96</sup> In terms of Extraordinary Government Notice No. 186 of 2020.

<sup>97</sup> Lockdown of Greater Gaborone Zone in terms of Extraordinary Government Notice No. 216 of 2020.

<sup>98</sup> Botswana Emergency (COVID-19) Regulations 2020, section 20(1) and (2). The latter provides that ‘For purposes of this regulation, ‘school’ means a pre-primary school, primary school, post primary school, during school and tertiary institution, including a university’.

The closure of schools during the State of Emergency means that the number of school days during this academic year may be far less than the minimum requirement of 180, and this may impact negatively on teaching and learning. Given that no significant teaching and learning would have taken place this year, it may not be possible for assessment to take place. As a result, all learners may have to repeat their classes in 2021.<sup>99</sup>

The statement by the Government of Botswana that, ‘all schools inclusive of private schools within the Greater Gaborone Zone are closed as of 13 June 2020 until further notice’,<sup>100</sup> assumed that all children would be equally affected by the closure. This was not the case; private schools had the option and arguably the resources to make alternative arrangements for learning – making the cost of access to education whether one could afford a private school. The statement does not consider the most vulnerable groups in relation to access to education who are students who attend public schools and are not able to access online learning at home, and for whom adequate alternative arrangements have not been made. Overall, the Botswana governments Ministry of Basic Education’s Plan of Action in response to the pandemic has been inadequate. For example, in relation to the continuity of learning during school closure, the Ministry stated that ‘[t]eachers should obtain the phone numbers of the parents/caregivers of the learners and create communication platforms to facilitate discussions, check in on children’s progress and share assignments’, and further that ‘[s]chools should prepare reading and assignment packages for learners.’ This response assumes that parents will have access to data which will facilitate communication with teachers and does not include proactive plans by the Botswana Government to facilitate continuous communication between parents, learners and the school. Further, while the state has provided learning through educational programs on state television, this alternative mechanism is limited in reach because it assumes that all learners actually have access to television. In addition, this measure is only supplementary as it is meant to support already existing learning infrastructure and modes of learning.

### 3.5 CORRUPTION

It is important to note that corruption was likely one of the barriers towards protecting vulnerable groups and the broader community in the three jurisdictions. Corruption is a major impediment to the delivery of socio-economic rights, particularly to vulnerable groups. This is because it further depletes already

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<sup>99</sup> Public statement by the Ministry of Basic Education on school closures, dated 10 April 2020, Ref MOBE 1/15/6 I (298).

<sup>100</sup> (n99).

scarce resources. In Kenya, initiatives by Kenya's Ministry of Health to curb the spread of Covid-19 through provision of items like masks and personal protective equipment (PPEs) to healthcare workers has been riddled with a corruption scandal dubbed #Covid19Millionaires. The scandal relates to the alleged plunder by public officials of the Ministry of Health's Kenya Medical Supplies Agency of millions of Kenya shillings.<sup>101</sup> In South Africa, the Special Investigation Unit is currently investigating multiple cases of corruption related to the Covid-19 pandemic relief funds.<sup>102</sup> In Botswana, there have been corruption allegations in relation to the procurement of materials meant to assist in the fight against the pandemic, which has led to some senior officers being put on leave of absence pending investigations.<sup>103</sup> Such corruption is also counterproductive, as during a time when countries will be implementing austerity due to the pandemic, foreign investment flows will necessarily decrease, and the presence of corruption and a lack of transparency will only serve to worsen the problem.<sup>104</sup>

These scandals affirm the South African Constitutional Court's observation in *Glenister* that 'corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order'.<sup>105</sup> The devastating impact that corruption has had on the realisation of all human rights has become one of the frontline struggles towards ensuring the realisation of rights. For example, the UN General Assembly's Agenda 2030 of sustainable development, has committed all states to reduce corruption in all its forms.<sup>106</sup>

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<sup>101</sup> P Wafula (24 August 2020) 'Lobbies want accounts of Covid-19 millionaires frozen, probe hastened' *The Nation* <https://allafrica.com/stories/202008240648.html> viewed 30 November 2020.

<sup>102</sup> L Kiewit (19 August 2020) 'SIU urged to act fast on Covid corruption, as more than 600 cases pile up' *Mail & Guardian* <https://mg.co.za/coronavirus-essentials/2020-08-19> viewed 30 November 2020.

<sup>103</sup> See <https://allafrica.com/stories/202007240156.html> viewed 28 August 2020.

<sup>104</sup> See L Somolekae et al (22 February 2019) 'Redefining investment in Africa – transparency as an investment incentive' *Africa Law & Business* <https://iclg.com/alb/9115-redefining-investment-in-africa-transparency-as-an-investment-incentive> viewed 30 November 2020.

<sup>105</sup> *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 166.

<sup>106</sup> United Nations General Assembly (25 September 2015) Transforming our world: The 2030 agenda for sustainable development, GA Res. 70/1 [16.4]-[16.5].

### 3.6 CONCLUSION

In this chapter, we have argued that the right to equality in Kenya, South Africa and Botswana place a positive obligation on the governments to take an equality-sensitive approach when realising socio-economic rights. This approach has two important features. First, it is a principle of prioritisation. This means that when allocating resources to realise socio-economic rights, the government must prioritise the needs of vulnerable groups. Second, this approach creates a positive obligation to take positive redistributive measures in favour of vulnerable groups and towards realising their socio-economic rights. The equality-sensitive approach is particularly salient during times of national emergency.

The chapter has shown that while some of the governments' relief efforts were cognisant of the need to provide for disadvantaged and vulnerable groups – this was on an *ad hoc* basis. In some cases, for example in the context of ensuring that all children's right to education was protected, examples from the three jurisdictions show that there was a failure to take an equality-sensitive approach. That local governments continued to evict poor and disadvantaged persons during the pandemic is another indication of the willingness of governments to curtail rather than fulfil, protect and respect socio-economic rights.

Noting the negative impact that the pandemic has had (and will likely continue to have) on the global, regional and local economy, we anticipate that governments may take austerity measures. If this does indeed occur, and the governments in the three jurisdictions do cut down on public spending, the equality-sensitive approach requires these governments to ensure that such measures have the least detrimental impact on vulnerable groups.

In order for the equality-sensitive approach to have its purported impact, the jurisdictions must commit to ending corruption and ensuring that funds allocated for realising socio-economic and other rights are correctly used for this intended purpose.

# Covid-19, access to rights and countering violent extremism against vulnerable women: Reflections and propositions from Kenya

Emmah Senge Wabuke\*

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**ABSTRACT**

As in other parts of the world, the Covid-19 pandemic has had adverse effects on Kenya, including in the state’s ongoing counterterrorism effort against Al Shabaab. This counterterrorism effort is multifaceted, including express integration of socio-economic rights as part of the national strategy to combat terrorist elements in the country. The thrust of this paper is to put this strategy into focus by interrogating the effects of Covid-19 on advancing socio-economic rights as part of the overall strategy in countering violent extremism in Kenya. Specific focus shall be given to vulnerable women because women, as a marginalised group, not only face challenges in accessing socio-economic rights but also, they remain largely underrepresented in Countering Violent Extremism (CVE) initiatives. This interrogation shall comprise three main parts. First, I shall justify the necessity of recognising the nexus between radicalisation into violent extremism and access to socio-economic rights to develop holistic CVE programming. Additionally, I shall inquire into the extent to which Kenya has adopted strategies that reflect the said nexus. In the second part of the chapter, I shall highlight the impact of Covid-19 on socio-economic-based CVE programmes in Kenya, including, the propagandist and ‘pretend-benevolent’ roles played by terrorist groups in the wake of the pandemic. The third part will attempt to isolate specific solutions that may be used by stakeholders to ensure that socio-economic CVE Policies may subsist irrespective of the continued global health pandemic. These include supporting a community-led do-it-yourself approach to countering violent extremism against women, integrating more private sector.

## 4.1 INTRODUCTION

On 13 March 2020, the Kenyan Government confirmed the first positive case of Covid-19 in the country.<sup>1</sup> This confirmation led to the adoption of several public health measures, including closure of schools and universities, restriction of public gatherings, suspension of international travel and a nationwide curfew to limit human physical movement.<sup>2</sup> These announcements were made against a backdrop of the country's ongoing counterterrorism strategies against the militant terrorist group, Al Shabaab and its affiliates.<sup>3</sup>

As in other countries, Kenya has increasingly adopted multifaceted approaches to counter violent extremism, including recognising linkages between unequal access to social and economic rights and the root causes of violent extremism.<sup>4</sup> Therefore, to varying levels, stakeholders have integrated socio-economic rights into the country's counterterrorism strategies.

Through laws and policies, the state has highlighted, at least on paper, the need to improve the socio-economic wellbeing of marginalised groups in Kenya as a key strategy in defeating radicalisation in the country.

However, as in every other aspect of society, the global health pandemic occasioned by Covid-19 has, and by most estimates will continue to have lasting effects on counterterrorism strategies.<sup>5</sup> Already, researchers have indicated that extremist groups in sub-Saharan Africa, more generally, are already exploiting this pandemic in varied ways.<sup>6</sup> Due to the strain in resources, for example, emergent governance vacuums in marginalised areas have been filled by some terrorist

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<sup>1</sup> Ministry of Health Kenya (13 March 2020) 'First case of Coronavirus disease confirmed in Kenya (Official Press Release) <https://www.health.go.ke/first-case-of-coronavirus-disease-confirmed-in-kenya/#:~:text=Press%20Releases-,FIRST%20CASE%20OF%20CORONAVIRUS%20DISEASE%20CONFIRMED%20IN%20KENYA,in%20China%20in%20December%202019> viewed 1 September 2020.

<sup>2</sup> The Office of the President Kenya (15 March 2020) 'Address to the nation on Covid-19, commonly known as Coronavirus (Official Press Release) <https://www.president.go.ke/2020/03/15/address-to-the-nation-by-h-e-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-on-covid-19-commonly-known-as-coronavirus/> viewed 1 September 2020.

<sup>3</sup> Kenya Defence Forces (2020) 'War For Peace: Kenya's Military in the African Mission In Somalia 2012-2020' (Ministry of Defence Kenya 2020) 35.

<sup>4</sup> (n3) at 49.

<sup>5</sup> R Ramadhan & L Ouma (1 May 2020) 'COVID-19 and countering violent extremism measures in Kenya' *Centre for Human Rights and Policy Studies* <https://www.chrips.or.ke/publications/policy-brief/covid-19-and-countering-violent-extremism-efforts-in-kenya/> viewed 1 September 2020.

<sup>6</sup> (n5).

groups which have provided socio-economic services, otherwise unavailable to the population.<sup>7</sup>

The main thrust of this paper, therefore, is to put this into focus by interrogating the effects of Covid-19 on advancing socio-economic rights as part of the overall strategy in countering violent extremism in Kenya. This interrogation shall comprise three main parts. First, I shall justify the expediency of recognising the nexus between radicalisation into violent extremism and access to socio-economic rights in order to develop holistic Countering Violent Extremism (CVE) programming. Additionally, I shall inquire into the extent to which Kenya has adopted strategies that reflect the said nexus.

In the second part of the paper, I shall highlight the impact of Covid-19 on socio-economic based CVE Programming in Kenya, including, the propagandist and ‘pretend – benevolent’ roles played by terrorist group in the wake of the pandemic. The third part shall attempt to isolate specific solutions that may be used by, among other stakeholders and community-based organisations, to ensure that socio-economic CVE Policies may subsist irrespective of the continued global health pandemic.

#### **4.1.1 Selection of vulnerable women as the case study**

To effectively respond to the main research question in this paper, I have selected ‘vulnerable women’ as the focal point of this study for the following two-fold justification. Women, as a marginalised group, already have unique challenges in accessing socio-economic rights but also remain largely underrepresented in CVE initiatives in spite of the documented roles they play in terrorist groups. I argue that these intertwined problems have excluded women from socio-economic interventions leaving them susceptible to radicalisation, a situation which will no doubt be exacerbated by Covid-19.

As intimated above, this paper shall specifically involve ‘vulnerable women’. While often used in human rights and feminist circles, the concept ‘vulnerable’, eludes exact definition. As noted by Anthony Wringley and Angus Dawson:<sup>8</sup>

[Vulnerability] indicates that an individual or group is thought to have a particular status that may adversely impact upon their well-being, and that this implies an ethical duty to safeguard that well-being because the person or group is unable to do so adequately themselves, this concept, although important, consistently eludes precise definition.<sup>9</sup>

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<sup>7</sup> (n5).

<sup>8</sup> A Wringley & A Dawson ‘Vulnerability and marginalized populations’ in DH Barrett et al *Public Health Ethics: Cases Spanning the Globe* (2016) Ch 7.

<sup>9</sup> (n8).

Wringley and Dawson therefore note that the import of this definition may result in more categories of persons being classified as vulnerable, hence rendering the concept as a useless status conferring a special protective mandate.<sup>10</sup> Put differently, inexplicably widening the vulnerability class may result in the inclusion of everyone, turning it into an absurd and unhelpful concept.

It is then critical to set out appropriate boundaries in defining ‘vulnerability’. A more popular approach characterises vulnerability in respect of a specific attribute or particular context.<sup>11</sup> In other words, this approach –

focuses on vulnerability *in terms of something*, such as physical vulnerability, social vulnerability, vulnerability *in terms of* lacking capacity, vulnerability *in terms of* belonging to a certain identifiable group, or vulnerability because of belonging to a marginalized population.<sup>12</sup>

This categorical approach to human rights, therefore, defines by example, who is considered to be vulnerable.

This understanding of vulnerability has been adopted in article 21 of the Constitution of Kenya which lists vulnerable groups to include ‘women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities’.<sup>13</sup> This is, however, not a complete list. In *Kituo Cha Sheria & 8 others v Attorney General*,<sup>14</sup> the High Court of Kenya held that refugees are considered to be a vulnerable group under Kenyan law. Similarly, in *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*,<sup>15</sup> the High Court once more, found that poor evictees may be considered to be legally vulnerable.

Of most importance to this paper is the constitutional listing of women as a vulnerable group. Since women are already listed as a vulnerable group under the Constitution, it is imperative to then justify the use of the term ‘vulnerable women’. The utility of using the term ‘vulnerable women’ in this chapter is to appreciate the double vulnerabilities that some women face. This ‘double vulnerabilities’ concept, better known as ‘intersectionality’, theorises that aspects of a person’s social, biological and political identities may intersect to create

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<sup>10</sup> (n8).

<sup>11</sup> International Bioethics Committee of UNESCO ‘The principle of respect for human vulnerability and personal integrity’ <http://unesdoc.unesco.org/images/0021/002194/219494e.pdf> viewed 1 September 2020.

<sup>12</sup> A Wringley & A Dawson (n8).

<sup>13</sup> The Constitution of Kenya, 2010 article 21.

<sup>14</sup> *Kituo Cha Sheria & 8 others v Attorney General* [2013] eKLR.

<sup>15</sup> *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* [2013] eKLR.

unique forms of discrimination.<sup>16</sup> These intersections may include marginalised women, that is, women who are doubly vulnerable due to their gender and, based on the fact that they are members of a marginalised community, defined in article 260 of the Constitution as –

A community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are nomadic; or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.<sup>17</sup>

These vulnerable women will form the focus of this paper.

#### **4.1.2 Access to socio-economic rights and vulnerable women**

The Constitution of Kenya contains several provisions which promote social and economic development for Kenyans generally, and more specifically for vulnerable women. These include listing as one of the objects of devolution to ‘promote social and economic development’,<sup>18</sup> providing that housing, health, social security, freedom from hunger and education are economic and social rights,<sup>19</sup> and stating that specific governmental obligations are to put in place affirmative action programmes designed to ensure minorities under the law (such as women) and other marginalised groups have reasonable access to water, health services and infrastructure.<sup>20</sup>

Despite these provisions, however, vulnerable women still face a seemingly insurmountable hurdle in realising socio-economic rights due to multiple, multifaceted and often interconnected obstacles.<sup>21</sup> The often quoted obstacle is

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<sup>16</sup> K Crenshaw ‘Demarginalising the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’ 1989 *The University of Chicago Legal Forum*.

<sup>17</sup> The Constitution of Kenya, 2010 (n13) article 260.

<sup>18</sup> (n17) article 174.

<sup>19</sup> (n17) article 43.

<sup>20</sup> (n17) article 56.

<sup>21</sup> The Association for Women’s Rights in Development (2006) ‘Achieving women’s economic & social rights strategies and lessons from experience’ <[https://www.awid.org/sites/default/files/atoms/files/achieving\\_womens\\_economic\\_social\\_rights\\_strategies\\_and\\_lessons\\_from\\_experience.pdf](https://www.awid.org/sites/default/files/atoms/files/achieving_womens_economic_social_rights_strategies_and_lessons_from_experience.pdf)> viewed 1 September 2020.

probably the persistence of structural discriminatory norms which contribute to women receiving unequal distribution of resources, and having limited access to the means of production, such as land and financial capital.<sup>22</sup> Harmful cultural and religious practices, although prohibited by law, continue to be practised in some communities and in that way have also limited women's access to property through inheritance, protection from violence and access to education.<sup>23</sup>

Although the Kenyan government stakeholders have made significant progress, including the establishment of Government Affirmative Action Funds and the Access to Government Procurement Opportunities (AGPO) platform,<sup>24</sup> realisation of these socio-economic rights remain severely hampered due to alleged corruption which obscures accountability and full implementation of these programmes.<sup>25</sup>

Emerging global problems, such as climate change and environmental degradation have also negatively affected vulnerable women's realisation of their socio-economic rights by straining traditional methods of livelihood, be they agriculture or pastoralism, which in turn caused displacement that has led to conflict and increased levels of poverty.<sup>26</sup>

## 4.2 SOCIO-ECONOMIC RIGHTS, VULNERABLE WOMEN AND COUNTERING VIOLENT EXTREMISM

In this part, I shall attempt to trace a nexus between CVE Measures and socio-economic rights in Kenya. To do so, this paper will first explore the possible linkages between socio-economic rights and CVE before discussing the government-led CVE interventions in Kenya. The third section will inquire into the treatment of vulnerable women in CVE programmes in Kenya and more specifically, the extent to which these programs have attempted to ensure adequate access to socio-economic opportunities for these women.

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<sup>22</sup> Oxfam 'Women's Rights' < <https://kenya.oxfam.org/what-we-do/womens-rights>> viewed 1 September 2020.

<sup>23</sup> United Nations Economic and Social Council, Commission on the Status of Women (12-23 March 2018) Report of the Secretary-General 'Challenges and opportunities in achieving gender equality and the empowerment of rural women and girls' <https://www.peacewomen.org/node/101209> viewed 2 September 2020.

<sup>24</sup> Ministry of Public Service and Gender: Socio-Economic Empowerment Directorate <https://gender.go.ke/socio-economic-empowerment/> viewed 1 September 2020.

<sup>25</sup> L Mwiti (17 February 2018) 'Corrupt officers lock out youth from state tenders' *The Standard* <https://www.standardmedia.co.ke/business/article/2001269999/outcry-as-women-youth-miss-out-on-state-tenders>> viewed 1 September 2020.

<sup>26</sup> The Association for Women's Rights in Development (n21) 6.

#### 4.2.1 The socio-economic approach to countering violent extremism

Counter-terrorism policymakers have, by and large, acknowledged socio-economic deprivation as a contributory factor to violent extremism and recruitment into terrorist groups.<sup>27</sup> This ‘poverty-terrorism’ thesis<sup>28</sup> notes that poverty increases the likelihood of radicalisation in multiple ways. For one, socio-economic deprivation occasioned by poverty may be used to reinforce political disaffection and exclusion sentiments by the populace, making them susceptible to an extremist anti-government ideology.<sup>29</sup>

In studying the relationship between economic discrimination and terrorism, James Piazza notes that –

Minority economic discrimination – which usually involves some combination of employment discrimination, and lack of economic opportunities available to the rest of society – is a catalyst for the development of minority group grievances’ which may then be exploited by terrorist groups.<sup>30</sup>

A second way in which poverty operates as a contributory factor to terrorism is through providing an opportunity for members of poor marginalised communities to attain feelings of status and achievement that their poverty status otherwise denied them.<sup>31</sup> Muhsin Hassan,<sup>32</sup> after conducting interviews with former members of Al Shabaab noted thus:

Although personal poverty is not a reason for joining violent extremism...The fact that many Somali youth are unemployed and rely on relatives for sustenance... dampens their self-worth such that when an opportunity to fend for oneself arises, they are quick to take advantage.<sup>33</sup>

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<sup>27</sup> I Briscoe & B van Ginkel (2013) ‘The nexus between development and security: searching for common ground in countering terrorism’ (ICCT Policy Brief 2013) <https://www.icct.nl/download/file/Briscoe-van-Ginkel-Nexus-between-Security-and-Development-March-2013.pdf> viewed 1 September 2020.

<sup>28</sup> J Burdette (2014) ‘Rethinking the relationship between poverty and terrorism’ *Small Wars Journal* <https://smallwarsjournal.com/jrnl/art/rethinking-the-relationship-between-poverty-and-terrorism> viewed 1 September 2020.

<sup>29</sup> N Smelser *The Faces of Terrorism* (2007) 15.

<sup>30</sup> JA Piazza ‘Poverty, minority economic discrimination, and domestic terrorism’ 2011 (48) *Journal of Peace Research* 349.

<sup>31</sup> J Burdette (n 28).

<sup>32</sup> M Venhaus (4 May 2010) Why youth join al-Qaeda (US Institute of Peace Special Report) <https://www.usip.org/publications/2010/05/why-youth-join-al-qaeda> viewed 30 November 2020.

<sup>33</sup> (n32) at 9.

Similarly, in another research related to Al Shabaab, Alexander Meleagrou-Hitchens found that many adolescents joined the Somalia-based terrorist group as a means to earn some money, rather than through solidarity with the extremist ideology.<sup>34</sup>

In addition to acting as a 'push' factor of terrorism,<sup>35</sup> poverty also creates opportunities for terrorism to flourish by promoting corruption among poorly-paid security forces.<sup>36</sup> In Kenya, for example, reports have indicated that poorly-paid police officers are more inclined to accept bribes along the borders, which Al Shabaab militants may exploit to illegally enter the country.<sup>37</sup>

Due to this acceptance of the role that poverty and socio-economic deprivation plays in terrorism, policymakers have continually called for counter-terrorism measures that employ socio-economic development as part and parcel of the overall strategy to counter violent extremism. The U.S. Counterterrorism Strategy, for instance, explains that al-Qaeda must be confronted with a 'counter-terrorism strategy embedded within an overall strategy of enhanced U.S. economic and political engagement'.<sup>38</sup>

The African Union, in its Plan of Action of the African Union High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa,<sup>39</sup> noted that 'severe conditions of poverty and deprivation experienced by large sections of the African population provide a fertile breeding ground for terrorist extremism'<sup>40</sup> and further that member states should 'promote policies

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<sup>34</sup> A Meleagrou-Hitchens (22 November 2012) 'ICSR Insight - Al-Shabaab: recruitment and radicalisation in Kenya / ICSR' *ICSR* <http://icsr.info/2012/11/icsr-insight-al-shabaabrecruitment-and-radicalisation-in-kenya/> viewed 1 September 2020.

<sup>35</sup> M Vergani, M Iqbal, E Ilbahar & G Barton 'The three Ps of radicalisation: Push, pull and personal. A systematic scoping review of the scientific evidence about radicalization into violent extremism' 2020 (43) *Studies in Conflict & Terrorism* 854.

<sup>36</sup> Smelser *The Faces of Terrorism* (n29).

<sup>37</sup> N Gilchrist & N Eisen (22 August 2019) 'Corruption and terrorism: The case of Kenya' *Brookings Institution* <https://www.brookings.edu/blog/order-from-chaos/2019/08/22/corruption-and-terrorism-the-case-of-kenya/> viewed 2 September 2020.

<sup>38</sup> Office of the President of the United States (June 2011) National strategy for counterterrorism *Office of the President of the United States* 16 <https://obamawhitehouse.archives.gov/blog/2011/06/29/national-strategy-counterterrorism> viewed 30 November 2020.

<sup>39</sup> The African Union (September 2002) 'Plan of action of the African Union high-level inter-governmental meeting on the prevention and combating of terrorism in Africa' *The African Union* <http://www.peaceau.org/uploads/au-anti-terrorism-plan-of-action.pdf> viewed 1 September 2020.

<sup>40</sup> (n39) at para I (6).



aimed at addressing the root causes of terrorism, in particular poverty, deprivation and marginalisation'.<sup>41</sup>

In its reference guide on developing national and regional action plans to prevent violent extremism,<sup>42</sup> the UN Office of Counterterrorism notes that 'prevention of violent extremism plans should contribute to the attainment of the Sustainable Development Goals (SDGs) in addressing the drivers of violent extremism, specifically through...ending poverty in all its forms everywhere'.<sup>43</sup>

The RAND Corporation,<sup>44</sup> in a comprehensive study on the link between socio-economic development and terrorism in Israel, the Philippines and the United Kingdom provided six main benefits of encompassing development into counter-terrorism strategies. These findings included that social and economic development policies can not only weaken local support to terrorist activities<sup>45</sup> but also can discourage new recruits into these groups.<sup>46</sup>

However, comprehensive development policies, if implemented inadequately or inadequately funded, are likely to inflate expectations among the targeted population<sup>47</sup> and when unfulfilled, may renew political disaffection and create a vacuum that may then be exploited by terrorist groups.<sup>48</sup>

#### **4.2.2 Legal and policy framework on countering violent extremism in Kenya**

As a result of increased terrorist attacks in the country since 2010,<sup>49</sup> Kenya has developed a robust legal and policy framework governing both state and

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<sup>41</sup> (n39) at para II (10)(e).

<sup>42</sup> The United Nations Office of Counterterrorism (undated) 'Reference guide on developing national and regional action plans to prevent violent extremism' *The United Nations Office of Counterterrorism* [https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/UNOCT\\_PVEReferenceGuide\\_FINAL.pdf](https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/UNOCT_PVEReferenceGuide_FINAL.pdf) viewed 1 September 2020.

<sup>43</sup> (n42) at para 7.

<sup>44</sup> K Cragin et al (2003) *Terrorism & development using social and economic development to inhibit a resurgence of terrorism* (*RAND Corporation*) [https://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2005/MR1630.pdf](https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1630.pdf) viewed 1 September 2020.

<sup>45</sup> (n44) 33.

<sup>46</sup> (n45).

<sup>47</sup> (n45).

<sup>48</sup> (n45).

<sup>49</sup> Counter Extremism Project (2020) 'Kenya: Extremism & counter-extremism' [https://www.counterextremism.com/sites/default/files/country\\_pdf/KE-02202020.pdf](https://www.counterextremism.com/sites/default/files/country_pdf/KE-02202020.pdf) viewed 1 September 2020.

non-state actors in countering violent extremism conducted by, primarily, the Somalia-based terrorist group Al Shabaab and other extremist groups.

While terrorist acts such as destruction of property and murder were already criminalised in the Penal Code,<sup>50</sup> Kenya has, since 2010, developed specific security-based laws and policies, that have had the net effect of elevating terrorism to a national security issue. Some of the relevant laws include the Prevention of Terrorism Act 2012,<sup>51</sup> the Security Laws (Amendment) Act, 2014<sup>52</sup> and the Proceeds of Crime and Anti-Money Laundering (Amendment) Act 2017.<sup>53</sup>

These laws were primarily focused on policing terrorism by state actors, including, setting up controls to prevent money laundering, developing both the intelligence and counter-intelligence capacities of security actors, investigation of terrorist activities and subsequent prosecution of suspected terrorists. These laws were chiefly focused on the role of the state in national security and did not encompass other possible partnerships and actors.

This state-centric approach to national security was modified, at least on paper, with the passage of the National Strategy to Counter Violent Extremism (NSCVE) in September 2016.<sup>54</sup> It is anchored on eight pillars:

- the media and online pillar;
- the psycho-social pillar;
- the faith-based and ideological pillar;
- the legal and policy pillar;
- training and capacity building;
- arts and culture;
- the education; and
- the security pillar.<sup>55</sup>

Expansion of the CVE framework to include non-state actors has duly restructured counterterrorism measures to include socio-economic development, such as,

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<sup>50</sup> *The Penal Code* chapter 63 Laws of Kenya.

<sup>51</sup> *Prevention of Terrorism Act* 30 of 2012, Laws of Kenya.

<sup>52</sup> *The Security Laws (Amendment) Act* 19 of 2014, Laws of Kenya.

<sup>53</sup> *Proceeds of Crime and Anti-Money Laundering (Amendment) Act* 15 of 2017, Laws of Kenya.

<sup>54</sup> National Strategy to Counter Violent Extremism, Kenya (popular version, 2016).

<sup>55</sup> J Opondo (13 December 2017) 'Role of security sector and civil society in responding to and preventing violent extremism' *Security Governance Initiative Partners Seminar* <https://africacenter.org/wp-content/uploads/2017/12/Role-of-Security-and-civil-society-PCVE-KENYA-ENG.pdf>> viewed 2 September 2020.

provision of employment options, business opportunities and life skills, among other interventions aimed at reducing vulnerability to violent extremism.<sup>56</sup>

The NSCVE has also developed a multi-agency institutional framework by establishing the National Counterterrorism Centre (NCTC) as a coordination mechanism among security organs in matters relating to counterterrorism in the state.<sup>57</sup> This agency, though first created as a cabinet decision in 2004, was later re-established in the law by the Security Law Amendment Act, 2014.<sup>58</sup>

Headed by a Director, the NCTC has the overall mandate in the international, regional and domestic spheres to coordinate CVE programming among different stakeholders, including bilateral agreements, multilateral arrangements and private sector partnerships.<sup>59</sup>

To counter terrorist financing, the Proceeds of Crime and Anti-Money Laundering Act, 2009, establishes several institutions to combat money laundering, including, the Anti-Money Laundering Advisory Board, the Financial Reporting Centre (Kenya's Financial Intelligence Unit), the Asset Recovery Agency and the Criminal Assets Recovery Fund.<sup>60</sup>

#### **4.2.3 Socio-economic approach to countering violent extremism under the Kenyan National Strategy**

The National Strategy expressly recognises adverse socio-economic conditions as drivers of radicalisation in Kenya since these conditions 'create high levels of frustration and a sense of powerlessness [which are] ideal conditions for persuading groups and individuals to embrace violent extremism and to oppose the political, social and legal status quo'.<sup>61</sup> Additionally, under the heading, 'Neighbourhood Dynamics', the Strategy notes that the bulk of radicalisation occurs in poorer urban neighbourhoods, further highlighting the nexus between poverty and violent extremism.<sup>62</sup>

Regrettably however, despite the foregoing, the National Strategy does little to explain how the state and its partners shall work towards ensuring access

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<sup>56</sup> M Ogada ( 9 November 2017) 'A policy content evaluation of Kenya's national strategy to counter violent extremism' *CHRIPS Policy Brief* No. 9 file:///C:/Users/Trisha/Desktop/A%20Policy%20Content%20Evaluation%20of%20Kenya&%23039%3Bs%20National%20Strategy%20to%20Counter%20Violent%20Extremism.pdf viewed 2 September 2020.

<sup>57</sup> Ogada (n56).

<sup>58</sup> Ogada (n56).

<sup>59</sup> Ogada (n56).

<sup>60</sup> Ogada (n56).

<sup>61</sup> National Strategy to Counter Violent Extremism (n54) 23.

<sup>62</sup> (n61) 25.

to socio-economic rights to marginalised populations. Instead, the strategy, without substantial guidance, mentions ‘employment opportunities’ as one of the initiatives and capabilities that need to be developed at the national level to counter terrorism.<sup>63</sup>

Additionally, in selected parts, the strategy also provides, without much detail, that national institutions should collaborate with economic development organisations to combat radicalisation of vulnerable Kenyan populations into terrorist groups.<sup>64</sup>

#### **4.2.4 Vulnerable women, socio-economic rights and the countering violent extremism mechanism in Kenya**

Regrettably however, the National Strategy does not make any provision for an appreciation of the gendered nature of terrorism in Kenya, despite the documented increasing role that women play in Al Shabaab, an offshoot of the Islamic Courts Union, which has imposed sharia law in parts of Somalia and conducted terrorist attacks in neighbouring Kenya and Uganda.<sup>65</sup>

Although there is increased literature on the roles women play in violent extremism, not much of the literature has focused on Al Shabaab. However, anecdotal evidence reveals that women do play a role in the terrorist group. These include grenade attacks at a Kenyan police station by veiled women in 2017,<sup>66</sup> the arrest of three girls en-route to Somalia to join Al Shabaab in 2015<sup>67</sup> and the detention and sentencing of two women, Rukia Faraj<sup>68</sup> and Hania Saud,<sup>69</sup> on charges of facilitating financial transactions and other logistical support to Al Shabaab.

The only major mention of the gendered nature of terrorism is found in the Kenya National Action Plan on UNSCR 1325 on Women, Peace and Security.<sup>70</sup> This National Action Plan endeavours to domesticate the implementation of the Women, Peace and Security (WPS) Agenda in Kenya. The Women, Peace

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<sup>63</sup> (n61) 30.

<sup>64</sup> (n61) 31.

<sup>65</sup> S Hansen *Al-Shabaab in Somalia: The History and Ideology of a Militant Islamist Group* (2013).

<sup>66</sup> I Ndung'u, U Salifu & R Sigsworth ‘*Violent Extremism in Kenya: Why Women Are a Priority*’ (2017) at 4.

<sup>67</sup> (n66).

<sup>68</sup> (n66).

<sup>69</sup> (n66).

<sup>70</sup> ‘Kenya National Action Plan on UNSCR 1325 on Women, Peace and Security’ 2016–2018’ <https://www.peacewomen.org/sites/default/files/Kenya%20NAP-with-cover-final.pdf> viewed 30 November 2020.

and Security (WPS) Agenda, as envisioned in multiple UN Security Council Resolutions, is typically understood as comprising three main pillars: protection of women, prevention of conflict, and increased participation of women in peace processes.<sup>71</sup>

The WPS Agenda comprises several UNSC Resolutions,<sup>72</sup> the latest being UNSC 2242.<sup>73</sup> This Resolution, passed on 13 October 2015, is unique in that it explicitly recognises ‘violent extremism’ as a new item of interest for WPS. To that end, it provides several guidelines, including, urging ‘[m]ember States and the United Nations system to ensure the participation and leadership of women and women’s organisations in developing strategies to counter terrorism and violent extremism which can be conducive to terrorism’.<sup>74</sup>

It further urges member states ‘to conduct and gather gender-sensitive research and data collection on the drivers of radicalisation for women’,<sup>75</sup> illustrating that, as noted by Laura Shepherd in respect of other prior Resolutions, ‘the later Resolutions (after 1325) add a discursive representation of women as actors, agents or even superheroines’.<sup>76</sup>

However, this Resolution, while debunking the 1325 depiction of women as victims and peacebuilders, fails to recognise intersections between gender and other factors, such as group identity, and social status which make women more vulnerable to violent extremism. Without appreciating these intersectionalities, UNSC 2242 remains stunted in its intervention in countering violent extremism among women.

Obviously, understanding the intersection between gender and other identities first requires us to problematise the exclusion of women from the mainstream discourse on violent extremism. Laura Sjoberg’s ‘mothers, monsters, whores’ narrative<sup>77</sup> is perhaps the best-known theory surrounding female militancy phenomenon. Briefly, Laura argues that female militants, including women who are recruited into terrorist groups, are contrary to the societal ‘peaceful woman’ stereotype. Therefore, to explain this phenomenon, societies have constructed three narratives.

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<sup>71</sup> M O’Reilly ‘Where the four pillars of WPS intersect’ in SE Davies & J True *Oxford Handbook of Women, Peace and Security* (2018).

<sup>72</sup> These include Res 1325 (October 2000), Res 1820 (June 2008), Res 1888 (September 2009), Res 1889 (October 2009), Res 1960 (December 2010), Res 2106 (June 2013), Res 2122 (October 2013), and Res 2242 (October 2015).

<sup>73</sup> S/RES/2242 (2015) at <http://peacewomen.org/SCR-2242> viewed 30 November 2020.

<sup>74</sup> (n73) para 13.

<sup>75</sup> (n74) para 12.

<sup>76</sup> N Pratt & S Richter-Devroe ‘Critically examining UNSCR 1325 on Women, Peace and Security’ 2011 (4) *International Feminist Journal of Politics* 489-503.

<sup>77</sup> L Sjoberg & CE Gentry *Beyond Mothers, Monsters, Whores* (2015).

The ‘mothers’ narrative argues that women participate in militant acts due to maternal and domestic disappointments, that is, that women-led political violence is in fact due to perversion/disruption of their domestic realm.<sup>78</sup> On the other hand, the ‘monsters’ narrative argues that women’s violence emerges from a biological flaw that disrupts their otherwise ‘peaceful and timid’ femininity.<sup>79</sup>

Lastly, the ‘whore’ narratives characterise female militancy as sexual deviance, either motivated into violence by their sexual perversion (erotomania), or due to their inability to sexually pleasure men, such as continued myths about violence and lesbianism (erotic dysfunction) or that these women cause violence since they are sold into sexual and political violence slavery by men.<sup>80</sup>

Laura Sjoberg’s theory is important in helping us to appreciate the non-inclusion of women into the National Strategy on CVE Mechanisms. This exclusion, however, has dire consequences as vulnerable women remain invisible in policy interventions in spite of the fact that selected biographic narratives have noted that socio-economic factors play a key role in recruitment of vulnerable women into Al Shabaab.

In her seminal article, Fathima Badurdeen, after conducting interviews with women who were formerly members of Al Shabaab, provides detailed accounts of women lured into Al Shabaab using deceptive strategies, such as employment opportunities and education opportunities.<sup>81</sup>

Other women willingly joined the terrorist group in the hope that employment provided by the group would grant them some level of independence. Fathima notes that poverty and socio-economic deprivation provide an effective environment for Al-Shabaab recruiters, who use economic coercion and friendship links to recruit these vulnerable women.<sup>82</sup>

Exclusion of these women from general governmental intervention invariably increases their susceptibility to violent extremism. Non-governmental organisations and community-based societies have attempted to fill this gap by developing socio-economic programs specifically targeting these vulnerable women.

Advocacy for women in peace and security in Africa (AWAPSA), for example, is a Mombasa-based organisation which assists vulnerable women,

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<sup>78</sup> (n77) at 71.

<sup>79</sup> (n77) 93.

<sup>80</sup> (n77) 113–116.

<sup>81</sup> FA Badurdeen ‘Women and recruitment in the Al-Shabaab network: Stories of women being recruited by women recruiters in the coastal region of Kenya’ 2018 (45) *The African Review* 19–48.

<sup>82</sup> (n81) 27.

including returnees from Al Shabaab, to re-join schooling or open up businesses.<sup>83</sup> These women are also empowered, through microfinancing, to attend vocational training and are assigned mentors to guide them in new business ventures.<sup>84</sup>

### **4.3 COVID-19, COUNTERING VIOLENT EXTREMISM, SOCIO-ECONOMIC RIGHTS AND VULNERABLE WOMEN IN KENYA: SOME REFLECTIONS**

The previous section laid the foundation of the main inquiry of this paper by discussing the link between vulnerable women, CVE and socio-economic rights in Kenya. This part will deal with the extent to which Covid-19 has affected the socio-economic approach to CVE for vulnerable women in Kenya.

First, I shall discuss the socio-economic impact of Covid-19 on CVE approaches in Kenya, before dealing more specifically with vulnerable women.

#### **4.3.1 The socio-economic impact of Covid-19 in Kenya**

As at 5 November 2020, nearly nine months after its first confirmed case,<sup>85</sup> the recorded number of Kenyans who have tested positive for Covid-19 is 59,595.<sup>86</sup> A further 39,193 are recorded as recovered while 1,072 known deaths have been reported.<sup>87</sup>

Kenya's economy experienced contraction as the majority of foreign investors, fearing a market collapse, started disposing of their securities.<sup>88</sup> Additionally, the global health pandemic has negatively affected the import ability of the country, which in turn, has exacerbated food insecurity in certain parts of the country.<sup>89</sup>

The Covid-19 pandemic has also caused a severe strain on an already weak health system. As widely reported, Kenya has only 537 intensive care beds and 256 ventilators, which is not nearly enough to combat this pandemic.<sup>90</sup> Moreover,

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<sup>83</sup> S Anderlini & M Holmes *Invisible Women: Gendered Dimension of Return, Rehabilitation and Reintegration from Violent Extremism* (2019) 74.

<sup>84</sup> (n83) at 74.

<sup>85</sup> Ministry of Health Kenya *First case of coronavirus disease confirmed in Kenya* (n1).

<sup>86</sup> Corona Tracker <https://www.coronatracker.com/country/kenya/> viewed 5 November 2020.

<sup>87</sup> (n86).

<sup>88</sup> FA Odhiambo (24 June 2020) 'Impact of COVID-19 on the economy of Kenya' *University of Nairobi Research, Innovation and Enterprise Blog* <https://uonresearch.org/blog/impact-of-covid-19-to-the-economy-of-kenya/> viewed 3 September 2020.

<sup>89</sup> (n88).

<sup>90</sup> A Mohidin & M Temmerman (27 July 2020) 'COVID-19 exposes weaknesses in Kenya's healthcare system. And what can be done' *The Conversation* <https://>

many counties, especially those serving marginalised communities, do not have specialist health equipment which is essential to deal with the virus<sup>91</sup>

To remedy this situation, the Kenyan Government has increased health spending by approximately 10 billion Kenya Shillings sourced from international aid donors, government borrowing and the reopening of the economy to improve tax revenues and sustainability.<sup>92</sup> While this is an important step, the health sector has already been hit with allegations of corruption in the supply of necessary equipment to combat Covid-19.<sup>93</sup>

### 4.3.2 Covid-19 and countering violent extremism measures in Kenya

The entry of Covid-19 into Kenya occurred amidst an ongoing government-led effort to counter terrorist attacks and ideology propagated by chiefly Al Shabaab, in marginalised areas. Since the Covid-19 pandemic remains a moving target, it is difficult to derive concrete effects of the pandemic has caused on CVE mechanisms in Kenya. However, we can draw some tentative conclusions from emerging evidence and previous behavioural trends of terrorist groups during national crises.

Al Shabaab, in selected instances, has capitalised on the spread of the Covid-19 pandemic in several ways. As Kenya resorted to diverting the majority of its security and financial efforts to combating the spread of the pandemic, Al Shabaab has attempted to utilise this emergent gap to conduct terrorist attacks in marginalised communities in Kenya. This includes a 22 July 2020 incident where suspected Al Shabaab militants launched systematic attacks against the Yumbis Rural Border Patrol Unit in Garissa County.<sup>94</sup>

The Covid-19 pandemic may also be exploited to fit within the terrorist group's propagandist messaging. Reports indicate that Al Shabaab is systematically including Covid-19 in its propagandist ideology by wrongly asserting that the virus is a divine punishment from god to non-believers.<sup>95</sup> This ideology, read together with some residents' opposition to closure of mosques, allegations

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theconversation.com/covid-19-exposes-weaknesses-in-kenyas-healthcare-system-and-what-can-be-done-143356 viewed 3 September 2020.

<sup>91</sup> (n90).

<sup>92</sup> (n90).

<sup>93</sup> W Mwaura (6 May 2020) 'Coronavirus in Kenya: Fearing 'money heists' amid pandemic' *BBC Online* <https://www.bbc.com/news/world-africa-52540076>> viewed 3 September 2020.

<sup>94</sup> C Ombati (23 July 2020) 'Police officer killed in Al Shabaab attack on station' *The Standard* <https://www.standardmedia.co.ke/north-eastern/article/2001379804/police-officer-killed-in-al-shabaab-attack-on-station>> viewed 3 September 2020.

<sup>95</sup> R Ramadhan (n5) 2.



of police brutality in enforcing curfews, food insecurity and loss of income for many families may create an opportune moment for terrorist recruitment by Al Shabaab.<sup>96</sup>

Al Shabaab may also incorporate opportunities for employment as part of their recruitment methods in order to target vulnerable persons who may have suffered unemployment due to the pandemic. In addition, while not yet reported in Kenya, there is increased fear, based on previous approaches taken by Al Shabaab and other terrorist groups, that the group may brand itself as a ‘benevolent substitute’ for an already-strained government by providing health services and other socio-economic needs to marginalised communities. On 13 June 2020 for example, the group unveiled a Covid-19 isolation and care facility at its Jilib headquarters in Somalia, which includes a ‘corona(virus) prevention and treatment committee’, a round-the-clock hotline and ready vehicles to ferry patients.<sup>97</sup>

### **4.3.3 Covid-19, countering violent extremism and vulnerable women in Kenya**

Covid-19 has had acute effects on marginalised communities in Kenya. Strained healthcare services in marginalised areas, such as Northern Kenya have forced local clinics to convert accommodation designated for nurses to quarantine bays.<sup>98</sup>

These areas have also experienced a decline of tourism, leading to unemployment and loss of business in these areas.<sup>99</sup> Access to education has also been severed, due to the closure of primary and secondary schools in Kenya.<sup>100</sup>

In addition to the above, vulnerable women have endured increased vulnerabilities due to Covid-19 which has significantly increased their susceptibility to recruitment into terrorist groups. These increased vulnerabilities may be attributed to the gendered impact of Covid-19 and the divergence of priorities by relevant aid agencies and restricted opportunities for relevant NGOs, as discussed below.

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<sup>96</sup> Human Rights Watch (22 April 2020) ‘Kenya: Police brutality during curfew’ *Human Rights Watch* <https://www.hrw.org/news/2020/04/22/kenya-police-brutality-during-curfew> viewed 3 September 2020.

<sup>97</sup> P Kagwanja (22 July 2020) ‘Al-Shabaab recruiting behind the Covid-19 ‘Iron Curtain’ *Nation* <https://nation.africa/kenya/blogs-opinion/opinion/al-shabaab-recruiting-behind-the-covid-19-iron-curtain--1906152> viewed 3 September 2020.

<sup>98</sup> Northern Rangelands Trust ‘The community-level impact of COVID-19 in northern and coastal Kenya’ <https://www.nrt-kenya.org/covid19-impact> viewed 5 September 2020.

<sup>99</sup> (n98).

<sup>100</sup> (n98).

#### 4.3.4 Countering violent extremism and the gendered socio-economic impact of Covid-19 on vulnerable women

Comparative evidence from other health pandemics, such as the Ebola crisis reveals that vulnerable women will face disproportionate effects on their social and economic lives.<sup>101</sup> First, the employment avenues where women are overly represented, including the hospitality industry, are some of the worst affected by the pandemic.<sup>102</sup> Due to this, the economic stability of many vulnerable women is projected to be significantly impaired. In any event, closure of schools and promotion of at-home care due to strained health resources will mandate many vulnerable women to take primary roles in caregiving, duly affecting their economic standard of life.<sup>103</sup> This increased economic vulnerability may in turn increase these women's susceptibility to Al Shabaab terrorist 'benevolent' propaganda which intimates that the group may be able to provide jobs and employment opportunities for these women.

Covid-19 has also had a gendered impact on vulnerable women, especially in respect of sexual and reproductive health. In April 2020, the National Council on the Administration of Justice reported a significant spike in sexual offences following the lockdown measures instituted by the Kenyan government since 'in some cases, the perpetrators are close relatives, guardians and/or persons living with the victims'.<sup>104</sup> This has made it difficult for the victims, mainly women and girls, to report and seek help in cases of domestic violence.

Terrorist groups, such as Al Shabaab and Daesh may attempt to use this state of affairs as a propagandist tool by promising 'freedom and autonomy' for women bearing the brunt of sexual violence.<sup>105</sup>

#### 4.3.5 Divergence of priorities by foreign aid agencies

As noted earlier, vulnerable women have typically been excluded from government-led CVE Mechanisms due to the persistence of the mainstream narrative that men are perpetrators while women are victims, and thus, viewing terrorist

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<sup>101</sup> United Nations Policy Brief (9 April 2020) '*The Impact of COVID-19 on women*' <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2020/06/report/policy-brief-the-impact-of-covid-19-on-women/policy-brief-the-impact-of-covid-19-on-women-en-1.pdf>> viewed 4 September 2020.

<sup>102</sup> (n101) at 15.

<sup>103</sup> (n101) at 14.

<sup>104</sup> A Odhiambo (8 April 2020) 'Tackling Kenya's domestic violence amid COVID-19 crisis' *Human Rights Watch* <https://www.hrw.org/news/2020/04/08/tackling-kenyas-domestic-violence-amid-covid-19-crisis>> viewed 4 September 2020.

<sup>105</sup> FA Badurdeen 'Women who volunteer: A relative autonomy perspective in Al-Shabaab female recruitment in Kenya' 2020 *Critical Studies on Terrorism*.

attacks involving female perpetrators as episodic rather than thematic events.<sup>106</sup> However, with increased lobbying, foreign aid agencies such as the World Bank and UN specialised agencies, such as UNDP and UN Women have financed projects to support socio-economic empowerment of vulnerable women as CVE Measures. These projects include job training, provision of educational opportunities and incubation of businesses.<sup>107</sup>

However, with the continued impact of Covid-19, foreign aid funding has been redirected to combating the health pandemic. The World Bank, for example, approved a 1 billion USD financing plan for Kenya to combat the pandemic. Most of this funding is geared towards strengthening health services and cushioning the country's economy from the brunt of Covid-19.<sup>108</sup> Third-party funding from foreign governments has also significantly declined, as resources are redirected to support Covid-19 interventions in their home countries.<sup>109</sup>

Reduced foreign aid support exacerbates the already-dire situation faced by vulnerable women in realising their socio-economic rights and in that way, make them more susceptible to terrorist recruitment.

#### **4.3.6 Restricted opportunities for local NGOs involved in countering violent extremism work**

While foreign aid agencies typically provide financial assistance, local NGOs are the key implementing partners in combating CVE among vulnerable women. This is because of the greater accessibility and flexibility that these local NGOs have with the targeted population.<sup>110</sup> To implement these programs, local NGOs typically use a combination of face-to-face engagement and training forums, home visits, and physical counselling and mentorship sessions.<sup>111</sup>

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<sup>106</sup> BL Nacos 'The portrayal of female terrorists in the media: Similar framing patterns in the news coverage of women in politics and in terrorism' in C Ness (ed) *Female Terrorism and Militancy: Agency, Utility and Organization* (2008) 217-232.

<sup>107</sup> Anderlini & Holmes *Invisible Women* (n8).

<sup>108</sup> The World Bank (20 May 2020) 'World Bank approves \$1 billion financing for Kenya, to address COVID-19 financing gap and support Kenya's economy' <https://www.worldbank.org/en/news/press-release/2020/05/20/world-bank-approves-1-billion-financing-for-kenya-to-address-covid-19-financing-gap-and-support-kenyas-economy> viewed 5 September 2020.

<sup>109</sup> BBC Online (23 July 2020) 'Coronavirus: UK foreign aid spending cut by £2.9bn amid economic downturn' <https://www.bbc.com/news/uk-politics-53508933> viewed 2 September 2020.

<sup>110</sup> Anderlini & Holmes *Invisible Women* (n8) 75.

<sup>111</sup> (n110).

Restricted movement and a ban on public gatherings have greatly hampered these approaches to socio-economic empowerment of vulnerable women. Substitution of physical meetings with digital platforms has proved difficult as most of these marginalised areas are not supported by internet connectivity.

#### **4.4 COVID-19, COUNTERING VIOLENT EXTREMISM, SOCIO-ECONOMIC RIGHTS AND VULNERABLE WOMEN IN KENYA: SOME PROPOSITIONS**

In the previous section, this paper discussed the impact of Covid-19 on the socio-economic rights of vulnerable women in CVE mechanisms in Kenya. Three main challenges were identified:

- the gendered impact of Covid-19 creating a propagandist opportunity for Al Shabaab to recruit vulnerable women;
- diversion of foreign aid support away from socio-economic programs for vulnerable women; and
- restriction of local NGO operations due to lockdown measures.

In this part, I shall propose three main suggestions to alleviate the impact of Covid-19 on CVE mechanisms targeting socio-economic conditions of vulnerable women in Kenya.

##### **4.4.1 Supporting a do-it-yourself (DIY) approach to countering violent extremism among vulnerable women**

The widespread and, by all accounts, long-lasting effects of Covid-19 in Kenya require an innovative home-grown solution. Community engagement is critical in combating not only the immediate public health effects of Covid-19, but also peripheral effects relevant to the specific community, such as terrorist recruitment of vulnerable women.

Duncan Green refers to this method of problem-solving as ‘positive deviance’, that is, ‘looking for outliers who succeed against the odds’.<sup>112</sup> This thought process relies on a simple principle: someone in the community will have already identified the solution.<sup>113</sup> More research should be dedicated to identifying positive deviants and their solutions in mitigating the socio-economic impact of Covid-19 on vulnerable women, and hence building their resilience against terrorist recruitment.

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<sup>112</sup> D Greene *How Change Happens* (2016) 25.

<sup>113</sup> (n112).

One emerging way adopted by ‘positive deviants’ is through the utilisation of pre-existing networks.<sup>114</sup> In Lamu and Mombasa counties, for example, local NGOs are tapping into existing CVE youth networks to sensitise the community to the perils of the global health pandemic while incorporating counter extremism messaging.<sup>115</sup> Similar approaches have been undertaken in Kamukunji, Nairobi.<sup>116</sup> This twin approach is important to combat Al Shabaab propaganda on Covid-19 being a specific punishment from god while also systematically combating the pandemic.

These networks may also be designed to specifically ensure the socio-economic empowerment of vulnerable women, including creating access channels to health providers, including access to sexual and reproductive health services where necessary, and communal financial support to vulnerable women and their families.

#### **4.4.2 Private sector involvement as a countering violent extremism mechanism**

To supplement, or in other instances, fill in the gap left by departing foreign aid agencies, local CVE actors may engage the private sector for assistance. Prior to the release of the National Strategy, counterterrorism measures were viewed as a wholly governmental initiative. With the express acknowledgement of the utility of the private sector in the National Strategy, the role of the private sector has been duly expanded to include socio-economic support to marginalised areas.<sup>117</sup> Therefore, local stakeholders are now adequately empowered to reach out to the private sector for more specific assistance, including financial and other expertise.

Inspiration may be drawn by the Dangote Foundation, a private foundation established by Nigerian billionaire Aliko Dangote to coordinate his philanthropic activities.<sup>118</sup> On 10 May 2016, the Foundation announced a 10 million USD donation to support marginalised populations in northern Nigeria, including vulnerable women, by providing socio-economic opportunities such as job training and schooling.<sup>119</sup>

Similarly, in June 2018 the Dangote Foundation launched the Dangote Village, a housing unit comprising 200 houses, a school, hospital, irrigation farms and poultry farms amongst others, to enable the residents, who are

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<sup>114</sup> Ogada (n 56).

<sup>115</sup> (n56).

<sup>116</sup> (n56).

<sup>117</sup> National Strategy Kenya (n54) 22.

<sup>118</sup> BBC (10 May 2016) ‘Boko Haram crisis: Nigerian tycoon Dangote donates \$10m in aid’ <https://www.bbc.com/news/world-africa-36255482> viewed 2 September 2020.

<sup>119</sup> (n118).

primarily vulnerable populations affected by the Boko Haram onslaught, to be socially and economically empowered<sup>120</sup> and hence less likely to be recruited into Boko Haram.

Including the private sector into the CVE framework may not only alleviate the financial hardship occasioned by Covid-19 but may also create new methods of combating violent extremism in Kenya.

#### **4.4.3 Gendered inclusion of socio-economic rights into countering violent extremism law and policy**

Independent of Covid-19, one of the main obstacles in ensuring socio-economic rights for vulnerable women in CVE law and policy is the relative invisibility of these women in CVE frameworks.

Therefore, to ensure a sustainable approach in the future, there must be a deliberate inclusion of a gendered approach in access to socio-economic opportunities in the context of CVE. Without this deliberate effort, socio-economic empowerment programs may be designed from a gender-neutral perspective rendering these strategies unhelpful as they will most likely only reflect men's experience of violent extremism.

#### **4.5 CONCLUSION**

This paper set out to discuss how Covid-19 has undermined the socio-economic approach to CVE among vulnerable women in Kenya. The Covid-19 pandemic has revealed the increased vulnerabilities that women already face in accessing socio-economic rights in the context of CVE. Therefore, to alleviate the impact of this pandemic we must with deliberate effort, include women in the CVE discourse and begin to remove barriers compounded or introduced by Covid-19 to these women's access to socio-economic opportunities.

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<sup>120</sup> (n118).



# Deliberate disregard: Socio-economic rights, constitutionalism and the Covid-19 pandemic in Zambia

O'Brien Kaaba\*

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## ABSTRACT

The novel coronavirus (Covid-19) crisis has wreaked havoc across the globe, disrupting social life, destroying economies, overwhelming health care systems and limiting the enjoyment of human rights. Zambia recorded its first case of Covid-19 in March 2020. In response, the government took wide ranging measures to combat the spread of the virus, primarily based on public health legislation, and avoided relying on emergency laws. The government also took other gratuitous measures not specifically mandated by any specific reference to the law. These include closing some businesses, suspending some of the rights of workers, enforcing quarantine, closing schools, and restricting meetings and movements.<sup>1</sup> This chapter discusses the impact of the coronavirus pandemic and government's response to it in the arena of socio-economic rights. The chapter is premised on the conceptualisation of a crisis and its impact on social and

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<sup>1</sup> C Muzyamba 2020 'Covid-19 response in low-income country: The case of a lockdown in Zambia' *Research Square* <https://assets.researchsquare.com/files/rs-38257/v1/756b6427-39be-4224-93fb-94a14d91a544.pdf> viewed 30 November 2020.



economic rights. It contends that a crisis provides an opportunity to populist regimes to accumulate and expand their scope of power. The effect is to diminish the means of holding government accountable for the provision of economic and social rights. Using the right to education for illustration, it is argued that the failure to protect and fulfil social economic rights of the people in Zambia during the pandemic validates this view.

## 5.1 INTRODUCTION

There is no doubt that the coronavirus pandemic is an unprecedented crisis in Zambia and globally. The virus has wreaked havoc across the globe, disrupting social life, destroying economies, overwhelming health systems and limiting the enjoyment of human rights. Like many other countries, Zambia has been affected by the virus and the consequences have been far reaching. In order to contain the spread of the virus and ameliorate the economic and social consequences of the pandemic, the Zambian government responded to the pandemic using several measures and approaches.

This chapter discusses the impact of the government's measures to combat coronavirus on social and economic rights in Zambia. It contends that the consequences of these measures on the enjoyment of socio-economic rights should be seen in light of the trajectory of ongoing autocratisation by the current regime. The government took advantage of the coronavirus to further close the political space by persecuting the opposition and critical civil society, thereby significantly limiting their capacity to mobilise, protest and hold government accountable. The coronavirus pandemic provided a perfect cover for the government to carry this out under the guise of implementing coronavirus containment measures. Ultimately, the deprivation of socio-economic rights in this context demonstrates the failure of government to adhere to constitutionalism. The impact on social and economic rights is premised on the doctrine of the indivisibility and interdependence of human rights whereby if there is suppression of civil and political rights, that will inevitably have an effect on social and economic rights. To further demonstrate this, the discussion is later focused on the impact on the right to education in Zambia.

The chapter is divided into five parts, starting with the introduction. The second part of the chapter discusses the concept of a crisis and its impact on governance and ultimately on social and economic rights. The third part highlights the government's response to the coronavirus pandemic in Zambia. Here it is demonstrated how the measures, overall, seem to have been designed for populist ends. The fourth part discusses the impact of the pandemic and government measures on the enjoyment of socio-economic rights. It dovetails the consequences with the concept of constitutionalism and argues that the failure to respect and fulfil social and economic rights denotes failure of government to respect the tenets of constitutionalism.

## 5.2 CRISES, POPULISM, AND SOCIO-ECONOMIC RIGHTS: A CONCEPTUAL RELATIONSHIP

Major crises of any kind, such as natural disasters, economic melt-downs, wars and security threats tend to provoke populist sentiments that in turn put a strain on democratic institutions.<sup>2</sup> As a large-scale epidemic, the coronavirus is no exception. This is because pandemics such as the current coronavirus pandemic disrupt social order by engendering stigmatisation of the victim, uncertainty, panic and social disintegration. A crisis episode is a moment of fluidity and openness, where what guaranteed certainty and predictability no longer holds.<sup>3</sup>

This is more so when the pandemic is new and much is unknown about it as it is likely to ‘instill suspicion of others and the fear that they might transmit the disease, leading to prejudicial attitudes and behaviours.’<sup>4</sup> The coronavirus crisis should, therefore, be treated like any other major crisis that is disruptive to the normal ordering of social life, such as security threats. As a crisis, it plays into the hands of political populists who seek to exploit it to the fullest. It is a golden opportunity for political populists.

Political populism has been defined as ‘a political strategy through which a personalist leader seeks or exercises governmental power based on direct, unmediated, un-institutionalised support from large numbers of mostly unorganised followers’.<sup>5</sup> A populist therefore, seeks to exercise public power in a manner that does not allow for countervailing mechanisms to check on how that power is exercised. This can only happen if there are large enough numbers of people who share in the populist’s views, which the populist uses to dismantle mechanisms intended to be a check on the exercise of public power.<sup>6</sup> Rovira Kaltwasser has argued that populist sentiments are relatively widespread across the population in every society or country.<sup>7</sup> However, these attitudes tend to be largely dormant when there is no crisis and become activated in moments of crisis, real or imaginary.

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<sup>2</sup> S Levitsky & D Ziblatt *How Democracies Die: What History Reveals About Our Future* (2018) 92.

<sup>3</sup> F Volpi & J Gerschewski ‘Crises and critical junctures in authoritarian regimes: Addressing uprisings, temporalities and discontinuities’ 2020 (41) *Third World Quarterly* 3.

<sup>4</sup> TK Hartman et al ‘*The Authoritarian Dynamic During the COVID-19 Pandemic: Effects on Nationalism and Anti-Immigrant Sentiment*,’ University of Sheffield Department of Clinical, Educational and Health Psychology Working Paper 8 May 2020.

<sup>5</sup> CR Kaltwasser ‘How to define populism?’ in G Fitzi, J Mackert & BS Turner (eds) *Populism and the Crisis of Democracy: Concepts and Theory* Volume 1 (2019) 64.

<sup>6</sup> (n5) 65.

<sup>7</sup> (n5).

Populists often use a crisis to paint a picture of being at war through their rhetoric. It is therefore, not surprising that President Edgar Lungu in Zambia was quick to describe his government as being ‘at war against the Covid-19 pandemic’ in which the government was already scoring ‘victories.’<sup>8</sup> Paul Taggart argues that the tone or metaphors of war by populists in addressing a crisis serve at least two distinct roles.<sup>9</sup> In the first instance, it is to polarise the nation by making a distinction between those perceived to be on the side of the populist ruler and those against. Those against are often painted as enemies of the state. The second role played by the war rhetoric of populism is to divest the perceived enemy of human rights. According to Taggart, the war metaphor ‘implies that the enemy is very much an enemy in everything.’<sup>10</sup> As the perceived enemy, it means they must be defeated at any cost and defeating them is presented as a noble cause. As such, suspending or neglecting their rights is considered a legitimate thing.

Not only does a crisis trigger populism but it presents an opportunity for populists to concentrate and abuse power, by whipping up public sentiment. The concentration or abuse of power in a crisis is possible, as Steven Levitsky and Daniel Ziblatt<sup>11</sup> have shown, for two reasons. First, in a time of crisis, the uncertainty makes citizens fearful for their safety and lives and very suspicious. This makes them more likely to tolerate or even actively support populist measures. This seems to be true of Zambia. A survey conducted in July and August 2020, established that 2 out of 3 Zambians were fearful of Covid-19 and 60% of Zambians feared that if they got the virus, others will think poorly of them.<sup>12</sup> The survey also found that 90% of the respondents placed their faith in authorities to be knowledgeable about the virus. However, at the same time 71% of the respondents feared that the politicians would use Covid-19 to enrich themselves and extend their power.<sup>13</sup> Second, in moments of crisis, many constitutions allow presidents to exercise exceptional powers with little or no effective checks and balances. This is usually through the declaration of a state of emergency. Where this occurs, the president is usually given power which may be used to target and weaken perceived political enemies and critics.<sup>14</sup>

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<sup>8</sup> Statement by President Edgar Lungu on the Covid-19 Pandemic, April 2020, 9.

<sup>9</sup> P Taggart ‘Populism and ‘unpolitics’’ in Fitzi, Mackert & Turner (n5) 82.

<sup>10</sup> (n9) 82.

<sup>11</sup> Levitsky & Ziblatt (n2) 92.

<sup>12</sup> *Governance & Local Development (GLD) and Southern African Institute for Policy and Research (SAIPAR)* (September 2020) ‘Covid-19 Survey’ <https://saipar.org/covid-19-survey-zambia/> viewed 30 November 2020.

<sup>13</sup> GLD and SAIPAR (September 2020) ‘Covid-19: Trust in Authorities’ [https://prezi.com/i/b46ibd8clq0/trustinauthorities\\_zambia/](https://prezi.com/i/b46ibd8clq0/trustinauthorities_zambia/) viewed 30 November 2020.

<sup>14</sup> Levitsky & Ziblatt (n2) 94.

Where an emergency is declared, its effect on democracy and human rights is usually detrimental. This is because by its very nature, an emergency usually replaces rule of law with personal rule, although international law and many modern constitutions now place limitations on what can be done within an emergency. The use of states of emergency has been traced back to the Roman empire, where during times of national crises, Roman consuls nominated ‘dictators’, vested him with nearly absolute power, and authorised him to take action even in disregard of institutions of accountability.<sup>15</sup> Emergencies may still operate in the same way today, where there are inadequate mechanisms to control the exercise of emergency power. They provide an opportunity to an incumbent president or government to accumulate power instantly, overcome democratic mechanisms of accountability, and target those they consider to be political enemies.

In the Zambian context, however, the President did not promulgate a state of emergency in responding to the coronavirus. This, however, does not imply that the government took a more human-rights-sensitive approach to fighting the virus. The opposite has been the case, as the government used the coronavirus pandemic to abuse human rights, limit political space and undermine the rule of law. As Zambian law scholar Felicity Kayumba Kalunga argued, ‘The ongoing violations of the rule of law in Zambia suggest that the country is fast sliding into a despotic state, under the guise of containing the Covid- 19 pandemic.’<sup>16</sup>

As will be shown below, when there is no respect for rule of law shown by the closing down of political space, not only civil and political rights suffer. It equally undermines the enjoyment of social-economic rights. This is because when there is respect for human rights and freedom, then as Amartya Sen argued, ‘...more freedom gives us the opportunity to pursue our objectives – things that we have reason to value.’<sup>17</sup> To demonstrate the relationship between democracy and the

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<sup>15</sup> A Luhrmann & B Rooney ‘*Autocratisation by Decree: States of Emergency and Democratic Decline*,’ Varieties of Democracy Institute Working Paper Series 2020/85 (2 Ed) (April 2020) 4. See also GA Toth ‘Constitutional markers of authoritarianism’ 2018 (2) *Hague Journal on the Rule of Law*; VA Boese, AB Edgell, S Hellmeier et al ‘*Deterring Dictatorship: Explaining Democratic Resilience since 1990*’ The Varieties of Democracy Institute Working Paper Series 2020/101 (May 2020); and A Luhrmann & B Rooney ‘*When Democracy Has a Fever: State of Emergency as a Symptom and Accelerator of Autocratisation*’ The Varieties of Democracy Institute Working Paper Series 2019/85 (March 2019), 2.

<sup>16</sup> FK Kalunga (17 April 2020) ‘Bowman ni boma? The plight of the rule of law in Zambia during Covid-19’ *Lusaka Times* <https://www.lusakatimes.com/2020/04/17/boma-ni-bowman-the-plight-of-the-rule-of-law-in-zambia-during-covid-19/> > viewed 20 July 2020.

<sup>17</sup> A Sen *The Idea of Justice* (2009) 228.

enjoyment of socio-economic rights, Sen uses his research on the occurrence of famines and concludes that –

..no major famine has ever occurred in a functioning democracy with regular elections, opposition parties, basic freedom of speech and a relatively free media (even when the country is very poor and in a seriously adverse food situation).<sup>18</sup>

This finding illustrates the importance of democracy and respect for human rights. Respect for civil and political rights enables citizens to hold their governments accountable and responsive to their social and economic rights. It demonstrates the ‘protective power of political liberty’.<sup>19</sup> Where there is no respect for democratic principles underpinned by civil and political rights, the people have no means of holding government accountable and, therefore, the citizens suffer in silence. But where democracy thrives and civil and political rights are respected, the people will have the tools to hold government accountable and be responsive to their needs. In Sen’s words, this is because ‘when there is free news-reporting and uncensored public criticism, then the government too has an excellent incentive to do its best to eradicate famines’.<sup>20</sup>

### **5.3 ZAMBIAN GOVERNMENT’S RESPONSE TO THE COVID-19 PANDEMIC: AN OVERVIEW**

Zambia recorded its first two cases of Covid-19 on 18 March 2020.<sup>21</sup> Prior to that, the government had announced wide ranging measures to combat the virus, primarily based on public health legislation. There are generally three legal ways the government could have responded to the coronavirus crisis. First, it could have considered it as a public or state of emergency. From this perspective, the president could either have invoked article 30 of the Constitution to declare a full state of emergency or article 31 to declare the existence of a situation that could lead to a state of emergency (partial-emergency).<sup>22</sup> Without going into the intricate details, in both circumstances, the President could, under consequential regulations, arrogate himself power to restrict the enjoyment of human rights with the full imprimatur of the Constitution. For example, this could have authorised detention and restrictions of persons without trial; prohibition, restriction and control of assemblies; the regulation, control and maintenance of supplies and services; the prohibition and dissemination of matter, production, publishing,

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<sup>18</sup> (n17) 342.

<sup>19</sup> (n17) 342.

<sup>20</sup> Sen (n17) 343.

<sup>21</sup> Kalunga (n16).

<sup>22</sup> Articles 30 and 31 of the Constitution of Zambia.

sale, supply, distribution and possession of publications; the taking of possession or control of any property or undertaking and the acquisition of any property other than land; and authorised the entering and search of premises.<sup>23</sup> Indeed, in March 2020, a well-respected lawyer, John Sangwa, wrote to President Lungu asking him to consider declaring a state of emergency pursuant to Article 30 in order to provide a comprehensive framework for responding to the virus.<sup>24</sup>

It is not clear why the President did not take this route. Certainly, it was not as result of forbearance considering that in the recent past the president has invoked extreme executive powers over minor incidents. For example, in July 2017 President Lungu invoked article 31 to declare a threatened state of emergency, an act which was mainly used to target the opposition, following the burning of a market building in Lusaka.<sup>25</sup> A more likely explanation is that the declaration of an emergency has inbuilt mechanisms for checking the discretion of the president, albeit of limited effectiveness, such as parliamentary approval and remedies for those whose rights are restricted or detained.<sup>26</sup> It is likely that considering the slide towards autocratisation (as argued below), the pandemic provided an opportunity to run affairs through decrees not based on any specific law. This way, the pandemic, provided a cover for deliberately disregarding the few inbuilt mechanisms of holding the actions of government within check. As will be shown below, almost all the major measures announced by the President had no basis in law.

The second legal approach the government could have taken would have been to trigger provisions of the Disaster Management Act. Section 36 of the Act empowers the President to declare a national disaster.<sup>27</sup> The declaration is premised on the recommendation of the Disaster Management Council, and should only be made if the President considers that the emergency or situation giving rise to the disaster –

is of such nature and extent that exceptional measures are necessary to assist and protect the public or property in the area, or that circumstances are likely to arise making such measures necessary, by notice published in the Gazette, declare the situation or emergency a state of disaster and the area in which the emergency or situation exists, to be a disaster area.<sup>28</sup>

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<sup>23</sup> (n22).

<sup>24</sup> Letter from Joh Sangwa to President Edgar Lungu dated 26 March 2020.

<sup>25</sup> See Statutory Instrument 53 of 2017.

<sup>26</sup> See articles 26, 30 and 31 Constitution of Zambia.

<sup>27</sup> Section 36 Disaster Management Act 13 of 2010, Zambia.

<sup>28</sup> (n27) section 36(2).

The potential consequences of the declaration of a disaster are listed in section 37(1).<sup>29</sup> The potential consequences are not designed to restrict human rights and seem predominantly designed to facilitate the rescue of the victims and provide supplies. It is probably because the Act lacks far reaching powers to limit political space that the government could not countenance invoking it as part of its response to the coronavirus pandemic.

The third approach, which the government actually took, was to rely on public health legislation. The Public Health Act, Chapter 295 of the Laws of Zambia, empowers the minister of health to declare an infectious disease as a notifiable disease,<sup>30</sup> or to make regulations relating to management of infectious diseases.<sup>31</sup> Acting on these powers, the Minister of Health, in March 2020, promulgated two statutory instruments.

The first statutory instrument is the Public Health (Notifiable Infectious Disease) Declaration Notice 2020 (Statutory Instrument 21 of 2020). Paragraph 2 of the Statutory Instrument declared that the disease specified in the schedule was a notifiable disease while the schedule named the notifiable disease as ‘coronavirus disease 2019’.

The second statutory instrument is the main legal instrument containing government measures responding to the coronavirus pandemic, that is, the Public

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<sup>29</sup> Section 37(1) provides: ‘Where a declaration of a state of disaster is declared under section *thirty-six*, the President, in consultation with the Council, may make regulations relating to— (a) the release of any available resources including stores, equipment, vehicles and facilities; (b) the release of personnel of a State organ or institution for the rendering of emergency services; (c) the implementation of all or any of the provisions of a national disaster management plan that are applicable in the circumstances; (d) the evacuation to temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life; (e) the regulation of traffic to, from or within the disaster stricken or threatened area; (f) the regulation of the movement of persons and goods to, from or within the disaster stricken or threatened area; (g) the control and occupancy of premises in the disaster stricken or threatened area; (h) the provision, control or use of temporary emergency accommodation; (i) the suspension or limiting of the sale, dispensing or transportation of alcoholic beverages in the disaster stricken or threatened area; (j) the maintenance or installation of temporary lines of communication to, from or within the disaster area; (k) the dissemination of information required for dealing with the disaster; (l) emergency procurement procedures; (m) the facilitation of response and post-disaster recovery and rehabilitation; (n) other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimise the effects of the disaster; or (o) steps to facilitate international assistance.’

<sup>30</sup> Section 9 Public Health Act Chapter 295 of the Laws of Zambia.

<sup>31</sup> (n30) section 28.

Health (Infected Areas) (Coronavirus Disease 2019) Regulations 2020 (Statutory Instrument 22 of 2020). The Statutory Instrument provides for the principal public health measures such as quarantines, restrictions of movement, disposal of infected bodies and mandatory reporting of Covid-19 infections.

Statutory Instrument 22 of 2020 also imposes restrictions on holding gatherings or ceremonies. Paragraph 9 of the Statutory Instrument bans public ceremonies or gatherings of more than five people (except family members) in an infected area without the written permission of relevant authorities. An infected area is defined under paragraph 2 as a part of the country or conveyance declared as being or appearing to be threatened by Covid-19. Paragraph 10 gives discretionary power to an authorised officer to prohibit or restrict trade of food products and ready-to-eat foods from or in any location that could pose a danger to health of the customers and traders. By virtue of paragraph 11, this includes power to prohibit or restrict trading or vending in food in unsanitary conditions. Paragraph 12 authorises an authorised officer to inspect public premises in order to ensure that there is sufficient sanitation and hygiene to prevent the occurrence or transmission of Covid-19. This includes the power to close such facilities where conditions are found to be inadequate to prevent the transmission of the disease to people.

In July 2020, the minister of health amended Statutory Instrument 22 of 2020 to proscribe the holding of public gatherings in an infected area except with the written permission of an authorised officer.<sup>32</sup> This is the totality of measures provided for and which the government could lawfully implement under Statutory Instrument 22 of 2020.

However, these measures were not designed to start immediately. They could only be triggered when the minister raised the level of seriousness of the situation to ‘alert level’<sup>33</sup> in line with the schedule in Statutory Instrument 22 of 2020.<sup>34</sup> An alert level is defined in the schedule to the Statutory Instrument as ‘conveying the highest level of importance and warranting immediate action or attention.’ There has been no official declaration by the minister raising the national level to ‘alert level.’<sup>35</sup> In the absence of the formal raising of the risk

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<sup>32</sup> The Public Health (Infected Areas)(Coronavirus Disease 2019) (Amendment) Regulations 2020 (Statutory instrument 62 of 2020).

<sup>33</sup> The schedule has three urgency category levels. The first level is known as the ‘update level’ which simply requires the minister to update the nation but does not require immediate action; the second level is the ‘advisory level’ which requires provision of important information on an incident or situation but does not need immediate action; and finally, there is the ‘alert level’ which is the highest urgency level and requires immediate action.

<sup>34</sup> Paragraph 13, Statutory Instrument 22 of 2020.

<sup>35</sup> At least that was the case at the time of writing in October 2020.



level to ‘alert level,’ means that all the measures implemented by the government under the statutory instrument were patently illegal.

Apart from the legal measures, the government also announced a number of other measures to combat the pandemic. Shortly before the recording of the first two cases of Covid-19 on 18 March 2020, government ordered the closure of all schools. On 7 April 2020 the Ministry of General Education announced that following the closure of schools, learning would continue through e-learning platforms and on a self-instruction basis.<sup>36</sup> No details of how this would work were given. The likely consequences of this in terms of socio-economics rights are considered in the next section. In July 2020, the Ministry of Higher Education further extended the delay of the opening of schools. Citing a recent surge in cases, it ordered universities and colleges to remain closed, except for students in the final year of study.<sup>37</sup>

However, there is one type of measure that continued and continues to be applied to limit political space and to shut down dissent. The coronavirus pandemic provided a golden opportunity for government to limit political space and demobilise critical voices and restrict its political opposition. Although there is no legal measure in effect limiting the holding of meetings, the government continued to use the police to prohibit the opposition from meeting, and those who disobeyed were arrested. This approach clearly was not to stave off the spread of the coronavirus, as the ruling Patriotic Front (PF) members continued to mobilise and hold meetings unhindered. For example, in July 2020, police arrested members of the opposition United Party for National Development (UPND), who were holding intra-party elections on a farm in the Copperbelt province, despite their holding the meeting outdoors on a farm in order to maintain social distancing.<sup>38</sup> These arrests were on the pretext that the police were not given any notice of the meeting. Similarly, police blocked youths who wanted to hold a procession in June in protest against government corruption.<sup>39</sup>

The police, usually under the control of ruling party supporters (popularly referred to as ‘carders’ in Zambian parlance) have generally been agents of enforcing the closure of the political space in favour of the ruling party, under the

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<sup>36</sup> Ministry of General Education (7 April 2020) ‘Press Release on Provision of Alternative Modes of Education Provision During the Closure of Learning Institutions’.

<sup>37</sup> Ministry of Higher Education Circular No. MOHE/101/23/2 of 24 July 2020.

<sup>38</sup> N Sakala (27 July 2020) ‘C/Belt police nab Beyani, 6 others for conducting UPND intra-party elections’ *DiggersNews* <https://diggers.news/local/2020/07/27/c-belt-police-nab-beyani-6-others-for-conducting-upnd-intra-party-elections/> viewed 30 November 2020.

<sup>39</sup> S Ncube (23 June 2020) ‘Youths dribble police, as they take protest to the bush’ *DiggersNews* <https://diggers.news/local/2020/06/23/youths-dribble-police-as-they-take-protest-to-the-bush/> viewed 30 November 2020.

guise of enforcing government coronavirus measures. An editorial in a national tabloid succinctly summarised this situation as follows:

Patriotic Front cadres have been the main enforcers of the Public Order Act. They have been stopping the opposition structures from holding even the smallest of meetings saying the campaign period has not started. And they would order the police to arrest them. But any other meetings or gatherings they would tolerate. And today the Covid-19 regulations are being enforced by them in the same way. Anybody else can gather for a meeting but not opposition members. But they themselves are holding meetings to organise and mobilise for next year's elections.<sup>40</sup>

The approach that the Zambian government has used to limit political space under the guise of fighting coronavirus seems to validate Joao Nunes' assertion that mis-recognition of where the problem lies can lead to imposition of 'narratives that do not correspond to actual lived experiences'.<sup>41</sup> A superficial reading of the situation in Zambia would make one believe that the narrative of fighting the coronavirus by the government holds water, considering that the disease is a global pandemic. A close look, however, exposes the injustices that motivate government action, that is, to limit political space.

So how are all these measures, especially the political measures closing political space, related to socio-economic rights? As argued above, when freedoms are restricted, the people are divested of their power to hold government accountable. There is no incentive for government to provide social goods to the people as it is no longer answerable to the citizens. The people are left to scavenge for a living while institutions, such as civil society organisations and political parties, that are designed to be a check on government, are left to fight for their survival. This leads to the adjustment and narrowing of expectations, as the government is absolved of the people's highest expectations. It is such a situation Amartya Sen compellingly described as follows:

The hopelessly deprived people may lack the courage to desire any radical change and typically tend to adjust their desires and expectations to what little they see as feasible. They train themselves to take pleasure in small mercies.<sup>42</sup>

The closing of political space, therefore, had a detrimental effect not only on civil and political rights but also on socio-economic rights.

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<sup>40</sup> 'Killing the opposition with Covid' (11 August 2020) *The Mast* <https://www.themastonline.com/2020/08/11/killing-the-opposition-with-covid-19/> viewed 30 November 2020).

<sup>41</sup> J Nunes 'Ebola and the reproduction of neglect in global health' 2016 (37) *Third World Quarterly* 542.

<sup>42</sup> Sen (n17) 283.

The views by Sen also find support in the human rights concepts of indivisibility and interdependence of all human rights. The doctrine of indivisibility and interdependence holds that there is no hierarchy among human rights.<sup>43</sup> This entails that no human right can be realised fully without the full realisation of other human rights. As a result, states should not pick as choose what rights to implement. This is because rights reinforce and support each other.<sup>44</sup> As one commentator noted:

[W]e cannot enjoy civil and political rights unless we enjoy economic, cultural and social rights, any ... more than we can insure our economic, social and cultural rights, unless we can exercise our civil and political rights. True, a hungry man does not have much freedom of choice. But equally true, when a well-fed man does not have freedom of choice, he cannot protect himself against going hungry.<sup>45</sup>

The approach taken by the Zambian government is manifestly a violation of human rights and is at variance with the guidance by both the United Nations (UN) and the African Union (AU) on the best approach to combat Covid-19 in a manner that respects human rights. The UN, for example, has asserted that the time of the pandemic should not be the time to neglect human rights.<sup>46</sup> The UN emphasised that in responding to the pandemic, states have a triple responsibility: to enhance the effectiveness of the response to the health threat; to minimise the impact of the crisis on the people's lives; and to avoid creating new or worsening existing problems.<sup>47</sup> In demonstrating the interdependence of civil and political rights with social and economic rights, the UN emphasised that protecting the livelihoods of people would help protect lives, and that states that protected social and economic rights were more likely to be resilient.<sup>48</sup> At the regional level, the AU took a similar approach. For example, the AU strategy for combating the pandemic indicates that the goal of responding to the virus should not only be to prevent severe illness but also to 'minimise social disruption and economic consequences' of the pandemic.<sup>49</sup>

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<sup>43</sup> H Quane 'A further dimension to interdependence and indivisibility of human rights? Recent developments concerning the rights of indigenous peoples' 2012 (25) *Harvard Human Rights Journal* 49.

<sup>44</sup> JW Nickel 'Rethinking indivisibility: Towards a theory of supporting relations between human rights' 2008 (30) *Human Rights Quarterly* 985.

<sup>45</sup> Quane (n43) 49.

<sup>46</sup> United Nations (April 2020) 'Covid-19 and human rights: We are all in this together' <https://www.un.org/victimsofterrorism/en/node/5805> viewed 30 November 2020.

<sup>47</sup> (n46) 3.

<sup>48</sup> (n46) 9.

<sup>49</sup> African Union (5 March 2020) 'Africa Joint Continental Strategy for Covid-19 Outbreak' 3 <https://africacdc.org/download/africa-joint-continental-strategy-for-covid-19-outbreak/> viewed 30 November 2020.

## 5.4 IMPACT ON SOCIO-ECONOMIC RIGHTS AND INTERPLAY WITH CONSTITUTIONALISM

The Zambian constitution does not expressly recognise socio-economic rights. The Bill of Rights<sup>50</sup> only recognises what have traditionally been known as civil and political rights. These include the right to life, personal liberty, freedom from torture, cruel or inhumane punishment or treatment, privacy, freedom of association and assembly, freedom of speech, religious freedom and right to fair trial. A few socio-economic rights were included in the Constitution as mere directive principles of state policy and expressly made non justiciable.<sup>51</sup> These included adequate means of livelihood and employment, clean and safe water, health, education, shelter, and a clean and healthy environment.<sup>52</sup> In 2016, the Constitution was amended and the resulting document did not contain directive principles of state policy.<sup>53</sup> Instead, it was planned that the Bill of Rights should be expanded to include social and economic rights. The draft Bill of Rights containing social economic rights was duly subjected to a referendum in August 2016 but failed to garner the requisite number of votes in order to pass. The Zambian Bill of Rights, therefore, does not expressly enshrine social-economic rights.

The non-inclusion of socio-economic rights in the constitution does not of itself entail that they are not enforceable in Zambia. In a 2019 case, the Supreme Court effectively held that socio-economic rights are enforceable provided they are articulated in a manner that connects them with already recognised rights in the Bill of Rights.<sup>54</sup> In this case, two prisoners who were HIV positive brought an action arguing that the food they were given in prison was inadequate in quantity and deficient in nutritional value. That being the case, their right to life was threatened or violated. The High Court dismissed the case because the Zambian Constitution did not recognise socio-economic rights. On appeal, the Supreme Court reversed the decision of the High Court and found in favour of the petitioners.<sup>55</sup> The Supreme Court considered that human rights were interdependent and inter-related and that life would be meaningless without social economic rights that enhance its quality. Although this case related to two litigants, its holding is of general relevance as it articulates constitutionally

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<sup>50</sup> Part III Constitution of Zambia.

<sup>51</sup> Articles 110-113 Constitution of Zambia 1996. These, however, were repealed following the enactment of Constitution of Zambia (Amendment) Act 2 of 2016.

<sup>52</sup> (n51).

<sup>53</sup> Constitution of Zambia (Amendment) Act 2 of 2016.

<sup>54</sup> E Siang'andu 'George Peter Mwanza and Melvin Beene v Attorney General Appeal' SAIPAR Case Review 2020 (5) 9.

<sup>55</sup> (n54).

guaranteed rights. It is therefore to be considered that the Zambian Constitution, via articulation by case law, indirectly recognises enforceable socio-economic rights.

There are currently no comprehensive statistics detailing the impact of the coronavirus pandemic or of consequential measures taken by the government on social and economic rights in Zambia. It is, however, self-evident that the effects have been devastating. The national economy, which was predicted to grow by about 2 to 3% before the onset of the coronavirus, has been drastically affected and is in recession, shrinking by about -3%.<sup>56</sup> Many businesses were forced to close and had to lay off workers; health facilities have been overwhelmed; and social services disrupted. A survey conducted in July and August 2020 found that 43% of Zambians needed financial, social or medical support in order to make ends meet. However, only 16% of these received help. Hardly any support came from the central government as the bulk of support came from family and friends (31%), while other stakeholders provided meagre support (health workers 18%, employers 15%, local council 9%, NGOs 8%, Members of Parliament 7%, and religious organisations 7%). To illustrate the complexity of the interplay of the coronavirus pandemic and socio-economic rights, the right to education will be used here for purposes of illustration.

The right to education is firmly established in international human rights law. This is provided, for example, under article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 17 of the African Charter on Human and Peoples' Rights. The normative content of the right to education has been articulated by the Committee on Economic Social and Cultural Rights (CESCR), in its General Comment 13. In General Comment 13, the Committee has indicated that the right has four key normative components. These are availability (which means that education institutions and programmes should be available in sufficient quantities), accessibility (which entails that education institutions and programmes should be available to everyone without discrimination), acceptability (which means that the form and substance of education should be acceptable), and adaptability (which refers to the flexibility of education to meet new societal needs).<sup>57</sup> State parties are under an obligation to respect, protect and fulfil.<sup>58</sup> The duty to fulfil would require the state not only to

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<sup>56</sup> Statement of the Minister of Finance (April 2020) 'Further measures aimed at mitigating the impact of the coronavirus (Covid-19) on the Zambian economy' [https://www.mod.gov.zm/?wpfb\\_dl=43](https://www.mod.gov.zm/?wpfb_dl=43) viewed 30 November 2020.

<sup>57</sup> Paragraph 6 CESCR General Comment No. 13: The Right to Education (8 December 1999) [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d\)GeneralCommentNo13Therighttoeducation\(article13\)\(1999\).asp](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13Therighttoeducation(article13)(1999).asp) viewed 30 November 2020.

<sup>58</sup> (n57) para 46.

facilitate but also to actually provide education. Where the means of education are only available to a small number of citizens, that is a clear violation of the right to education.

As noted above, in March 2020, the government ordered the closure of schools as a way of containing the spread of the virus. This was seen as a proactive measure, as at that time Zambia had not recorded any cases of coronavirus. Although schools closed physically, the government ordered learning to be conducted online and through other virtual mechanisms. On the face of it, this seemed laudable as it entailed that students did not miss out on their education. This is especially so in view of the fact that the coronavirus was novel and no one knew when it would end or come under control. However, when one considers that successful online learning has prerequisites and that if these are not provided, then online learning translates into deprivation for those without the means.

Successful online learning, for example, requires electricity, working radio and or television sets, computers equipped with appropriate software, access to the internet, appropriately trained staff and properly developed materials. None of these were provided by the government. Without these amenities, the ensuing learning in effect only served the interests of those with the means. A few statistics can help put these assertions in context.

A 2018 survey on access and usage of information and communications technology (ICT) in Zambia demonstrated very low access and usage. For example, it established that only 32.9% of households had electricity.<sup>59</sup> Without electricity, the effective use of electronic devices upon which virtual learning depends is impossible. Further, only 37% of households owned a working television set and only 45% of households had a working radio set; only 8.1% of households owned a computer; (in rural areas, this was as low as 2.7%); 6.8% individuals knew how to use a computer; 53.5% of individuals were active users of cellular phones (of these, only 29.6% possessed smart phones); and only 14.3% had ever used the internet.<sup>60</sup>

Under these circumstances, and without government intervening to provide means to make online learning accessible to all students, it is manifestly clear that online learning deprived the poor of access to education and only served those endowed with means. This conclusion is validated by the findings of a non-governmental organisation (NGO) which carried out a snap survey on the status

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<sup>59</sup> Zambia Information and Communication Technology Authority '2018 National survey on access and usage of information and communication technologies by households and individuals' vii [https://www.zamstats.gov.zm/phocadownload/Other\\_Institutions/ZICTA%20ICT%20Survey%20-%202018.pdf](https://www.zamstats.gov.zm/phocadownload/Other_Institutions/ZICTA%20ICT%20Survey%20-%202018.pdf) viewed 30 November 2020.

<sup>60</sup> (n59) vii.

of online learning in rural areas. The NGO found that the online learning was ineffective and actually risked widening the deprivation gap between the rich and poor. It stated in part that –

Furthermore, the snap survey and, community and stakeholders engagements held in Lifeline/Childline Zambia’s child protection project sites in Katete, Kapiri-mposhi, Lufwanyama and Choma has revealed that pupils especially in those rural settlements have challenges of accessing the E-learning introduced by the government due to various factors such as lack of ICT facilities, poor internet connectivity, prolonged hours of power outages as a result of load shedding, lack of accessibility to television sets (TVs), lack of financial resources to subscribe to different TV platforms or bouquets. Lifeline/Childline Zambia through its child protection projects has further revealed that many schools in rural areas are under-resourced and ill-equipped to provide support to pupils learning at home through the newly established e-learning and education channels. Furthermore, parents in those areas are unable to support children’s learning due to either literacy levels and others are just too committed looking for ‘bread and butter’. Certainly, this has the capacity to amplify and widen the equity gap between the well-off and worse-off children in accessing e-learning and this may lead to life-long negative impact on the education of children in Zambia.<sup>61</sup>

The failure by government to provide tools that could enable online learning to all students cannot be as a result of limited resources in the country. A lot of money is lost due to mismanagement and official corruption. Corruption by senior government officials is endemic. For example, official corruption and lack of fiscal discipline have primarily led the country into a new public debt and economic crisis. The country has seen unprecedented levels of corruption, especially in the infrastructure sector. For instance, the World Bank in December 2017 categorically stated that ‘unfortunately, when compared to the median cost of paving roads in the region, Zambia’s roads stood out as being very expensive,’ and that ‘the tragedy is not the recent rapid build-up of debt, but the lack of productive assets Zambia can show from the borrowing.’<sup>62</sup> *Africa Confidential* in January 2018 reported:

A key reason behind the lack of certainty about the exact debt figures is that many of the loans that were contracted in 2016 and 2017 ended up in the pockets of individuals and cannot be accounted for.<sup>63</sup>

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<sup>61</sup> Lifeline/Childline Zambia (August 2020) ‘Position paper on the impact of Covid-19 on the protection of children in Zambia: A perspective from Lifeline/Childline Zambia Child Protection Project’ (August 2020) 4.

<sup>62</sup> The World Bank Group (December 2017) ‘Economic Brief: How Zambia can borrow without sorrow’ <https://www.worldbank.org/en/country/zambia/publication/economic-brief-how-zambia-can-borrow-without-sorrow> viewed 30 November 2020.

<sup>63</sup> *Africa Confidential* (January 2018) ‘Lungu’s costly power play’ [https://www.africa-confidential.com/article-preview/id/12226/Lungu%27s\\_costly\\_power\\_play](https://www.africa-confidential.com/article-preview/id/12226/Lungu%27s_costly_power_play) viewed 30 November 2020.

Similar sentiments were expressed by *The Economist*:

The government blames a fall in copper prices from 2011 [for the poor economic performance]. But the real reason is that Zambia is run by an inept and venal elite who used easy credit to line their own pockets. Much of the money Zambia borrowed was squandered or stolen. Big-wigs skimmed from worthy-sounding contracts.<sup>64</sup>

The Financial Intelligence Centre (FIC), an autonomous public institution created to investigate suspicious financial transactions, has documented cases of official corruption. FIC, in its 2016 report, stated that over K3 billion (about 300 million USD) was received by public officials or their associates through kickbacks from public contracts.<sup>65</sup> In 2017, the FIC figures more than doubled. FIC reported that politically exposed persons received more than K6.3 billion (630 million USD) in kickbacks mainly from the infrastructure contracts.<sup>66</sup> Considering that these are just figures for one year, and only capturing suspicious transactions through the formal banking system, one can safely conclude that what was reported is only the tip of an iceberg.

A recent report by the Auditor General reveals massive corruption and abuse of both donor and national funds and resources set aside for purposes of containing the pandemic. For example, donors committed more than 300 million USD to the fight against Covid-19 but the Ministry of Finance failed to produce documentation relating to the funds; and the Jack Ma Foundation donated multiple equipment and medical supplies, but the government failed to account for them, giving credence to media reports that these were sold off by corrupt officials.<sup>67</sup>

Given this scenario and the large sums of public funds lost through corruption, it cannot be argued convincingly that the country lacks resources to provide requisite equipment to facilitate online learning.

The failure by government to provide the necessary tools should therefore be seen from the perspective alluded to above, that once political space is limited,

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<sup>64</sup> The Economist (15 September 2018) 'Reckless in Lusaka: Zambia's looming debt crisis is a warning for the rest of Africa' <https://www.economist.com/leaders/2018/09/15/zambias-looming-debt-crisis-is-a-warning-for-the-rest-of-africa> viewed 6 October 2018.

<sup>65</sup> Financial Intelligence Center, 'Money laundering / terrorist financing: Trends report 2017' <https://www.fic.gov.zm/79-fic-news/101-trends-report-2017> viewed 30 November 2020).

<sup>66</sup> (n65) 10.

<sup>67</sup> See 'Interim report of the Auditor General on the audit of the utilisation of Covid-19 resources As at 31 July 2020' [https://www.ago.gov.zm/?wpfb\\_dl=210](https://www.ago.gov.zm/?wpfb_dl=210) viewed 30 November 2020.



then the mechanisms for holding government accountable are taken away. The government then no longer makes decisions primarily in service of the social needs of the people. This demonstrates the interconnectedness of civil and political rights with social and economic rights. Once civil and political rights suffer, social and economic rights are left to the benevolence of the ruling elite and are no longer considered entitlements of the people.

It is this situation that dovetails with the lack of constitutionalism in Zambia. The deprivation should be seen as a result of the failure of constitutionalism in the country. The concept of constitutionalism derives from the idea of a written constitution. The current concepts of a written constitution for a nation-state have roots in the 18th century in the context of the French and American revolutions.<sup>68</sup> What is distinct about the idea of a written constitution is that it is considered the fundamental law that not only establishes the government but regulates the exercise of governmental power by prescribing limits to such power. Liolos has argued that this entails that the constitution has two elements: the functional and aspirational.<sup>69</sup> The functional elements of the constitution create the organs of the state and the rules that govern them, while the aspirational elements articulate the nation-state's principles and values such as social justice, transparency and accountability which every well-ordered state aims at achieving.<sup>70</sup> In a well ordered state the aspirational elements of the constitution provide the nation with a moral compass that ought to dictate the policies and activities which the functional elements should implement to achieve legitimacy and promote social development.<sup>71</sup>

Distilled from this, constitutionalism therefore entails the establishment of a nation-state government that is enabled to carry out the task of governing effectively and efficiently, but doing so within the confines of constitutional limits and in furtherance of collective national values. The state should provide social goods to enable its nationals to live meaningful lives. However, this does not usually happen and the current situation in Zambia, where the government is riding on the coronavirus to limit political space, abuse human rights and effectively disavow the rule of law speaks to the existence of a government that has no respect for constitutionalism. Although the formal trappings of constitutionalism, such as reference to a written constitution and legislation as

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<sup>68</sup> Albert HY Chen, 'The achievement of constitutionalism in Asia: Moving beyond 'constitutionalism without constitutionalism'' in A Chen (ed) *Constitutionalism in Asia in the Early Twenty-First Century* (2014) 4.

<sup>69</sup> J Liolos 'Erecting new constitutional cultures: The problems and promise of constitutionalism post-Arab spring' 2013 (36) *Boston College International and Comparative Law Review* 2.

<sup>70</sup> Liolos (n69).

<sup>71</sup> Liolos (n69).

a basis for government action are in place, these are often used as a cover for what scholars have coined as ‘politically enabling documents,’ ‘constitutions without constitutionalism,’ ‘façade constitutions,’ ‘trap constitutions,’ ‘nominal constitutions,’ and ‘abusive constitutionalism’ to aptly describe the phenomena.<sup>72</sup> In such a situation, the government is not limited and susceptible of being accountable to the people. It does not consider itself as duty bound to provide social goods to its people and only considers itself as acting benevolently when it does so. Arguably that is the current Zambian situation.

## 5.5 CONCLUSION AND RECOMMENDATIONS

This chapter has discussed the experience of Zambia with the coronavirus pandemic, particularly in terms of its impact on social and economic rights. The chapter has been anchored on theoretical literature about the relationship of a crisis to political populism. It was established that a crisis provides an opportunity for autocratisation to political populists. It is argued that this is the case in Zambia. Using the exigencies of the Covid-19 pandemic, the Zambian government has closed political space and effectively squeezed out the opposition and civil society as agents of accountability. This has left these unable to effectively hold government accountable in its response to the coronavirus. The failure to protect social and economic rights, particularly the right to education used for purposes of illustration, clearly demonstrates the lack or failure of government adherence to constitutionalism. Without the respect for civil and political rights, the tools for holding government accountable for provision of social and economic rights are diminished and rendered largely ineffective.

Arising from the foregoing, it is important to make some recommendations that could help provide a better response in future. First of all, there is need for all advocates or human rights defenders, particularly those focusing on social and economic rights, to recognise that not only are human rights indivisible at conceptual level but also in practice. Where civil and political rights are assaulted, that invariably weakens the capacity of stakeholders to hold government accountable for failing to fulfil social and economic rights. Therefore, all activities aimed at fostering the realisation of social and economic rights must also be concerned about civil and political rights.

Second, it must be recognised that a moment of crisis provides an opportunity to a regime to accumulate power and limit political space. It is important that

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<sup>72</sup> See A Chen (n68) 12; J Gonzalez-Jacome ‘From abusive constitutionalism to multilayered understanding of constitutionalism: Lessons from Latin America’ 2017(15) *ICON* 450; and D Landau ‘Abusive Constitutionalism,’ 2013 *UC Davis Law Review* 191.

civil society should not defer too much to government but have in place measures to provide oversight and hold government accountable in moments of crisis. This could entail building auditing capacity to see how and where funds are utilised and readily providing the public with information on the impact of government decisions.

Finally, Zambian authorities officially only acted on public health legislation. The public health legislation, as discussed, clothes the Minister of Health with power to implement limited public health measures to contain the spread of an infectious disease. As discussed, however, it has been shown that the pandemic is not only a medical condition because the measures adopted in its wake have had a bearing not only on civil and political rights but also in equal measure on social and economic rights. This suggests that an isolated response is not adequate. It is therefore recommended that the Constitution (which is the supreme national law) and relevant public health legislation entitling government to take measures to control an infectious disease should be amended to include provisions that would bind the government to respect both civil and political rights as well as social and economic rights in equal measure. This should be done out of the realisation that human rights are indivisible and interdependent.

# The Covid-19 pandemic and the socio-economic rights of persons with disabilities: A comparative analysis of Kenyan and South African laws and policies

Foluso Adegalu\* and Wilson Macharia\*\*

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## ABSTRACT

The measures undertaken by states to combat the spread of Covid-19 have come with attendant human cost as some of these measures disproportionately affected the most marginalised people in society. These include persons with disabilities (PWDs). The role of laws and policies in overcoming pandemics such as Covid-19 is pivotal. Accordingly, it is important that the needs of the most marginalised groups in society, such as PWDs, are appropriately addressed when developing these laws and policies. From a comparative perspective, this chapter assesses the efficacy of the laws and policies enacted in Kenya and South Africa to combat disasters such as the Covid-19 pandemic. In assessing these laws and policies, the focus is placed on the impact of these laws and policies on the protection and realisation of the right to health, social protection and education of PWDs.

## 6.1 INTRODUCTION

On 11 March 2020, the World Health Organisation (WHO) declared Covid-19 as a global pandemic.<sup>1</sup> Subsequently, states have undertaken measures to combat the spread of Covid-19. Concerns have been raised about the heightened vulnerability and risks that persons with disabilities (PWDs) have been exposed to due to pre-existing inequalities and discrimination.<sup>2</sup> First, PWDs are among the most marginalised groups in terms of health care provision.<sup>3</sup> Concerns have been raised about the failure of states to establish clear protocols for public health emergencies to ensure that access to healthcare, including life-saving measures, do not discriminate against PWDs at a time when medical resources are scarce.<sup>4</sup> Secondly, minority communities and marginalised groups such as PWDs, who are reported to earn less, hold most insecure jobs and operate more in the informal sector with most of them being unemployed, are more likely to be affected by the pandemic.<sup>5</sup> To this effect, there is a need to undertake social protection measures for the benefit of PWDs. Social protection measures

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<sup>1</sup> WHO media briefing on Covid-19 (11 March 2020) <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> viewed 4 November 2020.

<sup>2</sup> OHCHR 'Statement on Covid-19 and the human rights of persons with disabilities' (9 June 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25942&LangID=E> viewed 4 November 2020.

<sup>3</sup> (n2).

<sup>4</sup> OHCHR (17 March 2020) 'Covid-19: Who is protecting the people with disabilities?' <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25725> viewed 4 November 2020.

<sup>5</sup> International Labour Organisation (5 July 2017) 'World Social Protection Report 2017-19: Universal social protection to achieve the Sustainable Development Goals' [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_604882.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_604882.pdf) viewed 8 September 2020.

are pathways for the realisation of a host of socio-economic rights such as the right to food, water and housing.<sup>6</sup> Thirdly, school closures during this period have disproportionately affected learners with disabilities, most of whom depend on schools for meals, basic healthcare services and information.<sup>7</sup> With the above concerns in mind, this chapter examines the impact of the Covid-19 pandemic on the right to health, social protection and education of PWDs. Making use of comparative research, this chapter assesses the efficacy of laws and policies adopted as part of the responses to the Covid-19 pandemic in Kenya and South Africa, with specific focus on their impact on the rights to health, education and social protection for PWDs. Although a greater cluster of socio-economic rights of PWDs have been impacted, this chapter focuses on these three rights because they require more urgent measures which if developed and implemented correctly, would greatly improve the standard of living of PWDs during this period.

## 6.2 SOCIO-ECONOMIC RIGHTS OF PWDS WITHIN THE KENYAN & SOUTH AFRICAN CONTEXT

The right to health, education and social security are guaranteed for everyone, including PWDs under article 43 of the Kenyan Constitution 2010. The right to education and health is further secured under article 53 of the Kenyan Constitution which provides for every child's right to free and compulsory basic education, and health care. Article 54 of the Kenyan Constitution provides an additional layer to the right to education for PWDs by guaranteeing access to educational institutions and facilities for PWDs. Odongo and Musila argued that the rationale for the consensus on the inclusion of socio-economic rights in the Kenyan Constitution was the result of the demand for a constitutional framework that would enable the state to transform society 'in social, economic and cultural spheres, and to protect the most vulnerable and marginalised', and the growing recognition of the justiciability of socio-economic rights.<sup>8</sup> As the case may be, the express recognition of socio-economic rights gives all persons, including PWDs who have in the past been disproportionately affected by poverty,<sup>9</sup> an opportunity

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<sup>6</sup> (n5).

<sup>7</sup> Human Rights Watch (26 August 2020) 'Impact of Covid-19 on children's rights in Africa' <https://www.hrw.org/news/2020/08/26/impact-covid-19-childrens-education-africa> viewed 7 September 2020.

<sup>8</sup> G Odongo & G Musila 'Direct constitutional protection of economic, social and cultural rights under Kenya's 2010 Constitution' in D Chirwa and L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa* (2016); (n7) 345.

<sup>9</sup> AS Kanter 'The Development of Disability Rights Law under International Law: from Charity to Human Rights' (2014) 31; UNDP 'Human Development Indices and Indicators:

to demand accountability from the state on the measures it has taken to protect, promote and fulfil these rights. In addition to the Constitutional provisions, sections 18 and 20 of the Persons with Disabilities Act 14 of 2003 (PDA 2003) also guarantees the right to education and health of PWDs respectively.

Within the South African context, the right to health is guaranteed under sections 24(a), 27(1)(a), 28(1)(c), and 35(2)(e) of the Constitution (South African Constitution).<sup>10</sup> Section 27(1)(c) and section 28 (1)(c) of the Constitution provides for the right to social security. Section 29 guarantees everyone the right to basic education. Section 29 further requires the state to make progressively available for everyone, the right to further education.<sup>11</sup> The limitation of certain socio-economic rights to ‘available resources’ and ‘progressive realisation’ means that socio-economic rights in the Constitution can be categorised as ‘priority rights’ and ‘internally qualified rights’.<sup>12</sup> Irrespective of the category of socio-economic rights, the import of socio-economic rights in the Constitution is that it places an obligation on the state to ensure that citizens are guaranteed the essential necessities of life.<sup>13</sup> With regards to the implementation and enforcement of socio-economic rights in the constitution, section 7(2) of the Constitution imposes an obligation on the state to ‘respect, protect, promote and fulfil the rights in the Bill of Rights.’ The implication of section 7(2) of the Constitution is that it imposes a positive obligation on South Africa to take steps through legislative, executive and administrative policies to ensure the realisation of the

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2018 Statistical update’ <<http://hdr.undp.org/sites/default/files/Country-Profiles/KEN.pdf>> viewed 3 August 2020.

<sup>10</sup> The Constitution of the Republic of South Africa (South African Constitution), has generally been described as one of the constitutions with the most progressive Bill of Rights, and the most advanced in the provision of socio-economic rights. See J Mubangizi ‘The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation’ (2006) 2 *African Journal of Legal Studies* 1, 2.

<sup>11</sup> The above socio-economic rights will form the core of this paper’s discussion. However, other socio-economic rights that are protected in the South African Constitution include environmental rights (s 24) and the right to land (s 25).

<sup>12</sup> C Heyns & D Brand, ‘Introduction to Socio-Economic Rights in the South African Constitution’ (1998) 163. An example of a priority right is the right to education in section 29 of the Constitution. While section 29 (1) (a) of the Constitution created a priority right by providing that everyone has the right ‘to a basic education, including adult basic education’, section 29 (1) (b) created an internally qualified right by providing that everyone has the right to ‘further education, which the state through reasonable measures must make progressively available and accessible.’

<sup>13</sup> Z Hansungule & T Boezaart ‘The socio-economic rights of children with disabilities in South Africa: A comparison between the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of Persons with Disabilities’ 2017 *African Disability Yearbook* 40.

rights, and negative obligations on the government to refrain from interfering with socio-economic rights.<sup>14</sup> Unlike Kenya, there is no specific Act for PWDs in South Africa, it is however anticipated that the White Paper on the Rights of Persons with Disabilities<sup>15</sup> will be developed into national legislation to address the specific concerns of PWDs in South Africa.<sup>16</sup>

At the international level, Kenya and South Africa are both parties to a range of international instruments that promote and protect the right to health, education and social security of PWDs.<sup>17</sup> Of importance to this discussion is the provisions of article 4 of the CRPD that sets forth several obligations with a view to inspire national legal and policy reform and guide domestic implementation of the convention's provisions.<sup>18</sup> It defines the scope and legal nature of the obligations of state parties,<sup>19</sup> including the obligation to develop legal frameworks that enunciate the rights of PWDs, as well as modify and abolish existing laws that discriminate against PWDs.<sup>20</sup> Additionally, the provision requires state parties to take into account the protection and promotion of the rights of PWDs in all policies and programmes, and to promote universal design in the development of standards and guidelines.<sup>21</sup> These requirements encapsulate the obligation of disability mainstreaming in tandem with Rule 14 of the UN Standard Rules on the Equalization of Opportunities for PWDs.<sup>22</sup>

This obligation should be read together with the requirement of 'equal protection of the law' as enunciated in article 5(1) of the CRPD, which requires states to refrain from adopting or maintaining laws that discriminate against PWDs. In undertaking these obligations, states are required to consult with, and

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<sup>14</sup> Mubangizi (n10) 6.

<sup>15</sup> Department of Social Development White Paper on the Rights of Persons with Disabilities' (GG 39792 of 9 March 2016) (White Paper on Disabilities South Africa).

<sup>16</sup> White Paper on Disabilities South Africa (n15) 9.

<sup>17</sup> At the global level, the two countries are parties to the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child, Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities (CRPD). At the regional level, Kenya and South Africa are state parties to the African Charter on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child.

<sup>18</sup> CRPD art 4.

<sup>19</sup> V Della Fina, 'Article 4 (General Obligations)' in Va Della Fina, R Cera & G Palmisano (eds) *The United Nations Convention on Human Rights: A Commentary* (Springer) 141.

<sup>20</sup> CRPD art 4(a), (b) & (c).

<sup>21</sup> CRPD art 4(1) (c) & (f).

<sup>22</sup> United Nations (4 March 1994) 'Standard rules on the equalization of opportunities for persons with disabilities' UNGA Res 48/96, annex (20 December 1993).



actively involve, PWDs through their representative organisations, at all stages of the decision-making and legal reform process.<sup>23</sup> In this regard, Kenya and South Africa, both parties to the CRPD, are required to adopt a wide variety of positive measures in order to bring their national laws, policies and practices in line with the Convention. This also entails ensuring that the rights of PWDs are included in disaster management and emergency laws, such as those adopted during the Covid-19 period. A disability mainstreaming approach in the context of Covid-19 involves the full realisation of the rights of PWDs in all policies, programmes, standards, and guidelines, both general and disability-specific that are adopted during this period.

### **6.3 AN OVERVIEW OF KENYA AND SOUTH AFRICA'S COVID-19 LAWS AND POLICIES**

#### **6.3.1 Enabling legislation for general Covid-19 responses**

On 28 February 2020, the President of the Republic of Kenya constituted a National Emergency Response Committee on Corona Virus (National Emergency Response Committee Kenya) chaired by the Cabinet Secretary for Health.<sup>24</sup> The mandate of the National Emergency Response Committee of Kenya includes, inter alia:

- coordination of Kenya's preparedness, prevention and response to the threat of Covid-19;
- enhancement of surveillance at all Points of Entry in Kenya;
- coordination of the preparation of national, County and Private isolation and treatment facilities;
- coordination of the supply of testing kits and PPEs;
- conducting economic impact assessments; and
- development of mitigation strategies with regard to Covid-19.<sup>25</sup>

Following the confirmation of the first Covid-19 case on 12 March 2020, the government acted to address the pandemic through a number of regulatory measures anchored upon the Public Health Act 1921, Cap 56 Laws of Kenya (PHA 1921 Kenya), and the Public Order Act 1950, Cap 242 Laws of Kenya (POA 1950 Kenya). The PHA 1921 Kenya gives the Cabinet Secretary in charge of health the powers to, by way of legal notices and rules,<sup>26</sup> declare a disease as an

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<sup>23</sup> CRPD art 4(3).

<sup>24</sup> Executive Office of the President State House 'National emergency response committee on Coronavirus' (Executive Order 2, 2020).

<sup>25</sup> (n24) 5-6.

<sup>26</sup> Section 169 PHA 1921 Kenya.

‘infectious disease’, and invoke the application of the Act nationwide or within a restricted area.<sup>27</sup> Additionally, the POA 1950 gives the government powers to restrict activities such as public gatherings and meetings,<sup>28</sup> and to impose curfews.<sup>29</sup> Subsequently, a series of regulations, rules and guidelines have been the basis upon which the Executive arm of government has expressed its powers during the duration of the pandemic. These include curfew orders, declaration of infected areas and restrictions of movement, and regulations and rules on the prevention, control and suppression of Covid-19.<sup>30</sup>

In South Africa, the Covid-19 pandemic was classified as a national disaster by the head of the National Disaster Management Centre (NDMC) on 15 March 2020.<sup>31</sup> The classification was done in terms of section 23(1)(b) of the Disaster Management Act 57 of 2002 (DMA 2002). The DMA 2002 was enacted –

to provide for an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery; the establishment of national, provincial and municipal disaster management centres; disaster management volunteers; and matters incidental thereto.<sup>32</sup>

The classification by the Head of the NDMC triggered the declaration of a national state of disaster<sup>33</sup> by the Minister of Cooperative Governance and Traditional Affairs in terms of section 3 of the DMA 2002. Recognising the inadequacy and limitation of the DMA 2002 to cater for all possible scenarios during a national state of disaster, section 27 of the DMA 2002 empowers the minister administering the Act to make regulations or issue directions or authorise the issue of directions concerning the general state of affairs during the related disaster. Pursuant to section 27, relevant cabinet ministers have issued different regulations and directives to govern different sectors and activities in South Africa during the pandemic. As at August 2020, the Minister of Cooperative Governance and Traditional Affairs has issued four core regulations to administer the general state of affairs in South Africa during the Covid-19 pandemic.<sup>34</sup>

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<sup>27</sup> Section 17(2) PHA 1921 Kenya.

<sup>28</sup> section 5 POA 1950 Kenya.

<sup>29</sup> (n28) pt iv.

<sup>30</sup> Legal Notice 49 of 2020.

<sup>31</sup> Department of Co-operative Governance and Traditional Affairs ‘Classification of a national disaster’ (GN 312, GG 43096, 2020).

<sup>32</sup> DMA 2002, Purpose of the Act.

<sup>33</sup> Department of Co-operative Governance and Traditional Affairs ‘Declaration of a national state of disaster’ GN 313 GG 43096 of 15 March 2020.

<sup>34</sup> The four core regulations are: Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 (GN 318 GG 43107 of 18 March 2020) (RITDMA March 2020);

In addition to the regulations issued by cabinet ministers, directions, guidelines and notices are constantly provided to give clarity and ensure the administrative effectiveness of regulations.

### 6.3.2 Covid-19 framework on health care

On 3 April 2020, the Cabinet Secretary in charge of health in Kenya released the Public Health Prevention, Control and Suppression of Covid-19 Rules, 2020,<sup>35</sup> meant to inform the tracing, testing and treating of Covid-19 cases as conducted by the government. These rules were followed by numerous press briefings by the committee, setting out the response of the government to the pandemic, the daily statistics of confirmed cases, and precautionary measures that all persons should adhere to in order to avoid being infected.<sup>36</sup> Additionally, the cabinet secretary published guidelines to build the capacity of the citizens, as well as professionals in different capacities on the identification and management of the virus. For example, in order to prevent and manage the spread of the virus in homes and residential communities, the Ministry of Health released guidelines on infection prevention and control of the virus in homes and residential communities.<sup>37</sup> The guidelines included information on proper planning among households and communities to avoid infection with the virus, steps to take upon confirmation of cases, and follow up activities after the spread of the virus within the said units. The ministry subsequently released more detailed guidelines on the management of Covid-19 in Kenya,<sup>38</sup> and the Home-based Isolation and Care Guidelines,<sup>39</sup> which guidelines offered a step to step guidance on the management of Covid-19.

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Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 (GN 480 GG 43258 of 29 April 2020) (Alert Level 4 Regulations); Amendment of Regulations Issued in terms of section 27(2) of the Disaster Management Act, 2002 (GN 608 GG 43364 of 28 May 2020) (Alert Level 3 Regulation); Amendment of Regulations Issued in terms of section 27(2) of the Disaster Management Act, 2002 (GN 891 GG 43620 of 17 August 2020) (Alert Level 2 Regulation).

<sup>35</sup> Legal Notice 49 of 2020.

<sup>36</sup> Kenya Ministry of Health press releases during the Covid-19 period <https://www.health.go.ke/press-releases/> viewed 2 November 2020.

<sup>37</sup> Ministry of Health (18 March 2020) 'Guidance for infection prevention and control for Coronavirus disease (Covid-19) in homes and residential communities' *Kenyalaw.org* viewed 30 November 2020.

<sup>38</sup> Ministry of Health Kenya 'Interim guidelines on the management of Covid-19 in Kenya' [https://www.health.go.ke/wp-content/uploads/2020/06/Updated-Case-Management-Guidelines-26\\_03\\_20-1.pdf](https://www.health.go.ke/wp-content/uploads/2020/06/Updated-Case-Management-Guidelines-26_03_20-1.pdf) viewed 19 August 2020.

<sup>39</sup> 'The home-based isolation and care guidelines for patients with Covid-19' (June 2020) <https://www.health.go.ke/wp-content/uploads/2020/06/Home-Based-Isolation.pdf> viewed 30 November 2020.

In South Africa, the primary regulations on health during the Covid-19 period are the Department of Health Directions issued in terms of regulation 10(a) of the Regulations Issued under section 27(2) of the DMA (GN 457, GG 43217, April 2020), (Health Care Directions April 2020).<sup>40</sup> Recognising the need for additional human resources to combat the Covid-19 pandemic, the directions provide for the recruitment, training, deployment and secondment of human resources for purposes of combating the spread of Covid-19.<sup>41</sup>

### 6.3.3 Social protection

Before the advent of the Covid-19 disaster, Kenya had an existing social protection system, entrenched under the Social Assistance Act which addresses social assistance to vulnerable populations;<sup>42</sup> the National Social Security Act which provides basic security for workers against contingencies such as employment loss, injury, illness, disability and death;<sup>43</sup> and the National Social Protection Policy which expounds on existing social protection strategies, programmes and activities with the aim of promoting synergy and minimising duplication.<sup>44</sup> As such, the approach adopted during the Covid-19 pandemic was to increase and expand the existing social benefits to reach a larger percentage of the population. In particular, Kenya enacted the Tax Laws Amendment Act which saw a 2% reduction of Value Added Tax alongside other income tax related reliefs aimed at reducing the tax burden on individuals and businesses.<sup>45</sup> Moreover, the government adopted the Public Finance Management Covid-19 Emergency Response Fund Regulations which created a Covid-19 emergency response fund to 'mobilise resources for emergency response towards containing the spread, effect and impact of the Covid-19 pandemic'.<sup>46</sup> The fund was established to, amongst other things, provide emergency relief to the most vulnerable, older and poor persons in urban informal settlements, support and stimulate micro, small and medium enterprises rendered vulnerable by the Covid-19 pandemic, and fund other issues emerging from the pandemic.<sup>47</sup>

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<sup>40</sup> The Minister of Health has made three subsequent amendments to the Health Care Directions April 2020: on 25 May 2020, 26 June 2020 and 17 July 2020 respectively.

<sup>41</sup> Regulation 2(1) of the Health Care Directions April 2020.

<sup>42</sup> The Social Assistance Act (2013).

<sup>43</sup> The National Social Security Act (2013).

<sup>44</sup> Kenya National Social Protection Policy (2011).

<sup>45</sup> Tax Laws Amendment Act 2 of 2020.

<sup>46</sup> The Public Finance Management (COVID-19 Emergency Response Fund) Regulations (2020).

<sup>47</sup> (n46).

In a similar manner to Kenya, South Africa has pre-Covid-19 legislation on social protection.<sup>48</sup> The state, however, developed regulations to address specific issues arising from social protection during the Covid-19 pandemic. The primary regulations that addressed social protection during the Covid-19 pandemic are the Social Development Directions.<sup>49</sup> The Directions provide guidance to officials of the Department of Social Development and other organs of state, responsible for the implementation of the social development mandate on the provision of social relief distress to persons affected by the Covid-19 pandemic. The Social Development Directions of March 2020 allowed temporary disability grants.<sup>50</sup> The amendment to the Social Development Directions in May eased the technical requirements of claiming temporary disability grants by providing that temporary disability grants which lapsed in February and March 2020, must be reinstated and continue to be paid from the date they were suspended until the end of October 2020. The amendment further provided that temporary disability grants which are due to lapse in May 2020 and June 2020 must continue to be paid until end of October 2020. The August amendment to the Social Development Directions, extended the validity of temporary disability and care dependency grants to December 2020. The amendment also reinstated the payment of permanent disability grants that lapsed in January 2020 until 31 December 2020. Other social protection policies adopted to cushion the economic effect of the Covid-19 pandemic are the Guidelines for Application for the SMME Relief Finance Scheme and the Business Growth and Resilience Facility. The guidelines regulate the intervention measures of the department of small business development (DSBD) for small, medium and micro enterprises (SMME).<sup>51</sup>

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<sup>48</sup> Social Assistance Act 13 of 2004 (Social Assistance Act). Section 4 of the Social Assistance Act provided for a range of social grants including disability grants and an older person's grant.

<sup>49</sup> Department of Social Development 'Directions issued in terms of Regulation 10(5) of the Regulations made under section 27(2) of The Disaster Management Act, 2002 GN 430 GG 43182 of 30 March 2020. The Direction was amended on 7 April 2020 (GN 455 GG 43213 of 7 April 2020), 9 May 2020 (GN 517 GG 43300 of 2020) and 6 August 2020 (GN 853 GG 43588 of 6 August 2020).

<sup>50</sup> Paragraph 5.1 of the Direction provides for universal access for persons with disabilities in a prescribed manner, to all service points, infrastructure and any other essential service and products that are related to Covid-19. The DSD Direction is arguably the most comprehensive Covid-19 directions that address disability-specific issues in South Africa.

<sup>51</sup> The Department of Small Business Development (DSBD) has come up with different intervention measures for small, medium and micro enterprises (SMMEs) in South Africa.

### 6.3.4 Education

In order to curb the spread of the virus in learning institutions, the Government of Kenya closed all learning institutions between the 16th and 20th March 2020. Subsequently, the government through the Ministry of Education developed the Covid-19 Response Plan which aims to ensure continued learning and promote health, safety and wellbeing of learners, teachers and education officials during and after the pandemic.<sup>52</sup> The Response Plan targets the ‘most vulnerable and poor learners in the Kenyan school system including learners with disabilities.’<sup>53</sup> The objectives of the one-and-a-half-year plan include to provide access to quality, equitable and inclusive education to learners, and to develop and implement intervention programmes for the marginalised and most vulnerable. In September 2020, the Ministry of Education adopted the Guidelines for Health and Safety Protocols of Reopening of Basic Education Institutions Amid Covid-19 Pandemic.<sup>54</sup> This document provides guidelines and protocols to guide the basic education sub-sector to implement measures required by public health to ensure safe school reopening. The guidelines have provided measures to be put in place before, during and after re-opening of institutions. In the Guidelines, the Ministry of Education reiterates its commitment to providing quality basic education to all children, including those with special needs.

In South Africa, the directions issued in terms of regulation 4(3) of the regulations to the Disaster Management Act, 2002<sup>55</sup> made an arrangement for the phased return of educators, officials and learners to schools and offices. Under the directions, only schools and offices that complied with the minimum health safety and social distancing measures were allowed to open. A subsequent and more comprehensive direction was issued by the Department of Basic Education on 23 June 2020, on re-opening of schools.<sup>56</sup> The directions allowed for phased return of students to hostels and crucially, provided guidelines on learners with special educational needs.

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<sup>52</sup> Ministry of Education ‘Kenya basic education Covid-19 emergency response plan’ [https://planipolis.iiep.unesco.org/sites/planipolis/files/ressources/kenya\\_emergency\\_response\\_plan\\_4\\_may\\_2020.pdf](https://planipolis.iiep.unesco.org/sites/planipolis/files/ressources/kenya_emergency_response_plan_4_may_2020.pdf) viewed 30 November 2020.

<sup>53</sup> Preamble (n52).

<sup>54</sup> Kenyan Ministry of Education (September 2020) ‘Guidelines for health and safety protocols of reopening of basic education institutions amid Covid-19 Pandemic’.

<sup>55</sup> GN 302 GG 43372 (Direction on Reopening of School May 2020). The Direction on the Reopening of School May 2020 was amended by GN 302 of 1 June 2020.

<sup>56</sup> GN 343 of 23 June 2020 GG 43465 (Direction on Reopening of school, 23 June 2020). The Direction on Reopening of school, 23 June 2020 was amended by GN 357 of 29 June 2020, GN 370 of 7 July 2020 and GN 411 of 2 August 2020.

## **6.4 AN ASSESSMENT OF COVID-19 LAWS AND POLICIES OF KENYA AND SOUTH AFRICA ON SELECTED SOCIO-ECONOMIC RIGHTS OF PEOPLE WITH DISABILITIES**

Having identified the laws and other statutory instruments that Kenya and South Africa have adopted in response to the Covid-19 pandemic, this section will analyse the efficacy of the laws and statutory instruments of the two countries as they relate to the right to health, social security and education of PWDs.

### **6.4.1 Enabling legislation**

The Convention on the Rights of Persons with Disabilities (CRPD) imposes an obligation upon state parties to guarantee to PWDs equal and effective legal protection against discrimination.<sup>57</sup> To fulfil this obligation, states should include disability in their national legal framework. However, it is noted that the enabling laws that were invoked to facilitate the Covid-19 response measures by the two countries do not have specific clauses on disability inclusion. This is perhaps because the laws were enacted before the adoption of the CRPD, during which time the plight of vulnerable and marginalised groups such as PWDs was not of great concern. This notwithstanding, Kenya and South Africa are still under an obligation to review all discriminatory laws since they ratified the CRPD, as has been emphasised by the CRPD Committee in its concluding observations to both countries.<sup>58</sup> The lack of express recognition of PWDs in these laws raises two main concerns. Firstly, the bodies that are mandated by the laws to develop and manage situations such as the Covid-19 pandemic do not necessarily include PWDs, or their representative organisations in their membership. Secondly, there is no obligation imposed upon the governments to include PWDs in the subsequent subsidiary legislation. As a result, subsequent soft law (guidelines and policies) on Covid-19 made little reference to PWDs.

### **6.4.2 Regulations and policies on rights to health**

While developing the safety precautions and health guidelines highlighted in para 6.3.2 above, Kenya did not make any attempts to provide disability-specific basic guidelines to help PWDs and their families to manage during the pandemic. Notably, the existing guidelines acknowledge the need to exercise more caution when dealing with other vulnerable groups such as children, pregnant women,

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<sup>57</sup> CRPD art 5(2).

<sup>58</sup> CRPD Committee 'Concluding observations to Kenya and South Africa: Recommendations on Article 5' [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fZAF%2fCO%2f1&Lang=en) viewed 30 November 2020.

persons living with HIV, older adults and persons who have underlying chronic medical conditions. The failure to recognise PWDs as a vulnerable group may be attributed to lack of involvement of disability focal points in Kenya's Covid-19 response process, and the lack of recognition of PWDs on the PHA, which is the enabling Act for these guidelines. As a result, the majority of Kenyan PWDs indicated that they did not receive sufficient attention in the Covid-19 response measures.<sup>59</sup>

In South Africa, the Health Directions of April 2020 which are the primary regulations on health, did not make direct reference to PWDs. However, Direction 5 (4) of the Social Development Directions provides that 'persons with disabilities must have access to personal assistance at all service points, hospitals, screening, testing facilities, supermarkets and any other available facilities which are appropriate and where it is deemed necessary, may be provided with regular care-giving services at their places of residence'. Further, Direction 6(i) of the Social Development Directions provides that PWDs 'requiring psychosocial interventions must have access to all prescribed medications and counselling as a minimum requirement for crisis interventions'. The consolidated regulations of the amendments to the RITDMA March 2020<sup>60</sup> also categorised 'care services and social relief of distress provided to older persons, mentally ill, persons with disabilities, the sick, and children' as essential services.<sup>61</sup>

The lack of disability rights inclusion in the primary policies on health in the two countries has raised some concerns. First, the guidelines and regulations did not require the two governments to disseminate information regarding the pandemic in accessible formats for PWDs. As a result, PWDs could not access critical information, most of which was disseminated through mass media, notably radio and television, and by way of information and communication technologies (ICT).<sup>62</sup> During this period, it is crucial that all people have equal access to information that can guide them in preventing the spread of the disease. Although the International Covenant on Economic, Social and Cultural Rights

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<sup>59</sup> COVID-19 Disability Rights Monitor <https://covid-drm.org/data> viewed 6 September 2020.

<sup>60</sup> Department of Co-operative Governance and Traditional Affairs, Consolidation of Regulations published by GN 318 of 18 March 2020, as amended by GN 398 of 25 March 2020, GN 419 of 26 March 2020, GN 446 of 2 April 2020 and GN 465 of 16 April 2020 (Consolidated RITDMA 2020) <https://sacoronavirus.co.za/wp-content/uploads/2020/04/Consolidated-Regulations-DMA-17-April.pdf> viewed 7 August 2020.

<sup>61</sup> Annexure B of Consolidated RITDMA 2020.

<sup>62</sup> CIPESA 'How technology is aiding the fight against Covid-19' <https://cipesa.org/2020/03/how-technology-is-aiding-the-covid-19-fight-in-africa/> viewed 6 September 2020.



(ICESCR) does not explicitly provide for the right of access to information, the Committee on Economic, Social and Cultural Rights (CESCR) recognises access to information as an essential element to the right to health.<sup>63</sup> This places an obligation upon the state parties to devise measures to ensure the widespread and timely dissemination of information on Covid-19 with due regard to the needs of its population. This would be critical in enhancing knowledge on the prevention measures, which would in turn reduce the spread of the virus to PWDs. Following complaints by PWDs and organisations for and of PWDs, the two governments increasingly ensured some accessibility of the information on Covid-19 by, for instance, providing sign language interpretation in all press briefings, and engaging civil society in the response measures.

Secondly, complaints about the accessibility of communication channels employed in hospitals have been raised in South Africa. In some instances, the hospital rooms call their patients on intercom systems which are not accessible by persons hard of hearing.<sup>64</sup> Moreover, medical personnel often do not understand sign language which leads to reliance on external interpreters at additional financial costs. Reliance on external sign language interpreters in such circumstances can also lead to violations of the right to privacy of PWDs. Efforts should be increased to ensure the provision of alternative modes of communication in health facilities in order to ensure the meaningful exercise of the right to health of PWDs.<sup>65</sup>

On a positive note, the social directions in South Africa provide that persons with disabilities requiring psychosocial interventions must have access to all prescribed medications and counselling as a minimum requirement for crisis interventions.<sup>66</sup> Similarly, the Kenyan Ministry of Health launched a public mental health education tool, to educate Kenyans on the prevention, identification, and management of mental health issues.<sup>67</sup> This tool also recognised the management of persons who have pre-existing mental health conditions, who may include persons with mental, intellectual and psychosocial disabilities. This is particularly important since data collected during this period shows that PWDs in Kenya

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<sup>63</sup> Committee on Economic, Social and Cultural Rights General Comment 14 para 3 <http://docstore.ohchr.org/> viewed 30 November 2020.

<sup>64</sup> B Huisman (20 May 2020) 'COVID-19: Life under lockdown for people living with disabilities' *City Press* <https://www.spotlightnsp.co.za/2020/05/19/covid-19-life-under-lockdown-for-people-living-with-disabilities/> viewed 7 September 2020.

<sup>65</sup> One such alternative mode is the use of transparent masks by health officials to enable persons that are hard of hearing to read the lips of health officials.

<sup>66</sup> Direction 6 (i).

<sup>67</sup> National Emergency Response Committee, 'Public mental health education during Covid-19 pandemic' <https://www.health.go.ke/wp-content/uploads/2020/03/Public-Mental-Health-AW.pdf.pdf> viewed 7 September 2020.

experienced various psychological challenges including ‘heightened social isolation (34.18%), depression (25.51%), stigma and discrimination (14.80%), neglect (7.14%) and abuse (7.14%).’<sup>68</sup>

### 6.4.3 Regulation and policies on social protection

The government of Kenya, through the Covid-19 relief fund, allocated K 10 billion to help cushion vulnerable groups (older persons, orphans and vulnerable children and, persons with severe disabilities) from the negative effects of Covid-19.<sup>69</sup> The National Council for Persons with Disabilities (NCPWD) was tasked with disseminating a portion of this fund to 33,333 PWDs between June and August 2020.<sup>70</sup> These social protection measures were evidently insufficient. Available data shows that due to the pandemic, most Kenyan PWDs were unable to meet their basic needs, experienced low returns in their businesses or closed them, and others lost their jobs.<sup>71</sup> Moreover, only 6.63% of Kenyan PWDs have gained access to the cash transfer, and only 6.12% have received relief food.<sup>72</sup> According to the 2019 Kenya Population and Housing Census, PWDs constitute 2.2% (0.9 million) of the Kenyan population, which means that the 33,333 PWDs targeted by the government to receive the cash transfer translates to only about 4% of all PWDs.<sup>73</sup>

South Africa set aside R500 billion to cushion the economic hardship brought about by Covid-19 on households and individuals, and to provide relief from hunger and social distress.<sup>74</sup> From this fund, the government introduced a top-up of R250 to disability grants (permanent and temporary) and the care

<sup>68</sup> Ulemavu Research Institute ‘Webinar: COVID-19 and Disability in Kenya’ <[https://www.facebook.com/watch/live/?v=350783049266212&ref=watch\\_permalink](https://www.facebook.com/watch/live/?v=350783049266212&ref=watch_permalink)> viewed 6 September 2020.

<sup>69</sup> Office of the President (23 May 2020) ‘Seventh Presidential address on the Coronavirus pandemic: The 8-point economic stimulus’ <https://www.president.go.ke/2020/05/23/the-seventh-presidential-address-on-the-coronavirus-pandemic-the-8-point-economic-stimulus-programme-saturday-23rd-may-2020/> viewed 30 November 2020.

<sup>70</sup> NCPWD ‘Covid-19 short-term cash transfer for persons with disabilities’ [http://ncpwd.go.ke/images/KEY\\_MESSAGES\\_COVID\\_19\\_CASH\\_TRANSFER\\_FOR\\_PWDs.pdf](http://ncpwd.go.ke/images/KEY_MESSAGES_COVID_19_CASH_TRANSFER_FOR_PWDs.pdf) viewed 3 November 2020.

<sup>71</sup> Ulemavu Research Institute (n68).

<sup>72</sup> Ulemavu Research Institute (n68).

<sup>73</sup> The Kenya National Bureau of Statistics ‘2019 Kenya population and housing reports’ <https://www.knbs.or.ke/?p=5732> viewed 10 August 2020.

<sup>74</sup> The Presidency ‘Progress in national effort to contain the Coronavirus COVID-19 Pandemic’ <https://www.gov.za/speeches/president-cyril-ramaphosa-progress-national-effort-contain-coronavirus-covid-19-pandemic-23> viewed 7 September 2020.

dependency grant from May to October 2020.<sup>75</sup> According to SASSA, from May 2020, the social grants for older persons and PWDs would be paid over 2 days, commencing from the 4<sup>th</sup> day of each month.<sup>76</sup> The government also stated that caregivers would be allowed to assist PWDs to access their social grants and do their shopping.<sup>77</sup>

However, even though the DSD Directions and the guidelines on the SMME Relief Finance Scheme addressed the social protection of PWDs in South Africa, there is still room for improvement. Firstly, the grant-in-aid which PWDs typically rely on to pay their caregivers was not topped-up by the government. Secondly, to reduce unemployment during the period of the Covid-19 pandemic, the government of South Africa introduced Covid-19 tax measures, including the expansion of the Employment Tax Incentive (ETI) age eligibility criteria and amounts claimable.<sup>78</sup> Since the import of the ETI expansion is to encourage employers to keep their workers despite the reduction in revenue caused by the Covid-19 pandemic, it would have been immensely beneficial if disability was included as one of the eligibility criteria for the expansion of the ETI. This would have encouraged employers to keep PWDs in their employment and improve the social protection guarantees for PWDs.

#### 6.4.4 Policies and regulations on education

Following the closure of schools due to Covid-19, various learning institutions adopted remote learning platforms for their students. Unfortunately, the adopted remote learning platforms did not take into consideration the needs of learners with disabilities. These needs include sign language interpretation for learners with hearing impairments, narrated material for learners with psychosocial disabilities, and Braille materials for the visually impaired.<sup>79</sup> Additionally, parents of learners with disabilities did not have sufficient knowledge and ability to assist them with home schooling.<sup>80</sup>

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<sup>75</sup> Annexure A of the Amendment to the Directions Issued in Terms of Regulation 4(5) of the Regulations made under section 27(2) of the Disaster Management Act, 2002 (GN 517 GG 43300) (Amendment to the Social Development Directions May 2020).

<sup>76</sup> <https://sacoronavirus.co.za/guidelines-and-relief/> viewed 7 September 2020.

<sup>77</sup> (n76).

<sup>78</sup> Explanatory notes on COVID-19 tax measures (1 April 2020) [http://www.treasury.gov.za/comm\\_media/press/2020/20200329%20Explanatory%20Notes%20on%20COVID%2019%20Tax%20measures%20-%202029%20March%202020.pdf](http://www.treasury.gov.za/comm_media/press/2020/20200329%20Explanatory%20Notes%20on%20COVID%2019%20Tax%20measures%20-%202029%20March%202020.pdf) viewed 7 September 2020.

<sup>79</sup> DE Battle 'The impact of Covid-19 on healthcare, education and persons with disabilities' 2020 *Global Issues in Communication Sciences*.

<sup>80</sup> (n79).

To address the barriers that learners with disabilities may face in access to education during the Covid-19 period, the Kenyan Covid-19 education response plan has proposed some disability specific interventions. These include the following:

- sharing educational content in sign language with increased screen space for the interpreters;
- using captions, and providing audio description;
- providing offline resources such as textbooks, study guides and equipment to learners from poor, marginalised and vulnerable households;
- providing appropriate psychosocial support to learners, teachers and education officials including care givers to manage the impact of Covid-19;
- identifying and supporting the most vulnerable learners who may have suffered due to Covid-19; and
- providing scholarships for the most vulnerable including learners with special needs and disabilities.<sup>81</sup>

Similarly, the Kenyan Guidelines for Health and Safety Protocols for Reopening of Basic Education Institutions Amid Covid-19 Pandemic provide for protocols that should be followed in special schools, and in institutions that accommodate learners with disabilities. For example, the guidelines provide that learning institutions should ensure that all information on Covid-19 measures during and after school re-opening is accessible to all learners and trainees with disabilities, including through sign language, captioning and easy to read formats.<sup>82</sup> Additionally, all hygiene facilities should be installed with age, disability and gender-appropriate accommodations.<sup>83</sup> Institutional medical centres and clinics should be equipped with basic supplies to cater for emergencies, paying attention to learners with disabilities.<sup>84</sup> Learners with disabilities will be provided with appropriate health and hygiene boarding facilities to ensure they are protected from Covid 19 disease.<sup>85</sup> Commendably, the guidelines also provide for protocols that should be followed when handling learners with specific types of disability. For example, they state that learners with hearing impairment ‘shall wear age appropriate clear face masks for ease of communication’.<sup>86</sup> They also require

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<sup>81</sup> Ministry of Education (n52).

<sup>82</sup> Ministry of Education (July 2020) ‘The guidelines for health and safety protocols of reopening of basic education institutions amid Covid-19 Pandemic 6 [https://education.go.ke/images/COVID-19\\_GUIDELINES.pdf](https://education.go.ke/images/COVID-19_GUIDELINES.pdf) viewed 9 September 2020.

<sup>83</sup> (n82).

<sup>84</sup> (n82) 7.

<sup>85</sup> (n82) 10.

<sup>86</sup> (n82) 10.

‘regular changing of face masks for learners with developmental disabilities’.<sup>87</sup> It would be difficult to assess the effectiveness of these two documents at the time of drafting this since they are still in the initial stages of being implemented. Be that as it may, they offer inclusive interventions which if properly implemented, will enhance the effective participation of learners with disabilities on an equal basis with others.

In South Africa, following the declaration of a national state of disaster, learning institutions were closed in March, 2020. Subsequently, online learning and home-schooling were introduced in order to ensure the continuation of education for learners. During this period, the Department of Basic Education (DBE) engaged in various support programmes to support online learning. For example, the DBE created an online resource portal which had study materials, multimedia and reading material as support packages for parents, caregivers and learners. The study materials were also available in Braille.<sup>88</sup> The DBE also engaged in multimedia learner support programmes in conjunction with the South African Broadcasting Corporation and expanded the FREE STEM Lockdown Digital School into community television to reach a bigger audience. Unfortunately, a disability rights approach was missing in the policies that were adopted for the phased re-opening of learning institutions. To this extent there was commendable efforts to ensure disability inclusion before the phased re-opening of schools.

The Directions on Reopening of School, May 2020 issued by the Minister of Basic Education providing for phased return of learners to schools, did not however, make any explicit provision for learners with disability to return to school. This is despite the fact that the directions listed schools for learners with severe intellectual disabilities (Grades 4 and 5) as part of the learning institutions for phased reopening. However, this anomaly was addressed in the Direction on Reopening of School, 23 June 2020. Paragraph 8 of the directions made specific provisions for learners with disabilities. The directions provide that –

officials who are unable to practise social distancing from learners with special education needs must be provided with appropriate personal protective equipment, including protective clothing, by the Provincial Department of Education where such provision is necessary. In addition, officials appointed to carry out symptom screening, in schools for deaf learners, must be able to communicate using South African Sign Language. Where this is not possible, a sign language interpreter must be available to ensure proper communication with the learners.

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<sup>87</sup> (n82) 10.

<sup>88</sup> <https://www.education.gov.za/covid19supportpackage.aspx> viewed 9 September 2020.

The direction also provided that ‘written communication for blind learners, as well as those who are both deaf and blind, must be through Braille’. The direction further imposed a mandatory obligation on the provincial Department of Education to –

at a minimum, provide the following personal protective equipment to learners with visual and hearing impairments: face shields must be provided to blind learners; cloth face masks must be provided to low vision learners, teachers and support staff; and face shields must be provided to teachers, support staff and learners in schools for the Deaf.<sup>89</sup>

Even though, the Direction on Reopening of School, 23 June 2020 dedicated a paragraph to learners with special needs, it excluded certain categories of learners with disabilities, including learners with physical disabilities, intellectual disabilities, severe to profound intellectual disabilities, and learners with epilepsy.<sup>90</sup> In response to the shortcomings of the Direction on Reopening of School, the Centre for Child Law instituted proceedings against the Minister of Basic Education. The Centre alleged that the DBE did not provide adequate support and proper health and safety measures to learners with disabilities who are mandated to resume attendance at special schools and special school hostels. The organisation has requested the court to review and set aside the DBE’s Directions and to request the Minister of Education to within 3 weeks of the judgment to include excluded categories of learners with disabilities.<sup>91</sup> According to the applicants, the litigation was necessary because of the inability of CSOs, including CSOs for persons with disabilities to meaningfully engage with the DBE and ensure an inclusive Covid-19 education directive from the DBE.<sup>92</sup>

## **6.4.5 General issues on the right to health, education and social protection**

### **6.4.5.1 Failure to involve people with disabilities in Covid-19 response and recovery measures**

The meaningful consultation with, and active participation of PWDs and their representative organisations in the Covid-19 response and recovery has been lacking in both countries. Based on the assessment above, one can draw

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<sup>89</sup> The inclusion of the provision on learners with special needs arises from the intense disagreement between the stakeholders on the reopening of learning institutions.

<sup>90</sup> Equal Education Law Centre ‘Centre for Child Law takes Minister of Basic Education to court to protect the rights of learners with disabilities during COVID-19 – #SafeSpecialSchools’ <https://eelawcentre.org.za/lwdl/> viewed 9 September 2020.

<sup>91</sup> (n90). At the time of writing, the court was yet to pronounce on the issue.

<sup>92</sup> (n90).

the conclusion that PWDs were not consulted or involved in all stages of the Covid-19 response and recovery. For example, the National Emergency Response Committee on coronavirus constituted by the President of Kenya did not include in its membership a representative from the National Council for Persons with Disabilities, a government agency tasked with mainstreaming disability in Kenya. Similarly, the bodies that were established to oversee South Africa's Covid-19 response did not require the membership of disability representatives. Without a doubt, PWDs can make important contributions in tackling the crisis and building the future. Their lived experiences contribute greatly to 'creativity, new approaches and innovative solutions to challenges'.<sup>93</sup> Therefore, if meaningful consultations had been conducted, the concerns that arose, specifically on the lack of timely disability-specific precautionary measures, and the inaccessibility of information and other Covid-19 related services and facilities would not have occurred.

#### 6.4.5.2 Lack of accountability

It has been established that the Covid-19 response measures by both Kenya and South Africa have been characterised by corrupt dealings. For example, the right to health in both countries has been compromised by the various corrupt dealings surrounding the procurement of PPEs and other health equipment that were meant to combat the spread of Covid-19. These corrupt dealings have been occurring at a time when vulnerable people, including PWDs do not have access to the necessary protective equipment to protect them from the virus. The safety of the learners with disability returning to school in South Africa has also been affected by PPE procurement corruption in the education sector.<sup>94</sup>

There is a need to plug the administrative loopholes that have resulted in a delay in disability focused investments, which should be considered as top priority for the two countries. Additionally, relevant stakeholders should ensure the availability of effective accountability measures to guarantee proper implementation of disability-related policies, strategies, programs and activities.

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<sup>93</sup> United Nations Policy Brief 'A disability-inclusive response to Covid-19' 3. <https://unsdg.un.org/sites/default/files/2020-05/Policy-Brief-A-Disability-Inclusive-Response-to-COVID-19.pdf> viewed 9 September 2020.

<sup>94</sup> The disappearance of large quantities of PPE in KwaZulu-Natal has allegedly cost the KwaZulu-Natal Department of Education million of rands. See *News24* 'Large quantities of PPE 'disappear' in KZN, costing Education Dept 'millions'' <https://www.news24.com/news24/southafrica/news/large-quantities-of-ppe-disappear-in-kzn-costing-education-dept-millions-20200602> viewed 9 September 2020.

### 6.4.5.3 Available resources

In order to support disability-inclusive outcomes, it is necessary for states to make inclusive investments. The issues of corruption and lack of accountability mentioned above are an indication that the governments of Kenya and South Africa cannot use the defence of inadequate resources and progressive realisation of the rights to health, social protection and education to justify their failures to adequately provide for these rights for PWDs during the Covid-19 pandemic. The principle of 'progressive realisation' is used when discussing the duty of states to promote socio-economic rights for which there are not resources available immediately. It has been provided for under article 2(1) of the ICESCR, as well as article 21(2) and section 27 of the constitutions of Kenya and South Africa respectively. The principle is often employed by states to justify their failure to realise socio-economic rights under the pretext of 'limited resources'. This chapter, however, argues that such a justification cannot suffice within the context of Covid-19. The CESCR has developed a normative framework on the interpretation of the concept of 'progressive realisation' and 'the maximum available resources' in article 2(1) of the ICESCR.<sup>95</sup> The Committee does not view the concept solely as a shield for states to defend their lack of progress in promoting or fulfilling socio-economic rights. Instead, it interprets the concept to include a positive duty on states parties to mobilise sufficient resources for the fulfilment of their Covenant obligations.<sup>96</sup> Additionally, it ascertains whether the state parties have adequately prioritised their resources to meet their minimum obligations.<sup>97</sup>

For the defence of inadequate resources to be applicable, there is the need for good governance in the management of available resources, and avoidance of the loss of resources for example through corruption. As has been illustrated on the preceding sections, both Kenya and South Africa set aside emergency funds to cushion vulnerable groups from the socio-economic effects of Covid-19. It then occurred that a large portion of the funds was lost due to corruption, especially in the purchase of PPEs. The justification of limited resources cannot stand since it is as a result of misappropriation of available funds. The elaboration provided by the CESCR on the nature of the duties generated by the concept of 'available resources' can be helpful in developing the interpretation of the concept in Kenya and South Africa.

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<sup>95</sup> See CESCR General Comment 3.

<sup>96</sup> (n95) paras 13 and 14.

<sup>97</sup> (n95) para 10.



## 6.5 CONCLUSION

This study has assessed the effectiveness of the legal frameworks that have been adopted by Kenya and South Africa as part of their responses to the Covid-19 pandemic, with a focus on the rights to health, social protection and education of PWDs. The Covid-19 pandemic has exposed the extent of exclusion that PWDs have been subjected to and the further deepening of pre-existing inequalities. The level of exclusion has been exacerbated by the failure of Kenya and South Africa to recognise PWDs in their disaster management laws, as well as in the subsidiary legislation that was developed during the Covid-19 period. This is despite the express recognition of the rights to health, social protection and education in the respective constitutions, and in the international human rights instruments that Kenya and South Africa have ratified. The CRPD imposes an obligation upon state parties to guarantee to PWDs equal and effective legal protection against discrimination.<sup>98</sup> Following lobbying and advocacy by PWDs and their representative organisations, Kenya and South Africa have increasingly proposed measures to address the challenges that PWDs have faced during this period, particularly in the education sector.

We have identified four overarching areas of action that should be taken into consideration in the future.

These areas include:

- mainstreaming disability in all Covid-19 response and recovery measures;
- ensuring that information, facilities, services and programmes in the Covid-19 response and recovery are accessible to PWDs;
- undertaking meaningful consultation with, and active participation of, PWDs and their representative organisations in the Covid-19 response and recovery; and
- establishing proper accountability mechanisms to ensure disability inclusion in the Covid-19 response.

In conclusion, the inclusion of PWDs in the Covid-19 response and recovery is essential, and a critical test of the commitments undertaken by both Kenya and South Africa in ratifying the CRPD. The CRPD, the national human rights frameworks, and the 2030 Agenda call for placing PWDs at the centre of all efforts, including those related to Covid-19 responses. A disability rights inclusive approach is required to ensure PWDs are not excluded from the global mission of ‘building back better’. Kenya and South Africa are increasingly recognising the need to mainstream disability in their Covid-19 actions. This is commendable since it is not known for how long the pandemic will last.

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<sup>98</sup> CRPD art 5(2).

In the future, partnerships and collaboration between relevant stakeholders will improve effectiveness and accountability, and help in achieving the inclusion of PWDs. As aptly stated by the United Nations:

A disability inclusive Covid-19 response and recovery will better serve everyone. It will provide for more inclusive, accessible and agile systems capable of responding to complex situations, reaching the furthest behind first. It will pave the way for a better future for all.<sup>99</sup>

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<sup>99</sup> United Nations (n 93).



# Covid-19 and right to housing in Zimbabwe: Creating the right of access to adequate housing through a dignity-based interpretation of substantive equality

Justice Alfred Mavedzenge\*

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## ABSTRACT

The Covid-19 pandemic has illuminated the significance of universal access to socio-economic rights. At the same time, this pandemic has exposed the existing unequal access to these rights in many jurisdictions across Africa. For example, in Zimbabwe, an estimated total of 1.25 million people are living without access to adequate housing and sanitation. The right to life and human dignity of these people have increasingly become threatened during the Covid-19 pandemic because they do not have access to adequate sanitation for them to practice hygiene, and to comply with the lock down

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measures imposed by government. The Covid-19 pandemic forces us to rethink how best the right to adequate housing can be enforced in contexts such as Zimbabwe where the Constitution does not expressly guarantee the right of access to adequate housing for every person. However, it recognises the right to substantive equality. This chapter argues that, when the value of human dignity is incorporated into the right to substantive equality, it creates the duty of the state to implement reasonable measures to promote or provide access to adequate housing to those who currently do not have such access as a result of past unfair discrimination.

## 7.1 INTRODUCTION

As is the case with other countries on the continent and around the globe, Zimbabwe was also hit by the novel coronavirus (Covid-19) pandemic. In an effort to combat the spread of Covid-19, the government of Zimbabwe declared a state of disaster.<sup>1</sup> As part of the disaster management measures, the government imposed a national lockdown for an initial period of 21 days, beginning on the 30<sup>th</sup> of March 2020. During this initial phase of the national lockdown, people were required to stay at home and only travel outside of their homes for strictly essential reasons such as seeking medical attention and purchasing essential grocery items. Only those who were classified as essential service providers<sup>2</sup> were allowed to go to work. Following the World Health Organisation's (WHO) advice, the government of Zimbabwe issued hygienic guidelines which, amongst other things, encouraged the public to ensure that they regularly wash their hands. These measures were designed on the assumption that everyone in Zimbabwe already enjoyed access to adequate housing with proper sanitation facilities. Yet, according to the latest United Nations database<sup>3</sup> there are at least 1.25 million people who currently live without access to adequate housing in Zimbabwe, with some living in the streets.

The government partnered with other stakeholders to provide some of these people with temporary shelter and sanitation facilities, but this was inadequate to address the problem. As a result, many such people failed to comply with the government's lock down measures, and guidelines on sanitary hygiene, thereby exposing themselves (and others) to the spread of the virus. Thus, the Covid-19 pandemic brought to the fore the centrality of access to adequate housing as a social service that is necessary for the protection of human security, human dignity and public health.

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<sup>1</sup> In terms of section 27 (1) of the Civil Protection Act, 1989.

<sup>2</sup> These were identified in the regulations available at <https://www.chr.up.ac.za/projects/covid19-regulations> viewed 21 October 2020.

<sup>3</sup> See <https://www.reuters.com/article/us-zimbabwe-cities-slums-idUSKCN1G71E2> viewed 22 October 2020.

The idea of a society based on the protection of life, human security and human dignity of all persons is captured as one of the aspirations of the 2013 Constitution of Zimbabwe. This is set out as a national vision in both the Preamble and section 3(1)(e) of the Constitution. Access to adequate housing is a pre-requisite for the achievement of this constitutional vision because, in order to have their life and inherent worthiness protected, human beings must live in adequate housing where they have access to basic amenities of life.

Prior to the Covid-19 pandemic, Zimbabwe was already bedevilled by an acute housing crisis worsened by corruption and unfair discrimination in the allocation of land for housing,<sup>4</sup> as well as large-scale forced evictions conducted by the government.<sup>5</sup> In a recently decided case on arbitrary evictions, Mathonsi J of the High Court took judicial notice of the national housing crisis in Zimbabwe when he held that:

There can be no doubt whatsoever in the minds of all well-informed persons that this country currently faces extremely serious problems relating to poverty, unemployment and more importantly housing. The latter problem has, in recent history, manifested itself in illegal occupants of municipal land by hordes of citizens who are without shelter...Illegal settlements are sprouting all over the place...<sup>6</sup>

Zimbabwe is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and therefore has an obligation to undertake measures to ensure the realisation of the right to adequate housing for all.<sup>7</sup> From a legal and constitutional law point of view, there is a need to reflect on the question: how can Zimbabwe's international commitment to providing access to adequate housing, especially for the poor and vulnerable, be enforced?

A major challenge to be confronted when answering this question is that, although the Constitution of Zimbabwe guarantees socio-economic rights, it

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<sup>4</sup> See J McGregor and K Chatisa 'Partisan citizenship and its discontents: Precarious possession and political agency on Harare city's expanding margins' 2020 (24) *Citizenship Studies* 18-19. For a historical account on this issue, also see Staff Reporter (9 September 2013) 'ZANU PF parcels out Harare' *NewsDay* <https://www.newsday.co.zw/2013/09/zanu-pf-parcels-harare/> viewed 25 June 2019.

<sup>5</sup> For example, government conducted evictions in Epworth which affected 350 families. See *Makani and Others v Epworth Local Board and Others* (HH) 550/14 (9 October 2014). Government also conducted evictions in Harare which destroyed several homes. See *Dusabe and Another v Harare City and Others* (HH) 114/16 (10 February 2016).

<sup>6</sup> *Makani and Others v Epworth Local Board and Others* (HH) 550/14 (9 October 2014) at p 1-2.

<sup>7</sup> See article 11(1) of the ICESCR.

does not expressly guarantee the right to adequate housing for all. In order to resolve this challenge, I contend in this chapter that there is a right to substantive equality in the Constitution, and this right can be interpreted to create the duty of the state to implement reasonable measures to promote or provide access to adequate housing to those who are poor and currently do not have such access, as a result of past unfair discrimination.

Having been adopted in 2013, the Constitution of Zimbabwe is still new and the courts are yet to develop much jurisprudence on the interpretation of the substantive equality provisions. Therefore, owing to the dearth of literature and jurisprudence on the right to substantive equality in Zimbabwe, I advance my arguments in this chapter by referring to scholarly and judicial views from the comparative jurisdictions of South Africa and Canada. The Constitution of Zimbabwe allows courts to borrow interpretations of similar constitutional provisions from comparable foreign jurisdictions.<sup>8</sup>

It is appropriate to refer to the jurisprudence of the Canadian Supreme Court and the South African Constitutional Court because the enactment of the right to equality under their Constitutions was preceded by historical developments that are similar to those that preceded the enactment of the right to equality under the Constitution of Zimbabwe. For instance, similar to Zimbabwe, the two countries experienced racial segregation, based on colonial and patriarchal systems of power, which created deep-rooted inequalities and poverty that continue to exist between individuals and between groups of people.<sup>9</sup> The right to equality was entrenched as a constitutional commitment to addressing these inequalities.<sup>10</sup> Therefore, Zimbabwean judges should be persuaded by how their counterparts in these jurisdictions have referred to historical and social contexts when interpreting the meaning of the right to equality.<sup>11</sup>

Furthermore, there is a unique chain of influence which links the development of the Constitutions of these three countries. The South African Bill of Rights borrowed heavily from the Canadian Charter of Rights and Freedoms (the Canadian Charter) because the drafters of the South African Constitution<sup>12</sup> considered Canada as a comparable jurisdiction.<sup>13</sup> The drafters of

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<sup>8</sup> Section 46 (1)(e) of the Constitution of Zimbabwe, 2013.

<sup>9</sup> C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 at 254-255.

<sup>10</sup> (n9).

<sup>11</sup> As illustrated in *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 40 and *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

<sup>12</sup> Constitution of the Republic of South Africa, Act 200 of 1993 repealed by the Constitution of South Africa, 1996.

<sup>13</sup> J Sarkin 'The effect of borrowings on the drafting of South Africa's Bill of Rights and interpretation of human rights provisions' 1998 (1) *Journal of Constitutional Law* 176 at 179.

the Zimbabwean Declaration of Rights were in turn significantly influenced by the South African Bill of Rights, as they considered South Africa to be a best practice jurisdiction on several aspects of the Bill of Rights.<sup>14</sup> As a result, the right to equality is similarly framed under the three Constitutions, albeit with some variations.<sup>15</sup> Therefore, as Zimbabwean courts develop their own jurisprudence on the meaning of the right to equality, they should be persuaded by how the Constitutional Court of South Africa and the Supreme Court of Canada have interpreted the same right under their respective Constitutions.

In addition to the above, it is also crucial to note that both the Constitution of South Africa and that of Canada entrench the rule that all fundamental rights must be interpreted in a manner which promotes the constitutional values of equality and human dignity.<sup>16</sup> This rule of interpretation is similarly entrenched through section 46(1)(b) of the Constitution of Zimbabwe.<sup>17</sup> Therefore, as Zimbabwean courts develop their own jurisprudence on how the value of human dignity can be incorporated into the scope and content of the right to equality, they ought to be persuaded by how the same has been achieved by the Constitutional Court of South Africa and the Supreme Court of Canada.

However, I acknowledge that there are some differences between how substantive equality is entrenched under the Constitution of Zimbabwe and how it is entrenched in the Canadian Charter and the 1996 Constitution of South Africa. One major difference is that in Zimbabwe the state has a mandatory constitutional duty to implement restitutionary measures to achieve substantive

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<sup>14</sup> These include the right to equality, the right to life, guidelines for the interpretation of constitutional rights and the entrenchment of constitutional values.

<sup>15</sup> See section 9 of the Constitution of South Africa, section 56 of the Constitution of Zimbabwe, 2013 and art 15 of the Canadian Charter on Rights and Freedoms, 1982.

<sup>16</sup> See section 39 (1) (a) of Constitution of South Africa, 1996. Although this rule is not explicitly provided for under the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada has held that it is implied under the Charter. See *R v Oakes* 1986 (1) SCR 103 para 64; *Health Services and Support - Facilities Subsector Bargaining Association v British Columbia* 2007 SCC 27 para 81 and *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37 para 88. Also see L Sossin and M Friedman 'Charter values and administrative justice' (2014) 13 *Osgoode Legal Studies Research Paper Series* 1 at 10-11.

<sup>17</sup> It is entrenched as follows 'When interpreting this Chapter, a court, tribunal, forum or body...must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3'.



equality,<sup>18</sup> while in both Canada<sup>19</sup> and South Africa,<sup>20</sup> the state has discretion to implement such measures or not. Thus the courts in Zimbabwe have a stronger mandate than their counterparts in Canada and South Africa when it comes to the enforcement of the state duty to achieve substantive equality. For instance, in South Africa and Canada, the courts cannot compel the state to undertake measures to achieve substantive equality because the state has discretion, while in Zimbabwe the courts can compel the government to undertake such measures because the state has a mandatory obligation to achieve substantive equality. Notwithstanding these differences, the Constitutions of Canada, South Africa and Zimbabwe share key similarities,<sup>21</sup> as discussed above, which make the jurisprudence from Canada and South Africa very useful to Zimbabwean courts and academics as they try to develop their own jurisprudence on the right to substantive equality. I will still make use of and engage with both the supportive and dissenting views from Canada and South Africa in order to advance my thesis in this paper which is that: in the absence of the right to adequate housing for all, individuals and groups in Zimbabwe can rely on the right to substantive equality in order to claim access to adequate housing conditions.

## **7.2 NO RIGHT OF ACCESS TO ADEQUATE HOUSING IN THE 2013 CONSTITUTION OF ZIMBABWE?**

Zimbabwe is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the African Charter on Human and Peoples' Rights (the African Charter). These two international instruments recognise access to adequate housing as a human right.<sup>22</sup> The state obligations which arise from this right have been thoroughly discussed elsewhere.<sup>23</sup> Therefore, there is

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<sup>18</sup> See section 56 (6) of Constitution of Zimbabwe, 2013.

<sup>19</sup> See art 15 (2) of Canadian Charter on Rights and Freedoms, 1982 as interpreted in *Thibaudeau v Canada* 1995 (2) SCR 627 at p 655 and *Egan v Canada* 1995 (2) SCR 513 at p 596.

<sup>20</sup> See section 9 (2) of Constitution of South Africa, 1996.

<sup>21</sup> For the reasons discussed earlier especially that similar to Zimbabwe, the Constitutions of South Africa and Canada recognise the principle that human rights must be interpreted in a manner which protects the underlying value of human dignity.

<sup>22</sup> The right of access to adequate housing is recognised in art 11 (1) of the ICESCR. It is also an implied right under the African Charter as was confirmed by the African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*, Communication 155/96 para 63, and *Nubian Community in Kenya v The Republic of Kenya*, Communication 317 / 2006 para 162-166.

<sup>23</sup> See 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)

no need to repeat them here save to summarise, and highlight the key duties of the state. Subject to resources available, the state is required to take steps which ensure the progressive realisation of the right of access to adequate housing by everyone.<sup>24</sup> Thus, the realisation of this right is meant to be fulfilled on a progressive rather than immediate basis. However, in order to ensure that this right is progressively realised within the shortest possible period of time, the state is required to take certain immediate steps and these include:

- refraining from and protecting people against retrogressive conduct;<sup>25</sup>
- enacting and implementing the necessary legislation as well as administrative policies;<sup>26</sup>
- conducting regular assessments in order to gather the necessary data which ascertain the extent and nature of the national housing challenges;<sup>27</sup> and
- developing a national housing strategy (in genuine consultation with the affected people) which sets out clear goals and reasonable policy measures.<sup>28</sup>

If these duties were to be enforced in Zimbabwe as a right, they could help to mitigate or address some of the housing challenges highlighted above.

However, Zimbabwe is a dualist state where international treaties are not directly applicable in domestic courts unless they are first incorporated into the municipal law.<sup>29</sup> Thus, although Zimbabwe is internationally bound to perform its duties under the right of access to adequate housing in terms of article 11 of the ICESCR, this right remains unenforceable in Zimbabwean courts unless it can be demonstrated that such a right has been incorporated into the domestic

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(13 December 1991). Also see A Akintayo ‘Planning law versus the right of the poor to adequate housing: A progressive assessment of the Lagos state of Nigeria’s urban and regional planning and development law of 2010’ 2014 (14) *African Human Rights Law Journal* 553 at 561–562.

<sup>24</sup> See CESCR General Comment No. 3: ‘The nature of states parties’ obligations (art 2, para 1, of the Covenant)’ (14 December 1990) para 9. Also see S Liebenberg & K Pillay (eds) *Socio-Economic Rights in South Africa* (2000) 192–194.

<sup>25</sup> Such as forced evictions and practices which unfairly discriminate against certain people. See CESCR General Comment No. 7: ‘The right to adequate housing (art 11.1): forced evictions’ (20 May 1997) para 1.

<sup>26</sup> CESCR General Comment No. 3: ‘The nature of states parties’ obligations (art 2, para 1, of the Covenant)’ (14 December 1990) para 3.

<sup>27</sup> CESCR General Comment No. 4: ‘the right to adequate housing (art 11 (1) of the Covenant)’ (13 December 1991) para 13.

<sup>28</sup> (n28) para 12.

<sup>29</sup> See section 327 (2) (b) of Constitution of Zimbabwe, 2013.

law. The question which arises therefore is: is there a right to adequate housing guaranteed for all under the 2013 Constitution of Zimbabwe?

In section 28, the Constitution of Zimbabwe provides that –

The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.

However, this obligation is set out in chapter 2 of the Constitution as part of what are called ‘National Objectives’. As was made very clear by the Zimbabwean High Court in the case of *Madzara v Stanbic Bank Zimbabwe*,<sup>30</sup> these objectives cannot be enforced as if they are fundamental rights, because chapter 2 of the Constitution is not a Bill of Rights. It outlines national objectives which are meant to function as guidelines for the development of state policies and legislation. Therefore, the duty to enable every person to have access to adequate housing as outlined in section 28 of the Constitution is not a fundamental right, but is a policy objective which is meant to guide the government as it develops its policy priorities. In practice, this means that individuals cannot rely on section 28 of the Constitution to claim access to adequate housing as a right.

In India, where the Constitution similarly outlines national objectives,<sup>31</sup> the courts have applied these objectives as aids for interpreting rights that are enshrined in the Bill of Rights. For example, the Indian Constitution recognises the national objective to ensure that everyone has adequate means of livelihood.<sup>32</sup> In addition, it also guarantees the right to life.<sup>33</sup> The Indian Supreme Court<sup>34</sup> has interpreted the right to life by incorporating the national objective on adequate livelihoods to generate the interpretation that the right to life implies the duties of the state to respect, protect and promote access to livelihoods. Thus, national objectives in India are also applied as aids to interpret rights.<sup>35</sup> However, on their own, national objectives in India cannot be enforced as if they are rights. The same legal position obtains in Zimbabwe, as clarified by the High Court in *Madzara v Stanbic Bank*. Thus, on its own, section 28 cannot be applied to claim access to adequate housing as a right.

The other provision, in the Constitution of Zimbabwe, which relates to housing is section 81(1)(f). It recognises the right to shelter but only for children.

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<sup>30</sup> *Madzara v Stanbic Bank Zimbabwe Ltd* (HH) 546/15 (17 June 2015) 14.

<sup>31</sup> Part IV of the Constitution of India, 1949.

<sup>32</sup> (n32) art 38 and art 48.

<sup>33</sup> (n32) art 21.

<sup>34</sup> See *Olga Tellis v Bombay Municipal Corporation* 1985 2 Supp SCR 51.

<sup>35</sup> See B de Villiers ‘Directive principles on state policy and fundamental rights: The Indian experience.’ 1992 (8) *South African Journal on Human Rights* 29 at 45.

Children are defined as persons who are aged 18 or below. Thus, this right may not be claimed by persons who are older than 18, especially when they do not have parental responsibilities. Furthermore, the Constitution provides for freedom from arbitrary evictions, framed as follows in section 74: 'No person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances.' Arguably, as has been confirmed in various instances in South Africa<sup>36</sup> and elsewhere<sup>37</sup> this right incorporates a number of elements of the right of access to adequate housing. It incorporates into Zimbabwean law the duty of government to refrain from and to take steps to protect people from forced or arbitrary evictions, which are elements of the right of access to adequate housing. However, this right does not incorporate certain crucial positive obligations such as the duty of the state to implement positive measures to promote or provide access to adequate housing to those who currently are deprived of access to adequate housing by factors or circumstances other than forced evictions. As highlighted above, there are many who have been deprived of access to adequate housing because of poverty, unfair discrimination and corruption. People in these circumstances cannot rely on the freedom from arbitrary evictions, enshrined in section 74 of the Constitution of Zimbabwe, to enforce in domestic courts, the state's international obligation to provide them with access to adequate housing. This brings to the fore the question whether the state's positive obligation to promote and provide access to adequate housing to people who currently do not have access to such housing as a result of poverty or unfair discrimination, can be enforced through any other right in the Zimbabwean Bill of Rights.

Elsewhere,<sup>38</sup> I have argued that the right to life and human dignity can be interpreted to imply the right of access to adequate housing. However, in this paper, I demonstrate that there is a right to substantive equality, guaranteed in the Constitution of Zimbabwe, which can be interpreted to imply the duties of the state to promote and provide access to adequate housing for previously marginalised groups. In this instance, 'previously marginalised groups' means people whose access to adequate housing has been prejudiced by past unfair discrimination, as will be illustrated later in this chapter.

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<sup>36</sup> For example, see *Government of the Republic of South Africa v Irene Grootboom* 2001 (1) SA 46 (CC) and *Residents of Joe Slovo Community Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC).

<sup>37</sup> Under the African Charter. See the decision of the African Commission on Human and Peoples' Rights in *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05.

<sup>38</sup> J A Mavedzenge 'The right to life as an alternative avenue for the enforcement of the right of access to adequate housing in Zimbabwe' 2020 (31) *Stellenbosch Law Review* 344.

### 7.3 IS THERE A RIGHT TO SUBSTANTIVE EQUALITY IN THE CONSTITUTION OF ZIMBABWE?

The Constitution of Zimbabwe guarantees every individual the right to equality.<sup>39</sup> This right implies both the right to formal equality for everyone and the right to substantive equality for groups that have been marginalised by past unfair discrimination. Conceptually, the right to formal equality emanates from the principle of formal equality, which is the idea that similarly situated persons must be treated alike.<sup>40</sup> Under this principle, all people are entitled to derive equal benefit of the law and are protected from being directly or indirectly subjected to a condition or restriction which other persons are not subjected to. This principle is entrenched in section 56(1), (3) and (4) of the Constitution of Zimbabwe as follows:

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law...
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
- (4) A person is treated in a discriminatory manner for the purpose of subsection (3) If –
  - (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

Thus, the Constitution guarantees a right to formal equality, which creates the duty of the state to protect people from any form of discrimination that is based on any of the grounds mentioned above in section 56(3).

In addition to providing the state with the duty to protect formal equality, the Constitution also requires the state to achieve substantive equality. In the comparable jurisdictions of South Africa and Canada, substantive equality has been described as ‘equality in lived, social and economic circumstances and

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<sup>39</sup> See section 56 of Constitution of Zimbabwe, 2013.

<sup>40</sup> A Smith ‘Equality constitutional adjudication in South Africa’ 2014 (14) *African Human Rights Law Journal* 609 at 611. Also see P de Vos ‘Grootboom, the right of access to housing and substantive equality as contextual fairness’ 2001 (17) *South African Journal on Human Rights* 258 at 274.

opportunities needed to experience human self-realisation<sup>41</sup> or a form of equality where all people enjoy access to resources and the opportunities which they need in order to develop, participate and flourish equally as human beings.<sup>42</sup> To achieve this form of equality, it has been argued<sup>43</sup> that the state must implement positive measures to eradicate systemic forms of domination and material disadvantage. In order to address the attendant material disadvantage, it is inevitable that the state may have to implement measures that favour a particular group in order to improve the living conditions of the members of that group so that those people are able to access opportunities which they currently cannot access as a result of their existing material disadvantage.<sup>44</sup> For example, the state may have to provide bursaries to a particular group of people in order to enable the members of that group to gain access to education so that they gain skills to compete for opportunities on equal footing with the rest of the society.

The duty to achieve this form of equality (substantive equality) is entrenched in section 56(6) of the Constitution of Zimbabwe as follows:

The State *must* take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and

- (a) such measures must be taken to redress circumstances of genuine need;
- (b) no such measure is to be regarded as unfair for the purposes of subsection (3).  
(Emphasis added)

A careful reading of the above cited provisions shows that the state is not only permitted to undertake measures that favour previously marginalised groups but, it ‘must’ implement those measures in order to protect and promote the achievement of equality for such groups. Thus, because the duty to achieve substantive equality is framed as a mandatory constitutional obligation of the state which features under the broad right to equality, there is a right to substantive equality in the Constitution of Zimbabwe.

This right can be interpreted to generate the right to claim access to adequate housing from the government. However, before I illustrate how this right can be interpreted to imply or create the duties of the state to promote and provide

<sup>41</sup> K Klare ‘Legal culture and transformative constitutionalism’ 1998 (14) *South African Journal on Human Rights* 140 at 146.

<sup>42</sup> S Liebenberg and B Goldblatt ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative constitution’ 2007 (23) *South African Journal on Human Rights* 335 at 342-343.

<sup>43</sup> C Albertyn and B Goldblatt ‘Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality’ 1998 (23) *South African Journal on Human Rights* 236 at 249.

<sup>44</sup> (n43) 342.

access to adequate housing, I must address certain conceptual criticisms which have been levelled first, against the very idea of generating socio-economic rights from civil and political liberties and secondly, against the idea of substantive equality itself.

Arguing that the duties of the state to promote and provide adequate housing can be generated from the right to substantive equality, raises the question whether it is both conceptually and legally possible to enforce socio-economic rights by means of relying on civil liberties. Usually, the obligation to make adequate housing accessible arises from a socio-economic right. However, this obligation may also arise from certain civil and political rights such as the right to equality. Conceptually, this is permissible because there is a relationship of interdependence and indivisibility between civil and political rights on one hand, and socio-economic rights on the other.<sup>45</sup> Such a relationship of interdependence and indivisibility is recognised in section 46 of the Constitution of Zimbabwe, which governs how the Bill of Rights must be interpreted. Section 46(1)(a) and (b) states that, when interpreting the rights enshrined in the Bill of Rights, the court ‘must give full effect’ to the rights concerned and ‘must promote the values and principles that underlie a democratic society’ and these values include human dignity. The effect of section 46(1)(a) and (b) is therefore that courts must interpret fundamental rights in a manner which ensures that those rights and the underlying constitutional values are protected effectively. Effective protection of constitutional rights and values can only be achieved if courts apply the principle of indivisibility and interdependence of rights when they interpret the duties created by the constitutional rights.<sup>46</sup>

Craig Scott suggests that there are two types of relationships of interdependence between human rights, and these are the ‘organic interdependence’ and the ‘related interdependence’.<sup>47</sup> Organic interdependence is the relationship where –

one right forms a part of another right and may therefore be incorporated into that latter right. From the organic rights perspective, interdependent rights are inseparable or indissoluble in the sense that one right (the core right) justifies the other (the derivative right). To protect right x will mean directly protecting right y...<sup>48</sup>

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<sup>45</sup> C Scott ‘Interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights’ 1989 (27) *Osgoode Hall Law Journal* 769 at 781. Also see S Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) at 51.

<sup>46</sup> Scott (n46).

<sup>47</sup> (n46) 779.

<sup>48</sup> (n46).

Thus, the concept of organic interdependence treats certain rights as constituent elements of other rights. Scott uses the example of the right to life and the right to adequate housing.<sup>49</sup> He argues that if the right to life is interpreted broadly to mean the right to live a dignified human life, then one cannot live such a life without first enjoying access to basic amenities such as adequate housing. When one lives under inadequate housing conditions, his or her inherent worth (human dignity) is violated and therefore, such a person is denied a dignified human life.

According to Scott, the organic interdependence of fundamental rights can be explained on the basis of two theories. First is what he describes as the ‘logical or semantic entailment’<sup>50</sup> theory. It is the idea that certain fundamental rights are to be regarded as ‘general core rights’ and such rights logically imply other rights (derivative rights).<sup>51</sup> Thus, the ‘derivative right’ is a logical consequence of the ‘core right’. Using the example of the right to life and the right to adequate housing, Scott argues that the right to life (as in the right to live in human dignity) is a ‘general core right’ which logically implies the right to have access to basic social services that are necessary for human life. The right to adequate housing is, therefore, a right that is logically derived from the right to life. The relationship between the right to life (as the core right) and the right to adequate housing (as a derivative right) is that of logical entailment in the sense that, it is illogical to expect individuals to enjoy their fundamental right to life if they are not guaranteed access to a basic livelihood such as adequate housing.

Similarly, it can be argued (as I do in this chapter) that the right to equality is a general core right which logically takes within its scope, the right of equal access to basic social services that are needed for the equal protection of human dignity for all persons in Zimbabwe. Thus, the duty of the state to achieve substantive equality should, out of necessity, include the duty to promote and provide access to adequate housing for those who are living under inadequate housing conditions as a result of previous unfair discrimination, so that such people can equally have their dignity protected.

A further conceptual counter-argument has been raised regarding the substantive content of equality. Some scholars<sup>52</sup> have argued that equality is a vague concept which does not create tangible or discernible legal obligations. The best starting point for addressing such criticism is to consider the fundamental question posed by Amartya Sen in his study of inequality<sup>53</sup> – in what respect

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<sup>49</sup> (n46) 780.

<sup>50</sup> (n46) 781.

<sup>51</sup> (n46).

<sup>52</sup> D Davis ‘Equality: The majesty of Legoland jurisprudence’ 1999 (116) *South African Law Journal* 398 at 413.

<sup>53</sup> See the preface to Amartya Sen *Inequality Re-examined* (1992).



are all human beings supposed to be equal? Put differently, in what respect do individuals have to be substantively equal, and what tangible legal steps is the government expected to take in order to achieve this kind of equality? Liebenberg and Goldblatt<sup>54</sup> suggest that: ‘Dignity, alongside the value of equality, is capable of being (and should be) developed as an important interpretive vehicle for a substantive understanding of equality.’ Although Liebenberg and Goldblatt made this suggestion in the context of the South African Bill of Rights, the same holds true in Zimbabwe because the Zimbabwean Constitution requires all fundamental rights to be interpreted in a manner which upholds the value of human dignity. Precisely, it states that –

When interpreting this Chapter [The Bill of Rights], a court, tribunal, forum or body...must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3.<sup>55</sup>

Therefore, I also make a similar argument here, that in order to interpret the substantive meaning of ‘equality’ and establish the nature of measures which the Constitution envisages under the duty of the state to achieve substantive equality, courts must resort to the value of human dignity as an interpretive aid.

#### **7.4 THE VALUE OF HUMAN DIGNITY AS AN INTERPRETIVE AID**

Zimbabwean courts are yet to develop their own jurisprudence on the interpretation of human dignity as a constitutional value. However, human rights law scholars<sup>56</sup> acknowledge that the constitutional value of human dignity is derived from the theoretical or philosophical concept of human dignity. Therefore, in order to interpret the meaning of human dignity as a constitutional value, a good starting point is to examine how human dignity was conceptualised and is now perceived as an academic theory or a philosophical concept.

The concept of human dignity is originally an idea that was developed as part of Immanuel Kant’s moral philosophy.<sup>57</sup> It entails that every human

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<sup>54</sup> Liebenberg & Goldblatt (n43) 344.

<sup>55</sup> See section 46 (1) (b) of Constitution of Zimbabwe, 2013.

<sup>56</sup> S Liebenberg ‘The value of human dignity in interpreting socio-economic rights’ 2005 (21) *South African Journal on Human Rights* 1 at 6. Also see A Chaskalson ‘Human dignity as a foundational value under our constitutional order’ 2000 (16) *South African Journal of Human Rights* 200 at 204.

<sup>57</sup> M Gregor (ed) *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (1996) 557. Also see L Ackermann ‘Equality and the South African Constitution: The Role of Dignity’ 2000 *Heidelberg Journal of International Law* 534 at 537 and 540.

being has intrinsic or inherent worthiness.<sup>58</sup> The phrase ‘inherent worthiness’, as an element of human dignity, is a descriptive phrase used to articulate the idea that, by virtue of being a human being, the individual is worthy to be treated with a certain measure of respect and concern by the society and other human beings.<sup>59</sup> Such worth arises from certain characteristics that are inherent to human beings, which differentiate humans from the impersonality of nature.<sup>60</sup> These characteristics include the human beings’ capability to exercise their own judgement, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their own personalities, to strive for self-fulfilment in their lives and to enter into meaningful relationships with others.<sup>61</sup> This view of human dignity, as a theory, has been supported by a number of contemporary scholars.<sup>62</sup> I also take a similar position that human dignity, as a theoretical or philosophical concept, entails the recognition that every human being (without differentiation) has inherent worth which arises from certain capabilities which they are born with as humans and these capabilities include the capability to develop intellectually, to determine their personal lives, to experience self-worth and to actively participate in public life in order to shape their society.

By recognising human dignity as a foundational value, the Constitution of Zimbabwe therefore contemplates the transformation of Zimbabwe into a society where the inherent worth of every human being is equally valued and equally protected at all times. Therefore, it can be argued that by recognising the right to equality, the Constitution of Zimbabwe guarantees the right to equal respect of the human dignity of all persons without any discrimination. By implication, the state has the duty to ensure equal respect and protection of the intrinsic worth of every human being in Zimbabwe. Thus, when interpreted in light of the constitutional value of human dignity, the right to substantive equality requires the state to implement reasonable measures to protect or restore the intrinsic worthiness of those who currently are living under inhumane conditions as a result of past unfair discrimination.

Access to adequate housing entails having access to a home where a person enjoys access to essential services such as potable water, sanitation facilities,

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<sup>58</sup> M Nussbaum *Women and Development: The Capabilities Approach* (2000) 23.

<sup>59</sup> L Ackermann *Human dignity: Lodestar for equality in South Africa* (2013) 56.

<sup>60</sup> (n60) 23-24.

<sup>61</sup> (n61). Also see S Liebenberg (n57) 7.

<sup>62</sup> C McCrudden ‘Human dignity and judicial interpretation of human rights’ 2008 (19) *European Journal of International Law* 655 at 679. Also see P Carozza ‘Human dignity and judicial interpretation of human rights: A reply’ 2008 (19) *European Journal of International Law* 931 at 931 and 944.

electricity, adequate space and privacy.<sup>63</sup> A person lives under inhumane conditions when he or she lives without access to these essential services. This is precisely why in *Government of South Africa v Grootboom*,<sup>64</sup> Yacoob J (writing on behalf of the Constitutional Court of South Africa) said: ‘There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter...’

Indeed, there can never be substantive equality as long as people live under inhumane conditions. In section 56(6) of the Constitution of Zimbabwe, the state is required to implement reasonable measures to achieve equality for those who have been unfairly discriminated against in the past. The measures contemplated in section 56(6) must therefore necessarily include measures aimed at providing access to adequate housing.

## 7.5 WHO CAN CLAIM THIS RIGHT?

This does not mean that every person who lacks access to adequate housing can rely on the right to substantive equality to claim access to adequate housing. The way the right to substantive equality is framed in the Constitution of Zimbabwe suggests that it can be claimed only by ‘people or classes of people who have been disadvantaged by unfair discrimination’.<sup>65</sup> In terms of section 56(4) of the Constitution, unfair discrimination occurs when a person is ‘subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or other people are accorded directly or indirectly a privilege or advantage which they are not accorded.’ Therefore, the right to substantive equality can be invoked only if the claimants can show that they are, or they belong to a group that has been unfairly marginalised in the past, and as a result of such marginalisation, they are currently living under inhumane housing conditions.

There are a number of identifiable social groups in Zimbabwe who are constrained from access to adequate housing or who live under inhumane conditions because of past unfair discrimination. For example, in 2005, the Government of Zimbabwe conducted a large scale forced evictions campaign which resulted in the displacement of over 700 000 people.<sup>66</sup> This eviction

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<sup>63</sup> CESCR General Comment No. 4: ‘The right to adequate housing (art 11 (1) of the Covenant)’ (13 December 1991) para 8 (f).

<sup>64</sup> *Government of the Republic of South Africa v Irene Grootboom* 2001 (1) SA 46 (CC) para 23.

<sup>65</sup> See section 56 (6) of Constitution of Zimbabwe, 2013.

<sup>66</sup> A Tibaijuka (2005) ‘Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe’ available at: <http://ww2.unhabitat.org/documents/ZimbabweReport.pdf>, viewed 10 April 2020.

campaign unfairly targeted certain communities who were perceived to be supporters of the then newly formed opposition political movement.<sup>67</sup> Thus, these communities were unfairly targeted and discriminated against on the basis of what the government perceived to be their political affiliation. As a result of the forced eviction campaign, they lost their homes and they also lost their sources of livelihoods, as some of them had their informal (backyard) industries destroyed.<sup>68</sup> In an effort to protect themselves from similar evictions in future, Zimbabweans successfully advocated for the entrenchment of the fundamental freedom from arbitrary evictions when the new Constitution of Zimbabwe was adopted in 2013.<sup>69</sup> However the impact and disadvantage caused by the 2005 mass forced eviction campaign is still being experienced by the survivors of this campaign. They are materially disadvantaged in the sense that they are still living under inadequate housing conditions and have no means to gain access to housing on their own, as a result of the 2005 mass forced eviction campaign. These people cannot invoke the freedom from arbitrary eviction to claim alternative housing because the evictions were conducted before the introduction of that constitutional right. However, they can apply their right to substantive equality to claim positive restitutionary or remedial action to be taken by the state to enable them to gain access to adequate housing.

Other examples of groups who currently live under inhumane housing conditions include those who are indigent and have been excluded from purchasing housing land on account of the exorbitant prices and or corruption. Potentially this category comprises a huge number of people given the high levels of poverty and corruption in the country.<sup>70</sup>

Another social group which can rely on the right to substantive equality in order to claim access to adequate housing is that of women who have been unfairly denied access to housing land, as a result of unfairly discriminatory customary land ownership laws which operated prior to the 2013 Constitution. There are at least two types of land ownership systems in Zimbabwe. First is the commercial agricultural land which is administered by the state.<sup>71</sup> The second category is the communal land which is owned and administered by traditional leaders.<sup>72</sup> It is estimated that 68% of the Zimbabwean population lives on communal lands in

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<sup>67</sup> (n67) 20-21.

<sup>68</sup> (n67) 7.

<sup>69</sup> See section 74 of Constitution of Zimbabwe, 2013 as interpreted in *Makani and Others v Epworth Local Board and Others* (HH) 550/ 14 (9 October 2014) at 1-2.

<sup>70</sup> Staff Reporter (11 June 2018) '72 percent Zimbabweans living in poverty' *The Zimbabwe Mail* <https://www.thezimbabwemail.com/economic-analysis/72-percent-zimbabweans-living-in-poverty/> viewed 25 June 2019.

<sup>71</sup> See section 8 of the Land Acquisition Act of Zimbabwe.

<sup>72</sup> See section 5(g) of the Traditional Leadership Act of Zimbabwe.

the rural areas.<sup>73</sup> Communal land is allocated by traditional leaders in accordance with rules of customary law. These rules dictate that communal land is allocated to heads of families and not individuals.<sup>74</sup> Until gender equality was firmly recognised as a constitutional right in 2013,<sup>75</sup> customary law recognised men only as heads of families and therefore, as a general rule of custom, only men could claim access to land to establish family homes. Consequently, as a general rule of custom, women could not claim access to communal land and could also be expelled from communal land in the event of termination of their marriage to their husbands.<sup>76</sup> Recent studies<sup>77</sup> demonstrate that there are several groups of women who currently lack access to adequate housing as a result of such past unfair discrimination. Such people can claim the right to substantive equality to compel the government to initiate certain measures that are meant to provide them with access to adequate housing.

## 7.6 NATURE OF MEASURES WHICH THE STATE CAN BE COMPELLED TO INITIATE

In terms of section 56(6) of the Constitution, the state must implement measures that are reasonable. In South Africa, the courts<sup>78</sup> have developed criteria which must be met if such measures are to be deemed reasonable. These criteria include the requirements that:

- the measures must be coherent;<sup>79</sup>
- they must be backed up by sufficient resources to finance their implementation;<sup>80</sup>

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<sup>73</sup> Zimbabwe National Statistics Agency ‘Inter-Censal demographic survey’ (2017) at xi.

<sup>74</sup> T Bennett ‘Conflict of laws: The application of customary law and the common law in Zimbabwe’ 1981 (30) *International and Comparative Law Quarterly* 59 at 73. Also see O Mafa et al *Gender, Politics and Land Use in Zimbabwe 1980-2012* (2015) 115. <https://codesria.org/IMG/pdf/00-prelim.pdf> viewed 30 November 2020.

<sup>75</sup> Unlike the previous Constitution, the 2013 Constitution guarantees in elaborate terms, the right to equality for women. See section 80 of the Constitution of Zimbabwe, 2013.

<sup>76</sup> R Gaidzanwa ‘Women’s land rights in Zimbabwe’ 1994 (22) *A Journal of Opinion* 12 at 12-13.

<sup>77</sup> See for example, B Toro ‘Rural women and the land question in Zimbabwe: The case of the Mutasa District’ 2016 (4) *International Journal of African Development* 77 at 8. Also see O Mafa (n73) 115.

<sup>78</sup> See for example the decision of the Constitutional Court of South Africa in *Government of the Republic of South Africa v Irene Grootboom* 2001 (1) SA 46 (CC).

<sup>79</sup> *Grootboom* (n79) para 41.

<sup>80</sup> *Grootboom* (n79) para 39.

- they must address the short term and long term housing needs of the affected people;<sup>81</sup> and
- the state must meaningfully engage with the affected groups when developing solutions to addressing the existing challenges.<sup>82</sup>

These criteria can also be applied in Zimbabwe given that the Constitution requires measures adopted to be reasonable and it allows courts to borrow the interpretation of ‘reasonable measures’ from foreign jurisdictions where a similar concept is entrenched.<sup>83</sup>

Some academics have rightly argued that the constitutional agenda to achieve substantive equality is a long-term vision.<sup>84</sup> Therefore, the right to substantive equality is a right that is to be progressively fulfilled, as opposed to being an immediate right. Though not entirely, I agree with this view because the ability of the state to eradicate material disadvantage will in most cases be determined by the resources available. Therefore, the duty of the state to undertake restitutionary or remedial action to enable previously marginalised groups to access adequate housing is meant to be fulfilled progressively, subject to the amount of resources available to the state.

However, whilst the right to restitutionary measures is to be fulfilled progressively in Zimbabwe, there are certain immediate steps that the state is required to undertake, and these do not require substantial resources. This interpretation accords well with the manner in which the right to substantive equality is framed in section 56(6) of the Constitution. Under this right, the state ‘must take reasonable legislative and other measures’ to promote the achievement of equality for the previously marginalised individuals and groups. Therefore, the state can be compelled to enact legislation and or administrative policies which indicate how it plans to address the attendant material disadvantage and make adequate housing accessible to those who have been deprived of such access as a result of past unfair discrimination. These plans should be developed in genuine consultation with the affected groups.<sup>85</sup>

In addition to developing these plans, the state can also be compelled to implement other immediate measures such as providing the affected groups with

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<sup>81</sup> *Grootboom* (n79) para 43.

<sup>82</sup> *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (2) SA 208 (CC) para 21.

<sup>83</sup> See section 46 (1)(e) of Constitution of Zimbabwe, 2013 which states that courts may consider relevant foreign law, when interpreting provisions of the Declaration of Rights.

<sup>84</sup> C Albertyn and B Goldblatt ‘Equality’ in S Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2007) at 14.

<sup>85</sup> section 68 Constitution of Zimbabwe, 2013.

suitable temporary adequate housing, in the event that these people are homeless as a result of past unfair discrimination. As mentioned earlier, one of the criteria for measuring the reasonableness of restitutionary measures is that they must address the short term and long term needs of the affected people.<sup>86</sup> This gives people who are homeless (as a result of past unfair discrimination) an immediate right to restitutionary measures in the form of suitable temporary housing, in order to address their immediate and urgent housing needs. It cannot be denied that the ability of the state to provide temporary housing is also dependent upon the resources available. However, the state cannot evade this responsibility by simply claiming that it does not have enough resources.<sup>87</sup> Where the state claims that it does not have sufficient resources to provide temporary housing as a restitutionary measure, it will have to prove that to the court and it must satisfy the court that it has done everything reasonably possible within its power and has failed to find the resources.<sup>88</sup>

As part of the immediate restitutionary measures, the state may also be compelled to provide security of tenure to people who are living in informal settlements as a result of past unfair discrimination. For instance, as a result of the mass forced eviction campaign of 2005 described above, a number of people who lost their homes ended up settling in informal settlements that are dotted around the country.<sup>89</sup> They do not have security of tenure and are constantly harassed with threats of forced evictions.<sup>90</sup> These people can rely on their right to substantive equality to claim, as a restitutionary measure, that they immediately be given security of tenure while the state is seeking to progressively make adequate housing accessible to them.

## **7.7 CAN THE STATE BE COMPELLED TO INITIATE THESE RESTITUTIONARY MEASURES?**

In making this claim, I recognise that some scholars have called for caution regarding the role of courts in enforcing substantive equality. For instance, Sandra Fredman rightly argues that in some welfare states, the achievement of

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<sup>86</sup> *Grootboom* (n79) para 43.

<sup>87</sup> See section 324 of Constitution of Zimbabwe, 2013 which state states that ‘All constitutional obligations must be performed diligently and without delay’.

<sup>88</sup> See CESCR General Comment No. 3: ‘The nature of states parties’ obligations (art 2, para 1, of the Covenant)’ 14 December 1990 at paras 10–12.

<sup>89</sup> PD Msindo et al ‘Squatter settlements an urban menace in Zimbabwe? Examining factors behind the continued resurfacing of squatter settlements in Epworth Suburb, Harare’ 2013 (4) *Journal of Settlements and Spatial Planning* 171 at 174–5.

<sup>90</sup> A Masuku (16 June 2013) ‘Squatters misery worsening’ *NewsDay Harare* <https://www.newsday.co.zw/2013/01/16/squatters-misery-worsening/> viewed 25 June 2020.

substantive equality exists as a political commitment as opposed to a constitutional right.<sup>91</sup> In such jurisdictions, Fredman argues that the role of the courts is limited to scrutinising the appropriateness of the restitutionary measures taken by the state, as opposed to compelling the state to initiate restitutionary measures.<sup>92</sup> In other words, there is no mandatory duty on the part of the state to initiate restitutionary measures but, if the state decides to implement the measures, the appropriateness of such measures can be reviewed by the courts.

In Zimbabwe, substantive equality is entrenched as a justiciable constitutional right which must be respected, protected, promoted and fulfilled by the state.<sup>93</sup> Therefore the role of the court is not limited to reviewing what the state has already initiated as restitutionary measures. Where the state has failed to initiate positive reasonable remedial measures, the courts have the jurisdiction to compel the relevant institutions of government to do so. It is therefore legally possible for people who live under conditions of inadequate housing as a result of past unfair discrimination, to seek the courts' intervention to compel the state to initiate positive restitutionary measures which enable them to access adequate housing.

In making the above argument, I recognise that even in those jurisdictions which I identified as possible sources of inspiration for Zimbabwean courts as they interpret the right to substantive equality, the role of the courts in enforcing this right against the state is not as clear as I suggested above. For instance, in Canada, the notion of substantive equality is entrenched in article 15(2) of the Canadian Charter.<sup>94</sup> However, the Canadian Supreme Court has not given a decisive interpretation on whether article 15(2) implies that the state can be compelled to initiate positive restitutionary measures where it has failed to do so, or the role of the court is limited to reviewing the appropriateness of what the state has decided to initiate.

In *Andrews v Law Society of British Columbia*<sup>95</sup>, the Supreme Court of Canada confirmed that article 15(2) allows the state to undertake restitutionary measures in favour of previously marginalised groups and, such measures shall not be deemed to be unfairly discriminatory.<sup>96</sup> This however did not answer the

<sup>91</sup> S Fredman 'Providing equality: Substantive equality and the positive duty to provide' 2005 (21) *South African Journal on Human Rights* 163 at 164.

<sup>92</sup> (n92).

<sup>93</sup> See section 44 of Constitution of Zimbabwe, 2013.

<sup>94</sup> Canadian Charter of Rights and Freedoms, 1982. It is enshrined as follows: '15(2) [Freedom from unfair discrimination] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

<sup>95</sup> *Andrews v Law Society of British Columbia* 1989 (1) SCR 143.

<sup>96</sup> A similar interpretation was reiterated in *Weatherall v Canada* (Attorney General) 1993 (2) SCR at 874.



question whether in the event that the state has failed to take any action, a group of people who are still disadvantaged by past unfair discrimination can approach the court under article 15(2) and claim that the state must initiate restitutionary measures to ameliorate their disadvantage. That question remained unanswered until *Haig v Canada (Chief Electoral Officer)*,<sup>97</sup> when the Supreme Court said that ‘the government may be required to take positive steps to ensure the equality of people or groups who come within the scope of section 15 [of the Charter]’. Thus, the Court confirmed that where the state has failed to act, it is possible to compel it to initiate positive measures to ameliorate the disadvantage suffered by a group as a result of past unfair discrimination. A similar interpretation was made in *Schachter v Canada*.<sup>98</sup>

However, this interpretation was rejected later by the Supreme Court in the case of *Egan v Canada*,<sup>99</sup> where Cory and Lacobucci JJ said ‘it is clear that Parliament does not have any constitutional obligation to provide benefits. However, once the decision has been made to confer a benefit, it cannot be applied in a discriminatory manner’. Thus, the Court seemed to suggest that its role was limited to reviewing the appropriateness of action taken by the state as opposed to compelling the state to initiate restitutionary measures. When one compares the interpretation of article 15 of the Canadian Charter in *Andrews v Law Society of British Columbia*, *Haig v Canada*, *Schachter v Canada* and *Egan v Canada*, it is evident as Bruce Porter<sup>100</sup> and Paul O’Connell<sup>101</sup> argue that, the Supreme Court of Canada has been indecisive. Thus, even in jurisdictions where substantive equality is entrenched as a constitutional duty, there is still an ongoing debate on whether this means that the state can be compelled to initiate restitutionary measures or that the court’s role is limited to reviewing the appropriateness of what the state has in its discretion decided to initiate. However, in Zimbabwe, that debate should not arise because unlike in Canada, the duty to initiate restitutionary measures is framed as a mandatory obligation which the state must undertake<sup>102</sup> as opposed to a discretionary power which the

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<sup>97</sup> *Haig v Canada (Chief Electoral Officer)* 1993 (2) SCR 995 at 1041.

<sup>98</sup> *Schachter v Canada* 1992 (2) SCR 679 at p 721 where Chief Justice Lamer (who wrote for the majority) said ‘Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterise section 15 as providing positive rights.’

<sup>99</sup> *Egan v Canada* 1995 (2) SCR 513 at 596.

<sup>100</sup> B Porter ‘Beyond Andrews: Substantive equality and positive obligations after Eldridge and Vriend’ 1998 (9) *Constitutional Forum* 71 at 73.

<sup>101</sup> P O’Connell ‘The death of socio-economic rights’ 2011 (74) *The Modern Law Review* 532 at 543–544.

<sup>102</sup> See section 56 (6) of Constitution of Zimbabwe, 2013.

state may exercise or chose not to exercise.<sup>103</sup> Therefore, if the state in Zimbabwe fails to initiate restitutionary measures, there should not be any doubt that the courts have jurisdiction to compel the government to develop and implement those measures. Consequently, if the state fails to initiate restitutionary measures to ameliorate the housing challenges being experienced as a result of past unfair discrimination, the courts can be petitioned to intervene and issue judicial orders compelling the relevant government institutions to initiate the measures.

However, it cannot be denied that lack of access to adequate housing is but one of the many socio-economic challenges which the state must address in order to create a society where there is substantive equal protection of the human dignity of all persons. There are other challenges in Zimbabwe such as lack of access to adequate food,<sup>104</sup> lack of access to basic education<sup>105</sup> and to healthcare.<sup>106</sup> In light of this, one could ask whether there is any basis for compelling the state to prioritise providing access to adequate housing ahead of addressing these other challenges that are equally important for the protection of human dignity for all persons. The argument being advanced here is not necessarily that the state must immediately provide access to adequate housing for the previously marginalised groups. This must be done on a progressive basis, depending on the resources available to the state and in light of the other challenges which the state has an obligation to address. However, as indicated earlier, the state must urgently implement certain measures such as adopting the necessary legislation and policies. These policies must be holistic in the sense that the state must outline reasonable measures on how it intends to address all these socio-economic challenges, including lack of access to adequate housing. If the provision of access to adequate housing is over-looked in those policies, then those policies should be deemed inadequate and therefore unreasonable.

## 7.8 CONCLUSION

By virtue of having ratified the ICESCR, the Government of Zimbabwe is internationally bound to ensure the progressive realisation of the right of access to adequate housing by everyone in the country. The Constitution of Zimbabwe does not expressly recognise the right of every person to enjoy access to adequate housing. However, it guarantees the right to substantive equality for people who

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<sup>103</sup> Art 15 (2) of the Canadian Charter of Rights and Freedoms, 1982.

<sup>104</sup> Staff Reporter (11 June 2018) '72 percent Zimbabweans living in poverty' *Zimbabwe Mail* <https://www.thezimbabwemail.com/economic-analysis/72-percent-zimbabweans-living-in-poverty/> viewed 25 June 2019.

<sup>105</sup> (n105).

<sup>106</sup> (n105).

have been unfairly discriminated against in the past. By virtue of this right, indigent persons who live under inadequate housing conditions as a result of past and or ongoing unfair discrimination are entitled to reasonable restitutionary measures implemented by the state, to enable them to access adequate housing.

In practice, the following are some of the measures which the state can be compelled to implement: developing reasonable policies which indicate how the state intends to make adequate housing accessible to the previously marginalised groups, providing suitable temporary housing to those who are homeless and providing security of tenure to those who live in informal settlements as a result of past unfair discrimination. The government can be compelled to undertake the above measures on the basis of the right to substantive equality, which must be interpreted by incorporating the value of human dignity.