THE ROLE OF COURTS IN FORGING INNOVATIVE REMEDIES: INTERROGATING KENYAN COURT OF APPEAL'S MITU BELL JUDICIAL MYTH AND FORMALISM.

By Joshua Malidzo Nyawa

Carol C Ngang in his 'judicial enforcement of socioeconomic rights in South Africa and the separation of powers objection: The obligation to take 'other measures'[1] views jurisprudence from two angles, the viewpoint of 'exasperation' and of 'accountability'. A jurisprudence of exasperation, as O'Regan explains, refers to the tendency of judges to base their judgments on exasperation with the state of affairs in the country rather than on reasoned arguments based on the possibilities and limits of the law.[2] Applying this approach in adjudication has the tendency of leading the courts to apply a more stringent measure of accountability on the government.[3] It is cautioned that, if not properly crafted, a jurisprudence of exasperation may 'produce worse outcomes' or have a more devastating effect than the presumed bad government policy that the courts may intend to remedy.[4]A jurisprudence of accountability, on the other hand, recognises that the political branches are responsible for government action, which must be subject to judicial scrutiny, especially when contestation is raised in court challenging such action.[5] The

[1] Carol C Ngang, 'Judicial enforcement of socioeconomic rights in South Africa and the separation of powers objection: The obligation to take 'other measures' (2014) 14 *AHRLJ* 655-680.

[2] K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39.

> Courts must accordingly avoid what a respected Indian commentator has termed the jurisprudence of exasperation: the tendency to reach decisions or make statements that are an expression of judges" exasperation with the state of affairs in the country, rather than on the basis of "carefully thought out arguments based on the law's possibilities and limits." . . . . In South Africa a jurisprudence of exasperation might result in the requirements of rationality being unduly tightened or in courts being too slow to accept that government's policies in achieving social economic rights are reasonable, or in insisting that government adopt the court's own views as to what is an appropriate government policy.

[3] K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39

[4] K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39

[5] K O'Regan 'A forum for reason: Reflections on the role and work of the Constitutional Court' (2011) Helen Suzman Memorial Lecture, Johannesburg, South Africa 39

jurisprudence of accountability has therefore the effect of limiting the judge's intrusion into the functions of the other branches of the government. The jurisprudence of accountability would favour the relief of declaratory orders because they are believed to preserve the Montesquieu's doctrine of separation of powers and disfavors any remedy which might be innovative(or a creation of the court) , A theory that was applied in Mitu bell 2 by the court of appeal.

On the other hand, the jurisprudence of exasperation seeks to produce better results. It allows judges to be innovative in ways that would hold the government more accountable to the law. When judges employ the jurisprudence of exasperation which in most of the circumstances is value based would lead to a judicial enforcement of rights which constitutes a key strategy for protecting and empowering dispossessed groups, particularly when political channels of realisation become unavailable, ineffective, inaccessible or insufficient[6].

This paper seeks to critique the decision of the court of appeal in Mitu bell where judges refused the ethos of the 2010 constitution which required them to be innovative and instead upheld the practice of the past. This paper will firstly look at the place of socio-economic rights in Kenya, secondly the judicial enforcement of socio-economic rights, thirdly the remedy of structural interdict as one of the innovative remedies before making a conclusion.

The place of socio-economic rights in the 2010 constitution.

The people of Kenya through the 2010 constitution desired a state where there would be emancipation of the poor and a promise of dignity to all.[7] A state where the concerns of the have

[6] Cumming & D Rhodes 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 612

[7] See *Okwanda v The Minister of Health and Medical Services & 3 Others*, High Court of Kenya at Nairobi, Petition No 94 of 2012 *at* para 13 where the court held that the incorporation of SERs in art 43 of the Constitution was aimed at dealing with issues of poverty, employment, ignorance and disease, and to achieve the above, the state

nots would be considered. It is the realisation of these rights that would lead to the realisation of that desire. The constitution therefore elevates the socio-economic rights from mere aspirations (see article 43). P O'Connell[8], defines SERs as the rights concerned with the material bases of the well-being of individuals and communities, that is, rights aimed at securing the basic quality of life for a particular society[9]. They include the right to shelter, food, water, healthcare, education and work.

The high court in John *Kabui Mwai and 3 Others v Kenya National Examination Council and 2 Others*[10], started off by making the valid observation that "[t]he realisation of socio-economic rights means the realisation of the conditions of the poor and less-advantaged and the beginning of a generation that is free from socio-economic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10 (2) (b). The realisation of socio-economic rights means the realization of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need."[11]

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has to deliver tangible benefits especially to those living in the margins of society. The Court contended that failure to enforce SERs will undermine the whole foundation of the Constitution.

[8] P O'Connell, *Vindicating socio-economic rights: International standards and comparative experiences* (2012) 3-6,

[9] See also Nikki Stein, A better life for all: using socio-economic rights litigation to enforce the principles governing public administration, *South African Journal On Human Rights*,2018 VOL.34, NO1.91-111 where she argues that The constitution is more than just a law that regulates state power. it is a blue print for a 'better life for all'; it is a rejection of the oppression , indignity and inequality that characterized the apartheid era. part of its purpose is to transform our society: to give us a map out of that era and into one of, inter alia, human dignity, the achievement of equality, the advancement of human rights and freedoms, and supremacy of the constitution of the rule of law.

[10] Petition No.15 of 2011. Available at http://www.hakijamii.com/publications/Education_case.pdf

[11] *John Kabui Mwai & 3 Others v Kenya National Examination Council and 2 others* at 6.

While explaining as to why Kenyans struggled for a new constitution, Nicholas Wasonga Orago[12] has written on the desires of Kenyans in the following words

> The high levels of poverty, inequality and socio-economic marginalisation that bedeviled Kenya for generations led to a struggle for a new constitutional dispensation, which culminated in the promulgation of a new, egalitarian and transformative constitution in August 2010. This constitution entrenched justiciable socio-economic rights within an elaborate Bill of Rights.

The high court has also captured the Kenyans' aspirations in the case of Satrose Ayuma[13] as follows: "[t]he crave for the new Constitution in this country was driven by people's expectations of better lives in every aspect, improvement of their living standards and just treatment that guarantees them human dignity, freedom and a measure of equality." While writing about the enforcement of socio-economic rights in South Africa, Yacoob wrote that the objective of the entrenchment of justiciable socio-economic rights in constitutions, is to facilitate the eradication of poverty and inequality, improve the overall standards of living of all people and ensure social justice.[14] This is therefore to mean that the realisation of the socio-economic rights is at the center of achieving the purposes of the promulgation of the constitution, N Haysom [15]has averred that for a constitution to have a meaningful place in the hearts and minds of citizens, and for it to have

[12] Nicholas Wasonga Orago, The Place of the "Minimum Core Approach" in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution, *Journal of African Law*, 59, 2 (2015), 237–270
[13] *Satrose Ayuma and 11 others v The Attorney General and 2 Others* High Court petition no 65 of 2010 at 22.
[14] Z Yacoob "The entrenchment and enforcement of socio-economic rights" (paper presented at the judges' conference to mark the inauguration of the new South African Constitutional Court building, 18–20 March 2004) at 3, available at:http://housingjustice.ca/wp-content/uploads/2012/03/the-entrenchment-and-enforcement-ofsocio-economic-rights.pdf (last accessed 27 January 2013).
[15] N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 452

lasting resonance among them, it must address their pressing survival needs through the entrenchment of justiciable SERs.

Similarly, the dreams of a new Kenya can be summarized in former president kibaki's description of a new Kenya, The then president had stated during the promulgation of new Constitution: [16]

> Fellow Kenyans, this moment marks the decisive conclusion of the TWENTY-YEAR journey in search of a new constitutional order. This New Constitution is an embodiment of our best hopes, aspirations, ideals and values for a peaceful and more prosperous nation. The New Constitution gives us renewed optimism about our country and its future. Some of us were present at the birth of the First Republic. As young leaders, we envisioned turning our newly born country into a prosperous, healthy, and developed nation in a generation or two. A lot has been achieved toward this goal, but much more work remains to be done. The New Constitution gives our nation a historic opportunity to decisively conquer the challenges that face us today. It provides us an avenue to renew our fight against unemployment and poverty; and opportunity to work and become a developed people and nation.

Similarly, Sandra Liebenberg[17], has written to the effect that

> The drafters of the Constitution clearly envisaged a far-reaching role for it in the transformation of post-apartheid society.' Among the key aims of the Constitution is to "improve the quality of life of all citizens and free the potential of each person". This constitutional concern with the socioeconomic wellbeing of people is especially evident in

[16] See Speech by H.E, Hon. Mwai Kibaki, ' president of the and Commander –in-chief of the Armed forces of the Republic of Kenya on the occasion of the Promulgation of the New Constitution, Friday 27th August,2010'

[17] Sandra Liebenberg, South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty

> the entrenchment of a wide range of justiciable socio-economic rights in the Bill of Rights. If the socio-economic rights in the Constitution are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity.[18]

The entrenchment of the socio-economic rights can be said to be one of the major tools entrenched in the new Constitution for the amelioration of the dire poverty, inequality and socio-economic marginalisation of many Kenyans, and to enhance social justice and the egalitarian transformation in Kenya are the, economic and social rights in the Bill of Rights[19], The entrenchment of the socio-economic rights was meant to prevent the Albie's state where 'The poor will remain poor and oppressed. The only difference would be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have nonracial oppression'[20]

DM Brinks & W Forbath[21], have similarly contended that in the context of Latin American Constitutions, that the reason for the inclusion of SERs in the new constitutions was 'to match the democratic promise of participation in public life with a promise of participation in the material opportunities, public goods and social wealth of the State ...[and thus] protect [the poor,

[18] see the words by Chaskalson P in *Soobramoney v minister of Health, Kwazulu-Natal* 1998 1 SA 765 (CC), 1997 (12) BCl,R 1696 *(Cc) at para 8*
·'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty there is a high level of unemployment. Inadequate social security. And many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hallow ring.

[19]see The East African Centre For Human Rights in A compendium on economic and social rights cases under the Constitution of Kenya, 2010

[20] Albie Sachs Advancing Human Rights in South Africa Town (1992) xi.

[21] DM Brinks & W Forbath 'Commentary - Social and economic rights in Latin America: Constitutional courts and the prospects for pro-poor interventions' (2010-2011) 89 *Texas Law Review* 1943,at 1943-1944,

marginalised and vulnerable citizens] against the harshness and widening inequalities of market-based political economies'.

J Nedelsky & C Scott[22] have also affirmed that the entrenchment of SERs is a formal constitutional recognition of the existence of disadvantaged groups in a society, and thus giving their voices and claims a formal priority by acknowledging that marginalisation is caused by structural injustices. It thus provides an opportunity for the use of the language of rights coupled with the structural institutions of power to advance the cause of the vulnerable and marginalised groups.

Judicial enforcement of socio-economic rights

The 2010 constitution has transformed the judicial interpretation of human rights in Kenya today. It encompasses what Moseneke[23] termed as Transformative adjudication. Ojwang argues that judicialism and (transformative) constitutionalism are the two defining ideologies of the Kenyan Constitution, and notes that the judiciary is the greatest beneficiary of the changing political philosophy ordained under the 2010 Constitution[24]. It is against the formalist reasoning as exhibited in most of the decisions rendered in pre-2010. The 2010 constitution in turns calls for a pro-poor jurisprudence. Some refer to it as a human rights jurisprudence. While writing for Malawi, Siri Gloppen and Fidelis Edge Kanyongolo in Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law have argued that

> The adoption of a democratic Constitution in Malawi in 1994 infused the law with a transformative ambition and, presumably, rendered the legal system better disposed toward

[22] J Nedelsky & C Scott 'Constitutional dialogue' in J Balkan & D Schneiderman (eds.) Social justice and the Constitution: Perspectives on a social union for Canada (1992) 59, at 59-60

[23] See D Moseneke 'The fourth Bram Fischer memorial lecture: Transformative adjudication' (2002) 18 *South African Journal on Human Rights* 309, at 316-19

[24] JB Ojwang *Ascendant judiciary in East Africa: Reconfiguring the balance of power in a democratising constitutional order* (2013).

the poor, at least in formal terms. This came about in light of the document's establishment of human rights and equality as core constitutional values and because of the constitutional recognition of social rights. With a pro-poor Constitution and a politically astute judiciary, conditions seemed propitious for the emergence of a transformative jurisprudence that could alter structured inequalities and power relations and improve the situation for the poor and marginalized.

Justice Langa puts it more succinctly that 'judges should approach human rights adjudication so as to uplift the underprivileged and thereby to re-orientate the social contract in a way that is fair to all[25]. The inclusion of these rights in the Constitution as justiciable rights has been described by Godfrey Musila as perhaps the single most revolutionary aspect of the 2010 Constitution.[26] He affirms the potential of the implementation of these rights to remedy the historical injustices of the past, to achieve social justice for marginalised and vulnerable individuals and groups, as well as to achieve substantive equality as demanded by the Constitution.[27] And similarly the 2010 constitution elevates socioeconomic rights from mere utopian ideas to binding norms both in international law and many national legal systems[28], a violation of the rights grants the victim(s) a chance to approach the court. Just like other human rights, socio-economic rights are judicially enforceable. Yacoob, J [29] held on the binding nature of these rights in the following terms

[25] Langa, P. 2008*, Transformative Constitutionalism and Socio Economic Rights*. Keynote address, Wolfson College Oxford, 11 June 2008.

[26]G Musila 'Testing two standards of compliance: A modest proposal on the adjudication of positive socio-economic rights under the new Constitution' in J Biegon & G Musila (eds.), *ICJ Judiciary Watch Report Volume 10: Judicial enforcement of socio-economic rights under the new Constitution – Challenges and opportunities for Kenya* (2012) 55 55 & 59.

[27] ibid

[28] David Bilchitz ,Taking Socioeconomic Rights Seriously: Substantive and Procedural Implications in Geraldine Van Bueren ,Freedom from Poverty as a Human Right Law's Duty to the Poor (2010) THE PHILOSOPHER'S LIBRARY SERIES volume 4

[29] Government of the Republic of South Africa v. Grootboom & Ors. 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC)

> I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.

However this has been objected before, others have argued that this should be in the realm of the legislature and the executive because the two arms are constituted by elected leaders and they are tasked by with the formulation and implementation of law and policy. Why then should we look to the courts? The answer to this question lies in the role of the courts as 'guardian' of the constitution, including the constitutional socioeconomic rights of the child[30].

The entrenchment of the socio-economic rights required judges to develop a positive attitude towards them. It calls for the abandonment of the common law methods of interpretation. This is evident in the *PE Municipality* case where the court was required to adjudge the conflict between *property* rights and housing rights. The court started by noting that with the entrenchment of housing rights in the Constitution, the Court acknowledged the change in the judicial role from the traditional common law approach, holding as follows:[31]

> The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather,

[30] Aoife Nolan ,Rising to the Challenge of Child Poverty: The Role of the Courts in Geraldine Van Bueren ,Freedom from Poverty as a Human Right Law's Duty to the Poor (2010) THE PHILOSOPHER'S LIBRARY SERIES volume 4
[31] *Port Elizabeth Municipality*, para. 23

> it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

The Court further held that its new role required it 'to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern'.[32] In her analysis of the *PE Municipality* case, Sandra Liebenberg contends that justice and equity should be the guiding lights of the courts in dealing with the Conflict between property rights and housing rights.[33]Rodrigo Uprimny[34] has also argued on the dangers of conservatisation, he has argued that courts should be progressive and not conservative. He argued thus

> The dangers of a conservatisation of the CCC's composition, competences and rulings might have influenced the Court's activity in the last years. Indeed, although still active and independent, the Court has demonstrated some kind of prudence in its rulings, prudence that may not mean its conservatisation, but that nonetheless shows how a conservative environment may limit the progressive potentialities of a Constitutional Court. This may be specially so in the case of social rights, the justiciability of which is regularly criticized by conservative actors.

The 2010 constitution calls for an active participation of the courts in the enforcement of socio-economic rights. This is informed by the idea of transformative constitutionalism which in

[32] *Port Elizabeth Municipality*, para. 37, as per Justice Sachs

[33] S Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010)277-79. She contends that these principles apply even in the context of eviction applications brought by private landowners as against unlawful occupiers. To elaborate she extensively discusses the *Modderklip* case, among other cases, calling the resultant jurisprudence a 'transformative approach' to the resolution of the conflict between housing rights and property rights, see 281-292.

[34] Rodrigo Uprimny. "The Enforcement of Social Rights by the Colombian Constitutional Court:Cases and Debates" in Roberto Gargarella, Pilar Domingo and Theunis Roux (Eds). *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor*?

summary means the use of the law for social change or in the words of Mashele Rapasta that: Post 1994, a reconstruction and development agenda became a priority, resulting in transformative constitutionalism, a project which adopted the stance of transforming the society by redressing the injustices of the past, to create a much just society grounded in law. It has a foundational mandate to heal the wounds of the past. This entails that the societal challenges can best be addressed using the supreme law in the Constitution, as the basis for societal transformation[35].On the role of the courts, Justice Subba Rao, in *Nath v. The Commissioner of Income Tax, Delhi and Rajasthan another* [36] had observed:

> A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot pitted against the State organizations and institutions, nor can they meet them on equal terms. In such circumstances, it the duty of this court to protect their rights against themselves.[37].

Pieterse Marius[38] has written against the judicial unwillingness to intervene in socio-economically significant contractual relationships. He argues that the judicial unwillingness endorses the power imbalances that currently permeate them, and accordingly allows for the compromise of the quality of relational access to socio-economic rights. Avinash Govindjee[39], while relying on Liebenberg

[35] Mashele Rapasta, 'Transformative Constitutionalism in South Africa: 20 Years of Democracy' (2014) Mediterranean Journal of Social Sciences, at the Abstract the
[36] (1959) 1 S.C.R. (Suppl.) 528.
[37] Id. at 618.
[38] Pieterse Marius (2009) Relational Socio-Economic Rights, *South African Journal on Human Rights*, 25:2, 198-217.
[39] Avinash Govindjee, Adjudication of Socio-Economic Rights by the Constitutional Court of South Africa:Walking the Tightrope between Activism and Deference?, National Law School of India Review, Vol. 25, No. 1 (2013), pp. 62-80

notes that the appropriate inter-relationship has been described as a constitutional aimed at[40] [P]rodding government to be more responsive to the needs of the poor in order to fulfil their constitutional rights and have access economic and social resources and services. Taking this role seriously will require, in appropriate cases, decisions which have extensive policy and budgetary implications.

Enoch Dumbutshena has argued in order to attain equity in Africa, judges must embrace judicial activism and that when adjudging socio-economic rights, the judges must be guided by the socio-context

> Judges must use their judicial power in order to give social justice to the poor and economically and socially disadvantaged. South Africa is best equipped to do this. Its bill of rights contains social and economic rights. In interpreting those provisions which protect social and economic rights, judges should remember that they cannot remain aloof from the social and economic needs of the disadvantaged. Through their activism, judges can nudge their governments so that they move forward and improve the social and economic conditions of the poor. In South Africa the bill of rights is, without interpretation, activist in its own right. However, it requires activist judges to make its provisions living realities[41]

This therefore means that if the rights are to amount to anything more than pieces of papers, they need a different judicial philosophy and not the pre -2010 or in other words the potential of change through the Constitution cannot amount to much unless the courts live up to the task in the

[40] Sandra Liebenberg, Towards a Transformative Adjudication of Socio-Economic Rights in Osode and Glover (eds.), at 53

[41] Enoch Dumbutshena, Judicial activism in the quest for justice and equity in Bola Ajibola and Deon Vein Zyl (eds.), The Judiciary in Africa, 188

adjudication of rights and their enforcement in real cases[42]. The High Court of Kenya in *The Very Right Rev Dr Jesse Kamau & Others v The Hon Attorney-General & Another*, quoting the former Chief Justice of The Gambia, EO Ayoola, observed that a 'timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document'.[43] On interpretation of rights in particular, the Court went on to note:[44]

The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.

The debate regarding the justiciability of socio-economic rights has been described as "old and well-worn"[45] and therefore there is no justification for the adoption of the common law interpretation of rights by the courts.

The court of appeal and the Structural interdicts

This part of the paper seeks to analyze the decision by the court of Appeal in the famous Mitu Bell[46]. The court of appeal held against the use of structural interdicts as a remedy. The three judge bench overturned the high court's decision that it would supervise the implantation of its decision. To the court's reasoning, such a remedy is unknown in Kenya. This commentary proceeds from

[42] see E Christiansen 'Transformative constitutionalism in South Africa: Creative uses of Constitutional Court authority to advance substantive justice' (2010) 13 *Journal of Gender, Race and Justice* 575.
[43] Nairobi HCMCA 890 of 2004 (unreported).
[44] Nairobi HCMCA 890 of 2004 (unreported).
[45] Nolan, A., Porter, B. and Langford, M., "The Justiciability of Social and Economic Rights: An Updated Appraisal", *Center for Human Rights and Global Justice*, Working Paper Number 15, 2007, p. 1.
[46] *Kenya Airports Authority v Mitu-Bell Welfare Society, civil appeal No.218 of (*2014)ekLR

here. It is undeniable that the court didn't have a proper reading of the Kenyan law. It is also evident that the court was not well versed with the demands, ethos and aspirations of the 2010 constitution. Under Article 23 the High Court '*may grant appropriate relief*.' The constitution does not define what amounts to appropriate relief. However the provision is similar to section 38 of the South African constitution. The courts of South Africa have interpreted the provision to mean an effective remedy. The Constitutional Court of South Africa in *Fose v Minister of Safety and Security*, addressing itself to as to what *'appropriate remedy'* means stated that *'appropriate remedy must mean an effective remedy.'* The Court further stated that 'courts have particular responsibility and are obliged to 'forge new tools' and shape innovative remedies.' Ackerman J put accent on the sensibility of transformative remedies, founded on the notion of just and equitable remedies, in the following excerpt:

In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their legal rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.[47]

Mia Swart[48] was skeptical of the constitutional court of South Africa in its issuance of a declaratory relief. She argues that it is clear that the superior courts in South Africa have wide powers to

[47] Fose v Minister of Safety of Home Affairs 2000(3) SA 936(CC)

[48] Mia Swart (2005) Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor, *South African Journal on Human Rights*, 21:2, 215-240

fashion remedies. However, the socio-economic rights debate should now shift from the justiciability of the rights to crafting appropriate remedies for their infringement. She opens up with what can constitute an effective remedy. An effective socio-economic remedy to her, will be a remedy which is capable of immediate implementation. If it is agreed that government should not only grant relief to those in desperate need but prioritise [49] the needs of the poor, the court should pay urgent attention to forging and formulating remedies with immediate effect.[50] In a rather catchy paragraph, she makes the point that

> The ordering of a structural interdict seems to be the most appropriate remedy in socio-economic cases of extreme urgency. By involving the court in ongoing supervision of an institution,[51] structural interdicts go where prohibitory and mandatory interdicts dare not go. Structural interdicts may be unpopular because they could result in the courts being engaged in the `full-time job' of supervising the state

For Dennis Davis on the other hand, he has written that the Constitutional Court has surrendered its power to sanction government inertia and, as a direct result, litigants have not obtained the shelter or drugs that the judgements promised in such a clear fashion.[52] He argues that the declaratory reliefs that were issued in *Grootboom*[53] and *TAC*[54] were ineffective and a supervisory

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[49]Theunis Roux `Understanding Grootboom ± A Response to Cass R Sunstein' (2002) 12 Constitutional Forum 46, 47. The article is a response to Cass R Sunstein `Social and Economic Rights? Lessons from South Africa' (2001) 11 Constitutional Forum 123

[50] In Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) para 69 Ackermann J stated

> that courts must ensure that the remedies they grant are effective and approach their task from the perspective that in a country such as South Africa `where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated'. Poor litigants will not be in a position to return to court again and again to have an order implemented.

[51]Jonathan Klaaren `Judicial Remedies' in S Woolman et al (ed) Constitutional Law of South Africa 2 ed (2004) 9-15.

[52] DM Davis `South Africa: The Record after Ten Years: Towards ``Deference Lite"?' forthcoming in SAJHR.

[53] In Grootboom the `winner' was less organised, less resourced and ultimately received little more than a paper order.

[54] *Minister of Health and Others vs. Treatment Action Campaign and Others* [2002] 5 LRC 216,

remedy would have achieved a purpose. Davis believes that the refusal of the Constitutional Court to grant structural relief that would empower courts to supervise the implementation of their own orders has produced unfortunate results. Government has done little to produce the tangible benefits that victorious litigants are entitled to expect from their success.[55]They therefore make a case for structural interdicts. Unlike the constitutional court, the high courts of south Africa have used structural interdicts for instance In *Centre for Child Law and Others v MEC for Education and Others*, the High Court's use of this remedy seems to have rested on the need to counter the state's reticence in realising socio-economic rights.[56] In *City of Cape Town v Rudolph and Others* (*Rudolph* case),[57] the High Court, in making the order, employed the principles enunciated in the *Grootboom* case to hold that the government had failed to ameliorate the conditions of those in desperate need[58]

Similarly, Wim Trengove points out that redressing systematic violations of socio-economic rights often requires far-reaching institutional and structural reforms.[59] Violations of this kind cannot be remedied by a single court order made once and for all. If remedies for socio-economic rights violations are to be effective and meaningful the assumption by a court of a supervisory jurisdiction appears unavoidable. An important reason for this is that poor litigants are unable to access legal representation to institute on-going litigation to enforce their rights.

This therefore bestows a duty on the courts to fashion new remedies which would effectively vindicate the rights. In the context of socio-economic rights feeble or ineffective measures do not

[55] DM Davis `South Africa: The Record after Ten Years: Towards ``Deference Lite"?' forthcoming in SAJHR
[56] Case No 19559/06, unreported (the *Luckhoff* case), High Court Transvaal Provincial Division at 11.
[57] 2003 (11) BCLR 1236 (C).
[58] *Ibid.* 1279.
[59] Wim Trengove `Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1 4 ESR Review.

constitute appropriate relief'.[60] If one believes in judges as vindicators of a socially progressive Constitution, one would expect judges to be activist and creative in the formulation of constitutional remedies particularly when assisting the most vulnerable members of society such as children, the aged and disabled applying for grants and landless squatters.[61]

In Kenya as Walter Ochieng[62] argues, The High Court and Supreme Court of Kenya have grasped the nettle by making jurisprudential strides by means of adopting effective remedies in the nature of structural interdicts. Dr. Mutakha Kangu[63] while arguing that the constitution is transformative has noted that the Judiciary must therefore play a pivotal role in the transformation of the society on the basis of the Constitution. He further argues that 'One important instrument which the Courts can use to realize the provisions and values of the Constitution, and transform society, is the manner in which they fashion and structure remedies for violation of constitutional provisions….Remedies can be fashioned and structure to ensure that the intention of the framers of the constitution is realized' and further that 'The Courts can breathe life into this constitutional provision(article 19) by **fashioning and structuring remedies** in constitutional litigation that ensure that other **arms of government** such as the legislature and the executive **take steps and measures** that ensure **fundamental changes** in the manner we run our **social, economic and cultural affairs'.**

[60] See Sanderson v Attorney-General, Eastern Cape para 38: ` `appropriateness' requires `suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights'..

[61] Cameron JA, in the Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza 2001 SA 1184 (SCA) at para 12 has described vulnerable litigants as those who are `most lacking in protective and assertive armour'

[62] Walter Ochieng, Kenyan Court of Appeal Shackles the Novel and Innovative Remedies for Socio-Economic Rights Violation

[63] Dr. Mutakha Kangu Remedies In Constitutional Litigation Under The Kenyan Constitution Of 2010 , Presented At An LSK Continuous Professional Development Seminar, Held On 15th To 16th September, 2016 At Green Hills Hotel, Nyeri.

The drafters of the constitution when incorporating the term appropriate relief therefore contemplated the innovation of new remedies. DIDCOTT J his separate opinion in *FOSE*[64] held that

> I shall also assume that the 'appropriate relief' envisaged by the subsection was not limited to remedies of the various natures and types available at common law, but covered in addition fresh remedies neither used nor even recognised yet which the courts could fashion in suitable circumstances to cope with the exigencies and to meet the special demands of constitutional litigation.

Therefore the reasoning of the court of appeal is not only formalistic but also founded on lies. A declaratory relief cannot enforce socio-economic rights and when granted, the same is tantamount to the entrenchment of rights without remedies. Kent Roach has argued that ‘’Judicial bodies that use declarations will find themselves dependent on the legislative and executive branches of government to provide remedies for socio-economic rights … Declarations proceed on the assumption that governments will take prompt and good faith steps to comply with the court’s declaration of constitutional entitlement.[65]A warning was sounded in *Nelles v Ontario* [66] where Lamer J observed as follows:

> When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the

[64] *FOSE* at para 78.
[65] K Roach, ‘The Challenges of Crafting Remedies for Violations of Socio-Economic Rights’ in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 53.
[66] *Nelles v Ontario* (1989) 60 DLR (4th) 609 (SCC)

purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur.

The formulation of innovative remedies is contemplated in the constitution itself and the same should not wait for a referendum. Indeed as Conor O'Mahony has noted, Irish constitutional jurisprudence has tended to be developed upon an underlying understanding that it would be "capable of evolution, and that judges should be free to mould it to changing conditions and ideas without the need for repeated referenda".[67] The court of appeal judges should accept the wind of change that is sweeping across the field of adjudication of socio-economic rights. The court can rightly be described as the weakest link to the realisation of the socio-economic rights[68].

The court of appeal committed unforgivable sin when it held that structural interdicts were inapplicable. It lied when it held that the structural interdicts were inapplicable in kenya. It lied because firstly, the term appropriate remedy has already been interpreted in kenya to allow innovation. To start with, In **Nancy Makokha Baraza vs Judicial Service Commission & 9 Others [2012] eKLR** the Court expressed itself inter alia as follows:

"The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises."

Similarly, In *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR , the court expressed itself thus

[67] C O'Mahony, "Societal Change and Constitutional Interpretation" (2010) 1(2) IJLS 71, 72.
[68] Christopher Mbazira ,You are the "weakest link" in realising socio-economic rights: Goodbye Strategies for effective implementation of court orders in South Africa, Community Law Centre 2008

'27. What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half-hungry millions of India who are continually denied their basic human rights. We need Judges who are alive to the socio-economic realities of Indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives. This has to be the broad blueprint of the appointment project for the higher echelons of judicial service. It is only if appointments of Judges are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India.'[69]

The second lie is because the remedy of structural interdict had already been applied in kenya, The Supreme Court in **Communications Commission in Kenya & 5 Others v Royal Media Services Limited & 5 Others SC Petition No.14 of 2014** issued orders and directions in the nature of a structural interdict. The High Court has also done so in among other cases; **Satrose Ayuma & 11th Others v The Registered Trustees of the Kenya Railways Staff Retirement Pension Scheme & 2 others, Nairobi HC Petition No. 65 of 2010** (Lenaola, J), **Kepha Omondi Onjuro & others v Attorney General & 5 others, Nairobi HCC Petition No. 239 of 2014** (Odunga, J.), and in the ***Matter of Illegal Demolition of Residential Houses and Business Premises Erected***

[69] Justice Bwagwati in the Judges case 1981 Supp SCC 87,222 , see also M.Radhakrishnan vs Union Of India on 11 June, 2018 at para 12

on Ngara Open Air Market Nairobi and in the Matter of Francis N. Kiboro & 198 Others, Nairobi Misc. Application No. 130 of 2014 (Odunga, J).

Conclusion

A judge of the Supreme Court of India has explained the need for invention of remedies by courts. He stated that in such cases 'the court is not merely a passive, disinterested umpire or onlooker, but has a more dynamic and positive role with the responsibility for ... moulding relief and - this is important - also supervising the implementation thereof'.[70] Similarly the Indian Supreme Court observed in *Morcha v the Union of India* that for the more vulnerable sections of society 'it is necessary to ⋯ forge new tools, devise new methods and adopt new strategies.[71] This dream therefore cannot survive when benches are occupied by formalistic and conservative judges. I find pleasure in ending with the following words

"To the large majority of people who are living in almost subhuman existence in conditions of abject poverty and for whom life is one long, unbroken story of want and destitution, notions of freedom and liberation, though representing some of the most cherished values of a free society would sound as empty words bandied about in the drawing rooms of the rich and well-to-do, and the only solution for making these rights meaningful to them was to re-make the material conditions and use in a new social order where socio-economic justice will inform all institutions of public life so that the preconditions of fundamental liberties for all may be secured"[72]

[70] *Sheela Barse v. Union of India* (1988) AIR 2211 at 2215
[71] *Bandhua Mukti Morcha v Union of India* 1984 3 SCC 161
[72] Minerva Mills Ltd v Union of India (1980) SC.

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