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Structural interdicts in Kenyan constitutional law

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1. Introduction

The promulgation of the Constitution of Kenya 2010 marked the start of a new era. No longer were we a nation subject to the will of the president or left at the mercy of parliament. The Constitution, as it strongly proclaims, was the supreme law of the land towering over every other law and person.[1] It draws this position of power from the Kenyan people as the people who elected for it to be the law that ruled over the land.[2] It is therefore no surprise that the rights it grants the people are not only prominently placed but are subject to great protection from violation and encroachment. Given our nation's history of rights being granted and respected when it suits the executive it is no surprise the great lengths the Constitution framers went to shield these rights from the whims of the executive. The judiciary was granted a prominent role acting as guardian of the Constitution and as an avenue for those claiming a violation of their rights to seek redress.[3]

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1 Constitution of Kenya (2010), Article 2.

2 Constitution of Kenya (2010), Article 1.

3 Constitution of Kenya (2010), Article 22, 23, 165(2).

Article 23(3) of the Constitution continues from the provisions of Article 22.[4] It empowers the courts to grant a number of reliefs to petitioners in an effort to ensure the Bill of Rights is respected and upheld. These reliefs include: 'a declaration of rights, an injunction, a conservatory order, an order of judicial review, an order for compensation or a declaration invalidating any law that infringes, violates or threatens a particular right'.[5] Interestingly in listing the remedies the Constitution uses the word 'including' which is interpreted to mean that the list of remedies that a court can issue 'is not an exhaustive list'[6] or as the Constitution puts it 'includes but is not limited to'.[7]

It is also worth noting that the Constitution makes no mention of the term 'structural interdicts'. It only calls for 'appropriate reliefs' and goes on to list what these may include. Appropriate relief in the context of Article 23(3) has been defined to be:

> …relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.[8]

The relief in which a court has the power to impose has been addressed by the High Court where it stated,

> …we are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables us to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights.[9]

4 Constitution of Kenya (2010), Article 22; provides for the enforcement of the Bill of rights particularly the institution of proceedings before the court for claim of a right being denied, violated or threatened.

5 Constitution of Kenya (2010), Article 23(3).

6 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, Petition 14 A of 2014, Petition 14B of 2014 and Petition 14C of 2014 (Consolidated), Judgment of the Supreme Court (2014) eKLR.

7 Constitution of Kenya (2010), Article 259(4).

8 To use the words of the Constitutional Court of South Africa in similar consideration. See *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002); See also *EWA and 2 others v Director of Immigration and Registration of Persons & another,* Petition 352 of 2016, Judgment of the High Court of Kenya at Nairobi, (2018) eKLR.

9 *Nancy Makokha Baraza v Judicial Service Commission & 9 others,* Petition 23 of 2012, Judgment of the High Court of Kenya at Nairobi, (2012) eKLR, para 126.

Additionally, Kenyan courts have embraced the reasoning in *Minister of Health & Others v Treatment Action & Others* stating;

> …if it is necessary to do so, the court may even fashion new remedies to secure the protection and enforcement of these all-important rights… the courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal.[10]

2.0 The concept of structural interdict

Structural interdicts has no universally agreed definition. Some legal scholars explain it to involve placing a requirement on a violator of a right to remedy the violation under the supervision of the court.[11] It is also referred to as supervised interdicts.[12] They have also been defined as 'an order under which a court controls compliance with its order'.[13] Structural interdicts are an exception to the *functus officio doctrine.* This doctrine provides that a court's jurisdiction over a particular case ends upon handing a final determination.[14] Structural interdicts were put in place to cater to the inadequacies of traditional remedies in addressing systemic violations in organisations.[15] The reasoning behind this is in order to cure systemic violations, it is best to have a continued assessment of the problem and to continuously remedy the matter in response to the changes and ensure the remedy is implemented to finality.

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10 *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

11 *County Government of Kitui v Ethics & Anti-Corruption Commission*, Petition No 3 of 2019, Judgment of the High Court of Kenya at Machakos (2019) eKLR, para 100.

12 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

13 Cherese Thakur, 'Structural interdicts: an effective means of ensuring political accountability?', Helen Suzman Foundation, 2018.

14 Daniel Malan Pretorious, 'The origin of the *functus officio* doctrine with specific reference to its application in administrative law', 122(4) *South African Law Journal* (2005) 832. See also the Special Project, 'The remedial process in institutional reform litigation' (1978) *Columbia Law Review* 784, 816.

15 Susan Sturm, 'A normative theory of public law remedies', Columbia Law School (1991) 79.

2.1 *Reasons for applying structural interdicts over other remedies*

These types of remedies are favoured for a number of reasons. To begin with they do not just aim to offer remedies and compensation but seek to eliminate the violation entirely.[16] This is seen in how structural interdicts are often fashioned targeting change in policy or the creation of needed policy or the implementation of a particular policy. Another advantage it poses is that it does not aim to provide a one-time approach remedy. Instead, it sets into motion an action plan that does not end at the final ruling of the matter.[17] This is through the court requiring a party to report back on a matter and to achieve certain milestones aimed ultimately at preventing or remedying a violation. The court is able to retain jurisdiction and may actively participate in the implementation of a decree.[18] This follow up ensures the party presenting a plan before the court implements it and the plan does not merely exist on paper.

2.2 *Different models of structural interdicts*

There are a number of models of structural interdicts. One is the 'Report Back to Court' Model. As the name suggests it requires the defendant to come up with a plan on how they will remedy the particular problem brought before the court, the court gives a timeline within which to formulate the plan and present it to the court. The petitioner is granted an opportunity to voice their opinion on the plan. Once the court is satisfied it adopts it as part of its final order.[19]

Another model is the Bargain Model where both parties come to the table to negotiate on the best solution to the issue.[20] Parties may also be directed to the Administrative Hearing Model which calls for public

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[16] Sandra Liebenberg, 'The value of human dignity in interpreting social-economic rights' 21(1) *South African Journal of Human Rights* (2005), 30.

[17] Abram Chayes, 'The role of the judge in public law litigation' 89(7) *Harvard Law Review* (1979) 1298.

[18] Pretorious, 'The origin of the *functus officio* doctrine with specific reference to its application in administrative law', 832.

[19] Christopher Mbazira, 'From ambivalence to certainty: Norms and principles for the structural interdict in South Africa' 24(1) *South African Journal of Human Rights* (2008).

[20] Special Project, 'The remedial process in institutional reform litigation', 810.

hearings and the opinions of interested parties who are not party to the matter to voice their opinions and contribute towards attaining a lasting resolution to the violation.[21] It can also involve applying the Expert Remedial Formulation Model which brings together experts in the field in question tasked with formulating the appropriate remedy to respond to the issue.[22] Finally, we have the consensual Remedial Formulation Model that calls for a third party being involved in the bargaining process between the parties with the aim of arriving at a solution that sits well with all the parties.[23]

Odunga, J, in *County Government of Kilifi v Ethics & Anti-Corruption Commission*[24] expounded on the elements of a structural interdict and explained it in five steps. The first step involves the court identifying how a particular right has been violated or how the government has failed to honour its obligation in regards to the right and making a declaration to that effect. Next, the court compels the government to comply with its constitutional responsibilities. Third involves ordering the government to submit a comprehensive report under oath, detailing the ways it will remedy the violations in question. The government tables the report before the court by a specified date. The plan itself should also bear timelines for achieving various milestones identified within it. What follows is the court evaluating the plan before it and weighing whether or not it adequately remedies the situation. This stage intertwines the judiciary and the other branches of government in the implementation of policies. The final stage comes in when the government fails to adhere to the plan in place which amounts to contempt of court.[25]

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21 Sturm, 'A normative theory of public law remedies', 79.

22 Special Project, 'The remedial process in institutional reform litigation', 795.

23 It was witnessed in *United States v Michigan* 471 F. Supp. 192 (W.D Mich 1979) where a third party was included in aiding negotiations between the parties in order to help them reach an agreement on allocation of fishing waters between tribes as cited in Mbazira, 'From ambivalence to certainty: Norms and principles for the structural interdict in South Africa'.

24 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

25 *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 100.

In the following sections, we will explore the various Kenyan and South African cases that have elucidated the concept of structural interdict, and applied it to the resolution of violations of socio-economic rights.

3.0 The *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*[26] cases

The original petition in this case arose from a demolition exercise. Residents of Mitumba village located near the Wilson Airport were given a seven (7) day notice to evict the plot of land or face demolition. The reason given for the particular eviction was that the village was on public land which was in the flight path of landing aircraft. Another was it being a shanty and being so close to the airport, at a time when Kenya was at war with terrorist elements, created a security risk. The residents rushed to the High Court to register a petition and to seek a conservatory order until the High Court heard the petition. The order was granted but the Respondents went ahead to conduct the demolitions in disregard of the order.

The petitioners amended the petition in light of the new circumstances following the demolition. They sought a declaration that the demolitions were a violation of their rights, illegal and oppressive and sought to have the Court restrain the respondents from future demolitions. Additionally, they sought a declaration that they were legally entitled to the plot but if that failed that they were entitled to compensation, and they should be relocated or offered an alternative shelter that allowed them access to clean water, education for their children, healthcare and food at the state's expense. They also claimed they were discriminated against as high-rise buildings located in the same area were spared during the demolition with only their shacks being brought down. Lastly, they sought a declaration that they were entitled to the

[26] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (amicus curiae)*, Petition 3 of 2018, Judgment of the Supreme Court (2021) eKLR.

full enjoyment of the social and economic rights particularly the right to housing.[27]

The Respondents in reply denied that there existed any rights of the Petitioners in regards to the plot of land in question. The land, they explain, belongs to the First Respondent, and the state carried out the demolitions as part of the obligations under the Civil Aviation Act and in the interest of safety and national security. In regards to the socio-economic rights, they opposed the declaration sought by the Petitioner stating that socio-economic rights are subject to progressive realisation.[28]

3.1 Decision at the High Court

Mumbi Ngugi, J., after considering the arguments, held that the Petitioners had no legitimate right over the land in dispute and could therefore not maintain a claim of violation of rights in regards to the land. However, as they had suffered damage to property during the prohibited demolitions and the Respondents had violated their right to property as provided for under the Constitution. Additionally, she termed the conduct of the demolition despite the existence of the court order barring the same a violation of the Petitioners' constitutional rights. She ruled that the state had violated the Petitioners' right to full enjoyment of social and economic rights based on Article 21 and 43 on the Constitution. Carrying out demolitions without proper notice and without offering alternative accommodation amounted to a violation of the Petitioners' rights under Article 43 as read with Article 21.[29]

She also looked to the decision in the celebrated *Grootboom case*[30] and consulted international law.[31] In *Grootboom*, the Constitutional

27 *Mitu-Bell Welfare Society v Attorney General & two others*, Petition 164 of 2011, Judgment of the High Court of Kenya at Nairobi, (2013) eKLR, para 5.

28 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court, para 6.

29 *Mitu-Bell Welfare Society v Attorney General & two others*, Judgment of the High Court.

30 *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

31 United Nations, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, 12 May 2004.

Court of South Africa stated there needed to be a relationship between reasonable state action and the need to treat people with appropriate dignity, respect and care.[32] In regards to the enjoyment of socio-economic rights, the Court held that this would only be possible if the state ensured its citizens had access to the rights to begin with. It explained that while eviction may be necessary it was necessary to follow due process in doing it.[33]

The High Court's final order was for the second respondent to provide an affidavit bearing the state policies and programmes that provide for provision of shelter to marginalised groups like residents of informal settlements. The second respondent was tasked with coordinating with the appropriate authorities both government agencies and non-state agencies that had knowledge in matters of eviction especially of squatters and slum dwellers.

3.2 Decision at the Court of Appeal

The Court of Appeal aligned itself with the *functus officio doctrine* and viewed the High Court's orders as going against this doctrine.[34] It did recognise the development of structural interdicts as a remedy developing in the area of constitutional petitions relating to violations of rights but held that the remedy did not extend to Kenya.[35] It did this in the recognition of earlier High Court rulings and sentiments by the Supreme Court. It also viewed this as an infringement on the doctrine of separation of powers[36] and also as raising the political question doctrine.[37]

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32 *Government of the Republic of South Africa and Others v Grootboom and Others.*

33 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court of Kenya.

34 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Civil Appeal 218 of 2014, Judgment of the Court of Appeal, (2016) eKLR, para 28.

35 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 37, 38 and 39.

36 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35, 36.

37 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35.

It went on to fault the High Court's decision to involve non-state actors in the formulation of the appropriate remedy. It termed it as a poor attempt at alternative dispute resolution[38] or on the other hand a move to delegate judicial function to unauthorised bodies.[39]

3.3 Decision at the Supreme Court

Speaking in regards to the structural interdicts, it expressed concern at the two opposing stances adopted by the two lower courts indicating there is still a wide disconnect when it comes to understanding what structural interdicts are. It was especially worried by the position of the Court of Appeal not only by disregarding the two earlier High Court decisions that championed for structural interdicts but also, especially so, of the Supreme Court's own express position in the matter.[40] It took issue with the Court of Appeal's move to abide by the *functus officio doctrine*[41] as embodied in the Civil Procedure Act at the expense of redressing a violation of a right enshrined in the Constitution.

In regards to the involvement of non-state parties who were not parties to the suit to engage in formulation of appropriate relief, the Supreme Court sided with the High Court. It held that it was much more acceptable to include state parties, even those who were not a party to the matter, to engage in the fashioning of appropriate relief as opposed to including non-state parties.[42] It viewed this as amounting to judicial overreach as it went beyond any constitutional or statutory mandate.[43] The final orders were to partially allow the petition and remitting the matter to the trial court for it to make the appropriate order.

[38] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 35.

[39] *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 27.

[40] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 119.

[41] Civil Procedure Act (No 17 of 1967), Order 21.

[42] *County Government of Kitui v Ethics & Anti-Corruption Commission*, para 156.

[43] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 122.

4. Challenges and pitfalls to implementation of structural interdicts

Earlier this paper mentioned the fact that the traditional understanding of judicial remedies and the authority of a court is that it operates along the *functus officio doctrine* meaning that once a court gives its final verdict it no longer has a hand in the matter. However, structural interdicts break these boundaries. They do not restrict themselves to the strict timelines. In the *Mitu-Bell Welfare case* the High Court had directed that the second Respondent file an affidavit reporting on existing state policies and programmes on provision of shelter and access to housing for the marginalised groups like slum dwellers.[44] However, the Court of Appeal showing a lack of proper understanding of the concept ruled against the High Court's directions stating that the High Court became *functus officio* upon the handing of its judgment. It went on to fault the direction to file affidavits and reports after reading the judgment stating that it opened the door to secondary litigation thus erring in law.[45]

One of the biggest problems facing the imposition of structural interdicts is the understanding of the point at which they can be imposed. This affects both litigants and judges presiding over the matter. Additionally, the trend has been to grant a structural interdict at the conclusion of a case and not prior to the hearing. In *Law Society of Kenya & 7 others v Cabinet Secretary of Health & 8 others; China Southern Co. Airline Ltd (Interested Party),*[46] the Petitioners were opposed to the resumption of non-essential flights into Kenya from China in 2020 fearing it would open the population of Kenya to infection with Covid-19, ultimately violating the right to health and life of the people of Kenya. The petitioners in this case moved the Court in granting an ex-parte order of injunction barring resumption of the flights. It also sought a conservatory order in the form of a structural interdict compelling the Respondent to present a

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44 *Mitu-Bell Welfare Society v Attorney General & two others,* Judgment of the High Court.

45 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*, Court of Appeal, para 122 and para 29.

46 Ruling of the High Court of Kenya at Nairobi, (2020) eKLR, para 24.

contingency plan on how it plans to prevent, monitor and control a Covid-19 outbreak and the response system it has in place. The advocate for the respondents argued against the imposition of structural interdicts at the interlocutory stage claiming they could only be imposed at the conclusion of a matter.

In response to this, the Court held that a court has the jurisdiction to grant a structural interdict at any point of the hearing including at the interlocutory stage provided it was the 'appropriate relief'.

Another challenge witnessed is the lack of understanding of what exactly a structural interdict is. The Court of Appeal in the *Mitu-Bell Welfare case* seemed to understand the structural interdicts imposed to be akin to an alternative dispute resolution mechanism. This is highlighted by its sentiments that had the High Court intended for third parties to adjudicate over the matter they ought to have done so prior to the issuing of the judgment.[47] This is because it viewed the move to involve third parties to aid in arriving at a solution as a form of alternative dispute resolution. Additionally, there was the concern that it amounted to delegating judicial functions to parties not mandated to wield such powers under any law.[48]

As explained earlier in this paper structural interdict models such as the Expert Remedial Model, Consensual Remedial Model and Administrative Hearing Model invite experts and members of the public to contribute towards fashioning the appropriate remedy. Another reason to welcome this unorthodox means will be by considering that the Constitution allows for the grant of 'appropriate remedies'[49] which has been understood to extend to the forging of new tools[50] the aim being to ensure the realisation of the rights guaranteed in the Constitution.

Structural interdicts may often mean that the court directs parties to look at the laws, policies and guidelines existing in a particular area.

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47 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 35.

48 *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 27.

49 Constitution of Kenya (2010) Article 23(3).

50 *Nancy Makokha Baraza v Judicial Service Commission & 9 others*, para 126.

This has not gone down well in some quarters as some jurists believe it raises the matter of the political question doctrine. The Court in *Ndoria Stephen v Minister of Education & 2 others*[51] explained that policy formulation was strictly an area of the Executive. These sentiments were echoed by the Court of Appeal in the *Mitu-Bell Welfare case* in a move to do away with the High Court's directives for the Respondent to present existing policies and consult human rights groups and organisations with knowledge in the area.[52] The Court of Appeal viewed this as the High Court encroaching on the state's power to formulate policy. It opined that the Court could not interfere in how the state chose to allocate the resources available neither could it engage in the execution of judgements.[53]

The question of encroachment on the separation of powers doctrine has been brought up as a challenge to the imposition of structural interdicts that touch on policy development. In response to this the South African apex court in *Port Elizabeth Municipality v Various Occupiers*[54] addressed this stating;

> …the procedural and substantive aspect of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways…[55]

Additionally in *Government of the Republic of South Africa and Others v Grootboom and Others*[56] the Court did not shy away from looking into the allocation of resources by the state to determine it had failed to make reasonable provision of available resources to go towards the realisation of the right to housing and to live in sanitary conditions.[57] The case arose from an eviction of the respondents who had been occupying private land earmarked for formal low-cost housing. Following the eviction,

[51] Judgment of the High Court of Kenya at Nairobi (2015) eKLR, para 55.

[52] *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 35.

[53] *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 36.

[54] *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).

[55] *Port Elizabeth Municipality v Various Occupiers.*

[56] *Government of the Republic of South Africa and Others v Grootboom and Others.*

[57] *Kenya Airport Authority v Mitu-Bell Welfare Society & 2 others,* Court of Appeal, para 99.

they petitioned the Court to order the government to provide them with basic shelter and housing until they acquired permanent housing.

The grant of structural interdicts in regards to socio-economic rights has also been barred by the argument of socio-economic rights being subject to progressive realisation. This has meant while civil and political rights are actively catered to and prioritised, the State is often reluctant when it comes to social economic and cultural rights. It has been argued that these rights create no mandatory obligation to ensure their realisation.[58] It led to some scholars referring to socio-economic rights as second-generation rights.[59]

5. Opportunities for using structural interdicts successfully to promote the rule of law

Structural interdicts are a useful tool for ensuring that policy and guidelines translate into reality instead of being mere words on paper. It provides a way for the judiciary to poke its nose into the arena of policy formulation in order to ensure the government is executing its role in the realisation of rights. In *Ndoria Steven v Minister of Education & 2 others*[60], the court was asked to determine whether the Respondents were in violation of the right to education in respect to children living in marginalised areas of Kenya. The Respondents furnished the court with copies of the various policies and guidelines in place to address that issue. The Court recognised that there was much evidence to show that policies and guidelines existed but no steps were in place to monitor implementation of those steps. The Court however, felt its powers were limited to ensuring that there existed policies and guidelines but did not

58 *Government of the Republic of South Africa and Others v Grootboom and Others.*

59 Andrew Byrnes, 'Second-class rights yet again? Economic, social and cultural rights in the report of the National Human Rights Consultation' (2010) 33(1) *UNSW Law Journal* 193; Rotem Litinski, 'Economic rights: Are they justiciable and should they be?', American Bar Association, 23 July 2022.

60 *Ndoria Stephen v Minister for Education & 2 others*, Petition 464 of 2012, Judgment of the High Court of Kenya at Nairobi (2015) eKLR.

extend to ensure those policies were actually implemented.[61] Through structural interdicts, the courts have an avenue to monitor the implementation of policies and guidelines.

This remedy is effective not just in the realisation of policy but in making sure a judgment issued against the state is executed. As was highlighted in the *Mitu-Bell Welfare case* the state is quick to disregard injunctions and normally, since courts adhere to the *functus officio doctrine*, traditionally the court's hands were tied. However, by imposition of a structural interdict the court extends its power over the matter post pronouncement of a judgment.

This was highlighted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*[62] where the Court had ordered the City of Johannesburg to provide alternative accommodation and relocate residents of a building that had been declared unfit for occupation. The residents now in desperate need of alternative accommodation approached the Court to compel the City to offer an alternative in line with securing their right to housing. The Court ruled that the two parties were to engage in talks to arrive at a suitable compromise or a solution that both parties were comfortable with. A timeline was given and later extended within which to conclude talks. However, time passed and a proper solution was not provided. The existence of the structural interdict opened the door for the Court to follow up and once again interrogate the matter.

Structural interdicts also offer a means to ensure the violation of rights is stopped from occurring in the first place. The *Law Society of Kenya & 7 others v Cabinet Secretary of Health & 8 others; China Southern Co. Airline Ltd (Interested Party)*[63] case came at a time when the world was on high alert following the outbreak of the Covid-19 virus which was

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61 *Ndoria Stephen v Minister for Education & 2 others*, para 54.

62 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008).

63 *Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party)*, Petition 78, 79, 80 & 81 of 2020 (Consolidated), Ruling of the High Court of Kenya at Nairobi (2020) eKLR, para 24.

spreading fast and had devastating effects. China had been identified as a hot spot and most countries were restricting flights between China and their territories. The same was happening in Kenya. However, an announcement was made that Kenya planned to reopen its airports to receive non-essential flights from China. The Petitioners rushed to court seeking an injunction to stop this. They argued that this would put the country at risk of allowing infected individuals into the country. The petition was grounded on the possible infringement posed to the right to health and the right to life.

The Court agreed granting an injunction barring the resumption of the flights. It also imposed on the respondent the responsibility of showing the contingency plan and response system it had in place to handle a possible Covid-19 outbreak in Kenya. All these directions being put in place before the actual violation of a right occurs.

Social and economic rights are subject to progressive realisation. This has often meant the executive does not prioritise the realisation of these particular rights. In fact, when their failure or reluctance in working towards the realisation of the rights is challenged in court, they use 'progressive realisation' shield to justify their inaction. They claim the nature of these rights does not create a mandatory obligation on the state to take measures towards their realisation.[64] Structural interdicts offer a way to force the government's hand into action in terms of these often neglected rights. The Supreme Court points out that socio-economic rights like all other rights require the state to formulate the needed policy and legislation to ensure their enjoyment. Additionally, it is well within the powers of the court to apply an interpretation of the law that most favours the enforcement of the bill of rights.[65] It goes on to state that the Court can use of structural interdicts to require the government to furnish the Court with evidence that indeed it is incapable, owing to limited resources, to realise the right.[66]

[64] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 91.

[65] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 147.

[66] *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others*, Supreme Court, para 148.

6. Conclusion

Our nation has endured a history ridden with scores of human rights violations and infringements. There are several instances of the state acting in complete disregard of the rights of citizens. The courts were often either turning a blind eye or assuming the role of a toothless dog when addressing matters of the violation of rights. When it came to social and economic rights the situation was even more pitiful. In the instances when the state acknowledged them as rights to begin with, they hid behind the progressive realisation clause to justify their reluctance to work towards their realisation. Where they did make an effort, it was often in the form of well written policies and plans that were mere markings on paper with little or no implementation.

The current Constitution came in with the aim of shaking things up and changing our trajectory where the Bill of Rights is concerned. It introduced radical changes placing obligations and imposing restrictions in equal measures to ensure the rights that it guaranteed were realised and enjoyed with minimum state interference. It knew that it was prudent to appoint watch dogs because the alternative would mean lack of checks and balances. This led it to hand power to the judiciary allowing it to determine whether there was a violation and where the answer was in the affirmative, put in place the needed remedies to rectify the situation.

It was also aware that the judiciary could not act as a custodian to the Constitution with no powers to back its orders. This led it to authorise a discretion – wider than previously available – that allows the judiciary to fashion creative ways to bend the state to the will of the Constitution. One such way is through structural interdicts. Admittedly it is not explicitly listed anywhere in the Constitution. It is a tool that has emerged in the area of constitutional law and the Bill of Rights to remedy violations and infringements. The wide scope of remedies the Constitution allows the judiciary in the area has allowed for its adoption into Kenya.

The remedy has not been received by all with open arms. Some jurists still cling to the doctrines of *functus officio,* separation of power and the political question doctrine. They want to abide to the traditional powers and remedies the judiciary is granted and refuse to accept the change. The Supreme Court, the highest court in the land, has however made its pronouncement; structural interdicts are here with us and they are here to stay. However, they warrant care and proper reasoning in informing their imposition.

Structural interdicts come with challenges mainly in understanding how they operate. That notwithstanding they are an opportunity. A breath of fresh air in a land that has for long been suffocating under an iron fisted government that turned rights into luxuries enjoyed at its behest. This remedy not only loosens the noose around our necks but it forces the state to play its part as required under the Constitution. The state is brought to the mercy of the Constitution; it is finally made to work for the people who put in a position of power. This however, is only true where the remedy is imposed and imposed correctly.