
The Justiciability Paradox: Examining the Enforcement and Impact of Socioeconomic Rights in African Constitutional Jurisprudence

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Abstract

African constitutions increasingly enshrine socioeconomic rights (SERs), including housing, healthcare, and education, reflecting a progressive commitment to substantive equality. However, the practical realisation of these rights frequently encounters a significant "justiciability paradox": the tension between judicial pronouncements upholding SERs and their tangible impact on citizens' lived realities. This article examines the legal and practical challenges that impede the effective enforcement of constitutionally guaranteed SERs across various African jurisdictions. Through an analysis of landmark court decisions and jurisprudential developments across the continent, this research investigates how courts have navigated the inherent complexities of adjudicating resource-intensive rights, often balancing judicial activism against concerns of budgetary constraints and separation of powers. We scrutinise the mechanisms and remedies employed by African judiciaries and critically assess the extent to which judicial interventions have translated into meaningful improvements in access to, and quality of, essential services. The article contrasts the aspirational constitutional guarantees with the persistent implementation gaps and socioeconomic inequalities observed in practice. By highlighting the disjuncture between formal constitutionalism and actual societal change, this study aims to offer a nuanced understanding of the obstacles to SERs' realisation in Africa and propose pathways towards more effective and impactful judicial and policy responses.

Keywords: Constitutionalism, judiciary, policy, institutions, post-judgment, citizenry

1. Introduction and Background

The post-apartheid constitutional era in Africa has witnessed a remarkable trend towards the explicit entrenchment of socioeconomic rights (SERs), such as the rights to housing, healthcare, food, water, and education, within national constitutions. This development reflects a global recognition that civil and political liberties alone are insufficient to guarantee human dignity,

particularly in contexts marked by historical injustice and pervasive poverty (Alston, 1987; Brand & Russell, 2002). African states, many grappling with the legacies of colonialism and underdevelopment, have increasingly adopted constitutional frameworks that mandate positive state obligations to progressively realise these fundamental rights for their citizens (Viljoen, 2007). Jurisdictions like South Africa, with its groundbreaking 1996 Constitution, and more recently Kenya (2010), have become prominent examples of this progressive constitutional design, theoretically offering robust legal avenues for citizens to claim their fundamental entitlements.

1.1 Problem Statement: The Justiciability Paradox

Despite this progressive constitutionalisation, the practical realisation of these enshrined SERs remains a profound and persistent challenge across the continent, creating what can be termed a "justiciability paradox" (Landau, 2010). This paradox refers to the inherent tension between the often robust and transformative judicial pronouncements on SERs and their limited, or even negligible, tangible impact on the lived realities of citizens, particularly the most vulnerable. Courts frequently issue structural interdicts or make strong declarations of rights, compelling states to take action or rectify failures (Bilchitz, 2007). However, these judicial victories often encounter significant implementation deficits, stemming from factors such as inadequate state capacity, budgetary constraints, political resistance, and insufficient institutional accountability mechanisms (Liebenberg & Young, 2012). Consequently, the promise of constitutional guarantees for SERs often founders on the rocks of practical enforcement, leaving formal legal victories to contrast sharply with persistent inequalities and unmet basic needs. This disjuncture not only undermines the efficacy of judicial review but also risks eroding public trust in constitutionalism as a vehicle for social justice.

1.2 Research Gap

While individual landmark SERs cases in Africa (e.g., *Grootboom* and *Treatment Action Campaign* in South Africa) have been extensively studied, much of the existing scholarship tends to focus on the doctrinal aspects of justiciability, judicial reasoning, and the legal merits of particular rulings (Fredman, 2011). There is a relative paucity of comparative and comprehensive research that rigorously examines the actual *enforcement mechanisms* deployed by states post-judgment and critically assesses the *tangible, on-the-ground impact* of judicial interventions across a diverse range of African contexts. Many analyses conclude at the point of the judicial decision itself, without systematically tracing the subsequent implementation journey or quantifying the extent to which these rulings have genuinely transformed citizens' access to essential services. A deeper, socio-legal inquiry is needed to bridge this gap, moving beyond abstract legal theory to confront the empirical realities of rights realisation and the specific factors contributing to the perpetuation of the "justiciability paradox."

1.3 Problem Statement:

African constitutions have increasingly embraced the explicit entrenchment of socioeconomic rights (SERs), such as access to housing, healthcare, food, water, and education. This progressive constitutional design, particularly evident in countries like South Africa and Kenya, reflects a commitment to human dignity and substantive equality, theoretically offering robust legal avenues for citizens to claim fundamental entitlements (Viljoen, 2007; Ghai & Cottrell, 2007). Courts have often responded with significant judicial activism, issuing landmark decisions that define state obligations and prescribe remedies, including structural interdicts (e.g., *Grootboom*, 2001; *Treatment Action Campaign*, 2002).

However, a profound challenge persists: the practical realisation of these enshrined SERs often falls short of their constitutional promise, creating what is termed a "justiciability paradox" (Landau, 2010). This paradox highlights the tension between powerful judicial pronouncements and their limited tangible impact on citizens' lived realities. Judicial victories frequently encounter significant implementation deficits, hindering the translation of legal rights into concrete improvements. These deficits stem from a complex interplay of factors, including inadequate state capacity, budgetary constraints, a lack of political will, bureaucratic inertia, and insufficient institutional accountability mechanisms (Liebenberg & Young, 2012; Langford, 2008).

Consequently, the aspirational promise of constitutional SERs often founders on the rocks of practical enforcement. This disjuncture not only undermines the efficacy of judicial review as a tool for social transformation but also risks eroding public trust in constitutionalism as a credible vehicle for achieving social justice in Africa. The "justiciability paradox" thus represents a critical problem, perpetuating the very inequalities these progressive constitutions aim to eradicate.

2. Methodology

This study adopts a comparative, socio-legal, and mixed-methods approach to investigate the disjuncture between judicial pronouncements on socioeconomic rights (SERs) and their tangible impact in selected African jurisdictions, bridging the gap between legal doctrine and empirical reality. Employing a multiple-case study design, the research focuses on a purposive sample of countries representing different constitutional models of SERs entrenchment: the directly justiciable model (South Africa, Kenya) and the directive principles/non-justiciable model (Nigeria, Uganda), with optional consideration of emerging hybrid models (e.g., Ghana, Malawi) for broader contextual insight. Data collection proceeds through three primary streams, beginning with a doctrinal and legal analysis addressing the core research questions. This involves systematic case law analysis and content analysis of primary legal texts (constitutions, statutes), landmark court judgments (e.g., *Grootboom*, *TAC*, *Mazibuko* in South Africa; *S.K. v. The State* in Kenya), and secondary scholarship, utilising a coding framework to extract data on SERs provisions and judicial reasoning.

2.1 Significance

This research holds significant theoretical and practical importance. Theoretically, it will contribute to a nuanced understanding of the effectiveness and limitations of constitutionalism in addressing deep-seated socioeconomic inequalities within the Global South. By offering a comparative perspective, it will enrich debates surrounding judicial power, institutional design, and the politics of implementation in nascent democracies. Practically, the findings will be invaluable for informing policymakers on the structural and systemic impediments to SERs' realisation, guiding judicial practice in crafting more implementable remedies, and empowering civil society organisations and advocates with evidence-based insights for more effective litigation strategies and advocacy. Ultimately, by dissecting the dynamics of the justiciability paradox, this study seeks to contribute to the broader goal of making constitutional SERs guarantees a lived reality for African citizens, thereby enhancing the legitimacy and transformative potential of constitutionalism on the continent.

2.2 Research Questions

1. How are socioeconomic rights constitutionally enshrined in selected African states, and what is the prevailing judicial interpretation of their justiciability?
2. What kinds of remedies have African courts typically ordered in cases of SERs violations, and what are the jurisprudential justifications behind these remedies?

3. The Legal and Constitutional Landscape of Socioeconomic Rights in Africa

The post-apartheid era has ushered in a wave of progressive constitutional reforms across Africa, prominently featuring the inclusion of socioeconomic rights (SERs). This section examines the diverse constitutional models for entrenching SERs, the evolving understanding of their justiciability, and the criteria for selecting relevant jurisdictions for in-depth study.

3.1 Constitutional Models of SERs Entrenchment

The manner in which SERs are enshrined in African constitutions significantly impacts their legal status and potential for enforcement. Broadly, three models can be identified: **Directly Enforceable Rights:** This model grants SERs the same legal status as civil and political rights, making them directly justiciable before ordinary or specialised courts. Countries adopting this approach often provide explicit constitutional provisions outlining these rights and empowering courts to order appropriate remedies for their violation. The rationale is that human rights are indivisible and interdependent, and the failure to realize SERs can undermine civil and political freedoms (Liebenberg, 2010). **South Africa:** The Constitution of the Republic of South Africa, 1996, is a leading example. Sections 26 (housing) and 27 (health, food, water, social security) explicitly guarantee these rights and obligate the state to take reasonable legislative and other measures, within its available resources, to achieve their progressive realisation. The Constitutional Court, in landmark cases like *Government of the Republic of South Africa v. Grootboom* (2001) and *Minister of Health v. Treatment Action Campaign (TAC)* (2002), has robustly interpreted these provisions, setting benchmarks for "reasonableness" and ordering the state to devise and implement coherent programs.

Kenya: The Constitution of Kenya, 2010, similarly incorporates an extensive array of directly enforceable SERs in Chapter Four (Bill of Rights), including the rights to accessible and adequate housing, reasonable standards of sanitation, clean and safe water, accessible and adequate health care services, and education (Articles 43-57). These provisions are backed by Article 23(3), which grants courts broad powers to grant appropriate relief, including declarations of rights and supervisory orders (Mutua, 2013).

3.2 Directive Principles of State Policy (or Non-Justiciable/Partially Justiciable Rights):

In contrast, some African constitutions treat SERs not as immediately enforceable individual rights, but as aspirational goals or guiding principles for state policymaking. These provisions often impose moral or political obligations on the state, rather than legal duties enforceable by courts. The traditional view is that such principles are non-justiciable due to their programmatic nature and the separation of powers doctrine (Oloka-Onyango, 1991). However, judicial attitudes towards these principles have evolved, with some courts seeking ways to indirectly enforce them.

Uganda: The Constitution of the Republic of Uganda, 1995, places SERs primarily under Chapter Four, "National Objectives and Directive Principles of State Policy." While Article VIII explicitly states that these objectives are non-justiciable, courts have, in certain instances, drawn upon them to interpret other constitutional provisions or statutory law, or to reinforce arguments in civil and political rights cases. This indirect influence can create a form of "weak justiciability" (Barya, 2003).

Nigeria: The Constitution of the Federal Republic of Nigeria, 1999, also categorises SERs largely under Chapter II, "Fundamental Objectives and Directive Principles of State Policy," stating they "shall not be justiciable." This has historically prevented direct enforcement. However, legal scholarship and some judicial opinions have argued for their indirect justiciability, particularly when linked to directly enforceable civil and political rights or international human rights instruments ratified by Nigeria (Okonkwo, 2016).

3.3 Incorporation Through International Treaties:

Beyond explicit constitutional entrenchment, SERs can also become part of a national legal framework through the incorporation of international human rights treaties. Many African states are signatories to instruments like the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights. The domestic legal effect of these treaties depends on a state's approach to international law (monism vs. dualism). In **monist** systems (less common or mixed), ratified treaties can automatically become part of domestic law, making their SERs provisions potentially enforceable. In **dualist** systems (more prevalent in common law Africa), treaties require specific legislative enactment (transformation) to have domestic legal force (Nkhoma, 2013). Even without direct legislative incorporation, courts may use ratified but unincorporated treaties as interpretative aids for constitutional

provisions or domestic legislation (e.g., in South Africa, Section 39(1)(b) of the Constitution mandates courts to consider international law when interpreting the Bill of Rights).

3.4 Defining Justiciability

The concept of justiciability lies at the heart of the "justiciability paradox," determining whether a court is competent to hear and rule on a particular matter. For SERs, this involves a contentious debate: **The Traditional Debate: SERs as Aspirational vs. Enforceable Rights:** Historically, a dominant argument against the justiciability of SERs was that they are merely "aspirational" and not suitable for judicial enforcement. Critics posited several reasons:

Separation of Powers: SERs involve complex policy choices and resource allocation, traditionally seen as the prerogative of the executive and legislative branches. Judicial intervention in these areas was viewed as an encroachment on parliamentary supremacy (Davis, 2006).

Resource Implications ("Polycentricity"): Courts lack the expertise and institutional capacity to make detailed budgetary decisions or manage complex state programs. Adjudicating SERs could lead to "judicial overreach" and potentially misallocate scarce resources, affecting other essential services (Gardbaum, 2008).

Vagueness and Indeterminacy: SERs are often framed broadly (e.g., "adequate housing"), making them difficult for courts to define, measure, and enforce with precision, unlike civil and political rights (Cassels, 1993).

Democratic Deficit: Unelected judges enforcing SERs against democratically elected governments could be seen as undemocratic and counter-majoritarian. Conversely, proponents argue for the justiciability of the **Indivisibility and Interdependence of Rights:** All human rights are inherently linked; the denial of SERs can undermine civil and political rights, and vice versa (e.g., without education, political participation is hampered). **Human Dignity:** SERs are fundamental to human dignity and a meaningful life, justifying judicial protection. **Progressive Realisation:** The concept of "progressive realisation" (ICESCR Article 2(1)) does not imply non-justiciability; rather, it requires states to take *concrete steps* towards full realisation, which courts can monitor for reasonableness. **Counter-Majoritarian Argument Rebuttal:** Courts play a crucial role in protecting vulnerable minorities against majoritarian indifference or oppression.

3.5 Evolution of Judicial Attitudes Towards Justiciability in Africa:

Over the past two decades, there has been a significant shift in judicial attitudes across much of Africa, moving from a cautious reluctance to a greater willingness to engage with SERs' justiciability. This evolution has been driven by several factors, including the explicit inclusion of justiciable SERs in new constitutions, which has directly empowered courts. **International Law:** The increasing ratification and influence of international human rights instruments have provided a normative framework and interpretive guidance for domestic courts (Heyns & Brand,

2012). **Transformative Constitutionalism:** The adoption of transformative constitutionalism, particularly in South Africa, has encouraged courts to promote social justice and address historical inequalities actively (Klare, 1998).

Civil Society Advocacy: Robust advocacy by civil society organisations and human rights lawyers has played a crucial role in bringing SERs cases before courts and shaping public discourse. **Innovative Judicial Craftsmanship:** African courts have developed innovative approaches and remedies, such as the "reasonableness review" (South Africa) and structural interdicts, to address concerns about judicial overreach and polycentricity (Bilchitz, 2007).

4.0 Judicial Approaches to SERs Enforcement: A Comparative Jurisprudential Analysis

The judicial enforcement of socioeconomic rights (SERs) in Africa presents a complex and evolving landscape, characterised by diverse constitutional frameworks, varying degrees of judicial activism, and innovative remedial strategies. This section examines the jurisprudential developments across selected African jurisdictions, assessing how courts have interpreted SERs, the remedies they have crafted, and the delicate balance they strike between rights enforcement and institutional deference.

4.1 Analysis of Landmark Court Decisions (per selected jurisdiction)

The interpretation of SERs by African courts reveals distinct patterns in judicial reasoning, particularly concerning the concepts of minimum core obligations, the reasonableness standard, and the interplay between negative and positive state obligations. **South Africa: Pioneering the "Reasonableness" Standard and Positive Obligations** South Africa's Constitutional Court has been a global pioneer in developing a sophisticated jurisprudence on directly enforceable SERs. Its approach is heavily influenced by the "reasonableness" standard, flowing from Section 26(2) and 27(2) of the Constitution, which obligate the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of these rights.

Housing (*Government of the Republic of South Africa v. Grootboom*, 2001): This landmark case concerned the state's failure to provide adequate emergency housing. The Court (per Yacoob J) famously ruled that the state's housing program was unreasonable because it failed to provide for those in desperate need who had no access to land or shelter. While it did not order the provision of specific housing units, it directed the state to devise and implement a comprehensive and effective program that included reasonable measures for the most vulnerable. This case established the "reasonableness" test for assessing state policies, emphasising the state's positive obligation to act.

Health (Minister of Health v. Treatment Action Campaign (TAC), 2002): Here, the Constitutional Court compelled the state to provide anti-retroviral drugs (Nevirapine) to pregnant women to prevent mother-to-child transmission of HIV. The Court found the state's policy of limiting access to only a few research sites unreasonable given the drugs' efficacy, safety, and relative affordability. It explicitly ordered the government to make Nevirapine available at public

hospitals where medically indicated, thereby confirming the judicial power to issue specific positive orders (Ackermann, 2006).

Water (*Mazibuko v. City of Johannesburg, 2010*): The Court here considered the water right, upholding the City's policy of providing 6,000 litres of free basic water per household per month as reasonable. While affirming a positive obligation, the Court cautiously refrained from defining a universal "minimum core" content for water, emphasising the context-specific nature of reasonableness and judicial deference to policy choices within the available resources.

These cases highlight a pattern of judicial interpretation that emphasises **positive obligations** (requiring state action), the **reasonableness standard** (to avoid judicial overreach into policymaking), and a cautious, context-dependent engagement with the **minimum core obligations** of SERs (Bilchitz, 2007). **Kenya: Embracing Direct Enforceability with Broad Interpretations** Kenya's 2010 Constitution ushered in a new era for SERs, making them directly justiciable. Kenyan courts have quickly adopted a proactive stance, interpreting these rights broadly and issuing significant remedies. **Water (*S.K. v. The State, 2013 - High Court at Isiolo*):** This case involved residents of Isiolo County seeking access to clean water. The High Court affirmed that the water right was directly enforceable and ordered the County Government to immediately begin providing safe, clean, and portable water, effectively issuing a positive obligation for service delivery. This demonstrated the judiciary's willingness to enforce SERs directly from the constitutional text.

Kenyan jurisprudence demonstrates a pattern of direct enforcement of SERs, a broad interpretation of their content, and a readiness to impose **positive obligations** on the state for their realisation, mirroring some aspects of the early South African approach. **Uganda/Nigeria: Navigating Non-Justiciability and Indirect Approaches.** In contrast, countries where SERs are enshrined as Directive Principles of State Policy, such as Uganda and Nigeria, present a more constrained judicial landscape for direct enforcement.

Uganda: While Article VIII of the 1995 Constitution declares the Directive Principles non-justiciable, Ugandan courts have sometimes drawn upon them as interpretive tools. For example, in cases involving civil and political rights, courts might refer to a directive principle on health or education to underscore the contextual importance of other rights (e.g., the right to life or dignity) (Barya, 2003). There have been attempts by scholars to argue for their "indirect justiciability" or that they impose positive obligations on the state to progressively realise them (Kibandama, 2011), but these arguments have met with limited success in compelling direct orders for SERs.

Nigeria: Chapter II of the 1999 Constitution similarly declares SERs non-justiciable. Nigerian courts have consistently upheld this non-justiciability, preventing direct enforcement actions to compel the state to provide specific SERs (Okonkwo, 2016). However, there's a growing academic debate and some judicial dicta suggesting that international human rights instruments ratified by Nigeria (like the African Charter) could provide an alternative route for justiciability,

or that SERs should be seen as inextricably linked to directly enforceable civil and political rights (e.g., a linkage between the right to life and the right to health). Despite these arguments, concrete judicial orders for the direct provision of SERs remain rare.

4.2 Remedies

African courts, particularly where SERs are directly justiciable, have developed a range of innovative remedies designed to address state non-compliance and advance SERs' realisation, while also attempting to respect institutional boundaries. **Declaratory Orders:** These are the most common and least intrusive remedies. A court declares that a state has violated a SER or that a particular policy is inconsistent with the constitutional right. While not directly compelling action, declarations provide authoritative legal interpretations, clarify state obligations, and serve as powerful tools for advocacy and political pressure (Liebenberg, 2010). For instance, a court might declare that a particular group's right to housing has been violated without specifying how the state must remedy the violation. **Structural Interdicts and Supervisory Orders:** These are more proactive and interventionist remedies. A structural interdict is an order requiring the state to provide a plan for how it will comply with its obligations under the SERs, often within a specified timeframe. A supervisory order goes further, allowing the court to retain jurisdiction over the matter to monitor the implementation of its original order or the state's submitted plan (Young, 2009).

Example: In *TAC* (2002), the South African Constitutional Court ordered the government to implement a national program for Nevirapine provision and submit reports to the court, effectively exercising a supervisory role. Similarly, in other SERs cases, courts have ordered municipalities to develop housing plans or sanitation strategies. **Damages and Compensatory Remedies:** While less common for the direct provision of SERs, courts may award damages or compensation in specific circumstances, especially where a SERs violation has a direct link to a breach of a civil or political right (e.g., right to dignity, freedom from cruel and inhuman treatment) or involves gross negligence resulting in demonstrable harm. For example, individuals subjected to unlawful forced evictions that result in the loss of property or livelihood might be compensated.

Mandamus Orders to Compel State Action: A mandamus order is a judicial command to a government official or body to perform a specific duty, often one that is legally required. In SERs cases, courts might issue such orders to compel the state to implement existing policies or to initiate specific actions that are clearly mandated by law or prior judicial rulings. These are typically used when the state owes a clear, non-discretionary duty (Bilchitz, 2007).

4.3 Judicial Activism vs. Restraint

African courts enforcing SERs frequently grapple with the delicate balance between robustly protecting rights and exercising judicial restraint, particularly with respect to the separation of powers and resource allocation. **Balancing Rights Enforcement Against Separation of Powers Concerns:** Judicial engagement with SERs is often criticised for allegedly encroaching on the executive and legislative policy-making domains (Davis, 2006). Courts typically respond by

using the "Reasonableness" Test: As seen in South Africa, this allows courts to assess the rationality and fairness of state policies without dictating specific policy content, thus granting some deference to state actors (Klare, 1998). **Focusing on Process rather than Outcomes:** Courts may order the state to develop, or revise plans, rather than immediately provide services, leaving the precise implementation to the executive.

Avoiding "Super-Legislator" Role: Courts generally avoid prescribing specific budget allocations or detailed policy blueprints, acknowledging their lack of technical expertise and democratic legitimacy in these areas. **Judicial Considerations of Resource Constraints and Budgetary Implications:** The explicit inclusion of "available resources" in many SERs provisions (e.g., South Africa's Constitution) directly confronts courts with the reality of limited state budgets. Courts typically address this by: **Progressive Realisation:** Acknowledging that full realisation may take time and resources, demanding that the state demonstrate genuine, continuous progress rather than immediate full provision. **Avoiding Direct Budgetary Allocation:** Courts generally refrain from ordering the reallocation of specific funds, which would constitute a direct intrusion into parliamentary budgetary authority.

4.4 Emphasis on Reasonable Measures within Available Resources:

Courts assess whether the state has taken reasonable steps to utilise *existing* resources effectively, prioritising the most vulnerable, and not whether the state has *enough* resources (Liebenberg, 2010). They can hold the state accountable for demonstrating that a lack of resources is genuine, and not a result of mismanagement or poor planning. **Minimum Core as a Floor:** While controversial, some argue that courts should define a non-derogable "minimum core" for certain SERs, below which no state policy can fall, regardless of resource constraints (Brand & Russell, 2002). The jurisprudential landscape thus reflects a complex and ongoing dialogue between courts and other branches of government, where judicial power is increasingly deployed to enforce SERs, yet often with an awareness of the institutional limits and the need for collaborative governance for effective implementation.

5. Practical Challenges to Implementation and Enforcement of SERs Judgments

The justiciability paradox, as previously discussed, largely crystallises in the post-judgment phase. While African courts have demonstrated increasing willingness to interpret and enforce socioeconomic rights (SERs), the translation of judicial orders into tangible improvements for citizens faces a myriad of formidable practical challenges. These obstacles often lie beyond the courtroom and within the operational realities of the state and its institutions, forming the crux of the implementation deficit (Mbazira, 2009; Langford, 2008).

5.1 State Capacity and Resource Limitations

One of the most frequently cited justifications for governmental inaction on SERs, and a significant impediment to implementing judicial orders, is the issue of limited state capacity and scarce resources. **Inadequate Budgets, Lack of Infrastructure, and Human Resource Deficits:** Many African states operate under severe financial constraints, limiting their ability to

fund comprehensive SERs programs (Liebenberg & Young, 2012). Judicial orders, particularly those requiring the expansion of services or infrastructure (e.g., building clinics, schools, housing units, or water reticulation systems), often come with substantial price tags. Even when funds are theoretically available, the practical infrastructure for delivery may be absent or dilapidated. Furthermore, a persistent deficit of skilled human resources – doctors, nurses, teachers, social workers, and even competent administrators – can cripple efforts to scale up service provision, irrespective of judicial directives (Fredman, 2011).

Challenges in Disaggregating and Targeting Resources Post-Judgment: Judicial orders frequently call for specific interventions, such as providing emergency housing for a particular community or ensuring access to a specific medicine. However, government budgets are typically allocated in broad categories (e.g., "health budget," "education budget"). Disaggregating these funds and strategically targeting them to comply with a court order, especially for a specific group, can be administratively complex and politically fraught (Wilson, 2009). This often leads to delays as departments scramble to find funding within existing, already stretched, envelopes or request supplemental appropriations, which may not materialise.

5.2 Political Will and Institutional Resistance

Even in the presence of resources, the implementation of SERs judgments can be undermined by a lack of political will and entrenched institutional resistance. **Executive and Legislative Reluctance to Comply with Judicial Mandates:** Judicial orders on SERs, by their very nature, often intrude into areas traditionally considered the domain of the executive and legislature. Governments may perceive these orders as an unwarranted judicial overreach into policy-making and resource allocation, leading to reluctance, passive non-compliance, or outright defiance (Landau, 2010). Political leaders might prioritise other spending or strategic goals over costly judicial directives, especially if compliance is perceived to have limited electoral benefits or generates opposition from powerful vested interests. Appeals and delays in compliance can be tactics to defer or avoid difficult political choices (Maimela, 2014).

Bureaucratic Inertia and Lack of Coordination: The vast and often complex bureaucratic machinery of the state can be slow to adapt and respond to judicial mandates. Inter-departmental coordination is frequently poor, with different ministries (e.g., Housing, Finance, Social Development) often having conflicting priorities, limited communication, or even adversarial relationships. This inertia can lead to significant delays, fragmented responses, and a failure to implement the holistic solutions often envisioned by the courts (Young, 2009). The lack of a clear, dedicated implementation task force or a single point of responsibility can exacerbate these issues.

5.3 Corruption and Governance Deficits

Pervasive corruption and broader governance deficits in many African states represent a profound and often insidious challenge to the effective implementation of SERs judgments. **Diversion of Funds Intended for SERs Implementation:** Court-ordered funds or resources

earmarked for SERs programs are vulnerable to corruption. Funds meant for constructing schools, clinics, or sanitation facilities can be siphoned off through inflated contracts, illicit procurement practices, or outright embezzlement (Transparency International, 2021). This directly undermines the state's capacity to comply with judicial directives, often leaving projects unfinished or substandard, despite the official allocation of resources.

Impact of Patronage Networks on Equitable Service Delivery: Patronage and clientelism can distort the allocation of public services, diverting resources to politically connected individuals or regions at the expense of those most in need. Even when a court orders the provision of a service to a specific vulnerable community, political interference can redirect efforts or resources to other areas deemed more politically expedient, thereby bypassing the judicial mandate and exacerbating inequity (Khan, 2000). This systemic issue fundamentally challenges the principle of universal access inherent in SERs.

5.4 Monitoring and Accountability Deficits

Even with the best intentions, the absence of robust monitoring and accountability mechanisms can render SERs' judgments ineffective. **Lack of Effective Post-Judgment Monitoring Mechanisms by Courts or Independent Bodies:** While some courts issue supervisory orders, their capacity to effectively monitor complex, long-term implementation plans is often limited by resources, expertise, and their institutional role. The judiciary is typically ill-equipped to act as an executive oversight body (Mbazira, 2009). Independent bodies, such as National Human Rights Institutions (NHRIs) or ombudsmen, theoretically play a crucial monitoring role. However, many NHRIs in Africa suffer from insufficient funding, lack of independence, or limited enforcement powers, which curtail their ability to ensure state compliance with judicial SERs orders (Heyns & Brand, 2012).

Limited Citizen Participation and Oversight in Implementation Processes: Effective accountability requires active involvement from the beneficiaries themselves. However, limited access to information, low levels of legal literacy, geographical remoteness, and fear of reprisal can restrict citizens' ability to monitor implementation progress, demand accountability, or report non-compliance effectively. Without sustained pressure from civil society and grassroots communities, states may find it easier to ignore or delay compliance (Liebenberg, 2010). This lack of robust external oversight creates an environment where non-compliance can persist largely unaddressed.

6. Explaining the Justiciability Paradox: Synthesis and Discussion

The preceding analysis has illuminated the multifaceted nature of the "justiciability paradox" in African constitutional jurisprudence. While robust constitutional guarantees and an increasingly assertive judiciary strive to uphold socioeconomic rights (SERs), their tangible impact on citizens' lives remains profoundly constrained. This section synthesises the findings from legal doctrine, implementation challenges, and impact assessment to construct a comprehensive

explanation for this paradox, integrating critical perspectives and considering its broader implications for constitutionalism in Africa.

6.1 Recapitulating the Paradox: From De Jure Recognition to De Facto Disconnect

The paradox fundamentally arises from the stark disconnect between the *de jure* (legal) recognition of SERs and their *de facto* (actual) realisation. As discussed in Section 2, many African constitutions explicitly enshrine SERs, moving beyond mere aspiration to establish enforceable entitlements, particularly in jurisdictions like South Africa and Kenya. Judicial interpretation, often guided by principles of progressive realisation and reasonableness, has translated these guarantees into concrete state obligations, frequently resulting in landmark court decisions (Section 3). Courts have innovated with remedies, issuing structural interdicts and supervisory orders to compel state action and monitor compliance.

However, Section 4 unequivocally demonstrates that these judicial victories frequently encounter a formidable array of practical barriers, including insufficient state capacity, resource limitations, a lack of political will, bureaucratic inertia, pervasive corruption, and inadequate monitoring mechanisms. The intended positive impact of these legal interventions on citizens' access to housing, healthcare, education, and other vital services often remains elusive. This persistent gap between strong legal commitments and limited empirical progress on the ground forms the core of the justiciability paradox, revealing that formal legality alone is insufficient to address deeply entrenched socioeconomic inequalities. The paradox signifies a systemic failure not just of individual cases, but of the entire machinery designed to translate rights into reality.

6.2 Interplay of Factors: A Systemic Perpetuation

The justiciability paradox is not attributable to a single cause but rather to a complex and often reinforcing interplay of legal, political, economic, and institutional factors. **Legal and Jurisprudential Ambiguity:** Despite judicial efforts to define SERs, their inherent programmatic nature can still lead to ambiguity. Courts, grappling with the "polycentricity" argument (Gardbaum, 2008), often resort to reasonableness tests that, while designed to respect separation of powers, can also dilute the specificity of state obligations, making compliance harder to monitor. Furthermore, the limited scope of remedies (e.g., a court cannot simply create a budget) constrains judicial efficacy.

Political Will and Executive Resistance: A fundamental obstacle is often the lack of genuine political will to implement costly or politically unpopular judicial mandates (Landau, 2010). Executive branches may view judicial orders as an infringement on their policy-making prerogatives, leading to passive non-compliance, deliberate delays, or the strategic use of appeals. This resistance can be fueled by a desire to prioritise other political agendas or to avoid reallocating resources that might benefit specific constituencies at the expense of others.

Economic Realities and Structural Constraints: While not an excuse for inaction, genuine resource scarcity in many developing African nations means that even well-intentioned governments struggle to meet all SERs obligations simultaneously. However, this is often compounded by structural economic inequalities and reliance on external aid, limiting fiscal autonomy. The argument of "available resources" can also be disingenuously employed to justify inaction when political priorities lie elsewhere (Liebenberg & Young, 2012).

Institutional Incapacity and Governance Deficits: Weak state institutions, characterised by bureaucratic inertia, poor inter-departmental coordination, and insufficient technical expertise, struggle to translate complex judicial directives into actionable policies and programs. This is exacerbated by pervasive corruption, which diverts funds intended for SERs projects, and by patronage networks that distort equitable service delivery, often bypassing vulnerable populations designated for relief by court orders (Khan, 2000; Transparency International, 2021).

Monitoring and Accountability Gaps: The effectiveness of judicial intervention is critically undermined by the absence of robust, independent, and well-resourced mechanisms for post-judgment monitoring (Mbazira, 2009). Courts are not equipped to oversee long-term projects, and national human rights institutions or civil society organisations often lack the mandate or resources for sustained, impactful oversight. This accountability deficit creates a permissive environment for non-compliance. These interwoven factors create a self-perpetuating cycle where constitutional promises are made, judicial efforts are exerted, but systemic barriers prevent the full translation of legal rights into lived realities, thereby entrenching the justiciability paradox.

6.3 Critiques and Alternative Perspectives: Engaging with TWAIL

Understanding the justiciability paradox also necessitates engagement with critical perspectives, notably those from **Third World Approaches to International Law (TWAIL)** and socio-legal studies. TWAIL scholars argue that the very framework of modern constitutionalism, even with its progressive SERs provisions, can inadvertently perpetuate existing inequalities, particularly in post-colonial contexts (Chimni, 2004; Anghie, 2005).

Eurocentrism and Borrowed Forms: TWAIL critiques the idea that Western-style constitutionalism, often adopted by African states post-independence, is a universally benevolent or effective model. It suggests that these "borrowed forms" of law, while appearing progressive, may not adequately address deep-seated structural issues rooted in colonial exploitation and global economic hierarchies. The assumption of a highly functional, well-resourced state that underpins much of Western constitutional theory often does not hold in many African realities.

Legitimation of Inaction: From a TWAIL perspective, the justiciability paradox might not be an accidental failure but rather an inherent feature, or even a subtle legitimiser of inaction. The emphasis on "progressive realisation within available resources" can become an escape clause, justifying the continuous deferral of full SERs enjoyment. The paradox allows states to maintain a facade of constitutional commitment to rights while avoiding the politically challenging and resource-intensive actions required for substantive change. This frames the problem not merely

as an implementation challenge, but as a potential indictment of the constitutional model's transformative capacity when divorced from critical socio-economic and historical analysis.

Beyond Judicialization: Critical scholars question whether judicialization is always the most effective or appropriate means for achieving social justice, particularly for SERs. They suggest that over-reliance on courts might distract from, or even depoliticise, the necessary political and social mobilisation required to demand state accountability and effect systemic change (Kagira & Maithya, 2018).

6.4 Broader Implications for Constitutionalism: Legitimacy, Rule of Law, and Social Transformation

The justiciability paradox carries profound implications for the very foundations of constitutionalism in Africa: **Erosion of Democratic Legitimacy:** When robust constitutional promises, especially those concerning fundamental human needs, consistently remain unfulfilled, it erodes public trust in democratic institutions and the constitutional order itself. Citizens may become disillusioned with the rule of law, perceiving it as an elite construct detached from their daily struggles, thereby undermining the social contract (Mbazira, 2009).

Undermining the Rule of Law: Persistent non-compliance with judicial orders, particularly from executive actors, challenges the fundamental principle that no one, including the state, is above the law. This selective adherence to legal mandates weakens the authority of the judiciary and can foster a culture of impunity (Ghai & Cottrell, 2007).

Limits to Social Transformation: If constitutionalism, even with its SERs provisions, cannot effectively drive social transformation and address historical inequalities, its transformative potential is severely curtailed. This necessitates a critical re-evaluation of how constitutional design, judicial capacity, and political will can be better integrated to achieve substantive justice.

Rethinking State-Society Relations: The paradox highlights the need for a more dynamic and interactive relationship between the state and civil society in SERs realisation. It calls for exploring alternative or complementary mechanisms beyond litigation, such as participatory budgeting, strengthened legislative oversight, and robust, independent human rights institutions, to push for greater accountability and impact.

In essence, the justiciability paradox is a critical barometer of the health and effectiveness of African constitutionalism. Explaining its persistence requires moving beyond a simplistic blame game to a nuanced understanding of how legal doctrine, political realities, economic constraints, and historical legacies collectively shape the struggle for SERs realisation.

6.5 Conclusion and Recommendations

Summary of Key Findings

This article has critically examined the "justiciability paradox" in African constitutional jurisprudence, revealing a profound and persistent disconnect between the progressive

constitutional entrenchment of socioeconomic rights (SERs) and their limited tangible impact on citizens' lived realities. While many African constitutions, particularly those of South Africa and Kenya, have provided robust legal guarantees for SERs, fostering an era of significant judicial activism and innovative remedial orders (as explored in Section 3), these legal victories frequently fail to translate into meaningful improvements on the ground.

The core of the paradox lies in the formidable practical challenges identified in Section 4. These include: severe state capacity and resource limitations, often exacerbated by the administrative complexity of disaggregating and targeting resources post-judgment; a pervasive lack of political will and institutional resistance from executive and legislative branches; endemic corruption and broader governance deficits that divert funds and distort equitable service delivery; and critical monitoring and accountability deficits across the implementation chain. As discussed in Section 6, this systemic interplay of legal, political, economic, and institutional factors collectively perpetuates the paradox. Furthermore, engaging with critical perspectives like TWAIL highlights how the constitutional framework, despite its progressive facade, can inadvertently legitimise inaction and entrench existing inequalities, raising fundamental questions about the efficacy and transformative potential of constitutionalism in post-colonial Africa. The justiciability paradox thus represents a critical challenge to the democratic legitimacy and rule of law in many African states.

6.6 Recommendations for Enhancing SERs Realisation

Addressing the justiciability paradox requires a multi-faceted and coordinated approach, engaging all branches of government, civil society, and the international community.

- 1) **The Judiciary:** While African courts have shown commendable innovation, their role in bridging the implementation gap can be further strengthened by:
 - **Crafting More Context-Sensitive and Implementable Remedies:** Courts should move beyond generic orders to develop remedies that are highly specific, phased, and financially viable, potentially incorporating detailed implementation plans submitted by the state (Liebenberg & Young, 2012).
 - **Utilising Expert Panels and Amicus Curiae:** To overcome limitations in technical expertise, courts can increasingly rely on independent expert panels or specialised bodies (e.g., human rights commissions, planning experts) to assist in crafting and monitoring structural interdicts, thereby ensuring the feasibility and effectiveness of orders.
 - **Promoting Participatory Remedial Processes:** Involving affected communities and civil society organisations in the design and monitoring of remedies can enhance the legitimacy and sustainability of implementation efforts (Mbazira, 2009).
- 2) **Executive & Legislature:** The primary responsibility for SERs' realisation lies with the political branches. Recommendations include:
 - **Prioritising SERs in Budgeting and Planning:** Governments must demonstrate genuine political will by allocating sufficient and ring-fenced resources for SERs, aligning national development plans with constitutional obligations, and conducting human rights-based budgeting (Wilson, 2009).

- **Enhancing Inter-Departmental Coordination:** Creating dedicated inter-ministerial task forces or mechanisms to coordinate SERs implementation across relevant departments can overcome bureaucratic inertia and improve service delivery efficiency.
 - **Strengthening Anti-Corruption Measures and Governance:** Robust anti-corruption laws, transparent procurement processes, and severe penalties for embezzlement are critical to prevent the diversion of funds intended for SERs, ensuring resources reach beneficiaries (Transparency International, 2021).
- 3) **Civil Society:** Civil society organisations (CSOs) play a crucial role in enhancing accountability and driving change:
- **Enhanced Monitoring and Documentation:** CSOs should strengthen their capacity for independent monitoring of SERs implementation, collecting empirical data on impact (or lack thereof) to hold governments accountable and inform legal interventions.
 - **Strategic Advocacy and Litigation:** Moving beyond individual cases, CSOs can pursue strategic litigation that targets systemic issues, while also engaging in public awareness campaigns and lobbying efforts to build political pressure for compliance.
 - **Collaborative Engagement:** Building constructive partnerships with state institutions, where possible, can facilitate information sharing, joint problem-solving, and more effective program design and implementation.

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