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The right to access to essential goods and the sub-Saharan Africa's courts
A comparative outlook

Abstract
The paper is aimed at outlining some trends in the legal enforcement of the right to access to essential goods in sub-Saharan Africa, through the analysis of some judicial decisions issued during the early stage of the Covid-19 Pandemic. The analysis is framed within the assessment of some general evolutions of African constitutionalism and of its specific stance towards states' interventionism for socio-economic development. At the same time, a comparative inquiry into the decisions examined presents some elements to draw some conclusions concerning the potential and obstacles of the evolution of an original model of African development law.

Keywords: Sub-Saharan Africa constitutionalism – Covid-19 Litigation – Access to essential goods – Directive Principles of State Policy – Pandemic crisis

Abstract
Il contributo è finalizzato a presentare alcune tendenze nell'*enforcement* giuridico del diritto di accesso ai beni fondamentali nell'Africa sub-sahariana, attraverso l'analisi di alcune decisioni giudiziali emesse durante la prima fase della pandemia da Covid-19. L'analisi è inquadrata in una valutazione di alcune evoluzioni generali del costituzionalismo africano e della sua specifica posizione nei confronti dell'interventismo statale ai fini dello sviluppo socio-economico. Al tempo stesso, un'indagine comparata sulle decisioni esaminate offre alcuni spunti per trarre delle conclusioni riguardo alle potenzialità e agli ostacoli dell'evoluzione di un modello africano originale di diritto dello sviluppo.

Parole Chiave: Costituzionalismo in Africa sub-sahariana – Controversie giudiziali in materia di Covid-19 – Accesso ai beni essenziali – Principi Direttivi della Politica Statale – Crisi pandemica

1. Introduction

The Covid-19 pandemic subjected national legal systems to the great challenge represented by the balancing between fundamental rights and public health necessities, as implemented through lockdown provisions[1]. With specific regard to social and economic rights, such balancing inevitably affected the determination and evolution of national economic policies during the pandemic and, as a

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[1] Cafaggi-Iamiceli (2021: 159-180).

consequence, the impact of Covid-19 on the development models pursued by states[2]. Indeed, the broad reference to socio-economic rights and freedoms implies a double perspective. On the one hand, emergency provisions are in potential conflict with basic economic freedoms—first and foremost, with the freedom to conduct a business—as public powers prohibit or limit business operations, thus clashing with the "negative duty" of abstention from interventionism, as upheld already by the classic nineteenth century liberal constitutionalism and later reformulated by the neoliberal thinking from the 1970s onward[3]. From a comparative perspective, the institutional empowerment of neoliberist theories meant not only the (partial) abstention of the State from the engagement in deep-reaching development planning operations—as such conflicting with private economic initiatives—but also an enhanced circulation of models of economic regulation shaped upon common law standards, perceived as better serving the purpose of protecting economic freedoms[4].

In the second place, however, socio-economic rights have also referred, in times of pandemic, to positive duties, enshrined in constitutions, to be undertaken by public powers in order to guarantee basic social and economic necessities for the population. From this perspective, the pandemic affects the implementation of policy-driven constitutional environments, aiming at tackling social hardships and inequality[5].

Indeed, socio-economic rights are an inherent part of the discourse of constitutionalism, especially starting from the second half of the 19th century. However, their integration in constitutional texts varies greatly, especially in terms of implementation mechanisms, since such rights may be intended either as directly justiciable principles or as aspirational ones, framed within a set of directive principles of state policy, as such following the Indian example[6]. In this second instance, nonetheless, constitutionalized socio-economic policies, though not linked to a direct judicial action to ensure their fulfilment, may very well be interpreted and referred to by courts in order to adjudicate disputes or issue specific orders to public authorities[7].

This paper is meant to emphasize the development of courts' reasoning in interpreting a set of specific socio-economic rights in times of pandemic, i.e., the rights of access to essential goods. The geographical scope of the analysis concerns three sub-Saharan republics, namely South Africa, Uganda and Zimbabwe. The research stems from the "Covid-19 Litigation Project," whose reliance on a wide network of partners and research collaborators made it possible to collect a large number of judicial decisions concerning potential and actual conflicts between pandemic-related emergency measures and fundamental rights[8].

[2] Sabatino (2021: 225-269).
[3] *Ibidem*.
[4] Somma (2019: Ch. 3 § 3 and Ch. 4).
[5] On the widening gap among socio-economic groups within countries and among countries, during and after the pandemic, see Esseau-Thomas-Galarraga-Khalifa (2022: 1-15); Gopalakrishnan-Wadhwa-Haddad-Blake (2022).
[6] Jung-Hirschl-Rosevear (2014: 1043-1093).
[7] Bhatia (2016); Francavilla (2010: 66-67); Amirante (2007).
[8] The "Covid-19 Litigation Project" is coordinated by the University of Trento (scientific coordinator: Prof. Paola Iamiceli) and co-financed by the World Health Organization. Its main purpose is to «the litigation stemming all over the world from challenges related with public health measures adopted within the pandemic». For detailed information about the project and its network, as well as for access to the project database, see https://www.covid19litigation.org/ (last access: 13th February 2022).

This brief overview is therefore meant as a by-product of the research activity carried out within the context of such project. In particular, the main goal of this work is to provide a specific focus on the legal reasoning developed by national courts to deal with requests concerning supplies of essential goods and services, as well as the concrete solutions adopted. Given the complex and often worrisome socio-economic contexts from which disputes concerning access to essential goods/services arise, the comparative effort commencing from the analysis of relevant case law implicitly sheds light upon the interplay between legal backgrounds, legal instruments for social interventionism and economic policies in sub-Saharan countries.

The historical context, furthermore, is indeed critical not only due to the consequences of the pandemic in Africa, but for Africa's strategic positions in the international legal and economic order. As the pandemic polarizes confrontations between development models—especially along the US vs. China divide—Africa seems to lose part of its strategic importance in the conflict among approaches to international development law and assistance[9]. Starting from the 1970s and with renewed force since the 1990s, sub-Saharan Africa had indeed been a great laboratory for the neoliberist interpretation of the law and development movement, albeit with disputable outcomes[10]. After the end of the cold war and the emergence of the doctrines of sustainability, the international efforts directed at the continent and channelled through the strategies of international organizations have sought to pursue a difficult (or, according to some, impossible) balance between market mechanisms, westernization of property rights and contractual transactions, and socio-economic interventionism, especially in order to provide basic living conditions to severely underdeveloped contexts[11].

The pandemic appears to change such landscape, while strengthening some tendencies already in place at the beginning of the century. The diversification of emergency responses to the health crisis among nations, coupled with geopolitical polarization, may change the nature as well as the orientation of international development law and assistance, in terms of an increasing nationalization of external aid schemes and strategies. As such, Africa is clearly exposed to the chance of becoming (even more) a battlefield for newly competing world powers, acting (also) through sanitary aids.

Such peculiar evolution of Africa's position in the international order offers a further perspective to be used to frame the judicial response to the emergency in selected African legal system within the landscape of public interventions (both domestic and international) in the post-Covid geopolitics.

The paper is divided into three main parts. The first part will offer a brief overview of the pandemic's impact on the selected legal system from the perspective of their systemic and constitutional background. The second part will outline a comparative analysis of the judicial interpretation of the right to access to essential goods and services during the pandemic. The third and final part will draw some conclusions concerning the positioning of the selected African legal system in the post-pandemic international legal order.

[9] Fidler (2020: 31-48).
[10] Somma (2019).
[11] *Ibid.*

2. Putting the pandemic in context. The development of sub-Saharan legal systems and the health emergency

In the eyes of several comparative lawyers, sub-Saharan Africa has always represented an incomplete and inherently transitional legal universe, due to the complex interactions among social forces continuously shaping and re-shaping the material constitutions of the several countries in the area[12]. A more profound analysis points out peculiarities in the very notion of political (and legal) power, deeply affected by the refusal of the principle of majority in favour of that of unanimity, as entrenched in the traditional chthonic legal cultures[13]. Such distinctive features are reflected by somewhat weak (or "thin") notions of rule of law, engaged in egalitarian (and sometimes ancillary) competition with systems of rules pertaining to a vast and diverse ensemble of social and political communities[14].

On the other hand, in the sub-Saharan context, the South African experience represents a model of pluralist democracy whose socio-economic progressist ethos relies also on the active role played by the courts, also at odds with the political trends advocated by the government.

Within such context, the circulation of legal models draws from a process of accumulation of legal traditions which, though with several profound differences, displays some common trends. Therefore, for instance, the Roman-Dutch law vehiculated by the experience of Dutch and later English colonisation of southern Africa, strengthened the role of the law of South Africa as a feasible model for neighbouring countries such as Namibia (which was actually occupied by South Africa up to 1990), Botswana, Lesotho, Swaziland and Zimbabwe[15]. In particular, Zimbabwean courts display some degree of deference towards South African case law, justified by a perceived common legal tradition[16].

From the constitutional point of view, the sub-Saharan experience, especially in recent decades, emphasizes a choice towards liberal-democratic models encapsuled in constitutional texts rich with statements upholding social harmony and progress, seeking integration between structures of foreign constitutionalism and protection of local identities[17]. Such picture, nonetheless, inevitably highlights the distance between form and substance. Social pluralism conceals trends of resistance by local communities and customs against the state-enforced orders, while the very core of liberal democracy—i.e., the multiparty elections—follows complex and even confusing dynamics which very rarely imply a peaceful alternance between political parties[18]. As politics are inherently embedded within relational networks which sustain themselves through use (and even exploitation) of public organizational structures, the sub-Saharan party model is no stranger to the entrenchment of authoritarian bureaucracies, often embodied by individual leaders[19]. In some countries, such as Zimbabwe, this context is coupled with a decisive presidential orientation of the constitutional architecture, which inevitably affects judicial independence[20].

[12] Orrù (2020: 4109-4134); Sacco (1995).
[13] Glenn (2014).
[14] Chigudu (2019).
[15] On the development of Roman-Dutch law see Du Bois (2004: 1-8).
[16] Madhuku (2010: 18 ff.).
[17] Orrù (2020: 4109-4134).
[18] *Ibid.*; Bleck-Van de Walle (2019); Chigudu (2019).
[19] Carbone (2007).
[20] Chiduza (2014).

The fragmentation of the political and socio-economic environment is reflected by the uncertain constitutional status of socio-economic rights. The attention of African constitutions to such rights is rooted in the decolonization process and in the concurring debate about a new notion of international development law, also connected to the increasing relevance of post-colonial countries within the UN. In some of its most relevant contemporary epiphanies, sub-Saharan African law reflects upon the enforceability of socio-economic rights, also in the light of international law, with special regard to the International Covenant on Economic, Social and Cultural Rights [21]. Furthermore, national constitutions incorporate several related provisions. For the topic here discussed, it is important to note that the constitutions of South Africa, Uganda and Zimbabwe all contain specific provisions concerning right to access to essential goods. The South African constitution includes the right to sufficient food and water within the bill of rights (Sec. 27(1)(b)). Uganda's constitution adopts, instead, a different approach, since it lists food security as a national objective (no. XXII) and outlines the state's obligation to provide for a sound food policy in the section dedicated to the directive principles of state policy. A similar pattern is found in the Zimbabwean constitution (Sec. 15) which, however, also acknowledges a fundamental right to food and water (Sec. 77).

The inclusion of provisions about access to essential goods within the principles of state policy is worth reflecting upon from a comparative perspective: such legislative technique—i.e., that of the principles of state policy—draws from the Indian experience, which in turn was inspired by the Irish constitution, where it has been the object of debate, with regard to the practical value of such principles[22]. Their function is, indeed, mostly an interpretative one, which may, however, guide the application of other specific provisions[23].

The vague and imprecise character of socio-economic rights, as integrated in the constitutions, is acknowledged as an issue; on the other hand, Courts' orders, in the forms of the "positively-oriented" writs, are regarded as feasible means of implementation[24].

Nevertheless, a creative attitude from the courts could clash with existing socio-economic conditions which prevent a rational distribution of essential goods and resources. A classic example concerns access to water. In most sub-Saharan countries—or at least in the anglophone ones—private ownership of water has been vastly limited in favor of a public management system relying on licenses for use and consumption[25]. However, the practice shows that previously existing riparian rights on water resources are often *de facto* left untouched. In the absence of a fully functioning licensing system, private users rely on the notion of existing legal use to uphold their rights[26]. In South Africa, the Water Act of 1994 maintained as legal, as a temporary measure, the riparian rights existing under the previous Act of 1956, promulgated during the Apartheid and which designed a so-called "White water economy"[27]. However, the ineffective implementation of the licensing system prolonged the existence

[21] Brennan (2009: 64-84).
[22] The model was also "exported" into the Nepali Constitution of 2015 whose Part 4 concerns the Directive Principles, Policies and Responsibilities of the State.
[23] Bhatia (2016); Francavilla (2010).
[24] Brennan (2009: 64-84).
[25] Bosch-Gupta (2020: 205-224).
[26] *Ibid.*
[27] *Ibid.*; Couzens (2015: 1162-1186).

and the *de facto* legitimacy of such rights, even after the promulgation of the National Water Act in 1998. In 2016, only 2,77% of the total water was subjected to compulsory licensing[28].

Furthermore, the commercialization of water in the recent decades led to serious social problems, since it connects access to water to the customers' ability to pay. A neoliberist trend in case law upheld the constitutionality of such "market-based" approach, even when applied to the poorest residents[29]. Such was the critique received by the South African Constitutional Court in the case *Mazibuko v City of Johannesburg*[30], where the court held that the constitutional right to access to water does not require everyone is provided with sufficient water by the state[31]; instead, it requires that the state take action (in terms of legislation or other measures) to achieve, on the basis of the available resources, a future goal of universal access to water[32].

After *Mazibuko*, indeed, South African courts also took different approaches and even upheld the direct enforceability of the constitutional right to water[33]. On the other hand, the conflicting trends among judicial decisions and the fragmented socio-economic background give a sufficiently clear picture of the context which the pandemic happened upon. As emphasized by scholars, the legal responses of sub-Saharan legal systems to the Covid-19 pandemic do not differ, substantially, from the ones adopted by non-African states[34]. The limitations of individual freedoms, from that of movement to that of business, as well as extensive lockdowns, as that occurred in South Africa in 2020, followed patterns which are comparable with European trends[35].

At the same time, however, the underlying political and socio-economic conditions affected by such measures implied peculiar issues and challenges for the government response to the pandemic. In particular, the presence of frail economic systems, mostly based on informal work, thus lacking any protection scheme, represented a direct challenge to the implementation of those rights to access to essential goods (especially food and water), leading some governments to launch emergency food aid schemes[36]. Some surveys, on the other hand, have pointed out how in several African countries (e.g. Sierra Leone, Tanzania) the lockdown measures taken with regard to business activities were quite mild, especially if compared with long-lasting shutdowns of economic activities occurred in Europe[37].

In other cases, the pandemic occurred in times of great political turmoil, such as in Zimbabwe, where emergency measures also assumed a clear political aim in managing the political uneasiness following the coup of November 2017 which led to a change in regime[38]. In such case, the dialectic between the government and the judiciary, which, from a global perspective, represented the most dynamic tool of legal adaptation to the pandemic, was certainly affected by the governmental

[28] Bosch-Gupta (2020: 205-224).
[29] Couzens (2015 : 1162-1186).
[30] 2010 4 SA 1 (CC).
[31] § 57.
[32] § 50.
[33] *City of Cape Town v Marcel Mouzakis Strümpher* 2012 ZASCA 54 (2012).
[34] Orrù (2020: 2189-2216); Nicolini (2020: 4289-4304).
[35] Staunton-Swanepoel-Labuschaigne (2020: 1-12); Nicolini (2020).
[36] Orrù (2020: 2189-2216); Malunga Acidri (2020).
[37] Haider et al. (2020).
[38] Moyo-Ivumile Phulu (2021: 48-66).

intervention which, through a constitutional amendment, has given the President of the Republic more powers in the appointment of constitutional judges[39].

Such uneven responses to the pandemic are on the one hand linked to the aforementioned critical development conditions. On the other hand, however, they also reflect a complex common sentiment toward Covid-19, exposed to skepticism toward scientific reactions to the health crisis. Such skepticism – mirrored by the increasing fortune experienced, in Africa – by conspiracy theories concerning the virus origins, has also led to a relatively low grade of vaccine acceptance[40]. The reasons of such widespread distrusts are obviously multifaceted and to a significant degree are embedded in cultural paradigms, local religious manifestations, perceived separation between social communities and state structures[41].

Against this background, the management of the socio-economic consequences of the pandemic acquires even more significance, since it deal with a popular sentiment less inclined to accept, from an ethical perspective, a "trade-off" between basic living necessities and the protection of life in a broader (and even ambiguous sense). This explains, at least in part, why the conflict between the health emergency and the socio-economic emergency – as fueled by lockdowns or by underlying conditions – in most cases struggles to be resolved through comprehensive governmental documents, with the partial exceptions represented, for instance, by the Health Directives relating to Covid-19 of Namibia, which combine health measures to tackle the pandemic and measures to alleviate poverty[42].

It is therefore important to look at how the courts dealt with such issues, so to comprehend their attitude toward government health and socio-economic policies, as well as their interpretation of the constitutional rights to access to essential goods. At the same time, a case law analysis could shed light over the judicial treatment and interpretation of general attitudes towards the handling of the pandemic.

3. Case law analysis

In this paragraph, we shall examine a selection of relevant decisions taken by sub-Saharan courts concerning access to essential goods such as food and water. In particular, we shall look at one decision from South Africa, one from Uganda and four decisions from Zimbabwe. After having examined the decisions, we will develop a brief comparative outlook, assessing how different courts in different countries have interpreted and enforced the aforementioned fundamental rights.

3.1 South Africa

On 17th July 2020 the Gauteng Division of the High Court of South Africa issued its judgment in case no. 22588 of 2020 – *Equal Education & others v. Minister of Basic Education & others*. The applicants sought urgent declaratory orders against the Minister of Basic Education as well as the Ministers of

[39] *Ibid.*
[40] Mugari-Obioha (2021: 277-293).
[41] *Ibid.*
[42] Nicolini (2020).

Education of several South African states concerning the failed implementation of the National School Nutrition Programme (hereinafter, NSNP). The applicants asked for a daily meal to be provided, according to the NSNP, to all qualified learners, "whether they are attending school or studying away from school as a result of the Covid-19 pandemic."

The NSNP is a programme launched right after the end of the apartheid, aimed at providing, especially for children coming from poor families, a balanced and nutritious daily meal while being educated at school. The programme is managed by the Ministry of Education and therefore the access to food is, in the matter examined by the court, deeply connected with the fundamental right to education[43]. Due to the pandemic, school was suspended throughout the country and lessons were held remotely. The NSNP, the court notes, was essentially suspended and the alleviation measures taken by the government for poor families were not a substitute. What the applicant sought was indeed an order to resume the implementation of the NSNP for all learners, both those who, once some schools are reopened, attended classes in person and those who continued to study remotely. In the applicants' argument, the suspension of the NSNP violated the right to education (Sec. 29(1)(a) of the Constitution), the right to access to food and water (Sec. 27(1)(b)) and, more in particular the right of children to basic nutrition (Sec. 28(1)(c)).

In the first place, the court points out that basic nutrition is a constitutional duty which also stems from the right to education, as directly involved in the dispute[44]. Both governmental policy documents and development plans mention that the NSNP, while concerning education, also pursues a basic aim to alleviate hunger[45]. Such aim is, furthermore, connected with obligation stemming from international conventions South Africa is part of, such as the Convention on the Rights of the Child of 1990[46].

In the second place, the court notes that the right to basic nutrition for children cannot be implemented gradually and, as a consequence, the NSNP cannot be rolled out grade by grade. The fact that, once some schools reopened on 8th June 2020, the government decided to not implement the NSNP for all learners represents an impairment of the right to nutrition[47]. In particular, after the schools reopened for learners of grades 7 and 12, only they received meals, while learners of other grades – still not attending schools and studying remotely – remained uncovered by the programme. The government explicitly upheld a phased-in approach for the resumption of the NSNP. In so doing, the court points out, the right to nutrition has been violated. The government, according to the court, did not offer proper justification for such violation, since there is no appreciable other fundamental right that explained the phased-in approach and the funding of the programme was not an issue[48]. The phased-in approach depends, therefore, on an organizational choice by the authorities, even in the absence of objective logistical obstacles for the implementation of the programme for all learners[49].

[43] Indeed, the White Paper on Reconstruction Development of 1994 mentioned that the NSNP main aim was to «improve the quality of education by enhancing learning capacity, school attendance and punctuality as well as contributing to general health development by alleviating hunger».
[44] § 42 of the decision.
[45] §§ 38.1, 38.2 and 38.3 of the decision.
[46] Art. 27 (2-3). See § 39.1 of the decision.
[47] §§ 54-55 of the decision.
[48] § 55 of the decision.
[49] *Ibid.*

Therefore, the court declared that the respondents (i.e., the central and the local governments) breached the constitutional rights of children and ordered them to resume the implementation of the NSNP for all learners.

However, the court also addresses another request from the applicants, i.e., a "supervisory interdict effectively seeking judicial supervision against the Minister and the MEC's with a step-by-step plan as to how the NSNP will be implemented with such plan to be submitted to the Court within 5 days and with follow up reports every fifteen days until the order is discharged by the Court." The issue of the supervisory interdict, as noted by the court, is connected to the respect of the principle of separation of powers and concerns the limits of the court's action toward the government[50]. At the same time, it is established case law in South Africa that certain matters may require supervisory interdicts, in light of a necessity to ensure effective relief and on the basis of a common commitment of the state's powers to uphold a vision of justice, dignity and equality[51]. The separation of powers must therefore not be interpreted as a static conception[52].

In the matter at hand, the court observed that, while the degree and significance of rights involved was high, the administrative authorities (especially at the local level) acted in an often-incoherent way in managing the resumption of the NSNP and the reopening of schools[53], especially in light of the fact the NSNP was a 26-year-old programme and not a new one. [P]The court, therefore, decided to issue a supervisory interdict, ordering the respondents "within 10 days to file at this Court under oath, and provide to the applicants, a plan and programme which they will implement without delay so as to ensure that the MECs carry out without delay their duties"[54]. At the same time, respondents are ordered to submit to the court, every fifteen days, a report outlining the steps taken in the implementation of the programme[55]. All of the documents must also be presented to the applicants.

3.2 Uganda

In the case no. 75 of 2020 – *Center for food and adequate living rights v. Attorney General* – the High Court of Uganda in Kampala decided a dispute which directly concerned the assessment of government food policies during the pandemic. The decision highlights several points worth discussing, both from the substantial and the methodological perspective, given the judicial dialogue the Court engages in. Indeed, the decision is immediately made peculiar by the specific constitutional clauses that are activated by the plaintiff in order to question state food policies, that are the Directive Principles of State Policy. In particular, the plaintiff acts upon no. XXII and XXIII of the Principles, outlining, respectively, the State's duty to encourage food storage by private citizens, encourage proper nutrition, as well as establish food reserves, and the duty to "institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities."

[50] § 87 of the decision.
[51] Constitutional Court of South Africa, *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597.
[52] *Ibid.*
[53] §§ 88.3 and following of the decision.
[54] §§ 103.09 and 103.11 of the decision.
[55] §§ 103.10 and 103.12 of the decision.

The factual background of the case is a particularly dire economic effect of the lockdown which closed down several businesses and vastly limited travel and movement of people. As a result, many people could not have access to food and, for those who did have access, prices had sharply risen. Indeed, the pandemic having happened at a time when planting had already begun, people could only get foodstuffs from shops[56].

The food distribution policy enacted by the government was judged insufficient by the plaintiff, against the background of an allegedly inexistent comprehensive food policy. The points raised concern: i) the "failure and omission to issue guidance on the access to and availability of food during the corona virus (COVID 19) pandemic"; ii) the "failure and omission to regulate the prices of food during the COVID- 19 pandemic and guidance on food reserves." As a consequence, the plaintiff asks for an order mandating the respondent, i.e., the national government, to issue guidelines concerning access and availability of food while the restrictive measures are in force, access to food from government food reserves, and food prices during the lockdown.

The failure to issue such guidelines is, from the plaintiff's perspective, a clear violation of both the Directive Principles of State Policy and the right to life, which the plaintiff derives from the general constitutional clauses protecting fundamental rights, namely Art. 8A, 20 and 45. Indeed, by referring to Ugandan case law as well as to the decision of the Supreme Court of India in *Olga Tellis & Ors –Vs- Bombay Municipal Council* ([1985] 2; SCR No. 51), the plaintiff argues that the right to life implies the right to means of livelihood, thus encompassing right to food[57].

In the peculiar situation caused by the pandemic, the lockdown produces even harsher effects, it is noticed, since most of Ugandan workers are employed in the informal sector, thus living on a day-by-day basis.

The dispute assessed by the court is heavily affected by contingencies as well as by the policy background it challenges. Indeed, the government's response to the pandemic is framed within the recommendations issued by the WHO; as such, from the respondent's perspective, the measures taken are justified by the necessity to comply with the indications coming from the international legal order.

The court clearly distinguishes between two legal issues: on the one hand, there is the alleged omission to issue guidelines on food access; on the other hand, there is the alleged omission to establish food reserves. While the right to life (and to means of livelihood) is involved in both issues, only the second issue, according to the court, also deals with no. XXII and XXIII of the Directive Principles of State Policy.

The given interpretation of the right to life is indeed not contested and is adhered to by the respondent. However, the same respondent argued that it had indeed not only implemented food distribution upon the declaration of the lockdown, but also put in place special policies for the

[56] Point 8 of the Grounds for Application.

[57] The plaintiff directly quotes the Indian Supreme Court, recalling that "The right to life includes protection of means of livelihood…the right to life, in Article 21 of the Constitution, encompassed means of livelihood since, if there is an obligation upon the State to secure to citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life." The comparative analysis carried out by the plaintiff is of particular significance because it reinforces, on the practical level, the constitutional dialogue with Indian law, already set, at the legislative level, by the transplant of the notion of directive principles of state policy.

prioritization of the vulnerable groups[58]. The court agrees with the respondent's views and declares that the right to life (implying the right to food) has not been violated. Furthermore, the court notes, once again agreeing with the respondents, that since Uganda does not have a legal regime of price control, food prices depend on the market. The protection of consumers from hoarding of goods – amounting to unethical business conducts – may also, however, be achieved through official condemnation by the competent ministry, evoking revocation of licenses and closure of business premises. The court, in other words, considers that the statement of condemnation issued by the ministry of trade is a sufficient guarantee for the protection of consumers, without need to issue guidelines on price control.

With regard to the second issue assessed, i.e., the failure to establish food reserves, the applicants rely on the judicial interpretation which considers the Directive Principles of State Policy to be directly justiciable and therefore not only a merely interpretative tool[59]. From this perspective, therefore, the objective XXII no. ii of the Directive Principles ("establish national food reserves") could be directly invoked before a court when the state fails to comply with it.

Once again, however, the court on the one hand recognizes that the right to food is constitutionally enshrined and implies a food policy which, according to the Directive Principles, concerns both the promotion of self-growing and storage of food and the establishment of food reserves; on the other hand, however, it advocates a flexible interpretation which ultimately justifies the government's conduct.

In particular, the court acknowledges that Uganda has no food reserves; however, it refers to the statements from the Ministry of Agriculture, outlining the measures (in terms of subsidies and supply of certain materials) that the government has been implementing to encourage citizens to produce and store food, in line and in cooperation with internal food aid programmes[60].

The court, ultimately, points out that while no food reserves are established in the country, there are other means to ensure that the right to food is concretely implemented. A further observation from the applicant, related to the practical difficulties for international food aid programmes of which Uganda is a beneficiary to function properly during the pandemic, therefore leading to food shortages, is dismissed by the court as purely speculative.

[58] "As a relief measure, the Office of the Prime Minister was tasked to procure food stuffs such as beans, maize flour, sugar and powdered milk to avail food to the most vulnerable, having been granted a supplementary budget of 59billion shillings. (Refer to paragraphs 5 (d) and (e) of the Respondent's supplementary affidavit) and there are guidelines that were put in place to be followed to ensure fair distribution of relief food especially to the most vulnerable Ugandans. These are still being followed by the Office of the Prime Minister in execution of relief aid measures. In these guidelines, there is a clear criterion to follow to identify vulnerable Ugandans and the groups outlined include elderly persons, pregnant mothers, child-headed households, female headed households, the informally employed, orphans."

[59] *Amooti Godfrey Nyakaana v. Nema and 6 ors*, Constitutional Appeal no. 5, 2011.

[60] «The Minister of Agriculture informed the House on that day, that the government is behind the agenda of having national food reserves. He explained that the government has started supporting farmers to get hermitic bags to keep their produce at home, to get vacuum tanks and that on this, the government is working with the World Food Program. Hon. Ssempijja further explained that the government has contributed some money to subsidize farmers and there are intentions to expand this program. The minister went on to explain that the government has also started on community storage of food and that about ten stores have been opened across the Country in some districts. The minister further explained that apart from the community stores, the government was going into regional stores. The community stores are supposed to feed into the regional stores under the Ministry of Trade, Industry and cooperatives.»

3.3 Zimbabwe

We focus on four cases decided by the High Court of Zimbabwe (in Harare, Masvingo and Mutare) between April and June 2020, therefore dealing with the first lockdowns ordered after the initial outbreak of the pandemic. The orders sought by the applicants in each of the cases emphasized the impact that lockdown measures had on fragile socio-economic environments characterized by scarceness of basic goods and high levels of informal work upon which families sustained themselves. Applicants, therefore, essentially ask for basic services (i.e., food and water) to be made available during the lockdown.

The earliest case we examine is *The Trustees of the Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company Ltd.* (hereinafter also ZETDC)[61]. The applicants act on behalf of the beneficiaries of the Relocation Development Trust, i.e., the workers (with their families) employed by mining companies which relocated them, between 2010 and 2016, from Chiadzwa to Arda Transau. Upon relocation, the mining companies paid the electricity bills of the families to the ZETDC. In December 2019, the companies ceased their constant payment of electricity bills, leading the community to accumulate debts towards the ZETDC which ultimately suspended the supply of electricity. As a consequence, tap water became unavailable for the members of the community. The applicants ask for the electricity supply to commence again.

The Court decides to grant the interim order sought in light of the potential consequences that lack of tap water may have on personal hygiene and therefore on health, given the rapid spread of the pandemic. The Court relies on government orders concerning the state of emergency and the lockdown, which declare water and electricity supply as essential services. In a moment when the death toll of the pandemic, also in neighbouring countries such as South Africa, is increasing, depriving people of tap water represents a health hazard which cannot be accepted.

The emergency circumstances are sufficient, in the Court's eyes, to judge the matter as urgent and therefore to support interim relief. However, the Court further points out that such urgency, even if, technically speaking, derives from the inability of the community inhabitants to pay the bills, cannot be considered as self-created. Indeed, as the community was supported by those companies which decided the relocation and which, up to December 2019, paid the electricity fees, it was the abrupt end of such support which rendered the community unable to perform its contractual duty towards the ZETDC. This decision may be singled out among the other ones, given that it is the only one where the Court actually grants the remedy sought.

In *Allan Norman Markham and Mfundo Mlilo v. Minister of Health and Childcare et al.*[62], the High Court points out that public authorities are in the process of establishing relief measures for vulnerable groups, in forms of electronic payments and places for the homeless. In this case, the applicants had asked for the implementation of the Statutory Instrument 83/2020 concerning relief in form of water deliveries; the Court, however, states that the implementation was a responsibility of the Ministry of Public Service, Labour and Social Welfare, which has not been cited in the proceeding. Anyway, the Court points out, the authorities are already doing what the applicants ask for, that is the enactment of support measures for marginalized groups. Therefore, there is no violation of the right to life, as instead claimed by the applicants. Similarly, in *Gumai Makoka v. Minister of Health and Child Care et*

[61] 4 April 2020, HMT 29-20; HC 88/20.
[62] 14 & 15 April 2020, HH 263-20; HC 2168/20.

al.[63], the Court points out that the right to life is not violated since people lacking means of survival due to lockdowns are eligible to apply for social welfare assistance and the fact that the applicant was denied assistance depends on his ineligibility. Therefore, while reaffirming the state's duty to assist citizens in need, the Court agrees with the defendant with regard to the unnecessary character of new regulatory interventions, given the already existing ones.

These decisions show how the High Court of Zimbabwe displayed a certain reluctance to uphold broad claims asking for extensive (albeit not defined in details) intervention by public authorities, with the ultimate end to provide cash, food and water to citizens whose work was disrupted by the lockdowns.

The same happens in *Nevermind Mutamba et al. v. City of Masvingo et al.*[64], albeit on the background of a slightly more complex situation. The order sought by the applicants concerns the continuous supply of clean and potable running tap water to the residents of several areas[65]. The failure to provide water amounts, according to the applicants, to a violation of Art. 77(a) of the Constitution as well as of Art. 76, concerning the right to basic healthcare.

The High Court immediately recognizes that the point raised is of capital importance, given the particular state of poor areas during the lockdown. The Court further recognizes that Articles 76 and 77 of the Constitution establish, indeed, a right to access to water which is inherently hindered by a non-adequate supply. However, the Court proceeds to highlight that none of the three applicants has established a *prima facie* right, required to grant the final interim order. Indeed, the first two applicants have not proven that their houses do not have running tap water and it is instead established that they receive constant supplies. The Court, in particular, emphasizes that the first applicant "refers to the water supply in other suburbs where he does not lay any personal and positive knowledge of the water supply threat. He refers to Zimre Park, Rhodene and Cloverly suburbs without laying a basis on how he obtained or has reasonable proof of the water supply position of those suburbs." Furthermore, the third applicant, in his *affidavit*, has not offered useful information to counter such argument.

Given the constant supply of water received by the applicants, the Court further points out that no irreparable harm to the applicants' rights has been proven. Lastly, the Court states that, "The nature of interim relief sought namely "adequate consistent, clean and potable water and water on wheels" is on its own vague. Particularly where applicant seeks supply of adequate water. What is adequate is not defined in the application." Therefore, even from the perspective of a balance of convenience—on account of the general distress caused by the lockdown—the applicants' claim may not be upheld, since it does not specify in detail the characteristics of the supply requested.

In this case, while the Court does not make it explicit, it seems that the reasoning followed implies several practical considerations, stemming from logistical challenges as well. In particular, the Court reports how the respondents pointed out that the existing water treatment plants only have a limited pumping capacity, which is inferior to the water demand of the city of Masvingo[66]. It is interesting to

[63] 13, 19 May 2020 and 19 June 2020, HH 414-20; HC 3003/20.
[64] 6, 7, 10 April and 21 May 2020, HMA 19-20; HC 84-20.
[65] Such areas are, in particular, the districts of Rujeko, Mucheke, Zimre Park, Rhodene and Cloverly.
[66] «Masvingo City abstracts and treats water at Bushmead Water Works close to Lake Mutirikwi. The city has a water demand of about 45 000 cubic meters a day for residential, commercial and industrial use. The water treatment plant has the capacity to deal with only 30 000 cubic metres per day. However because the water treatment plant is old its pumping capacity is 27 000 cubic metres per day, which amounts to 60% of the demand. The pumping capacity of 27 000 cubic metres is only achievable where there is no load shedding and electricity is available around the clock.»

note how the Court referred to such limited capacity in order to state that no irreparable harm may derive from rejecting the relief sought. It is, in other words, implicit in the reasoning of the Court that even in case the order sought was granted, the concrete situation of the households not served by constant water supply would not change, given the work capacity of the water treatment plants.

3.4 Comparative outlook

From a comparative perspective, the decisions examined display one main common element which, depending on the context, justifies different outcomes: the attention paid by courts not only to the practical implications of the fundamental right involved, but also the organizational and financial capabilities of public authorities. As displayed both by South African and Zimbabwean case law, courts tend to take into account the financial and organizational effort required to implement the right to access to essential goods. The South Africa High Court highlighted that, since the National School Nutrition Programme was already in place and financed through the state budget at the time of the dispute, the request to ensure access to food even for remote learners did not require additional efforts[67]. On the other hand, the High Court of Zimbabwe in *Nevermind Mutamba et al. v. City of Masvingo et al.* considers the actual pumping capacity of water treatment plans when assessing the request to ensure wider access to water and ultimately dismisses the claim.

It must be noted that, when courts deny the remedies sought, thus not detecting any violation of the fundamental rights to access to essential goods, they tend to rely heavily on statements and declarations from public authorities concerning efforts being put in place to assist the most disadvantaged social groups. This aspect is most evident in the Ugandan decision, which, in upholding the idea that the right to food must not necessarily be ensured through food reserves – as instead requested by the Directive Principles of State Policy – does not assess, in concrete terms, the adequacy of the measures that the Minister claims to have taken in substitution of the establishment of reserves.

On the other hand, when courts grant the remedies sought, they appear to rely, in concrete terms, on practical circumstances which render immediately feasible the implementation of the remedy. This could depend, as in the South African decision, on the financial coverage of a certain measure; alternatively, it could depend, as in *The Trustees of the Arda-Transau Relocation Development Trust v. Zimbabwe Electricity Transmission and Distribution Company Ltd.*, on the fact that the matter discussed revolved around a contract and the only effort required to the respondent was to resume the performance laid out in said contract.

4. Conclusion

The African legal response to Covid-19 and, in particular, the approaches taken by courts, highlight some degree of self-restraint in advocating positive actions to ensure universal access to essential goods, balanced against the emergency circumstances brought by the pandemic. The general trend which seems to emerge from the case law examined upholds, in its essence, the logic already followed by the South African *Mazibuko* judgment: the right to access to essential goods, from such perspective, does not imply that every person must receive such goods, but rather, on the other hand, that the state is

[67] *Equal Education & others v. Minister of Basic Education & others.*

subjected to a general obligation of taking comprehensive action to gradually move towards the objective (more or less idealized) of universal access.

In Uganda, such judicial outlook was supported by an interpretation of the Directive Principles of State Policy which, if compared with certain trends displayed by Indian courts regarding such notion, highlights the programmatic nature of the principles. Indeed, beyond declarations and theoretical propositions, the High Court of Uganda denied that the obligation to establish food reserves binds the state to establish food reserves; instead, it upheld that different actions, as long as aimed at achieving a similar general objective of ensuring nutrition, fully comply with the constitution.

In the other decisions, in absence of a direct assessment of policy principles, the courts reasoned on the adequacy of the existing relief measures as well as on the feasibility of alternative measures. Courts tend to uphold plaintiffs' claims only when they feel certain that the defendant has the organizational capacity to comply with the measures granted, as in *Equal Education & others v. Minister of Basic Education & others*.

To some extent, the stance of the courts here taken into consideration reflects an underlying uncertainty in African constitutionalism, which, in emphasizing its socio-economic dimension, relies heavily on the propositions of international development law but struggles to reconcile them with a fully developed domestic legal culture. Furthermore, the pandemic crisis inevitably reflects upon existing phenomena of social, economic and cultural stratification (or even substantial segregation) which implicitly weaken the legitimacy of states in tackling the consequences of the crisis itself.

From a comparative point of view, the self-restraint of African courts acquires renewed significance when assessed against judicial trends emerged in other highly fragmented legal contexts, such as the Indian one. Indeed, with regard to a wide range of economic issues arising from the pandemic, Indian courts upheld their increasing "activism" by outlining original remedies and, essentially, seeking to direct state policies towards a proper balancing between public health and economic freedoms[68].

From such perspective, it could be argued that the African engagement with the international economic order—as well as its stance within the WTO— while upholding the attachment to new and original models of state capitalism shaped upon domestic circumstances, still fails to establish a coherent institutional environment capable of fully adhering to those values. With regard to the rights to access to essential goods, on the other hand, domestic circumstances and the reference to international law are sometimes used to reject the idea of a comprehensive enforceability of those rights or even, in certain cases, to strengthen the power of the political leadership[69].

Once the feasibility and reliability of an assimilation of African laws into a Western-fashioned development pattern have been discarded, the coherence of new dynamics of legal evolution are tested. A more decisive reference to Indian concepts and models, which also partially emerges from the decisions examined in § 3, would ultimately need a reinforced fruitful domestic dialogue between courts and public authorities which appears to be still feeble, though the use of foreign models by courts—already a connoting element of sub-Saharan law[70]—may represent a growing trend with regard to socio-economic issues[71]. More significantly, the case law we have examined shows a sometimes

[68] Sabatino (2021: 225-269).
[69] Moyo-Ivumile Phulu (2021: 48-66).
[70] Nwachukwu Okeke (2011: 1-50); Adjami (2002: 103-167).
[71] On the potential interactions between the Indian and the African legal traditions see Menski (2006: 485-492).

chronic lack of comprehensive development and relief policies in African jurisdictions. In this context, the courts would be called, as indeed it happens in some instances in Indian law, to act as both collectors of social instances and socio-economic engineers.

A stronger mutual interaction with foreign models of developmental state and a firmer stance on enforcement of socio-economic rights could theoretically promote such renewed role for African courts. However, the political fragmentation within the multi-layered societies against the background of the confrontation among ruling cliques not only fuels the disorderly cohabitation of chthonic and "positive autocratic" law, but also exposes the weakness of judicial institutions[72].

If, on the one hand, the pandemic crisis has, to a certain extent, confirmed the uncertainties of African socio-economic constitutionalism; on the other hand it has highlighted the potential that court activism holds, as well as the obstacles it faces. In a world whose polycentricism, in terms of development models, is rapidly entrenching, the construction of an original legal identity for Africa could rapidly become a vital priority, especially as neoliberist influences have failed and Chinese models, viewed by many as a feasible alternative, are questioned by a partial inward turn of Chinese development philosophy.

There will be several circumstances, both during and after the pandemic, which will inevitably raise the issue of concrete enforcement of socio-economic rights. Part of the evolution of a proper African pattern of development will depend on which stance the courts will decide to uphold, which importance they will attach to self-restraint, to pragmatism and symbolism, to foreign models. So far, the theoretical potential for legal breakthroughs still is suffocated by an apparent self-awareness of institutional weakness, ultimately conducive to a lack of courage.

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[72] *Ibid.*

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