

Assessing violations of states' socio-economic rights obligations in the African Charter: towards a model of review grounded in the teleological approach

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ABSTRACT: Socio-economic rights in the African Charter on Human and Peoples' Rights impose a wide range of positive and negative obligations on state parties. The African Commission has applied different models of review to assess states' violations of these obligations in its socio-economic rights jurisprudence. While a model of review is vital for assessing realisation of these rights, the inconsistencies in the application of the models of review result in jurisprudential inconsistencies and non-alignment with the object and purpose of the African Charter. This article develops a model of review grounded on the teleological approach to guide the supervisory organs in assessing states' violations of the obligations imposed by socio-economic rights in the African Charter in a manner that advances the Charter's object and purpose.

TITRE ET RÉSUMÉ EN FRANCAIS:

Évaluation des violations des obligations des États relatives aux droits socioéconomiques dans la Charte africaine: vers un modèle de contrôle fondé sur l'approche téléologique

RÉSUMÉ: Les droits socio-économiques inscrits dans la Charte africaine des droits de l'homme et des peuples imposent un large éventail d'obligations positives et négatives aux États parties. Dans sa jurisprudence relative aux droits socioéconomiques, la Commission africaine a appliqué différents modèles de contrôle pour évaluer les violations par les États de ces obligations. Si un modèle de contrôle est essentiel pour évaluer la réalisation de ces droits, les incohérences dans l'application des modèles de contrôle entraînent des incohérences jurisprudentielles qui sont en porte-à-faux avec l'objet et le but de la Charte africaine. Le présent article développe un modèle de contrôle fondé sur l'approche téléologique pour guider les organes de contrôle dans l'évaluation des violations par les États des obligations imposées par les droits socioéconomiques dans la Charte africaine de manière à faire progresser l'objet et le but de la Charte.

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KEY WORDS: teleological approach, socio-economic rights, state obligations, African Charter, African Commission, model of review

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1 INTRODUCTION

Socio-economic rights¹ in the African Charter on Human and Peoples' Rights (African Charter)² impose a wide range of positive and negative obligations on state parties. States are not only required to refrain from violating or limiting existing socio-economic rights but also taking steps including legislative, budgetary planning, mobilising resources and other measures in compliance with their socio-economic rights obligations. At the heart of realising economic, social, and cultural rights is the question of resources³ and other relevant measures. Africa's people should be able to challenge their states, before the African Charter's supervisory organs, on the measures taken and amount of resources allocated for realising socio-economic rights.

Effective protection of these rights, therefore, requires the supervisory organs of the African Charter, that is, the African Commission on Human and Peoples' Rights (African Commission or Commission)⁴ and the African Court of Human and Peoples' Rights

1 For purposes of this article, socio-economic rights are defined as the rights that protect and improve the material living conditions of all human beings in their individual capacity and in groups. They include: the rights to property, work, health, education, family, social security, adequate standard of living including water, food and housing, as well as the rights to freely dispose of wealth, development and general satisfactory environment.

2 African Charter on Human and Peoples' Rights (1981) OAU CAB/LEG/67/3/rev 5, 21 ILM 58 (1982) (African Charter) adopted on 27 June 1981 and entered into force on 21 October 1986.

3 RE Robertson 'Measuring state compliance with the obligation to devote the "maximum available resources" to realising economic, social, and cultural rights' (1994) 16 *Human Rights Quarterly* 694.

4 African Commission is established in article 30 of the African Charter.

(African Court)⁵ to effectively assess states' implementation of the obligations imposed by these rights. It is a process by which the organs check whether legislative and executive decisions, at the level of both formulation and implementation, comply with certain standards contained in these rights.⁶

A model of review is required to enable the supervisory organs to assess the measures adopted by states.⁷ Through a model of review, supervisory organs can ascertain states' compliance with their socio-economic rights obligations. The African Court's socio-economic rights jurisprudence has just emerged with only one case decided on merits so far. Unfortunately, in this case, the Court did not assess the respondent's state compliance and therefore no model of review was invoked. The African Commission has dealt with a quite sufficient number of socio-economic rights communications. This article, therefore, focuses on the assessment of states' measures in the socio-economic rights jurisprudence of the African Commission.

In its jurisprudence, the African Commission has been inconsistent regarding the model of review it applies. In *Social and Economic Rights Action Centre (SERAC) v Nigeria (SERAC case)*⁸ and *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois case)*⁹ the African Commission applied the reasonableness model of review.¹⁰ In the SERAC case, the African Commission also applied the minimum core obligation.¹¹ In *Purohit and Moore v The Gambia (Purohit case)*,¹² the African Commission required state parties to take 'targeted and concrete' steps in compliance with their obligations imposed by the right to health.¹³ In *Sudan Human Rights Organisation & Centre on Human Rights and Evictions (COHRE) v Sudan (COHRE case)*¹⁴ and *Endorois case*¹⁵ the African Commission applied the proportionality test. This inconsistency is problematic, as it does not offer clear guidance as to the appropriate model of review to

5 African Court is established in article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

6 S Yeshanew 'Combining the "minimum core" and "reasonableness" models of reviewing socio-economic rights' (2008) 9 *ESR Review* 8.

7 M Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *South African Journal of Human Rights* 407.

8 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

9 *Centre for the Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) AHLRLR 75 (ACHPR 2009).

10 *SERAC case* (n 8) para 52; and *Endorois case* (n 9) para 172.

11 *SERAC case* (n 8) paras 61 and 65.

12 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit case*).

13 *Purohit case* (n 12) para 84.

14 *Sudan Human Rights Organisation & Centre on Human Rights and Evictions v Sudan* (2009) AHRLR 153 (ACHPR 2009) (*COHRE case*) para 188.

15 *Endorois case* (n 9) para 172.

be applied. Moreover, the African Commission does not elaborate on the content of these models of review.

Therefore, there is a need to develop a specific model of review for the supervisory organs to apply when monitoring states' compliance with their socio-economic rights obligations. This article develops a teleological model of review. The viability of reasonableness integrated with minimum core and proportionality as an appropriate model of review for the supervisory organs to use is considered. This model can be applied to review states' compliance in a manner that furthers the object and purpose of the African Charter relating to socio-economic rights. The teleological model of review is vital for the effective realisation of socio-economic rights in the African Charter.

The analysis of this article is divided into four sections. The first section gives a brief overview of the teleological approach while the second section provides an overview of socio-economic rights and their related obligations in the African Charter. A detailed analysis of the scope and content of these rights and their obligations falls outside the scope of this article. Section three discusses the models of review and their application in the jurisprudence of the African Commission. Section four develops a teleological model of review.

2 TELEOLOGICAL APPROACH

The teleological approach sometimes referred to as purposive interpretation,¹⁶ considers the object and purpose¹⁷ of a treaty as a basis of treaty interpretation.¹⁸ An inquiry into the object and purpose of a treaty is vital in generating the meaning, scope and content of treaty's provisions in question.¹⁹ This approach is endorsed in the Vienna Convention on the Law of Treaties (Vienna Convention)²⁰

16 TS Bulto 'The emergence of the human right to water in international human rights law: invention or discovery?' (2011) 12 *Melbourne Journal of International Law* 299.

17 This article considers the approach adopted in the Vienna Convention, which treats 'object and purpose' of a treaty as a single discursive concept. The article also argues that the efficacy of treaty interpretation requires the notion, 'object and purpose' of a treaty to be defined with a form of flexibility. See also JKlabbers 'Some problems regarding the object and purpose of treaties' (1997) *Finnish Year Book of International Law* 141; C McLachlan 'The principle of systemic integration and article 31(3)(c) of the Vienna Convention' (2005) 54 *International and Comparative Law Quarterly* 282.

18 Other approaches to treaty interpretation include the textual approach, and the intention of the parties approach. However, a detailed discussion of these approaches to treaty interpretation falls beyond the scope of this article. For a detailed discussion of these approaches, see Unpublished: A Amin 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' unpublished LLD dissertation, Stellenbosch University, 2017 22-27.

19 See also GG Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1951) 28 *British Year Book of International Law* 1-2.

20 The Vienna Convention on the Law of Treaties 8 ILM 679 (1969) was adopted on 23 May 1969 and entered into force on 27 January 1980.

through its single authoritative rule of interpretation in articles 31 and 32 respectively. Article 31(1) of the Vienna Convention requires the interpretation of the text to occur in accordance with the object and purpose of the treaty in question.

The object and purpose of a treaty is found through recourse to a wide range of interpretative tools including the treaty's historical background and its preparatory work; the circumstances at the time of the adoption of the treaty; any change in these circumstances that the parties sought to effect; and the conditions prevailing at the time the treaty is interpreted. It also includes a treaty's preamble at both its interpretive and binding characters,²¹ the subsequent practice of the parties to a treaty²² (including, the decisions of the interpretive organs,²³ and the rules of procedure formulated by these interpretive organs to interpret the treaty);²⁴ and the principle of effectiveness which is embodied in all tenets of the teleological approach.²⁵

The principle of effectiveness posits that provisions of a treaty are formulated to fulfil a specific effect. Accordingly, they should be interpreted to make them effective rather than ineffective.²⁶ The principle, in its general dimension, interprets the text in light of the declared or apparent object and purpose of the treaty. The principle of effectiveness gives such a text its effective meaning consistent with the words used to formulate it and with the other provisions of the treaty.²⁷ To assign effective meaning to the text, the principle of effectiveness allows the interpretive organs to consider and apply different possibilities of interpretation, which will safeguard the effectiveness of the text.²⁸ As such, in its substantive dimension, it requires interpretive organs to interpret the rights enshrined in a treaty broadly.²⁹ It also requires the limitations of such rights to be interpreted narrowly.³⁰ In its temporal dimension,³¹ the principle of effectiveness considers a treaty as a living instrument.³² The systemic dimension consists of both the internal and external coherence dimensions.³³ The internal

21 Fitzmaurice (n 19) 10.

22 Fitzmaurice (n 19) 9.

23 As above.

24 As above.

25 G Fitzmaurice 'The law and procedure of the International Court of Justice: treaty interpretation and certain other treaty points' (1957) 33 *British Year Book of International Law* 203 & 211. The principle of effectiveness is sometimes referred to as *ut res magis valeat quam pereat*.

26 Fitzmaurice (n 19) 8.

27 Fitzmaurice (n 25) 211.

28 D Rietiker 'The principle of "effectiveness" in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*' (2010) 79 *Nordic Journal of International Law* 256.

29 Rietiker (n 28) 259.

30 As above.

31 Rietiker (n 28) 261. According to Rietiker, temporal dimension is sometimes referred to as 'dynamic' or 'evolutive' approach.

32 Rietiker (n 28) 261.

33 Rietiker (n 28) 267-275.

coherence dimension emphasises a form of interpretation that reads the treaty as a whole in a manner that advances internal consistency and harmony among the various provisions of the treaty.³⁴ Concerning external coherence, the principle of effectiveness focuses on interpreting a treaty through other comparative legal sources.

Why is the teleological approach relevant in assessing states' compliance with the socio-economic rights obligations? Like all human rights provisions, socio-economic rights and their related obligations in the African Charter are formulated broadly.³⁵ Their broad formulation avails the supervisory organs with an opportunity to interpret them and assess states' compliance flexibly in a manner that gives effect to the object and purpose of the African Charter. Therefore, the teleological approach and its tenets that aim at establishing treaty's object and purpose offer supervisory organs the most appropriate and flexible guide in assessing whether state's measures give effect to the Charter's object and purpose.

How can we then contextualise an appropriate model for reviewing states' socio-economic rights obligations in the African Charter? To my mind, the model for reviewing obligations imposed by the socio-economic rights in the African Charter should base its inquiry on the object and purpose of the African Charter concerning these rights. The model should inquire as to whether states' measures uphold the object and purpose of the African Charter to protect these rights. This, it is submitted, will enable the supervisory organs to ascertain five criteria in the assessment process. Firstly, whether the measures advance the intention of the drafters of the African Charter as demonstrated in the preparatory work of the Charter. Secondly, whether the measures advance the values of dignity, equality, non-discrimination and justice as demonstrated in the Preamble to the African Charter and its substantive provisions. Thirdly, whether the measures uphold the notion of African philosophy and the principle of interdependence of rights as declared in the Preamble and embraced in the African Charter as a whole. Fourthly, whether the measures are capable of advancing both individual and collective socio-economic rights in the African Charter and whether they are effective enough to positively transform the socio-economic conditions of Africa's people in their individual and collective capacities. Finally, whether the measures are in line with the relevant international human rights standards and whether they protect these rights effectively.

34 Rietiker (n 28) 267.

35 M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 145.

3 SOCIO-ECONOMIC RIGHTS IN THE AFRICAN CHARTER AND THEIR RELATED OBLIGATIONS

3.1 Socio-economic rights: at a glance

The African Charter substantially protects explicit and implicit individual and collective socio-economic rights. The explicit socio-economic rights in the African Charter include the rights to property, work, health, education, family, freely dispose of wealth, development, and a general satisfactory environment. However, the list is not exhaustive. The teleological approach through the wide range of its interpretative tools within and outside of the African Charter offers an avenue to include the implicit socio-economic rights to social security and an adequate standard of living (including food, water, and housing). In the *SERAC* case, the African Commission held that, while the African Charter does not expressly recognise the right to housing, this right is implicitly protected through the provisions protecting the rights to health, property and family.³⁶ According to the African Commission, when housing is destroyed, property, health and family are negatively affected.³⁷ It then held on the implicit right to food. The African Commission noted that the right to food is directly linked to the dignity of human beings and relevant for the enjoyment and fulfilment of other rights- including, health, education, work and political participation.³⁸ In the *COHRE* case the African Commission interpreted the rights to adequate food, water and housing as the underlying components of the right to health.³⁹ It relied on the relevant international instruments particularly, the Universal Declaration of Human Rights (Universal Declaration),⁴⁰ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴¹ and Committee on Economic, Social and Cultural Rights (UN Committee) General Comment 4 on the right to adequate housing (General Comment 4)⁴² to include the derived rights.

36 *SERAC* case (n 8) para 60.

37 As above.

38 *SERAC* case (n 8) para 65.

39 *COHRE* case (n 14) para 209.

40 Universal Declaration of Human Rights 10 December 1948, GA Res 217A (III) UN Doc A/810.

41 The International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI) 16 December 1966, 993 UNTS 3.

42 Committee on Economic, Social and Cultural Rights General Comment No 4 The right to adequate housing (1991) UN Doc E/1992/3.

3.2 Nature of states' obligations imposed by socio-economic rights

3.2.1 Obligations to recognise and undertake legislative measures to give effect to the Charter's rights

African Charter broadly formulates states obligations through the provisions of article 1 and other provisions. The formulation of article 1 creates two layers of obligations. Firstly, the general obligation to recognise the rights, including rights of socio-economic nature, contained in the African Charter and their related obligations and freedoms. Secondly, it establishes the states' obligation to undertake legislative or other measures in order to give effect to these rights and their related obligations. These two obligations reinforce each other. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (Chad case)⁴³ the African Commission held that states are in breach of the obligation to recognise if they fail to undertake measures to give effect to all rights in the African Charter.⁴⁴ These obligations denote the fact that states are required to take positive measures to 'take steps' and 'adopt legislative or other measures' to give effect to socio-economic rights.

3.2.2 States' obligations to respect, protect, promote, and fulfil

The formulation of state obligations in article 1 incorporates negative and positive obligations to respect, protect, promote, and fulfil. These duties are holistically incorporated in the obligation to 'recognise' and 'legislate'. In *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* (Post Electoral Violence case) the African Commission held as follows:⁴⁵

Article 1 places the states parties under the obligation of respecting, protecting, promoting and implementing the rights. The respect for the rights imposes on the state the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights ... This Article places on the states parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter.

In the *SERAC* case the African Commission held that both civil and political rights as well as socio-economic rights, impose upon states a quartet of obligations, namely: the duty to respect, protect, promote and fulfil the rights.⁴⁶

43 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995).

44 *Chad case* (n 43) para 20.

45 *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* Communication 272/03 paras 87-90. See also Principles and Guidelines paras 4-12.

46 *SERAC case* (n 8) para 44.

3.2.3 Obligations of progressive realisation and within available resources

Unlike the provisions of article 2(1) of CESC, the formulation of article 1 of the African Charter does not expressly include a state's obligation to realise rights 'progressively' and within 'available resources'. Some scholars have argued that the omission of these two phrases implies that the socio-economic rights in the African Charter should be realised immediately.⁴⁷ However, based on the scarcity of resources in many African countries, socio-economic rights need to be realised progressively. Poor levels of economic development, as well as the uneven allocation of resources, can hinder states from realising these rights immediately.⁴⁸ In the *Purohit* case, the African Commission stated that poverty in many African countries hinders the enjoyment of the right to health.⁴⁹

The omission of explicit provisions on the obligations of 'progressive realisation' and 'within maximum available resources' does not necessarily mean that these obligations are excluded from the African Charter. All human rights instruments relating to socio-economic rights recognise that states must take immediate steps while the full realisation of these rights may be progressive.⁵⁰ The obligations of 'progressive realisation' and 'within maximum available resources' are implicitly incorporated in article 1 of the African Charter through the phrase 'to adopt other measures'. This phrase allows states to take into account measures beyond mere legislation,⁵¹ such as resource consideration, planning, and budgeting to realise the socio-economic rights in the African Charter. In *Purohit* and in *Kevin Mgwanga Gunme et al v Cameroon (Gunme case)*⁵² the African Commission stated that the right to health and the right to development impose upon states an obligation of progressive realisation.⁵³ While in the *Gunme* case the African Commission used the phrase 'progressive realisation', in the *Purohit* case the African Commission stated that the state's obligation to ensure the full realisation of the right to health entailed taking 'concrete and targeted steps'.⁵⁴

47 CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in MD Evans & R Murray R (eds) *The African Charter on Human and Peoples' Rights: the system in practice 1986-2000* (2002) 196.

48 AE Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) 144.

49 *Purohit* case (n 12) para 84.

50 M Craven *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (1995) 130.

51 The requirement to adopt legislative measures in art 1 is similar in nature to the negative obligation to respect. See *Purohit* case (n 12) para 42.

52 *Kevin Mgwanga Gunme et al v Cameroon* (2009) AHRLR 9 (ACHPR 2009).

53 *Purohit* case (n 12) para 84; *Gunme* case (n 52 above) para 205.

54 *Purohit* case (n 12) para 84.

3.2.4 Non-discrimination

Socio-economic rights in the African Charter impose on states the obligation to non-discrimination in article 2. The formulation of article 2 holistically implies that obligation to non-discrimination is immediately realisable. In *Purohit* case the African Commission stated that the right to health imposes upon states an obligation to ensure the realisation of this right without discrimination of any kind.⁵⁵ Moreover, in *Endorois* case the African Commission acknowledged states' obligation to non-discrimination in the right to property.⁵⁶ Significantly, the jurisprudence of the African Commission includes positive discrimination as a component of socio-economic rights' obligations. In *Endorois* case the African Commission recognised that states bear an obligation to consider preferential treatment for marginalised and disadvantaged groups to eliminate the discrimination they face and promote substantive equality.⁵⁷

4 MODELS OF REVIEW

4.1 Reasonableness review: meaning, application and implications

Reasonableness is a model of review that takes into consideration the historical, economic and social contexts of socio-economic rights.⁵⁸ This understanding of the reasonableness model of review enables a supervisory organ applying it to engage a wide range of factors to assess states' measures. This broad meaning of reasonableness renders it a model of review that takes into account the purpose and values of socio-economic rights that are affected by the violations of these rights.⁵⁹ In this way, the reasonableness model of review inquires into the object and purpose as well as the scope and content of the rights that are at stake.⁶⁰ It, therefore, applies such object and purpose, as well as the scope and content of socio-economic rights, to assess states' measures.⁶¹

As a model of review, reasonableness imposes limits on a state's discretion as well as guides supervisory organs to assess a state's measures to implement their legal obligations.⁶² It can, therefore, limit

55 *Purohit* case (n 12) para 80.

56 *Endorois* case (n 9) para 196.

57 As above.

58 S Liebenberg *Socio-economic rights: adjudication under a transformative Constitution* (2010) 174.

59 Liebenberg (n 58) 223.

60 As above.

61 As above.

62 B Griffey 'The "reasonableness" test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 304.

states' discretion if the measures adopted do not give effect to socio-economic rights and advance their object and purpose. In this regard, the reasonableness review creates space for the supervisory organs to assess states' measures regarding the negative and positive obligations imposed by the socio-economic rights. It also enables the supervisory organs to apply the content of the socio-economic rights to assess whether states' measures comply with the obligations imposed by these rights in a manner that advances the object and purpose of the treaty. Thus, the question in assessing the reasonableness of a state's measures will consider whether such state's measures foster the object and purpose of socio-economic rights. Furthermore, reasonableness considers whether the limitation of socio-economic rights reasonably fosters the object and purpose of these rights.

If applied by the supervisory organs of the African Charter reasonableness offers two avenues. Firstly, the reasonableness model of review should place the object and purpose of states' socio-economic rights obligations as central to the assessment of a state's measures. The object and purpose of the African Charter is to protect socio-economic rights. To advance this object and purpose the supervisory organs are required to take into account various interpretive tools. These tools include the African Charter as a whole, the preparatory work of the African Charter, relevant international, regional and national human rights laws and jurisprudence, and the principle of effectiveness. The reasonableness model of review enables the reviewing supervisory organs to generously consider these significant elements of the object and purpose of the African Charter in assessing states' measures.⁶³ Taking into account other considerations is important in interpreting socio-economic rights in the African Charter as it allows the supervisory organs to engage the values of equality, dignity and freedom in the reasonableness review. Engaging these values enables the supervisory organs to assess how the state's measures have taken into account the values and object and purpose of the African Charter. The failure to engage these values implies that these values and violations of the rights are given less priority in the assessment of states' measures.⁶⁴ The development of the values and purposes relating to socio-economic rights allows the interpretive body to assess whether the state's adopted measures reasonably give effect to the enjoyment of the rights.⁶⁵

Various judicial and quasi-judicial bodies have applied the reasonableness model of review. According to the Constitutional Court of South Africa, the reasonableness model of review concerns an enquiry as to whether a state's legislative and other measures for the protection of socio-economic rights are reasonable.⁶⁶ In *Grootboom*,

63 Liebenberg (n 58) 174.

64 Liebenberg (n 58) 176-177.

65 Liebenberg (n 58) 183.

Minister of Health and Others v Treatment Action Campaign and Others (TAC case),⁶⁷ *Mazibuko and Others v City of Johannesburg and Others (Mazibuko case)*,⁶⁸ and *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others (Olivia Road case)*⁶⁹ the South African Constitutional Court elaborated on various factors that a supervisory body can apply in assessing the reasonableness of a state's measures. According to the South African Constitutional Court, reasonable measures should demonstrate that the state has allocated appropriate financial and human resources to realise socio-economic rights.⁷⁰ Moreover, measures must be comprehensive, coherent and co-ordinated.⁷¹ Measures must also be capable of facilitating the realisation of the socio-economic rights in question.⁷² The conception and implementation of the measures must be reasonable.⁷³ Furthermore, such measures must be balanced and flexible and make appropriate provision for short, medium and long-term needs.⁷⁴ Measures must give priority to those who are in urgent need of the realisation of their rights.⁷⁵ They must demonstrate respect for human dignity, freedom and equality.⁷⁶ They must be transparent and made known effectively to the general public.⁷⁷ Furthermore, the reasonable measures of a state must guarantee meaningful engagement particularly with the poor, vulnerable or illiterate people.⁷⁸

In *IDG v Spain (IDG case)* the CESCR had to decide whether the complainant's right to housing recognised in article 11(1) of the ICESCR was violated by the respondent state as a result of a mortgage enforcement proceeding that the complainant argues the respondent state had failed to notify her.⁷⁹ The CESCR held that the right to housing in the ICESCR imposes upon states an obligation to adopt measures that guarantee its full realisation.⁸⁰ The CESCR further noted that states are therefore required to ensure that actions that can result into evictions take into account procedural protections. This includes meaningful consultation with the affected parties as well as 'adequate

66 C Curtis 'Standards to make ESC rights justiciable: a summary exploration' (2009) 2 *Erasmus Law Review* 391.

67 *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (2) SA 721 (CC).

68 *Mazibuko & Others v City of Johannesburg & Others* 2010 (1) SA (CC).

69 *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others* 2008 (1) SA (CC).

70 *Grootboom & Others v Government of the Republic of South Africa & Others* 2001 (46) SA (CC) para 39.

71 *Grootboom case* (n 70) paras 40-41.

72 *Grootboom case* (n 70) para 41.

73 *Grootboom case* (n 70) para 42.

74 *Grootboom case* (n 70) para 43.

75 *Grootboom case* (n 70) para 44.

76 *Grootboom case* (n 70) paras 44, 83.

77 *TAC case* (n 67) para 123, *Mazibuko case* (n 68) para 71.

78 *Olivia Road case* (n 69) para 15.

79 *IDG v Spain* Communication 2/2014 para 10.6.

80 *IDG case* (n 79) para 11.1.

and reasonable' notification to the affected persons before the eviction is carried out.⁸¹

In the *SERAC* case and *Endorois* case the African Commission applied the reasonableness model of review.⁸² It stated in the *SERAC* case that states are required to take reasonable and other measures to give effect to the obligations imposed by article 24 of the African Charter. According to the African Commission, article 24 imposes upon states 'an obligation to take reasonable legislative and other measures' to avoid air and environmental pollution as well as promoting progressive environmental conservation and 'ecologically sustainable development and use of natural resources'.⁸³ In the *Endorois* case it held that states' interference with the enjoyment of rights must be reasonable.⁸⁴ According to the African Commission, rights in the African Charter can be limited.⁸⁵ However, the limitation should not render the right illusory. The African Commission further added that the limitation of the rights must be reasonable.⁸⁶ However, unlike the Constitutional Court and the CESC, the African Commission did not elaborate on the content of the reasonableness model of review.

The reasonableness model of review as analysed above renders it a three-facet model as elaborated below.

4.1.1 Reasonableness as a two-stage model of review

What does the reasonableness as a two-stage model of review mean? The reasonableness model of review requires adjudicative bodies to inquire whether states' measures can reasonably achieve the object and purpose of the rights.⁸⁷ The reference to the object and purpose of the rights in the reasonableness model of review enables it to ascertain the content of the rights and then assess whether states' measures take into account such content to advance the object and purpose of the rights at stake. The reasonableness model of review enables the supervisory organs to apply the object and purpose of the socio-economic rights, as well as the values on dignity, equality, justice and freedom, for the development of the socio-economic rights.⁸⁸ The developed content can then be applied to monitor states' compliance with the obligations imposed by the socio-economic rights.⁸⁹ The content can further assist the supervisory organs in assessing whether the measures adopted by states further the object and purpose of socio-economic rights.

81 IDG case (n 79) para 11.2.

82 *SERAC* case (n 8) para 52; and *Endorois* case (n 9) para 172.

83 *SERAC* case (n 8) para 52.

84 *Endorois* case (n 9) para 172.

85 As above.

86 As above.

87 D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or what are socio-economic rights for?' in H Botha and others (eds) *Rights and democracy in a transformative Constitution* 43.

88 Liebenberg (n 58) 183.

89 Liebenberg (n 58) 183.

4.1.2 Reasonableness as a model for reviewing negative and positive socio-economic rights obligations

It should be noted that states can also violate the already existing socio-economic rights of individuals and groups. Violations of socio-economic rights are not entirely based on the states' failure to enforce their positive obligations but also on states' conduct of interfering with individuals' right to housing through forced evictions as well as discriminatory practices in the enjoyment of socio-economic rights.⁹⁰ The reasonableness review may be applied to assess states' compliance with their socio-economic rights obligations, both negative and positive. For example, concerning the negative obligations, the South African Constitutional Court held in *Jaftha v Schoeman; Van Rooyen v Stoltz* (*Jaftha case*)⁹¹ that the deprivation of the applicants' existing right to housing amounts to the limitation of the right enshrined in article 26 of the Constitution.⁹²

4.1.3 Reasonableness as a model capable of considering immediate socio-economic rights needs

The element of object and purpose in the reasonableness model of review provides the supervisory organs with the opportunity to engage the obligation to adopt legislative and other measures for the realisation of socio-economic rights to assess whether legislative and other measures adopted by the state take into account the immediate socio-economic needs of individuals and groups. For example, state's measures must be able to address and fulfil progressively explicitly and implicitly guaranteed socio-economic rights such as rights to an adequate standard of living (water, food and housing), health care, education, and property. At the same time, such state's measures must fulfil the immediate realisation of these rights required by the people who are in desperate need of these rights. Writing on reasonableness in the South African context, Sunstein notes that a guaranteed constitutional right to housing requires the state to formulate policies that ensure the realisation of this right as well as urgent relief regarding housing to people in desperate housing need.⁹³ Steinberg notes that failure of the state to include in its measures the immediate socio-economic needs of the desperate people renders such measures unreasonable.⁹⁴ The reasonableness review is flexible in the sense that

90 B Porter 'Reasonableness and article 8(4)' in M Langford and others (eds) *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary* 196.

91 *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC), 2005 1 BCLR 78 (CC).

92 *Jaftha case* (n 91) para 39.

93 CR Sunstein 'Social and economic rights? Lessons from South Africa' (2000-2001) 11 *Constitutional Forum* 131.

94 C Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123 *South African Law Journal* 264 280.

it enables a state to adopt appropriate measures to respond to the nature of the particular obligations imposed by socio-economic rights.⁹⁵ It thus enables supervisory organs to assess the reasonableness of the measures adopted to meet the urgent socio-economic needs of the most vulnerable individuals in society.⁹⁶ The values of dignity, equality and freedom are appropriate to assess states measures regarding the urgent socio-economic needs of the desperate people in society. It allows supervisory organs to inquire whether the measures reasonably take into account the immediate socio-economic needs of the people in a manner that enables them to live a dignified life and a life of equality without distinction from other sections or members of the society. As important elements of reasonableness these values provide effective protection to the socio-economic needs of the most vulnerable individuals in society.⁹⁷

4.1.4 Reasonableness review in the African Charter

Unlike the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol), the African Charter does not explicitly provide for reasonableness as a model of review to monitor states' compliance with their obligations. The omission does not necessarily mean that the reasonableness model of review is not recognised in the African Charter. The teleological approach interprets a treaty as a whole and enables the identification and the engagement of various provisions of the African Charter that enshrine elements of the reasonableness review. Reasonableness is enshrined in two statements of the preamble to the African Charter. The preamble identifies the object and purpose of the African Charter to protect human rights (including socio-economic rights). It was demonstrated above, that to be reasonable, a state's measure must show the object and purpose to be achieved by the relevant measure. The preambular statement can thus be used to elucidate the object and purpose to be achieved by the state's measure regarding socio-economic rights. Any measure adopted by the state regarding socio-economic rights should be able to protect and achieve the realisation of these rights. Furthermore, the preamble recognises the values of freedom, equality, justice and dignity as part of the object and purpose of the African Charter. It was demonstrated above, that in order to be reasonable the state's measures must promote the values of equality and dignity. Thus, the values recognised in the preamble to the African Charter can be applied to help assess the reasonableness of a state's measures. The reasonableness model of review is implicitly incorporated in the African Charter through the preamble, articles 1, 2, 3, 5, 30, 45(2), 55, 60 and 61 as well as the socio-economic rights provisions. It is also included in articles 2 and 3 of the African Court Protocol. Article 1 of the African Charter incorporates the requirement for a reasonableness review. It was demonstrated above that this article

95 Liebenberg (n 58) 174.

96 As above.

97 Steinberg (n 94) 281.

requires states to adopt legislative and other measures to give effect to socio-economic rights in the African Charter. Through the principle of effectiveness the phrase 'to adopt legislative or other measures to give effect to socio-economic rights' can broadly be construed to require states to adopt reasonable measures for the realisation of these rights. Thus the obligation to adopt measures in article 1 effectively requires states to adopt reasonable legislative and other administrative and policy measures. The reasonableness review is premised on an obligation that the state adopts legislative and policy measures to give effect to the relevant human rights.⁹⁸ The provisions of articles 2, 3, and 5 of the African Charter regarding non-discrimination, equality and dignity can be broadly elaborated to include the reasonableness review. As demonstrated above a reasonable measure must take into account human dignity, equality and non-discrimination. As such equality, dignity and non-discrimination can be applied by the supervisory organs to inform the content of reasonableness. These contents can then be used in the interpretative process to assess the reasonableness of a state's measures.

The reasonableness model of review can also be derived from the socio-economic rights' provisions of the African Charter. As demonstrated above, the socio-economic rights' provisions are formulated in broad, general terms. The general formulation allows the supervisory organs, through the principle of effectiveness as an element of the teleological approach to interpretation, to construe these provisions in a manner that render their protection practical and effective. The broad interpretation enables the supervisory organs to include reasonableness as a content of socio-economic rights and their related obligations. Moreover, reasonableness can be invoked to ensure that the content of the socio-economic rights that require immediate realisation are taken into account by states' measures. In the *SERAC* case the African Commission endorsed this interpretation by, for example, holding that the provisions of article 24 of the African Charter oblige states to adopt 'reasonable measures' to prevent environmental pollution.⁹⁹

Provisions regarding the protective mandate of the supervisory organs and the mandate to determine cases can be broadly construed to incorporate the reasonableness review. Articles 30 and 45(2) of the African Charter, and article 2 of the African Court Protocol grant the African Commission and the African Court a protective mandate through the determination of complaints. It can, therefore, be argued that the provisions relating to the supervisory organs' mandate to determine cases in article 55 of the African Charter, article 3 of the African Court Protocol enshrine the reasonableness model of review. These provisions can effectively be construed in a manner that requires the supervisory organs, when determining claims relating to socio-

98 S Liebenberg 'Toward an equality-promoting interpretation of socio-economic rights: insights from the egalitarian liberal tradition' (2015) 132 *South African Law Journal* 413.

99 *SERAC* case (n 8) para 52.

economic rights, to consider the reasonableness of a state's legislative, administrative and policy measures.

Moreover articles 60 and 61 of the African Charter as well as article 3 of the African Court Protocol and article 28(c) of the African Court of Justice Protocol, allow the supervisory organs to draw inspiration and apply other relevant instruments in the interpretation of socio-economic rights. Through these provisions, the supervisory organs can draw inspiration from the application of the reasonableness model of review of the UN Committee in interpreting article 8(4) of the Optional Protocol as well as the South African Constitutional Court in its socio-economic rights jurisprudence.

4.2 Minimum core obligations: meaning and implications

The UN Committee in its various General Comments earlier on introduced the minimum core as a significant component in interpreting socio-economic rights in the ICESCR. In its General Comment 3 on the nature of states' obligations (General Comment 3),¹⁰⁰ the UN Committee stated that socio-economic rights in the ICESCR impose upon states a minimum core obligation to guarantee the enjoyment of the minimum essentials of these rights.¹⁰¹ The African Commission in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines)¹⁰² identifies that socio-economic rights enshrined in the African Charter impose upon the Member states a minimum core obligation which is immediate.¹⁰³ According to the African Commission, a minimum core obligation imposes upon the member states of the African Charter to guarantee the minimum essential levels of each socio-economic right enshrined in the African Charter.¹⁰⁴ The African Commission stated further that minimum core obligation is meant to ensure that individuals and groups are not denied enjoyment of the essential levels enshrined in each socio-economic right.¹⁰⁵ The African Commission applied minimum core obligation in *SERAC*.¹⁰⁶ According to the African Commission, at the minimum, the right to shelter requires states to desist from destroying housing of the people, as well as their efforts to

100 Committee on Economic, Social and Cultural Rights, General Comment No 3, The nature of states parties obligations (art 2, para 1) (1990) UN Doc E/1991/23.

101 General Comment 3 (n 100) para 10.

102 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Adopted at the Forty Seventh Ordinary Session held in Banjul, The Gambia, from 12 to 26 May 2010 and formally launched at the Commission's Fiftieth Ordinary Session held in Banjul, The Gambia from 24 October to 7 November 2011).

103 Principles and Guidelines (n 102) para 16.

104 Principles and Guidelines (n 102) para 17.

105 As above.

106 *SERAC* case (n 8) paras 61 and 65.

reconstruct the demolished homes.¹⁰⁷ It further stated that the minimum core of the right to food obliges states to refrain from destroying and polluting food sources.¹⁰⁸ Furthermore, this obligation requires states to ensure that third parties do not destroy or pollute food sources as well as peoples' efforts to feed themselves.¹⁰⁹

Young notes that the concept of a minimum core is based on three broad approaches. She describes the first category as an 'essence approach' that establishes the minimum legal contents of the right that should be prioritised for the protection of individuals' survival, life and dignity.¹¹⁰ According to Young, the essential levels of socio-economic rights, through the essence approach, are determined by their close link with the foundational norms such as survival and life.¹¹¹ The essence approach takes into account the 'basic needs' of the beneficiary of the right.¹¹² It also incorporates the values of equality, dignity and freedom.¹¹³ The second category is the 'minimum consensus' approach that focuses on states' agreement on the elements constituting the universal core content of socio-economic rights rather than the core contents of the rights themselves. This approach asks not what normative minimum should be given priority in each right, but rather where consensus has been reached on content.¹¹⁴ The third approach focuses on the 'minimum obligations' imposed by socio-economic rights rather than the rights themselves. This approach investigates whether a minimum obligation (or minimum set of obligations) can correlate to the minimum core.¹¹⁵

Some aspects of the minimum core obligation as identified above undermine the object and purpose of the African Charter relating to socio-economic rights. For example, greater emphasis is placed on realising the minimum elements of socio-economic rights. A conception of the minimum core that focuses exclusively on the aspect of survival ignores other values which are integral to socio-economic rights such as 'participatory democracy, equality, freedom and human dignity'.¹¹⁶ Moreover, the notion of a minimum core as identified above is in danger of creating a dichotomy of socio-economic rights by establishing important and less important thresholds of socio-economic rights realisation. This dichotomy is problematic for the protection of socio-economic rights in two respects. First, states may give more emphasis to the minimum levels of the rights and less emphasis on the extensive levels of enjoyment through progressive realisation. Second, it may cause the states to undermine the realisation

107 *SERAC case* (n 8) para 61.

108 *SERAC case* (n 8) para 65.

109 As above.

110 KG Young 'The minimum core of economic and social rights: a concept in search of content' (2008) 33 *Yale Journal of International Law* 126-138.

111 Young (n 110) 126.

112 Young (n 110) 128.

113 Young (n 110) 133.

114 Young (n 110) 140-151.

115 Young (n 110) 151-164.

116 Liebenberg (n 58) 167-168 & 173.

of these rights progressively and focus only on meeting the minimum core obligations. Writing in the context of the right to health, Toebes argues that 'minimum core' renders some content of such socio-economic rights less important, as well as undermines the progressive realisation of such rights.¹¹⁷ The 'minimum core approach is in danger of encouraging minimalism in social provisioning when the context, in fact, renders such minimalism unnecessary and inappropriate'.¹¹⁸ The survival-based approach of minimum core fails to effectively respond to diverse socio-economic needs of different groups of people in society. The approach, for example, fails to accommodate the object and purpose of significant socio-economic rights that are not directly related to life such as the right to education.¹¹⁹ The survival-based approach is not exclusive since individuals can survive even with minute nutrition or in situations where dietary standards are high.¹²⁰ Another shortcoming of the minimum core concept is that it stresses the prioritising of socio-economic rights of the individual rather than the collective socio-economic rights. This is evidenced in Bilchitz's statement where he notes that: Collective goals cannot outweigh protections for the most basic interests of individuals.¹²¹ This individualistic understanding of the minimum core needs to be balanced with the collective socio-economic rights in the African Charter that are formulated and based on the African philosophy of collectivism.

The minimum core as an independent model of review is insufficient to achieve the protection of socio-economic rights. Firstly, it encourages states to focus on implementing only the minimum elements of socio-economic rights. Secondly, it exclusively prioritises essential levels of socio-economic rights. Thirdly, it lacks the elements to achieve socio-economic rights progressively but rather focuses on the immediate realisation of socio-economic rights. Finally, it undermines collective socio-economic rights. Thus, the minimum core concept should be supplemented by another model of review that can guarantee the development of the normative content of all socio-economic rights in the African Charter and their progressive realisation. Liebenberg notes that opponents of minimum core do not argue for a total disregard of this notion since it helps states to ensure their measures prioritise the socio-economic needs of marginalised individuals.¹²²

117 B Toebes 'The right to health' in A Eide and others (eds) *Economic, social and cultural rights: a textbook* (2001) 176.

118 Liebenberg (n 58) 169.

119 Liebenberg (n 58) 170.

120 A Sen *Poverty and famines: an essay on entitlement and deprivation* (1982) 12 quoted in Young (n 110) 131.

121 D Bilchitz 'Giving socio-economic rights teeth: the minimum core and its importance' (2002) 119 *South African Law Journal* 499.

122 Liebenberg (n 58) 172-173.

4.3 Proportionality: meaning and implications

The proportionality model of review is centred on the understanding that human rights are not absolute; they can be restricted for the protection of the human rights of others or public interest.¹²³ In the *COHRE* case the African Commission stated that human rights enshrined in the African Charter can only be restricted for reasons of protecting the 'rights of others, collective security, morality and common interest'.¹²⁴ Craig elaborates on proportionality as a standard of review that enables supervisory organs to assess whether a state's limitation measures are appropriate to achieve the intended purposes.¹²⁵ Craig posits, about human rights enshrined in various treaties, proportionality is appropriate in assessing the limitations of such rights by states.¹²⁶ According to Craig, courts assess whether a state's measures relate to the intended goals, as well as whether such measures are disproportionate and impair the object and purpose of the rights.¹²⁷ Möller defines proportionality as a 'doctrinal tool' applied by the supervisory organs to determine whether a state's restriction of individuals' rights is justified and proportionate to the purpose of such restriction.¹²⁸ As a model of review proportionality assists the supervisory organs to establish whether a state's limitation measures are appropriate to achieve the intended purposes.¹²⁹ It guides the supervisory organs to resolve a conflict between human rights as well as between rights and public interests.¹³⁰

In common the above definitions demonstrate that human rights are not absolute; their enjoyment can be subjected to some limitations. Significantly, the states must be able to justify the limitation of the rights. In *Constitutional Rights Project and Others v Nigeria (Constitutional Rights Project case)*¹³¹ the African Commission held that states' justification for the limitation of human rights entrenched in the African Charter should be 'strictly proportionate and absolutely necessary' for the purpose aimed to be achieved.¹³² The African Commission further emphasised that the limitation must not render the limited right illusory.¹³³ In *Endorois* case the African Commission held that the limitation of the rights in the African Charter should not

123 AV Dolzhikov 'The European Court of Human Rights on the principle of proportionality in "Russian" cases' (2012) 82 *Teisės aktualijos* 215.

124 *COHRE* case (n 14) para 165.

125 P Craig 'Proportionality, rationality and review' (2010) *New Zealand Law Review* 256 at 268.

126 Craig (n 125) 269.

127 Craig (n 125) 270.

128 K Möller 'Proportionality and rights inflation' in G Huscroft and others (eds) *Proportionality and the rule of law: rights, justification, reasoning* (2014) 155.

129 Craig (n 125) 268.

130 Möller (n 128) 156.

131 *Constitutional Rights Project & Others v Nigeria* (1999) AHRLR 227 (ACHPR 1999).

132 *Constitutional Rights Project case* (n 131) para 42.

133 As above.

render such rights illusory and ineffective.¹³⁴ This aspect of proportionality links with the teleological approach, particularly with the principle of effectiveness that requires supervisory organs to interpret the socio-economic rights in a manner that renders such rights practical and effective rather than theoretical and ineffective. The concept of proportionality helps supervisory organs to scrutinise a state's justification for restricting individuals' rights.¹³⁵

Scholars have identified four elements of proportionality namely legitimate aim, suitability, necessity, and balancing.¹³⁶ Legitimate aim focuses on ensuring that the measures adopted by the state to restrict the rights of the individuals and groups are in line with the law and the values of a democratic society. For states to restrict human rights they must prove to have a 'legitimate aim'.¹³⁷ Limitation of the enjoyment of the rights by states should be strictly based on legitimate aims.¹³⁸ The African Commission applied this element of proportionality in *Endorois* case where it stated that restriction of the rights in the African Charter must be established by law.¹³⁹ The legitimate aim of a state is justified when the limitation is 'prescribed by law' and 'necessary in a democratic society'.¹⁴⁰ The legitimate goals of the state to limit the rights are also expressed in different phrases¹⁴¹ but are mainly expressed in the phrases 'to the protection of the rights of other persons or public interests'.¹⁴² These two phrases are the basis for restricting human rights.¹⁴³ In *Prince v South Africa (Prince case)*¹⁴⁴ the African Commission held that the individual's right to 'hold religious beliefs' is absolute, however, the right to exercise such religious beliefs is not absolute.¹⁴⁵ According to the African Commission, how an individual practices his or her religious beliefs must be in line with the 'interests of society'.¹⁴⁶ The African Commission did not define the phrases 'public interest', 'public need' or 'interests of society' in its jurisprudence. However, in its Guidelines, it has interpreted the phrase 'public interest' to mean the 'common well-being or general welfare of the

134 *Endorois* case (n 9) para 172.

135 J Rivers 'Proportionality and variable intensity of review' (2006) 65 *Cambridge Law Journal* 176-177.

136 See Möller (n 128) 155-156, Dolzhikov (n 123) 218, J Gerards 'How to improve the necessity test of the European Court of Human Rights' (2013) 11 *International Journal of Constitutional Law* 469, J Rivers 'Proportionality and variable intensity of review' (2006) 65 *Cambridge Law Journal* (2006) 181; and Craig (n 125) 271-272.

137 Dolzhikov (n 123) 218.

138 As above.

139 *Endorois* case (n 9) para 172.

140 M Eissen 'The principle of proportionality in the case-law of the European Court of Human Rights' in RSt.J Macdonald and others (eds) *The European system for the protection of human rights* (1993) 126.

141 Dolzhikov (n 123) 218.

142 Dolzhikov (n 123) 219.

143 As above.

144 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).

145 *Prince* case (n 144) para 41.

146 As above.

population'.¹⁴⁷ It has also elaborated the phrases 'public need' and 'interest of the society' in the provisions of the African Charter to include 'legitimate public interest objective such as economic reform or measures designed to achieve greater social justice'.¹⁴⁸ Suitability determines whether the measures adopted to limit the rights are capable of achieving the legitimate purpose of the limitation.¹⁴⁹ Significantly, suitability requires states' measures to be reasonable in a manner that does not provide absurdity in the enjoyment of the rights.¹⁵⁰ The reasonable link between the limitation and the purpose of the limitation is established when the measures taken are capable of achieving the aim.¹⁵¹ If a measure fails to achieve the legitimate purpose then it does not pass the suitability test.¹⁵² As such suitability requires states to develop a mechanism capable of achieving the legitimate aim of the limitation.¹⁵³ In *Prince* case, the African Commission held that the effect of the state's restriction of the rights should be 'strictly proportionate' with the legitimate goal aimed to be achieved.¹⁵⁴ In *Endorois* case the African Commission held that restriction of the rights in the African Charter must be necessary for achieving the desired purpose and they should also be least restrictive.¹⁵⁵ In the *Prince* case, the African Commission held that the effect of the state's restriction of the rights should be necessary for achieving the legitimate aim.¹⁵⁶ The fourth element of proportionality is balancing. Contrary to suitability and necessity that are concerned with the link between the purpose of the measures and the means to achieve such purpose, balancing determines the inter-relation between the limited rights and the rights that the state aims to protect.¹⁵⁷ At the balancing stage, a supervisory organ establishes which of the two categories of rights at stake should be prioritised.¹⁵⁸ The inquiry at this stage is whether the state's limitation of the right can assist the protection of the 'competing right or interest'.¹⁵⁹ The balance between the limited right and the right aimed to be protected by the state should be reasonable.¹⁶⁰ In the Principles and Guidelines the African Commission while interpreting the principle of proportionality, stated that the principle aims at 'striking a fair balance' between the individual's socio-economic rights and the interest of the society.¹⁶¹

147 Principles and Guidelines (n 102) para 1(h).

148 Principles and Guidelines (n 102) para 55(c).

149 Dolzhikov (n 123) 219.

150 As above.

151 Möller (n 128) 712.

152 As above.

153 Gerards (n 136) 473.

154 *Prince* case (n 144) para 43.

155 *Endorois* case (n 9) paras 213-214.

156 *Prince* case (n 144) para 43.

157 Gerards (n 136) 469.

158 Möller (n 128) 713.

159 As above.

160 Gerards (n 136) 469.

161 Principles and Guidelines (n 102) para 1(g).

A state's limitation of socio-economic rights is not proportional in circumstances where the state fails to prove that it balanced the competing socio-economic rights of the individual with those of the general public before taking the limitation steps.¹⁶² These elements of proportionality are relevant to the interpretation of socio-economic rights. Firstly, they assist the supervisory organs to establish whether the measures adopted by the state fulfil the legitimate aim. However, it should be noted that exclusive legitimate aim is not sufficient justification for states to restrict socio-economic rights. Secondly, supervisory organs must ascertain the suitability of the measure. They should establish whether the measure adopted is suitable for achieving a legitimate aim. Thirdly, supervisory organs must ascertain that there is no other less restrictive measure that a state could adopt to lessen the effects of the limitation to the victims. Finally, supervisory organs should balance the rights restricted and the rights protected by the measure and establish if justification is established.

4.3.1 Proportionality in the African Charter

The notion of proportionality is recognised in the African Charter. The socio-economic rights in the African Charter are not absolute, states can limit these rights through the provisions of article 27(2) of the African Charter. The African Commission held in the *COHRE* case that the human rights enshrined in the African Charter can be limited by the provisions of article 27(2).¹⁶³ These provisions provide an internal limitation clause. Rights provisions in a treaty incorporate limitation clauses which are necessary restrictions for the protection of human rights of a larger community of people in the society.¹⁶⁴ It can thus be argued that the conditions identified in the limitation provisions of article 27(2) namely 'interest of public need' or 'general interest of the community' 'rights of others, collective security, morality and common interest' implicitly incorporate the model of proportionality. The underlying assumptions regarding proportionality are twofold. Firstly, public interests override an individual's interests. Second, a state's measures to foster such public interests prevail only to the extent that they do not impose excessive restrictions on individuals.¹⁶⁵

162 Principles and Guidelines (n 102) para 1(g).

163 *COHRE* case (n 14) para 165.

164 S Tsakyrakis 'Proportionality: an assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468.

165 Tsakyrakis (n 164) 476.

5 TOWARDS A MODEL OF REVIEW GROUNDED IN THE TELEOLOGICAL APPROACH: REASONABLENESS INCORPORATING MINIMUM CORE AND PROPORTIONALITY

The effective protection of the socio-economic rights in the African Charter will require an assessment of the states' compliance with the obligations imposed by these rights. The model of review suitable for assessing states' compliance with their socio-economic rights obligations must be able to correspond with the teleological approach and advance the object and purpose of the African Charter regarding these rights. The discussion above on the models of review identified reasonableness as a model of review that considers the object and purpose of the rights to assess states' compliance with the obligations imposed by such rights. The element of object and purpose of the rights in the reasonableness review corresponds with the teleological approach to interpretation. The appropriateness of the teleological approach centres on its use of the object and purpose of the treaty regarding socio-economic rights. The element of object and purpose enables the supervisory organs to engage various interpretative tools to develop the meaning, scope and content of socio-economic rights and their related obligations. Based on this interrelation between the reasonableness review and the teleological approach it can be argued that reasonableness can be developed as a teleological model of review. The aspect of object and purpose of the rights as an element of reasonableness can be applied in a manner that incorporates in this model of review the elements of the teleological approach identified above which are vital in elaborating the object and purpose of the socio-economic rights in the African Charter.

5.1 Identifying the scope and content of socio-economic rights at stake

As argued above, the object and purpose of the rights is a vital element of the reasonableness review. This element as elaborated above engages various interpretative aspects to develop the scope and content of the rights at stake. The element, therefore, renders reasonableness as a two-stage model of review in the sense that it first develops the scope and content of the socio-economic rights and then applies such content to assess states' measures. As demonstrated above, the reference to the object and purpose enables a reviewing supervisory organ, applying reasonableness, to engage the values of dignity, equality, justice and freedom to elaborate the content of the rights that the states must take into account when they develop measures to realise the rights. Furthermore, as shown above, the reference to the object and purpose enables reviewing supervisory organs to engage the provisions of the African Charter holistically to generate the scope and content of the

socio-economic rights that states' measures must take into consideration.

5.2 Minimum essentials of socio-economic rights

Effective protection of socio-economic rights requires states to be able to give effect to these rights progressively. However, this does not necessarily mean that the states should ignore the immediate socio-economic needs of individuals and groups. The object and purpose of the African Charter regarding socio-economic rights will be defeated when states' measures fail to give effect to the minimum essentials of socio-economic rights. As such, object and purpose as an element of the reasonableness review creates space for a reviewing supervisory organ to assess how states' measures take into account the individual's and peoples' immediate socio-economic needs. In this regard, the measures of a state will be unreasonable when they leave the immediate socio-economic needs out of their scope. In situations where immediate socio-economic needs of the people are not realised by the state, it exposes people to live an undignified life and fail to engage equally in society.¹⁶⁶ Minimum core in the reasonableness model of review enables supervisory organs to place a heavy burden of justification in circumstances where individuals are denied their immediate socio-economic needs.¹⁶⁷ If merged with the reasonableness model of review, the minimum core would help in establishing the content of immediate socio-economic needs and enable the supervisory organs to assess how states' measures have taken into account such needs.¹⁶⁸ Furthermore, as demonstrated above, the object and purpose of rights incorporates the principle of effectiveness that ensures rights' provisions are assigned meaning that is effective and practical. In this regard, a reviewing supervisory organ, applying reasonableness, can apply the principle of effectiveness as an element of object and purpose to construe the provisions of socio-economic rights in a manner that renders their meaning effective and practical. This generous interpretation requires that the minimum essential of these rights are protected. The incorporation of the minimum essential of socio-economic needs is significant in that it engages in the reasonableness review of the minimum core model of review. It should be noted that the analysis of the minimum core obligation above identified that this model of review cannot independently advance the object and purpose of the African Charter regarding socio-economic rights. The discussion demonstrated the need to integrate minimum obligation with the reasonableness review. The integration is vital in that it enables the supervisory organs to assess how states realise the immediate socio-economic needs of the most vulnerable people in the society while

166 Liebenberg (n 58) 184.

167 As above.

168 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: theories, laws, practices and prospects* (2011) 321.

giving effect to the progressive realisation of these rights. Minimum core obligation is useful for establishing the basic content of socio-economic rights and the reasonableness review helps in establishing the content of the rights for progressive realisation.¹⁶⁹

5.3 Reviewing positive and negative obligations

As demonstrated above, the provisions of article 1 of the African Charter incorporates both the negative and positive obligations imposed by the socio-economic rights. Positive obligations require states to adopt measures that realise socio-economic rights. It was argued above that the reasonableness review is implicitly incorporated in the provisions of article 1 of the African Charter. In this regard, the reasonableness review can be applied to review the positive obligations imposed by socio-economic rights. As demonstrated above, a reviewing court can inquire as to whether the measures adopted by the state reasonably realise the obligations imposed by the socio-economic rights. In this regard, reasonableness sufficiently reviews positive obligations. Regarding the negative obligations, it was demonstrated above that the state is in breach of its negative obligation when it violates the enjoyment of the existing socio-economic rights. When the enjoyment of existing rights is limited states should justify the limitation. It was demonstrated above that the object and purpose requires the restriction of rights to be narrowly interpreted. Object and purpose of the rights as an element of reasonableness enables this model of review to assess states' restrictive measures. In this regard, reasonableness integrates the proportionality model of review. In the analysis regarding the proportionality model of review it was demonstrated that it cannot effectively review the obligations imposed by the socio-economic rights in a manner that advances their object and purpose. The need to integrate it with the reasonableness review was demonstrated. Writing on the model he developed that combines the reasonableness review and minimum core, Yeshanew notes that this model is not exclusive or that other models of review can be developed for the effective protection of socio-economic rights.¹⁷⁰

6 CONCLUSION

This article has shown that it is important for the supervisory organs to adopt and apply the teleological model of review for effective protection of socio-economic rights. When assessing states' compliance with their socio-economic rights obligations supervisory organs must be able to ascertain the scope and content of the socio-economic rights at stake and then use such content as a mechanism to assess states' measures. Where the immediate socio-economic needs are at stake states' measures should be assessed to establish how they take such needs into

169 Yeshanew (n 168) 223.

170 Yeshanew (n 168) 321.

account. Moreover, where the existing socio-economic rights are limited states' restrictive measures must be assessed. This article has demonstrated that the reasonableness review integrating minimum core and proportionality as a teleological model of review can be applied by the supervisory organs to assess states' measures relating to the obligations imposed by the socio-economic rights. The reasonableness model of review incorporating minimum core obligation and proportionality as a teleological model of review focuses on advancing the object and purpose of the socio-economic rights. It enables supervisory organs to develop the scope and content of socio-economic rights. It also requires supervisory organs to use such scope and content to limit states' discretion regarding their mandate to adopt measures and policies for realising these rights. Moreover, it helps supervisory organs, through the object and purpose of the rights, to develop the minimum essentials of the socio-economic rights that should be realised by the Member states. Finally, it allows the supervisory organs, in circumstances where states limit the socio-economic rights, to assess the restrictive measures of states.