

**SCOPE AND LIMITS OF JUDICIALISATION
OF THE CONSTITUTIONAL RIGHT TO
HEALTH IN SOUTH AFRICA: AN APPRAISAL
OF KEY CASES WITH PARTICULAR
REFERENCE TO JUSTICIABILITY**

*Escopo e limite da judicialização do direito constitucional
à saúde na África do Sul: avaliação de casos com
referência específica à justiciabilidade da saúde*

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ABSTRACT

Section 27 of the South African Constitution guarantees everyone a right of access to healthcare services, including reproductive healthcare. This paper discusses how domestic courts have interpreted and applied section 27. It explores the extent to which section 27 is justiciable in the sense of being amenable to judicial interpretation and application in practice. The paper highlights the scope as well as the limits of the constitutional and institutional competences of the courts to adjudicate a claim relating to the right to health that is guaranteed by section 27. The justiciability of the right to health under the South African Constitution is interrogated through a critical appraisal of three cases decided by the South African Constitutional Court, namely, *Soobramoney versus Minister of Health KwaZulu-Natal*, *Minister of Health and Others versus Treatment Action Campaign and Others*, and *Government of the Republic of South Africa and Others versus Grootboom and Others* against the backdrop of the transformation of the South African constitutional landscape in the post-apartheid era.

Keywords: Constitutional Competence; Institutional Competence; Justiciability; Right to Health; Socioeconomic Rights.

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RESUMO

Este trabalho discute como as cortes sul-africanas têm interpretado e aplicado o artigo 27 da Constituição da África do Sul, que garante a todos o direito de acesso aos serviços de saúde, incluindo cuidados reprodutivos. A extensão da judicialização do artigo 27 é analisada, considerando a possibilidade de interpretação judicial e aplicação prática. Destaca-se a abrangência e os limites das competências constitucional e institucional dos tribunais para julgar uma ação relacionada ao direito à saúde. A judicialização deste direito na Constituição da África do Sul é investigada por meio de uma análise crítica de três casos decididos na Corte Constitucional do país: (1) *Soobramoney versus Secretaria de Saúde de KwaZulu-Natal*; (2) *Ministro da Saúde e Outros versus Campanha de Tratamento e Outros*; e (3) *Governo da República da África do Sul e Outros versus Grootboom e Outros*, tendo como pano de fundo a transformação do quadro constitucional sul-africano na era pós-apartheid.

Palavras-chave: Competência Constitucional; Competência Institucional; Direito à Saúde; Direitos Socioeconômicos; Justiciabilidade.

Introduction

The right to health is among the provisions of the *Bill of Rights of the South African Constitution*. While the right to health manifests in a number of provisions of the Constitution, section 27 is its most universal expression. Section 27, which bears a close resemblance to article 2(1) of the *International Covenant on Economic, Social and Cultural Rights*, (CESCR),⁽¹⁾ provides that:

1. Everyone has the right to have access to:

(a) **health care services, including reproductive health care**

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

2. The state must take reasonable and other measures, within its available resources, to achieve a progressive realisation of each of these rights

3. No one may be refused emergency medical treatment.⁽²⁾

This paper seeks to interrogate how the right to health has been judicialised in South Africa in the post-apartheid era. It critically appraises the manner in which

¹ INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. GA Res. 2200A (XXI), adopted 16 December 1966, entered into force 3 January 1976.

² CONSTITUTION of the Republic of South Africa N. 108 of 1996 (hereinafter Constitution). Emphasis added.

courts have adjudicated and conceptualised constitutional claims revolving around the right to health. The emphasis is on exploring the scope as well as limits of justiciability of the right to health in the South African context. The paper uses three leading cases as the main pivot for discussion. All the cases were decided by the South African Constitutional Court, the country's highest court on constitutional matters.⁽³⁾ Two of the cases, namely, *Soobramoney v Minister of Health KwaZulu-Natal (Soobramoney)*⁽⁴⁾ and *Minister of Health and Others v Treatment Action Campaign and Others (TAC)*,⁽⁵⁾ concern claims directly relating to a right to health. However, the third case, *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*,⁽⁶⁾ concerns a right to housing rather than health. Notwithstanding that the *Grootboom* case does not directly relate to health, it is the Constitutional Court's leading decision on the interpretation and application of socioeconomic rights under the South African Constitution. For this reason, the *Grootboom* decision is an important source of interpretive guidance for lower courts when adjudicating socioeconomic rights generally, including the right to health, under domestic law.

Because the concepts of the right to health and justiciability are central to this paper, it serves well to begin by clarifying the context in which they are being used.

I. Right to health

At the domestic as well as the international level, the term "right to health" has been used not so much as a legal term of art but rather as convenient shorthand. When used in international human rights discourses, the term "right to health" can be understood in a wider sense to cover not only a right of access to a range of facilities, goods and services, including health services, but also a right to the underlying determinants of health such as food, housing, safe water, sanitation, healthy working conditions, and an environment that is safe and free from hazards such as pollutants.⁽⁷⁾ In *General Comment 14*, for example, the Committee on Economic, Social and Cultural Rights (Committee on ESCR), said that it interprets the "right to health" in article 12 of the CESCR as an "inclusive" right that extends not only to access to discrete healthcare services, but also to the underlying determinants of health.⁽⁸⁾ In this paper, however, right to health is used in a narrower sense to mean a legally enforceable right of access to health services for the attainment of health.

³ Section 167(3)(a) of the Constitution.

⁴ 1997 (6) BCLR 78 (Constitutional Court).

⁵ 2002 (10) BCLR 1033 (Constitutional Court).

⁶ 2000 (11) BCLR 1169 (Constitutional Court).

⁷ SHINN, Carolyne. The right to the highest attainable standard of health: public health's opportunity to reframe human rights debate in the United States. *Health and Human Rights*, v. 4, n. 1, p. 119, 1999.

⁸ COMMITTEE ON ESCR. *General Comment No 14, The right to the highest attainable standard of health (art 12 of the Covenant)* (22n Session 2000), UN Doc E.C 12/2000/4.

It is otherwise accepted that, when referring to the right to health in the narrower sense, other terms such as “right to health care” or the “right to health protection” can also be used to convey the notion of individual entitlement to the protection of health and provision of health care services under international law and domestic legal systems.⁽⁹⁾ Furthermore, it is accepted that irrespective of the term that one uses to convey a notion of entitlement to services for attaining health, the attainment of health cannot, itself, be guaranteed.⁽¹⁰⁾ The most that the state can do is to provide diagnostic, preventative, curative and rehabilitative services for the attainment of health.⁽¹¹⁾

II. Justiciability

The notion of justiciability in this paper primarily denotes the constitutional competence of the courts to adjudicate a claim that seeks to enforce a state obligation to provide health service as a correlative duty to a tangible right to health that is held by the claimant. To a limited extent, the notion of justiciability also implicates the institutional competence of the courts to adjudicate a claim based on a right to health. But why is justiciability an important consideration when seeking to enforce a right to health?

Criticisms have often been levelled at the notion of a right to health as something that is not amenable to justifiability. The criticisms take two main forms. One is to do with the normative content of a right to health. In traditional liberalism, there is a general discomfiture with socio-economic rights. It is said that unlike traditional civil and political rights, a right to health is socio-economic right whose content and parameters are not easily ascertainable.⁽¹²⁾ It is argued that even if we are to agree on the desirability of socio-economic rights, we will still be left with the problems of defining in tangible or concrete forms the attendant rights and obligations.⁽¹³⁾ The argument is that, much more than their civil and political counterparts, socio-economic rights tend to be nebulous such that individual entitlements as well as the corresponding obligations on the part of the state are not clear save where state obligations are reduced to procedural fairness such as the obligation to act rationally and reasonably or when the obligations are reduced to a bare minimum

⁹ TOEBES, Brigit. Towards an improved understanding of the international human right to health. *Human Rights Quarterly*, v. 21, n. 3, p. 661-663, 1999.

¹⁰ BUCHANAN, Allan. The right to a decent minimum of health care. *Philosophy and Public Affairs*, v. 13, n.1, p. 56, 1984.

¹¹ ROEMER, Ruth. The right to health care. In: FUENZALIDA-PUELMA, Hernán Luis; CONNOR, Susan Scholle (Eds.). *The right to health in the Americas: a comparative constitutional study*. Washington DC: PAHO, 1989. p 17-23; TOEBES, Brigit. op. cit., p. 662-663.

¹² FELDMAN, David. *Civil liberties and human rights in England and Wales*. Oxford: Oxford University Press, 1993. p. 902.

¹³ PUTA-CHEKWE, Chisanga; FLOOD, Nora. From division to integration: economic, social and cultural rights as basic human rights. In: MERALI, Isefahan; OOSTERVELD, Valerie (Eds.). *Giving meaning to economic, social and cultural rights*. Philadelphia: University of Pennsylvania Press. 2001. p. 41-43.

as not to meaningfully contribute to the alleviation of poverty and deprivation.⁽¹⁴⁾ This criticism can be described as the problem of normative content.

The second criticism is a more formidable case against the justiciability of the right to health. The criticism revolves not so much about the tangibility of socio-economic rights. Rather, it is about judicial competence in two senses. One type of competence is judicial competence in a constitutional sense. The second type of competence is competence in an institutional sense. The argument is that historical deficits in both constitutional and institutional competence interact at different levels and with differing intensity to render it difficult, if not impossible, for courts to claim to command the same constitutional and institutional competences to hear and resolve disputes about socio-economic rights that courts command in respect of disputes involving civil and political rights.

The problem of constitutional competence is really the problem of separation of powers between the judiciary and the executive. The right to health, as a socio-economic right, implicates the doctrine of separation of powers that was popularised by *Montesquieu* in the eighteenth century.⁽¹⁵⁾ The problem of constitutional competence, when exploring the justiciability of the right to health, is not because socio-economic rights impact on separation of powers, at all. It is accepted that even civil and political rights impact on separation of powers. Civil and political rights claims that come before the courts can be as much about law as they are about policy which, constitutionally, is pre eminently the preserve of the executive. Rather, when we raise the problem of constitutional competence, the important question is whether socio-economic rights do not upset the doctrine of separation of powers to a point where the judiciary begins to substantively involve itself in the day to day allocation budgets and thus rivaling if not usurping the constitutional prerogative of the executive. What is constitutionally problematic about socioeconomic rights is that they implicate a positive and enforceable commitment of resources by the state to a much greater degree than their civil and political counterparts. Ultimately, socioeconomic rights obligations are about the state committing significant and often substantial financial resources in order to fulfil certain rights.

When seeking to uphold separation of powers in liberal democracies, the underlying political and constitutional tenets are that budgets are subject to democratic control and accountability. Consequently, in a democratic polity, it would be illegitimate for a body that is not subject to the same degree of control and accountability to the electorate, such as the judiciary, to substitute its own view of the public good for that of the executive. In short, without a clear constitutional mandate, courts are in troubled waters when it comes to adjudicating on socio-economic rights. Even where there is there is a constitutional mandate, courts may have

¹⁴ BUCHANAN, Allan. op. cit.

¹⁵ MONTESQUIEU. *The spirit of the laws* 1748. Available at: <<http://etext.lib.virginia.edu/toc/modeng/public/MonLaws.html>>.

to be restrained about their own competence in order not to appear to be ready to substitute the executive, or worse still, usurp it.⁽¹⁶⁾

By raising institutional competence, we are also saying that even if there is constitutional competence, there is the problem of polycentricity to contend with.⁽¹⁷⁾ The question is whether courts have the ability, institutional memory and expertise to decide on allocation of health care resources within health care and between health care and other spheres. Given the adversarial nature of adjudication we have, the task of the court is, ultimately, to weigh up the arguments it has heard from the two contending parties and then find in favour of one – the winner. It is a winner takes all. But does this approach sit well with socioeconomic rights?

Socioeconomic rights, including the right to health, however, militate against always making clear choices between two opposing arguments. More pertinently, it is argued, that decisions about allocation for health care resources, for example, often entail reconciling mutually interacting variables rather choosing one goal and the exclusion of the other. Within health care itself there are difficult choices to be made, for example, between acute and chronic care.⁽¹⁸⁾ Outside of health care, choices have to be made about how resources allocated to health care stand alongside those allocated to social welfare expenditure, defence, education and so on. It was the American scholar, *Lon Fuller*, who first gave us a classic statement on the limitations of the judicial function when attempting to resolve polycentric questions.⁽¹⁹⁾ Using the metaphor of a spider's web, he said:

We may visualise this kind of situation by thinking of a spider's web. A pull on one strand will distribute the tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would occur for example, if the double pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" – each crossing of a strand is a distinct centre for distributing tension.⁽²⁰⁾

The argument is not that civil and political rights do not give rise to polycentric questions at all. Rather, it is that socioeconomic rights such as the right to health are inherently polycentric to the point of rendering a right to health a highly problematic claim in adversarial proceedings.

¹⁶ This observation was made, for example, by the South African Constitutional Court in *MINISTER of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (Constitutional Court), which is discussed in this paper.

¹⁷ FULLER, Lon Luvois. The forms and limits of adjudication. *Harvard Law Review*, v. 92, n. 2, p. 353-409, Dec. 1978.

¹⁸ This observation was made, for example, by the South African Constitutional Court in *SOOBARAMONEY v Minister of Health KwaZulu-Natal (Soobramoney)* 1997 (6) BCLR 78 (Constitutional Court), which is discussed in this paper.

¹⁹ FULLER, Lon Luvois. op. cit., p. 395.

²⁰ Id., loc. cit.

There are counterarguments, of course, not least the argument that while it is true that at the time that socioeconomic rights first entered modern human rights jurisprudence there were huge problems about their ascertainability and the institutional capacity of the courts to adjudicate on socio-economic rights, over the years there been tremendous conceptual and interpretive progress made by a variety stakeholders, including by scholars, treaty bodies, and domestic courts.⁽²¹⁾ Yes, socioeconomic rights are second generation rights. Yes, we must concede that they are not as juridically developed as their civil and political counterparts and that their normative content is not as clear. At the same time, we must take cognisance that for a growing number of jurisdictions as well as in international human rights discourse, socioeconomic rights are no longer rights in their infancy. The real question is whether in a given case a jurisdiction has juridically agreed to be bound by socio-economic rights, and whether there is judicial as well as political willingness to fulfil socio-economic rights.

The work done by international law experts that culminated in the *Limburg Principles* in 1986⁽²²⁾ and the *Maastricht Guidelines* in 1997⁽²³⁾ on clarifying the normative content of the CESCR, and developing criteria for identifying violations of socio-economic rights and the appropriate in the domestic legal spheres, is evidence of a growing jurisprudence on socioeconomic rights. The jurisprudence of the Committee on ESCR, especially jurisprudence emanating from its *General Comments*, has contributed significantly towards clarifying and underscoring the justiciability of socioeconomic rights. In this regard, *General Comment 14* of the Committee on ESCR is an important milestone.⁽²⁴⁾ Though the justiciability of socioeconomic rights remains a contested terrain, what stands in the way of recognition and implementation of socioeconomic rights is no longer necessarily the limitation of jurisprudence on justiciability, but rather problems of judicial as well as political resolve.

III. South African experience with justiciability of the right to health: the background

South Africa provides us with an ideal jurisdiction in which to test the justiciability of the right to health for four main interrelated reasons Firstly, South African has a transformative Constitution. The second reason is the commitment to substantive equality under the Constitution. The third reason is the premium that the Constitution puts on the respect of human dignity as a concomitant part of respecting

²¹ LIEBENBERG, Sandra. *Socio-economic rights: adjudication under a transformative constitution*. Claremont: Juta, 2010. p. 83-86.

²² LIMBURG Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. UN Document E.CN.4/1987/17, 1987. The Limburg Principles were developed under the auspices of the International Commission of Jurists.

²³ MAASTRICHT Guidelines on Violations of Economic, Social and Cultural Rights. *Human Rights Quarterly*, v. 20, n. p. 691-705, 1998. The Maastricht Guidelines were also developed under the auspices of the International Commission of Jurists.

²⁴ COMMITTEE ON ESCR. *General Comment No 14*, cit.

equality. The fourth reason is the explicit recognition of socio-economic rights, including the right to health as enforceable fundamental rights.

The inauguration of a new constitution to mark the demise of the iniquitous and brutish apartheid system and the birth of a new political dispensation was in constitutional terms a great leap. Not only did the new Constitution inscribe into the political and legal economy of the country a new culture of human rights by ushering in a justiciable Bill of Rights built around the democratic values of human dignity, equality and freedom which the state has a duty to respect, protect, promote and fulfil.⁽²⁵⁾ Equally significant, the Constitution went beyond the classical liberal promise of merely protecting individual liberties against the tyranny of the state by creating, as part of recognising the history of oppressive, exclusionary and, fractious human relations in the country, a space for transformative constitutionalism.⁽²⁶⁾ *Karl Klare* has described transformative constitutionalism under the South African Constitution as “a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country’s political and social institutions and power relationships in democratic, participatory, and egalitarian direction”.⁽²⁷⁾ The transformative nature of the South African Constitution is an important normative feature of the South African Constitution as it provides a context in which to interpret socioeconomic rights as rights that are intended to transcend the classical libertarian idea of a Bill of Rights as essentially a bastion against the state where fundamental rights are essentially rights to restrain the state rather than positive entitlements that impose positive duties.⁽²⁸⁾

The substantive equality orientation of the South African Constitution manifests in a number of ways. One manifestation is the historical situatedness of equality in the constitutional universe. To underpin the place of equality in the new constitutional dispensation, the Constitutional Court has said:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable states may underscore their principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and its organising principle.⁽²⁹⁾

²⁵ Section 7(2) of the Constitution.

²⁶ KLARE, Karl. Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, v. 14, n. 1, p. 146-188, 1998; MOSENEKE, Dikgang. The fourth bram fischer memorial lecture: transformative adjudication. *South African Journal on Human Rights*, v. 18, n. 3, p. 309-319, 2002; PIETERSE, Marius. What do we mean when we talk about transformative constitutionalism? *SA Public Law*, v. 20, n. 2, p. 156-166, 2005; LANGA, Pius. Transformative constitutionalism. *Stellenbosch Law Review*, v. 22, n. 3, p. 351-360, 2006; ALBERTYN, Cathi. Substantive equality and transformation in South Africa. *South African Journal on Human Rights*, v. 23, n. 2, p. 253-276, 2007.

²⁷ KLARE, Karl. op. cit., p. 150.

²⁸ FREDMAN, Sandra. *Human rights transformed: positive rights and positive duties*. Oxford: Oxford University Press, 2008. p. 10-13.

²⁹ PRESIDENT of the Republic of South Africa and Another v Hugo, 1997 (6) BCLR 708 (Constitutional Court), para. 74.

The most important manifestation is the departure from formal equality. The right to equality, which finds its most direct expression in section 9 of the Constitution, means much more than merely ensuring formal equality. The equality clause goes beyond the Aristotelian or equal treatment model. It extends to imposing positive obligations on the state to create conditions for achieving equality of opportunity and possibly equality of outcome. In contemporary South African jurisprudence, the term substantive equality has come to signify an expansive notion of equality under the Constitution.⁽³⁰⁾ It is a model of equality whose main premise is derived from a recognition that in the particular historical circumstances of South Africa, the pattern of disadvantage that was spawned and entrenched by colonialism and apartheid, imposes a legal obligation on the part of the state to redress underlying structural inequality so as to remove barriers to meaningful equality, promote equal participation in the social and economic spheres, and secure full and equal enjoyment of the fundamental rights that are inscribed in the Bill of Rights. If the rationale of socio-economic rights is creating a minimum floor of socio-economic wellbeing, then substantive equality is its foundational lynchpin for socioeconomic rights along with respect for human dignity.

An understanding of the reach of equality under the South African Constitution would be incomplete without concomitantly understanding how the Constitutional Court has forged a link between the right to equality in section 9 and the right to human dignity in section 10 of the Constitution. The section provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected". Human dignity, like equality, operates as a pervasive value as well as a right under the South African Constitution. While the Constitutional Court concedes the difficulties of giving tangible content to human dignity, at the same time, in several cases, the Court has been quite emphatic that human dignity is inextricably intertwined with equality.⁽³¹⁾ In these cases, the Court has highlighted that the right to human dignity is an acknowledgment that all human beings have intrinsic worth and none more than the other. Equality under the South African Constitution does not countenance distinctions that treat certain people as "second class" citizens.⁽³²⁾ Consequently every human being is entitled to *equal* worth, respect and concern. Socio-economic rights affirm human dignity by alleviating the consequences of poverty and deprivation.⁽³³⁾

³⁰ See, for example, the pronouncements of the Constitutional Court in the following cases: *PRESIDENT of the Republic of South Africa and Another v Hugo*, cit., para 41; *NATIONAL Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (Constitutional Court), para 60-62; *CITY Council of Pretoria v Walker* 1998 (3) BCLR 257 (Constitutional Court), para 46; *MINISTER of Finance v Van Heerden* 2004 (11) BCLR 1125 (CC) 2004 (6) SA 26 (Constitutional Court), para 26.

³¹ See, for example, the pronouncements of the Constitutional Court in the following cases: *PRESIDENT of the Republic of South Africa and Another v Hugo*, cit., para 41; *HARKSEN v Lane NO and Others* 1997 (11) BCLR 1489 (Constitutional Court), para 50; *CITY Council of Pretoria v Walker*, cit., para 81; *NATIONAL Coalition for Gay and Lesbian Equality v Minister of Justice*, cit., para 120-129; *MINISTER of Finance v Van Heerden*, cit., para 116.

³² *MINISTER of Finance v Van Heerden*, cit., para 116.

³³ *LIEBENBERG*, Sandra. The value of human dignity in interpreting socio-economic rights. *South African Journal on Human Rights*, v. 21, n. 1, p. 1-31, 2005.

Prior to the inauguration of the Constitution, there was much debate as to whether socio-economic rights should be guaranteed as part of the Bill of Rights. In the end, the wishes of the African National Congress, the majority political party, to have a Bill of Rights that would reflect the indivisibility and interdependence of human rights, as part of overcoming the legacy of apartheid, prevailed and socio-economic rights became part of the Bill of Rights. In the *Grootboom* case, which is discussed in the next section, the Constitutional Court made the following pronouncement by way of taking juridical notice of the rationale of socio-economic rights:

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.⁽³⁴⁾

In *Khosa versus Minister for Social Development*,⁽³⁵⁾ the Constitutional Court drew a link between socioeconomic rights, equality and human dignity. It underscored that when fulfilling the fundamental rights of individuals under the Constitution, socioeconomic rights, and rights to equality and human dignity are not atomistic rights but rather are interrelated and reinforce each other.⁽³⁶⁾ As part of the commitment to transforming the legacy of apartheid and achieving substantive equality and human dignity, the South African Constitution contains a host of socio-economic rights in its Bill of Rights, including section 27 which guarantees everyone a right to access health services.⁽³⁷⁾

IV. The *Soobramoney*, *Grootboom* and *Tac* cases

This section uses the *Soobramoney*, *Grootboom*, and *TAC* cases to test the justiciability of the right to health under South African law. The cases are, by no means, the only relevant cases as they have been other cases that have raised socioeconomic rights. However, because the cases are widely regarded as leading cases, they are sufficiently illustrative of the possibilities as well as the constraints of judicialising the right to health.

³⁴ GOVERNMENT of the Republic of South Africa and Others v *Grootboom* and Others 2000 (11) BCLR 1169 (Constitutional Court), para 26.

³⁵ *KHOSA* and Others: *Mahlaule* and Others v Minister for Social Development 2004 (6) BCLR 569 (Constitutional Court).

³⁶ *Id.*, paras 40-43.

³⁷ The other socioeconomic rights apart from the right of access to health care services are right to: an environment that is not harmful to one's health or well-being (section 24); land (section 30); adequate housing (section 26); emergency treatment (section 27(3)); sufficient food (section 27(1)(b)); sufficient water (section 27(1)(b)); social security (section 27(1)(c)); basic nutrition, shelter, basic health care services and social services in respect of children; basic and further education (section 29(1)(a) and (b)); adequate accommodation, nutrition, reading material and medical treatment in respect of incarcerated persons (section 35(2)(e)).

1. *Soobramoney*

1.1. Facts and decision

The applicant, a 41-year-old man, was in a critical condition with chronic renal failure. He would otherwise die if he did not receive treatment in the form of renal dialysis. He had been receiving dialysis through private care, but his funds had run out. He sought to have dialysis provided to him at the expense of the state. He approached a renal unit of a state hospital. Although such treatment was available, his request was declined on the ground that he did not meet the medical criteria for dialysis.

The medical criteria for determining eligibility for renal dialysis at the expense of the State had been designed to reconcile scarce state resources for supplying kidney dialysis with the demand for kidney dialysis. The demand for kidney dialysis far outstripped supply by state health providers. The criteria took the form of guidelines that had been drawn by the renal unit and were, in turn, based on national guidelines drawn up by the Department of Health. The criteria were designed to ration state renal dialysis services by giving priority to patients in acute renal failure who needed only short-term dialysis while waiting for a more long-term solution such as a kidney transplant or some other appropriate treatment. In this instance, the applicant had irreversible renal disease and would *not*, in the long run, be a suitable candidate for renal transplantation. Moreover, the applicant suffered from ischaemic heart disease and was a diabetic with peripheral vascular disease. In the previous year, he had suffered a stroke. He needed life-long dialysis. Such a medical history and the need for life-long dialysis placed the applicant well outside the inclusion criteria for eligibility for dialysis in the public health sector.

At first, the applicant applied to the High Court for an order to quash the decision of the state renal unit and compel the unit to provide renal dialysis. The matter was first heard in chambers, but the application was refused. The matter was then set for trial before Justice Combrink as an urgent application for final relief. Though the applicant canvassed several grounds in support of his application, in the main, he contended that the respondent's decision had infringed his constitutional right to life and right not to be refused emergency medical treatment that were guaranteed by section 11 and section 27(3) of the Constitution respectively.⁽³⁸⁾ The application was not successful.

On the question of whether section 27(3) assisted the patient, Justice Combrink was of the view that it did not and for two reasons. Firstly, the section could not be interpreted in a vacuum, but in the context of limited resources. Emergency

³⁸ The applicant also argued that refusal of treatment was unjust, discriminatory and an infringement of his constitutional right to human dignity contrary to section 9 and section 10 of the Constitution, respectively.

treatment meant treatment that was possible and available. It could not have been the legislature's intention to impose a duty to provide treatment regardless of cost. In this case, cost was a prohibiting factor. Secondly, even if cost was not relevant, chronic disease such as the applicant was afflicted with, did not merit emergency treatment. Emergency treatment envisaged sudden illness or unexpected trauma but not a chronic condition that had been extant for many years and had eventually reached a stage where it would cause the sufferer to die within a few days.

In a unanimous judgment, the Constitutional Court upheld the decision for, more or less, the same reasons as Justice Combrink. Justice Chaskalson (then President of the Constitutional Court), delivered the leading judgment and Justices Madala and Sachs the supporting judgments. On the construction of section 27(3), Justice Chaskalson took the view that although the section was capable of a broader meaning to cover on-going treatment for chronic illnesses for the purpose of prolonging life, it had a narrower meaning. It meant treatment that was designed to avert a sudden occurrence for which the patient did not anticipate and had no opportunity to make contingent arrangements.⁽³⁹⁾ Section 27(3) was designed for a sudden catastrophe that calls for immediate medical attention. According to Justice Chaskalson, a broader interpretation was, in any event, untenable as it would make it substantially more difficult for the state to fulfill its obligations under section 27(1) and section 27(2). These sections oblige the State to provide health care services to *everyone* within its available resources. If adopted, the appellant's construction would have the consequences of prioritising the treatment of terminal illnesses over other forms of care. It would reduce the resources available to the State for other purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening.⁽⁴⁰⁾

With respect to the right to life argument, Justice Chaskalson distinguished an Indian case, *Paschim Banga Khet Mazdoor Samity versus State of West Bengal*,⁽⁴¹⁾ on which the appellant had relied. In that case, various hospitals had refused to attend to a patient who had suffered trauma and was haemorrhaging as a result of falling from a train. Ostensibly, the patient had been turned away on the grounds that the hospitals were too full. In fact, the patient could have been accommodated. It was held by the Supreme Court of India that failure on the part of a State hospital to provide the patient with timely treatment was a violation of his right to life under Article 21 of the Indian Constitution. According to Justice Chaskalson, in the Indian case, the patient was precisely faced with an emergency and urgent treatment was clearly necessary. This was unlike the present case where the patient was suffering from a chronic condition. Moreover, Justice Chaskalson was of the opinion that since the South African Constitution, unlike its Indian counterpart, contained specific provisions on access to health

³⁹ SOOBRAMONEY v Minister of Health KwaZulu-Natal, cit., paras 13-18.

⁴⁰ Id. Ibid., para 19.

⁴¹ (1996) AIR SC 2426.

care, the case would be primarily resolved by applying provisions of section 27 rather than drawing inference from s11.⁽⁴²⁾

In short, Justice Chaskalson was of the view that reliance upon section 11 and section 27(3) of the Constitution was misconceived. The more appropriate grounds were section 27(1) and section 27(2) taken together. The sections entitle everyone to have access to health care services. However, the obligations imposed on the Constitution by the state necessarily depended on the corresponding resources as evidenced by the limitation in section 27(2). Allocations of health care resources involved executive choices. The choices involved difficult decisions that had to be taken at a political level. The court would be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility it is to deal with such matters.⁽⁴³⁾ According to the Constitutional Court, this was a case where, as the trial judge had found, no funds were available to meet the needs of an applicant who was outside the medical criteria set by the unit.

In their supporting judgments, both Justices Madala and Sachs agreed with Justice Chaskalson that section 27(3) did not assist the patient as he was suffering from a chronic condition. Though both judges, unlike Justice Chaskalson, appeared to entertain the relevance of the right to life argument (section 11 of the Constitution), nevertheless, came to the conclusion that, where resources were scarce and demand outstripped supply, that right was necessarily limited. According to Justice Sachs, where scarce artificial life-prolonging resources had to be called upon, tragic medical choices had to be made as in this case.⁽⁴⁴⁾ Moreover, courts were not the proper place to resolve the agonising personal and medical problems underlying such choices.⁽⁴⁵⁾ Justice Madala went as far as saying that though the Constitution guaranteed many rights, some rights were best regarded as aspirations rather than rights in *stricto sensu* on account of their unattainability.⁽⁴⁶⁾

1.2. Analysis

Notwithstanding that socioeconomic rights, including the right to health, are unambiguously inscribed in the South African Bill of Rights, the approach of the Constitutional Court in *Soobramoney* paradoxically seems to make a case against *for* the proponents of the argument that courts lack the constitutional and institutional competence to decide on allocation of health care resources. The shortcoming is not with the outcome of the case as such. The decision itself was correct given the prevailing scarcity of resources to provide lifelong renal dialysis at a time that the state health sector could meet only 30 per cent of the demand

⁴² SOOBARAMONEY v Minister of Health KwaZulu-Natal, cit., para 15.

⁴³ Id. Ibid., para 29.

⁴⁴ Id. Ibid., para 57.

⁴⁵ Id. Ibid., para 58.

⁴⁶ Id. Ibid., para 42.

for renal dialysis. Under the guidelines that had been worked out by the state renal unit priority was given to patients who were candidates for renal transplant and, thus, did not require life-long dialysis. In this case, the applicant was in chronic renal failure. On account of his poor medical history and prognosis, he was not a candidate for a kidney transplant. Instead, he required life-long dialysis.

The shortcoming with *Soobramoney* is that the Constitutional Court seemed to envisage an unduly limited role for the courts in decisions on allocation of health care resources and in the protection of socio-economic rights in general. The Court seemed to take as its starting point, that once it is asserted by the state that resources are unavailable, then that per se limits the realisation of a right of access to the service sought. The Court's approach has the unfortunate consequence of making socio-economic rights wholly depend on, rather than inform, executive policy, has much cogency.⁽⁴⁷⁾ There is no promise in the judgment that the Court would be keen to inquire into whether the state was in fact according due priority to the realisation of the right sought, by making available resources that *ought* to be available and utilising such resources effectively. It seems enough for the health care provider to "toll the bell of tight resources".⁽⁴⁸⁾

The task of the Court seems to have been limited to conducting judicial review in the traditional sense and inquire only into the form rather than the substance of the decision to ensure that it is taken without bias, after weighing all relevant factors and excluding all extraneous factors- the so-called rationality test. Ultimately, what is intended to be a justiciable right may unwittingly be whittled down to the status of a directive principle which is merely exhortatory rather than peremptory. The suggestion by Justice Madala, for example, that socioeconomic rights be understood as aspirations rather than proper legal rights supports this inference.⁽⁴⁹⁾ Moreover, what is missing from *Soobramoney* is a systematic approach to the determination of a socioeconomic right and a clear articulation of the normative content of the right to health care services.

Soobramoney did not really lay down any guidelines that could be followed when interpreting socio-economic rights so as to illuminate and indigenise jurisprudence on socio-economic rights, and also guide lower courts with jurisdiction to determine constitutional matters. The Court did not consider how the right to health or the right of access to health care has been interpreted under international human rights instruments. In particular, the Court failed to make use of jurisprudence that has been developed by the Committee on ESCR. Thus, whilst the Court arrived at the correct conclusion, its approach fell short of advancing a fuller juridical landscape of the justiciability of socio-economic rights.

⁴⁷ MOLLENDORF, Darrel. Reasoning about resources: *Soobramoney* and the future of economic rights claims. *South African Journal on Human Rights*, v. 14, n. 2, p 332, 1998.

⁴⁸ R v Cambridge Health Authority, ex Pb (a minor) (QBD) 25 BMLR 5, 17, per Laws J.

⁴⁹ SOOBARAMONEY v Minister of Health KwaZulu-Natal, cit., para 42.

2. Grootboom

2.1. Facts and decision

The respondents had been rendered homeless as a result of being evicted from informal homes that they had erected on land earmarked by the state for formal low-cost housing. They had applied to the High Court for an order requiring the state or its organs to provide them with basic shelter adequate housing, or in the alternative basic shelter relying upon sections 26 and 28 of the Constitution, respectively. Section 26(1) guarantees everyone a right of access to adequate housing while section 28(1)(c), *inter alia*, guarantees children a right to shelter. The respondents had succeeded on the section 28 argument but not on section 26. On appeal, the Constitutional Court reversed the order of success, as it were. The Constitutional Court held that the appellants were in breach of the state's obligation in section 26(2) of the Constitution. Section 26(2) requires the state to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of the right to have access to adequate housing that is guaranteed to everyone by section 26(1). Section 26(2) is analogous to section 27(2) of the Constitution which was relevant in the *Soobramoney* case.

In reaching its conclusion, the Court considered international human rights jurisprudence and drew particular assistance from the provisions of the CESCR and their interpretation by the Committee on ESCR. It made use of *General Comment 3* which explains the normative content of article 2(1) of the CESCR and the attendant state obligations.⁽⁵⁰⁾ It is in part on account of the systematic approach adopted by the Committee on CESR in *General Comment 3* that the Court was able to disentangle section 26(2) of the Constitution into three main elements, namely: "reasonable legislative and other measures"; "progressive realisation of the right"; and "within its available resources". The Court then evaluated, step by step, the state housing programme against the three benchmarks.

The Court noted that though, the state's housing programme was genuine and commendable in many respects, nonetheless, it lacked balance and flexibility. It tended to cater for medium and long-term needs only and was, thus, unable to respond to the immediate, short-term needs of those in crisis and most desperate.⁽⁵¹⁾ In part drawing from *General Comment 3*, the Court observed that whilst use of the term "progressive realisation" shows that it was not contemplated that the right would be realised immediately, at the same time, it did not mean not doing anything. The state has to take steps, including legal, administrative, operational and financial steps, towards ensuring that accessibility is progressively facilitated.⁽⁵²⁾

⁵⁰ COMMITTEE ON ESCR, *General Comment No 3, The nature of state obligations (Art. 2, Para. 1 of the Covenant)* 1990. Doc. No. E/1991/23.

⁵¹ GOVERNMENT of the Republic of South Africa and Others v Grootboom and Others, cit., para 44, 52, 65-68.

⁵² Id. Ibid., para 45.

The Court concluded that the state was not meeting the obligations imposed by section 26(2) in that it had not made provision for relief to the categories of people in desperate need within its available resources. The Government had failed to come up with a framework for a comprehensive, co-ordinated and workable plan. The Court emphasised that a well-intentioned programme would not pass constitutional muster if it lacked reasonableness. In this regard, the Court said:

The State is required to take reasonable legislative and other measures. (...) The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation (...) An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.⁽⁵³⁾

The Court issued a declaratory order. The order set out the shortcomings of the government programme and suggested rather than directed means of remedying the shortcomings. It did not indicate, for example, what type of shelter government should build, but left it to government to decide. The Court appointed the South African Human Rights Commission to monitor implementation of the order.

2.2. Analysis

What is instructive about *Grootboom* is not so much the outcome of the case but the approach adopted by the Court to determine the right to housing, especially the role of international law as a symbiotic aid to constitutional interpretation. The approach of the Constitutional Court in *Grootboom*, unlike its approach in the *Soobramoney* case, confirms rather than puts in the balance the justiciability of socio-economic rights. The thorough and systematic approach adopted by the Constitutional Court in *Grootboom* confirms that once the constitution is enabling, courts can muster not only the constitutional competence but equally significant, the institutional competence to adjudicate socioeconomic rights claims.

But whilst finding for the respondents, the Court refused to conceive socio-economic rights as requiring the state to fulfil a "core minimum obligation" in line with the jurisprudence of the Committee on ESCR.⁽⁵⁴⁾ The rationale behind the core minimum is that if states are given *carter blanche* discretion, they may easily shield behind progressive realization and do little even to fulfil the survival needs of those that are most vulnerable and most desperate. In practical terms, the advantage of a minimum core approach is that whilst socio-economic rights are progressively realizable, there is a part of them that is immediately realizable. Without shutting the door the Constitutional Court said that it would need sufficient information first before it can proceed to hold that there is such a minimum.

⁵³ GOVERNMENT of the Republic of South Africa and Others v *Grootboom* and Others, cit., para 42.

⁵⁴ Id. Ibid., paras 32-33; COMMITTEE ON ESCR, *General Comment No 3*, cit., para 10.

In rejecting the minimum core approach, the Court effectively conceded the problem of institutional competence when adjudicating polycentric rights. The Constitutional Court said:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.⁽⁵⁵⁾

The reluctance of the Court to concede the “minimum core” when mapping the normative content of socioeconomic rights demonstrates that courts concede that even where there is constitutional competence, they will exercise self-restraint where they are lacking in institutional competence to adjudicate a particular socioeconomic rights claim.

3. TAC

3.1. Facts and decision

The applicants had challenged the decision of government to confine the dispensation of nevirapine to 18 pilot sites only (two in each the country’s nine provinces) for the purpose of prevention of mother-to-child transmission of HIV (PMTCT). The main argument of the applicants was that the government’s failure to provide universal access to antiretroviral therapy in the public health sector to prevent mother-to-child transmission of HIV, constituted a series of breaches of provisions of the Constitution, including section 27 which guarantees everyone a right of access to health services.

The reasons why government had confined nevirapine to the 18 sites are two-fold. Firstly, government had reservations about the safety of nevirapine. It wished to monitor the possible side-effects of nevirapine. Secondly, government wished to study the social, economic and public health implications of providing a nationwide programme. This was with a view to enabling government to develop and monitor human and material resources for the provision of a comprehensive package,

⁵⁵ GOVERNMENT of the Republic of South Africa and Others v Grootboom and Others, cit., paras 32.

including the following services: voluntary testing and counselling; follow-up services; provision of formula milk where it is substituted for breast-feeding; and provision of antibiotics and vitamin supplements. Thus the pilot sites were intended to serve the purpose of monitoring safety and generating information for developing capacity for the best prevention programme that would eventually be extended to all public facilities. However, government did not indicate as to when the programme would be extended to hospitals and clinics outside the pilot sites.

The applicants were successful before the High Court. The Constitutional Court upheld the decision of the High Court but modified the order. Applying the principles it had formulated in *Grootboom* for the determination of socio-economic rights, the Court held that while government was better placed than the courts to formulate and implement policy on HIV, including measures for PMTCT, it had, nonetheless, failed to adopt a reasonable measure to achieve the progressive realisation of the right of access to health care services in accordance with section 27(2) read with section 27(1). The decision to confine nevirapine to the 18 pilot sites was unreasonable and thus constituted a breach of the state's obligations under sections 27(1) and (2) to the extent that it was rigid and inflexible.⁽⁵⁶⁾ The policy denied mothers and babies, outside the pilot sites, the opportunity of receiving a potentially life-saving drug that could have been administered within the available resources of the state. According to the Court, the reasons given by government to justify limiting its nevirapine programme to the pilot sites had failed to distinguish between the need to evaluate a programme for PMTCT, and the need to provide access to health care services required by those who did not have access to the pilot sites.⁽⁵⁷⁾

The Court also indicated, albeit implicitly, that it would have reached the same conclusion had the matter been determined according to the state's obligation under section 28 of the Constitution.⁽⁵⁸⁾ The section, *inter alia*, guarantees every child a right to basic health services. In the Court's view, the provision of nevirapine to prevent transmission of HIV could be considered as 'essential' to the child. The needs of the children were 'most urgent'. The right conferred on children by section 28 had been endangered by the state's rigid and inflexible policy which excluded children outside the pilot sites from having access to nevirapine.⁽⁵⁹⁾ Moreover, the children concerned were on the whole born to mothers who were indigent and relied on public health sector facilities as private care was beyond their means.

By way of remedy, the Court modified the order of the High Court, and in essence ordered government without delay to:

- remove the restrictions that prevent nevirapine from being made available for the purpose of PMTCT at public health facilities outside the pilot sites;

⁵⁶ MINISTER of Health and Others v Treatment Action Campaign and Others, cit., para 95.

⁵⁷ Id. Ibid., paras 67-68.

⁵⁸ Id. Ibid. para 78.

⁵⁹ Id. loc. cit.

- permit, facilitate and expedite use of nevirapine for PMTCT at public health facilities when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility nevirapine is medically indicated, and if necessary, the mother concerned has been appropriately tested and counselled; and
- make provision if necessary for training of counsellors for counselling for PMTCT outside the pilot sites.

3.2. Analysis

Whilst the order was prescriptive, the Court said that government had the discretion to adapt the order if equally appropriate or better methods for PMTCT became available. The remedy that was ordered by the Constitutional Court seems proportionate to the rights and interests that were at stake. Section 38 of the Constitution empowers the court to grant “appropriate relief” where a fundamental right has been infringed. Section 172 gives the court competence to declare invalid any law or conduct that is inconsistent with the Constitution, to make any order that is “just and equitable”. The Court could have declared that the government’s pilot sites were a violation of sections 27(1) and (2), but without necessarily prescribing a particular response on the part of the government. However, such a course would not have sufficiently vindicated that what was at stake was not only the protection of health, but also the protection of life. It was right, therefore, for the Court to specify the result that would be just and equitable, namely not merely planning, but also implementing a universal programme for access to a nevirapine-based programme for preventing mother-to-child transmission of HIV. This was a case where the Court seemed convinced that nothing less than a targeted measure would remedy the injustice. At the same time, there was sufficient flexibility in the order, to the extent that government was given discretion to substitute its own measures for those of the court if those measures were equally efficacious in meeting the urgent need for access to antiretroviral therapy for PMTCT.

The Court’s approach might be criticized for appearing to sit uneasily with the traditional doctrine of separation of powers. The Court’s order was, in substance, prescriptive of policy and, to some extent, had budgetary implications. The order effectively amounted to an unelected judiciary countermanding a democratic government’s own HIV/AIDS strategy for the country, thus encroaching on policy and economic issues that are traditionally the preserve of the executive. However as the Court observed, by providing for socioeconomic rights, the Constitution was at the same time conferring competence on judges over matters that will frequently have budgetary implications. The Constitutional Court was at pains not to be seen as violating the doctrine of separation of powers. The explicitly acknowledged the superior position that the executive has over matters of policy and budgetary appropriations when it said:

It should be borne in mind that in dealing with such matters courts are not institutionally equipped to make the wide-ranging factual and political enquiries...nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse.⁽⁶⁰⁾

As in *Grootboom*, the Court in *TAC* also refused to concede to the “minimum core” arguments for the same reasons the Court gave in *Grootboom*.⁽⁶¹⁾

Concluding remarks

The justiciability of the right to health should be understood as something much more than the mere inscription of this right in a domestic constitution. A better understanding of the justiciability of the right to health comes from appreciating how courts with the constitutional competence to adjudicate the right to health develop the requisite institutional competence to adjudicate the right to health within a constitutional paradigm in which the doctrine of separation of powers is a check and balance on the relationship between organs of state. The South African Constitutional Court has affirmed, as it should, the justiciability of the right to health which is clearly inscribed in the Constitution. It has begun to develop institutional competence for adjudicating the right to health.

Though *Soobramoney* represents a faltering start in the development of institutional competence, *TAC* represents promise. *TAC* which was a beneficiary of the jurisprudence developed by the Constitutional Court in *Grootboom*, is a positive marker on the willingness and capacity of the Constitutional Court to transcend rhetoric and provide tangible remedies for breach of the right to health. *TAC* shows that courts may determine the right to health even where there are budgetary implications. The fact that socio-economic rights will almost inevitably give rise to such implications limits rather than bars their justiciability. When looked through section 27(2) of the Constitution, the right to health is not meaningless. Like its counterparts under international human rights instruments, it imposes ascertainable and time-laden duties albeit within a framework that accommodates peculiar domestic economic circumstances, political orientation and history. Disadvantaged and vulnerable groups, including women, children, the disabled and elderly should be given due priority.

At the same time the cases show that the Constitutional Court has not thrown caution to the wind. The cases show that even where the courts find violations of socio-economic rights, courts remain conscious of, rather than oblivious to, their limitations in terms of constitutional and institutional competence. Courts are much more comfortable issuing declaratory judgments and leaving it to the discretion of the executive about how to arrange budgets. At the same time, limitations of institutional competence are real. The rejection of the core minimum obligation in *Grootboom* and *TAC* is a manifestation or acknowledgment of the limitations in this regard.

⁶⁰ MINISTER of Health and Others v Treatment Action Campaign and Others, cit., paras 34-35 and 39.

⁶¹ Id. Ibid., paras 34-35 and 39.

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