

# Chapter 56A

## Health

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### **Health care, food, water and social security**

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 legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

3. No one may be refused emergency medical treatment.

## **56A.1 Introduction\***

The Final Constitution<sup>1</sup> is one of few in the world that contains a genuinely justiciable right to health.<sup>2</sup> This chapter offers a summary of the black letter law on the right to health in South Africa (§ 56A.2), a critique of the emerging jurisprudence (§ 56A.3), a preferred approach to the interpretation of the right that draws on international law (§ 56A.4), and an indication of the manner in which current South African health-care policy is failing to realize the right in practice (§ 56A.5).

## **56A.2 The right to health in the final constitution**

1 Constitution of the Republic of South Africa, 1996 ('Final Constitution' or 'FC').

## (a) A justiciable constitutional right to health: the black letter law

The key principles enunciated in the general body of socio-economic rights jurisprudence<sup>3</sup> in South Africa may be summarized as follows:

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- Socio-economic rights do not, generally speaking, embrace an individual entitlement to the immediate provision of any services or resources.<sup>4</sup>
- These rights require the State to develop a systematic, comprehensive programme that is designed to realize these rights progressively within 'available resources'.<sup>5</sup>

2 See FC s 27(1)(a) and FC s 27(3). It is interesting to note that the Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC') did not enshrine any of the traditional socio-economic rights and thus there was no right to health expressly included in it. The only aspect of health protected within that Constitution was contained within the environmental right, which guaranteed each person the right to 'an environment which is not detrimental to his or her health or well-being' (IC s 29). Put slightly differently, the Interim Constitution guaranteed a right to a healthy environment — without any guarantee that one would be entitled to the resources or services necessary to stay healthy. For more on the right to a healthy environment, see M van der Linde & E Basson 'Environment' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 50.

3 The leading Constitutional Court cases are: *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC) ('*Soobramoney*'); *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*'); *Minister of Health v Treatment Action Campaign No. 2* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1023 (CC) ('*TAC*'); *Khosa & Others v Minister of Social Development & Another* 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) ('*Khosa*'). For comprehensive analysis of this body of jurisprudence, see D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10; S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 22; M Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases' (2003) 120 *SALJ* 41; M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383; D Moellendorf 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327. For accounts that approve of the court's deferential approach, see CR Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123 (Defending the Court's 'administrative law model of socio-economic rights'); M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.

4 See *Soobramoney* (supra) at paras 11 and 31, *Grootboom* (supra) at paras 93–94 and *TAC* (supra) at para 34.

5 See *Soobramoney* (supra) at paras 28–31. See also *R v Cambridge Health Authority, Ex Parte B* [1995] 2 All ER 129, 137 (CA):

- Whether the State has discharged its duty to realize progressively any particular socio-economic right will be evaluated by the courts in terms of the 'reasonableness' of the programme concerned.<sup>6</sup>
- The reasonableness enquiry does not depend on a closed list of criteria. Rather, the criteria will vary according to the context and circumstances of each case. Some of the criteria that have already been considered are that the programme: (1) must ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in its conception and its implementation'; (4) must be flexible; (5) must attend to 'crises'; (6) must not exclude 'a significant segment' of the affected population; and (7) must balance short, medium and long-term needs.<sup>7</sup>

These four principles can be traced through the following three cases.

In *Soobramoney*, a 41-year-old unemployed man from KwaZulu-Natal, in the final, terminal stages of chronic renal failure, had been denied access by provincial health authorities to regular renal dialysis treatment required to extend his life. He challenged their decision on the grounds that he was entitled, in terms of several

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constitutional rights, including FC s 27(1)(a), to such care.<sup>8</sup> The Constitutional Court rejected his claims. It held that the obligations imposed on the State by FC s 27(1)(a) are dependent on the resources available for such purposes and that the rights themselves may be justifiably limited because of a lack of resources. With respect to the budgetary allocations at issue, the Court noted that there were many more patients who required renal dialysis than could be accommodated by the existing dialysis machines in the province. It wrote: 'This is a nationwide problem and resources are stretched in all renal clinics throughout the land.'<sup>9</sup> The Court then held

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I have no doubt that in a perfect world any treatment which a patient or a patient's family sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the Court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonizing judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients.

6 See *Khosa* (supra) at para 43:

In determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case by case basis depending on the particular facts and circumstances in question.

7 *Grootboom* (supra) at paras 39-46, 52, 53, 63-69, 74, 83. For a similar explication of the criteria that a court may employ in the health care context, see C Sprague & S Woolman 'Moral Luck: Exploiting South Africa's Policy Environment to Produce a Viable ARV Programme' paper presented at XVI International AIDS Conference (Toronto, 2006)(On file with author).

8 I shall consider its decision concerning emergency medical treatment below at § 56A2(e).

9 *Soobramoney* (supra) at para 24.

that the guidelines that had been developed by the health authorities were fair and rational. They were aimed at benefiting the greatest number of patients possible and such benefits could be measured by the extent to which they saved or extended lives. Such benefits were limited in the case of a person — like Mr Soobramoney — in the terminal stages of illness. The Court reasoned that if everyone in a condition comparable to that of Mr Soobramoney were to be provided with renal dialysis, the existing provincial renal dialysis programme would collapse and no one would receive its benefits.<sup>10</sup> Moreover, the Court held, the State was under a duty to manage its limited resources in order to address *all* the basic claims made upon it: 'There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.'<sup>11</sup> On this basis, it concluded that the failure to provide renal dialysis to those suffering from chronic renal failure did not represent a breach of the State's obligations in terms of FC s 27(1)(a). Mindful of the suffering caused by its rejection of Mr Soobramoney's complaint, the Court acknowledged the hardship worked on the applicant, his family and all those persons who might be similarly situated.<sup>12</sup>

In *Van Biljon v Minister of Correctional Services; B & Others v Minister of Correctional Services & Others*, four prisoners diagnosed as HIV positive sought orders

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declaring that, under FC s 35(2)(e), they had the right to the provision, at state expense, of adequate medical treatment.<sup>13</sup> All four had CD4 counts of less than 400/ml. All four therefore satisfied generally accepted criteria for anti-retroviral treatment. Two of the prisoners had already been prescribed appropriate anti-retrovirals by medical practitioners. The other two prisoners had not had any anti-retroviral treatment prescribed by the State. The High Court held that the two prisoners who had been prescribed a combination of AZT and DDL by medical

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10 The *Soobramoney* Court found that if all those with chronic renal failure were to be treated

the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.

Ibid at para 28. The provincial administration had to make difficult choices in fixing the health budget, and in deciding upon the priorities to be met. Chaskalson P held importantly that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'. Ibid at para 29.

11 Ibid at para 31.

12 The Court framed its difficult decision against the harsh realities of South African life:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Ibid at para 8.

13 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C) ('*Van Biljon*').

practitioners were entitled to provision of that cocktail at State expense, but that the two prisoners who had not as yet been prescribed either antiretroviral mono-therapy or antiretroviral combination therapy were not entitled to provision of any treatment at State expense. Although not decided under FC s 27, but under the provision for medical treatment of prisoners in FC s 35(2), *Van Biljon* stands for the proposition that socio-economic rights do not necessarily entitle individuals to specific remedies unless the State has already committed itself to the provision of specific benefits. Thus, in *Van Biljon*, only the first two applicants were provided with antiretroviral drugs because only the first two applicants could point to a legitimate expectation that the State would provide such treatment to them.

In *TAC*, the applicants took issue with the South African government's policy toward the provision of nevirapine, an antiretroviral drug that considerably reduces the likelihood of HIV transmission from mother to child at birth. Despite the fact that the manufacturers of nevirapine had offered to make the drug available to the South African government free of charge for a period of five years in order to reduce the risk of the vertical transmission of HIV, only a fraction of the hundreds of thousands of pregnant women infected with HIV had access to nevirapine at a small number of research and training sites throughout the country.<sup>14</sup> The Constitutional Court held that, in terms of FC s 27, the government's decision to confine nevirapine to a limited number of research and training sites was manifestly unreasonable.<sup>15</sup> The Court viewed the facts in *TAC* through the prism of the criteria developed in *Grootboom* and found that a comprehensive and coordinated programme of nevirapine could substantially reduce the risk of vertical transmission of HIV without placing a significant burden on the fiscus. It issued a mandamus that required the government to extend the provision of nevirapine beyond the current sites and ordered the government to provide the requisite testing and counselling services needed to make effective use of nevirapine.

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## **(b) An explanation of some basic conceptual issues attending the right to have access to health-care services in FC s 27**

### **(i) Right to health and the right to a healthy environment**

In international law, the right to health is a shorthand expression for a composite right with two elements: a right to health care and a right to healthy conditions.<sup>16</sup> The Final Constitution divides these two elements of the right between FC s 27(1)(a) (the right to have access to health-care services) and FC s 24(a) (the right to a healthy environment). When a health-related dispute arises, the first step is to determine the Final Constitution provision under which to pursue the matter.

### **(ii) Right to have access to health-care services and not a right to resources necessary for health**

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14 *TAC* (supra) at para 16.

15 *Ibid* at para 47.

16 See § 56A.4 *infra*, concerning the development of the right at international law. See also P Hunt *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 111; DM Chirwa 'The Right to Health in International Law: Its Implications for the Obligations of State and Non-state Actors in Ensuring Access to Essential Medicine' (2003) 19 *SAJHR* 541, 545.

The formulation of the right in FC s 27(1)(a) is fairly narrow: it only provides for a right to have access to health care *services*; it does not provide for the general resources necessary to preserve and to maintain health. It is possible to adopt an expansive interpretation of 'services' to include such resources. Alternatively, it is possible to understand that the resources necessary to maintain health are specified in some of the other socio-economic rights provisions, including the right to have access to adequate housing (FC s 26(1)), the right to have access to sufficient food and water (FC s 27(1)(b)), and the right to have access to social security (FC s 27(1)(c)).

### **(iii) The relationship between the right to have access to health-care services and other socio-economic rights in FC s 27**

The right to have access to health care services appears together with the right to have access to sufficient food and water, and the right to have access to social security. In addition, FC s 27(3) confers a right to emergency medical treatment. The question thus arises as to what connects all these elements of FC s 27? Are they completely disparate rights, or is there some reason for their inclusion in one section of the Final Constitution? It is possible to read FC s 27(1)(a), (b) and (c) disjunctively as separate rights completely disconnected from one another. However, this does not explain why the drafters decided to include them together in one section. It is submitted that the purpose for doing so was to indicate the interrelated nature of these rights. It would be meaningless to have access to health-care services where one lacks sufficient food and water. Social security in turn allows people to access sufficient food and water, and universal public health care is a form of social security. In fact, the narrow formulation of the right to

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health-care services may be broadened through its inclusion in a provision dealing with rights to particular resources. The failure to include a right to specific resources in FC s 27(1)(a) can thus be said to be remedied by the structure of FC s 27.

### **(iv) The interdependence of rights**

The structure of FC s 27 indicates that the right to have access to health-care services cannot be considered in isolation from other rights, and that the links and interdependencies between this right and other rights need to be explored. The UN Committee responsible for interpreting the right to health has recognized these interdependencies through widening the ambit of the right to include such elements as nutrition, clean water and sanitation.<sup>17</sup> The Final Constitution likewise makes it clear that an integrated understanding of health care will be required when interpreting FC s 27.

### **(v) The right to have access to health-care services and immediate benefits**

In *Soobramoney*, the Constitutional Court expressly refused to adopt an understanding of the right to health-care services that would require the State to

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17 See United Nations Committee on Economic, Social and Cultural Rights ('UNCESCR') General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Convention)(22nd Session, 2000) UN Doc. E/C. 12/2000/4 available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf) (accessed on 28 January 2006) at para 4. See A Kok & M Langford 'Water' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2004) Chapter 56B.

provide individuals with any immediate benefits. Instead, the majority construed the right in light of the broader needs of society:

The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.<sup>18</sup>

The Court adopted a similar position in *Grootboom*. It held that the positive obligations imposed on the State by FC s 26(1) and (2) do not entitle individuals to claim housing or shelter on demand.<sup>19</sup> Rather, they require the State to develop a comprehensive and workable plan to meet its obligations.<sup>20</sup> In *TAC*, too, the Court declined to recognize an approach to socio-economic rights that could be 'construed as entitling everyone to demand that the minimum core be provided to them'.<sup>21</sup> Rather, the Court held, the State is required to 'take reasonable measures

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progressively to eliminate or reduce the large areas of severe deprivation that afflict our society'.<sup>22</sup>

## **(vi) Progressive realization and available resources**

The general approach to the interpretation of socio-economic rights in the Final Constitution is outlined in *Grootboom*. Yacoob J, writing on behalf of the Court, held that 'the real question in terms of our Constitution is whether the measures taken by the State to realise the right afforded by s 26 are reasonable'.<sup>23</sup> Reasonable measures require the establishment and implementation by the State of a coherent, well co-ordinated and comprehensive programme directed towards the progressive realization of the right of access to adequate housing. Essentially, the Court has found that FC s 26(2) (and its cognate provision, FC s 27(2)) embrace three significant and distinct internal limitations on the rights articulated in FC s 26(1) and FC s 27(1): first, the measures must be reasonable (the factors involved in assessing reasonableness will be summarized below); secondly, the rights have to be realized progressively; and, finally, the measures that are adopted must be within the available resources of the State. I will consider each of the last two limitations in turn.

### **(aa) Progressive Realization**

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18 *Soobramoney* (supra) at para 31. See S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206 (Arguing that the *Soobramoney* decision was in part driven by utilitarian considerations).

19 *Grootboom* (supra) at para 95.

20 See *Grootboom* (supra) at para 38.

21 *TAC* (supra) at para 34.

22 *TAC* (supra) at para 36. See further S Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at § 33.

23 *Grootboom* (supra) at para 33.

The Court has had little to say about progressive realization.<sup>24</sup> The only clear dictum on this facet of the socio-economic rights provisions has been in *Grootboom*. There the Court held that this term indicates that socio-economic rights need not be realized immediately. Nevertheless, 'the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal.'<sup>25</sup> This goal, in turn, requires that 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.'<sup>26</sup> In the end, according to the Court, housing must not only be made more accessible to a larger number of people, it must be made available to a wider range of people as time progresses.

Lastly, the Court refers to the origins of the phrase 'progressive realisation' in the International Covenant on Economic, Social and Cultural Rights ('ICESCR').<sup>27</sup> It then quotes the analysis of this notion by the UNCESCR with approval, arguing that the meaning of the phrase in our Final Constitution is the same as

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that it bears in the ICESCR. The Committee refers to the notion of progressive realization, as a 'necessary flexibility device, reflecting the realities of the world and the difficulties involved in ensuring full realisation of economic, social and cultural rights'. The phrase must not be seen to deprive the obligations on State parties of content but imposes an obligation to move as 'expeditiously and effectively as possible towards that goal'. Moreover, 'any deliberately retrogressive measures would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.<sup>28</sup>

The Court's analysis of progressive realization is problematic and deficient. It imposes a duty on the State to take steps towards the achievement of socio-economic rights: but what steps should be taken? When are the steps insufficient? The Court says that obstacles to the realization of these rights need to be lowered over time. But what are the implications of this statement? For instance, where a statute lowers the obstacles to housing for some by making it simple to acquire a home loan, it has in one sense lowered the barriers for some to gain access to housing. But what about those who cannot afford the loan? This measure in no way improves their access to housing. Are State obligations only the facilitative ones of removing obstacles or does the State need to take active steps towards fulfilling these rights?

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24 Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-41-33-44.

25 *Grootboom* (supra) at para 45.

26 *Ibid.*

27 (1966) UN Doc. A/6316, 993 UNTS 3 (signed but not yet ratified by South Africa), available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (accessed on 28 January 2006).

28 See UNCESCR General Comment No 3 'The Nature of States Parties Obligations' (Article 2(1) of the Convention)(5th Session, 1990) UN Doc. E/1991/23 at para 9, available at <http://www.unhchr.ch/tbs/doc.nsf> (accessed on 28 January 2006)('GC 3').

## **(bb) Available resources**

*Soobramoney* was decided largely on the basis of the scarcity of resources. Chaskalson P held that the obligations imposed on the State by FC ss 26 and 27 are dependent on the resources available for such purposes and the rights themselves are limited because of a lack of resources. In relation to current budgetary allocations, there were many more patients than could be accommodated by the existing dialysis machines.<sup>29</sup> The Court held that the guidelines that had been developed were fair and rational: they were aimed at benefiting the most patients and directed towards the curing of patients. On the other hand, if everyone in the condition of Mr Soobramoney were to be provided with dialysis, the current programme would collapse and no one would benefit.

The Court emphasized this last point: if Mr Soobramoney were to be provided with dialysis, then others in a similar position would also have to be treated. That

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would prove very costly. The Court took note of the KwaZulu-Natal provincial Department of Health's budget and the significant overspending of the department in the year 1996–1997.<sup>30</sup> It found that if all those with chronic renal failure were to be treated

the cost of doing so would make substantial inroads into the health budget. And if this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the State has to meet.<sup>31</sup>

Chaskalson P noted that '[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters'.<sup>32</sup> The Court then held that the State is required to manage its limited resources in order to address *all* the basic claims upon it. Chaskalson P concluded on this basis that the failure to provide renal dialysis to those suffering from chronic renal failure did not represent a breach of the State's obligations in terms of FC s 27.

Curiously, in *Soobramoney*, the majority did not engage with the internal limitation in FC s 27(2). Instead, it seemed to rule purely in terms of FC s 27(1)(a) that the very content of the right did not embrace a right to renal dialysis where there is a scarcity of resources.<sup>33</sup> This approach would seem to do away with the need to have an internal limitation clause in FC s 27(2).

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*Grootboom* addressed the issue of availability of resources only briefly and in the context of the internal limitation in FC s 26(2). Yacoob J held that 'both the content of the obligation in relation to the rate at which it is achieved as well as the

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29 *Soobramoney* (supra) at para 24.

30 In that year, there had been overspending of R152 million, and in the year of the decision overspending was likely to reach R700 million. See *Soobramoney* (supra) at para 24.

31 *Ibid* at para 28.

32 *Soobramoney* (supra) at para 29.

reasonableness of the measures employed to achieve the result are governed by the availability of resources.<sup>134</sup> The decision itself did not have to address whether there were sufficient resources available for housing: it merely held that the government had to allocate a reasonable proportion of the housing budget to providing relief for those in desperate need.

In *Khosa*, the Court held that it would not simply accept a statement by the State that it could not afford to extend benefits to a group to which it had not previously catered. The criterion according to which any exclusion occurs must be consistent with the purposes of the Bill of Rights and must not amount to unlawful discrimination or create a serious impact upon dignity.<sup>35</sup> The information concerning the actual cost of extending benefits to permanent residents was sketchy and was estimated to be between R243 million and R672 million.<sup>36</sup> It is interesting to note that the Court was prepared to use this speculative estimate to conclude that the actual cost of extending benefits to permanent residents would only be a small proportion of the total expenditure on grants.

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33 There appear to be conflicting dicta in this regard. The dominant approach appears to be expressed in *Soobramoney*. See *Soobramoney* (supra) at para 11. Chaskalson P writes: 'what is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources.' The Court's statement here suggests that the availability of resources must be considered in defining the very content of the right itself. In a separate judgment, Sachs J specifically endorses adapting traditional rights analyses to take account of the problem of scarcity and competing interests. He holds that, '[w]hen rights by their very nature are shared and inter-dependent, striking appropriate balances between equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of s 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed'. Ibid at para 54. In *Grootboom* the Court held that FC '[s]ection 26 does not expect more of the state than is achievable within its available resources' and in so doing suggested that the content of the right itself was determined by the availability of resources. *Grootboom* (supra) at para 46. The approach of the Court in *TAC* comes close to viewing socio-economic rights as providing a right to reasonable government action. Since the reasonableness of government action must be determined by having regard to the resources which are available, the content of the right is partially determined by the resources that are available. To that end, Madala J in *Soobramoney* writes that 'the guarantees of the Constitution are not absolute but may be limited in one way or another. One of the limiting factors to the attainment of the Constitution's guarantees is that of limited or scarce resources.' Ibid at para 43. But there is a subtle difference of emphasis here. Madala J seems to construe constitutional rights as having a content determined prior to a consideration of the availability of resources. The scarcity of resources represents a limitation on the ability to fulfil a constitutional guarantee. The majority judgment in *Soobramoney* can also be interpreted as suggesting that socio-economic rights confer entitlements that go beyond what the government can at present be required to provide: '[g]iven this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not *presently* be capable of being fulfilled.' *Soobramoney* (supra) at para 11 (my emphasis). In *Grootboom*, the Court claims that available resources only qualify the content of the obligation in relation to 'the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result.' Ibid at para 46. This, too, could provide support for the contention that the entitlements conferred by the Final Constitution are to be determined separately from a consideration of the availability of resources.

34 *Grootboom* (supra) at para 46.

35 *Khosa* (supra) at para 45.

36 Ibid at para 62.

These decisions suggest that the Court has not given extensive thought to what is meant by the notion of 'available resources'. The following is a fair summary of the Court's approach towards this criterion thus far: firstly, the Court will focus its enquiry upon the current allocations within a particular department that is directed towards the realization of a particular right; secondly, the Court will be more ready to order reallocations within existing budgets rather than require an increased budget in a particular area; and finally, the Court will not readily accept a defence that there is a lack of available resources where the exclusion of individuals or groups from a government programme constitutes unlawful discrimination or a serious invasion of dignity.<sup>37</sup>

## (vii) The reasonableness approach

### *General understanding of reasonableness*

*Soobramoney* represents the first decision the Constitutional Court had to make in relation to socio-economic rights. The decision was difficult and had tragic results: Mr Soobramoney died within four days of the judgment. The statements of the Court in this decision must be viewed in light of the Court's cautious approach to novel doctrinal questions. For instance, the Court stated that it would interfere with State decisions relating to budgets only where they are irrational. This standard of review appears to have been revised in more recent decisions. The Court has held that State programmes should be evaluated for their reasonableness rather than their rationality.<sup>38</sup>

*Grootboom* was the first major decision to develop the reasonableness approach. Its use in this context is partially reminiscent of its use in administrative law.<sup>39</sup> For example, Hoexter writes that the notion of reasonableness is designed to refer to that which lies within the 'limits of reason' and allows for a legitimate diversity of views. What is reasonable is not only that which is correct but refers to decisions that lie in between correctness and capriciousness. A reasonable decision is one that is supported by reasons and evidence, rationally connected to a purpose, and is objectively capable of furthering that purpose. A reasonable decision generally also tends to reflect proportionality between ends and means, and between benefits and detriments.<sup>40</sup> The notion of reasonableness is thus designed to allow for the substantive judicial review of decisions by another branch of government, whilst granting the original decision-making body a margin of appreciation.

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37 Further important features of the 'availability of resources' limitation that have not been adequately dealt with by the Court are discussed at § 56A.4 *infra*.

38 See, for example, T Roux 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court' (2003) 4 *Democratization* 10, 97 (Discussing the different standards of review adopted by the Court in socio-economic rights matters.)

39 Sunstein terms the court's approach the 'administrative law model of socio-economic rights'. See CR Sunstein 'Social and Economic Rights? Lessons from South Africa' (2001) 11 *Constitutional Forum* 123. But see M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284 (Critiques Sunstein's model.)

40 C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *SALJ* 484, 509-13. See also HWR Wade & CF Forsyth *Administrative Law* (2000); M Elliott 'The Human Rights Act and the Standard of Substantive Review' (2001) 60 *CLJ* 301.

This standard conforms to the separation of powers doctrine, and the idea that the body that has been mandated to make a decision or has the greatest institutional competence to do so may choose between a number of measures that fall within the range of the reasonable. In the context of socio-economic rights, reasonableness allows the legislature and executive a margin of appreciation in deciding on the measures that need to be taken. Thus, in response to doubts about the institutional competence of courts in making judgments on socio-economic rights,<sup>41</sup> or the legitimacy of judicial decision-making in this

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arena,<sup>42</sup> the Constitutional Court has crafted a doctrine of reasonableness that allows it to demonstrate appropriate deference to the legislature and executive.

Reasonableness is also a notion familiar from the limitations analysis in FC s 36.<sup>43</sup> In this context it involves a proportionality analysis investigating the importance of the ends involved, the relationships between means and ends and the use of the least restrictive means to further those ends. From the dicta of the courts, however, it does not appear that reasonableness in the context of socio-economic rights replicates the notion that appears in administrative law, nor does it map exactly onto the notion of reasonableness used in the limitations analysis. Rather, it is something in between that can only be understood by considering its specific features.

#### *Specific features of reasonableness*

The most extensive discussion of reasonableness takes place in *Grootboom*. However, *TAC* and *Khosa* each add to our understanding of what is involved in this test. The list below reflects an attempt to systematize some of the thinking of the Constitutional Court on this issue:

- (1) A reasonable programme must allocate responsibilities and tasks to the different spheres of government.
- (2) It must ensure that the appropriate financial and human resources are available.
- (3) The programme must be capable of facilitating the realization of the right in question.
- (4) A wide range of possible measures can be reasonable. The question is not whether other measures are more desirable or favourable. (This criterion seems to indicate a difference between reasonableness in the context of socio-economic rights and reasonableness in relation to the limitations clause; the limitation clause requires that the measures adopted be the least restrictive means of violating a right and realising an important social purpose.)<sup>44</sup>

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41 See, eg, E Mureinik 'Beyond a Charter of Luxuries' 1992 (8) *SAJHR* 464.

42 See, for instance, D Davis 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475.

43 See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34.

44 See Woolman & Botha (*supra*) at § 34.7.

- (5) The measures must be reasonable 'both in their conception and their implementation'.
- (6) A reasonable programme must be balanced and flexible.
- (7) A reasonable programme must attend to 'crises': a reasonable programme must 'respond to the urgent needs of those in desperate situations'.
- (8) A reasonable programme must not exclude 'a significant segment' of the affected population.
- (9) A reasonable programme must balance short, medium and long-term needs.<sup>45</sup>

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- (10) A reasonable programme does not render the best the enemy of the good: it is not necessary to design the ideal programme prior to its initial implementation. For instance, in *TAC*, waiting for the best programme to be developed for a protracted period of time before deciding to extend the use of nevirapine beyond the research sites was not reasonable given the benefits that could be achieved by rolling out the drug in the interim.<sup>46</sup>
- (11) A reasonable programme will not discriminate unlawfully between persons on grounds which can have a serious impact upon dignity.<sup>47</sup>

### **(c) Beneficiaries of health-care rights as opposed to the ambit of the right: application not interpretation**

The approach outlined thus far concerns the content of health-care rights; this does not, however, answer the question as to who is entitled to such rights. The recent case of *Khosa* dealt with this question. It concerned a number of Mozambican citizens ('the applicants') who had acquired the status of permanent residents in South Africa after living in the country since 1980. All of these people were destitute and thus would have been entitled to pension grants as well as other social assistance grants — such as child-support grants — but for the fact that they were not South African citizens.<sup>48</sup> The applicants challenged the constitutionality of prevailing legislation (the Social Assistance Act 59 of 1992) that limited social assistance grants to South African citizens. They argued that FC s 27 guaranteed the right to social security to 'everyone'. Because 'Everyone', they argued, included permanent residents, the legislation excluding this group was unconstitutional.

After confirming the approach towards the content of rights in *Grootboom* and *TAC*, Mokgoro J, writing for the majority, went on to consider the ambit of the right to have access to social security. The Court reasoned that certain rights such as political rights (FC s 19) and the right to have access to land have been expressly limited to citizens (FC s 25(5)). However, FC s 27 does not contain such a modification — it applies to 'everyone'. Since there was no indication that FC s 27

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45 *Grootboom* (supra) at paras 39-46, 52, 53, 63-69, 74, 83.

46 *TAC* (supra) at para 81.

47 *Khosa* (supra) at para 68.

48 *Ibid* at paras 3-4.

was limited only to citizens, Mokgoro J held that the word 'everyone' could not be construed as referring only to citizens.<sup>49</sup>

The Court then curiously applies its 'reasonableness' approach — that was developed in the context of providing normative content to socio-economic rights — to the question of scope.<sup>50</sup> It asks whether the exclusion of permanent

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residents from having access to social assistance grants is reasonable. In reaching a conclusion on this matter the Court considers a number of factors. First, it considers the purpose of providing social security to those in need. The reason for the inclusion of a right to social security was because 'as a society we value human beings and want to ensure that people are afforded their basic needs.'<sup>51</sup> Such a purpose included within its ambit the needs of non-citizens. Secondly, there were no good grounds for differentiating between citizens and permanent residents in relation to social assistance benefits. Permanent residents have made South Africa their home and, like citizens, have lived in the country legally for a considerable length of time. In most respects, permanent residents also have similar obligations to citizens; it thus seems unclear why they should not achieve similar benefits.<sup>52</sup> On the evidence, the inclusion of permanent residents would not seem to place an inordinate burden on the state.<sup>53</sup> The impact, however, of the exclusion of permanent residents forces them into relationships of dependency with families, friends and communities. For them, Mokgoro J writes, 'the denial of the right is total and the consequences of the denial are grave. They are relegated to the margins of society and are deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution.'<sup>54</sup> In light of these considerations, the Court reaches the conclusion that insufficient reasons exist for the invasive treatment of the rights of permanent residents and that consequently, 'the exclusion of permanent residents is inconsistent with section 27 of the Constitution'.<sup>55</sup> In light of this, the Court orders that the words 'or permanent residents' be read into the legislation (after the citizenship requirement) so as to allow for benefits to be allocated to permanent residents.

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49 Ibid at para 47.

50 There appears to be a conflation here of two separate questions: the question of scope and the question of content. This matter cannot, however, be addressed in detail here. Iles argues that the difference determines whether the Court should have decided the case under the internal limitations clause or the general limitations clause. See K Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *SAJHR* 448.

51 *Khosa* (supra) at para 52.

52 Ibid at para 59.

53 Ibid at paras 60–62.

54 Ibid at para 77.

55 Ibid at para 85.

Although *Khosa* dealt with social assistance benefits, it is likely that its reasoning will be applicable to the rest of FC s 27. FC s 27 was said to involve the protection of the basic needs of people within South Africa. The protection of the health of permanent residents falls clearly within the ambit of this purpose and thus it is likely that permanent residents will have the same rights as citizens in connection with health care.

The fact that the Court indicates that there is a universalist justification for these rights could, however, form the basis of an extension of such rights to all people within the borders of South Africa, including illegal immigrants and temporary residents. The court in *Khosa* did not discuss this issue in detail but indicated that, given the tenuous nature of the links such individuals have to the country, there may be a justification for denying them social assistance benefits. In relation to illegal immigrants, it would make no sense for the law to regard their very presence as illegal, but to be able to use that presence to secure a legal entitlement to social assistance benefits. In relation to temporary residents,

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matters are not so simple. Temporary residents often become permanent residents and legally reside in the country. If they become destitute whilst in the country, it is unclear why the temporary nature of their stay should in any way diminish their entitlement to assistance. If the criterion upon which benefits is distributed is one of need and dignity, then the automatic exclusion of temporary residents does not appear to be clearly justifiable.

This reasoning applies a fortiori in the case of health care, and, in particular, health care for those suffering from acute conditions. Whilst social assistance benefits may be said to be linked to permanence and one's contribution to a community, health care is a requirement of all who fall within the borders of a country. Anyone anywhere can become ill at any time. To allow someone to die or suffer merely because they are temporarily or even illegally resident in a country runs counter to basic universalist principles of political morality.<sup>56</sup> Many societies, such as those in Europe, provide medical assistance for anyone who falls upon hard times within their countries. This is not dependent on their status in the country (for example, as a tourist). Common humanity and solidarity dictate that a sick person should be treated irrespective of who they are or why they are in a country.<sup>57</sup> At international law, this principle extends to the obligation on an army to treat the wounded enemy soldiers it captures.<sup>58</sup> Thus, in the case of access to health-care

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56 The basis of this duty may lie in need or simply human vulnerability. See, for example, RE Goodin 'Vulnerabilities and Responsibilities: An Ethical Defence of the Welfare State' in G Brock (ed) *Necessary Goods* (1998).

57 Where a person suffers from a chronic condition or one that requires medical treatment over a long period, it may be argued that this kind of care is similar to a social benefit and that the same legal regime should apply: treatment of such conditions should only be available to those with more permanent connections to the political community concerned. Tourists and illegal immigrants may well not qualify for such treatment.

58 Article 3(2) of the Geneva Convention Relative to the Treatment of Prisoners of War (1950) 75 UNTS 135 (ratified by South Africa on 31 March 1952). The same is true of prisoners, for whom society often has little sympathy. See the discussion in § 56A.2(a) of *Van Biljon v Minister of Correctional Services*. 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C).

services (even if not in the case of social assistance grants), the judgment in *Khosa* should be extended to all persons within South Africa irrespective of their status.<sup>59</sup>

#### **(d) The relationship between internal and external limitations**

*Khosa* also considered but did not decide some difficult questions relating to the limitation of socio-economic rights, in particular, the relationship between the internal limitation clause in each socio-economic right (FC s 26(2) and FC s 27(2)) and the general limitation clause in FC s 36. After raising this question, both the majority and the minority declined to decide it.<sup>60</sup>

Though this matter cannot be engaged at length here, it is unlikely that the indeterminate notion of reasonableness can be shown to bear an inherently different meaning in these two contexts.<sup>61</sup> It would also be extremely confusing for these notions to bear entirely different meanings. However, some guidance can be given as to the distinction between these two enquiries by considering the differing functions of the internal limitation and the general limitations clause. The internal limitation is focused on a particular right: in this context, the right to have access to adequate health-care services. The enquiry requires us to consider whether, in the context of this *particular* right, and the competing priorities in relation to this *particular* right, the measures taken by the State are reasonable.<sup>62</sup>

FC s 36 involves a more global enquiry. It requires us to situate the right to have access to health-care services and the measures adopted by the State against a background of others rights and interests that people possess. It allows for the consideration of legitimate government purposes other than those relating to the particular right that has been limited, and requires consideration of a measure's impact on society beyond the sphere of health care.

59 The question of scope also includes the question of our duties to non-human animals. Animals under human control may well have a right to medical treatment from those within whose care and control they fall. A right to such treatment might be implied from the duty to avoid cruelty and neglect in the Animal Protection Act 71 of 1962. It could also be argued that the term 'everyone' in FC s 27(1) should include non-human animals to the extent that they are capable of having these rights attributed to them. At present, it is generally accepted that the rights in the Bill of Rights are only applicable to natural persons (and, in some cases, to juristic persons). See S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February 2005) Chapter 31, § 31.3. At this stage in our legal development, only human beings have been recognized as constituting natural persons. In my view, animals are capable of bearing rights, and our law should develop to recognize such rights. For some writing on this question, see P Singer *Animal Liberation* (2nd Edition, 1995); T Regan *The Case for Animal Rights* (1988); S Wise *Rattling the Cage: Towards Legal Rights for Animals* (2001).

60 *Khosa* (supra) at paras 83-84 and 105-106.

61 For alternative constructions of the relationship between FC s 36 and socio-economic rights, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) Chapter 34; S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-54-33-56; P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 3 *SAJHR* 67, 79-80; M Pieterse 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases' (2003) 120 *SALJ* 41-48 (Pieterse 'Towards a Useful Role'); Iles (supra) at 455-57.

62 See Woolman & Botha (supra) at § 36.6.

In standard Bill of Rights analysis, we are required to focus first on a particular context — of health care for instance — and to consider the interests at stake in this context and the measures that the State is required to adopt to alleviate suffering in this area. Policies and decisions can be adopted in this context that may address the problems relating to health care or fail to do so. *TAC* is an example of a case where there was no need for a wider enquiry: the State failed to adopt a reasonable (or even rational) policy relating to the health care of individuals, and there were virtually no ramifications for other policy areas because of the negligible costs of rolling out a drug that had been offered to the State free of charge. The failure to adopt a comprehensive programme for rolling out the drug was therefore patently unreasonable.

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As an abstract matter, however, the existence of the FC s 36 enquiry suggests that a consideration of the health care context alone may not be enough. There may well be legitimate governmental purposes unrelated to health care that could justify a limitation of an FC s 27 right in terms of FC s 36 that could not be limited in terms of FC s 27(2).<sup>63</sup>

### **(e) FC s 27(3)**

#### **(i) Summary of the Constitutional Court's approach to FC s 27(3)**

FC s 27(3) provides that no one may be refused emergency medical treatment. The question as to what constitutes emergency medical treatment arose in *Soobramoney*. In this instance, the Court could not avoid giving content to the right since its ambit was unclear. The Court held that emergency medical treatment is to be provided in the following cases:

- There must be a sudden or unexpected event or catastrophe.<sup>64</sup>
- This event must be of a passing nature and not be continuous.<sup>65</sup>
- The event must lead to a person requiring medical attention or treatment.<sup>66</sup>
- To the extent such treatment is necessary and available, it must be provided.<sup>67</sup>

#### **(ii) Analysis of the Constitutional Court's approach to FC s 27(3)**

In *Soobramoney*, counsel for the applicant contended that people who suffer from terminal illnesses and require treatment such as renal dialysis to prolong their life are entitled to such treatment by the State in terms of FC s 27(3).<sup>68</sup> Chaskalson P held, on behalf of the majority, that there were several reasons against extending the phrase 'emergency medical treatment' to include ongoing treatment for chronic

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63 See Woolman & Botha (*supra*) at § 36.6.

64 *Soobramoney* (*supra*) at para 18-20, 38, 51.

65 *Ibid* at para 21, 38.

66 *Ibid* at para 18.

67 *Ibid* at para 20.

illnesses for the purpose of prolonging life. First, this was not the ordinary meaning of the term and, 'if this had been the purpose which s 27(3) was intended to serve, one would have expected that to have been expressed in positive and specific terms'.<sup>69</sup> Secondly, if FC s 27(3) were to be construed in this broad manner, it would make it substantially more difficult for the State to fulfil its primary obligations under FC ss 27(1) and (2) to provide health care services to 'everyone' within its available resources. Thirdly, it would entail the prioritizing of the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. Again, Chaskalson P states,

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'for such a conclusion to be reached, clearer language would have to be used than occurs in s 27(3).'<sup>70</sup>

Moreover, the Court holds that FC s 27(3) itself is couched in negative terms: it is a right not to be refused emergency treatment. This means, according to the Court, that the purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. Chaskalson P also suggests that, in light of our history, this provision is designed to prevent, for instance, the refusal to grant emergency treatment on grounds of race.<sup>71</sup> Thus, the content of the section is to ensure that

a person who suffers a sudden catastrophe which calls for immediate medical attention should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.<sup>72</sup>

Since Mr Soobramoney suffered from a chronic condition and required dialysis treatment two to three times a week, his condition did not fall within the ambit of an emergency. His incurable condition was an ongoing state of affairs resulting from a deterioration of his renal function. Consequently, FC s 27 (3) did not apply to such facts. Madala J, in his separate judgment, agreed with Chaskalson P that FC s 27(3) envisaged a

dramatic, sudden situation or event which is of a passing nature in terms of time. There is some suddenness and at times even an element of unexpectedness in the concept 'emergency medical treatment.'<sup>73</sup>

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68 Ibid at para 12.

69 Ibid at para 13.

70 *Soobramoney* (supra) at para 19.

71 FC s 9 outlaws such conduct and it is thus unclear why there would need to be a specific clause to guard against this evil.

72 *Soobramoney* (supra) at para 20.

73 Ibid at para 38.

Sachs J tied the purpose of FC s 27(3) to the particular

sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be available to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time.<sup>74</sup>

He held further that the values protected by FC s 27(3) would be undermined rather than reinforced by any unwarranted conflation of emergency and non-emergency treatment.<sup>75</sup>

One of the important consequences of this judgment is that no one who satisfies the court's criteria can be refused treatment. In light of the split between private and public health care in South Africa, FC s 27(3) arguably places an obligation on private health-care providers to offer emergency medical treatment to individuals even if the people who are brought to these hospitals lack health insurance.

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The Court clearly had to restrict the scope of FC s 27(3) for fear of supplanting the right in FC s 27(1)(a).<sup>76</sup> On the other hand, the negative formulation of the right is confusing: if no one may be refused treatment, must they, as a necessary corollary, be provided with it? The formulation suggests that the State merely has a duty not to interfere, but it is unclear how one can fail to refuse treatment without providing it. The supposedly negative formulation thus seems to imply that there are in fact positive obligations on the State. FC s 27(3) could, in addition, be developed to impose a positive duty on private health-care providers to offer emergency services where they have facilities and services available.<sup>77</sup>

However, the Court did not in fact indicate the extent to which the State is required to take measures to ensure that people are provided with emergency treatment.<sup>78</sup> For instance, most cities in South Africa have a chronic shortage of ambulances. In remote areas, helicopters would be necessary to ensure people have access to emergency medical treatment. In order to notify authorities about an

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74 Ibid at para 52.

75 Ibid.

76 See Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-21 (Agrees with this line of analysis when she states that the 'restriction of the scope of the right to genuine medical emergencies seems appropriate'.) Scott and Alston, however, argue that the Court's interpretation of FC s 27(3) renders the right virtually redundant in light of the fact that its content surely falls within any minimal understanding of FC s 27(1). S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206, 247.

77 Scott and Alston further suggest this as a possible manner in which to avoid rendering the right in FC s 27(3) redundant. See Scott & Alston (supra) at 248. For more on the possible horizontal application of socio-economic rights, see also Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-57-33-59; Woolman 'Application' (supra) at § 31.4.

78 See *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) AIR SC 2426 (Indian Supreme Court required positive measures to be taken to ensure emergency medical facilities were available.) See also Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-21.

emergency, some form of communication system is necessary. Is the State required to ensure that telephones are placed in all areas in the country to enable citizens to have access to emergency medical treatment? Is the State required to have adequate ambulance facilities and provide helicopters for inaccessible areas? These questions still need to be determined. It is quite clear, however, that without some of these measures, FC s 27(3) will be meaningless for many people in this country.

### 56A.3 General critique of the constitutional court's approach to FC s 27

This brings to an end the discussion of the various facets of the right to health-care services in FC s 27.<sup>79</sup> The main approach adopted by the Constitutional

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Court has been to focus on the notion of 'reasonableness'. The Court's 'reasonableness approach' has attracted a number of important academic critiques.<sup>80</sup> The primary problem raised is that the vague notion of reasonableness fails to provide adequate content to socio-economic rights. I shall now elaborate on a few of these critiques.

#### (a) The failure to integrate FC s 27(1) and (2)

In *TAC* the Court held that FC ss 26(2) and 27(2) require the State to take 'reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right'. The reference to 'this right', it claimed, is clearly aimed at the FC ss 26(1) and 27(1) rights. This wording, together with the inclusion of these subsections within the same overall section of the Bill of Rights, provides evidence that the two subsections are linked and meant to be read together. The Court reasoned that this defeated the approach of the amici curiae who contended that the Final Constitution conferred on each person two distinct causes of action: one under FC ss 26(2) and 27(2), and another under FC ss 26(1) and 27(1) read with FC s 7(2).

From a purely formal point of view, the Court's approach seems to offer the more natural construction of the relationship between FC ss 27(1) and (2). Yet, the Court's argument still raises interpretative difficulties.<sup>81</sup> The Court is clearly eager to emphasize that the rights referred to in FC ss 26(2) and 27(2) are the same rights

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79 The Final Constitution contains specific guarantees of health care for children and prisoners. The focus of this chapter has been on the right in FC s 27(1), which is a right to which 'everyone' is entitled. The special vulnerability of children may require the State to take special measures to protect their health. In the case of prisoners, the fact that their imprisonment deprives them of resources to gain access to medical treatment imposes a duty on the State to provide them with these resources. It has been held that the State has a higher duty of care towards prisoners than towards free persons for the following two reasons: first, they are solely dependent on the State for treatment and cannot use any of their own income to obtain treatment unlike free persons; secondly, the conditions in the prisons often render individuals peculiarly susceptible to illness. These principles are discussed in *Van Biljon*.

80 See D Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 48; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1; Liebenberg 'The Interpretation of Socio-Economic Rights' (supra) at 33-38-33-41; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 22; Pieterse 'Towards a Useful Role' (supra); M Pieterse 'Coming to Terms with the Judicial Enforcement of Socio-Economic Rights' (2004) 20 *SAJHR* 383 (Pieterse 'Judicial Enforcement').

referred to in FC ss 26(1) and 27(1) respectively.<sup>82</sup> This argument implies that the reasonable measures that the State adopts must be assessed in relation to whether or not they are aimed at the progressive realization of the rights expressed in FC ss 26(1) and 27(1). If so, then an enquiry into the reasonableness of the measures adopted by the State must also involve an enquiry into the content of the rights contained in FC ss 26(1) and 27(1). The problem with the Court's approach in *TAC* is that it fails to provide an analysis of what the

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right to have access to health-care services involves. What are the services to which one is entitled to claim access? Do these services involve preventative medicine, such as immunizations, or treatment for existing diseases, or both? Does the right entitle one to primary, secondary, or tertiary health care services, or all of these?<sup>83</sup> The enquiry concerning the reasonableness of the measures adopted by government cannot be conducted in a vacuum and requires that some content be given to the right to which these measures are designed to give effect.

### **(b) Content of the right to health-care services**

As will be discussed in § 56A.4 below, the normative content of the right to health has been analysed by the UNCESCR in its General Comment 14,<sup>84</sup> and by a number of writers.<sup>85</sup> No doubt the task of specifying the content of this right is a difficult matter, and the Court should not attempt to provide in one case a final and exhaustive definition of what is included therein. That said, *TAC* could have provided greater specification of the obligations imposed by the right.

For instance, the Final Constitution requires that when interpreting rights, a court must consider international law.<sup>86</sup> Thus, the right in *TAC* could have been interpreted in light of the ICESCR, which provides specifically in article 12(2)(a) that there be provision for the 'reduction of the still-birth rate and of infant mortality and for the healthy development of the child'. The UNCESCR has interpreted this article as requiring State parties to adopt measures designed to improve child and maternal health, and to extend sexual and reproductive health services. Recognizing such an obligation to provide the services necessary for healthy child development could

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81 See Scott & Alston (*supra*) at 249 (Argue that already in *Soobramoney*, the Court shows that it has not applied its mind to the precise role of FC s 27(1) and (2).)

82 *TAC* (*supra*) at para 30.

83 I do not suggest that the Court was required to answer all these questions, but that it was obliged to provide some analysis of the right in order to reach the conclusion that it did: that access to nevirapine fell within the entitlements conferred upon people by FC s 27(1)(a).

84 UNCESCR General Comment No 14 'The Right to the Highest Attainable Standard of Health' (Article 12 of the Convention)(22nd Session, 2000) UN Doc. E/C. 12/2000/4 available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf) (accessed on 28 January 2006)('GC 14').

85 See, for instance, P Hunt *Reclaiming Social Rights: International and Comparative Perspectives* (1996); B Toebes *The Right to Health as Human Right in International Law* (1999); A Chapman 'Core Obligations Related to the Right to Health' in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

86 FC s 39(1)(b).

have provided the basis for the decision to require the government to make nevirapine available beyond the research sites.

Similarly, an argument could have been made to determine the content of FC s 27(1)(a) in accordance with article 12(2)(c) of the ICESCR, which provides for the 'prevention, treatment and control of epidemic, endemic, occupational and other diseases'. The UNCECSR has interpreted this article to require the provision of urgent medical care in cases of epidemics.<sup>87</sup> The TAC Court could have

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reached its decision by recognizing that FC s 27(1)(a) imposed at least this obligation on the State.

Some of the judges seem to have shown a willingness in *New Clicks* to provide some normative content to the right in FC s 27(1).<sup>88</sup> Ngcobo J, for instance, made the important statement that 'the right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable'.<sup>89</sup> This would involve the imposition of specific obligations upon the State: *New Clicks* however, turned on issues of administrative law rather than on FC s 27(1).

In sum, the Court has approached socio-economic rights cases by asserting that the test in terms of the Final Constitution is whether the measures adopted by the government are reasonable. This approach fails to integrate FC ss 27(2) and 27(1): it focuses the entire enquiry on FC s 27(2) without providing a role for FC s 27(1). Yet, FC s 27(1) is, in fact, the primary statement of the right, and the Final Constitution directs us to evaluate the reasonableness of government policy in relation to an understanding of what the right in question demands of the State.

### **(c) Reasonableness and its lack of content**

This structural point is mirrored by a further complaint against the reasonableness approach. By focusing on the notion of 'reasonableness' the Court has demonstrated that it will scrutinize the government's policy and conduct for its ability to meet this standard of justification. This development ties in with a prominent argument for constitutionalism: that it resists a culture in which authority is to be respected for its own sake and promotes an environment in which all decisions of those in positions of authority, even those of the legislature, must be justified.<sup>90</sup> An emphasis on justification, in turn, has certain salutary effects on laws and policies: it requires a high degree of accountability and thus provides incentives for public servants to consider carefully their reasons for making decisions, thus helping to expose any weaknesses.<sup>91</sup>

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87 GC 14 (supra) at para 16.

88 *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) at para 514. For a brief discussion of this case, see § 56A.4(e) infra.

89 *Ibid* at para 514.

90 See E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

The distinctive role of rights, however, is not simply to draw attention to a failure in the justification of government policy. It is a particular type of failure that we are concerned with: a failure to address adequately certain vital interests. One of the main theoretical defects of this approach to adjudicating socio-economic rights is the failure to place the fundamental interests of individuals at the centre of its enquiry. Instead, the Court has attempted to focus the enquiry on

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more abstract and procedural concerns that can tend to obscure the vulnerabilities of individuals.

But it is difficult to find adequate reasons for including socio-economic rights in the Final Constitution without recognizing that they are designed to protect the fundamental interests of individuals in having access to such essential goods as housing, food, water and health care. Thus, the roots of the reasonableness approach do not clearly correlate with the intention behind including socio-economic rights in the Final Constitution.

#### **(d) Reasonableness and context**

What is considered reasonable will vary in large measure with the circumstances being evaluated.<sup>92</sup> However, even this approach requires the articulation of some general standards that can be used to appraise State action in a variety of contexts. Otherwise, the enquiry into reasonableness would be empty. For instance, in *Grootboom*, it was stated that a government programme that was reasonable must be balanced and flexible. That general standard can then be applied to a variety of cases to see whether the programme or policy in question is in fact balanced and flexible.<sup>93</sup>

A contextual determination of reasonableness thus presupposes certain a-contextual standards that guide our appraisal in different contexts. If we analyse what is required by the reasonableness approach more closely, it involves evaluating the justifiability of the links between policies that are adopted and ends that are constitutionally endorsed. It becomes evident in this context that the very contextual sensitivity of reasonableness rests on the fact that different circumstances allow for different conclusions concerning these linkages. However, in any such enquiry, it must be possible to specify the ends that are being aimed at in a way that is general and not specifically related to the particular context. Thus, the very benefits of the reasonableness approach rest upon our ability to identify general ends against which government policy must be evaluated. In this context, those ends are provided by the rights in FC ss 26 and 27. An approach that rejects the need to determine the content of these rights is empty.

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91 See E Mureinik 'Beyond a Charter of Luxuries' (1992) 8 *SAJHR* 464.

92 The Court seems to recognize this point in *TAC*. See *TAC* (*supra*) at para 24.

93 It is unclear whether the Court has correctly identified flexibility as being 'reasonable' in all circumstances. In *Soobramoney*, the government's a policy of rationing the provision of health-care resources was fairly inflexible, yet it seemed reasonable in light of the desire to use the available resources in the best possible manner. The Court's analysis demonstrates the difficulty of giving content to such a vague notion as reasonableness.

## (e) Separation of powers

The formalism of the Court's current approach means that 'reasonableness' stands for whatever the Court regards as desirable features of government policy. The problem with such an approach is that it lacks a principled basis upon which to found decisions in socio-economic rights cases. Without clear guidance as to the role of the courts in these cases, the Constitutional Court and other courts may overstep their legitimate role in this area by ruling on matters that should be left to other branches of government. They may also fail to intervene when they should, and their orders may lack practical efficacy.<sup>94</sup> At the same time the Court's amorphous standards fail to provide guidance to other branches of the State concerning the content of these rights and the duties they impose.<sup>95</sup>

## (f) Remedies

The vagueness of the Constitutional Court's reasonableness approach is reflected in its orders. In *Grootboom*, the Court merely made a declaratory order, which has been largely ineffective.<sup>96</sup> In *TAC*, the Court went further and issued a mandatory order requiring the government to make nevirapine available beyond the dedicated research sites it had identified. However, the Court declined to exercise supervisory jurisdiction over the implementation of its order. This deference occurred in the context of a government policy that had singularly failed to deal with the HIV/AIDS crisis in South Africa, and a government that was reluctant to roll out nevirapine. This lack of a structural injunction led to delays in the rolling out of the drug in a number of provinces, a situation that, arguably, could have been avoided if the Court had opted for a more intrusive remedy.<sup>97</sup> Numerous academics have criticized the *TAC* Court for its order in this case and have called for more effective remedies to be implemented in future cases. The types of remedy suggested include mandatory orders, structural interdicts (which involve the courts in ongoing supervision to ensure that their orders are implemented) and constitutional damages.<sup>98</sup>

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94 See Bilchitz 'Towards a Reasonable Approach' (supra) at 10.

95 Pieterse 'Judicial Enforcement' (supra) at 407 (States that the 'interpretative task should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive.')

96 See K Pillay 'Implementing *Grootboom*: Supervision Needed' (2002) 3(1) *ESR Review* 13-14; K Pillay 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-Economic Rights' (2003) 6 *Law, Democracy and Development* 255; M Swart 'Left out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 *SAJHR* 215, 215-16.

97 See Bilchitz 'Towards a Reasonable Approach' (supra) at 23-24; Swart (supra) at 223.

98 See on the issue of creating more effective remedies, W Trengove 'Judicial Remedies for Violations of Socio-economic Rights' (1999) 1(4) *ESR Review* 8; Bilchitz 'Towards a Reasonable Approach' (supra); Pieterse 'Judicial Enforcement' (supra); J Klaaren 'A Remedial Interpretation of the Treatment Action Campaign Case' (2003) 19 *SAJHR* 460; K Roach & G Budlender 'South African Law on Mandatory Relief and Supervisory Jurisdiction' (2005) 122 *SALJ* 325; and Swart (supra) at 215.

## 56A.4 A Preferred reading of FC S 27 that draws on international law

In § 56A.3, I argued that there are numerous weaknesses in the Constitutional Court's current approach to the right to have access to health-care services. This section sets out a preferred approach to this right that draws on some of the developments in international law concerning the right to health. It involves a discussion of the minimum core approach to the right, amplifies to the notion of progressive realization and develops a better understanding of the term 'available resources'.

### (a) Philosophical progression: a right to the conditions necessary for health rather than a right to be healthy

Explicit discussions of the right to health at the international law level are of a relatively recent vintage. They can be traced to the Russian Revolution of 1917,<sup>99</sup> the serious economic misery of the Great Depression, and the horrors of the Second World War and the Holocaust.<sup>100</sup> Prior to this, health care for the sick was largely seen as the responsibility of private actors and civil society institutions, such as churches and charities.<sup>101</sup> Little thought was given to the exact nature of a State's responsibility for the health of its citizens.<sup>102</sup>

The early formulations of the right to health within human rights documents situate it within the general basic welfare rights of the individual. The first explicit mention of the right to health within an international human rights instrument is in article 25(1) of the United Nations Declaration of Human Rights:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>103</sup>

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99 See E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 1-15 (Traces the turning point in the struggle for socio-economic rights to the Russian Revolution of 1917.)

100 See Chapman (*supra*) at 39; B Toebes 'The Right to Health' in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (2001) 169, 171; and DM Chirwa 'The Right to Health in International Law: Its Implications for the Obligations of State and Non-state Actors in Ensuring Access to Essential Medicine' (2003) 19 *SAJHR* 541, 543-44.

101 See Chirwa (*supra*) at 543.

102 One could trace this entitlement back to many of the early philosophical treatises that provided the foundation for rights discourse. For instance, the individual's basic interest in self-preservation in the theories of Thomas Hobbes and John Locke provide a very early basis for recognizing a fundamental individual right to health care. See T Hobbes *Leviathan* (1651, Penguin Classics Edition 1985) 192 and J Locke *Two Treatises of Government* (1690, Cambridge University Press Edition 1988) 271. Such a right can also be traced to political documents that represent the first major advances in the recognition of fundamental rights. See the French Declaration of the Rights of Man; the United States' Declaration of Independence; T Paine *Rights of Man* (1791).

103 Universal Declaration of Human Rights (1948) GA res. 217A (III), UN Doc A/810 available at <http://www.un.org/Overview/rights.html> (accessed on 10 March 2009).

Health was thus seen as different from medical care and related to 'a right to an adequate standard of living, which included other basic needs'.<sup>104</sup> This formulation points to the wider role of health in the lives of human beings (and indeed other sentient creatures). Being in a state of health is a basic condition for the functioning of a human being: it is the state in which people can realize their purposes and goals and to be free from a range of unpleasant phenomenal experiences that hinder the enjoyment of life. Health would be what John Rawls terms a 'natural primary good': goods that are 'necessary conditions for realizing the powers of moral personality and are all-purpose means for a sufficiently wide range of final ends'.<sup>105</sup> It is a natural primary good as opposed to a social primary good because health cannot be completely guaranteed by any society.

This last point is important in understanding the evolution of the right to health at international law. One of the very first formulations of the right occurs in the Constitution of the World Health Organisation ('WHO').<sup>106</sup> The preamble recognizes that 'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition.' Health is understood in this document as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.<sup>107</sup> Again, we see that health is understood in relation to general well-being. However, although health is often connected to this wider notion, conceptualizing the right to health in this manner was a recipe not only for theoretical confusion but also practical inaction.

A right entitles a human being to a certain good and allows for a claim to be made for this good against another party. The problem with conceptualising the right to health in this way is that no one can guarantee any other person that they will be in such a state of physical and mental well-being. Many of the factors affecting health lie within the province of the individual herself: smoking, for instance, can ruin a person's health, but this is generally an individual choice. The individual cannot ask anyone else to guarantee that she does not smoke: she must make that choice herself. Moreover, the actual state of health is not something that can be guaranteed by a society or even individuals themselves. Whilst one can limit the health risks one is exposed to, even fit young people at times naturally develop debilitating diseases. A right to health conceptualized in this manner seems to go against the basic facts of nature.<sup>108</sup>

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104 See Hunt (supra) at 113, quoting H Fuenzalida-Puelma & S Scholle Connor (eds) *The Right to Health in the Americas* (1989) 601.

105 J Rawls 'Social Unity and Primary Goods' in S Freeman (ed) *John Rawls: Collected Papers* (1999) 367.

106 World Health Organization ('WHO') Constitution (1946), available at [http://www.opbw.org/int\\_inst/health\\_docs/who-constitution.pdf](http://www.opbw.org/int_inst/health_docs/who-constitution.pdf) (accessed on 28 January 2006).

107 Ibid at preamble.

108 There have been many critiques of a right to health conceptualized in this way. See, for instance, V Leary 'The Right to Health in International Human Rights Law' 1994 (1) *Health and Human Rights* 24, 28; Hunt (supra) at 111; Chapman (supra) at 39; and Chirwa (supra) at 545.

Since there can be no right to be healthy, philosophical analysis shows that the right to health must mean something different. It must relate to that which can in fact be guaranteed to individuals by third parties: certain resources and conditions that are necessary for a person to be healthy. To maintain health and bodily functioning, certain goods are necessary. For instance, it is crucial that people are provided with food adequate to meet the nutritional requirements of a human being. Here, it is interesting to note, that one cannot just be provided with that level of food necessary to be free from threats to one's survival. Such a level of provision may well keep one alive but still undernourished. A person who is undernourished, however, will be hindered in the pursuit of a wide range of purposes. As such, if we wish to protect the conditions necessary to pursue diverse purposes,<sup>109</sup> we must make sure that people are not undernourished and constantly hungry. In such an instance, the food must be sufficient that human beings have the energy and vitality necessary to pursue a range of purposes. The level of food required does not entail that individuals share a basic interest in such luxuries as ice cream and caviar. However, it does mean that individuals have a basic interest in well-balanced nutritional food that enables them to be healthy and physically vigorous, thus being capable of realizing a wide range of purposes.

Similar remarks could be made in relation to human beings about having access to housing, clothing and medical care. Such goods all concern the resources and conditions that must be obtained if individuals are to be in conditions such that they are able to realize a wide range of purposes. Law can affect the ability of individuals to access these resources and conditions such that they are able to function optimally. A right to health ought to entail a right to have access to the resources and conditions necessary for human beings to function in a state of health. The right to health at international law embodies this understanding of the right. It goes beyond a right to health care services such as doctors and medicines,<sup>110</sup> and encompasses the right not to be exposed to dangerous conditions that threaten one's health through, for example, environmental pollution and degradation, or occupational safety hazards. The right to health thus becomes a shorthand expression with two components: a right to health care and a right to healthy conditions.<sup>111</sup> As has been mentioned, these two components are split in the Final Constitution.

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109 This argument assumes that the pursuit of diverse purposes is an important value for human beings. Such an account will be defended in my forthcoming book, D Bilchitz *Combating Poverty through Human Rights: The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007). Similar accounts of value are provided by A Gewirth *Reason and Morality* (1978) and J Raz *The Morality of Freedom* (1986).

110 The General Comment on the Right to Health ('GC 14') begins by recognizing that the right to the highest attainable standard of health is not a right to be healthy: it is a right 'to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health'. GC 14 (supra) at para 9. The Committee goes on to interpret the right to health as extending not only to timely and appropriate health care but also to the underlying determinants of health. These include 'access to safe and potable water and adequate sanitation; an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.' Ibid at para 11.

111 Hunt (supra) at 111; Chirwa (supra) at 545. For an extensive discussion of the right to health at international law, see B Toebes *The Right to Health as Human Right in International Law* (1999) 245.

## (b) A minimum core?

Despite, or because of, the diverse developments in a range of regional and international instruments, the exact content of the right to health remained unclear. Apart from the work of the World Health Organisation the rights possessed little content and were largely unenforceable. The Constitutional Court's approach thus far suffers from similar defects.

To cure this defect at international law, the UNCESCR drafted General Comment 14 on the Right to Health. The aim of this General Comment was to give greater content to the right to health contained in the ICESCR.<sup>112</sup> The UNCESCR had previously adopted what may be termed the 'minimum core approach' to socio-economic rights in GC 3. GC 3 outlines the general principles that govern the obligations of State parties to the ICESCR.<sup>113</sup> GC 3 states that a 'minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels

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of each of the rights is incumbent upon every State party'.<sup>114</sup> A State party in which any significant number of individuals is deprived of essential foodstuffs, primary health care, shelter and housing is in prima facie breach of its obligations. The

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112 The most important statement of the right to health at international law is in the ICESCR. Whilst there remains a right to an adequate standard of living in article 11, this is separated from the right to health enshrined in article 12. It reads as follows: '(1) The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) the provision for the reduction of the still-birth rate and of infant mortality and for the healthy development of the child; (b) the improvement of all aspects of environmental and industrial hygiene; (c) the prevention, treatment and control of epidemic, endemic, occupational and other disease; (d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness.' The ICESCR is available at [http://www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm) (accessed on 28 January 2006). Numerous other international instruments contain a right to health. Perhaps the clearest and most explicit expression of such a right is contained in article 24 of the Convention on the Rights of the Child (1989) 1577 UNTS 3, UN Doc. A/RES/44/25 (ratified by South Africa on 16 July 1995) available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed on 28 January 2006). Since this relates specifically to children, it will not be dealt with in depth in this chapter, which deals with provisions of a more universal applicability. For more on children's rights and entitlements, see A Pantazis & A Friedman 'Children's Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (2nd Edition, OS, December 2004) Chapter 48. The Convention on the Elimination of All Forms of Racial Discrimination ('CERD') prohibits racial discrimination in the provision of health care and provides that health care must be provided on a basis of equality (1969) 660 UNTS 195 (ratified by South Africa on 10 December 1998). The Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') obligates states to ensure that discrimination in relation to health care is eliminated and that the provision of health-care services takes place on a basis of equality between men and women. (1981) UN Doc A/34/46 (ratified by South Africa on 13 December 1995). Particular provisions impose health-care obligations to provide adequate health care to women in connection with all matters relating to pregnancy. A range of regional instruments contains provisions concerning the right to health. These instruments include the European Social Charter as well as the Additional Protocol to the Inter-American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Of particular relevance to South Africa is the fact that the African Charter of Human and Peoples' Rights contains a guarantee in article 14(1) of a general right to 'enjoy the best attainable state of physical and mental health'. It places an obligation on state parties to take the necessary measures to 'protect the health of their people and to ensure that they receive medical attention when they are sick'. The African Charter on the Rights and Welfare of the Child contains provisions similar to the Convention on the Rights of the Child. It recognizes health as a human right and provides a list of particular measures that the state must take in fulfilling these rights.

113 See UNCESCR General Comment No 3 'The Nature of States Parties Obligations' (Article 2(1) of the Convention)(5th Session, 1990) UN Doc. E/1991/23, available at [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf) (accessed on 28 January 2006)('GC 3').

UNCESCR went on to qualify this statement by recognizing that such an obligation must be considered in light of the resource constraints faced by a country. It concluded: '[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'<sup>115</sup>

General Comment 14 ('GC 14') amplifies the content of this minimum core obligation in the context of the right to health. GC 14, as guided by the Alma-Ata Declaration,<sup>116</sup> lays out the content of these core obligations as follows:

- To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- To ensure equitable distribution of all health facilities, goods and services;
- To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.

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It also recognizes what it terms obligations of comparable priority. These obligations include the following:

- To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;

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114 GC 3 (supra) at para 10.

115 Ibid.

116 A most important development in understanding what is entailed by the right to health took place at an International Health Conference held at Alma-Ata. Delegates came up with a declaration that stressed the notion of primary health care: a notion that focuses upon the importance of preventing and treating illness at the community level. The idea here was that the problem in the world was not simply a shortage of health resources but a misallocation: instead of focusing all medical resources in urban areas with a very specialized, high-level and curative focus, there was a need to distribute such services more evenly and focus on the prevention of illness. After this conference, several indicators were developed which could help measure the level of primary health-care access in countries around the world. This strategy has had an impact on the right to health in international law and, as is explained in the text above, has come to form part of the minimum core obligations imposed by this right upon all State parties to the Covenant.

- To provide immunization against the major infectious diseases occurring in the community;
- To take measures to prevent, treat and control epidemic and endemic diseases;
- To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- To provide appropriate training for health personnel, including education on health and human rights.<sup>117</sup>

### **(c) Conceptual issues relating to the minimum core and the right of access to health-care services**

The right to health care raises a number of complex questions about the notion of a minimum core.<sup>118</sup> Dealing with these questions involves recognizing that this concept serves several purposes. In this section, I shall attempt to disentangle some of these strands of thought.

First, it is important to consider the reasons for the introduction of this notion by the UNCESCR. In General Comment 3, the Committee provides two fairly rather opaque rationales: first, it mentions that it became necessary to recognize a

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minimum core obligation as a result of its experience in examining the reports of States concerning their compliance with the Covenant; secondly, it makes the following claim: '[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.'<sup>119</sup>

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117 GC 14 (*supra*) at paras 43-4.

118 The Constitutional Court has declined to follow the minimum core approach adopted at international law, regarding the minimum core as possibly only being relevant to reasonableness rather than providing independent content to the right. Nevertheless, it is arguable that a number of its underlying reasons for reaching the conclusions it does rest upon notions that implicitly invoke the idea of a minimum core. See Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2001) 119 *SALJ* 48 (Bilchitz 'Giving Rights Teeth') 497-99. The notion may also over time come to play a more important role in socio-economic rights jurisprudence both here and abroad. Moreover, most academics who have written on socio-economic rights in South Africa have been in favour of adopting a minimum core approach towards socio-economic rights. A non-exhausting list of writers in favour of adopting some variety of this notion, see C Scott & P Macklem 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *Univ of Pennsylvania LR* 1, 77; S Liebenberg 'Socio-Economic Rights' in M Chaskalson, J Klaaren, J Kentridge, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS5, 1999) 41-43; P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 97; G van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 57; S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206, 250; T Roux 'Understanding *Grootboom* — A Response to Cass R. Sunstein' (2002) 12 *Constitutional Forum* 41, 50; and D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1 ('Towards a Reasonable Approach'). For some arguments against this approach see E de Wet *The Constitutional Enforceability of Economic and Social Rights* (1996) 96 and M Wesson 'Grootboom and Beyond: Reassessing the Socio-Economic Rights Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284.

119 GC 3 (*supra*) at para 10.

The first reason fails to explain adequately the problems that the Committee had experienced and why recognition of a minimum core obligation would serve to rectify such difficulties. Presumably, these were practical difficulties relating to the development of normative standards against which to measure State compliance. One central reason for a minimum core is the ability to develop at least minimal benchmarks against which to evaluate state action.

The second reason provided by the Committee is incomplete: it requires an understanding of the purposes behind the Covenant and an explanation as to why recognition of a minimum core obligation is necessary to realize these purposes. As a result, the motivation for introducing a minimum core obligation into the discussions concerning socio-economic rights does not appear clear from the statements in the General Comment. That has allowed for different understandings of the purpose of a minimum core. A reconstruction of the reasons for such an approach is necessary in order to understand why it is of importance to the enforcement of socio-economic rights.<sup>120</sup>

Although a detailed reconstruction of these reasons cannot be provided here,<sup>121</sup> it is enough to note that the General Comment conflates two ways in which the minimum core can be understood. While both of these notions are of importance to the content and enforcement of social rights, they need to be distinguished conceptually.

### **(i) The principled minimum core**

The first notion is what may be termed the 'principled minimum core'. Essentially, this notion relates to the statement by the UNCESCR that the minimum core describes 'minimum essential levels of the right'. The minimum core here refers to the minimum basic resources that are necessary to allow individuals to survive and achieve a minimal level of well-being. The minimum core does not encompass the resources necessary to live a decent life or a dignified life in a community, but rather the basic resources that allow people to move beyond starvation, thirst and homelessness.

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However, in the context of health care, the specification of a standard of resources that is necessary for survival causes problems for the minimum core approach. For one of the key evils sought to be remedied by the minimum core approach is a lack of practical benchmarks against which to evaluate the performance of States in meeting the needs of people. In relation to food, water and housing, it seems that the principled minimum core notion can provide such benchmarks. We can determine the amount of food necessary to prevent malnutrition or water necessary to avoid dehydration. The State's actions can then be measured against whether it provides this level of food or water. However, matters are different in the context of health care.

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120 I cannot, for reasons of length, investigate all the reasons that have been offered for a minimum core approach, and instead provide here my own limited understanding.

121 I have dealt with this subject elsewhere. See Bilchitz 'Giving Rights Teeth' and Bilchitz 'Towards a Reasonable Approach'. I engage it at greater length in my forthcoming book, *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

There are several strong reasons which can be given to show the difficulty, if not impossibility, of realizing the principled minimum core obligation in the context of health care. First, consider the definition of the principled minimum core obligation as the duty to ensure that individuals are able to survive. In relation to health care, the imposition of such an obligation would involve not only primary health care, but also the provision of expensive drugs and treatments such as dialysis and heart transplants that are necessary to preserve life. The imposition of such an obligation could preclude spending on any other area of human endeavour and result in the entire budget of a country being absorbed by health-care expenditure.<sup>122</sup> The problem with providing such care universally is explained eloquently by Moellendorf:

The cost of providing needed medical resources to all citizens, unlike the costs of providing universal housing and access to food and water, may be limitless since the costs of new technology are high and resources needs will continue to grow as new treatments become available. If the costs of providing needed medical resources to all citizens is limitless, then clearly available resources are insufficient to meet all claims and a system of rationing available resources is needed.<sup>123</sup>

The second problem with focusing all expenditure on the provision of health-care services is that it will inevitably affect the realization of other less expensive needs, such as the provision of housing and food. The failure to realize these interests in turn has an impact upon the health of individuals. Thus, focusing expenditure purely on health-care services that meet survival needs can be self-defeating — even from a point of view that is concerned with the promotion of the health of individuals.<sup>124</sup>

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A UNESCO publication has recognized a similar point in relation to health-care services. The provision of equal access to high-technology care even in industrialized nations, it states, 'would inevitably raise the level of spending to a point which would preclude investment in preventive care for the young, and maintenance care for working adults.'<sup>125</sup>

Finally, the vast spending necessary to maintain everyone at the level of the principled minimum core in relation to health care would ensure that people could only attain a very low standard of living. Few resources would be available for people to use to fulfil their projects and goals beyond those focused on guaranteeing survival needs. It is unlikely that individuals will be content to live in a society which offers such minimal conditions and ambitions for individuals.

Thus, in the context of health care, it is possible to say that there is indeed a principled minimum core that provides strong reasons for prioritizing the health care necessary for survival and to alleviate suffering. However, there are strong countervailing reasons not to impose a practical obligation upon governments to

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122 The problems mentioned here will vary in their severity according to the level of development of a country.

123 D Moellendorf 'Reasoning about Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327, 327-33.

124 The UNCESCR has recognized these points by including access to basic food, water and shelter as part of the minimum core of the right to health. See GC 14 (supra) at para 11.

125 EB Brody *Biomedical Technology and Human Rights* (1993) quoted in *Soobramoney* (supra) at para 53.

realize the principled minimum core: simply put, giving people in all cases the level of health care necessary to survive can be too costly for a society. In light of this conclusion, it may be objected that the idea of a 'principled minimum core' loses its usefulness and that we should rather focus our energies on defining practical minimum standards against which government action can be measured.

It is important to make two points in response to this objection. The first is to point out the reasons behind identifying the principled minimum core apply to the case of health care as much as to any other important interest: they represent the necessary conditions that must be in place for individuals generally to be able to survive and be free from certain negative experiences which hamper their ability to lead good lives. This threshold recognizes the crucial importance to people of having the health care necessary to survive. Any failure to provide such health care has tragic consequences for the individual, and we should not attempt to pretend otherwise. The provision of such health care remains a priority and only strong reasons can justify the failure to provide such services. The principled minimum core ensures that we recognize the urgency of individual interests and that these have a central place on our list of concerns that governments are obliged to address. That importance persists even if there are strong reasons why a government cannot afford to provide the entire principled minimum core. To focus only on pragmatic standards loses sight of the urgency that certain interests have for individuals irrespective of resource constraints.<sup>126</sup> Tragic consequences may follow for individuals even if it is simply not possible to assist

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them in realizing these important interests. A principled minimum core thus has the virtue of placing these interests in clear view, and, practically, still requiring justification for the failure to realize them.<sup>127</sup>

Secondly, the formulation of pragmatic minimum standards does not take place in a vacuum. The point is that without some form of principled foundation, the pragmatic standards are likely to be arbitrary. It is thus necessary to have a background theory which determines why the minimum practical standards are determined in the way that they are. Central to any formulation of practical standards in relation to fundamental rights must be a recognition of the interests involved, and the differing levels of urgency that must be attached to the realisation of such interests. Thus, even though the principled minimum core will not itself provide the minimum standard against which government action will be evaluated, it remains of importance in helping to define — along with a range of other factors — the practical standards which will be used.

## **(ii) A pragmatic minimum threshold**

While there is good reason to retain the idea of a principled minimum core in the case of health care, a focus on the principled minimum core alone might mean that

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126 The urgency of many health needs may be the foundation of the view that the obligation exists irrespective of the resources available to a country. See B Toebes *The Right to Health as Human Right in International Law* (1999) 244.

127 On the importance of the minimum core approach in placing a burden on the state to justify its failure to fulfil minimum core obligations, see S Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 *Law, Democracy and Development* 159, 176-77.

we fail to articulate practical minimum standards that governments must meet in the provision of health care.

Defining such a 'pragmatic minimum threshold' would involve a number of factors — apart from the urgency of the interests that I have already mentioned — only some of which are canvassed here. First, the cost of the treatment required would clearly be of relevance. Secondly, the availability of resources needs to be taken into account. Thirdly, it will be important to balance a strategy focused on preventing health-care problems from arising against a curative strategy that focuses on treating health-care problems as they arise. Finally, it is important to ensure that each individual is offered equal opportunities for treatment.

The pragmatic minimum threshold is thus arrived at through considering the principled minimum core as well as other theoretical considerations together with the resources and the capacity available in a particular society. These considerations are then used in the process of formulating a threshold which specifies a pragmatic minimum standard to which governments must devote urgent attention. This pragmatic standard is a conglomeration of several considerations that lacks the simplicity of the principled minimum core.<sup>128</sup>

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The UNCESCR has in fact defined a 'pragmatic minimum core' in its General Comment 14 on the right to health care. As was seen above, in this General Comment, the UN Committee purports to define a core obligation to 'ensure the satisfaction of, at the very least, minimum essential levels' of the right to the highest attainable standard of health in the International Covenant.<sup>129</sup> However, the obligations it identifies do not meet even people's survival needs. Much life-saving health care is left out of the scope of the minimum core.<sup>130</sup> Thus, it is evident that the definition of the minimum core has not only been governed by the 'essential' nature of the interests involved but by pragmatic considerations as well. Distinguishing the principled and pragmatic strands in the minimum core concept, especially where they cannot be reconciled, allows us to understand the various important theoretical and practical purposes that such a concept must fulfil.

#### **(d) The relationship between the minimum core and progressive realization of the right to health-care services**

It is curious that in *Grootboom* Yacoob J approves of the UN Committee's approach to progressive realization but not of its use of the minimum core. In the UN

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128 Eide writes in a similar vein: '[i]t is required to accept a pragmatic compromise between the ideal and the realistic'. A Eide 'The Realisation of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *HRLJ* 35, 47. Russell also states that the notion of minimum state obligations bridges the gap 'between fundamental entitlements and scarce resources'. S Russell 'Minimum State Obligation: International Dimensions' in D Brand & S Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* (2002).

129 GC 14 (supra) at para 43. This definition of the minimum core comes from GC 3. See GC 3 (supra) at para 10.

130 For instance, surgery and treatment of life-threatening illnesses that do not constitute epidemic diseases are not part of the minimum core.

Committee's approach, the two notions are linked.<sup>131</sup> To see this, it is important to recognize that there is an ambiguity in the notion of 'progressive realisation'.

One way of understanding this notion could be in relation to the fact that it imposes an obligation upon the government to make a resource such as housing or health care accessible to a greater number of people over time. Progressive realization thus involves more people gaining houses (or health care) over time. There are several problems with this interpretation. First, the rights in FC s 26(1) and FC s 27(1) vest immediately in everyone. But the failure to offer temporary alleviation of vulnerability (through homelessness or lack of health care) would result in some persons never enjoying the 'full realization' of their right (as some people would not be able to survive). For these people, their rights would be effectively negated. Secondly, this interpretation is unable to capture the important point that some persons are at a greater relative disadvantage than others in South African society. Consider a situation in which the government focused its housing programme on those who could afford to repay loans that it granted for the purpose of building houses. Similarly, the government could focus the health-care programme largely on middle-class health needs and not the problems

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affecting the poorest in society. It seems that such a programme would constitute 'progressive realization', on the above interpretation, even though it completely ignored those who are most significantly deprived. Again, there is no recognition of the urgent priority that some interests must take over others.

An alternative interpretation, however, exists, and fits very well with the socio-economic provisions in the Final Constitution. It understands the notion of 'progressive realization' as involving two components: the first component is a minimum core obligation to realize as a matter of priority the minimally adequate levels of provision required to meet basic needs; the second component is a duty on the State to take steps to improve the adequacy of the provision of the resource over time. In other words, progressive realization means, in the context of housing, the movement from the realization of a minimal interest that people have in not being subjected to the elements to the realization of the maximal interest of having a place to live in which people are able to flourish as human beings. Progressive realization involves an improvement in the adequacy of housing for the meeting of human interests. It does not mean that some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government is required to improve gradually over time. Such an interpretation makes sense of the idea that the socio-economic rights enshrined in the Final Constitution have an aspirational dimension but, like other rights, also impose obligations as a matter of priority for the provision of certain goods.

The problem with trying to divorce the UNCESCR's analysis of progressive realization from its adoption of the minimum core approach to socio-economic rights can now be seen. The Committee claims that the notion of 'progressive realization' imposes 'an obligation to move as expeditiously and effectively as possible towards' the full realization of the right, and to refrain from deliberately retrogressive measures.<sup>132</sup> Thus, the State has a duty to take steps towards the full realisation of

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131 See Scott & Alston (supra) at 250.

132 See GC 3 (supra) at para 9.

the right, but is at the same time under an obligation to come up with the essential levels of provision required by the minimum core. While these two duties are fundamentally intertwined in the interpretation given by the Committee, Yacoob J attempts to divorce the one element from the other. Such an interpretation lacks coherence and significantly weakens the protection that socio-economic rights provide for individuals.

What then should the meaning of the term 'progressive realization' be in the context of the right to have access to health care? The Constitutional Court has not really considered this question and its approach in fact militates against providing meaning to this term. The reasonableness approach does not involve considering the content of socio-economic rights and thus how the State can qualitatively improve the realization of the right over time. The Court does not attempt to set any base line below which the standards of health care should not

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fall; this reticence complicates, if not confounds any appraisal of progressive realization. No doubt, if the State withdraws services that it currently provides, such retrogressive measures might be deemed to violate the demand for progressive realization. However, it is unclear what would constitute an actual progression. It is suggested that what needs to happen in the health-care sector is a determination of pragmatic benchmarks against which government actions can be measured. A number of goals need to be set for government policy (this need not be done by the courts), a minimum level of service specified, and the government must then present its plans and programmes for an increase in the quality of health care over time to citizens. Should it fail to meet these targets, it will be in breach of its constitutional duty to realize the right to health care progressively over time. This requirement thus points a way to the future; it requires that there be a plan in place to ensure decent health care for all over time. That plan requires clear benchmarks and a willingness by the courts to measure the government's progress against such benchmarks.

### **(e) Providing normative content to the right to health-care services**

The Final Constitution makes it clear that what needs to be progressively realized is the right to have access to health-care services. What exactly is involved in this right? One of the main theoretical defects of the approach to adjudicating socio-economic rights that has been adopted by the Constitutional Court is its failure to place the fundamental interests of individuals at the centre of its enquiry. It is in fact difficult to find adequate reasons for including socio-economic rights in the Final Constitution without recognizing that they are designed to protect the fundamental interests of individuals in having access to such essential goods as housing, food and health care. An 'interests-based approach' to the right that is advocated here thus places the interests that are involved in the right (and those that are affected in a particular case) under the spotlight. This approach also questions the extent to which government policy detrimentally impacts upon these interests.<sup>133</sup> There are a range of interests impacted upon by health, but the most important ones are survival, the ability to be free from negative phenomenal experiences and the ability to function optimally to be able to realise a range of diverse purposes.<sup>134</sup>

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133 See D Bilchitz 'Placing Basic Needs at the Centre of Socio-Economic Rights Jurisprudence' (2003) 4(1) *ESR Review* 2; D Bilchitz 'Right to Health and Access to HIV/AIDS Drug Treatment' (2003) 1 *International Journal of Constitutional Law* 524-34.

Further guidance in giving content to this right and the interests involved can be obtained from General Comment 14. It attempts to specify various elements of the right including:

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- (a) Availability: there have to be functioning public health facilities and programmes available in sufficient quantity within the State party. This will include the determinants of health — water, food, and sanitation — hospitals, clinics, sufficient trained medical personnel and essential drugs.
- (b) Accessibility: This has four dimensions:
  - Non-discrimination: health facilities must be accessible to all, particularly the vulnerable and marginalized, without discrimination on prohibited grounds.
  - Physical accessibility: health facilities must be within a safe physical reach of the population. This includes adequate access to buildings for people with disabilities.
  - Economic accessibility: health facilities must be affordable for all.<sup>135</sup>
  - Information accessibility: this involves the right to seek, receive and impart information and ideas concerning health issues.
- (c) Acceptability: All health facilities must be respectful of medical ethics and be culturally appropriate. They must respect confidentiality.
- (d) Quality: Health facilities must be scientifically and medically appropriate and of a good quality. This involves skilled medical personnel; scientifically approved and unexpired drugs and hospital equipment; safe and potable water and adequate sanitation.

GC 14 then elaborates upon the specific examples contained in article 12(2) of the ICESCR. For instance, the right to health facilities, goods and services (article 12(2) (d)) must embrace: the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care.<sup>136</sup>

The right to health imposes three types of obligations upon State parties: the obligations to respect, protect and fulfil these rights.<sup>137</sup> The obligation to *respect*

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134 Again, a full account of relevant interests cannot be provided here.

135 See *Minister of Health & Another v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign and Innovative Medicines SA as Amici Curiae)* 2006 (1) BCLR 1 (CC) ('New Clicks CC') (Constitutional Court held that the right to access health-care services embraces the right to affordable medicines.)

136 The General Comment also elaborates on the importance of non-discrimination and equal treatment in relation to accessing health care. It recommends the use of a gender perspective in health planning and policies as a result of impact of sex and gender upon health. GC 13 (supra) at para 20. There are also sections dealing specifically with women (para 21), children (paras 22-4), older persons (para 25), persons with disabilities (para 26), and indigenous peoples (para 27).

demands the State refrain from interfering directly or indirectly with the enjoyment of the right to health. The state must not deny any person access to

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preventative, curative or palliative health services, abstaining from discriminatory practices, and not limiting access to contraceptives or other means of maintaining sexual or reproductive health.

The obligation to *protect* requires the State to take measures to prevent third parties from interfering with the right to health. The State must adopt legislation: to regulate health services provided by third parties; to ensure that privatisation does not affect the availability of health care services to all; to control the marketing of medicines and medical equipment by third parties; and to ensure that medical practitioners meet appropriate standards of education, skill and codes of conduct.

The obligation to *fulfil* requires the State to adopt an appropriate national health policy that will lead to the full realization of the right. States must ensure the provision of health-care services, including immunisation, equal access to the underlying determinants of health, access to medical personnel, hospitals and clinics, and treatment of diseases. The obligation to fulfil can be further broken down into an obligation to facilitate, provide and promote. The obligation to *facilitate* involves the taking of positive measures that enable and assist individuals and communities to enjoy the right to health. States are required actually to *provide* a service where an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. The obligation to *promote* involves undertaking actions that create, maintain and restore health among the population: this includes assisting people to make informed choices about their health and to know about healthy lifestyles.

Two recent interventions by the government and the courts have led to the development of the content of the right to health-care services in accordance with the approach suggested above. Although *New Clicks* concerned primarily the pricing of medicines,<sup>138</sup> and little was said in connection with the right to health care, Ngcobo J stated that

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The right to health care services includes the right of access to medicines that are affordable. The state has an obligation to promote access to medicines that are affordable.<sup>139</sup>

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137 For an analysis on the obligations imposed by international law with respect to socio-economic rights, see P de Vos 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 3 *SAJHR* 67.

138 In trying to make drugs affordable to people, the government has attempted to enact regulations to ensure that pharmacies do not overcharge for drugs. Such regulations became mired in conflict and have recently been the subject of a lengthy judgment by the Constitutional Court after conflicting judgments were delivered by the Cape High Court and then the Supreme Court Appeal. The High Court decision is reported as *New Clicks SA (Pty) Ltd v Msimang NO & Another; Pharmaceutical Society of SA & Others v Minister of Health & Another* 2005 (2) SA 530 (C), [2005] 1 All SA 196 (C). In its judgment, the Supreme Court of Appeal made the following important remarks relating to the right to health care:

one has to agree that the right of access to health care includes the right of access to medicines although this right is not without limitations. It is also correct that the prohibitive pricing of medicines may be tantamount to a denial of the right of access to health-care.

Similarly, Moseneke J writes that 'the right of access to health care services embraces the right to access quality and affordable medicines' and that 'access to affordable medicines is an important component of any scheme directed at poverty reduction and the physical well-being of all people.'<sup>140</sup> These judgments place an important obligation on the State and begin to do what the other more direct judgments on socio-economic rights have failed to do: provide content to the right to have access to health-care services.

Secondly, framework legislation passed in the form of a National Health Act<sup>141</sup> has the express goal of uniting 'the various elements of the national health system in a common goal to actively promote and improve the national health system in South Africa.' The Act gives specific content to the right to have access to health care by guaranteeing (a) the right of pregnant women and children under six years of age to free health services and (b) all persons the right to free primary health care services unless the individual is a member of a medical aid.<sup>142</sup>

### **(f) Further issues relating to the scarcity of resources and the right to health care**

The problem of scarcity of resources is particularly acute in the case of the right to health care. In accordance with the philosophical principle that 'ought implies can', it is not possible to impose obligations that cannot be realized. However, the difficult problem that generally arises is in interpreting the phrase 'cannot be realized'. It is rare that there is an absolute scarcity of resources. More thus needs to be said about the interpretation of the phrase 'within available resources' which appears in FC ss 26(2) and 27(2).<sup>143</sup>

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Pharmaceutical Society of South Africa & Others v Tshabalala-Msimang & Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health & Another 2005 (3) SA 238 (SCA), 2005 (6) BCLR 576 (SCA) at para 42. The Supreme Court of Appeal went further arguing that the obligations of the state in this regard involve affordability as well as access: 'Cheap medicines available at two hypermarkets provide cold comfort to the poor living in a township or on the platteland.' Ibid at para 77. The Supreme Court of Appeal, however, struck down these regulations as ultra vires as they did not comply with the principle of legality. The Constitutional Court overturned that part of the decision of the SCA that held that the whole regulatory scheme was invalid. It held instead that only certain individual regulations were invalid. *New Clicks CC* (supra) at paras 13–20. The majority held that the dispensing fee that was set was not 'appropriate.' It decided to remit the matter back to the Pricing Committee and Minister for reconsideration and ordered that the Minister publish the amended regulations within 60 days. The judgment was mainly decided on administrative-law grounds.

139 *New Clicks CC* (supra) at para 514.

140 Ibid at paras 704–705.

141 Act 61 of 2003. Other important statutes relating to the right to health-care services that have been passed since 1994 are: Choice on Termination of Pregnancy Act 92 of 1996; Traditional Health Practitioners Act 35 of 2004; and Mental Health Care Act 17 of 2002.

142 Section 4(3) of the National Health Act.

143 For a discussion of the international law relating to this notion, see RE Robertson 'Measuring State Compliance with the Obligation to Devote the Maximum Available Resources to Realizing Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693.

## (i) Relationship between availability of resources and the right: content or limitation?

The first question to determine is whether the availability of resources must be considered in the process of defining the very content of a right, or whether that very content is determined independently of the availability of resources. Under the latter scenario, the scarcity of a resource would represent a limitation on the ability to fulfil a right, whose content is determined independently.

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Is there any value, then, in recognizing that a right exists when it cannot presently be fulfilled? Is it not better to recognize only those rights that are presently capable of being fulfilled?<sup>144</sup> In answering this question, it is important to go back to the underlying rationale for the recognition of rights. Fundamental rights protect certain basic interests that people have. These guarantees are designed to enable people to survive, avoid significantly negative experiences and to be capable of achieving the purposes they value in the world. Inherent in this conception of rights is the idea that there are entitlements that people have merely by virtue of their status as beings with certain characteristics.<sup>145</sup> If we accept this as one of the underlying ideas behind the protection of fundamental rights, then it becomes clear that rights should be recognized even where they are not presently capable of being fulfilled. People have rights by virtue of being creatures of a certain type with certain interests and not in virtue of having control over a certain quantity of resources. The scarcity of resources does not affect a person's having a right, but rather the capacity to realize that right.<sup>146</sup>

The recognition that people have rights even where there is no ability to realize them is important in that it recognizes that in a world of scarcity, there are often cases where people are not able to acquire that to which they are entitled. It suggests that as the scarcity is lessened, there are entitlements that are already in existence which must now be realized. The idea that people have rights even when these are not presently capable of being fulfilled thus helps to express the idea that there is a moral loss, something deeply disturbing that occurs when we admit that not everyone can be provided with life-saving health care, food, water, and shelter. It enjoins us to change this situation as soon as we can so that people can be given that to which they are entitled. Without such recognition, the failure to meet basic needs under conditions of scarcity does not violate any claim people have. The situation does not demand reform. The recognition of a right's violation confirms our original intuition that there is something morally defective about such a situation.

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144 See M Kramer 'Getting Rights Right' in M Kramer (ed) *Rights, Wrongs and Responsibilities* (2001) 28, 65-78.

145 Such an approach has a long history, and can, for instance, be traced to Immanuel Kant's idea of treating rational agents as ends in themselves. See I Kant *The Groundwork of the Metaphysics of Morals* (1785), reprinted in MJ Gregor (ed) *Immanuel Kant: Practical Philosophy* (1996) 80. For a lengthy discussion of Kant's notion of individuals as ends-in-themselves, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36. For similar, but more contemporary philosophical approaches, see A Gewirth *Reason and Morality* (1978); J Donnelly 'Human Rights as Natural Rights' (1982) 4 *Human Rights Quarterly* 391; G Vlastos 'Justice and Equality' in J Waldron (ed) *Theories of Rights* (1984) 41, 55; and M Nussbaum *Women and Human Development* (2000).

146 Donnelly (supra) at 394-95 argues that this analysis of socio-economic rights accords with how cases of impossibility of performance are dealt with in relation to private law rights as well.

In addition to these two conceptual arguments for thinking that rights should be recognized even when they are not presently capable of being fulfilled, there are also some textual arguments in favour of this claim. Consider the structure of the principal socio-economic rights in the Final Constitution. First, there is the recognition of the rights in FC ss 26(1) and 27(1). These rights are expressed in

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unqualified terms and are recognized as existing no matter what the circumstances. FC ss 26(2) and 27(2), however, stress that what can be required of the State in realizing these rights may be limited by the resources that are available. It is important to recognize that the rights and their content are thus to be determined independently of the current obligations of the State in realizing those rights. The State's current obligations must take account of the current situation of scarcity. Where such scarcity is lessened, the obligations of the State change accordingly. Scarcity thus conditions the extent to which the right can be realized but does not qualify the actual content of the right itself.

It may be objected, however, that there is no practical virtue in recognizing a right that is essentially inchoate. What is the difference between recognizing that such a right exists and cannot be fulfilled, and not recognizing that any such right exists? Apart from the theoretical virtues I have mentioned, there could be certain practical effects to adopting an approach of recognizing rights that are not presently capable of being fulfilled. First, the recognition of an existing entitlement entails that the government is required to modify the current position so as to fulfil people's rights as soon as possible. As such, the government can be expected to make every effort to increase its control over those resources that will enable it to fulfil these rights. Secondly, the continued existence of these entitlements can also help influence the behaviour of those who have resources available but are not legally obligated to provide for those suffering from deprivation (private parties or other countries, for instance). The idea that people are being deprived of something that they are entitled to by virtue of their humanity may well have significant persuasive power.<sup>147</sup> Finally, recognizing that a right exists even when not fulfilled entails that, as soon as resources do become available, the government is required to act in order to realize the rights that have been abrogated.<sup>148</sup>

## (ii) The pool of available resources

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147 See Woolman 'Dignity' (supra) at § 36.1(a) (Argues that 'the recognition of the inherent dignity of our fellow South Africans broadens the reach of this right [to dignity] from mere duties of justice to duties of virtue that impose on us obligations that have as their aim the qualitative perfection of humanity.')

148 In dealing with conditions of scarcity and possibility, it is also important to bring in a principle of equality: each individual is entitled to have access to these rights. But, as such, one cannot prioritize the rights of one individual over any other. Thus, a policy must be instituted that is capable of realizing the rights of all individuals to the greatest possible extent. That will usually mean under conditions of scarcity that each specific individual cannot claim their full entitlements under the right; but it also implies that each individual will be provided equally with some access to what resources allow. In this way, we can retain a focus on individuals, as individual rights demand, whilst taking account of the need to make decisions in a collective context. Sachs J comes close to taking this approach to health-care rights in *Soobramoney*. See *Soobramoney* (supra) at paras 53–54. Although I have disagreed with his approach to defining the content of the right in relation to resources, he at least recognizes the need to take account of the shared context in which rights are realized, and the extent to which the meaningful exercise of rights is parasitic upon substantive equality of access to material resources.

The preceding discussion has considered in what context the availability of resources should be relevant to the right to health-care services. However, it is

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important to consider the pool of resources that are to be regarded as being available for purposes of realizing socio-economic rights claims. Moellendorf has pointed out that the notion of 'available resources' is ambiguous:

It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the state can marshal to protect the right.<sup>149</sup>

Moellendorf recognizes that these are two extreme versions of what the term means and that it may fall somewhere between these extremes. In *Soobramoney*, he argues, Chaskalson P generally employs the term in its narrowest sense: the resources allocated by the provincial government to kidney dialysis.

This position, he points out, does not accord with the position the Court adopted in its *First Certification Judgment*.<sup>150</sup> Whilst the *First Certification Judgment* Court recognized that socio-economic rights might well have direct implications for budgetary matters, it also found that this was true when the enforcement of civil and political rights was at issue. It concluded that '[i]n our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.'<sup>151</sup>

The Court in this passage does not limit its role in the adjudication of rights claims to the framework of existing allocations. 'Rather' as Moellendorf notes, 'the court may pass judgments on these rights, as with other rights, that require a change in fiscal priorities'.<sup>152</sup> Moellendorf supports this broader reading of 'available resources'<sup>153</sup> because he claims that the narrow reading would reduce rights to mere 'policy priorities'. Rights, he claims, 'must have some role in guiding policy rather than being merely dependent upon it, if they are to be real rights and not mere priorities'.<sup>154</sup>

But Moellendorf does not attend to the manner in which he uses the term 'priority' and fails to explain what the exact difference is between rights and policy priorities. His reasoning suggests this is a distinction in kind between different types of reasons. Yet, when the notion of priority is considered properly, the distinction

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149 D Moellendorf 'Reasoning About Resources: *Soobramoney* and the Future of Socio-Economic Rights Claims' (1998) 14 *SAJHR* 327, 330.

150 *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC).

151 *Ibid* at para 77.

152 *Moellendorf* (supra) at 331-332.

153 *Ibid* at 331.

154 *Ibid* at 332.

becomes not one of kind but one between reasons with differing degrees of strength.<sup>155</sup> The right in FC s 27(1) provides a reason which has a

special weight.<sup>156</sup> If we recast Moellendorf's argument in this light, it becomes evident what the real problem with the narrow interpretation of 'available resources' is.

To construe 'available resources' in the narrowest sense would be to ignore the special weight that should be attached to rights. As Moellendorf correctly argues: 'It would be remarkable, for example, for the court to claim that the right to a fair trial need not be protected because those legislating and administering the budget have simply not allowed the resources to provide for fair trials.'<sup>157</sup> That would allow the government to avoid realizing rights merely by virtue of its allocation of the budget. Such allocations may be well motivated but it is also possible that they can fail to have sufficient regard for the urgent interests of individuals or be based upon the poor management of resources. In order to justify a limitation on the right in FC s 27(1), it is essential to raise reasons of sufficient weight to do so.<sup>158</sup>

Thus, if the allocation of the budget is to provide a sufficient reason for not fulfilling certain rights, that allocation itself needs to be justified by reasons of sufficient weight to justify the failure to fulfil such rights. This explains why the mere allocation by the government of resources cannot alone be taken to justify the non-fulfilment of rights. There must be good reasons lying behind such an allocation, which take account of the special weight to be attached to rights.<sup>159</sup> Any other interpretation is incompatible with the decision to include socio-economic rights in a bill of rights. Thus, since the State may be called upon to justify its allocation of resources, the pool of resources that must be considered as being 'available' must be all those that lie within the control of the State.

That formulation, however, itself admits of various meanings. It is clear that it refers at least to those resources that are controlled by the State and form part of the national budget.<sup>160</sup> Any narrower construal of this phrase is not consistent with a purposive approach to interpreting socio-economic rights. What is controversial,

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155 I cannot develop this argument here. The full argument will be contained in my forthcoming book, *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

156 See, for instance, R Dworkin *Taking Rights Seriously* (1977) 188 (Argues that '[i]n most cases, when we say that someone has the 'right' to do something, we imply that it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference.')

157 Moellendorf (*supra*) at 331.

158 See S Liebenberg 'Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 31, 31-47 (Makes a similar point when she states that 'the courts should not simply accept unsubstantiated allegations regarding resource shortages. The Court's role is to scrutinise the validity of this defence'.)

159 See, for instance, E Mureinik 'Beyond a Charter of Luxuries' (1992) 8 *SAJHR* 464 (Argues that socio-economic rights place a burden upon the state to justify its resource allocations in light of the commitments contained within the Bill of Rights.)

however, is whether the notion of 'available resources' can be given an even wider gloss. It is plausible to suggest, for instance, that capital from foreign loans

may also be said to be 'available' to a State.<sup>161</sup> The question thus arises as to whether there are any limits to — or what the appropriate limits are with respect to — the pool of available resources that should be considered when determining the obligations of a society.

To some extent, the answer to this question depends upon the particular context with which we are concerned and the branch of government that is making decisions about the realization of socio-economic rights. The judiciary generally lacks expertise in macro-economic policy. It would therefore generally be inappropriate for courts to require the government to take out foreign loans in order to meet their constitutional obligations. There would be legitimate fears of the judiciary straying well beyond their sphere of competence and thus, for judges, the notion of 'available resources' would generally not include higher levels of foreign capital than that to which the government currently has access. Courts could only recommend that other branches of government consider this as an option for improving the realization of rights and require that the other branches of government justify their decisions properly in this regard. The executive, however, is well-placed to consider the amount of foreign capital that can be marshalled for the fulfilment of rights and, as such, a realistic assessment of foreign assistance should be part of its understanding of 'available resources'. The extent to which such capital can be acquired will, however, depend on a number of economic and political factors determined by such institutions as the International Monetary Fund and World Bank, which lie beyond the control of any one State.

Privately-held resources within a State may also lie within its control through its regulatory and taxation powers as well as its powers to expropriate property. The question once again arises as to whether the notion of 'available resources' can also be said to include the State's ability to control privately-held resources. That question is an important one to consider, but cannot be developed here as it requires a discussion of the nature and role of property rights in a democracy such as South Africa.<sup>162</sup>

Determining the 'availability of resources' is thus more complicated than it initially appears. Scarcity is in many instances a result not of natural facts but

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160 Scott and Alston claim that the court in *Soobramoney* was implicitly working from the narrow assumption that available resources refers only to *existing* state resources. See S Scott & P Alston 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206.

161 Van Bueren argues that resources should not only be considered to include direct economic resources but also human and organisational resources:

Human resources include the time, energy, motivation, skills, professionalism, the vision and desire of the individual adults and children and communities. Organisational resources include both the formal and the informal relationships by which actions are taken in society including political organisations, indigenous people's organisations, families and non-governmental organisations.

G van Bueren 'Alleviating Poverty through the Constitutional Court' (1999) 15 *SAJHR* 52, 61-2.

162 I discuss this question in my forthcoming book, D Bilchitz *Combating Poverty through Human Rights, The Justification and Enforcement of Socio-Economic Rights* (forthcoming, 2007).

human institutions and decisions. As a result, the availability of resources is not a fixed parameter and its meaning needs to be considered as part of an overarching enquiry into the content of the State's obligations in relation to socio-economic rights. I have argued in this section that the phrase 'available resources' should

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be interpreted so as to refer to all those resources that lie within the control of the State. In determining what lies within the control of the State, consideration must first be given to those resources that lie directly within the State's budget. However, the 'availability of resources' may legitimately encompass the ability to secure international loans, to increase taxes, and to interfere with private property rights. The executive may consider this phrase to include all these elements whilst judges may adopt a more restrictive approach consonant with their role in our system of government.

## 56A.5 Health-care policy and the final constitution

### (a) Background

I conclude this chapter in a manner that indicates the way in which health rights are in many ways honoured in the breach in South Africa. In a departure from standard academic practice, I shall relate a tragic story concerning the operation of the South African health-care system with which I was personally involved. Academic writing should not be divorced from such practical realities. That the law needs to be cognizant of the lived experience ordinary people has been confirmed repeatedly by the Constitutional Court.<sup>163</sup> It is in this spirit that I relate a story which, though it provides only anecdotal evidence, nevertheless highlights the multiple ways in which current health-care policy is failing to realize even the most basic elements of the right to have access to health-care services. The story also provides a method of illustrating some of the challenges involved in developing the content of the right in FC s 27.

### (b) Themba's story: HIV/AIDS in the public health-care system

On 25 May 2005 at 02h45, Themba Baloyi,<sup>164</sup> aged 25, died at a care home in Johannesburg. Themba's death is attributable to serious deficiencies in the South African health care system. Whilst in hospital, he lay next to many people suffering in the same way that he did. His story exemplifies the suffering of poor people in South Africa.

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Themba first became ill at the beginning of 2005. Unable to work, he went to his rural home close to Madibogo, near Mafikeng. With severe vomiting and diarrhoea, Themba was taken to the local clinic. He was given treatment to re-hydrate him and sent back home. His blood was taken. Themba discovered shortly thereafter that he was HIV-positive.

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163 See, eg, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), 1997 (1) SACR 567 (CC). Taking account of the fact that *de facto* women still remain the primary care-givers in society for children. See also *Soobramoney* (supra) at para 111 ('Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.')

164 Name changed by request of family.

Being unable to travel into Madibogo as an outpatient, Themba returned to Johannesburg, hoping for better treatment. After a short stay in hospital, however, he was discharged whilst still extremely ill. Miraculously, he slowly improved and returned to his employment. His employer had kept Themba's job open because he was an excellent employee: trustworthy and reliable.

Themba tried to have a CD4 count taken. He waited for hours in the Johannesburg General Hospital for a blood test and was sent away without the test having been taken. Because he did not understand how the State health care system operates, Themba accepted this treatment.

At the beginning of May 2005, Themba was taken to the Johannesburg General Hospital with pneumonia. His feet were extremely painful and he was unable to stand on his own. He could not hold down food. Despite his desperate condition, he was kept waiting to see a doctor for ten hours in casualty. There was no triage nurse to assess the urgency with which patients were to be seen in casualty. He was also provided with no information as to when he would be seen.

The doctor who eventually saw Themba helped him to die. Instead of attempting to save this 25-year-old, the doctor sent him from the Johannesburg General to Selby Park Hospital. This hospital is completely under-equipped and, from what we saw, sections of this hospital are used as a warehouse facility in which patients are 'permitted' to die. Themba was given minimal care: whilst he was given anti-biotics, he could not hold down food or drink properly. In any decent hospital, he would have been put on a drip. For most of Themba's stay in Selby Park, he lay without a drip. His body, trying to fight with minimal resources against the illnesses that beset him, now had to cope with dehydration and starvation. Since Themba had AIDS-defining illnesses he was also entitled to anti-retroviral treatment. All attempts to get him such treatment in hospital failed, and he was initially even denied a CD4 count test with the excuse that this was too expensive. The cost of a CD4 count is currently R150.

Placing Themba on a government anti-retroviral programme proved impossible. Despite being malnourished and very sick, the hospital discharged him. On the way to the care home, we managed to arrange for Themba to be placed on a US-funded anti-retroviral programme. He was due to begin his treatment on Wednesday 25th May. We hoped his body ravaged from illness and neglect could cope with these drugs.

Themba died in the early hours of 25 May. His CD4 count was 1.

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