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# A South African Perspective on Social and Economic Rights

by Richard J. Goldstone

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**A**LTHOUGH THE DECISION as to whether a country's constitution should make provisions for social and economic rights is a political one, the task of interpreting and enforcing such rights is undoubtedly judicial in nature. When interpreting and enforcing these rights, judges often face the unenviable task of weighing the critical needs of individual citizens against the legitimate budgetary constraints of the state. Despite the view of certain individuals that this sort of task is either undesirable or impossible, this article demonstrates how South Africa's Constitutional Court has successfully enforced the constitution's provisions for social and economic rights while balancing the state's interest in managing its political affairs. Although this balancing approach is not always easy, the South African experience has been largely successful. As such, an analysis of the Constitutional Court's jurisprudence on this issue is suggestive of how other countries such as the United States might (re)consider their courts' approach to the question of social and economic rights.

## THE FALSE DISTINCTION BETWEEN POSITIVE AND NEGATIVE RIGHTS

LET ME FIRST REFER TO WHAT I WOULD SUGGEST is the false distinction between positive and negative rights that one often reads, for example, in the decisions of some American judges. They argue that negative rights, which protect individuals from interference, can be enforced, but positive rights, such as social and economic rights, encroach on the powers of the legislative and executive branches. In the view of many American courts, because these rights involve enabling individuals through the allocation of public funds, they cannot be enforced.<sup>1</sup> The question thus becomes whether courts should become involved in instructing the legislature or executive how to allocate such funds. Many individuals believe that it is not the province of the judiciary to do so.

What these proponents of positive and negative rights fail to realize, however, is that most court decisions involve spending public money. Take, for instance, judicial decisions ordering the improvement of prison conditions. Such decisions may be based on the premise of protecting the negative rights of incarcerated individuals; however, they also entail a positive obligation because they compel government action that is likely to cost hundreds of millions of dollars. In California, for example, a federal judge issued an order threatening to take over California's prisons if the state did not take bolder steps to ensure prison reform.<sup>2</sup> Sufficient steps were not taken and the whole state prison system is now under federal court control. Similarly, the mandated bussing that followed *Brown v. Board of Education* is an example of judicial enforcement that has cost taxpayers huge amounts of money.<sup>3</sup> Ultimately, this dichotomy between positive and negative rights breaks down at a funda-

mental level because many judicial decisions involve some determination of the allocation of public funds.

## THE DEVELOPMENT OF SOCIAL AND ECONOMIC RIGHTS IN SOUTH AFRICA

IN SOUTH AFRICA THE CONSTITUTION'S DRAFTERS believed that the overwhelming majority of South Africans, in particular the previously oppressed black South Africans, would not be particularly concerned with so-called "first-generation" rights, such as freedom of speech, assembly, association, and movement. All of these first generation rights were thought not to be of great concern to individuals who did not have enough food to eat, or a roof above their heads, or money to send their children to school. Rather, it was felt that for South Africa's new constitution in 1994 and its final constitution in 1996 to be relevant to the majority of South Africans, it would have to include "third-generation" rights, such as rights to housing, health care, and education.

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The South African Constitution very carefully delineates social and economic rights, and provides that "everyone"<sup>4</sup> is entitled to reasonable access to housing, health care, and education.<sup>5</sup> The Constitutional Court has held, however, that "reasonable access" does not mean that an individual is entitled to these provisions. Rather, these provisions should be progressively provided, taking into account the financial ability of the state. Indeed, the Constitution is carefully worded to give appropriate deference to the legislature, and it can be very difficult for courts and judges in the context of that careful wording to determine at what point the legislature or executive can be faulted and told that it is acting unconstitutionally.

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## SOUTH AFRICA'S RIGHT TO HEALTH CARE

The first case the South African Constitutional Court heard on social and economic rights was the worst possible beginning. In *Soobramoney v. Minister of Health*, an Indian South African living in the city of Durban had an ischemic heart, a failed liver, and a life expectation of approximately 18 months.<sup>6</sup> Soobramoney's condition required that he receive treatment at least once a week. He went to a public government hospital for dialysis, but was denied treatment because the hospital only had provisions for 78 patients in any given week. Therefore, the hospital gave priority to patients who were in line to receive transplants, who needed only short-term treatment, and who would make a full recovery. In other words, to give Soobramoney dialysis would have prevented a different patient from receiving the long-term benefits of treatment. When hospital authorities reluctantly explained to him that the treatment was not available, Soobramoney brought an urgent application to the High Court at Durban, which ordered the government to provide him with the dialysis. The government urgently appealed, and the Constitutional Court heard the appeal.



Richard J. Wilson, Richard J. Goldstone, Hadar Harris, and Herman Schwartz.

The Constitutional Court held that it could not order the dialysis treatment. First, the Court rejected Soobramoney's argument that this was emergency treatment, which is an absolute right under the South African Constitution and not, like other forms of health care, something to which the government must only provide reasonable access.<sup>7</sup> The Court said emergency treatment is the sort of treatment that an individual receives in trauma and emergency wards following a serious accident. Soobramoney's situation, as grave as it was, did not require such a level of care. Second, the Court unanimously held that it could not order the hospital to purchase more dialysis machines. The budget had been carefully drafted in the state hospitals, and more machines would have meant less money for medicines, which would have altered the hospital's budgetary determinations. In the judges' conference room, it was noted that ordering more dialysis machines would open the door to situations where individuals could demand non-emergency treatments that would cost hospitals significant amounts of money.

The Court held that it could not interfere and tell the government how to stock its medical supplies. Rather, the Court said that

it could only interfere in situations where there was an unconstitutional violation of equality; for example, if the priority list prepared by the doctors gave preference to individuals of a particular race. Unfortunately, national television stations took their cameras to Soobramoney's home the day the opinion came down rejecting the claim for dialysis treatment. He was sitting with his wife and three children, and they asked him how he felt about the decision to deny him dialysis treatment. Before he could even begin to answer, however, he had a stroke and died within the hour. The Court was criticized by much of the media for effectively sentencing Soobramoney to death.

Perhaps the most dramatic case in the Constitutional Court's history thus far has been *Minister of Health v. Treatment Action Campaign*.<sup>8</sup> This particular case involved the supply of a drug called Nevirapine to pregnant mothers. The drug has been very successful in stopping the transmission of the HIV virus from HIV-positive mothers to their newborn children. It is inexpensive and easily dispensed; the mother has to have one small dose during labor and the child a very small dose at birth. But the South African government has an ambivalent and in some ways irrational approach to HIV/AIDS. Some senior ministers, and even President Thabo Mbeki at one stage, have denied that the HIV virus is the cause of AIDS. As such, only two test stations in two medical facilities were set up within the country, effectively denying Nevirapine to 90 percent of South Africa's pregnant mothers.

Because the government could not challenge the undeniable efficacy of the drug, it argued that too many obstacles prevented it from safely and effectively administering the drug. First, the government argued that the drug had potential side effects. There was no evidence of these side effects, however, and the World Health Organization has authorized the drug's use. The government also said that there were insufficient nursing aids to explain how to use the drug and its potential side effects. In response, the Court insisted on obtaining evidence for these claims, and proposed that nursing aids be trained to provide adequate guidance to expectant mothers.

The government argued that the use of Nevirapine would require mothers to understand that they could not breast-feed to prevent the transfer of the HIV virus to their children. The government contended that there was no use in taking a drug and possibly building up resistance to it if a mother was then going to breast-feed her child. The Court responded, however, that individuals could be trained to educate expectant mothers about these risks. Finally, the government objected on the grounds that women who did not breast-feed would need clean water for formula, which was not available in some areas. The Court held that this was not a reason to deny the drug, but rather a reason to supply clean water. If no clean water were available, the mother would not be advised to take the drug.

As a result, the government was ordered to supply the drug to every hospital in South Africa. In its decision, the Court relied not only on the right to medical treatment but also equality: Nevirapine could not be supplied to some mothers and not others. The government, to its great credit in this and other cases where the Court has ruled against it, has quickly implemented the orders of the Constitutional Court.

## A CONSTITUTIONAL RIGHT TO HOUSING

In addition to the right to health care, the Constitutional Court has also pushed the South African government to ensure the rights of its citizens in cases concerning the right to housing. In *Government of the RSA v. Grootboom*, hundreds of squatter-dwellers who lived in an area on the banks of a river outside of Cape Town lost their homes during a flood.<sup>9</sup> The squatter-dwellers moved onto private property and built makeshift homes with cardboard and plastic that provided minimal protection from the elements. Shamefully, the owner of this private property was encouraged by local authorities to apply for their eviction, which the lower court granted. In response, the squatter-dwellers brought an application against Cape Town's provisional government and the city government, which asserted that the South African Constitution provided a right to housing.

The government argued that its housing scheme, which provided housing for over three million families, as well as electricity and water for millions of South Africans, was evidence that it had

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taken the social and economic rights provisions of the Constitution seriously. In a unanimous decision, the 11 members of the Constitutional Court praised the government housing policy and its significant achievements. The Court noted, however, that the policy did not provide for the poorest of the poor or for emergency situations. It said that where reasonable access to housing had been provided as a constitutional requirement, there had to be minimal provisions for emergencies and for individuals of lower socio-economic status. The government's response was that these provisions would drain its resources.

Notably, the Court was urged in an *amicus curiae* brief to adopt the “minimum core” approach of the United Nations Committee on Social and Economic Rights that has been developed over decades, and that identifies minimum core social and economic rights. The Court refused to implement this approach, however, because there was insufficient information to determine what constitutes a minimum core for housing or, by extension,

what would be a minimum core for health care. Instead it reiterated that although there must be adequate provisions for the country's neediest, such determinations were not the business of the judiciary. The Court recommended that the government address these problems and requested that the Human Rights Commission, which was established by the Constitution, monitor the government and, if necessary, come back to the Court if it was of the view that the government was not taking the decision seriously. To date, the Human Rights Commission has not returned to the Court.

Another interesting case in South Africa's rights jurisprudence that is often overlooked is *Minister of Public Works v. Kyalami Ridge*.<sup>10</sup> *Kyalami* cropped up about six months after the *Grootboom* decision and involved a group of poor squatter-dwellers who were living outside Johannesburg in Alexandra Township, which is located on the banks of a stream. One day, the stream flooded and washed away the squatter-dwellers' homes. In light of the *Grootboom* decision, the government allocated 300 million rand for those affected by the flood and established a cabinet committee to determine what to do with these homeless squatter-dwellers. The committee decided to give them temporary prefabricated homes with bathroom facilities on the grounds of a large farm prison outside of Johannesburg, near Kyalami Ridge, an upper-middle class white residential suburb. Property owners of Kyalami Ridge argued that placing these squatter-dwellers half a mile from the suburb would depress their property values. They said the legislature did not have a right to take this action and that the Constitution should not be converted into legislation. A High Court judge ordered that the government immediately stop building these prefabricated houses. The Constitutional Court, however, heard an urgent appeal and reversed the decision. The Court held that the government had acted properly in providing housing to the squatter-dwellers. It concluded that where there is a constitutional demand, no special legislation is necessary because the demand itself is sufficient legislative authority to authorize government action.

The most recent case handed down in the last couple of months was *President of the Republic of South Africa v. Modderklip*, which concerned farmland in the same province as Johannesburg.<sup>11</sup> A farmer had a fairly large plot of land that approximately 10,000 squatter-dwellers had unlawfully inhabited over the years. The farmer received an order from the High Court authorizing the squatter-dwellers' eviction, but when he went to implement the order the sheriff noted that it would cost 1.8 million rand to execute. The farmer refused to pay the fee and argued that it exceeded

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the land's market value. Instead, he started a new case in the Pretoria High Court, which ordered the government to expropriate the land and maintain it permanently for these squatter-dwellers.

The government appealed the case to the Constitutional Court and argued that private individuals had infringed Modderklip's property rights. It also argued that Modderklip was not entitled to the relief he claimed because he had failed to submit a timely application for the eviction order. The Court found that it was unreasonable for the government to do nothing when it was impossible for Modderklip to evict the large number of squatter-dwellers. The Court ordered the government to pay damages, to pay the farm owner the value of his property, and to expropriate the land if they wished. These remedies compensated Modderklip for the unlawful occupation of his property in violation of his rights while ensuring that the squatter-dwellers continued to have accommodation until suitable alternatives were found. Without the housing provision of South Africa's Constitution, the Court could never have made such an order.

### CONCLUSION

THE CONSTITUTIONAL COURT has referred to the South African Constitution on a number of occasions as a "transformation constitution." By questioning unjust resource distributions and affirming the

right to social and economic benefits, it is facilitating the transformation of an apartheid society into a democratic society. Indeed, as the *Modderklip* case demonstrates, ownership is not necessarily a trump card in the new South Africa. The government can override ownership in the interests of securing social and economic rights for South African citizens that are guaranteed by the new constitution.

South Africa does not have to be an isolated example. There is also room in the United States to monitor the manner in which social and economic rights are implemented. One important example is the response by the federal and state governments in the post-Hurricane Katrina Gulf states, particularly in New Orleans and other parts of Louisiana. This tragedy demonstrates the false distinction between positive and negative rights because the government inevitably will have to invest in the region and provide for its citizens if the area is ever to be rebuilt successfully. As such, there must be some duty on behalf of the government to spend the billions of dollars it will have to use in an appropriate fashion and in accordance with the principles of due process and equal protection. There must be rights to housing, health care, and education that should be taken into account in some rational way. Creative NGOs and imaginative academics should examine international legal requirements in this regard to determine the extent to which, if any, they might be applicable in the United States. *HRB*

### ENDNOTES: A South African Perspective

<sup>1</sup> *Deshaney v. Winnebago County*, 489 U.S. 189 (1989), held that nothing in the Due Process Clause itself requires the state to protect life, liberty, or property of citizens against invasion by private actors.

<sup>2</sup> Richard Gonzales, *National Public Radio*, "Judge Urges California Prison Reform," <http://www.npr.org/templates/story/story.php?storyId=3620517> (July 26, 2004).

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> *Khosa and Others v. Minister of Social Development; Mahlaule and Another v. Minister of Social Development and Others*, 2004 (6) SA 505 (CC) (S. Afr.). In *Khosa*, which dealt with social welfare grants to children and the elderly, the government passed legislation limiting social welfare to South African citizens. The Constitutional Court held that the use of "everyone" in the Constitution refers to all lawful residents in the country, such as the many hundreds of thousands of permanent residents lawfully living in the country. The government replied that it would cost hundreds of millions of rand more because of the hundreds of thousands of elderly individuals and children of permanent residents. The Constitutional Court said "everyone" must be given a unique meaning, especially taking into account that other provisions of the Constitu-

tion make reference to "citizens." This definition, however, had to be limited and could not refer to tourists or illegal immigrants.

<sup>5</sup> Constitution of the Republic of South Africa, ch. 2, §§ 26, 27, 29 (Oct. 11, 1996), available at <http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1> (accessed Feb. 6, 2006).

<sup>6</sup> *Soobramoney v. Minister of Health [KwaZulu-Natal]*, 1997 (12) BCLR 1696 (CC) (S. Afr.).

<sup>7</sup> Constitution of the Republic of South Africa at §§ 27(1), 27(3).

<sup>8</sup> *Minister of Health v. Treatment Action Campaign*, 2002 (5) SA 721 (CC) (S. Afr.).

<sup>9</sup> *Government of the RSA v. Grootboom*, 2001 (1) SA 46 (CC) (S. Afr.). *Grootboom* in Afrikaans is a Dutch word that means big tree.

<sup>10</sup> *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*, 2001 (7) BCLR 652 (CC) (S. Afr.).

<sup>11</sup> *President of the Republic of South Africa and Others v. Modderklip Boerdery (Pty) Ltd and Others*, 2005 (—) BCLR — (CC) (S. Afr.).