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In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core

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IN DEFENSE OF THE CONSTITUTIONAL COURT: LITIGATING SOCIO-ECONOMIC RIGHTS AND THE MYTH OF THE MINIMUM CORE

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INTRODUCTION

Constitutional scholars and human rights activists had high hopes for the “transformative potential” of the South African Constitution.¹ Today, ten years into our post-apartheid constitutional democracy,

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1. See Nicholas Haysom, *Constitutionalism, Majoritarian Democracy and Socio-Economic Rights*, 8 SAJHR 451, 459-60 (1992); see also Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 SAJHR 464, 472 (1992).

approximately forty percent of South Africans remain unemployed,² approximately thirty percent do not have either adequate housing or access to piped water in their dwelling or on their site, and close to forty percent lack access to hygienic toilet facilities.³ About fifty percent survive, somehow, on an income of less than R500 per month.⁴ Life, for the majority of South Africans, remains appallingly hard, despite the socio-economic promises of the Constitution.⁵ It is not surprising that scholars, activists, and the poor themselves are disappointed, and feel that the Constitution has not realized its promise of transforming the lives of South Africa's poor. In their disappointment, scholars and activists seek to apportion blame between all three branches of government. The legislative and executive branches are criticized for failing to formulate and implement policies and programs that prioritize the needs of the poorest of the poor.⁶ The judiciary, more particularly the Constitutional Court, is criticized for its failure to hold the other branches sufficiently accountable for their failures. Frustrated by the slow pace of transformation, scholars have described the

2. The General Household Survey of 2003 put the unemployment rate at 30.2%, under the official definition and at 43% under the expanded definition. STATISTICS SOUTH AFRICA, GENERAL HOUSEHOLD SURVEY at x-xi, Statistical Release P0318 (July 2003), available at <http://www.statssa.gov.za/publications/P0318/P0318July2005.pdf>. The survey defined "the unemployed" as those people within the economically active population who: (a) did not work during the seven days prior to the interview, (b) want to work and are available to start work within two weeks of the interview, and (c) have taken active steps to look for work or start some form of self-employment in the four weeks prior to the interview. The expanded definition of unemployment excludes criterion (c). *Id.* at xxiv..

3. See *id.* at xi-xiv.

4. See World Bank, *South Africa Country Brief*, (Nov. 2005), <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXTN/0,,menuPK:368086~pagePK:141132~piPK:141107~theSitePK:368057,00.html> (estimating that "about 22 million South Africans live in 'third world' conditions").

5. Public discontent with the slow pace of housing and service delivery exploded into riots in May 2005. See, e.g., Rowan Philp, *Protests Reflect a Crisis of Dignity*, SUNDAY TIMES (S. Afr.), May 29, 2005, at 5; Quinton Mtyala et al., *Now Ocean View Erupts*, CAPE TIMES (S. Afr.), May 31, 2005, at 6.

6. See, e.g., Bryan Rostron, *High Water Rising in the Cape*, BUSINESS DAY (S. Afr.), Dec. 13, 2005, at 11.

Constitutional Court's socio-economic rights jurisprudence as "timid,"⁷ "deferential," and "flawed."⁸

The criticisms suggest that the court has had the opportunity to act as a more effective agent of social change, but has missed that opportunity. The opportunity presented to the court, say many of its critics, was to give concrete meaning to the individual socio-economic rights in the Constitution by identifying the minimum core of each of the rights that have come before it.⁹ Had the court done so, the executive would have a clearer understanding of the constitutional requirements in regards to progressive social delivery, and individuals would, in turn, find it easier to hold the executive accountable for its failure to deliver their most pressing needs.

Are these criticisms justified? I think not. The advocated minimum core approach is both conceptually and pragmatically misconceived. In critiquing the critics, I argue that the court was right to reject the minimum core approach because it is inappropriate as a tool of judicial decision-making. I consider the court's reasonableness approach jurisprudentially sounder than the proposed minimum-core alternative. However, I do take issue with the court's repeated insistence that it will not examine *how* the public purse is spent. It is this aspect of the court's jurisprudence, in my opinion, that should be the target of vigorous criticism.

This paper commences with an overview of the three principal South African socio-economic rights cases to date: *Soobramoney*,¹⁰ *Grootboom*,¹¹ and *Treatment Action Campaign*.¹² This paper emphasizes the factual backdrop against which the court made its

7. Audrey Chapman, *Core Obligations Related to the Right to Health and Their Relevance for South Africa*, in *EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES* 35, 56 (Danie Brand & Sage Russell eds., 2002).

8. David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-economic Rights Jurisprudence*, 19 SAJHR 1, 2 (2003).

9. See *id.* at 13.

10. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

11. *Gov't of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) (S.Afr.).

12. *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) (S. Afr.).

decision in each case. This context is all too often glossed over by critics who approach their analysis at a level of abstraction that downplays the difficult, and purely utilitarian, nature of the choices they argue the court should be engaging in. Beginning with an examination of the cases, and then moving on to a consideration of the minimum core concept itself, this paper hopes to demonstrate that the choices involved in extracting a minimum core are utilitarian rather than principled. As such, the minimum core approach is inappropriate in the context of litigation related to the enforcement of an *individual's* rights. This paper then argues that the processes involved in arriving at the content of civil-political and socio-economic rights are quite distinct: the former are a matter for interpretation, the latter for determination. As such, it is disingenuous to argue that all that is required of the court, in identifying the minimum core, is to interpret socio-economic rights in the same way it has interpreted civil-political rights. This paper concludes by arguing that litigation should instead challenge instances of government misspending, and that the court should be asked to direct that the funds be spent, and spent appropriately, on the provision of social goods.

I. THE CASES

There have been three socio-economic rights cases relevant to the minimum core debate, two involving the right of access to health care,¹³ and one on the right of access to housing.¹⁴ A proper understanding of the court's jurisprudence requires an appreciation of the facts of each case and the socio-economic backdrop against which each decision was taken. This backdrop is critical to understanding the court's awareness of the tension between the individual rights of the claimants and the utilitarian considerations that underpin the allocation of scarce resources in all cases.

13. See *id.* at 722-23; *Soobramoney* 1998 (1) SA at 766.

14. *Grootboom* 2001 (1) SA at 48.

A. SOOBRAMONEY V MINISTER OF HEALTH, KWA-ZULU NATAL

Soobramoney involved a challenge to the treatment available to Mr. Soobramoney at a state hospital.¹⁵ Mr. Soobramoney was a forty-one year old unemployed man who was in the final stages of chronic renal failure at the time of application.¹⁶ Regular renal dialysis could have prolonged his life, but it is unclear for how long.¹⁷ He could not afford dialysis from the private sector, and so, sought it from a state hospital.¹⁸ However, the hospital refused his application because he did not meet their eligibility criteria.¹⁹ For, in addition to renal failure, he was a diabetic who suffered from ischaemic heart disease and cerebro-vascular disease.²⁰ Since the demand for dialysis treatment outstripped supply, the hospital's dialysis unit was already over-burdened and only individuals who were eligible for a kidney transplant were admitted onto the dialysis program.²¹ Mr. Soobramoney did not qualify for a transplant because of his multiple medical conditions.²² The refusal to admit him for treatment meant that Mr. Soobramoney would die sooner than he would have otherwise. This fact alone did not bring him within the scope of section 27(3) of the Constitution, which states that "[n]o one may be refused emergency medical treatment."²³ The Constitutional Court felt that interpreting it as an "emergency" would have effectively prioritized the treatment of terminal illnesses over other forms of medical care, reducing the resources available to the state for preventative health care and the treatment of illnesses or infirmities which are not life threatening.²⁴ Moreover, the court held that Mr. Soobramoney could not succeed under section 27(1),²⁵ the general right of access to health care services, because the eligibility criteria adopted by the hospital were reasonable given the resource constraints it faced, and given the "agonising choices" inherent in

15. *Soobramoney* 1998 (1) SA at 769.

16. *Id.*

17. *Id.*

18. *Id.* at 770.

19. *Id.* at 769-70.

20. *Id.*

21. *Id.*

22. *Id.* at 769-70.

23. S. AFR. CONST. 1996, § 27(3).

24. *Soobramoney* 1998 (1) SA at 774.

25. S. AFR. CONST. 1996, § 27(1)(a).

budgeting limited resources.²⁶ Providing dialysis to a patient with chronic renal failure twice a week would cost the state R60,000 per year,²⁷ and Mr. Soobramoney's condition was so bad that he required dialysis three times a week.²⁸ If the dialysis budget remained the same, and Mr. Soobramoney received dialysis, someone else, and probably more than one person, would not receive the treatment. Moreover, the person who would be denied treatment would potentially live longer than Mr. Soobramoney because he or she would qualify for a kidney transplant. If the dialysis budget was extended to provide for Mr. Soobramoney and others in his position, it would be at the cost of the provision of other health services. In the starkest terms, the choice was between Mr. Soobramoney's death and the death or suffering of others. The medical authorities determined that Mr. Soobramoney, and others in his position, should die so that others might live. And this, said the court, was not a decision with which it would readily interfere. To quote from the judgment itself:

The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. 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.

. . . [T]he danger of making any order that the resources be used for a particular patient, [is that it] might have the effect of denying those resources to other patients to whom they might more advantageously be devoted.²⁹

26. *Soobramoney* 1998 (1) SA at 774-77.

27. *Id.* at 775.

28. *Id.* at 776.

29. *Id.* at 776.

In reaching its decision, the court relied on the English decision of *R v. Cambridge Health Authority*.³⁰ The court in this case emphasized the hard utilitarian choices facing medical authorities:

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 all 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 agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgement which the court can make.³¹

Scholars have not questioned the propriety of the utilitarian choice informing the state's and the court's approach. Most accept that Mr. Soobramoney's interest in prolonging his life had to be sacrificed in the interest of the general welfare.³²

B. GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA V GROOTBOOM

A few years later the Constitutional Court heard *Grootboom* and began to develop more clearly a general test for the adjudication of constitutional rights.³³ *Grootboom* involved a challenge to the state's

30. *R v. Cambridge Health Auth., ex p B*, [1995] 2 All E.R. 129 (A.C.).

31. *Id.* at 137.

32. For a detailed and critical analysis of the case see Craig Scott & Philip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 SAJHR 206 (2000). The authors accept the outcome of the case but are critical of the court's reasoning. They argue that the court's interpretation of section 27(3) and its failure to articulate a minimum core could lead to a situation in which "[t]he individual is quickly sacrificed to an amorphous general good." *Id.* at 252.

33. *Gov't of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46

housing program under section 26 of the Constitution, which guarantees that “[e]veryone has the right to have access to adequate housing.”³⁴ As with the section 27 right to health care, section 26 is subject to the qualification that “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.”³⁵

Once again, it is important to appreciate the factual backdrop to the case and the difficult reality facing *choice-makers*, those responsible for drawing up policies and programs to ensure the best utilization of limited resources. The case arose because of the “intolerable conditions” under which the applicants were living.³⁶ The applicants were squatting on private land from which the state had sought to evict them.³⁷ Prior to setting up home on the private land, Mrs. Grootboom and her fellow applicants lived in shacks on a recognized informal settlement called Wallacedene, near Cape Town.³⁸ Living conditions were so intolerable, “lamentable” said the court, that the applicants were driven to leave the settlement and unlawfully occupy private land.³⁹ In Wallacedene “all lived in shacks”:

They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs. Grootboom lived with her family and her sister’s family in a shack about 20 metres square.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. . . .⁴⁰

The general economic plight of residents in Wallacedene was considerable; “a quarter of the households in Wallacedene had no

(CC) at 60-64 (S.Afr.).

34. S. AFR. CONST. 1996, § 26(1).

35. *Id.* § 26(2).

36. *Grootboom* 2001 (1) SA at 53.

37. *Id.*

38. *Id.* at 55.

39. *Id.*

40. *Id.*

income at all, and more than two-thirds earned less than R500 per month.”⁴¹

This is the reality of life for many, if not the majority, of South Africans, and it *is* lamentable. In an attempt to escape this crushing poverty, Mrs. Grootboom and her family removed their shacks to a better area on private land, which had actually been designated for future low-cost housing.⁴² The owner of the land obtained an eviction order against them, but the family remained in occupation because they had nowhere else to go.⁴³ At the beginning of the “cold, windy and rainy Cape winter,” Mrs. Grootboom and the other litigants were “forcibly” and “inhumanely” evicted from the land they were occupying.⁴⁴ Their homes were bulldozed and their possessions destroyed in practices that had been typical of the apartheid governments.⁴⁵

Mrs. Grootboom and the other applicants approached the court for an order directing the state to provide them with “adequate basic temporary shelter or housing . . . pending their obtaining permanent accommodation.”⁴⁶ The court refused to grant such an order, interpreting section 26 in a way that did not entitle Mrs. Grootboom to obtain immediate relief. The court held that section 26 did not “entitle[] the respondents [who had won in the High Court] to claim shelter or housing immediately upon demand.”⁴⁷

Despite holding that the state had no obligation to provide immediate shelter to Mrs. Grootboom specifically, the court found the state’s housing program unconstitutional because it was

41. *Id.* at 77.

42. *Id.* at 55.

43. *Id.*

44. *Id.* at 56.

45. *Id.* The court presents a discussion of the connection between the apartheid governments’ influx control policy and the modern-day housing shortage in urban areas. *Id.* at 54. The policy, which aggressively sought to limit the African presence in urban areas, instigated a vicious cycle consisting of “untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor into the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals.” *Id.*

46. *Id.* at 57.

47. *Id.* at 86

unreasonable.⁴⁸ It was unreasonable, even though it was a coordinated and comprehensive attempt by all spheres of government to address the pressing housing needs in South Africa, because it addressed only the medium and long-term housing needs (and did so excellently well felt the court).⁴⁹ It made no provision for the short-term housing needs of those “whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril.”⁵⁰ Specifically, the court said that “[a] program that excludes a significant segment of society cannot be said to be reasonable.”⁵¹

The policy was unreasonable not only from the perspective of the class of persons excluded, but also for the effect that such exclusion could have on the national housing program as a whole. And it is this that distinguishes the utilitarian approach in *Grootboom* to that adopted in *Soobramoney*. In *Soobramoney*, sacrificing Mr. Soobramoney, and others in his position, to the interests of the majority did not have any potentially widespread adverse social repercussions.⁵² In fact, the overarching public interest required that he be sacrificed, as it were.⁵³ In *Grootboom*, the interest of the general public good required that some provision be made for those in the position of Mrs. Grootboom. Sacrificing the interests of those desperately in need of shelter, which the state felt was justified in view of its overall housing scheme, would likely not have led to the outcomes the state hoped for, namely the actual realization of medium and long term housing needs.⁵⁴ The reason such action would not have lead to the fulfillment of national housing needs is the spectre of continuing land invasions from the landless and the homeless.⁵⁵

48. *Id.* at 69.

49. *See id.* at 78-79.

50. *Id.* at 69.

51. *Id.*

52. *See Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 776 (S. Afr.).

53. *Id.*

54. *See Grootboom* 2001 (1) SA at 69.

55. *Id.* at 54.

At the outset of the judgment, the court identified the issues in the case in the following terms.

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.⁵⁶

Later, the court repeats this concern in the decisive paragraph of the judgment.

Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long-term objectives of the nationwide housing program. . . .

. . . It is essential that a reasonable part of the national housing budget be devoted to this [the provision of short term shelter], but the precise allocation is for national government to decide in the first instance.⁵⁷

The court further held that when the state makes its budgetary allocations, it must recognize that part of its obligation includes meeting the immediate needs of desperate people.⁵⁸ However, while its consequent program must ensure that a significant number of desperate people in need are afforded relief, the court held that it is

56. *See id.* at 53.

57. *Id.* at 78-79.

58. *See id.* at 79 (directing the national government to provide at least a minimum level of "budgetary support" for the nationwide housing program).

not a necessary part of the constitutional obligation on the state that every desperate person receive relief immediately.⁵⁹

Although the court, in the quotation above, may appear to be suggesting that it would be willing to scrutinize budgetary allocations, since it says that budgetary allocations are a matter for the national government in the first instance, implying that there is a second instance decision-maker, other portions of the judgment indicate that if there is a *second instance*, it is not the court. Instead, the unidentified second instance, if any, most plausibly refers to scrutiny by other levels of government, rather than by the court itself.

C. MINISTER OF HEALTH V TREATMENT ACTION CAMPAIGN

Treatment Action Campaign is the most contentious and jurisprudentially difficult of the three cases. The case involved a challenge, by a range of organizations, to the government's refusal to provide Nevirapine to HIV positive pregnant women at all state clinics and hospitals.⁶⁰ At that time the government expressed concern about the safety of Nevirapine,⁶¹ and so decided to only dispense Nevirapine at a number of designated test sites around the country while the efficacy of the drug and the potential side-effects and dangers attendant on its use were carefully monitored.⁶² Doctors at other public facilities were expressly prohibited from dispensing Nevirapine.⁶³ The government did not have a timeline in place for expected completion of testing and the national rollout to follow.⁶⁴

59. *Id.*

60. *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at 728 (S. Afr.). "Nevirapine is a fast-acting and potent antiretroviral drug" routinely used to treat HIV/AIDS that was approved in 2001 by the World Health Organization for use in the prevention of mother-to-child transmission HIV/AIDS at birth. *Id.* at 728 n.3. A mother taking Nevirapine to prevent mother-to-child transmission would ingest a single tablet "at the onset of labour and a few drops fed to the baby within seventy-two hours after birth." *Id.* at 729 n.5.

61. *See id.* at 743-44 (contending that the government feared the unpredictable hazards associated with the drug's potency and doubted that the public health system could distribute Nevirapine in the "comprehensive package" required for effective use).

62. *See id.* at 741.

63. *See id.*

64. *See id.* at 733. (recognizing that the program was initially scheduled to last for two years, but administrative delays and lack of concrete guidelines ensured

The court found that, on the whole, the government had developed a “formidable array of responses to the pandemic.”⁶⁵ Nevertheless, the court found that the government’s refusal to extend the provision of Nevirapine was unconstitutional.⁶⁶ Following its jurisprudence in *Grootboom*, the court only examined the reasonableness of the government’s program.⁶⁷ But, it is difficult to extract from the judgment the principled basis on which the court decided that the program was unreasonable. Essentially, it seems the court felt that it was unreasonable to not provide Nevirapine since it could be provided without straining the health budget and its efficacy and safety were not seriously open to doubt.⁶⁸

Based on the court order in *Grootboom*, one might have expected that the court would order the government to formulate and implement a comprehensive Nevirapine roll-out nationwide as soon as possible. However, the court went beyond this and ordered the government to remove all restrictions preventing doctors at public hospitals from dispensing Nevirapine. Moreover, the court instructed the government to provide Nevirapine for dispensing at public hospitals and clinics, and to provide testing and counseling at such facilities.⁶⁹

What is fundamental to the court’s decision, however, is the fact that the cost implications of its order were negligible. The government had admitted that the provision of Nevirapine was within its available resources, and the court found that the additional

that Nevirapine would remain unavailable outside of the test sites for an indefinite period of time).

65. *Id.* at 729.

66. *Id.* at 750. (reasoning that the limits on Nevirapine breached “the State’s obligations under section 27(2) read with section 27(1) (a) of the Constitution”).

67. *Compare id.* at 754 (reiterating that “this Court has the duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission are reasonable”) with *Gov’t of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) at 68 (S.Afr.) (stating that although the Legislative and Executive are responsible for establishing a public policy program, “[t]hey must, however, ensure that the measures they adopt are reasonable”).

68. The court discusses both the budgetary concerns, and the safety and efficacy of the drug. *Treatment Action Campaign* 2002 (5) SA at 740, 745.

69. *Id.* at 765. This degree of judicial instruction has been criticized by some who feel it is a clear case of the judiciary intruding on the executive domain. See, Kevin Hopkins, *Shattering the Divide – When Judges Go Too Far*, DE REBUS, March, 2002, available at <http://www.derebus.org.za>.

costs associated with providing testing, counseling, and breast-feeding were not at all significant.⁷⁰ Moreover, the court emphasized that HIV/AIDS is “the greatest threat to public health in our country,” while acknowledging that it is but “one of many illnesses that require attention.”⁷¹

The case was therefore one in which the interests of the individual HIV positive pregnant women and their children was commensurate with the general public welfare that they receive treatment. The overall economic and social costs in not preventing mother to child transmission are considerable.⁷² In this case, utilitarian and individual interests coincided. The court could, and was willing to as a result, order the immediate provision of Nevirapine to HIV positive pregnant women.

The confluence of individual interests, general welfare, and affordability considerations made this an easy case to decide in a legal sense despite the contentious nature of the debate in the public arena as a result of the political controversy surrounding the government’s policy regarding the link between HIV and AIDS and the public suspicion voiced by the President and the Minister of Health regarding the use of anti-retrovirals.⁷³

II. SCHOLARLY CRITICISM OF THE COURT’S SOCIO-ECONOMIC RIGHTS JURISPRUDENCE

Despite the fact that the court declared the government’s policies unconstitutional in both *Grootboom* and *Treatment Action Campaign*, the court’s jurisprudence has been much criticized.⁷⁴ For

70. Indeed, the court recognized that Nevirapine was a “simple, cheap, and potentially life-saving medical intervention.” *Treatment Action Campaign* 2002 (5) SA at 749 (S. Afr.).

71. *Id.* at 754.

72. See, e.g., NICOLI NATTRASS, THE MORAL ECONOMY OF AIDS IN SOUTH AFRICA 66-79 (2004) (demonstrating that it costs more to treat the opportunistic infections and sickness suffered by HIV positive children than it costs to prevent mother-to-child transmissions with regimens like Nevirapine).

73. The controversial position of President Thabo Mbeki and Minister of Health Manto Tshabalala-Msimang has been extensively commented upon in the press and in scholarly articles. See, e.g., Chapman, *supra* note 7, at 59-60.

74. See, e.g., David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 SALJ 484, 484 (2002) (arguing that the court in *Grootboom* failed to provide a sufficient right of access to housing by not

the most part, the criticisms leveled at the court have not been directed at the court's determination of whether the executive's conduct was constitutional or unconstitutional. Most scholars agree with the outcome in each case. Instead, criticism has been leveled at what is perceived as the court's undue and excessive deference to the legislature and executive.⁷⁵ This deference is thought to manifest itself in two forms. The first is the criteria used by the court to decide whether executive action is unconstitutional.⁷⁶ The second pertains to the form of relief granted by the court when a particular action is declared unconstitutional.⁷⁷

As far as the first criticism is concerned, which is one of substance and is the more difficult to address, critics complain that the court will adjudge a particular policy or program constitutional if it is rational, reasonable, and made in good faith.⁷⁸ Following *Grootboom*

recognizing a minimum core obligation); John Dugard, *Twenty Years of Human Rights Scholarship and Ten Years of Democracy*, 20 SAJHR 345, 348 (2004) (accusing the court of not going far enough to impose a minimum core requirement in *Soobramoney*, *Grootboom*, and *Treatment Action Campaign*); Hopkins, *supra* note 69, (criticizing the decision in *Treatment Action Campaign* for making policy judgments better suited for other branches of the government).

75. See, e.g., Bilchitz, *supra* note 8, at 23-24 (characterizing the court's "cautious" approach as overly deferential and advocating for the court's supervisory jurisdiction in cases dealing with the implementation of socio-economic rights); Murray Wesson, *Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court*, 20 SAJHR 284, 306-307 (2004) (arguing that the court should, but has yet to exercise supervisory jurisdiction to ensure the protection of socio-economic rights). Wesson describes supervisory jurisdiction as the "missing half of *Grootboom*." *Id.* at 307.

76. See Bilchitz, *supra* note 8, at 10 (viewing the court's reasonableness standard as "amorphous" and as "a stand in for whatever the court regards as desirable features of state policy"); Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 SAJHR 448, 449-50 (2004) (contending that the reasonableness standard gives the Court excessive "room to mould [sic] the concept" to suit its own needs).

77. See Bilchitz, *supra* note 8, at 23-26 (arguing that the court must exert supervisory jurisdiction over the government in cases dealing with the implementation of socio-economic rights); see also *infra* note 80, and accompanying text (questioning the court's good faith reliance on the government and their ability and willingness to implement judicial orders).

78. The court is hesitant to interfere with "rational decisions" made in "good faith" by authorities with responsibility over the matter in question. See *Soobramoney v Minister of Health, Kwazulu-Natal*, 1998 (1) SA 765 (CC) at 776 (S. Afr.). In *Grootboom*, the court would not interfere with the legislative and executive branches' authority over public housing programs, unless they adopted

and *Treatment Action Campaign*, it is clear that the essence of the judicial inquiry in most cases will be whether the particular policy or program is reasonable. The court has thus not been willing to declare, in respect to any of the cases brought before it, that the individual applicants have an immediate right to obtain the socio-economic good in question.⁷⁹ The second criticism leveled at the court is that it has not been willing to make orders that give it any kind of monitoring or supervisory role over the implementation of the order. In effect, the court trusts that the government will abide by the order and formulate a policy that is reasonable.⁸⁰

Human rights scholars feel that the reasonableness criterion is vague and unclear. They are, as a result, critical of the court's failure to take the opportunity presented to it to define, in concrete terms, the parameters of each right. Bilchitz for example argues that:

[T]here is a need for the Court to clarify the state's obligations imposed by socio-economic rights. This would entail that the state is not left with an amorphous standard with which to judge its own conduct, but would be able to assess its conduct against clear benchmarks. The current system of invoking the amorphous notion of reasonableness does not provide a clear and principled basis for the evaluation of the state's conduct by judges or other branches of government in future cases.⁸¹

unreasonable measures. 2001 (1) SA 46 (CC) at 68-9 (S.Afr.). Similarly, in *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at 740 (S. Afr.), the court explained that the Constitution envisions a "restrained and focused" court that evaluates only the reasonableness of government action.

79. However, in *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (CC) at 458-59 (S.Afr.), the Cape High Court held that the state must provide anti-retroviral medication to certain HIV positive prisoners under Section 35(2)(e) of the Constitution which guarantees to prisoners the provision of "adequate medical treatment."

80. The court has declared executive action unconstitutional for being unreasonable, and has ordered the executive to amend its policies to the extent that they are unreasonable. It has not, however, insisted that the executive report back to the court with its amended program, nor has it insisted that the actual litigants be amongst the immediate beneficiaries of the improved program. See *Treatment Action Campaign* 2002 (5) SA at 763.

81. Bilchitz, *supra* note 8, at 10.

In the two “successful”—from the perspective of the litigants—socio-economic rights cases, *Grootboom* and *Treatment Action Campaign*, *amici curiae* intervened and attempted to persuade the court that there is a minimum core to each socio-economic right, which the government is obliged to realize immediately.⁸² In both cases, the court seemed to accept the validity of the concept of a minimum core, but felt that it lacked the information and expertise necessary to define and articulate the parameters of that minimum core.⁸³ In *Treatment Action Campaign*, the court further suggests that defining a minimum core would, in any event, be contrary to its constitutional mandate because this type of decision-making goes beyond what the court regards as “judicial” decision-making. In the court’s view, “judicial” decision-making only involves ensuring that the legislature and executive have *taken action* through the adoption and implementation of “reasonable” policies and programs.⁸⁴ The court therefore emphasizes its review role as a body that is entitled only to judge the reasonableness of the conduct of the executive and legislative branches of government, rather than its potential role as a decision maker of first or last resort.⁸⁵ In fact, the court states that it

82. See *Grootboom* 2001 (1) SA at 63-64 (urging the court to proactively protect minimum core rights as called for by the International Covenant on Economic, Social and Cultural Rights). The court, however, focuses on the key differences distinguishing the Covenant from the South African Constitution. *Id.* at 64. See also *Treatment Action Campaign* 2002 (5) SA at 737-38 (voicing the argument that section 27(1) of the Constitution establishes a minimum core right vested in each individual). See generally Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA 1, 33-1, 33-23 to -26 (contrasting the relative conception of the minimum core argued for by the *amici* in *Grootboom* with the absolute conception of the minimum core argued for by the *amici* in *Treatment Action Campaign*).

83. *Grootboom* identifies variables such as “income, unemployment, availability of land, and poverty” as barriers to determining the “minimum threshold for the progressive realization of the right” to adequate housing. 2001 (1) SA at 65. In *Treatment Action Campaign*, the court acknowledges that the “minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human decency.” 2002 (5) SA at 738.

84. See *Treatment Action Campaign* 2002 (5) SA at 740 (maintaining that “[t]he Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation”).

85. *Id.*

is ill-suited to make decisions that “could have multiple social and economic consequences for the community.”⁸⁶

Most human rights scholars are minimum core campaigners.⁸⁷ Accordingly, they are highly critical of the court’s unwillingness to venture down the minimum core path.⁸⁸ They find the various objections raised by the court unpersuasive.⁸⁹ I do not propose to

86. *Id.* Some scholars support the court’s assertion, arguing that judicial decision-making in cases involving social and economic questions produces complicated and unforeseeable social repercussions. See, e.g., Marius Pieterse, *Coming to Terms With Judicial Enforcement of Socio-Economic Rights*, 20 SAJHR 383, 392 (2004). However, numerous academics feel this concern is overstated. Murray Wesson, for example, intimates that the judiciary might extract an acceptable working definition of the minimum core from principles laid out by the International Committee on Economic, Social and Cultural Rights. See Wesson, *supra* note 75, at 301-02.

87. See Bilchitz, *supra* note 74, at 484 (disapproving of the court’s deliberate avoidance of the minimum core issue in *Grootboom*); Sandra Liebenberg, *South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L., DEMOCRACY & DEV. 159, 174 (2002) (dismissing the court’s justifications for rejecting the minimum core approach as “unconvincing”); Scott & Alston, *supra* note 32, at 264 (arguing that the outcome in *Grootboom* would have been more satisfactory if the court employed a minimum core jurisprudence); Geraldine van Bueren, *Alleviating Poverty through the Constitutional Court*, 15 SAJHR 52, 57(1999) (declaring that “[i]t is the minimum core approach which provides economic and social rights with a determinacy and certainty”); Iles, *supra* note 76, at 458 (criticizing the court’s “confused” approach to the limitations clause as an inherent by-product of its rejection of the minimum core approach to socio-economic rights).

88. See Bilchitz, *supra* note 74, at 500-01 (criticizing the court’s ruling because the standard of “reasonable measures” is indefinite in comparison to the minimum core standard, the ruling lacked a time limit requiring short-term necessities to be met by the Government, and the court failed to undertake a larger role in the supervision of socio-economic rights enforcement); Bilchitz, *supra* note 8, at 5-6, 11-12 (decrying the court for failing to address the content of the right to access health care, and for preferring a reasonable standard over the minimum core approach); Dugard, *supra* note 74, at 348 (agreeing that the court should interpret sections 26 and 27 of the Constitution to guarantee individuals minimum core requirements); Iles, *supra* note 76, at 449-50 (criticizing the reasonable measures standard because the court can “mould” it in such a way as to “avoid engaging in socio-economic policy”); Liebenberg, *supra* note 87, at 174-77 (calling the court’s justifications for not using minimum core obligations “unconvincing” because, contrary to what the court said in *Grootboom*, the court would not have to specifically define what the minimum core obligations would entail); Pieterse, *supra* note 86, at 407, 410-11 (finding the reasonableness standard to be “abstract” and “unable to balance the needs for vigilance and deference”).

89. Even scholars who feel that the court is right to be “suspicious” of the minimum core concept are critical of the reasons the court has given for its

examine the court's reservations and commentators responses in this article, for they are thoroughly canvassed elsewhere. Distilled, the essence of critics' concerns is that the court has failed to grasp a golden opportunity to "fast-track" constitutional transformation by using the minimum core to set clear benchmarks for the legislature and executive, benchmarks that prioritize the welfare of the poorest in South Africa. Liebenberg, arguably South Africa's foremost human rights scholar, argues that:

The Court does not escape the interpretative difficulties of clarifying the state's obligations in relation to socio-economic rights by rejecting the minimum core obligation. The review standard of "reasonable measures" endorsed by the Court does not lend itself to easy definition or application. The needs and opportunities for enjoying rights are surely also relevant to an assessment of the reasonableness of the measures adopted by the state. The component of the reasonableness test requiring government programmes to provide relief for those in desperate need and living in intolerable conditions is vague and leaves many questions unanswered. In the South African context of extreme and widespread poverty, how does one define the groups that government programmes must specifically cater for, and what precise forms of relief must be provided? The obvious response is that greater normative clarity will be developed through a process of application of the *Grootboom* principles to the facts of particular cases. A similar response can be made to concerns about the indeterminacy of minimum core obligations. As I have argued, the underlying purpose of recognising minimum core obligations can guide the evaluation of whether, in concrete cases, a particular service or resource must be provided by the state to the applicants.⁹⁰

rejection of the concept, and appear to find some merit in the concept itself, albeit not as a tool for socio-economic rights adjudication in the South African context. See Wesson, *supra* note 75, at 300-05 (preferring the court's reasonable measures approach, but criticizing the court for speculating that defining a minimum core would be "impossible").

90. Liebenberg, *supra* note 87, at 175. Similarly, Bilchitz says that:

Imposing a minimum core obligation would have had the benefit that the state would have been provided with a more definite standard against which to judge its behaviour. Thus, instead of merely being implored to be 'reasonable,' the state would have been required to ensure that people have

In the opinion of its proponents, if the court articulated a minimum core of socio-economic rights, all branches of government would engage in a more active dialogue or trialogue with each other.⁹¹ The vision is that of a government with all its branches engaged in a co-operative attempt, a grand joint venture, to alleviate poverty and ameliorate the suffering caused by poverty.

III. CRITIQUING THE CRITICS AND THE MINIMUM CORE

There are significant conceptual flaws with the minimum core concept. I believe that the court's unwillingness to adopt the minimum core approach stems from an intellectual discomfort that it has not yet fully been able to articulate, not for lack of candor, but for want of opportunity to reflect fully on the contradictions inherent in the concept, and from its reluctance to expose the starkly utilitarian choices that inform the allocation of resources among the beneficiaries of socio-economic rights.⁹²

The conceptual problems are particularly apparent in relation to the right to health care. The minimum core approach would require that the court distinguish between minimum, or essential, levels of health care versus non-essential forms of health care. I will call this the "outer" core in contrast to the minimum core. The idea has its genesis in *General Comment 3* of the Committee on Economic, Social and Cultural Rights,⁹³ where the Committee states that:

'effective protection from the elements and basic services, such as toilets and running water.'

Bilchitz, *supra* note 74, at 500.

91. See Dennis Davis, Address at the University of Cape Town: Socio-Economic Rights in South Africa: The Record After Ten Years, 62-63 (2004).

92. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 161-64, 187 (1998), who feels that the Constitutional Court fails to candidly acknowledge the political character of constitutional decision-making. A recognition of the political nature of constitutional decision-making will, argues Klare, lead both to a more transparent and more transformative bench. *Id.*

93. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties Obligations*, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990) [hereinafter *General Comment 3*]; see also ECOSOC, Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) [hereinafter *General Comment 14*].

On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. . . . By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. . . . In 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.

....

Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.⁹⁴

Both the Committee and scholars are not always clear as to whether their conception of the right is an absolute or a relative one.⁹⁵ In other words, is the content of the minimum core itself determined by the state's resources, such that the minimum core differs between countries depending on their respective wealth? Or, is the minimum core an absolute, in the sense that it is identical for all states?⁹⁶

94. *General Comment 3*, *supra* note 93, ¶¶ 10, 12.

95. On this distinction, see Scott & Alston, *supra* note 32, at 250, explaining that a wealthy country's relative minimum core will "go considerably beyond the absolute core minimum," while a developing country's relative minimum core may extend no further than the core universal minimum itself.

96. Both *General Comment 3* and *General Comment 14* suggest that there is a singular, universal minimum core. *General Comment 3* and *General Comment 14* differ somewhat however in that *General Comment 3* recognizes explicitly that a state may be unable to meet even its minimum core obligations as a result of

If there is such a thing as the minimum core, it is meaningful for minimum core “activists” only if it is an absolute core and not relative to the state’s resources. If it is relative then it is redundant because the court’s reasonableness test, under which the content of the right itself is determined by the available resources, already performs the same function.⁹⁷ All it can mean then is that a state must use all the resources it has available *for* health care, *on* health care. In other words, what the state *can* provide, it *must* provide. This is no different than asking whether a policy or program is reasonable *having regard to the resources that are available*. The minimum core would then necessarily be a shifting target, its boundaries determined by what the particular state could afford to provide. The minimum core in an impoverished least developed country would not be the same as the minimum core in a wealthy country.⁹⁸ This would mean that there is not a singular minimum core, but rather a continuum. Accordingly, every single component of health care would need to be ranked along this continuum, with the state obliged to commence its fulfillment of the obligation at the bottom of the continuum.⁹⁹ Following the logic of this approach, if a sufficiently

resource constraints, whereas *General Comment 14* suggests that there are non-derogable components within the minimum core that must be met, irrespective of resource constraints. See *General Comment 3*, *supra* note 93, ¶ 10; *General Comment 14*, *supra* note 93, ¶¶ 43, 47.

97. See *Gov’t of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) at 70 (S.Afr.) (recognizing that “both the content of the obligation . . . as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources”); see also Bilchitz, *supra* note 8, at 19 (stressing that the court effectively defines the state’s obligation by first determining the availability of the state’s resources).

98. For example, France’s government spent \$1786 per capita on health care in 2002 and had an under-five mortality rate of five per thousand in 2003. This is in stark contrast to a country such as Ghana, whose government was only able to spend \$7 per capita on health care in 2002 and had an under-five mortality rate of ninety-five per thousand in 2003. Therefore, Ghana’s minimum core obligation in regard to children’s health care would be considerably less than France’s obligations since it has less available resources. See The World Health Organization, *The World Health Report 2005: Make Every Mother and Child Count*, 176, 201 (2005) available at <http://www.who.int/whr/2005/en/>.

99. See Scott & Alston, *supra* note 32, at 250, who suggest that there is a universal absolute minimum core that all states must fulfil, but that the minimum obligation increases commensurate with a state’s resources. This attempts to reconcile both the absolute and relative conceptions of the minimum core so as to make sense of the present ambiguity in the General Comments and other scholars’

wealthy state existed that could afford to meet its citizens every medically-prescribed health care need, the minimum and the maximum would be one and the same. The reverse, for an impoverished state, would of course be equally true.

On the other hand, what is the minimum core if it is absolute so that there is an inherent and inflexible universal set of entitlements within health care that represent the minimum each individual *needs* to lead a dignified life, determined apart from the state's available resources?¹⁰⁰ No one has been able to provide a satisfactory answer to this question.

What is clear is that the minimum core requires a ranking of interests. Urgent interests need to be prioritized. As Bilchitz says, "[t]he idea of a minimum core obligation suggests that there are degrees of fulfilment of a right and that a certain minimum level of fulfilment takes priority over a more extensive realisation of the right."¹⁰¹ Liebenberg adds, "the underlying purpose of recognising minimum core obligations can guide the evaluation of whether, in concrete cases, *a particular service or resource* must be provided by the state to the applicants."¹⁰²

But on what basis are interests to be ranked? How should "urgent" interests be distinguished from less-urgent interests? After all, problems relating to the fulfillment of socio-economic rights ordinarily arise when there is greater need than resources. There is a distinct lack of specificity, in both academics' and the Committee's comments, on how competing interests should be ranked. The Committee's guidance is so general that while it may be helpful for national policy makers designing national health care programs,¹⁰³ it

interpretations thereof.

100. The danger in the "absolute" approach, for individuals in comparatively wealthy countries, is that a state will be seen to have fulfilled its main responsibility by providing the minimum core, and the "outer" core will come to be seen as luxury entitlements, as a result of which realization of the "outer" core will be subject to lower standard of scrutiny. See Danie Brand, *The Minimum Core Content of the Right to Food in Context: A Response to Rolf Künneemann*, in EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES, *supra* note 7, at 99, 106-08.

101. Bilchitz, *supra* note 8, at 13.

102. Liebenberg, *supra* note 87, at 175 (emphasis added).

103. Similarly, Dworkin's "prudent-insurer" model may be equally helpful for national policymakers designing a universal health care system because it is based

is singularly unhelpful for courts and decision-makers faced with the type of hard choices that come before the courts. The obligations outlined in *General Comment 14* provide benchmarks against which the overarching reasonableness of a national health strategy may be evaluated. However, these obligations do not identify the exact parameters of the minimum core advocated for by the committee and human rights scholars.¹⁰⁴ In the context of the right to the highest attainable standard of health, the Committee identifies core obligations that it says are non-derogable, for which non-compliance cannot be justified under any circumstances.¹⁰⁵ These core obligations are:

- (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) to ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
- (d) to provide essential drugs, as from time to time defined by the WHO Action Programme on Essential Drugs;
- (e) to ensure equitable distribution of all health facilities, goods and services;
- (f) to adopt and implement a national public health strategy and plan of action [which meets certain specified criteria].¹⁰⁶

on a set of assumptions about the utilitarian choices that individuals would make for themselves when allocating their own resources. It is, however, an inappropriate model for the judiciary to use. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000).

104. See *General Comment 14*, *supra* note 93, ¶¶ 43-45.

105. *Id.* ¶ 47.

106. *Id.* ¶ 43.

Apart from identifying the provision of essential medicines as one component of the right, the remaining core components are simply restatements and elaborations of other rights contained in the International Covenant on Economic, Social and Cultural Rights.¹⁰⁷ What the core obligations do not do is assist decision-makers, in concrete cases, determine whether a particular claimant's need for health care *must, as a matter of right*, be prioritized over another claimant's health care needs.

Similarly, domestic human rights scholars provide the court with little in the way of concrete guidance, and suggest that utilizing and developing the minimum core concept does not require that they do so. These scholars feel that the court need only lay down general principles that will guide policy makers in the allocative choices they make.

[A]n acceptance of the concept of minimum core obligations does not require the Court to define in abstract the [precise] basket of goods and services that must be provided. Instead, it could define the general principles underlying the concept of minimum core obligations in relation to socio-economic rights and apply these [contextually] on a case-by-case basis.¹⁰⁸

In *Treatment Action Campaign*, the *amici* argued that the minimum core represented the “minimum decencies of life consistent with human dignity” because “[n]o one should be condemned to a life below the basic level of dignified human existence.”¹⁰⁹ Bilchitz argues that the minimum core of a right represents those aspects necessary to protect the “survival interests” of the poor. Specifically, he says that:

In the context of socio-economic rights, there are indeed interests that can be classified as of great urgency and that must be realised as a matter of priority in order to ensure survival. If anything deserves to be designated a core aspect

107. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, at 49, 50-51 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) arts. 11-12.

108. Liebenberg, *supra* note 82, at 33-31.

109. *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at 738 (S. Afr.).

of a right, then survival interests are the most likely candidates for such a role.

....

The minimum core approach does require us to take a rigid stance in one respect: it requires us to recognise that it is simply unacceptable for any human being to have to live without sufficient resources to maintain their survival.¹¹⁰

The lack of specificity from those who urge the adoption of the minimum core, and who themselves argue that it requires a ranking of interests, is unsurprising. For no principled basis exists on which the court can rank the interests of claimants when their interests are incommensurable.

How are the principles developed by the Human Rights Committee and by human rights scholars any less vague than the reasonableness criterion? Do the principles articulated by scholars help decision-makers, or the courts, choose between renal dialysis for a terminally-ill patient with poor prospects for survival and a patient with slightly better, but not guaranteed, prospects for survival? Do the principles help in ranking the interests a cancer patient has in receiving chemotherapy treatment with the interests an individual has in receiving anti-retroviral treatment, or in ranking the interests a tuberculosis sufferer has in receiving medication from the interest a cholera sufferer has in receiving treatment? From the perspective of the individual sufferer, their subjective interests in receiving treatment are equal. If they do not receive the required treatment, they are likely to die sooner than they would if they receive treatment. Take a completely different example, in which the "apparent" interests are not equal: For instance, an HIV positive patient's interest in receiving anti-retroviral medicine versus a chronic migraine sufferer's interest in receiving migraine treatment because their quality of life is seriously and adversely impaired. The HIV positive patient's life may be extended significantly if she receives anti-retroviral medicine. The migraine sufferer's quality of life will be improved significantly if she receives migraine

110. Bilchitz, *supra* note 8, at 14-15.

medication. Under Bilchitz's formulation, and perhaps most individual's immediate compassionate response, the HIV positive patient's claim must be prioritized. But if that choice would condemn the migraine sufferer to a life of suffering, where her dignity and quality of life was seriously eroded, can one still so readily argue that the one claim *inherently* trumps the other? Must life always prevail over quality of life? Bilchitz's formulation would, surely, lead to a situation in the health care context where the government must prioritize "terminal illnesses" above other interests, an approach the court expressly and appropriately rejected in *Soobramoney*.¹¹¹

These examples expose the impossibility of trying to locate, within the right itself, what are, from the perspective of individual sufferers, equally compelling interests. And in the human rights arena, the perspective that matters is the individual's, not the collective's. The essence of human rights is that the individual interest trumps those of the collective. Limitations on an individual's rights need to be separately and specifically justified under the limitation's clause.¹¹² And it is here that the proponents of the minimum core idea go wrong because they try to locate these choices within the right itself, when they cannot be so located. The real problem in adjudicating socio-economic rights is the conceptual or ideological tension between rights on the one hand, and rights limited (or negated) by resource constraints on the other. Now, it is of course trite to say that the real problem in South Africa, as in most parts of the world, is one of limited resources. Resource constraints are real, practical, and unavoidable problems that require all those with small purses and larger needs to make difficult choices regarding how to best spend the money they have. It is no answer to say that South Africa is in fact resource-rich, and that the problem lies with how resources are

111. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at 771-72 (S. Afr.) (reasoning that "prioritising the treatment of terminal illness over other forms of medical care . . . 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").

112. S. AFR. CONST. 1996, § 36 (listing "the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose" as factors to be weighed when determining the reasonableness of a limitation of rights).

distributed rather than the size of the resource-pot. The same issues arise in comparatively wealthy countries, the difference being one of scale.

The problem, however, goes beyond the practical reality to the unacknowledged and, I would say, irresolvable problem that in any resource constrained society there is a conflict between the constitutional commitment to individual human rights and the utilitarian philosophy that necessity informs the government's choice as to how to maximize the welfare of the greatest number. Quite simply, it means that even though all individuals are supposed to be equal holders of the same right, and that notwithstanding the fact that each of us has an *equal interest* in having that right realized, the *right* of one individual to receive the promised good will be sacrificed if the welfare of the majority requires it. Each individual has a right of access to health care, and yet the unfortunate reality is that one individual's right to the exact same socio-economic good, health care, may be deliberately sacrificed so that others can receive the benefits of the right instead.¹¹³ The idea that one individual's rights may be sacrificed for another's is inimical to the very purpose a rights-based system is intended to serve. Clearly, it is not possible to argue that there are gradations of interest within the right to health care such that one can say that the right to health care itself *means* that Ms. X is entitled to dialysis treatment but that Mr. Soobramoney is not. If both are in need of dialysis treatment, if dialysis treatment would alleviate both their suffering and prolong their lives, it cannot be said that Ms. X has a right to dialysis treatment and Mr. Soobramoney does not. Their subjective interest in receiving treatment is identical. The considerations that inform the decision as to which one of them will have their right realized is external to their subjective interest. It is entirely utilitarian. Mr. Soobramoney was told that he was to die so that others might live.

113. See *Soobramoney* 1998 (1) SA at 775-77 (stating that the limited number of dialysis machines can better serve the public when used to actually cure people that may be less sick, instead of being used for maintaining the life of those with advanced chronic illnesses that will never be fully cured); *Treatment Action Campaign* 2002 (5) SA at 740 (citing with approval *Soobramoney's* conclusion that limited resources may require decision makers to focus on the benefits to society in general, instead of on the needs of certain individuals).

Bilchitz fails to recognize this because he believes that a minimum core will protect the individual against the collective interest.¹¹⁴ In criticizing Justice Yacoob's statement in *Grootboom* that the state's housing program might have been acceptable, despite its failure to cater for those in need of emergency shelter, if it would have provided affordable housing for most people within a reasonably short time, Bilchitz writes:

Even if housing could be achieved for most people in a reasonable time, it would never be acceptable for some to have to suffer the dire effects of not being protected from the elements or not having their other basic needs met. This is one of the prime reasons for the protection of socio-economic entitlements in the form of rights. Collective goals cannot outweigh protections for the most basic interests of individuals.¹¹⁵

Yet the minimum core does not protect the individual against the collective; it justifies the sacrifice of certain individuals on grounds that are apparently principled, but which are in reality merely utilitarian. In relation to housing, it may be possible to say that those without shelter have greater need than those with imperfect shelter. In relation to the right to food, it may be possible to say that those without food have greater need than those with weeviled food. In relation to the right to education, it may be possible to say that those without primary education have greater need than those seeking tertiary education. But what if the education needed is expensive special schooling for a disabled child? What if the choice is between one imperfectly housed person and another? Between a family of three in a two-bed roomed house that lacks running water and sanitation, and a family of ten squeezed into a two-bedroom house with running water and sanitation? Between a family living in a cold and leaking shack, as millions of South Africans do, and a family living on the street? What if the choice is between those who are malnourished and those who are under-nourished? How does one find the answer to these questions within the right itself?¹¹⁶

114. See Bilchitz, *supra* note 74, at 499.

115. See *id.* (citing Justice Yacoob's decision from *Gov't of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) at 78-79 (S.Afr.).

116. The impossibility of defining the minimum core in abstract terms is well-

The point about socio-economic rights, after all, is that it is the bundle of socio-economic goods, collectively, that constitute the minimum necessary for an adequate standard of living. An adequate standard of living requires adequate housing, adequate clothing, adequate food, an adequate standard of education, and so forth. The minimum required is that which is adequate. Less than adequate is inadequate. The right, and the minimum core, are the same.

This is not to say that interests within a right cannot be prioritized. Merely that the prioritization of certain interests over others is informed by pragmatic, utilitarian considerations. The decision to prioritize primary health care over tertiary health care, or the provision of medicines deemed essential by the World Health Organisation, are examples of precisely that kind of prioritization. The decision to prioritize certain interests is eminently rational and reasonable. An executive cannot be faulted for doing so, provided its choices are rational and reasonable. The judiciary's power to scrutinize those choices must be limited to ensuring that the policy is rational and reasonable. The judiciary cannot set aside a policy that is rational and reasonable on the basis that the *right itself* requires a different ranking of interests. The right is the bundle of all those interests; therefore, there is no basis for the claim that the appropriate ranking is located within the right itself.

The unavoidable utilitarianism that would inform the ranking of socio-economic interests is quite different than the balancing of interests that informs the limitation of a civil and political right permitted under section 36 of the Constitution,¹¹⁷ which says that rights may be limited when this is necessary in the interests of a just and democratic society. One person's right to freedom of expression may be limited where the expression takes the form of hate speech, which will be detrimental to the attainment of a just and equitable society founded on respect for and tolerance of others of a different caste, creed, color etc. The person's right to freedom of speech is not negated, even if that right does not include the right to engage in hate

illustrated by Brand's statement that defining minimum core rights, such as the right to food, in an abstract manner is difficult because "[w]hat actually matters . . . are the specific entitlements and specific duties of conduct implied by the minimum standard of freedom from hunger in real-time, specific situations"). Brand, *supra* note 100, at 102-06.

117. See *supra* note 112 and accompanying text.

speech. The individual's freedom of expression to engage in non-hate speech is unaffected. And, importantly, the limitation can be justified as being in the individual's interest as well as in the collective's interest, for the individual has as great an interest in the maintenance of a just and equitable democracy as the collective does. When an individual's right to health care is held to not include the right to receive renal dialysis, chemotherapy, or whatever form of medical treatment that individual needs, it is disingenuous to argue that the "balance" of her right remains unimpaired. If an individual needs specific treatment, which she will not receive, it cannot be said that the right has only been limited, and that the 'balance' somehow survives. For an individual with an unrealized specific need, the right has been negated. She has not received the health care she needs. She has no right to health care that she does not need. Also, one cannot argue that the individual's overarching interest is served in that the utilitarian allocation is necessary for the maintenance of a just and equitable democracy. For the individual may not be alive to enjoy that democracy.¹¹⁸ The allocation is only justified when it serves the collective's interest, not the individual's interest. The ranking is based on considerations external to the individual sufferer, most notably the cost involved in providing the required treatment, and the costs to the economy as a whole if the problem is not addressed. Since these considerations simply cannot be located within the right itself, it cannot be the court's business to decide those choices. The court's role is to enforce individual human rights, not to identify which individuals' interests should be sacrificed to the collective's.

IV. TOWARDS A MORE ROBUST APPROACH

The true difficulty, in relation to socio-economic rights, is not that the scope and content of the particular right needs still to be determined through judicial interpretation. The true difficulty is that the state's failure to provide the promised goods is excused if the state does not have the resources available to do so. The silent premise in socio-economic rights litigation is that the executive is in

118. As John Maynard Keynes famously observed when criticizing economists who believed that in the long-run market failures self-correct without government intervention: "But this *long run* is a misleading guide to current affairs. *In the long run* we are all dead." JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 88 (1924).

breach of its constitutional obligation to individual litigants because there *are* additional resources available for the provision of social goods. Litigants would not approach the court to instruct the executive to increase taxation so as to increase the size of the public purse. Just as the court will not directly order the executive to change its macroeconomic policies, so too the court cannot be expected to make orders that may have the effect of obliging the executive to do so. Therefore, the additional resources must come from within the existing resource pool. To be effective, litigation must identify that source. And yet, to date, human rights scholars and activists seem to accept both that the court's remit is limited to testing the constitutionality of specific policies and programs on their own merits, and that its remit does not include scrutinizing how the public purse is spent. It certainly follows that a court cannot, in the ordinary course of things, determine the reasonableness of program or policy-specific budgetary allocations. In other words, it cannot determine whether the allocation of a particular sum of money for the implementation of a particular program is reasonable, for that would potentially require that it examine each and every budgetary allocation that has been made to each and every program.¹¹⁹ The court would be required to examine every budgetary allocation because it could only conclude that the sums committed to one program were inadequate if it first satisfies itself that the sums committed to another program were profligate. It could, for example, only conclude that the sum committed to the provision of radiotherapy was unreasonable if it concluded that the sums committed to the provision of ante-natal care or another program were excessive. Similarly, the court could only conclude that the national housing expenditure was inadequate and thus unreasonable if it first decided that a national expenditure in another area was unreasonable for being profligate. At the level of specific programs, evaluating the reasonableness of budgetary allocations would thus be an impossible task. It is less clear to me that it would be impossible at the macro level, at the level of scrutinizing macro-budgetary allocations, provided the court is not comparing one socio-economic expenditure with another.¹²⁰

119. See Liebenberg, *supra* note 82, at 33-30 to -31.

120. See Darrel Moellendorf, *Reasoning about Resources: Soobramoney and the Future of Socio-Economic Rights Claims*, 14 SAHJR 327, 330-33 (1998).

Assuming all government departments act in good faith when making their allocative decisions, as they undoubtedly do,¹²¹ it would be impossible for the court to decide that too little money is being spent on the provision of housing and too much on the provision of education. Since there is no ranking of socio-economic rights and because all the rights *collectively* constitute the minimum necessary for a reasonable quality of life, any diversion of funds from one right to another would necessarily be arbitrary, irrational, and unreasonable.¹²² There are, however, many claims on the public purse besides those that directly implicate the fulfillment of a right. And there seems to me no reason, in principle, why the court could not scrutinize the reasonableness of those budgetary allocations. The state, after all, has a constitutional duty to meet the socio-economic needs of its peoples. It recognizes that socio-economic rights, together with civil and political rights, are cornerstones of democracy. There is no suggestion in the Constitution that the maintenance of democracy requires that R587 million be spent on the acquisition of an airplane for presidential use,¹²³ or that R50 billion be spent on the acquisition of arms.¹²⁴ As long as the socio-economic needs of individuals remain unfulfilled, expenditures such as these require explanation. In determining whether a particular expenditure that does not involve the fulfillment of a right is reasonable, account must be taken of the fact that it is a non-rights expenditure.

121. See Geoff Budlender, *Socio-Economic Rights in the New Millennium: The Challenges of Implementation in SA*, ECON. & SOC. REV., Mar. 1999, http://www.communitylawcentre.org.za/ser/esr1999/1999march_budlender.php (depicting health, housing, and land officials as honest and desiring to use their positions to help the public receive land, housing, and health care).

122. Unless, of course, a very anomalous situation had arisen in which resource allocation was far in excess of present needs, where, for example, very few individuals required housing but many required education, in spite of which funding for both remained equal.

123. See, e.g., Jonathon Katzenellenbogen, *Mbeki's Jet Flies Into Storm of Criticism*, BUSINESS DAY (S. Afr.), Oct. 23, 2002, at 11, available at <http://www.businessday.co.za/Articles/TarkArticle.aspx?ID=633201>; John Scott, *Mbeki's Jet is Just a Cut Below the Best*, INDEPENDENT ONLINE (S. Afr.), Oct. 25, 2002, http://www.int.iol.co.za/index.php?set_id=1&click_id=1&art_id=qw1035520740115S300.

124. Nathan Geffen, *The Arms Deal and HIV/AIDS*, AFR. GENDER INST. NEWSL., Dec. 2001, 7, at 8, available at <http://web.uct.ac.za/org/agi/pubs/newsletters/vol9/arms.htm>.

Therefore, account must be taken of the purpose of the expenditure, and to what extent the expenditure is necessary in order for the executive to fulfill its constitutionally-entrusted duties to the peoples of South Africa. The court would have little difficulty in finding that a father's purchase of the latest BMW is unreasonable if it means that his children are reduced to a diet of bread, water, and gruel; unless the BMW is necessary to provide even that marginal level of sustenance for the children. Yet, when the "father" is the executive, the court will not enquire into the reasonableness of these expenditures for political and pragmatic reasons. Accepting the proposition that the executive must answer for such expenditures does not imply that the determination will always go against the executive. The expenditure may nevertheless be found to be reasonable, notwithstanding the urgency of individuals' socio-economic needs. Most human rights scholars appear to accept the court's self-imposed restraint,¹²⁵ for it is not this aspect of the court's jurisprudence that they criticize. It is this, however, that they should criticize.

CONCLUSION

The true discontent that informs constitutional adjudication about socio-economic rights is with the government's macro-economic policy choices and with the government's broad budgetary allocations. It is with the choice of neo-liberal macro-economic policies that prioritize growth rather than redistribution, and with the government's decision to spend twice as much on defense than on either the provision of education and health.¹²⁶ The former are not

125. With the notable exception of the challenge to South Africa's estimated \$280 billion arms deal by the South African branch of Economists Allied For Arms Reduction. See Ben MacLennan, *Arms Deal Ruling to be Challenged*, MAIL & GUARDIAN ONLINE (S. Afr.), Mar. 4, 2004, http://www.mg.co.za/articledirect.aspx?articleid=43950&area=%2fbreaking_news%2fbreaking_news__national%2f; Donwald Pressly, *Manuel Hails Failure of Arms Application*, MAIL & GUARDIAN ONLINE (S. Afr.), Mar. 4, 2004, http://www.mg.co.za/articledirect.aspx?articleid=43920&area=%2fbreaking_news%2fbreaking_news__national%2f.

126. The projected expenditure for defense for the 2004/05 budget year was R22.5 billion, while for education and health it was respectively R11.1 billion and R9.9 billion. The housing budget was R5.3 billion. See NATIONAL TREASURY,

open to constitutional challenge, but why should the latter not be? On the face of it these are choices that should outrage. Critiquing the court for its refusal to adopt jurisprudentially dubious reasoning is misdirected. The minimum core concept is inherently flawed and its adoption could lead to outcomes that exacerbate rather than alleviate poverty as spending is shifted from one type of social spending to another, from less-urgent social needs to more-urgent social needs, rather than from an inessential to an essential expenditure. A minimum core strategy may help some poor, but it may well be at the expense of other poor. Zero-sum litigation will not benefit the poor. If it is disproportionate defense spending that is hurting the homeless, jobless, and those without adequate water, sanitation, and education, then it is that disproportionate spending that should be challenged, and the court's refusal to entertain such challenges that should be criticized.