

## **The Judicial Enforcement of Socio-Economic Rights**

### **The Grootboom Case**

By Albie Sachs<sup>1</sup>

Mrs Grootboom<sup>2</sup> decided she had had enough. She and her two children and her sister with three children, lived in a shack in an area not far from Cape Town. The winter rains were approaching and she decided she could not bear another season in a water-logged area. Altogether, about 5000 people lived in similar circumstances in the settlement, without clean water, sewage and refuse removal services and with virtually no electricity. Many had applied to the municipality for subsidised low-cost housing and had been on waiting lists for as long as seven years, with no relief in sight. Faced with the prospect of remaining indefinitely in intolerable conditions, Mrs Grootboom and nearly a thousand adults and children moved to a nearby vacant hillside. The land had, in fact, been set aside for low-cost housing. Negotiations with the owner and the local council followed, but without success. Eventually a court order was issued declaring them to be in unlawful occupation of the land and requiring them to be evicted. They were then forcibly removed, prematurely and inhumanely, at the expense of the municipality. Their makeshift homes were bulldozed and burnt and their possessions destroyed. Many of the residents were not even present to salvage what meagre belongings they could.

Desperate and homeless, they moved onto a local sports field. The bitter winter rains of the Cape were arriving and they had little more than plastic sheeting for protection. They approached an attorney who wrote to the council describing the intolerable conditions under which they were living and demanded that the council meet its constitutional obligations and provide them with temporary accommodation. Dissatisfied with the municipality's response to the letter, the group launched an urgent application in the High Court. And so Mrs Grootboom gave her name to what many consider to be a case at the cutting-edge of world jurisprudence. The question

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<sup>1</sup> Justice of the Constitutional Court of South Africa.

<sup>2</sup> The name Grootboom is the Afrikaans version of an African name meaning 'Big Tree'.

her case raised was: could social and economic rights be regarded as fundamental rights enforceable directly<sup>3</sup> by the courts, and if so, how?

The South African Constitution<sup>4</sup> provides as follows:

*Section 26*

**Housing**

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

The High Court ordered the municipality to provide temporary shelter pending the outcome of the application, so that the Court would not be compelled to determine the difficult and important questions under pressure of approaching rains.

At the hearing the state acknowledged the dire circumstances in which the applicants found themselves. It contended, however, that these were the inherited consequences of past injustice, and not indications of a failure to meet current constitutional obligations. On the contrary, it argued, it was meeting these obligations by means of implementing a massive housing programme which enabled millions of poor people to move from leaking and makeshift shacks without secure tenure to weather-proof homes to which they had full title. Three quarters of a million families had already been able to move into completely subsidised homes, serviced with electricity and water, and millions more would benefit in future as the housing programme unrolled.

The High Court accepted that the state in fact was meeting its obligation progressively to realise the right of access to adequate housing in terms of section 26(2) of the Constitution. The Court went on to hold, however, that the state had failed to meet

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<sup>3</sup> Nearly all modern states have legislation which the courts enforce, concerning housing, health, education and welfare. The issue was whether a right to housing flowed directly from the Constitution and as such had binding and overriding legal force in relation to legislation and policy on housing.

<sup>4</sup> Act 108 of 1996.

further and special obligations which it owed to the children involved. The Bill of Rights provides:

*Section 28*

**Children**

(1) Every child has the right-

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(c) to basic nutrition, shelter, basic health care services and social services (emphasis added).

The Court pointed out that the right of the child to shelter was not qualified by reference to progressive realisation within available resources. The shelter envisaged by the section might be less than adequate housing, but at the very least the state had an obligation to provide the children with some protection from the elements. Furthermore, since the children could not be separated from their parents, the Court ordered that all the people concerned should be given at least elementary protection.

The state took the case on appeal to the Constitutional Court.<sup>5</sup> I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission<sup>6</sup> and the Community Law Centre of the University of the Western Cape. Counsel for the Legal Resources Centre<sup>7</sup> appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the rights of all South Africans to shelter, whether they had children or not, in terms of section 26 of the Constitution. The case showed the extent to which creative lawyers can help the poor to secure their basic rights.

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<sup>5</sup> The Constitutional Court was established in 1994 after the country's first democratic election, in terms of the Interim Constitution of RSA Act 200 of 1993, and was confirmed as the highest court in the land in respect of all constitutional matters in the Final Constitution, n. 4 above. Its decision in respect of this issue was reported as *Government of the Republic of South Africa and others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000(11) BCLR 1169 (CC).

<sup>6</sup> The Human Rights Commission is a 'Chapter Nine' body established in terms of section 184 of the Constitution, as a state institution supporting constitutional democracy. It has a monitoring and assessing function, which includes aiming sure that the values and rights of the Constitution are observed, respected, and promoted at all levels.

<sup>7</sup> The Legal Resources Centre is a non-profit, non-governmental public interest law centre which provides legal assistance to vulnerable and marginalized communities in South Africa who are disadvantaged by reason of social, economic, and historical circumstances. For further information, see LRC mission statement at [www.lrc.org.za](http://www.lrc.org.za).

How did the provision dealing with the right of access to adequate housing come to be in the Constitution? And the same question may be asked of similar provisions in the Bill of Rights dealing with access to health care, food, water and social security. How did they all come to be placed in the Constitution as fundamental rights which the state was obliged to realise progressively within its available resources? The existence of this cluster of social and economic rights in the Bill of Rights added to the task facing our Court. In determining the scope of the right of access to adequate housing we would not only be resolving the case of Mrs Grootboom and others, we would also start exploring the whole question of the status of socio-economic rights, and more particularly the extent of the state's duty in fulfilling them.

My own direct confrontation with the question started in the mid-1980s when I was a law professor in exile in Mozambique. A group of black law students at the University of Natal-Durban established a body called the Anti-Bill of Rights Committee. What?!? Not Anti-Apartheid, but Anti-Bill of Rights. I was jolted by the notion of idealistic persons belonging to the oppressed community, part of the struggle for a non-racial democracy, being opposed to the idea of a Bill of Rights. Yet I understood and sympathised with much of their motivation. They saw a Bill of Rights as a document established in advance by a privileged white minority to block any future moves towards social and economic transformation. The Bill of Rights would defend the unjust socio-economic situation created by apartheid, guarantee property rights in terms of which whites owned 87% of the land and 95% of productive capital, and impose extreme limits on the capacity of the democratic state to equalise access to wealth. Ultimately, the poor would remain poor, albeit formally liberated, and the rich would get richer, though technically not advantaged. As I heard one commentator put it, the Bill of Rights would in effect be a 'Bill of Whites'.

Yet a number of forward-looking white judges and academics had advanced the need for a Bill of Rights in the hope that it would facilitate the achievement of majority rule. Their reasoning had been that while ensuring the vote to everyone and outlawing discrimination, a Bill of Rights would re-assure whites that they had a constitutionally-protected future in the country. Such is the dialectic of legal development, however, that concepts that assuage the anxieties of the whites, inevitably arouse the concerns of the blacks.

I was determined to keep the dialectic from congealing in that unsatisfactory form. I wrote a paper espousing the need for an 'Anti-Anti-Bill of Rights Committee'. I started by pointing out that every revolution was impossible until it happened, then it became inevitable. It was in this unstable context that we had to consider a future Bill of Rights. The notion the law students had of a Bill of Rights was unduly narrow, presupposing that the function of a Bill of Rights was simply to limit the power of government. Yet there was no reason why the Bill of Rights should not also be an instrument for advancing the claims of the dispossessed. At this point I introduced into the discourse the theme of the three generations of rights.

The first generation encompassed the classic civil and political rights which emerged from the French and American Revolutions. These were the fundamental rights of citizens and free persons, which had to be spelt out unequivocally in any post-liberation document.

The second generation of rights dealt with entitlements concerning housing, health, education and welfare, and were introduced in Germany under Bismarck in the late 19<sup>th</sup> Century. These rights were taken up in the Russian Revolution and later came to be central to national policy in the so-called welfare states of the 20<sup>th</sup> Century. So they were developed in authoritarian, revolutionary and social democratic countries. After the Second World War these rights gained strong international favour and were integrated with civil and political rights into the Universal Declaration of Human Rights. They were subsequently entrenched in the International Convention on Economic, Social and Cultural Rights, which, though adopted separately from the International Convention on Civil and Political Rights, enjoyed equal legal status.

The concept of a third generation of rights, and, indeed, the whole notion of clustering rights in generational terms, was developed in the late 1970s by a Czech lawyer working at the United Nations. His concern was primarily with the right to a clean and healthy environment, a collective right which he could not fit easily into any known category of basic human rights. Hence he coined the idea of a third generation of rights which by its nature would belong to the whole community and to future generations, and not just to individuals. Other similar rights, sometimes

referred to as solidarity rights, were the right to development and the right to peace. One analyst referred to the three generation of rights as ‘blue rights’ (civil and political), ‘red rights’ (socio-economic) and ‘green rights’ (as above).<sup>8</sup>

When political prisoners were released in South Africa and exiles like myself able to return, serious negotiations about a new constitutional order began, and the debate on the enforcement of social and economic rights entered a new and pressing phase. Three distinct positions emerged. There were those who argued that such rights should be seen as aspirational only, and not be embodied in any way in the constitution. A second current favoured incorporating such rights in the constitution, but giving them the status of guiding principles only and not making them enforceable by the courts. The third position was that appropriate language should be found to make them justiciable as enforceable constitutional rights.

The only precedents we could find pointed towards the midway position, that is, to incorporating socio-economic rights in the constitution merely as non-justiciable directives of state policy. Thus when the Irish won independence from Britain they included socio-economic rights in their constitution but made it clear such rights would not be enforceable by the courts.<sup>9</sup> Similarly, when India won its independence after World War Two, its Constituent Assembly adopted a constitution which included socio-economic rights simply as directives of state policy, making it clear that they were not in themselves to be enforceable by the courts.<sup>10</sup> I mention in passing that the Indian Supreme Court went on to interpret these rights in a creative way, so using them to give texture and substance to the fundamental civil and political rights directly enforceable in the courts.<sup>11</sup> In the South African debate there was

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<sup>8</sup>Professor Kader Asmal, then at the University of the Western Cape and recently Minister of Education, used these descriptions during the debates preceding the drafting of the Constitution.

<sup>9</sup>Article 45 of the Irish Constitution states that: ‘The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.’

<sup>10</sup>Part IV of the Indian Constitution contains these Directive Principles of State Policy. Article 37 states that: ‘The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.’

<sup>11</sup> Thus, in *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545, the Indian Supreme Court held that the right to life, which could not be taken away except by due process of law, included more

strong support for having separate chapters in the constitution to deal with rights that were to be enforceable and those that were to be understood simply as directives of state policy.

It was at about this time, in the early 1990s, that I had the pleasure of being invited to spend a week in Paris as a guest of Robert Badinter, President of the Conseil Constitutionnelle. Ronald Dworkin happened to be in Paris at the time. I was hoping to receive from him comments on the Draft Bill of Rights produced by the ANC Constitutional Committee, and in particular on the provisions for socio-economic rights. As a sweetener I was able to invite him to see the original copy of the Declaration of the Rights of Man in the Palais Royale. I recall Ronald Dworkin's cautious observations. As we descended the steps of the Palais he indicated his doubts as to whether it was appropriate to include extensive and detailed social and economic rights as fundamental rights in a constitution. He pointed out that equal protection was a powerful and principled instrument that could be used to strengthen the position of those whom racial policies had forced to live in disadvantage at the margins of society. I spent much time pondering over his words. The problem as I saw it was not simply to prevent the continuation of discrimination, but to ensure that everyone was entitled at least to the minimum decencies of life. There was a connection between the two, but not a complete overlap. As eventually drafted, the equality clause in our Constitution came to occupy a central role in the new Bill of Rights.<sup>12</sup> Yet it did not go beyond prohibiting negative discriminatory conduct and

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than just the right to bodily being. Read together with the Directives of State Policy, the right to life included the right to a decent human existence. This meant that pavement dwellers could not be evicted from their rudimentary shelters without due process of law.

<sup>12</sup> Section 9 of the Constitutions provides:

**Equality**

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

facilitating ameliorative action to redress patterns of disadvantage. It did not require positive action on the part of the state to enable people to live in conditions consistent with at least the minimum standards of human dignity.

During the final stages of the drafting of the Constitution the arguments on the enforcement of social and economic rights became particularly heated. The conservative position was that because judges were not accountable to the electorate, it was not appropriate for them to be embroiled in debates over social and economic policy. Relying on separation of powers arguments, supporters of this position argued that the judiciary should not be involved in decisions that had major implications for governmental spending. They pointed out that this was precisely what bodies were democratically elected to deal with. They feared that inevitably the courts would find their authority diminished through being sucked into taking positions on what were essentially political rather than legal matters.

If confirmation were necessary, my eight years on the Court underline for me the overall wisdom of starting off with such an approach. Normally it is not for us to decide on how resources should best be used. This is not simply because of the need not to get involved in questions affecting the budget. The enforcement of political and civil rights will, after all, often involve intrusion on the budget, such as when the court orders the holding of elections or the provision of legal aid. The deeper question is whether it is institutionally appropriate for judges to take positions on highly controversial questions of the kind that are hotly debated during elections. The answer must in general be no. Whether government policy is wise or stupid is something for public opinion and the electorate to decide, not for the judges. In a constitutional democracy this must be the general rule. I stress, the general rule, not the invariable one.

My view is that there are in reality a restricted number of circumstances involving highly contentious matters where it is actually an advantage for judges not to be accountable to the electorate. When you see yourself as having a constitutional duty to defend deep core values which are part of emerging world jurisprudence and of

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evolving constitutional notions in your own country, you become sharply aware of the constitutional connection between the maintenance of judicial independence and the protection of human dignity.

The very notion of entrenching rights is to provide a basic framework of constitutional regard for every human being. It is not the duty of courts to side with one section of society against another, however powerful or weak they might be and however sympathetic to their claims individual judges might feel. But there is every reason why it should be incumbent on the courts to see to it that basic respect for the dignity of every person is maintained at all times. That is why we have fundamental rights. The Bill of Rights is there not simply to protect the vested interests of those that have, but to secure basic dignity for those that have not. The key question, then is not whether unelected judges should ever take positions on controversial political questions. It is to define in a principled way the limited and functionally manageable circumstances in which the judicial responsibility for being the ultimate protector of human dignity compels them to enter what might be politically contested terrain. It is precisely in situations where political leaders may have difficulty withstanding populist pressures, and where human dignity is most at risk, that it becomes an advantage that judges are not accountable. It is at these moments that the judicial function expresses itself in its purest form. The judges, able to rely on the independence guaranteed to them by the Constitution, ensure that justice is done to all without fear, favour or prejudice.<sup>13</sup>

In my opinion, then, the greatest problem concerning judicial enforcement of social and economic rights is not one of institutional *legitimacy*. The Constitution itself requires the courts to ensure respect for such rights. The real difficulty is that of institutional *capacity*. It is in this connection that the more radical objection to our suitability to enforce socio-economic rights comes into play. The objection from radical quarters to judges enforcing social and economic rights suggests that we are likely to get it all wrong. They point to the social class from which we judges

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<sup>13</sup> Section 6 (1) of Schedule 2 of the Constitution contains the Oath or Solemn Affirmation of Judicial Officers as follows ‘...I, A. B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E. F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. (In the case of an oath: So help me God.)’

traditionally have been drawn, and the nature of our legal thinking which tends to look at questions in abstract and formulaic ways that end up favouring the status quo. But even where our background and modes of thought might be thought to predispose us differently, there can be little doubt that it is inappropriate for judges who in general know very little about the practicalities of housing, land and other social realities, to pronounce on these issues. That is what Parliament is there for. It has hearings and receives inputs from a variety of people with special expertise in particular areas. The very nature of the political process calls for compromise and a balancing out of interests, something to be applauded in an open and democratic society based on principles of give-and-take rather than of all-or-nothing.

Yet, though compromise on questions of practicality and use of resources is valuable, compromise on matters of deep principle is dangerous. Thus, the securing of maximum support, which is part and parcel of the political process, is intrinsically different from the principled balancing that in matters involving fundamental rights is central to the judicial function. We are institutionally completely unsuited to take decisions on houses, hospitals, schools and electricity. We just do not have the know-how and the capacity to handle those questions. But we do know about human dignity, we do know about oppression and we do know about things that reduce a human being to a status below that which a democratic society would regard as tolerable.

An implication of placing social and economic rights in a constitution is to say that decisions which, however well-intended, might have the consequence of producing intolerable hardship, cannot be left solely in the hands of overburdened administrators and legislators. Efficiency is one of the great principles of government. The utilitarian principle of producing the greatest good for the greatest number might well be the starting-off point for the use of public resources. But the qualitative element, based on respect for the dignity of each one of us, should never be left out. This is where the vision of the judiciary, tunnelled in the unshakable direction of securing respect for human dignity, comes into its own.

I suspect that behind the technical and political science arguments advanced against the judicial enforcement of socio-economic rights, lies a basic concern that somehow

the involvement of the courts in this area will lead to a dilution of their respect for fundamental civil and political rights. Put another way, there is a fear that in pursuit of the right to bread, the right to freedom will be submerged. Anxiety on this score has historical foundations. Certain states have contended that in order to achieve national development and to improve the conditions of the impoverished masses they have had to suppress freedom of speech and do away with multi-party democracy and spurn an open society. Can it be, though, that people want freedom without bread, or bread without freedom? In South Africa the struggle for the vote and for freedom of movement and speech was always inseparable from the right to housing, health and education. Bureaucratic authoritarianism was intrinsic to apartheid. People simply did not count as human beings. The restoration of dignity for all South Africans accordingly requires the simultaneous creation of material conditions for a dignified life and development of increased respect for the personality and rights of each one of us.

Both freedom and bread are necessary for the all-round human being. Instead of undermining each other, they are interrelated and interdependent.<sup>14</sup>

It heaps indignity upon indignity to say that the poor are not interested in the franchise or the right to speak their mind or the right to be treated fairly, but only in a full stomach. The experience in South Africa was that in general terms the greatest sacrifices for freedom were made by those who were the poorest and most dispossessed. Yet the constitutional vision is deeply impoverished if it is limited to allowing a person dying of hunger simply to curse the government with his or her last breath. Where the struggle for survival is overwhelming, freedom to vote and the right to criticise the government become remote from the exigencies of daily existence. In a society in which people are not simply striving to survive but where they are educated, where they can read and study and learn about the world, they can make informed political decisions and exercise meaningful self-determination.

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<sup>14</sup> As Amartya Sen has shown, in open and democratic societies you do not get famine, because shortages of food are dealt with in ways in which there is public accountability for distribution. In dictatorships, on the other hand, where you have the same quantity of food, you get famine and starvation because what grain is available is secretly hoarded and siphoned off to the rich. See Amartya Sen and Jean Dreze *Hunger and Public Action* Oxford: Clarendon Press, 1989.

The inter-relatedness of the different generations of rights helps resolve some of the libertarian versus communitarian tensions on the question of the enforcement of social and economic rights. An extreme libertarian approach to Mrs Grootboom's situation would have secured to her the right to be left alone, with unrestricted freedom to denounce the government as the rain pelted down. Yet she did not want the state to leave her alone when the rains came. She wanted to be able to call upon the state to ensure that she and her children had a roof over their heads. On the other hand, if a radical communitarian approach had been adopted, the invasion by herself and a thousand others of privately owned land would, without more, have been justified. The fact was, however, that apart from the rights of the landowner, there were other individuals in the queue for formal housing due to be built on that land whose rights were also being affected. In my opinion, the approach that our Constitution required us to adopt was neither purely libertarian nor simply communitarian, but dignitarian. It is respect for human dignity that unites the right to be autonomous with the need to recognise that we are all social beings. Thus, the fundamental right of all human beings to have their basic human dignity respected becomes the link between freedom and bread.

Before I get to the manner in which the Court dealt with Mrs Grootboom's problem, I must mention the one previous case that had come to us concerning the enforcement of socio-economic rights. It was an extremely poignant matter, brought to us by someone close to death. It dealt with the right of access to healthcare and in particular to emergency medical treatment.<sup>15</sup>

Mr Soobramoney, who was suffering from chronic renal failure and other heart and sugar-related problems, approached our Court asking us to order the state hospital dialysis service to keep death away for as long as possible. He had previously received a session of life-saving dialysis treatment at a state hospital, but was told that he did not qualify for further treatment because limited resources meant that only thirty per cent of persons suffering from chronic renal failure could be treated. Priority was given to those who could benefit from renal transplants and since he was a badly placed candidate for such transplants, he had to stay at the back of the queue. Mr

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<sup>15</sup> *Soobramoney v Minister of Health, Kwa Zulu-Natal* 1998(1) SA 765 (CC); 1997(12) BCLR 1696 (CC).

Soobramoney survived for some time on dialysis in the private medical sector, but when his family's funds ran out, he once more sought free treatment from a state hospital. On being turned away he went to court, claiming his constitutional rights were being denied. He relied on section 27 of the Constitution which provides:

*Section 27*

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

- (1) Everyone has the right to have access to-
  - (a) health care services, including reproductive health care;
  - ...
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

This was a most painful case. Effectively, it was up to the eleven men and women on the Court to decide whether this man lived or died. There was no precedent to guide us, all we had was the text of the Constitution.

We decided firstly that his claim based on the right to emergency medical treatment had to be rejected. In our view, this right to emergency care could be claimed by or on behalf of someone who collapsed suddenly or and who was the victim of sudden trauma. It did not apply to chronic medical conditions, even if they reached life threatening proportions. If all chronic illnesses were to be regarded as emergency cases entitled to treatment at state expense, there would be no funds left in the health budget for other pressing health services such as mother and child care, health education or immunization, the prevention and treatment of diseases such as TB, cancer and malaria and the amelioration of HIV/AIDS. We did not accept that the Constitution should be read in a way which would produce such distorted allocation of resources.

As far as the right of access to health care was concerned, the Court found that the access granted by the state health services to Mr Soobramoney had not been shown to be unreasonable. The evidence from the hospital showed that their plan was eminently

rational and non-discriminatory, and accordingly his claim on this ground failed as well.

In the course of argument, I said to counsel that I appreciated the dignity with which his client had approached the Court, and that if resources were co-existent with compassion, the case would have been easy to determine.. And in my written judgment concurring with the main judgment I pointed out that the problem in all cases concerned with enforcing socio-economic rights is precisely that resources are always limited. In this context I stated that social and economic rights by their very nature involved rationing. Such rationing should not be considered a restriction of or limitation on the right of access to health care, but the very condition for its proper exercise. Socio-economic rights in this respect are different in their mode of enjoyment, if not in their essence, from civil and political rights. The right to free speech is not by its nature rationed. Everybody can speak their mind just as everybody above a certain age can vote. Difficult problems may arise in terms of their practical exercise, for example in relation to access to public broadcasting or having the financial means to establish independent media or running an election campaign. But the rights are fully-fledged from the start, and not subject to progressive realisation. If A expresses him or herself or votes in a certain way, this does not prevent B from expressing him or herself or from voting in the same or different ways. The progressive realisation of socio-economic rights within available resources, on the other hand, indicates that a system of apportionment is fundamental to their very being. I am not sure as to the full implications of this distinction, both in terms of conceptualising the nature of the right and in respect of determining appropriate remedies for a breach. Yet I am convinced that the exercise of a right that by its nature is shared, often competitively, with other holders of the right, must have different legal characteristics from the exercise of a classical individual civil right that is autonomous and complete in itself.

The right to treatment of a particular kind thus cannot be equated with the right to vote. This does not make the right of access to health care inferior in any qualitative sense to the right to vote, but different in its mode of protection. This difference is expressly recognised in the Constitution through the notion of requiring the state to take measures progressively to realise the right of access to health care. Thus, the state

fulfils its duty in respect of providing such access as much by its measures to provide safe water, clean air and basic nutrition for the whole community, as it does by providing a place in a hospital and expensive curative treatment for an individual. What is important is that the reach of health programmes becomes progressively larger and that every individual has a right to be considered fairly and without discrimination for treatment within each programme.

Mrs Grootboom's case confronted us fully with what is meant by the statement that rights must be taken seriously. Constitutionally-demanded seriousness can be undermined in two opposite ways. Judges can either be overly eager to secure favourable headlines for being sympathetic to the poor, or else be unduly formalistic, passive and uncaring about the real lives of real people. I think we were all aware of the need to avoid judicial populism, that is, to resist any temptation to make orders that captured the popular imagination, but which could not be carried out effectively in practice. Yet our oath to do justice to all required us to give meaning and content to the socio-economic rights as set out in our Bill of Rights. The situation in which Mrs Grootboom and the others found themselves clamoured for some kind of response. The constitutionally protected right of access to adequate housing would have no meaning if a thousand people, as a result of state action, were left without a place to lay their heads and without even minimal shelter, only a spot on a sports field and a piece of plastic sheeting. The problem facing us was how to find a secure jurisprudential foundation for responding to their situation and how to provide a remedy consonant with our limited institutional capacity and capable of meaningful enforcement.

We were urged by the *amicus* to base our decision on the concept of a minimum core of rights as outlined by the United Nations Committee on Economic, Social and Cultural Rights.<sup>16</sup> We declined to do so. In the first place, our Constitution speaks

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<sup>16</sup> See *Government of RSA and Others v Grootboom and Others* note 4 at para 29:

'In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

10. 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 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. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential

directly on the subject and has language sufficiently expressive to provide a basic guide. In the second place we had no clear evidence before us as to how such a minimum core could be established, other than by reference to people dropping below the level that basic requirements of human dignity necessitated. In a unanimous judgment prepared by Justice Zak Yacoob, it was held that the key concept in the provisions on access to adequate housing was the obligation on the state to take “reasonable legislative and other measures” progressively to realise the right. We felt that the concept of reasonable measures was one capable of being adjudicated on by our Court. If the measures failed to meet the standard of reasonableness then the state would be in breach of its constitutional obligations. In deciding whether the measure met this standard the Court would acknowledge the special expertise of the government in this area and the fact that a wide range of policy choices would be consistent with reasonableness. Yet, however impressive the state housing programme was, it made no provision for persons such as Mrs Grootboom who found themselves in situations of such crisis and desperation that their dignity was being seriously assailed. In other words, however reasonable the programme was in its broad reach, it had one serious gap which prevented it from satisfying the constitutional requirement of being reasonable. There was no comprehensive plan, or indeed, any national plan at all, to deal with homeless people in situations of extreme desperation, such as victims of disaster, or persons in Mrs Grootboom’s situation.

The fact that some relief had already been given to such persons (relief which was extended and consolidated pending our decision) left us free to deal with the level of unreasonableness, of which the situation of Mrs Grootboom was a symptom. We accordingly declared the housing programme of the state to be unreasonable and in

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primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. 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. Article 2(1) obligates each state party to take necessary steps ‘to the maximum of its available resources’. 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’.

conflict with the constitution to the extent that “it failed to make reasonable provision within its available resources for people . . . with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations”.<sup>17</sup>

Having made that declaration, that is, having established the nature of the state’s obligations in this area, we then left it to the state to decide how best in practice it could remedy its failure. Thus, we left it open to the state to decide as to whether the programme should operate nationally, provincially or locally, and as to how a programme of emergency shelter should best be developed. We expressly left it up to the state to decide how best to deal with emergency situations, that is whether the programme would involve only providing dry land on which people could erect shelters, or whether it would provide both land and houses or whether it would be more efficacious for the state to provide sufficient financial assistance for the affected persons to make their own housing arrangements. There would be further policy choices open to the state, for example, whether to establish medium density housing or provide subsidies for the private sector construction industry. Similarly, it was left to the state to decide where it was to get the money for the emergency programme. It could take it from the formal housing programme, it could take it from defence, it could raise new taxes, it could take it from anywhere, except, I should add, from the judges’ salaries!

It was in this way that we sought to balance out the need to protect the fundamental dignity of human beings on the one hand, with recognition of the fact that it was the role of the state, in respect of which its institutional capacity was superior to that of the Court, to determine the priorities, texture and detail of the manner in which it should fulfil its responsibilities.

In making what we regarded as a principled determination capable of being operational and effective, we were strongly influenced by the way in which the rights set out in our Bill of Rights are interrelated and interdependent. We made it plain that the right of access to housing could not be separated from the right to human

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<sup>17</sup> Id at para 99.

dignity.<sup>18</sup> This meant that a purely quantitative response by the state to its obligations would not be enough, even if, by international standards, it made extraordinary provision for access to formal housing. The qualitative dimension could never be lost sight of. Our Constitution says that in interpreting our Bill of Rights we must promote the values of human dignity, equality and freedom.<sup>19</sup> It was respect for these values, and especially the value of human dignity, that guided us in this case, as it orients us in all matters concerning the Bill of Rights.

The next major case concerning the enforcement of socio-economic rights was not long in coming, nor was it any less dramatic. It concerned the right of access to health care in the context of the HIV/AIDS pandemic which has hit our country severely.<sup>20</sup> In particular, it related to the right of pregnant women living with HIV to receive, in all state hospitals where it could be managed, the drug Nevirapine, which would substantially cut the transmission to the newborn baby of the virus. To reiterate, the Constitution provides as follows:

*Section 27*

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

- (1) Everyone has the right to have access to-
  - (a) health care services, including reproductive health care;
  - ...
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

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<sup>18</sup> Section 10 of the Constitution states that ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected’.

<sup>19</sup> Section 39 of the Constitution provides that:

**Interpretation of Bill of Rights**

- (1) When interpreting the Bill of Rights, a court, tribunal or forum—
  - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - ...

<sup>20</sup> *Minister of Health and Others v Treatment Action Campaign and Others (1)* 2002(10) BCLR 1033 (CC).

The case provoked intense emotion in our country. It was brought by the Treatment Action Campaign (TAC), described by its counsel as the most lively and effective civil society organisation in South Africa, and became known as the *TAC* case. It was a matter of public knowledge that the TAC had mobilised tens of thousands of people living with HIV not simply to see themselves as marginalised victims of a terrible disease, but as people actively determining their lives as best they could. Many of them had learnt in the struggle against apartheid how to combine street campaigning with the use of the media and development of litigation. Their constitutional complaint was that the government was unreasonable and in default of its constitutional obligations to the extent that it restricted the supply of Nevirapine to only two state hospitals on a two-year trial basis in each of the nine provinces. They pointed to the fact that the drug was being supplied to the state without cost for five years, and that its safety could not be in issue because it could freely be bought over the counter in the private sector. Furthermore doctors and nurses in medical facilities outside of the eighteen selected sites were in a position and eager to dispense it.

Counsel for the state argued forcefully that the questions raised belonged to government policy and were accordingly outside the domain of the judiciary. Simply put, it was not for judges to prescribe drugs. In essence, his argument based itself on the separation of powers doctrine. If accepted, its effect would have been significantly to curtail the scope of our decision in *Grootboom*.

Counsel arguing in support of the TAC position, on the other hand, contended that the decision in *Grootboom* did not go far enough. He challenged us to reconsider the reasoning of the Court in that case to the extent that it combined sections 26(1) and (2). In particular he argued that section 26(1) gave an independent right to each individual to have access to adequate housing, and not just a right to require government to put a reasonable programme in place. The Bill of Rights was based on the notion of individual rights. The duty on the state to take reasonable measures to secure these rights should be seen as additional to the individual rights, and not as fully subsuming the content of individual rights. In dealing with how these individual rights should be determined, he relied strongly on the minimum core notion as advanced by the United Nations Committee on Economic, Social and Cultural Rights. He stated that such a minimum core should be established on a case by case basis in

terms of ensuring that at least the minimum decencies for a dignified life were provided to each individual. The effect of his argument was that the Constitution required more from the judiciary than an insistence that the state design and implement reasonable housing programmes. In his view, section 26(1) required the courts to come to the assistance of any individual whose life circumstances fell below the minimum core of entitlements consistent with the maintenance of human dignity.

I recall vividly an exchange between counsel and myself on this score. I put to him the following question: Does he mean that somebody living up in the mountains can come to court and say he wants water from a tap, even if the money spent on meeting his particular claim could be used to furnish water for 10,000 people living lower down on the plains? That was an emotional argument, he replied. No, I suggested, it was part of determining how the Constitution must be understood in terms of encouraging the best use of scarce resources to realise social and economic rights. I continued: could it be that the Constitution implied that those individuals with the sharpest elbows (and the best lawyers) would get a house, water and electricity? Should the Constitution be read as handing over to each judge in each court the right and duty to decide who should have priority access to social goods in short supply? Yes, he replied, if the individuals concerned were below the level of existence consistent with dignity. And so the dialogue continued.

In any event the judgment of the Court rejected the argument advanced by counsel. It did not reject the minimum core notion, the satisfaction of which the United Nations Committee on Social, Economic and Cultural Rights had declared to be obligatory for all states. It implied, however, that such minimum core obligation could be satisfied through broad governmental programmes aimed at meeting minimum needs and did not have to be met by acknowledging individual entitlements enforceable in the courts. Such entitlements would be completely unmanageable, and would end up discrediting the whole notion of social and economic rights, to the detriment of those most in need.

From a public point of view, however, the main interest was in how we would deal with the argument by counsel for the Minister of Health that, whatever our personal views, it was constitutionally inappropriate for us as judges to determine health

policies. In response to this separation of powers argument, the judgment emphasised that it is the Constitution itself that gives the Constitutional Court the express task of enforcing constitutional rights. Accordingly, we would not be unduly interfering with government when we enforced rights spelt out in the Constitution, even if by so doing we intruded on questions of policy. Far from not respecting the separation of powers, we were in fact fulfilling our obligation in terms of that doctrine when we used our judicial authority to ensure that the Constitution was respected. In our view, the restriction to eighteen sites of the supply of a drug that was apparently safe, efficacious and inexpensive was not reasonable. Accordingly, we prepared a judgment ordering the Ministry of Health to make Nevirapine available in all public facilities where the doctors called for it and were in a position to control its proper use.

We had been asked also to require the Ministry to report back to the Court within a certain period of time as to what steps it had taken to fulfil its obligations. The judgment refused to do that. It pointed out that the government had responded correctly in the past in terms of complying with orders that came from the Court, and we had no reason to suspect it would not do so in the present case. I mention in passing that one cannot overemphasise the need that dialogue between the different branches of government be civil in tone and reasonable in substance. We view ourselves not as being in a contestatory relationship with government, but in a constitutional conversation with them. Just as we expect them to give respect to our role as an independent judiciary, so must we accord respect to them for doing what the Constitution requires them to do. I prefer not to use the term “deference” to describe our relationship. Rather it is a question of giving full acknowledgment to the functional and institutional roles given by the Constitution to the different branches of government.

As we were going into Court to deliver this judgment my colleague Sandile Ngcobo playfully offered me a handkerchief and asked: “Albie, are you going to cry today, will you need it?” He was referring to my reaction previously to a judgment of our Court which he had written, and about which, in my travels I had frequently spoken. It concerned somebody living with HIV who had applied for a job as a steward on the South African Airways, passed all the entrance exams, and been declared ineligible

because of his HIV status.<sup>21</sup> South African Airways had said, amongst other things, that British Airways did not employ people in his situation because its customers might flee to a different airline. In his judgment, my colleague had firmly rejected the proposition that the commercial practices of other airlines could determine the constitutional rights of South Africans. The very fact that people were subject to prejudice was a reason for the court to intervene. He had therefore declared the applicant to be a victim of unfair discrimination and ordered South African Airways to employ him. The courtroom had been packed with people wearing T-shirts saying “HIV Positive”. There had been complete silence as we handed down judgment. As we had gone out to the passage at the back I had heard cheering, and found myself crying. It had not just been because of emotion about the impact of AIDS on our country. The tears had come because of an overwhelming sense of pride at being a member of a court that protected fundamental values and secured dignity for all human beings. “No problem, Sandile. Today I’m prepared,” was my response to his offer.

When we filed into court to deliver the judgment I saw that once more it was packed with people – young and old, men and women, black and white, the nation – wearing T-shirts marked “HIV Positive”. There were also journalists from all over the world. The atmosphere was heavy as Arthur Chaskalson, the Chief Justice, in a magisterial voice read out a summary of our decision. The gist of our judgment was clear: since the drugs were available without cost and were deemed safe enough for use in the private sector and in the test sites, limiting their supply on the grounds that the government wanted to do further research on operational problems, was not reasonable. It had to be borne in mind that large numbers of children were unnecessarily going to be born with HIV in the meantime, and that doctors had said clearly that they wanted to prescribe the drugs but were prevented from doing so by directives from the Ministry. Once more after the judgment was given there was total silence. We filed out of the court and stood together for a moment in the passage behind. Then cheering erupted. And once more, I cried.

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<sup>21</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).