

THE RIGHT OF ACCESS TO HEALTH CARE SERVICES IN SOUTH
AFRICA: A CRITICAL ANALYSIS OF THE REALISATION OF THE RIGHT

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Declaration

I, Lester Lulamile Peter declare that this research report 'The Right of Access to Health Care Services in South Africa: A Critical Analysis of the Realisation of the Right' is submitted for assessment for the MSc. MEd. (Bioethics & Health Law) course, is my own unaided work except where I have explicitly indicated otherwise. I have followed the required conventions in referencing the thoughts and ideas of others. It is being submitted for the degree MSc MEd (Bioethics & Health Law) at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at this or any other university.

Signature:  25 August 2009.

Dedication

This paper is dedicated to my late younger brother, Melikhaya Nicholas Peter whose short life inspired me to find the lawyer inside me.

ABSTRACT

Health rights have been the subject-matter of discourse in many countries. The increase in infectious and deadly diseases can be regarded as one of the highly controversial subject-matters associated with the health rights debate. Policy makers, ethicists, lawyers, courts of law and non-governmental organisations have been at the centre of these debates. In this research report I argue that whereas the meaning and understanding of health rights such as the right of access to health care services is confusing, the content and extent of such rights is embarrassingly fictitious in communities that are faced with high levels of poverty and lethal diseases such as HIV/AIDS. I further argue that the courts have in their interpretation and application of health rights, such as the right of access to health care services, become less generous. The increase in lethal diseases and long waiting lists to receive health care in the public funded health care system are amongst other factors that justify the recommended review of health rights. Such review must, amongst other issues, affirm the use of purposive interpretation in giving effect to the meaning, content and extent of health rights. The unreasonable suspensive condition that government has an *obligation to provide within its available resources* must be reviewed in order to give efficacy to the fundamental human right of access to health care services. The government's failure to adequately budget for health care services must not deter the public in enjoying its human right to access health care services.

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INTRODUCTION TO THE PROBLEM

1.1. Introductory Issues

In the human rights arena, rights are divided into three distinct groups. These are the civil and political rights (e.g. the right to life, right to vote) and socio-economic rights such as the rights of access to housing and health care services. The former class of rights is also known as 'first generation rights' and socio-economic rights are known as 'second generation rights'. A new generation of rights known as 'third generation rights' has also been introduced. The third generation of rights encompasses environmental and developmental rights. This research report is more concerned with the critical analysis of the second generation of rights, the socio-economic right of access to health care services.

Despite the classification of rights into generations, all rights are considered equal and important in the human rights arena. This consideration has been premised on the argument that human rights are indivisible and interdependent.¹ This argument has been developed into what is known as a Universal Principle of Human Rights.² In the international arena, the United Nations (UN) has recognised this principle. In its World Conference on Human Rights held in Vienna, it declared that 'human rights are universal, indivisible

¹ M. Winston 'On the Indivisibility and Interdependence of Rights' [Online] <<http://www.bu.edu/wcp/Papers/Huma/HumaWins.htm>> (Accessed on the 06 August 2008).

² See, A.R.V. Sarmiento 'Human Rights: Universal? Indivisible? Interdependent?' (*Speech Delivered at the PAHRA-Sponsored Forum on Human Rights held at Max's Restaurant, Scout Tuazon St., Quezon City on June 20, 1995*). [Online] <<http://www.hrsolidarity.net/mainfile.php/1995vol05no02/92/>> (Accessed on the 06 August 2008).

and interdependent and interrelated³. The UN has further declared that 'the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'⁴.

In the Africa region, the principle of universality of human rights has been recognised in the Preamble of the African Charter.⁵ The Charter's preamble states unequivocally that the right to development, civil and political rights 'cannot be dissociated from economic, social and cultural rights in their conception as well as universality'⁶. This preamble affirms the African position that all human rights are equal and indivisible.

In some countries, the primary objective of introducing socio-economic rights was to address the imbalances of the past.⁷ For example, Liebenberg and Pillay have submitted that socio-economic rights were introduced to exterminate the apartheid legacies such as discrimination in the quality and quantity of health care services.⁸ The socio-economic rights are recognised widely and some countries have incorporated them into their Constitutions.⁹

³ See, United Nations General Assembly Secretary Note 'Vienna Declaration and Programme of Action' *World Conference on Human Right*, Vienna 14-25 June 1993 [Online] <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)> (Accessed on the 13 August 2008).

⁴ Ibid.

⁵ See, Preamble of the African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc.CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [Online] <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (Accessed on the 13 August 2008).

⁶ Ibid.

⁷ See, S. Liebenberg & K. Pillay (Eds) (2000) 'Socio-Economic Rights in South Africa' at pp. 18 & 224 referring to South Africa.

⁸ Idem at p. 18.

⁹ For example, in South Africa these have been included in Chapter 2 of the Constitution Act 108 of 1996.

In South Africa, socio-economic rights such as the right of access to health care services are contained in the Constitution's chapter dealing with the Bill of Rights.¹⁰ The Constitution's Bill of Rights chapter is also known and regarded as the chapter of Fundamental Rights. The South African Constitution provides that the state has an obligation to respect, protect, promote and fulfil all the rights contained in the Bill of Rights.¹¹ The inclusion of health rights into the Constitution is regarded by many South Africans as one of the milestone achievements of our democratic government. For example, Liebenberg views the inclusion of these rights into the Bill of Rights as a contribution 'to a substantive view of a transformed South African society'¹².

The Constitution¹³ of the Republic of South Africa provides that '(1) Everyone has the right to have access to-

- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable 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.'

¹⁰ Ibid.

¹¹ Section 7(2) fn. 9 *supra*.

¹² S. Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' [Online] <http://www.academic.sun.ac.za/stias/projects/7_social_econ_justice/documents/abstracts/sa_ndra_liebenberg.pdf> (Accessed on the 11 June 2008).

¹³ Section 27 fn. 9 *supra*.

The socio-economic right of access to health care services has in general been the subject of many discourses around the world.¹⁴ In some jurisdictions, the recognition of socio-economic rights came with a plethora of criticism. Most of the criticism relates to the nature, meaning, extent and content of socio-economic rights. The criticisms have ignited a universal social and legal debate about the justiciability of these rights.¹⁵ In the legal circles, the nature, meaning, extent and content of these rights has also been widely debated and challenged in various forums. For example, the South African Constitutional Court was called upon as early as in 1997 to decide on the right of everyone to access health care services.¹⁶ The case¹⁷ of Mr Soobramoney is the first test case that attempted to define the nature, content, meaning and extent of socio-economic rights entrenched in the South African Constitution.

The socio-economic rights judicial cases brought after Mr Soobramoney's matter have increased, varied and include claims of rights such as the rights of access to housing and a healthy environment.¹⁸ It is significant to note that in 1996 and during the process of certification of the Constitution, the South African community was given an opportunity which it exercised through its

¹⁴ J. Nakuta 'The Justiciability of Social, Economic and Cultural Rights in Namibia and the Role of Non-governmental Organisations' [Online]
<<http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/Nakuta.pdf>>
(Accessed on the 29 April 2008).

¹⁵ J.M. Woods 'Justiciable Social Rights as a Critique of the Liberal Paradigm' (2003) *Texas International Law Journal* at p. 766 [Also Online]
<<http://www.law.loyno.edu/faculty/documents/JusticiableSocialRights-woods.pdf>>
(Accessed on the 06 August 2008). Woods defines justiciability as 'the ability of a court to adjudicate a dispute and order remedies for constitutional violations'.

¹⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC), 1998 (1) SA 765 (CC).

¹⁷ *Ibid.*

¹⁸ For example, the case of *Grootboom v Oostenberg Municipality & Others* 2000 (3) BCLR 277 (C), 2001 (1) SA 46 (CC) dealt with the right of access to housing.

political representatives and non-governmental organisations, to file submissions on the justiciability of socio-economic rights.¹⁹

Despite the significant developments surveyed above, uncertainties about the nature, content, meaning and extent of the socio-economic right of access to health care services still remain. In this research report, I have considered it necessary to clearly articulate the nature, meaning, content and extent of the right of access to health care services. The necessity for such study is justified. For example, academics in the legal arena have confirmed that even the South African Constitutional Court has, in its interpretation so far, not clarified the content and extent to which the obligations in Section 27 may be enforceable.²⁰

In the philosophy of human rights, the effect and nature of rights is determined through a distinction process of whether such right is expressed in a positive or negative manner. In general, socio-economic rights are associated with positive rights, while civil and political rights are associated with negative rights. In this regard, it is significant to note that positive and negative rights do not coexist. This view has been endorsed by classical liberals and libertarians. For example, John Stuart Mill is one of the first libertarians to endorse the view that positive and negative rights do not coexist.²¹ In support of their view, the classical liberal and libertarians have argued that positive

¹⁹ See, A. Sachs 'Social and Economic Rights: Can they be Justifiable?' Paper presented at Southern Methodist University Symposium, [Online] (Accessed on the 10 June 2008). <http://www.unep.org/law/Symposium/Documents/country_papers/Sachs-Speech.doc>

²⁰ M. Pieterse 'Indirect Horizontal Application of the Right to Access Health Care Services' (2007) *South African Journal of Human Rights* at p.163.

²¹ J.S. Mill 'Liberty' (1859) Essay [Online] <<http://www.utilitarianism.com/ol/three.html>> (Accessed on 29 May 2009).

rights are only created by a contract.²² A positive right provides an entitlement to provision of goods or services and negative rights provides an entitlement to non-interference.²³ Shue argues that even though these rights do not coexist, the moral urgency of respecting them is equal or the same.²⁴ This means that any kind of protection afforded to civil and political rights, such as the right to life, must be on a par with the protection afforded to socio-economic rights, such as the right of access to health care services.

The ethical assumption of this research report is that the government is, by virtue of its control of the national wealth and resources, the trustee of the health of its people.²⁵ The public is obliged by the laws of the country to pay taxes and levies. These assets (taxes and levies) constitute the wealth and resources of the country which are kept in trust managed by the government as the trustee of the public.²⁶ As the trustee of these assets, the government has a positive and direct fiduciary duty to provide access to health care services.²⁷ In some countries the fiduciary duties of the government have been incorporated and implied in the Constitution. The failures and derelictions of the government to fulfil the obligations constitute a breach of a legal and moral duty. For example, in South Africa the government's failure or

²² K. Sakharov 'Locke Interpretations' [Online] accessed on 28 May 2009
<<http://www.leokrut.com/maverick/target.php?file=20080320173345.txt>>

²³ Anon 'Rights' (2007) *Stanford Encyclopedia of Philosophy* [Online]
<<http://plato.stanford.edu/entries/rights/>> (Accessed on the 29 April 2008).

²⁴ H. Shue (1996) 'Basic Rights: Substance, Affluence, and US Foreign Policy' in Anon 'Rights' fn. 23 *supra*.

²⁵ S. Richman (2002) 'Wrong Rights' [online] <<http://www.fff.org/freedom/fd0202c.asp>> (Accessed on the 29 April 2008).

²⁶ J.K. Mason & G.T. Laurie (2006) 'Law and Medical Ethics' at p.55.

²⁷ S. Richman (2002) fn. 25 *supra*.

dereliction of its fiduciary obligations constitutes a violation of Constitutional²⁸ duty.

In South Africa, and in relation to health care services, the government controls the country's wealth and resources through its political structures such as the National Treasury and the Department of Health. This control has become an obstacle in an autonomous society such as South Africa. Firstly, and as it was once observed in the environmental rights arena by Kasrils, the 'political arrangements on national and international levels have often disregarded the importance of distributing wealth equitably...'²⁹. Secondly, the political arrangements or structures have limited individuals' autonomy.³⁰ These two elements support the contention that the government has a responsibility to provide the public with basic and essential commodities.³¹

In this research report, I consider access to health care services as a basic and necessary public commodity. Consequently, the government's full realisation of rights in Section 27 of the Constitution begins with the prioritization of health issues in the financial budgeting process. This, if it is done appropriately, would justify the recommendation to remove the Constitutional *proviso* or qualification³² that the government will only *provide access to health care services within its available resources* (my emphasis).

²⁸ Act 108 of 1996 fn. 9 *supra*.

²⁹ R. Kasrils (*Foreword*) in S. Reed & M. de Wit 'Towards a Just South Africa: The Political Economy of Natural Resource Wealth' at p. 5.

³⁰ S. Fredman 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) *Public Law* at p. 498.

³¹ *Ibid*.

³² See, Section 27(2) fn. 9 *supra*.

The Constitutional qualification³³ that the state will only provide access to health care services within its available resources raises an ethical dilemma for the members of the community who largely depend on the public health care system. In this research report, I consider it extremely subjective and unfair for the state to only provide health care services within its available budget or resource. The qualification raises an ethical question of who bears or will be the bearer of the Constitutional duty³⁴ when the state's resources are unavailable. The right of access to health care services becomes an empty claim or fictitious when the state does not promote, protect and fulfil it as it is obliged by the Constitution.³⁵ In general terms, this research report regards the Constitutional qualification as an unreasonable and unjustifiable measure for the South African community which is faced with the rapid increase in life threatening diseases such as HIV and Aids.

In this research report I will interrogate certain precepts of Section 27 of the Constitution. In particular, I will evaluate the nature, meaning and content of the right of access to health care services. Section 27(1) (a) of the Constitution will be evaluated in conjunction with subsections (2) and (3). The legal question to be critically reviewed in this research report is whether Section 27 of the Constitution has been given its proper social and legal meaning. The legal assumption of this report is that the judiciary's interpretation of Section 27 is legally absurd and defeats the overall purpose of including health rights in the Constitution.

³³ Ibid.

³⁴ Section 27 read with Section 7(2) fn. 9 *supra*.

³⁵ Ibid.

Further in this report, the view that there would be no full enjoyment of the civil and political rights, such as the right to life, without the full and effective realisation of the right of access to health care services, is supported. In this report it is argued that because the right to life³⁶ is not subject to any constitutional limitation, there can be no substantive argument or reasonable justification why the right of access to health care services should not be perceived on a par with civil and political rights. On this premise, this research report recommends that Section 27 of the Constitution be reviewed in order to grant health rights the same or similar status as civil and political rights.

1.2. Research Problem

The meaning (interpretation) given to the right of access to health care services contradicts the underlying purpose of incorporating the right into the South African Constitution. The Constitutional suspensive condition that the government will only realise the right of access to health care services *within its available resources* opens a back door for it to escape Constitutional obligation.

1.3. Research Methodology

This research report is literature-based and both primary and secondary sources have been used to achieve the objectives of the study. Although in the Health Sciences discipline the Vancouver or Harvard style of referencing

³⁶ Section 11 fn. 9 *supra*.

sources is common, the Chicago style of referencing (as used in the legal fraternity) has been approved and used in this study.

1.4. Delimitation of Study

Though the focus of this research report is on the South African perspectives, the context and perceptions of socio-economic right of access to health care services in other countries will be analysed in order to articulate the problem question of the study.

1.5. Study Outline

This research report has been divided into four chapters which are indivisible and interlinked. The first chapter follows this brief introductory background to the problem and focuses briefly on the national, international perspectives and normative overview of the rights discourse.

The second chapter of this research report introduces the first critical analysis of the realisation process of the socio-economic right of access to health care services. In this chapter, the focus is on the legal absurdity and interpretation of Section 27 of the South African Constitution.

Chapter three focuses on the second critical analysis of the realisation process of rights of access to health care services. In this chapter, an ethical hypothesis is formulated in order to substantiate the critical analysis of the

judicially adopted meaning, context and extent of the socio-economic right of access to health care services.

Chapter four of this research report has been divided into two sections. The first section provides a summary of pertinent issues raised in the various chapters of this research report and the second section provides concluding remarks.

The final part of my research report provides a list of sources (bibliography) used in the report and the waiver letter from Wits Human Research Ethics Committee.

CHAPTER 1

OVERVIEW OF THE RIGHTS DISCOURSE

1.1. Introduction

Rights discourse has over the years received great attention from jurists and modern commentators.³⁷ The nature, content and meaning of rights has been at the centre of this discourse. There has been a conspicuous divergence of opinion on the subject-matter of this discourse. For example, Van Duffel has noted a divergence of philosophers' opinions on the discourse relating to the nature of rights.³⁸ In particular, Van Duffel has noted that there are two opposing camps of philosophers in the nature of rights discourse.³⁹

The International Commission of Jurists (ICJ) has more recently also submitted that 'the precise legal meaning and content' of rights such as socio-economic rights is still rudimentary.⁴⁰ The ICJ has blamed the various governments and human rights commentators for this predicament.⁴¹ In this regard, the ICJ has held that the 'national governments and human rights

³⁷ L. Wenar 'The Nature of Rights' (2005) *Philosophy and Public Affairs* at p. 223. Wenar has noted that 'the twentieth century saw a vigorous debate over the nature of rights'. See also, M. Weinberg 'The Human Rights Discourse: A Bahá'í Perspective' (1996-1997 Ed.) *The Bahá'í World* at pp. 247-273 [Online] <<http://info.bahai.org/article-1-8-3-2.html>> (Accessed on the 06 August 2008). Weinberg notes that the subject-matter of the rights discourse represents legal, political, philosophical and moral dimensions.

³⁸ S. Van Duffel 'The Nature of Rights' at p. 1 (*Forthcoming, 2009*) Accessed Online on 05 August 2008 at <<http://works.bepress.com/siegfried/7>>.

³⁹ Ibid.

⁴⁰ See, International Commission of Jurists (ICJ) 'The Justiciability of Economic, Social and Cultural Rights: National, Regional and International Experiences' [Online] <<http://www.icj.org/IMG/pdf/3.pdf>> (Accessed on the 10 June 2008).

⁴¹ Ibid.

movement have ... neglected economic, social and cultural rights, devoting little time and attention to both understanding and protecting them.⁴²

In the legal arena, judiciary and legal commentators have been more particularly concerned with the justiciability of socio-economic rights. It has been argued that the socio-economic rights fall within the ambit of control of the executive arm of government and, for that reason, they are not justiciable.⁴³ The proponents of this argument have also argued that the justiciability of these rights is in repugnance of the Constitutional Principle of Separation of Powers.⁴⁴ For example, Tribe notes that this argument is common 'in a constitutional jurisprudence marked by the central concepts of limited government and separation of powers'.⁴⁵

In some parts of the world the judiciary has taken a firm and different position on the aspect of justiciability of socio-economic rights. For example, the South African Constitutional Court has held that 'it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.'⁴⁶ Regarding this, the South African judiciary has received accolades for 'increasingly *creating* a foundation of jurisprudence moving towards the improved protection of economic, social and

⁴² Ibid.

⁴³ See, L.H. Tribe 'American Constitutional Law' (2000) at p. 311.

⁴⁴ Principle of 'separation of powers' is based on the rationale that the three arms of government (viz. executive, legislature and judiciary) are independent from each other.

⁴⁵ LH Tribe fn. 43 *supra*.

⁴⁶ *Ex Parte Chairperson of the National Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC). The extract is taken from the Court's judgment (CCT 23/1996) at paragraph 77.

cultural rights' (my emphasis).⁴⁷ Despite the commendations and taking position on this aspect of the rights discourse, the judiciary's interpretation of the socio-economic rights such as the right of access to health care services has been levelled with a plethora of criticism. The criticisms are canvassed in more detail in chapter two and three of this research report.

1.2. Categorization of Rights

It has been submitted earlier in the introduction to the problem of this study that, in the human rights arena, rights have been classified into three distinct groups. The social and legal commentators have argued that despite this classification, rights are indivisible and interdependent.⁴⁸ The ICJ has supported this argument and has regarded it as a principle of international law.⁴⁹ The following sub-paragraphs of the research report are intended to provide a brief overview of the rights discourse and to establish the foundation of the main argument of the study.

1.2.1. The Nature of Rights

In law and policy, the understanding of the nature of rights is considered as one of the significant factors of the process of realisation of a right. Feinberg argues that the understanding of the nature of rights is 'necessary for a fully

⁴⁷ See, International Commission of Jurists in fn. 40 *supra*.

⁴⁸ See, A.R.V. Sarmiento 'Human Rights: Universal? Indivisible? Interdependent?' in fn. 2 *supra* and M. Winston 'On the Indivisibility and Interdependence of Rights' in fn. 1 *supra*.

⁴⁹ See, International Commission of Jurists in fn. 40 *supra*.

human and morally satisfactory life'⁵⁰. The question that I seek to answer in this sub-paragraph is what is the nature of rights? This question is regarded in this report as complex, especially with regard to the plethora of rights' theories that have emerged over the years.

There have been some notable disagreements in the nature of rights discourse.⁵¹ For example, Wenar⁵² notes that the 20th century has seen several schools of thought being involved in vigorous conceptual discourses about what rights are and their meaning to those who hold them. Wenar submits that the divergence of opinion in these conceptual debates has resulted in a serious deadlock.⁵³ Van Duffel⁵⁴, in support of Wenar's⁵⁵ view, has argued that the nature of rights discourse has shifted its focus. The shift, according to Van Duffel, has been caused by the focus on two 'substantive theories'⁵⁶. Van Duffel argues that the theorists are more focused on and interested in defending their theories than investigating what the *nature of rights* is (emphasis).⁵⁷

⁵⁰ J. Feinberg 'A Postscript to the Nature and Value of Rights' [Online]
<<http://bibliotsanimaux.site.voila.fr/pdf/FeinbergTheNatureandValueofRights.pdf>>
(Accessed on the 05 August 2008).

⁵¹ M. Weinberg 'The Human Rights Discourse: A Bahá'í Perspective' fn. 37 *supra*.
Weinberg notes that a glance at the available literature suggests that 'philosophical foundations of human rights remain highly contested'.

⁵² See, L. Wenar fn. 37 *supra*.

⁵³ Ibid. Wenar has instead of 'deadlock' used the word 'standoff' which he borrowed from L.W. Sumner 'The Moral Foundations of Rights' at p. 51.

⁵⁴ 'The Nature of Rights' fn. 38 *supra* at p. 18.

⁵⁵ 'The Nature of Rights' fn. 37 *supra*.

⁵⁶ Van Duffel fn. 38 *supra* at p.18. He identifies the Kantian and Welfarist theories as the two substantive theories.

⁵⁷ Ibid.

As a result of the standoff⁵⁸ and a lack of progress in determining the nature of rights, in this report I consider it necessary to briefly review and evaluate the content and meaning of rights. This, I argue, may lead us to a better understanding of the nature of rights.

1.2.2. The Content and Meaning of Rights

The content and meaning of rights is determined through a process of evaluating the purpose of the rights. "Will" theorists (such as Immanuel Kant and Joel Feinberg) and "interests" theorists (such as Jeremy Bentham and Neil MacCormick) suggest respectively that the purpose of rights is to defend welfare⁵⁹ and give effect to human liberties.⁶⁰ Wenar, on the other hand, argues that the content of rights is complex and the purpose of rights suggested by the respective theorists is a 'too narrow and restrictive' articulation of rights purpose.⁶¹ Consequently, Wenar proposes what he called a 'several functions theory' and further argues that the purpose of rights is better understood through the analysis of Wesley Hohfeld's four incidents.⁶²

⁵⁸ See, Wenar fn. 37 *supra*.

⁵⁹ N.D. MacCormick 'Rights in Legislation' in P.M.S. Hacker and J. Raz (eds) 'Law Morality and Society' at p. 192. MacCormick (interest theorist) submits that the purpose of rights is to confer 'the protection or advancement of individual interests or goods'. See also, C Wellman 'Will vs. Interest Theories of Rights: Setting the Record Straight' [Online] <http://www.wenar.staff.shef.ac.uk/Wellman_Response_to_Nature.pdf> (Accessed on the 06 August 2008). In this article, Wellman describes the content of these theories and also criticises L. Wenar's description of Will's theory in his 'The Nature of Rights' paper in fn. 37 *supra*.

⁶⁰ L. Wenar 'The Nature of Rights' in fn. 37 *supra*.

⁶¹ *Ibid*.

⁶² *Ibid*. Wenar identifies these incidents as 'Hohfeldian incidents' and they encompass privileges, claims, powers and immunities.

In terms of the Hohfeldian incidents, privileges, claims, powers and immunities constitute the content of rights.⁶³ The point of departure of the several function theorists is that rights do not have a solitary meaning. Wenar has held in support of this view that rights have different functions.⁶⁴

In the philosophy of human rights, philosophers and political scientists are of the view that the effect of rights is determined through a distinction process of evaluating whether such right is expressed in the positive or negative.⁶⁵ As submitted earlier, the socio-economic right to access health care services is generally associated with positive rights, while civil and political rights such as the right to life are associated with negative rights. Shue argues that despite the distinct process of evaluation of the effect of rights, they are equal.⁶⁶

Rights have either a positive or negative expression. The right of access to health care is described as a positive right. In general, positive rights depend on actions of third parties.⁶⁷ For example, Bilchitz in his discussion of the *Minister of Health v. Treatment Action Campaign*⁶⁸ case refers to 'positive

⁶³ See, N. Lazarev 'Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of Nature of Rights' (2005) *Murdoch University Electronic Journal of Law* 9 [Online] <<http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html>> (Accessed on the 06 August 2008). In this journal, Lazarev provides a detailed discussion of the Hohfeldians' incidents.

⁶⁴ L. Wenar 'The Nature of Rights' in fn. 37 *supra*.

⁶⁵ See, A. Gewirth 'Are all Rights Positive' (2001) *Philosophy and Public Affairs* at pp. 321-333 and R. Chappell 'Positive and Negative Rights' [Online] <<http://www.philosophyetc.net/2006/06/positive-and-negative-rights.html>> .(Accessed on the 28 May 2009).

⁶⁶ H. Shue (1996) 'Basic Rights: Substance, Affluence, and US Foreign Policy' fn. 24 *supra*.

⁶⁷ See, D. Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) *South Journal for Human Rights* at p. 7. Bilchitz provides an example that a 'positive obligation would require the state to make such drugs available for use by people'.

⁶⁸ 2002 (5) SA 721 (CC).

obligations upon the state to provide life-saving medication to patients'⁶⁹. Richman submits that positive rights mean that 'others have an obligation to provide' things such as health care services regardless of 'whether they want to or not'.⁷⁰ Richman argues that the repudiation of this obligation 'constitutes a violation of rights'.⁷¹ This argument finds support in Bilchitz's submission that the failure of government to provide nevirapine beyond research sites was a breach of the state's positive obligations.⁷² Negative rights are the opposite of positive rights. Unlike positive rights, negative rights do not require actions from third parties; they require non-interference with the right.⁷³

Moving to the realisation of the positive right of access to health care services, in the premises of Richman's argument, the meaning of the right of access to health care services consists of an obligation to provide.⁷⁴ The question that arises from this argument is who has the obligation to provide access to health care services?

I will argue later in this research report that various governments have the primary (legal) and positive (moral) obligation to provide everyone with access to health care services. The government is by virtue of these obligations also obliged to ensure that it has adequate resources available to discharge its obligations.

⁶⁹ 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' at p. 7 fn. 67 *supra*.

⁷⁰ 'Wrong Rights' fn. 25 *supra*.

⁷¹ *Ibid*.

⁷² 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' at p. 8 fn. 67 *supra*.

⁷³ *Ibid*.

⁷⁴ 'Wrongs Rights' fn. 25 *supra*.

1.3. Socio-economic Right of Access to Health Care Services

The notion that the socio-economic right of access to health care services is a human right is supported in various national and international legal and policy documents.⁷⁵ The UN has also endorsed this notion in its various reports on human rights. Beyond access to health care services, the UN has stated that 'the right to health is relevant to all States'.⁷⁶

Despite the recognition of socio-economic rights in the international customary law arena, the preference and protection of political and civil rights over socio-economic rights is still evident. For example, countries like Canada did not overtly recognise socio-economic rights in their legal instruments.⁷⁷ Porter submits that the Canadians 'struggle to have the protection of social and economic rights recognised as a component of rights such as the right to equality and the right to life, liberty and security of the person'.⁷⁸

I now turn to the examples of national, regional and international perspectives concerning the socio-economic right of access to health care services.

⁷⁵ For example, the International Covenant on Economic Social and Cultural Rights of 1966 (ICESCR), World Health Organisation (WHO) Constitution of 1946 and Universal Declaration of Human Rights of 1948 (UDHR) recognises the right to health as a human right.

⁷⁶ UN High Commissioner for Human Rights and WHO 'The Right to Health' *Fact Sheet* No. 31 at p. 1 [Online] <<http://www.ohchr.org/Documents/publications/Factsheets31.pdf>> (Accessed on the 07 July 2008).

⁷⁷ B. Porter 'Social and Economic Rights and the Canadian Charter of Rights and Freedoms' *Social Rights Advocacy Centre* [Online] <<http://www.srap.ca/publications/porter-social-and-economic-rights-and-the-charter.pdf>> (Accessed on the 10 June 2008). Porter discusses the Canadian Charter of Rights and Freedom as one of the Canadian instruments which is not 'explicit' on the regulation and protection of socio-economic rights. The Canadian Charter of Rights and Freedom is contained in Part 1 of the Canadian Constitution Act of 1982.

⁷⁸ *Ibid.*

1.3.1. National Perspectives

In this part of the report I will limit the national perspectives of the socio-economic right of access to health care services to South Africa whilst making a brief reference to perspectives of other countries such as the United States of America, Namibia, Nigeria and Canada. It is significant to note that despite limiting the scope of this part of the report to specific countries, the UN has recorded that there are over 115 countries that have recognised in their constitutions the right of access to health care services.⁷⁹ Some of these constitutions have gone beyond recognising the right by including specific obligations.⁸⁰

While many countries have recognised socio-economic rights such as the right of access to health care services by incorporating them into their constitutions, others have not. For example, the American Constitution does not provide for socio-economic rights.⁸¹ In those countries that have included socio-economic rights into the constitution, they have proclaimed them as directive principles of state policy that cannot be enforced or claimed in the courts of law.

⁷⁹ UN High Commissioner for Human Rights and WHO at p. 10 in fn.76 *supra*.

⁸⁰ *Ibid.*

⁸¹ G.S. Alexander 'Why are there no Socio-economic Rights in the American Constitution' [Online] <http://academic.sun.ac.za/stias/projects/7_social_econ_Justice/documents/> Accessed on the 11 June 2008. The American position is not discussed in this paper and the same has been articulated in M.F. Tinta 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) *Human Rights Quarterly* (2) at pp. 431-459.

Nigeria and Namibia are examples of those countries that have in their Constitutions included and characterized socio-economic rights as directive principles of state policy. Sadurksi has criticised this form of characterization of rights.⁸² He argues that the characterising of rights as 'programmatic goals for the government ... is not quite accurate'⁸³.

1.3.1.1. South African Position

South Africa has been commended by many for giving direction to and recognising health rights such as the right of access to health care services.⁸⁴ Politicians, judiciary and the public through non-governmental organisations such as the Treatment Action Campaign (TAC) have been participating in the development and recognition of health rights in South Africa. The Constitution which is the supreme law⁸⁵ of South Africa recognises health rights. Section 27(2) imposes an obligation on the state to realise the right in Section 27(1).

In Section 2, the Constitution provides that 'the obligations imposed by it must be fulfilled'. The most important precept of constitutional supremacy is that Section 2 provides that 'law or conduct inconsistent with it is invalid'. Literally, this part of the section means that the decisions of the executive and judiciary

⁸² W. Sadurksi 'Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part I: Social and Economic Rights' EUI Working Paper Law No. 2002/14 [Online] <<http://cadmus.iue.it/dispace/bitsream/1814/192/1/law02-14.pdf>> (Accessed on the 11 June 2008).

⁸³ Ibid.

⁸⁴ A. Snellman 'The Development of a Socio-economic Rights Jurisprudence in South Africa' (2002) *A Minor Field Study* Orebro University [Online] <<http://www.afrikagruppema.se/usrd/agm488.pdf>> (Accessed on the 10 June 2008).

⁸⁵ See, the Preamble and Section 2 fn. 9 *supra*. The Constitution of South Africa was adopted (per Preamble) as the supreme law of the Republic of South Africa.

must be consistent with the obligations set out in the Constitution. The conduct of the executive and the judiciary as I will be arguing in chapter two of this report is inconsistent with the obligations imposed by the Constitution.

In summary, the judiciary in South Africa⁸⁶ has held that the right of everyone to access health care services is, amongst other things⁸⁷, conditional upon the availability of government resources. Consequently, if the government does not have resources, its obligation to provide everyone with access to health care services becomes an empty claim. If this supposition is correct, it is my submission that the assumed positive nature of health rights is destroyed by the suspensive condition that the government will realise health rights *within its available resources* (my emphasis).

1.3.1.2. Namibian, Nigerian and Canadian Positions

Other African countries have also made some significant progress in the recognition of health rights.⁸⁸ Namibian and Nigerian perspectives are interesting to note for the purposes of a comparative study.⁸⁹ The only notable similarity between the Constitution of Namibia and South Africa is that the Constitutional rights have been 'derived from the 1948 Universal Declaration of Human Rights'.⁹⁰

⁸⁶ *Soobramoney v Minister of Health, KwaZulu-Natal* fn. 16 *supra*.

⁸⁷ See, Section 27(2) fn. 9 *supra*.

⁸⁸ For example, Uganda, Ghana, Namibia and Nigeria have made some progress.

⁸⁹ See, J.C. Mubangizi 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) *African Journal of Legal Studies* (2) at p.1.

⁹⁰ *Idem* at p. 1 and p. 8.

The difference between the two African countries is that Namibia does not guarantee all socio-economic rights in its Constitution. In Namibia, socio-economic rights such as health rights are regarded as directive principles of state policies.⁹¹ Mubangizi submits that because socio-economic rights in Namibia are listed as directive principles of state policy, they cannot be regarded as Constitutional rights that can be enforced in the courts of law.⁹² Mubangizi submits that the socio-economic rights in Namibia 'can be described as policy or societal goals that have no force of law'.⁹³ Article 101 of the Namibian Constitution⁹⁴ proclaims that the directive principles of state policy⁹⁵ 'shall not of and by themselves be legally enforceable by any Court'.⁹⁶ Accordingly, in Namibia certain socio-economic rights such as the right to access health care services are in terms of the Constitution not justiciable.⁹⁷ Some other countries have endorsed this view in their Constitutions.⁹⁸

The Nigerian perspective regarding socio-economic rights is to some extent comparable to the Namibian position. In the Nigerian Constitution, socio-economic rights are also viewed as part of directive principles of state policy.⁹⁹

⁹¹ *Idem* at p. 9.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ The Constitution of the Republic of Namibia [Online]

<http://www.chr.up.ac.za/undp/domestic/docs/c_Namibia.pdf> (Accessed on the 13 August 2008).

⁹⁵ See, Article 95 fn. 94 *supra*. Mubangizi fn. 89 *supra* at p.10, submits that these principles 'are equivalent of the socio-economic rights'.

⁹⁶ Mubangizi in fn. 89 *supra* at p. 9.

⁹⁷ *Idem* at p. 11.

⁹⁸ See, Article 37 of the Indian Constitution. See also, 'Justiciability of ESC Rights - the Indian Experience' [Online]

<<http://www1.umn.edu/humanrts/edumat/IHRIP/circles/justiciability.htm>> (Accessed on the 10 June 2008).

⁹⁹ H. Abdullah 'Economic, Social and Cultural Rights in Nigeria' (2000) *Foundation for Human Rights*

[Online]<<http://www.humanrights.se/upload/files/2/Rapporter%20seminaricdoc/eng->> (Accessed on the 11 June 2008).

Abdullah has submitted that 'fundamental objectives and directive principles ... are recognised as duty of the state to its citizenry' and 'Nigerians cannot sue to protect these rights in any court in the country'¹⁰⁰.

On the other side, the Nigerian courts have welcomed the use of the African Charter in the proceedings aimed at protecting socio-economic rights.¹⁰¹ Abdullah submits that despite the option to use the African Charter, there are legal and social obstacles to fulfilling these rights.¹⁰² In particular, Abdullah argues that proceedings under the Charter are 'complex, rigorous and time-consuming processes which may discourage victims from seeking redress'.¹⁰³ The Nigerian community, in particular the civil society activists, have shown dissatisfaction about the current position of socio-economic rights in the country.¹⁰⁴ They have lobbied and argued that the principles listed in Article 95 of their Constitution must be made justiciable.

The Canadian perspective of socio-economic rights is an interesting position to note in the rights discourse. The majority of commentators such as Bruce Porter have over the years taken ardent interest in the perception and interpretation of socio-economic rights in Canada's legal system.¹⁰⁵ In Canada, the health rights discourse has focused amongst other things on the

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ I. Wakili 'Social Justice – How Far Has Nigeria Gone?' Opinion – 27 April 2008, *Daily Trust* (Abuja) [Online] <<http://allafrica.com/stories/printable/200804281079.html>> (Accessed on the 10 June 2008).

¹⁰⁵ See, B. Porter 'The Domestic Implementation of the ICESR: The Right to Effective Remedies, the Role of the Courts and the Place of the Claimants of ESC Rights' (Remarks for the Workshop of Judges and Lawyers, North East Asia – held in Ulaan Baatar, Magnolia 26 January 2004) [Accessed Online on the 10 June 2008]
<http://www.srap.ca/publications/porter_the_domestic_implementation_of_the_iescr.pdf>

patient's rights such as 'access to timely health care services'.¹⁰⁶ The Canadian public health care system has been criticised for having long waiting lists.¹⁰⁷

1.3.2. International and Regional Perspectives

In the international and regional arena, most rights are better understood by looking at the instruments such as the treaties, charters, conventions and declarations entered into between member states. All these instruments are significant as they form part of international human rights law. It is significant to note that there is no specific international instrument which is solely dedicated to the regulation of health rights. However, there is a plethora of international human rights instruments that recognise health rights. These instruments have been agreed to by the majority of the international community. Following general observations, I will turn to a brief overview of various international and African region instruments providing for health rights.

1.3.2.1. General Observations

Despite the divergence of opinion in the discourse about the universality of human rights, there is a growing support of the view that the right to health is a human right. The majority rectification of international instruments that

¹⁰⁶ C. Flood and T. Epps 'Can a Patients' Bill of Rights Address Concern about Waiting Lists?' (Draft Working Paper, Health Law Group, University of Toronto Faculty of Law, 09 October 2001) [Online] <<http://www.irpp.org/events.archive/oct01/flood.pdf>> (Accessed on the 12 July 2008).

¹⁰⁷ Ibid.

recognises the right to health shows that the member states have a common concern about the significance and protection of health rights.

It is significant to observe that despite the different proclamations and perceptions of the health rights in the instruments to be surveyed below, the meaning and content of the health right is equivalent if not entirely the same. However, it is still interesting to note how the various regional and international instruments have articulated and perceived the right to health.

1.3.2.2 International and Regional Instruments

The UN has reported that the 1946 Constitution of the World Health Organisation (WHO) was the first international document to clearly recognise health rights.¹⁰⁸ In the African region, the African Charter has been the champion in the recognition of the socio-economic right to health care services. The African Charter has also been of benefit to those countries whose Constitutions¹⁰⁹ do not provide for the enforcement of socio-economic rights in the courts of law.

In the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), health rights have been recognised as the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.¹¹⁰ Importantly, the ICESCR imposes certain obligations on the state's parties. In

¹⁰⁸ See, Mubangizi in fn. 89 *supra* at p. 1.

¹⁰⁹ For example, Nigerian and Namibian positions discussed in paragraphs 3.1.2 of this report.

¹¹⁰ See, Article 12(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 (United Nations General Assembly, proclaimed by Resolution 2200A XXI).

particular, Article 12(2) lists the steps to be taken by member states in order to ensure the 'full realization' of Article 12(1).¹¹¹ The UN regards the ICESCR as the 'central instrument of protection for the right to health'¹¹².

The evolution of international human rights law brought with it the recognition of health rights of specific groups of people in various regional¹¹³ and international¹¹⁴ instruments. The precepts of health rights contained in these instruments have been incorporated into various states' Constitutions. However, the developments in international human rights law have not yielded the anticipated results at national level. The people who are supposed to enjoy the rights contained in these instruments are still prejudiced by the lack of real access to health care services. The perception that socio-economic rights of access to health care services are directive principles of state policy and their full enjoyment is conditional upon the availability of states' resources, has made human rights in general look fictitious to the poor communities.

¹¹¹ Ibid.

¹¹² See, UN High Commissioner for Human Rights and WHO 'The Right to Health' in fn. 76 *supra*.

¹¹³ See, Article 6 of the 1975 Declaration on the Rights of Disabled Persons (United Nations General Assembly, proclaimed by Resolution 3447 XXX). See also, Patel E.M. and Watters C. 'Human Rights: Fundamental Instruments & Documents' at pp. 231-361.

¹¹⁴ See, Article 24 of the Convention on the Rights of the Child (United Nations General Assembly, adopted in 1989) and the European Convention for the Promotion of Human Rights and Fundamental Freedoms, 1950 (signed in Rome on 04 November 1950 in accordance with Article 66).

CHAPTER 2

LEGAL ABSURDITY AND INTERPRETATION

2.1. Introduction

In the preceding chapters, I have shown that socio-economic rights such as the right of access to health care services have both in international and domestic laws been recognised as justiciable rights. There have also been some notable and significant developments in countries whose Constitutions proclaimed socio-economic rights as unjusticiable directive principles of state policy. The judiciary of these countries has upheld the use of international law instruments in domestic matters relating to socio-economic rights. For example, the Nigerian courts of law have recognised the use of the African Charter on Human and People's Rights.¹¹⁵ The Nigerian Supreme Court of Appeal's findings in *Ogugu v. State*¹¹⁶ and *Fawehinmi v. Abacha*¹¹⁷ are landmark decisions in this regard.

Notwithstanding the developments in the jurisprudence of justiciability of socio-economic rights, the process of realisation of the socio-economic right of access to health care services is still rudimentary. It is argued in this part of the report that the judiciary is one of the actors who have contributed to the slow paced process of realisation of socio-economic rights. In particular, I will argue later that the judiciary's adjudication of socio-economic rights has been

¹¹⁵ See, H. Abdullah 'Economic, Social and Cultural Rights in Nigeria' fn. 99 *supra*.

¹¹⁶ (1994) 9 NWLR (Pt. 336) 20 quoted in Mubangizi fn. 89 *supra*.

¹¹⁷ (1996) 7 NWLR (Pt. 475) 710 quoted in Mubangizi fn. 89 *supra*.

absurd. The absurdity has been caused by the misguided and ambiguous interpretation of socio-economic rights contained in the Constitution. I will further argue that purposive interpretation of legal texts such as the Constitution must be adopted in the interpretation of socio economic rights.

The doctrine of purpose in interpreting constitutional health rights supports the underlying purpose of incorporating such rights into the Constitution. Consequently, I argue that the determination of the purpose of incorporating health rights into the Constitution must be a crucial aspect in the judiciary's process of adjudication of socio-economic rights.

2.2. Judiciary and the Right of Access to Health Care Services

The judiciary is, by virtue of the argument for justiciability of socio-economic rights, one of the main actors in the process of realisation of socio-economic rights. Now I will provide a summary of judicial perceptions of socio-economic right of access to health care services using case law.

2.2.1. Soobramoney v. Minister of Health, KwaZulu Natal¹¹⁸

In this matter, Soobramoney approached the Constitutional Court for an order directing the government to give effect to his Constitutional health rights.¹¹⁹

Soobramoney suffered, amongst other problems, from chronic kidney failure and required urgent dialysis treatment. He could no longer afford to pay for the dialysis treatment at a private health care facility. Soobramoney

¹¹⁸ Fn. 16 *supra*.

¹¹⁹ Section 27 fn. 9 *supra*.

approached a government (public) hospital for help. The public hospital had a limited number of dialysis machines and long waiting lists of patients in need of the same treatment. Consequently, the state's hospital could not provide him with access to dialysis treatment.

Soobramoney approached the courts of law and submitted that the government through its public hospital was constitutionally obliged to provide him with access to dialysis treatment. However, in the court papers, Soobramoney submitted that the dialysis treatment which he sought constituted an emergency medical treatment purported in Section 27(3) of the Constitution. He further argued that the state's hospital's refusal to provide access to such treatment constituted a violation of his Constitutional right to life.¹²⁰

The Constitutional Court held that it was satisfied with the government's case that it did not have available resources to realise Soobramoney's access to the dialysis treatment. The court held further that the state of Soobramoney's health did not constitute an emergency in terms of the Constitution.¹²¹ The court defined emergency as a 'sudden catastrophe' and noted that Soobramoney had sought access to an ongoing medical treatment aimed at prolonging his life.

¹²⁰ Section 11 fn. 9 *supra*.

¹²¹ Section 27(3) fn. 9 *supra*.

The court held that Soobramoney's case was more based on Sections 27(1) and 27(2) of the Constitution.¹²² However, as stated by the court, Soobramoney did not allege before it that the provincial health department's guidelines on access to dialysis machines were unreasonable.¹²³ Moellendorf notes this anomaly in his comment on the case.¹²⁴ In his view, Moellendorf submits that if the case before the Constitutional court was based on Section 27(1), 'a judgment about what counts as reasonable legislative measures and how available resources are to be measured would have been forced'¹²⁵. In the absence of such contention, the court held that it cannot find that the government was in breach of its obligations in terms of Section 27(1) and 27(2).

The court's decision in this matter did not contribute significantly to the understanding of rights to access health care services. In my view, the fact that Soobramoney did not allege adequately the breach of state duty provided for in Section 27(1), contributed to the court's misdirection highlighted in the following paragraphs of this report. Moellendorf appears to also have noticed the court's misdirection when he submitted that its decision on the matter went beyond what it was required to rule on and, even when it did so, its conduct 'signals a disturbing possibility for the basis of future decisions about socio-economic claims'¹²⁶.

¹²² *Soobramoney v. Minister of Health, KwaZulu Natal* fn.16 at para 22.

¹²³ *Idem* at para 25.

¹²⁴ D. Moellendorf 'Reasoning about resources: Soobramoney and the future of socio-economic rights claims' (1998) 14 *SAJHR* p. 327.

¹²⁵ *Idem* at p. 329.

¹²⁶ *Idem* at p. 327. Moellendorf further submits that Chaskalson P and Madala J's comments on Section 27(1) and 27(2) 'seem to foreshadow a downgrading of the status of socio-economic rights' at p. 329.

2.2.2 Van Biljon v. Minister of Correctional Services¹²⁷

In this matter the applicants, who were at the time prisoners serving court sentences at Pollsmoor Prison, challenged the Minister of Correctional Services and others¹²⁸ by invoking Section 35 of the Republic of South Africa Constitution¹²⁹. Notwithstanding the fact that Section 35 provides for rights of accused and detained persons, the applicants' cause of action was based on their health rights provided for in Section 35(2)(e). This section provides everyone who is detained or sentenced to prison with a right to adequate medical treatment at the government's expense.

The applicants were diagnosed Human Immunodeficiency Viral (HIV) positive. The court was called on to make certain declaratory orders¹³⁰ based on two questions.¹³¹ The first question before the court was whether the applicants were entitled to have anti-retroviral therapy prescribed for them and secondly, whether the government was obliged to pay for such a therapy?¹³² The respondents' contention to these questions was that what is sought by the applicants was more than what it provides to the outside HIV patients and cannot afford it.

Brand J held that he did 'not believe that the refusal to provide these prisoners with anti-viral medication is consistent with the principles of our common

¹²⁷ 1997 (4) SA 441.

¹²⁸ Commander of Pollsmoor Prison (as a third respondent) and Minister of Health and Welfare (Western Cape Province) as the fourth respondent.

¹²⁹ See, fn. 9 *supra*.

¹³⁰ *Van Biljon & Others v. Minister of Correctional Services & Others* fn. 127 *supra* at 444B-E.

¹³¹ *Idem* at 450C.

¹³² *Ibid.*

law'¹³³. With respect to the questions at issue, Brand J held that the treatment for HIV infected prisoners cannot be determined by what the government provides to outside HIV patients.¹³⁴ In support of this, Brand J reasoned that HIV infected prisoners are more vulnerable to opportunistic diseases than HIV patients outside.¹³⁵ With this, Brand J endorsed the applicants' contention that the 'State owes a higher duty of care to HIV positive prisoners than to citizens who suffer from the same infection, in general'¹³⁶.

With respect to the government's contention that it cannot afford the treatment sought by the applicants, Brand J concurred in principle with the applicants' submission that the 'lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment'¹³⁷. However, Brand J held that determination of what is adequate treatment for the applicants in this case involved an inquiry into what the government can afford.¹³⁸ Brand J held that, because the respondents had not made out a proper case that due to budgetary constraints they could not afford the medical treatment sought by the applicants, the court could not decide in their favour.¹³⁹ The court concluded that the respondents' failure to provide applicants with the medical treatment sought constituted an infringement of their constitutional right to access adequate medical treatment at government expense.¹⁴⁰

¹³³ Idem at 457A.

¹³⁴ Idem at 457F.

¹³⁵ Idem at 457E.

¹³⁶ Idem at 456C.

¹³⁷ Idem at 455C.

¹³⁸ Idem at 455D-F.

¹³⁹ Idem at 455E-F and 458C-I.

¹⁴⁰ Idem at 459A.

Notwithstanding the fact that the matter before Brand J dealt with prisoners' rights in terms of Section 35 of the Constitution, the court's decision raised three important aspects in relation to rights of access to health care services in general. The first significant aspect is that the court confirmed that prisoners are entitled to medical treatment at the government's expense.¹⁴¹ Secondly, the court held that the provision of such a treatment is subject to what the government can afford.¹⁴² Thirdly, even if the government can show that it cannot afford a particular treatment sought by a prisoner, 'the court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as sufficient or adequate medical treatment'¹⁴³.

The court's submission and decision on the rights of prisoners to access medical treatment at the government's expense has some elements of ambiguity. For example, Brand J acknowledges in principle that the lack of funds cannot be a conclusive answer to prisoners' constitutional claims to adequate medical treatment and, on the other side, he submits that what is adequate treatment is not determined '*in vacuo*' but by having regard to what the government can afford.¹⁴⁴ Van Oosten notes this by submitting that the court 'speaks with two tongues' in this regard.¹⁴⁵ He argues that the court's submission that regard must be given to government's budgetary constraints is a sudden reversal¹⁴⁶ of principle, which it supported, that lack of funds is not

¹⁴¹ Idem at 459B.

¹⁴² Idem at 455D.

¹⁴³ Idem at 455E-F.

¹⁴⁴ Ibid.

¹⁴⁵ F. van Oosten 'Financial resources and the patient's right to health care: Myth and Reality' (1999) 32 *De Jure* at p. 10.

¹⁴⁶ Van Oosten uses the word '*volte face*' instead of 'sudden reversal'.

a conclusive answer to prisoners' constitutional claims to adequate treatment at government's expense.¹⁴⁷

2.2.3 Minister of Health v. Treatment Action Campaign & Others¹⁴⁸

This matter related to a challenge of the government's programme aimed at preventing mother-to-child transmission of HIV through provision and administration of nevirapine drugs. It was contended that the programme was inconsistent with certain sections¹⁴⁹ of the Constitution. The ultimate question before the court was 'whether the applicants (TAC and Others) have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fell short of its obligations under the Constitution'.¹⁵⁰ This question, according to the court, involves an inquiry into the reasonableness of the programme.¹⁵¹

The court held that confining treatment to certain health care facilities was unreasonable¹⁵² and constituted a breach¹⁵³ of government's Constitutional duties enumerated in Section 27. In support of this decision, the court quoted with approval its previous decision wherein it held that the government's

¹⁴⁷ Idem fn. 145 *supra* at p.10

¹⁴⁸ See, fn. 68 *supra*.

¹⁴⁹ Sections 28 and 27. Section 28(1)(b) and (c) deals with children's rights, which are dealt with by the court at 749C-750B. This research report is delimited to Section 27 and I shall only focus on court's discussions and findings relating to this section.

¹⁵⁰ See, *Minister of Health v. Treatment Action Campaign* fn. 68 *supra* at 736H.

¹⁵¹ Idem at 754C.

¹⁵² Idem 754G.

¹⁵³ Idem 750D-E.

programme must be balanced and flexible taking into account the short, medium and long term needs of the entire society.¹⁵⁴

In coming to its conclusion above, the court also considered some jurisprudential findings of socio-economic rights in previous cases before it.¹⁵⁵

However, these findings were coupled with mistakes which were noted and criticised by legal commentators.¹⁵⁶ For example, the court has been criticised for failing to give content to the rights contained in Section 27(1) and its approach on reasonableness of the programme challenged by the TAC.¹⁵⁷

2.3. Legal Absurdity

The judicial and academic proclamation¹⁵⁸ that socio-economic rights are justiciable has contributed to the development of socio-economic rights jurisprudence. However, the juridical reasoning and findings have been to a certain extent legally absurd.

In this part of the research report, I argue that the legal absurdity is caused amongst other factors by the judiciary's failure to deal with the content of

¹⁵⁴ See, *Government of the Republic of South Africa & Others v. Grootboom & Others* fn. 18 *supra* at para 43 in *Minister of Health v. Treatment Action Campaign* fn. 68 *supra* at 748B-C.

¹⁵⁵ *Idem* at 736A-F.

¹⁵⁶ D. Bilchitz 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' fn. 67 *supra* at pp. 6-10.

¹⁵⁷ *Ibid.*

¹⁵⁸ See, *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* in fn. 46 *supra* and remarks of the Canadian Supreme Court of Appeal in *Schachter v. Canada* [1992] 2 S.C.R. 679 at 721 on the scope of rights. See also, B. Porter 'Social and Economic Rights and the Canadian Charter of Rights and Freedoms' at p.1 fn. 77 *supra*. Porter, submits that with respect to socio-economic rights the poor communities 'have the most legitimate claim for judicial intervention on their behalf'.

health rights in their interpretation and the internal limitation that the fulfilment of the right to access health care services is conditional upon availability of state resources. These factors, I argue, have made the right of access to health care services fictitious for those individuals who do not have money to access or belong to private health care schemes or funds.

2.3.1. Fictitious Rights

It has been submitted earlier in this research report that the purpose of rights is to defend welfare and give effect to human liberties.¹⁵⁹ The Constitution grants everyone the right of access to health care services. The government is vested with the Constitutional duty to realise this right. However, the government's duty to realise the right is subject to the availability of its resources. Literally, this means that the enjoyment of the right of access to health care services is subject to government having resources. Then, what happens when the government does not have resources to realise the right of access to health care services? It is my submission that the right of access to health care services becomes an empty claim.

In the legal arena, there is a growing divergence of opinion on who must incur the obligation when government does not have resources available. For example, some legal scholars are of the view that private entities must incur this obligation.¹⁶⁰ Others have argued against this view and submitted that

¹⁵⁹ See, N.D. MacCormick 'Rights in Legislation' fn. 59 *supra* and L. Wenar 'Nature of Rights' fn. 37 *supra*.

¹⁶⁰ M. Pieterse 'Indirect Horizontal Application of the Right to Access Health Care Services' fn. 20 *supra* at p. 158.

socio-economic rights are 'associated with a particular social democratic view ... that they should bind only the state'.¹⁶¹ Because private entities do not control the wealth and resources of the country, the transfer of government's obligation would place an unwarranted obligation on them.¹⁶²

2.3.2. Unreasonable Limitation

The South African Constitution provides that the rights contained in chapter two of the 'Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill'¹⁶³. In Section 36, the Constitution provides that 'the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all the relevant factors, including the -

- (a) nature of the right;
- (b) importance of the purpose of the limitation;
- (c) nature and extent of the limitation;
- (d) relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose'¹⁶⁴.

Elsewhere in the Constitution and as provided in Section 7(3), the limitation of constitutional rights is also contained in sections providing for socio-economic rights. In particular, socio-economic rights such as the right of access to

¹⁶¹ Ibid.

¹⁶² Pieterse fn. 20 *supra* submits that 'horizontal application of socio-economic rights would impose overly onerous duties on private entities'.

¹⁶³ Section 7(3) fn.9 *supra*.

¹⁶⁴ Republic of South Africa Constitution fn. 9 *supra*.

land¹⁶⁵, health care services¹⁶⁶ and housing have internal limitation clauses.¹⁶⁷

It is significant to note that these rights¹⁶⁸ are the only socio-economic rights in the South African Constitution which contain similar internal limitation provisions.¹⁶⁹ Interestingly, there are other sections in the Constitution providing for socio-economic rights which do not have internal limitation provisions. Environmental and educational rights are clear examples of these.¹⁷⁰

The government and the judiciary have so far not provided clarity or reasons as to why some of the socio-economic rights in the Constitution have internal limitations and others don't. In the light of the conventional wisdom in the rights discourse arena that rights are equal and interdependent¹⁷¹, it would be interesting to understand why some of the rights have internal limitations and others don't.

Albeit the legal and ethical problems, the two limitation provisions in one Constitution¹⁷² appear to be endorsed by the judiciary to some extent. For example, Mokgoro J and Ngcobo J in interpreting socio-economic rights to

¹⁶⁵ Section 25(5) fn. 9 *supra*.

¹⁶⁶ Section 27(2) fn. 9 *supra*.

¹⁶⁷ Section 26(2) fn. 9 *supra*.

¹⁶⁸ Sections 25, 26 and 27 of the Constitution of the Republic of South Africa Act 108 of 1996.

¹⁶⁹ See, C. Mbazira 'The Enforcement of Socio-Economic Rights in the African Human Rights System: Drawing Inspiration from the International Covenant on Economic, Social and Cultural Rights and South Africa's Evolving Jurisprudence' (2003) *Unpublished LLM Dissertation*, University of Pretoria. Mbazira describes the limitation provision as 'internal limitations'.

¹⁷⁰ *Idem* at p. 13.

¹⁷¹ M. Winston 'On the Indivisibility and Interdependence of Rights' fn. 1 *supra* and the UN General Assembly Secretary Note on the 'Vienna Declaration and Programme of Action' World Conference on Human Rights fn. 3 *supra*.

¹⁷² Internal limitation in Section 27(2) and general limitation clause in Section 36 of the Constitution fn. 9 *supra*.

access social security held in *Khosa & Others v. Minister of Social Development & Others*¹⁷³ that socio-economic rights with internal limitations are also subject to the general limitation clause.¹⁷⁴ However, the court in this and other matters has failed to explain the need for two limitation provisions in the Constitution.

Kevin Iles¹⁷⁵ and Ngcobo¹⁷⁶ J refer to this as 'methodological difficulty'. The 'methodological difficulty' is still unresolved.¹⁷⁷ The court, in *Khosa & Others v. Minister of Social Development & Others*, had distanced itself from dealing with and resolving the methodological difficulty raised by the two limitation provisions.¹⁷⁸ Mokgoro J held that it was not necessary for the court to decide on the issue.¹⁷⁹ This was an incorrect assumption in the light of Section 7(3) of the Constitution, which subjects all the rights to the limitation provisions contained in the Constitution.

Section 7(3) recognises Section 36 as one of the limitation clauses of the rights in the Constitution and, in my view, the court was selective in not dealing with it. The court's rationale for not applying the general limitation clause in socio-economic rights has not been fully justified. If the consequences of interpretation would still be the same as it was submitted by

¹⁷³ 2004(6) SA 505 at 549C-551A.

¹⁷⁴ *Idem* at 540C.

¹⁷⁵ See, K. Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 SAJHR at pp. 450-453 discussing *Khosa & Others v Minister of Social Development & Others* fn.173 *supra*.

¹⁷⁶ *Khosa & Others v Minister of Social Development & Others* fn. 173 *supra* at 549C-550E.

¹⁷⁷ K. Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' fn. 173 *supra* at p. 456.

¹⁷⁸ For example, Mokgoro J regarded the failure of the High Court to decide on the issue as enough justification to excuse herself to decide on the matter.

¹⁷⁹ *Khosa & Others v Minister of Social Development & Others* fn. 173 *supra* at 540E.

Ngcobo J¹⁸⁰, the purpose of having two limitations of rights in one Constitution remains unjustified.

The incorporation of internal limitation provision in certain sections of the Constitution, whilst excluding the same in other rights, is unreasonable and a clear manifestation of an apathetic government. The general limitation provision¹⁸¹ is an adequate limitation of rights contained in the Bill of Rights. The internal limitation provisions such as Section 27(2) render the Section 36 limitation clause useless.¹⁸² The Constitutional Court's position per Mokgoro J and Ngcobo J¹⁸³ creates an unnecessary and unreasonable duplication of limitation of rights. Such a position complicates the process of realisation of rights. Consequently, and in the absence of substantive justification or reasons, all rights contained in the Constitution must be limited only in accordance with the general limitation clause contained in Section 36.

2.4. Purposive Interpretation

The notion of finding a purpose in legal texts is not a foreign language in the law of interpretation. Countries such as Israel have successfully applied the doctrine of purposive interpretation in resolving legal dilemmas.¹⁸⁴ Purposive

¹⁸⁰ Idem at 549G.

¹⁸¹ Section 36 fn. 9 *supra*.

¹⁸² See, K. Iles 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' fn. 175 *supra* at p. 458. Iles submits that 's36 justification analysis ends up getting subsumed into the internal limitation clause'.

¹⁸³ Assumption that the two limitation provisions apply in the interpretation of socio-economic rights. For example, Mokgoro J held that Section 36 applies if the state fails to prove the reasonableness of its measures in terms of Sections 26 and 27. See, *Khosa & Others v Minister of Social Development & Others* fn. 173 *supra* at 540C-D.

¹⁸⁴ A. Barak 'Purposive Interpretation in Law' (*Introduction*) at xi and p. 371. See also, *Sobramoney v. Minister of Health, Kwa-Zulu Natal* fn. 16 *supra* at 1702. In this case the

interpretation has been used and applied in the interpretation of various legal texts such as wills, contracts and constitutions.¹⁸⁵ In this report, I am more concerned with the application of purposive interpretation in the interpretation of health rights contained in the Constitution.¹⁸⁶ Now, I turn to an overview of purposive interpretation.

2.4.1. Overview and Principles

Barak describes purposive interpretation as a 'legal concept' which encompasses a determination of aspects such as 'the goals, interests, and values that the text seeks to actualize'¹⁸⁷. The process of determination is divided into subjective and objective assessments of the aspects which the text seeks to actualize.¹⁸⁸

The subjective assessment focuses on the determination of intention of the author of the legal text.¹⁸⁹ Particularly, subjective assessment is concerned with what the author intended the purpose of the legal text to be¹⁹⁰. The objective assessment, according to Barak, focuses on the 'author's hypothetical intent' and not 'the actual intent'¹⁹¹. Barak submits that

former Constitutional Court President (Chaskalson P), approved the application of purposive interpretation in *S v. Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (4) BCLR 665 (CC) at para. 9.

¹⁸⁵ Ibid.

¹⁸⁶ See, fn. 9 *supra*.

¹⁸⁷ A. Barak fn. 184 *supra* at xiii. See also in Barak (pp. 85-96) a full discussion of the essence and terminology of the concept 'purposive interpretation'.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

hypothetical intent encompasses certain values such as 'social, morality, justice, public interest, modes of behaviour and human rights'¹⁹².

In this part of the research report, my aim is to determine the purpose of a Constitutional provision. Barak submits that the objective assessment is befitting for the determination of purpose of a Constitution.¹⁹³ Because of the history of the enactment of the South African Constitution, the view against the use of subjective assessment in determining the purpose of constitutional texts is supported in this report.¹⁹⁴

2.4.2. Purposive Interpretation of Section 27¹⁹⁵

As discussed above, in purposive interpretation the objective purpose of a legal text relates to the 'intent of the system' and subjective purpose relates to the 'author's intent'¹⁹⁶. What is the objective purpose of including Section 27 in the South African Constitution?

Barak submits that one of the primary aims of the Constitution is to 'establish the nation's fundamental values, covenants, and social viewpoints'.¹⁹⁷ In South Africa, the past and present social values played a crucial role in determining the inclusion of the right of access to health care services into the democratic

¹⁹² Idem at xiv.

¹⁹³ Idem at xv and p. 371. Barak argues that this is because of 'the nature and character of a constitution'.

¹⁹⁴ See, K. Greenawalt 'Are Mental States Relevant for Statutory and Constitutional Interpretation?' (2000) 85 *Cornell Law Review* 1609 in A. Barak fn. 184 *supra* at p. 375.

¹⁹⁵ Constitution of the Republic of South Africa fn. 9 *supra*.

¹⁹⁶ Barak fn. 184 *supra* at p. 371.

¹⁹⁷ Idem at p. 372.

Constitution. For example, in the past and during apartheid South Africa the majority of the people did not have the right of access to health care services.¹⁹⁸

Even today, post-apartheid, the majority of South Africans have unequal, or no access to health care services. The disparity between private and health care services is one of the few but many classic examples of this problem.¹⁹⁹ These factors, I submit, constitute the objective purpose of incorporating the right of access to health care services. The past and present objective goals, interest, values and functions of Section 27 are to eradicate the legacy of apartheid and provide everyone with equal access to health care services at the government's expense.

2.5 General Observation of socio-economic rights interpretation

The jurisprudential findings on the socio-economic rights matters, as submitted above in this chapter, have been criticised by legal commentators. The last paragraph of this chapter provides a survey of some of the judicial interpretations of socio-economic rights and criticism of such interpretations.

The courts have in several matters acknowledged that the government has an obligation to fulfil health rights, including those who are serving prison terms.²⁰⁰ The available literature and judicial findings suggest that the

¹⁹⁸ S. Liebenberg & K. Pillay 'Socio-Economic Rights in South Africa' fn. 7 *supra* at p. 18.

¹⁹⁹ See, J. Sarkin 'Health and Human Rights in Post-Apartheid South Africa' (1999) 89 *South African Medical Journal*.

²⁰⁰ *N & Others v. Government of Republic of South Africa & Others* (No.1) 2006 (6) SA 543(D)

interpretation of such obligation is premised on two stages. The first stage is the interpretation approach of the right invoked and the second stage is the test applied to determine compliance with the right.

With respect to the first stage, the courts have held that the socio-economic rights such as the right of access to housing and health care services are not 'self-standing rights' which are enforceable irrespective of the internal limitation.²⁰¹ In the *Minister of Health v. Treatment Action Campaign*, the court concluded that 'Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights... and the corresponding obligations on the State to respect, protect, promote and fulfil such rights'²⁰². This conclusion confirms the court's approach in previous cases dealing with socio-economic rights.²⁰³

The second stage focuses on an inquiry into the reasonableness of the measures or steps taken by the government to realise socio-economic rights. This stage is the most criticised stage of interpretation of socio-economic rights. For example, Bilchitz referring to the *Minister of Health v. Treatment Action Campaign* case submitted that the court focused on the second stage and failed to combine the two stages of interpretation.²⁰⁴ Particularly, Bilchitz criticises the courts for failing to provide the content of socio-economic rights. According to Bilchitz, the first stage of interpretation must provide an

²⁰¹ *Minister of Health v. Treatment Action Campaign* fn. 68 *supra* at 740H.

²⁰² *Ibid.*

²⁰³ See, *Soobramoney v. Minister of Health, KwaZulu Natal* fn. 16 *supra* at para 11 and *Grootboom v. Oostenberg Municipality & Others* fn.18 *supra* at para 34.

²⁰⁴ See, fn. 67 *supra* at pp. 9-10. Bilchitz submits that 'it is necessary to have prior understanding of the general obligations government is under by virtue of having to realise the rights in question'.

understanding of the content of the right.²⁰⁵ On the second stage, the legal commentator submits that the determination of reasonableness requires specification of standards that should be met, so that the society can appraise the government measures or steps to realise the right.²⁰⁶

The courts have so far failed to recognise the problems and consequences of its reasonableness test in socio-economic rights interpretation. The decision of the court in the case of *Van Biljon & Others v. Minister of Correctional Services & Others*²⁰⁷ is an example. The impression created by the courts is that once the government has shown it has no available resources because of budgetary constraints, there is no obligation on it to realise the rights of access to health care. This assumption, as argued in paragraphs 2.3.1 and 2.3.2 of this chapter, makes the constitutional rights fictitious and unworthy to claim. The court needs to go beyond the investigation of financial affordability and reasonable measures taken by the government to realise socio-economic rights. This view is supported by legal commentators.

Marius Pieterse submits that 'courts should not simply accept assertions of resource-scarcity... without enquiring into the accuracy thereof'²⁰⁸. The court's investigation must also include an analysis of the government's conduct in progressive realisation of the right. In this regard, Pieterse argues that the court must analyse the adequacy of government's resources to realise the rights, assess the process of allocation of resources and direct the

²⁰⁵ Ibid.

²⁰⁶ Idem at p.10.

²⁰⁷ See, fn. 127 *supra*.

²⁰⁸ M. Pieterse 'Health Care Rights, Resources and Rationing' (2007) 124 SALJ at p. 528.

government to correct any misappropriation or misspending of resources.²⁰⁹

This argument is supported in this research report.

²⁰⁹ Ibid.

CHAPTER 3

ETHICAL DILEMMA OF UNCERTAIN LANGUAGE

3.1. Introduction

The evolving human rights jurisprudence recognises a positive obligation on the government to take positive measures to realise the needs of its people.²¹⁰ Porter argues that the human rights jurisprudence also confers a positive obligation on the government to refrain from interfering with the enjoyment of human rights.²¹¹

In this chapter, I focus on the ethical dilemmas created by the uncertain language used in Section 27.²¹² In the foregoing parts of the report, I have argued that the use of the words 'within its available resources' in the Constitution of a country that is faced with the challenges of eradicating legacies of the past, is problematic. In this part of the report, I argue that the language used in the Constitution²¹³ raises an ethical dilemma on the role that should be played by the three arms of government²¹⁴ in a democratic country such as South Africa.

²¹⁰ B. Porter 'Social and Economic Rights and the Canadian Charter of Rights and Freedoms' at p. 2 fn. 77 *supra*.

²¹¹ *Ibid*.

²¹² See, fn. 9 *supra*.

²¹³ *Idem* at Section 27(2).

²¹⁴ The judiciary, executive and legislature based on principle of 'Separation of Powers'. This principle is based on the assumption that the activities of the three arms are separate from each other.

The ethical dilemma is premised on two subject-matters of debate. These are the doctrine of public trust and the articulation of unreasonable qualification contained in Section 27.²¹⁵ At the centre of these subject-matters, there is an ethical debate about the rationing of health resources. The encouragement of augmentation of participative democracy and efficient rationing of health resources are regarded as proper mechanisms that can be used to resolve the ethical dilemmas created by the internal limitations and language used in the Constitution.²¹⁶

3.2. Doctrine of Public Trust

The doctrine of trust is well founded in common law of trust and has been applied primarily in areas such as natural resources, property and land law. In South Africa, it has been proclaimed by legislation that the government is the trustee of the environment and all natural resources.²¹⁷ As the trustee of the environment and natural resources, the government has fiduciary responsibility to protect and preserve the resources for the present and future generations.

The central question which I seek to answer in this part of the report is whether the doctrine of trust, which is founded and well-known in the law of trust, can be used or applied in the health rights discourse. In providing the

²¹⁵ Section 27(2).

²¹⁶ Ibid.

²¹⁷ See, Section 28(5)(e) of National Environmental Management Act 107 of 1998 and Section 3(1) of the National Water Act 36 of 1998. See also, PWG. Henderson 'Some Thoughts on Distinctive Principles of South African Law' (2001) 8 *SAJELP* at pp. 171-173.

answer, this report creates an analogy by suggesting who can be deemed as the trustee of the citizens' rights of access to health care services²¹⁸.

In determining who can be the trustee of health rights, it is significant to first understand that there are various kinds of trust. For example, the law of trust recognises, amongst others, a private and public trust. In this report, the public trust is used as an analogy. A public trust is, by creation, a charitable trust that is aimed at improving access and use of nation's resources. Richman²¹⁹ argues that the government's control of wealth and resources of the country makes it the trustee of public health. As the trustee of public health, it is my submission that the government has an ethical and fiduciary obligation to fulfil and protect public health.

Common law imposes certain obligations on the trustees. For example, the trustees are obliged to manage the trust and distribute the resources of the trust equitably to all the trust beneficiaries.²²⁰ In the context of health rights, it is my submission that the government is the trustee of the health of its citizens and has a fiduciary duty to distribute its health care budget equitably. If the budget has been distributed equitably, the unreasonable *suspensive condition or qualification* that the government would provide access to health care services within its available resources will have no place in the South African Constitution (my emphasis). Now, I turn to the articulation of the unreasonable suspensive condition or qualification contained in the Constitution.

²¹⁸ The report does not however recommend or suggest that the substantive principles of a trust apply or a particular trust should be established in order to realise the rights of access to health care services.

²¹⁹ S. Richman 'Wrong Rights' fn. 25 *supra*.

²²⁰ *Ibid*.

3.3. Unreasonable Qualification

The South African Constitution provides that the government will provide access to health care services within its available resources. The government's duty to provide is subject to the qualification or suspensive condition that the government has resources available to realise it. Without available state resources, the right of access to health care services of many South Africans becomes an empty claim. Consequently, the qualification is subjective and unreasonable.

Section 27 imposes an additional limitation of rights provided in the Constitution. The additional limitation provision is unjustifiable in a society that is in a transition from a period where access to health care services was for the most part limited to a certain reach and class of the country's population. The additional limitation provision is in repugnance with the government's Constitutional obligation to promote, protect and fulfil the rights contained in the Bill of Rights.²²¹

It is a trite law that in a democratic country such as South Africa, rights ought to have some level of limitation. The limitation has to be reasonable and justifiable in an open democratic society. The general limitation clause²²² in the Constitution serves that purpose. There is no reasonable and justifiable need or explanation to have two limitation clauses of rights in a single document of rights. An additional limitation clause of rights opens doors for

²²¹ Section 7(2) fn. 9 *supra*.

²²² *Idem* at Section 36.

those who are responsible for its realization to escape accountability and responsibility. The courts are to be blamed for opening such doors. In fact, the courts have opened the doors wider when they pronounced that an additional limitation will apply when the government fails to prove reasonableness of its measures in terms of Sections 27 and 26 of the Constitution.²²³

The approach of the courts in dealing with socio-economic rights such as the right to access health care services needs to change to, or be supplemented by, an ethics approach. Particularly, the courts need to take into account the ethics of rationing health care resources. Cookson and Dolan submit that focus must be on 'who should get what health care and when, rather than principles of procedural justice about what decision making process should be followed'²²⁴. The courts have focused too much on the decision making process to be followed.

Cookson and Dole support a three-fold approach of rationing health care resources ethically.²²⁵ The first approach involves the process of determining the needs and the second focuses on the maximising of health benefits.²²⁶ The third approach, normally referred to as egalitarian principle, focuses on the equal distribution of health care benefits.²²⁷

²²³ See, *Khosa & Others v Minister of Social Development & Others* fn. 171 *supra* at 540C-D.

²²⁴ R. Cookson and P. Dolan 'Principles of Justice in Health Care Rationing' (2000) *J. Med. Ethics* at p.323.

²²⁵ *Ibid.* Cookson and Dole describe these as 'substantive principles of rationing'.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

As discussed earlier in this report, the control exercised by the government over wealth and resources of the country limits the individual's autonomy.²²⁸ The control becomes unethical when the government fails to use the wealth and resources to realise access to health care services. Governments of various countries have chosen to dedicate most of their financial budgets to secondary issues such as defence.²²⁹ Primary issues such as increasing access to health care services are not being prioritized. In the South African context, the arms deal fiasco is one of the few but crucial examples of this problem. South Africa was not threatened with war; however the government spent billions of rand on ammunition. It was estimated that 43 billion was spent to purchase ammunition from various European countries.²³⁰

The money that is spent on secondary issues such as the purchase of ammunition must be dedicated to increasing health care resources such as human resources in hospitals and purchasing of dialysis machines.²³¹ In this regard, Pieterse submits that the interpretation of health resources must be 'extended beyond individual budget line items to encompass the totality of resources available to the state and to include not only financial resources'.²³² Such an interpretation will ensure to a certain extent that the government is held accountable for its health budgeting decisions.

²²⁸ See, S. Fredman 'Human Rights Transformed: Positive Duties and Positive Rights' fn. 30 *supra*.

²²⁹ See, F. Van Oosten 'Financial Resources and the Patient's Right to Health Care: Myth and Reality' fn. 145 *supra* p. 17.

²³⁰ Fin24 'Erwin Defends Arms Deal' (19 July 2001) [Online] <http://www.fin24.com/articles/default/display_article.aspx?Nav=ns&ArticleID=1518-25_1041115> (Accessed on the 04 August 2008).

²³¹ See, M. Pieterse 'Health Care Rights, Resources and Rationing' fn. 208 *supra* at pp. 523-524.

²³² *Ibid*.

The ethical dilemmas are exacerbated by the lack of effective public participation in the preparation and allocation of financial budgets. Participative democracy requires the public to be involved in decisions that affect them.

3.4. Participative Democracy

The concept of participative democracy is not an entirely new concept in democratic countries. The concept refers to the public's involvement and participation in public affairs decision making processes. In this part of the report, I argue that participative democracy in the government's budgeting and decision making process must be encouraged.

In some parts of Germany, participative democracy in the government budgeting process has been encouraged.²³³ For example, Trunschke has identified Emsdetten and Westfalen amongst the German cities that have progressively used participative democracy in their financial budget processes.²³⁴ Participative democracy in the budget process is significant for the citizens in order to ensure equitable and proper distribution of wealth of the country.

In South Africa, unspent budgets and inadequate financial planning has contributed to the predicament of accessing health care services. This issue,

²³³ A. Trunschke 'Participative Democracy and Participative Budget in Germany' [Online] <<http://www.brangsch.de/partizipation/datelem/trunschkemumbaie.pdf>> (Accessed on the 01 October 2008).

²³⁴ Ibid.

normally referred to as 'health care underfunding', is a global problem.²³⁵ Maynard submits that political representatives are shy to confront the problem of health care underfunding.²³⁶ For example, the Eastern Cape Province is one of the country's provinces that has a record of appalling standards of health care service and in 2007 its political administrators failed to spend 12% of their provincial health budget.²³⁷

The encouragement of participative democracy in financial decision making can minimize the problems associated with the provision of access to health care services. This view has been supported by commentators in the field of medical ethics.²³⁸ For example, Maynard has submitted that 'individuals, groups and government' must participate in the health care budget decision making and manage the process of allocation of health care resources.²³⁹ In support of this submission, Maynard argues that 'until the principles of resource allocation are made explicit, agreed by social consensus and applied, health care delivery will exhibit variation in practice and outcome'²⁴⁰.

²³⁵ A. Maynard 'Ethics and Health Care Underfunding' (2001) *J. Med. Ethics* at p. 223.

²³⁶ *Ibid.*

²³⁷ See, Z. Vavi 'Challenges for a poor province like Eastern Cape Post Polokwane - a workers' perspectives' Address to Eastern Cape Socio-Economic Consultative Council on the 26 March 2008 [Online] <http://www.ecsecc.org/press_releases/9/> (Accessed on the 04 October 2008).

²³⁸ See, K.C. Calman 'The Ethics of Allocation of Scarce Health Care Resources: A view from the centre' (1994) *J. Med. Ethics* 20 at p. 74.

²³⁹ 'Ethics and Health Care Underfunding' fn. 231 *supra* at p. 235.

²⁴⁰ *Idem* at p. 226.

CHAPTER 4

SUMMARY AND CONCLUDING REMARKS

4.1. Summary of Issues

The central discourse of this paper has been on the perception of the right of access to health care services in South Africa. In particular, I focused on the critical analysis of interpretation of the right of access to health care services.

In the introduction chapter, my aim was to introduce the reader to the main subject-matter of the discourses. In that chapter, I provided a brief introduction of issues debated in subsequent parts of the paper and also crystallised the problem study of the paper. In chapter one, I articulated the discourse relating to the nature, content and meaning of rights. In particular, chapter one focused on the socio-economic right of access to health care services discourse. Chapters two and three of this report were dedicated to the central discourse of the paper. Chapter two identified the legal problem of Section 27 and Chapter three articulated the ethical dilemmas caused by the internal limitation clause and use of language in Section 27.

4.2. Concluding Remarks

In the premise of the discussions and literature reviewed in the above, I conclude this research report with the following remarks:

4.2.1. Rights Discourse

In the rights discourse, the purpose of rights is an essential element. The purpose determines the nature, content and meaning of rights. There is a purpose for creating and recognising socio-economic rights. In the South African context, socio-economic rights were introduced to address the past imbalances that left the majority of the society poor.²⁴¹ Consequently, in the South African context the purpose of introducing socio-economic rights was to provide certain benefits to those who were prejudiced by the apartheid government.²⁴² Sarkin submits that the socio-economic right of access to health care services was incorporated into the South African Constitution²⁴³ as a 'constitutional norm'²⁴⁴.

Notwithstanding the constitutional and international law recognition of health rights, the struggle for equal and real access to health care services continues. For example, Sarkin has noted that 'South Africa still faces serious health problems'²⁴⁵. Amongst these problems, Sarkin has noted that 'the discrepancy between private and public health care continues to reflect the legacy of apartheid'²⁴⁶.

²⁴¹ J. Sarkin fn. 199 *supra*. Sarkin submits that during apartheid South Africa, human rights conditions were 'appalling' and distribution of health care services was unequal.

²⁴² *Ibid.*

²⁴³ Section 27 fn. 9 *supra*.

²⁴⁴ J. Sarkin fn. 199 *supra*.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

In the new democratic South Africa, the government is by law obliged to realise the rights provided in the Constitution.²⁴⁷ As the trustee of the wealth and resources of the South African community, the government is constitutionally obliged to ensure that it has resources available to realise the Constitutional right of access to health care services. Inadequate budgeting does not relieve the government from its obligation to provide the poor with access to essential services such as health care services.

4.2.2. Constitutional Absurdity

Section 27(2) has opened a backdoor (Pandora's box) for the government to escape its Constitutional obligation²⁴⁸ to provide everyone with access to health care services. The qualification²⁴⁹ that the government will provide access to health care services within its available resources is absurd. For South Africans, the unavailability of state resources means no right of access to health care services. The courts have also impliedly accepted that the government is only obliged to realise health rights within its available resources.²⁵⁰ Sarkin argues that rights such as the socio-economic right of access to health care services '...have little significance in practice, since the resource prioritisation necessary to give them effect...depends solely on the

²⁴⁷ See, Section 7(2) fn. 9 *supra*.

²⁴⁸ Section 27 fn. 9 *supra*.

²⁴⁹ See, Section 27(2) fn. 9 *supra*.

²⁵⁰ See, *Van Biljon and Others v. Minister of Correctional Services & Others* fn.127 *supra*. See also, M. Pieterse 'The Potential of Socio-economic Rights Litigation for Achievement of Social Justice: Considering the Example of Access of Medical Care in SA Prisons' (2006) 50 *Journal of African Law* at pp. 118-131 and the African Christian Democratic Party (ACDP) 'No Special Treatment for Prisoners/Offenders' Human Rights Research and Advocacy Project (20 June 2003). [Online] <<http://www.acdp.org.za/oldpress/Prisoners20June03.htm>> (Accessed on the 14 March 2008). In this speech the ACDP criticised the judgment of the court.

government'²⁵¹. In this report, it has been argued that the process of prioritisation and realisation of socio-economic rights, such as the right to access health care services, need to be made explicit.

The qualification that the provision of health resources is dependent solely on the availability of state resources is extremely subjective, unreasonable and unjustifiable in societies that are faced with high mortality rates from diseases such as HIV-AIDS. In this report, I argue and recommend that Section 27(2) of the Constitution must be amended to reflect the purports of incorporating socio-economic right of access to health care services into the Constitution. The government's obligation to realise the right of access to health care services must not be conditional upon availability of its resources. Section 27(2) must be amended to include a positive obligation on the government to ensure that it has resources available for the realisation of health rights.

Section 36, which has become known as a general limitation clause of the rights contained in the Bill of Rights, is an adequate instrument for limitation of constitutional rights such as the right to access health care services. The qualification that the state will realise the right of access to health care services within its available resources, constitutes an additional limitation of rights. There is no reasonable and justifiable conclusion for having two limitations of rights in the same Constitution. Section 36 of the Constitution provides an adequate limitation of the rights contained in the Constitution. If

²⁵¹ J. Sarkin fn. 199 *supra*.

all rights are deemed equal and interdependent, they should in principle be subjected to the same limitation clause.

4.2.3. Role of Judiciary

In the enforcement and realisation of socio-economic rights the courts have held in various matters that they would 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'.²⁵² Sarkin has described the court's role in this regard as a 'hands-off role'.²⁵³ The court's position in this regard is an indication of a court shying away from its responsibility to protect the rights of society. Sarkin argues that the court's position is 'highly problematic, because a dynamic and robust court is necessary in finding a balance in a country undergoing transition'.²⁵⁴

The judiciary has an obligation to protect the interests of society through proper interpretation of rights contained in various statutes such as the Constitution. Purposive interpretation is one of the legal mechanisms that the judiciary can use to protect the interests of the society. The purpose of creating and incorporating the right of access to health care services must be a crucial factor in the adjudication process.

²⁵² See, *Soobramoney v. Minister of Health, Kwa-Zulu Natal* fn. 16 *supra*. Sachs J held that 'I can find no reason to interfere with the allocation undertaken by those better equipped than I to deal with the agonising choices that had to be made' at p. 1714.

²⁵³ Sarkin J. fn. 199 *supra*.

²⁵⁴ *Ibid*.

The highest court in South Africa has acknowledged the use of purposive interpretation in South African law.²⁵⁵ However, it is unclear how much weight the courts attach to it in their interpretation of legal texts such as the Constitution.

In this research report, judicial activism²⁵⁶ is recommended as a role that should be assumed by the courts in giving effect to health rights. The concept of judicial activism as noted by Chima²⁵⁷ is complex and various scholars have not reached consensus on its use. In this paper I have understood judicial activism to mean 'judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions in the legislative and executive matters'.²⁵⁸

Applying judicial activism in the South African context, it is recommended that the courts must deviate from strict adherence to the language used in Section 27(2) and direct the government to ensure through its budgeting processes the availability of resources to realise health rights contained in the Constitution.

²⁵⁵ *S v. Makwanyane and Another* fn. 184 *supra* and *Soobramoney v. Minister of Health, KwaZulu-Natal* in fn. 16 *supra*.

²⁵⁶ See, DA. Chima 'Judicial Activism in South Africa's Constitutional Court: Minority Protection or Judicial Illegitimacy?' (2007) *Unpublished LLM Dissertation* (University of Pretoria).

²⁵⁷ *Idem* at pp. 5-17.

²⁵⁸ Black's Law Dictionary (1999), 7th Edition; cited by DA. Chima (fn. 256 *supra* at p. 6).

The court's interference with the principle of separation of powers is justified by the purpose of interference. In this regard, the purpose of the court's interference would be the protection of a fundamental human right. This position has been well summarised by legal scholars. For example, Barak submits that the role of the 'judiciary should express the role of the judge in a democratic regime'.²⁵⁹ This role according to Barak 'includes bridging the gap between law and society's changing reality and protecting the democratic constitution'.²⁶⁰

4.2.4. Government's Obligations

The Constitution imposes an obligation on the government to respect, protect, promote and fulfil the rights in the Bill of Rights.²⁶¹ In relation to health rights in the Bill of Rights, the government has an obligation to 'take reasonable legislative and other measures, with its available resources, to achieve progressive realisation of each of these rights'.²⁶² The legislative arm of government has over the past decade enacted several health legislations to realise the right.²⁶³ Other measures that have been taken so far have been the development of policies, programmes and projects to realise the right of access to health care services.²⁶⁴

²⁵⁹ A. Barak fn. 184 *supra* at xvi.

²⁶⁰ *Ibid.*

²⁶¹ Section 7(2) fn. 9 *supra*.

²⁶² Section 27(2). This has been confirmed by the judiciary in various cases before it. The TAC judgment discussed in paragraph 2.2.3 of this research report is one of these.

²⁶³ See, Chapter 4 'Right to Health Care' in South African Human Rights Commission (SAHRC) 'Economic and Social Rights' 4th Report (2000-2002) at pp. 103-106 [Online] <http://www.sahrc.org.za/old_website/4th_esr_chap_4.pdf> (Accessed on the 26 August 2008).

²⁶⁴ *Idem* at pp. 97-102.

The measures which have been taken so far by the government have proved ineffective.²⁶⁵ The incorporation and use of the words 'reasonable and within its available resources' has made the constitutional obligations of the government fictitious. The concern of the majority of South Africans who are unemployed and depend largely on the public health care system is who will provide them with access to health care services when the government does not have resources? If the government does not have resources, it simply means that the majority of South Africans do not have the right to access health care.

In this research report, I have used an analogy in arguing that the government is the trustee of the wealth and resources of the country. The wealth and resources are kept in trust by the government and for the benefit of everyone in the country ('the public'). If this analogy is accepted, the government needs to be held legally and ethically responsible to appropriately manage the assets held by it in public trust. Proper management of the trust, which the analogy is based on, encompasses two significant processes. Firstly, the government needs to make the budgeting process explicit. Secondly, the government needs to ensure it budgets adequately for the needs of the trust and its beneficiaries. The success of the latter process is dependent on the government's budget for 'human, organizational and technological resources'²⁶⁶ needed to realise health rights.

²⁶⁵ For example, J. Sarkin (fn. 199 *supra*) submits that 'although great strides were made during this period in terms of legislating a more accessible and affordable health care system, many laws have not been translated into practice.

²⁶⁶ M. Pieterse 'Health Care Rights, Resources and Rationing' fn.208 *supra* at pp. 523-524.

In general, access to health care services is one of the essential needs of the population. Consequently, the government as the trustee of public wealth and resources should be constitutionally obliged, without qualification, to provide access to health care services *within availability of resources* (my emphasis). The qualification has become a vehicle of government's excuse to provide access to health care services.

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8. Appendices

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