

Basic rights claims

How responsive is 'reasonableness review'?

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If life on earth was such that people could easily provide for their needs and develop and protect their capacities, perhaps disputes about how to live and how to organise society could emphasise the heights to be attained and ignore the depths of misery to be avoided, but in our world, minimal standards are indispensable. (James W. Nickel, 1987.)

South Africa's 1996 Constitution (the Constitution) is widely renowned for its holistic, inclusive Bill of Rights. A particular innovation is its inclusion of a wide range of fully justiciable socio-economic rights. There is now a burgeoning body of jurisprudence from the Constitutional Court (the Court) interpreting these rights. There can be little doubt that South African jurisprudence has given a significant boost to international endeavours to protect socio-economic rights.

Through its jurisprudence, the Court has to achieve a critical balance between effectively protecting the socio-economic rights of the poor, while also respecting the roles of the legislature and executive as the primary branches of government responsible for realising socio-economic rights.

In its most recent decision of *Jaftha v Schoeman and Others* CCT 74/03, 8 October 2004 (*Jaftha*), the Court gave effect to its earlier indications that it would strongly protect people against negative invasions of socio-economic rights. In *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom*), the Court held that the first subsection of section 26 (and by implication, section 27) imposed "at

the very least, a negative obligation...upon the State and all other entities and persons to desist from preventing or impairing the right of access to housing" (at para. 34). Section 26(1) enshrines the right of access to adequate housing and section 27(1) entrenches the rights of access to health care services, sufficient food and water, and social security.

Jaftha concerned the constitutionality of provisions of the Magistrates' Courts Act, which permitted the sale in execution of people's homes in order to satisfy (sometimes trifling) debts. The Court accepted the appellants' arguments that measures that permit a person to be deprived of existing access to housing constitute a negative violation of the right of access to housing. This negative violation is not subject to the qualifications of "reasonable measures", "progressive realisation" and the availability of resources in section 26(2). Instead any justification offered by the State for the violation falls to be determined in terms of the general limitations clause (section 36).

The Court did not find it necessary to delineate all the circumstances in which a measure will constitute a violation of the negative obligations inherent in socio-economic rights. One can anticipate that given the strong protection accorded to them, the scope of these negative duties will be an area of contestation in future litigation.

However, it is in the area of the positive duties imposed on the State by the socio-economic rights provisions that the Court is con-

fronted most starkly with the dilemma of how far it should go in reviewing the policy, legislative and budgetary choices of the legislature and executive. The landmark cases that established the foundations of the Court's jurisprudence on the positive duties imposed by the socio-economic rights provisions are *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (*Soobramoney*), *Grootboom*, and *Treatment Action Campaign and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) (*TAC*).

The model of reasonableness review

The Court has rejected the notion that the socio-economic rights provisions in the Constitution impose a direct, unqualified duty on the State to provide social goods and services on demand. It has done this in the

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context of arguments raised by the *amici curiae* ('friends of the court') interventions in *Grootboom* and *TAC*. The *amici* sought to persuade the Court to adopt the notion of "minimum core obligations" developed by the

UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 3 (GC3, The nature of State parties' obligations, article 2(1) of the International Covenant on Economic, Social and Cultural Rights, para. 10). In *TAC*, the Court rejected an interpretation of socio-economic rights that would "give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2)" of the Constitution (para. 39).

The Court voiced a number of concerns regarding the concept of minimum core obligations. These included practical issues concerning the definition of the rights in the context of varying social needs (*Grootboom*, paras. 32-33), the impossibility (according to the Court) of giving everyone access even to a "core" service immediately (*TAC*, para. 35), and its incompatibility with the institutional competencies and role of the courts (*TAC*, paras. 37-38). However, the Court did indicate that evidence in a particular case might show that there is a minimum core of a particular service that should be taken into account in determining whether the measures adopted by the State are reasonable (*Grootboom*, para. 33 and *TAC*, para. 34).

The Court has instead adopted a model of reasonableness review for dealing with the positive duties imposed by the socio-economic rights provisions. The central question that the Court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question. In the words of the Court:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of

reasonableness. Once it is shown that the measures do so, this requirement is met. (Grootboom, para. 41.)

The assessment of the reasonableness of government's programmes is influenced by two factors. First, the internal limitations of section 26(2) require that the rights may be "progressively realised" (Grootboom, para. 45), and that the availability of resources is "an important factor in determining what is reasonable" (para. 46). Second, reasonableness is judged in the light of the social, economic and historical context, and consideration is given to the capacity of institutions responsible for implementing the programme (Soobramoney, para. 16 and Grootboom, para. 43).

The standard of scrutiny employed by the Court is more substantive than simply enquiring whether the policy was rationally conceived and applied in good faith. Thus, in the *Grootboom* and the *TAC* cases, the Court set the following standards for a reasonable government programme to realise socio-economic rights:

- the programme must be comprehensive, coherent, co-ordinated (Grootboom, para. 39-40);
- it must be balanced and flexible and make appropriate provision for short-, medium- and long-term needs (para. 43);
- it must be reasonably conceived and implemented (para. 40-43); and
- it must be transparent, and its contents must be made known effectively to the public (*TAC*, para. 123)

However, the element of the reasonableness test that comes

close to a threshold requirement is that the programme in question must cater for those in urgent need:

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. (Grootboom, para. 44.)

This requirement of the reasonableness test is justified particularly in terms of the value of human dignity (Grootboom, para. 83).

In *Grootboom*, the otherwise rational, comprehensive housing programme was faulted for its failure "to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations" (para. 99). In *TAC*, the Court held that the failure to extend the provision of the anti-retroviral drug, Nevirapine (described as "a simple, cheap and potentially lifesaving medical intervention") to prevent mother-to-child transmission of HIV throughout public health care

facilities in South Africa, was unreasonable, and hence a breach of the right of access to health care services in the Constitution (paras. 73 and 135).

Evaluating 'reasonableness review'?

The model of reasonableness review gives the Court a flexible and context-sensitive tool in relation to socio-economic rights claims. On the one hand, it allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. On the other hand, it subjects government's choices to the requirements of rationality, inclusiveness and particularly the threshold requirement that all programmes must provide reasonable measures of relief for those whose circumstances are urgent and intolerable. Government has the latitude to demonstrate that the measures it has adopted are reasonable in the light of its resource and capacity constraints and the overall claims on its resources. The Court has made it clear that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not "in themselves directed at rearranging budgets" (*TAC*, para. 38).

The important point is that government will have to justify its policy choices when they impact detrimentally on people's access to socio-economic rights, and these justifications will be scrutinised by the Court. This promotes, to borrow Etienne Mureinik's words, "a culture of justification".

But does the Court's jurisprudence do enough to protect vulnerable groups who face an absolute deprivation of minimum

essential levels of basic socio-economic goods and services? This category of claimants is in danger of suffering irreparable harm to their lives, health and sense of human dignity if they do not receive urgent assistance. In addition, if their urgent needs are not met, there is no foundation for the progressive improvement in their living standards. For example, once the harms of malnutrition and a deprivation of adequate early childhood education have been suffered, progressive improvements in the provision of these services cannot undo the damage to those affected.

It is useful in this regard to distinguish between the two interests protected by socio-economic rights identified by David Bilchitz. The first is the more basic interest in survival and non-impaired functioning. The second is a more extensive interest (which includes the minimal one) in “being able to live well” (D Bilchitz, *Giving socio-economic rights teeth: The minimum core and its importance*, (2002) 118 *South African Law Journal* at 484 at 490). The latter interest extends beyond mere survival and meeting of basic needs. This distinction allows us to recognise that there are differences between the two interests, “and that the minimal interest has an urgency and must be prioritised in a way that the maximal interest does not” (at 491).

The Court’s model of reasonableness review has been criticised for not catering adequately to this group of claimants. Thus, for example, the Court has indicated that not everyone who is deprived of basic services will have an entitlement to claim immediate relief from the State (*Grootboom*, paras. 69 and 95; and *TAC*, paras. 39 and 125).

Making ‘reasonableness review’ more robust

The Court’s review standard could be strengthened to offer greater protection to those claimants who lack access to a basic level of social services. First, vulnerable litigants seeking access to basic socio-economic services would benefit from having the burden of proving the reasonableness of government’s programmes placed on the State. Thus, in situations where a vulnerable group is excluded from accessing a basic social service, the duty would be on the State to justify why the exclusion is reasonable in the circumstances.

In terms of practical litigation, individual litigants currently bear a difficult burden of proof to illustrate that government programmes are unreasonable. They are required to review the whole panoply of government programmes and assess their reasonableness in the light of the resources available to the State and the latitude of progressive realisation that it enjoys. The alternative proposed above would give individuals the benefit of a presumption of unreasonableness in circumstances where they cannot gain access to basic survival needs.

Second, requiring a compelling government purpose for failing to ensure that all have access to basic needs could strengthen the review standard. Government should be required to show that its resources are “demonstrably inadequate” (*GC3*, para. 11) for meeting basic needs in the light of other compelling government

purposes. This would require placing both evidence and arguments before the Court regarding why its budgetary resources are inadequate to ensure a basic level of social provisioning to all. The Court would be required to scrutinise the evidence and arguments closely with a view to assessing whether they present a compelling justification for failing to provide basic needs.

The final element that should strengthen the Court’s review stand-

ards in respect of basic needs is the inclusion of a more vigorous proportionality analysis. The Court comes close to including such an analysis by its threshold requirement that a government programme will be found unreasonable if it does not make provision for those in desperate need. However, the Court has also

indicated that this does not necessarily imply that all in desperate need should receive relief immediately, but only “a significant number” (*Grootboom*, para. 39).

The inclusion of a stronger proportionality analysis would require government to show that there are no less restrictive means of achieving its purposes than limiting access to essential levels of the socio-economic rights, and that other less restrictive measures have been considered. Thus, even if the State can make a compelling case that it is not possible to provide everyone with a basic level of service immediately, it should also be required to show that other ‘lesser’ forms of provision have been considered. In addition, it must show that it is monitoring the deprivation

Government has done little to produce the tangible benefits litigants were entitled to expect from winning their cases.

of basic needs, and devising programmes and strategies for remedying the situation. The views of the CESC in this regard are instructive:

The Committee wishes to emphasise, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints....Similarly, the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. (GC3, paras. 11-12.)

It is beyond the scope of this article to discuss the question of remedies. Suffice to say that the nature of the remedies handed down by courts should be informed by the urgent nature of the interests at stake and the danger of claimants suffering irreparable harm if they do not receive immediate relief. The courts should be willing to grant orders of interim individual relief to litigants

pending government's adoption of a comprehensive programme for ensuring access to the various socio-economic rights. In addition, in cases of this nature, the courts should be willing to exercise a supervisory jurisdiction to ensure that adequate progress is made in designing effective remedial programmes.

Conclusion

The Court has developed a model of reasonableness review for adjudicating the positive duties imposed by socio-economic rights. Of particular importance is the element of the reasonableness test that enquires whether the state has made short-term provision for vulnerable groups in desperate need and living in intolerable conditions. This model of review has given the courts a flexible, context-sensitive tool to adjudicate positive socio-economic rights claims. It allows the Court to respect the role and competencies of the other branches of government – the democratically-elected legislature and the executive – while not abdicating its responsibilities to enforce the positive duties imposed by socio-economic rights.

However, this paper has argued that the justificatory elements of the reasonableness test should be tightened when dealing with situations where vulnerable groups are deprived of basic essential levels of social goods and services. A high standard of justification is warranted in this category, given the nature and urgency of the interests at stake. Members of groups who are deprived of basic socio-economic needs face severe threats to their life, health and future development. When a society has the resources to provide basic levels of socio-economic rights, it constitutes a

serious denial of human dignity to neglect to do so. It also undermines society's efforts to build an inclusive, caring political community. As expressed by Justice Mokgoro in the case of *Khosa, Mahluli and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC):

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society. (Para. 74, footnotes omitted.)

The stronger review standard proposed above will ensure respect for the dignity and equal worth of the poor within the model of reasonableness review developed by the Court. It requires a higher degree of justification from the State in respect of basic needs claims, but does not impose inflexible standards nor demand the impossible.

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