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Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld

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ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS*

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Mrs. Grootboom had had enough.[1] The winter rains were approaching and she could not bear the idea of her three children wanting to go out of the little homemade shack in which they lived, a little shelter she put up having to wade through water; not again, not another year. She and a thousand others—mainly women, single parent families, and children living in an area called Wallacedean, not far from Cape Town—decided that that they were going to move. They could not spare shelters, so they dragged materials to nearby broken land on a hillside, which provided for decent draining, only to discover that when they tried to rebuild the shelters, the land upon which they sought to build the shelters had been allocated for low-cost housing for 5,000 people living in these shacks. All claimed to be entitled to housing, and all were threatened by the rains. However, she and the others were very low in the queue.

The state was called in and told Mrs. Grootboom and the others, *you are jumping the queue; you can't occupy this land.* Although mediation was tried, it failed, and eventually the bailiffs were

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1. *See* Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 47 (S. Afr.).

brought in and Mrs. Grootboom and the others were evicted very roughly, very brutally. Things were knocked down and destroyed; they ended up on an open sports field nearby. We call it a sports field. It is a piece of dusty soil with maybe three sticks to denote goal posts at either end.

The rains were threatening, and all they had to protect themselves with was plastic sheeting. They had even lost their few remaining materials they were using to construct their shacks. Mrs. Grootboom and the children were huddled there, not knowing what to do. I often imagine her, lying there, looking out at the sky and the stars, thinking about her children, and saying to herself: *Why was I born? What does it mean to be alive? What does it mean to be a human being, just looking up and staring and imagining? What rights do I have? I've got nothing, nothing, nothing; just some children, and the responsibilities that go with that. What does it mean to be living in the new democratic South Africa? I can vote. I can speak. I can move freely if I've had the money to get from place A to place B. But here I am without a roof over my head.*

A local attorney became so indignant about the situation that he decided he had to do something. The Constitution, in its Bill of Rights, says that every person has the right of access to adequate housing.[2] What does that right mean to Mrs. Grootboom, lying there on the open ground with the rain coming down, covered by a bit of plastic sheeting? The attorney went to the High Court in Cape Town, and the judge hearing the matter realized that this was an extremely important case. The case was important, not just for Mrs. Grootboom, but it was really the first kind of case under our new Constitution in which the questions which I imagine Mrs. Grootboom was asking herself—existential questions—have become jurisprudential questions. What does it mean when the Bill of Rights says, in relation to somebody sleeping out in the open bush or field like that, that people have a right of access to adequate housing?

The judge very wisely decided that this was not a case that ought to be determined by the weather reports. The judge stated, *the rains were coming in, I've got to give judgment within twenty-four hours so that she can get protection or no protection.* He arranged for her

2. *See* S. AFR. CONST. 1996, § 26(1).

and the others to have some kind of temporary shelter so that the issues of principle could be debated without those particular pressures.

The matter eventually came before Judge Dennis Davis. He looked at the clauses in the Bill of Rights, which provide that everyone has the right of access to adequate housing. It goes on to say that the state shall take reasonable legislative and other measures progressively to realize that right, within its available resources.[3] So this is the text in our Constitution that has to be applied to that particular situation.

According to Dennis Davis—a friend of mine, a very lively, spirited, creative person and judge—as far as the obligations of the state are concerned, records indicate that hundreds of thousands of houses have already been made available to people in the situation of Mrs. Grootboom. At that stage, it was a few hundred thousand houses. Now it is well over a million houses and something approaching ten million people in South Africa have been moved from shacks into brick houses that have electricity, water, and sewage arrangements. People own the houses, which they get on the basis of a state subsidy. They pay for nothing more than water and electricity. By international standards, this was a massive breakthrough, almost spectacular. Dennis Davis said the state is, in general terms, meeting its obligations progressively to realize the rights within its available resources.

But, he said, if we look further on in the Constitution, we see that children have certain rights that are not qualified by the concept of progressive realization and available resources.[4] Included in those rights are the rights to nutrition and the right to shelter.[5] He said shelter might be something less than adequate housing. But it is at least some kind of roof over one's head. That is an unqualified right, one not subject to the resources of the state and not to be progressively realized;[6] rather, it is immediately claimable. And so

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3. *See id.* § 26(2).
4. *See id.* § 28(1).
5. *See id.* § 28(1)(c).
6. *Compare id.* § 28(1)(c) (establishing children's rights to "basic nutrition, shelter, basic health care services and social cervices" without qualification), *with id.* § 26 (requiring the State to "take reasonable legislative and other measures,

he said he was going to order the state to provide shelter for the children, and since the children could not be separated from their parents, to provide shelter for their parents as well.

The state appealed to the Constitutional Court against this decision.[7] It was not an angry, aggressive type of appeal, the kind we sometimes get. Rather, it was an appeal saying, *here is a completely pristine kind of provision in the Constitution, for which there is no precedent and the implications are unknown.* This could have immense implications for government planning, resources, and competition between different groups (all making the same claims). The state asked, *please, Constitutional Court, guide us in relation to this matter.*

The position of counsel for Mrs. Grootboom—the experienced advocate Peter Hodes—was a very simple one.[8] He said, *all I'm saying is, my client is sleeping out in the open, and if you give her land, she will put up a shack.*[9] *She cannot go back to where she was because other people have filled those spaces where she was before.*[10] *She cannot go on to that open dry land because that has been set aside for others. She comes to court and she says, I just want a place to lay my head.*[11] He did not go into the international law dimensions, nor did he go into the philosophical dimensions, or the budgetary or separation of powers implications. He simply said, my client is guaranteed in the Constitution the right of access to adequate housing, and she has nowhere to make a home, let alone a decent house.[12]

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within its available resources, to achieve the progressive realisation of this right").

7. *See* Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 48 (S. Afr.) (arguing that the State had "complied with the obligation imposed upon them by § 26 of the Constitution").

8. *See id.* at 57 (stating the two arguments of the respondents who requested that the State provide "adequate basic temporary shelter" or "basic nutrition, shelter, healthcare and social services to the respondents who are children").

9. *Id.* at 56.

10. *Id.*

11. *Id.*

12. *See id.* (stating that the respondents were living in "intolerable conditions" and demanding that the State "meet its constitutional obligations" to provide shelter under Section 26 of the Constitution).

The state argued primarily that there were major separation of powers issues here;[13] that it is basically not the function of the judges to determine housing policy and allocation of resources.[14] The judges are not elected, and they are not accountable to the people.[15] The state tried to say, quite nicely, that judges know nothing about financing or building housing, housing priorities, or how to organize the queue.[16] The state is, in fact, progressively realizing the rights within its available resources.[17] When it comes to the children's rights, such rights are basically protected in another way. The children's rights are protected through family law—family rights.[18] It is not the duty of the state to provide for the needs of children directly in that way; rather, it is the duty of the family to make such provisions. Indirectly, the state supports families through providing aid such as children's grants, old age pensions, and so on.

We had an applicant, coming as an amicus curiae—Jeff Padlinder—who said, on behalf of NGOs and civil society organizations interested in public interest litigation, they did not want the case decided on the basis of children's rights.[19] There are people without children who have rights of access to adequate housing. There are elderly people, disabled people, and ill people who all have very special claims. Of course, children have claims, and in many families you will find children, and housing is very much about children. But the issue should not be decided on the clauses in the Constitution dealing with children; rather, it should be decided in the clauses dealing with the right of access to adequate housing.[20]

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13. *See id.* at 61 (referring to the government's justiciability arguments raised in an earlier case, and reasserting that budgetary implications of social and economic rights do not "compromis[e] their justiciability").

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.* at 53–56 (detailing the state's design and execution of national, provincial, and local housing policies). "Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery." *Id.* at 76.

18. *See id.* at 82 (interpreting Section 28 of the Constitution to place the obligation to provide shelter to children "primarily on the parents or family and only alternatively on the State").

19. *See id.* at 58–59.

20. *See* S. AFR. CONST. 1996, § 26.

That was the issue before us. Judges on this court do not discuss cases before the hearing. Each judge does his own research, analyzes it, and then debates the research with other judges. For this, we convene one day and discuss our different positions. Typically, we feel torn and are not in complete agreement.

In this case, there were key legal elements that we had to deal with. For example, every person has the right of access to adequate housing.[21] The state shall take reasonable legislative and other measures progressively to realize the rights within its available resources.[22] Within that framework, what was the peg that we used to find an appropriate mode of judicial intervention? The answer, again, was that the state shall take reasonable legislative and other measures progressively to realize the rights within its available resources.[23] However, what can we use to determine whether or not the state had complied with its obligations?

In relation to available resources in a certain fiscal year, what is an appropriate percentage of the government's budget that has been spent on housing, education, and so forth? Put another way, considering only available resources, is the state doing its best to address the issue of adequate housing with such resources? That is a difficult question. How can judges decide this? First of all, we do not know much about this, and secondly, this amounts to great intervention on the work of Parliament and the Executive. The elected representatives, not judges, must decide between health education, other aspects of housing, armaments, foreign affairs, and culture, when allocating state resources. Although we addressed these considerations,[24] we decided that this is not the way forward. Perhaps there are other suggestions.

For example, should the importance of one's need be compared to that of someone else's? Should the court itself decide this, or should

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21. *See id.*
22. *See id.*
23. *See id.*
24. *See* Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 65–66 (S. Afr.) (emphasizing that, while a state must "demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core" of certain obligations, a minimum core determination presents courts with difficult questions that would require prioritizing groups, causes, and resources).

it ask the government to do this? Perhaps the court should order the government to develop a policy based on needs. In this case, the government will say that is what it has been doing. This is the nature of parliamentary business—we debate and discuss such things. People often decide in terms of a balancing test based on policy considerations, and this is not for the judges to decide.

Another important question is: what are reasonable measures? The action the government has taken in the case of this woman is a narrow question because it involves how the government has specifically allocated and used its resources, and fulfilled its needs, in her particular case. Here is a particular plaintiff who has a very specific need, and the question of whether she has adequate housing turns on what the government has done for her. Should the Court respond to her particular claim?

A suggestion is that the court should examine such situations and determine how specific and intense the need for adequate housing is, and then order the government to intervene if necessary. But how does the court measure that? Especially, how can the court determine this for a country with a thirty to forty percent unemployment rate, due to its whole history of apartheid, migrant labor system, citizens being unable to use land in an economical way, massive poverty throughout the country, and citizens with vast health, education, nutrition, and housing needs. We asked ourselves how we, as judges of this court, would begin to evaluate and compare this information in an effort to reach a solution. We explored various avenues.

What is the legal text underlying such a decision? Based on Archimedes' statement—*give me a lever and I can move the world*—it is important to consider what the intellectual lever was which we used to address the issue of adequate housing. Again, we found the answer to be that the State shall take "reasonable" legislative and other measures progressively to realize the right within its available resources.[25] Reasonableness is a concept that lawyers are very familiar with, although they are not familiar with available resources and progressive realization.

From a viewpoint based in reasonable measures and objectivity, we decided that however extensive the housing program, and

25. *See* S. AFR. CONST. 1996, § 26.

however admirable it was, it was insufficient simply to go in for a massive quantitative advance and claim that accounts for what is required.[26] If some people are left behind in situations of such extreme deprivation that links up with that special need, then the government is not behaving reasonably. For example, it is unreasonable for the government to say, *wait fifteen years and then you will receive adequate housing*, or *unfortunately there is no remaining land available for you in this area*, or *there are people ahead of you in the queue to get access to such resources and tough luck.*

But we did not want to get into a situation where courts said, because Mrs. Grootboom is in desperate circumstances, she must get a house, or because Mrs. Shabalala, in another province, has terrible circumstances, she must get a house or land.[27] The courts would then be taking over functions of local government, of housing departments. They would be determining competition between different people for scarce resources, which would absorb all of our time. What we said was unreasonable was that the government had a massive program, quantitatively speaking, for housing, but it did not have in its program special emergency provisions for people in situations of extreme desperation.[28]

We said the lack of special emergency provisions was unreasonable, and what thereafter became very clear to us was what is called the indivisibility of human rights. The right of access to adequate housing cannot be separated from the right to human dignity.[29] This becomes especially clear when people, particularly

26. *See Grootboom* 2001 (1) SA at 69 ("A program that excludes a significant segment of society cannot be said to be reasonable.").

27. *See id.* at 62 n.22 (citing *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC) at 761 (S. Afr.). This case exemplifies "[t]he right to be free from unfair discrimination, for example, must be understood against [South Africa's] legacy of deep social inequality." *Id.* at 62.

28. *See Grootboom* 2001 (1) SA at 79 (asserting that "[t]he nationwide housing program falls short of obligations imposed upon national government to the extent that it fails to recognise that the State must provide for relief for those in desperate need.").

29. *See id.* at 83–84 (stating that the constitutional right to housing found in Section 26, "read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity").

black women, find themselves in situations where they have absolutely nothing at all, are in a crisis or emergency situation, or there is no program on which they may call.[30] We ordered the government to develop such a program.[31] Although we did not get into the details, we indicated a program like that can take on many forms and can involve giving land to people, providing financing for housing loans, and performing construction of brick housing. Indirectly, it may even involve augmenting the economy so that people have disposable income. There is a whole range of measures that are involved.

Such programs may be developed by the national, provincial, or local government. The court, however, does not decide that. Rather, it is the job of the government, the executive controlled by parliament,[32] to decide such matters. But we, who focus on the human rights dimension, can require the government's program to meet a standard of reasonableness, one that does not fail to account for appropriate arrangements for people in situations of extreme desperation—such as flood or fire victims, people who for one reason or another have got nothing at all. Thus we imposed on the government a legal obligation, within a reasonable time, to develop a reasonable program to meet its reasonable obligations.[33]

This case followed the very first case we heard on social economic rights, one in which the outcome led to huge dismay in the human-rights/civil-society community.[34] It involved a Mr. Soobramoney, who suffered from acute and chronic renal failure.[35] His kidneys just were not working. When he collapsed, he went to the state hospital.

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30. *See id.* at 87 (ordering the State had to devise a program to address the needs of people in desperate situations—those with "no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations").

31. *See id.* at 86 (requiring the State "to devise, fund, implement and supervise measures to provide relief to those in desperate need").

32. *See id.* at 82 (observing that the obligations "would normally be fulfilled by passing laws and creating enforcement mechanisms"); S. AFR. CONST. 1996, § 92(2) (making government officials "accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions").

33. *See Grootboom* 2001 (1) SA at 87.

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

35. *See id.* at 766.

After his condition was discovered, he received dialysis treatment. However, hospital representatives told him that he could receive emergency treatment only once, and thereafter would be required to wait in a long queue for treatment. The representatives also told him that the hospital had strict criteria for selecting persons for which treatment would be most beneficial, due to a limited number of machines (seventeen), which were very expensive to operate and which made up a large percentage of the hospital's budget. Because he was suffering from ischemic heart disease and had diabetes, the hospital told him that he was a very poor candidate for renal transplants and prioritized others over him to receive treatment. The hospital deemed the best use of a limited amount of equipment that the hospital had would be to serve others that had better chances of benefiting from renal transplants.[36]

He then went to private institutions, which absorbed all his family's money. He could not afford the prices charged by private institutions, and their minimal treatment was just keeping him alive. He eventually decided to return to the state hospital. Upon returning, he told hospital representatives that he was in a crisis and because he was dying, he asked them to save him.[37] He then went to court and reiterated the hospital's statement that because he was at the back of the queue, the hospital could not treat him.[38]

Our Court decided unanimously that, in those circumstances, the medical personnel had applied criteria that were compatible with constitutional standards and values, that they used rational grounds for deciding who should have access to emergency treatment, and that the selection process used was not discriminatory, except on pure health grounds (which was relevant as criteria); therefore, we could not order the hospitals to act otherwise.[39] To move him to the

36. *See id.* at 769–70, 774–76.

37. *See id.* at 781 (Madala, J., concurring) (noting that the appellant owed a private clinic R25 000 for dialysis treatments two to three times each week, costing approximately R1 000 per treatment, which eventually depleted the appellant's financial resources to the point where he could not continue treatment).

38. *See id.* at 769–70 (stating that the appellant's chronic renal failure combined with heart and vascular diseases rendered him ineligible to receive dialysis at the state hospital).

39. *See id.* at 771, 778 (holding that the state's failure to provide renal dialysis facilities for all individuals with chronic renal failure did not violate Section 27 of the Constitution because the hospital guidelines determining which applicants with

head of the queue would be to prejudice other people who had greater health claims, by saying that government must take money away from dealing with HIV, immunization for children, health education programs, victims of trauma, and all other diseases that we have such as cancer and tuberculosis. We decided that, as judges, we could not interfere with the priorities in that particular area, and could not say that the hospital's expenditure and way it was utilized did not meet constitutional standards.

I still remember that counsel for Mr. Soobramoney felt a terrible weight that he did not get the argument right, his client was going to die, and that we as judges might get the law wrong and would be unjustly depriving him of the chance of living longer. I said to his counsel, who was almost shaking, *if resources and compassion were co-equal, this would be the easiest case in the world to decide, but they are not.*[40] It is just a question of compassion.

That raised the whole issue of the extent to which resource limitations can be relevant to the enjoyment of rights. I then developed, in a short concurring judgment, that in a concept of the role of rationing in relation to enjoyment of social and economic rights, one's rights to freedom, vote, move, and dignity are not rationed.[41] These are rights that A can enjoy and B can enjoy and C can enjoy, and they do not compete with each other. I can say with freedom of speech, if one has a monopoly of the airwaves, control of finance, etc., then indirectly there is a form of rationing through economic power. But in terms of the concept, rationing does not enter into ordinary, basic civil and political rights.[42]

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chronic renal failure had access to treatment constituted a reasonable attempt to provide, within available resources, all its citizens with access to health care services).

40. *See id.* at 784 (Sachs, J., concurring) (recognizing that courts should not unnecessarily interfere with the allocation of limited resources where political organs and medical authorities are better prepared to make such "agonising choices").

41. *See id.* at 782–84 (Sachs, J., concurring) (asserting that when socio-economic rights are inherently shared and inter-dependent because of limited resources, rationing should delineate when individuals have a right of access that should "most fairly and effectively be enjoyed").

42. *Cf.* International Covenant on Civil and Political Rights arts. 6–27, Dec. 16, 1966, 999 U.N.T.S. 171 (articulating generally recognized civil and political rights).

When it comes to social and economic rights, and particularly highly expensive medical interventions, there must be rationing of such resources; for example, studies that were conducted by the World Health Organization, the National Health Service in Britain, among others, indicated that utilization of these scarce resources is a control based on non-discrimination and on rational and fair utilization of what is available.[43] And it is very difficult for judges to determine who should have priority in matters like this. It is the responsibility of the medical community, in relation to and in conjunction with the families and individuals concerned, to have ethical standards and criteria for making those determinations.[44] It is not a decision for courts to make, especially in matters such as these.

It was our most poignant case—one that I will remember for as long as I remember my years as a judge. And we knew that, quite literally, we had power of life or death, in terms of the order that we made. There was a huge reaction against us from the human rights community, that we were using the lack of resources to determine fundamental rights. I remember a former law clerk of ours very angrily suggested that money for emergency treatment should be found from wherever possible, even if it was just enough to purchase one more machine for one more person.[45] But we cannot determine basic principles of law that have enormous impact on public life simply on the basis of finding something, a little bit of spare money, for someone. If that were the case, then the law would break down. This is not like freedom rights, where every person is vested with the

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43. *See* Constitution of the World Health Organization pmbl., July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 ("The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."); U.K. SEC'Y OF STATE FOR HEALTH, THE NHS PLAN: A PLAN FOR INVESTMENT, A PLAN FOR REFORM 3–5 (2000), *available at* http://www.dh.gov.uk/assetRoot/04/05/57/83/04055783.pdf ("The NHS will provide a universal service for all based on clinical need, not ability to pay.").

44. *See* HEALTH PROFESSIONS COUNCIL OF S. AFR., PROFESSIONAL GUIDELINES § 2, pt. 6, http://www.hpcsa.co.za/hpcsa/UserFiles/File/ProfessionalGuidelines.doc (last visited Mar. 13, 2007) (establishing the health care professional's ethical duty to "[d]eal responsibly with scarce health care resources").

45. *But see Soobramoney* 1998 (1) SA at 776 (discouraging court-ordered resource allocations because it can "deny[] those resources to other patients to whom they might more advantageously be devoted").

same rights under the Constitution.[46] Rather, it is a question of appropriate utilization of resources, and this is a very pressing issue in the contemporary world, one that involves fundamental issues of which social and economic rights must be enforced.

But that does not mean that because there are budgetary implications, these issues automatically involve policy matters, and the law has no role at all to play. The next big case that came before us raised that very question. It was the *Treatment Action Campaign* ("TAC") case, and it dealt with claims by doctors, in particular, on behalf of pregnant women about to give birth who were living with HIV. The affected women claimed that they should be allowed by the State to take the drug Nevirapine.[47] The evidence was to the effect that Nevaripine cut the rate of transmission of the virus to children to be born by about fifty percent, which is a dramatic impact.[48] The procedure involves the mother simply taking one drop before giving birth and the child taking a drop after birth.[49] The drug was safe, otherwise, it could not be given at all. If women had money, they could buy it over the counter on prescription.

The Minister of Health said, however, that she was only allowing the drug to be provided to two medical sites in each of the nine provinces, because its management, problems of counseling, and problems of transmission after birth by breastfeeding needed to be studied. After two years, the Ministry of Health would be in a

46. *See* S. AFR. CONST. 1996, § 9 (declaring that everyone is equal before the law and providing that "[e]quality includes the full and equal enjoyment of all rights and freedoms").

47. *See* Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 721 (CC) at 728–30 (S. Afr.) (explaining the applicants' claim that restrictions on the availability of Nevirapine—an antiretroviral drug used in the treatment of HIV/AIDS—in the public health sector violated Sections 27(1) and 27(2) of the Constitution because the government failed to act reasonably, within its available resources, to provide pregnant women and their newborn children with the right to have access to public health care services).

48. *See* WORLD HEALTH ORG., ANTIRETROVIRAL DRUGS FOR TREATING PREGNANT WOMEN AND PREVENTING HIV INFECTION IN INFANTS: GUIDELINES ON CARE, TREATMENT AND SUPPORT FOR WOMEN LIVING WITH HIV/AIDS AND THEIR CHILDREN IN RESOURCE-CONSTRAINED SETTINGS 8–9 tbl.1 (2004), *available at* http://www.who.int/hiv/pub/mtct/en/arvdrugswomenguidelinesfinal.pdf (finding that Nevirapine reduced the vertical transmission rate by 47% in the HIVNET 012 clinical trial in Uganda).

49. *See Treatment Action Campaign* 2002 (5) SA at 729 n.5.

position to roll out the program.[50] However, the doctors were saying that they could not wait two years because in the meanwhile, thousands of babies were going to be born with the virus in circumstances in which they could be saved, especially when there were measures that cost almost nothing and the drug was being provided free for five years by the manufacturers. The drug was free, had no cost implications, and it was safe. Otherwise, it could not be used at all either in the private health sector or in the State's selected sites. The only remaining problems were logistical, questions of management, and possible health implications.

The State argued before us that judges do not prescribe medicines, rather, it is the function of the Department of Health to make these determinations. The Department of Health may be wrong, the State argued, and if it is wrong, then it is accountable to the public, for which there are political responses. Separation of powers supports this – meaning the judiciary should not be involved in these policy questions.[51]

The counsel for the doctors and mothers argued that in light of our decision in *Grootboom*,[52] it was not reasonable for the Ministry of Health to say the drug was safe, it had no cost, and although the doctors wanted it, we had to wait two years to see what the implications were.[53] Counsel for an amicus curiae wanted to take the

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50. *See id.* at 732–33 (suggesting that the government wanted more time not only to establish the funds and infrastructure necessary to implement a comprehensive approach for reducing the risk of mother-to-child transmission, but also to evaluate the operational challenges inherent in introducing Nevirapine to the public health sector).

51. *See id.* at 755 (acknowledging that even though no bright lines separate the responsibilities of the different branches of government, policymaking primarily falls within the domain of the executive branch). *But see id.* (clarifying that the Constitution mandates courts to make orders that can affect policy when a specific governmental policy is inconsistent with constitutional provisions).

52. *See* Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 87 (S. Afr.) (holding that the government failed to satisfy its obligations under Section 26(2) of the constitution because its housing program did not constitute a reasonable measure within available resources to achieve the progressive realization of the right of access to adequate housing).

53. *See Treatment Action Campaign* 2002 (5) SA at 734–35, 743 (accepting the applicants' assertion that the government's desire for a comprehensive approach to reducing mother-to-child transmission did not provide a rational basis for prohibiting doctors at public hospitals with adequate testing and counseling facilities from prescribing Nevirapine to patients who needed the drug).

matter a step further, and said the group he represented was not satisfied with our decision in the *Grootboom* case; rather, the group felt that all of the rights in our Bill of Rights are individual rights.[54] It was not just a duty of the State to have a program that was reasonable; instead, individuals should be able to come to court and say that the State was not meeting its obligations to the extent that it failed to meet, at a minimum, a basic platform that could be quantitatively determined in relation to people, whether it concerns health, education, water, nutrition, or housing, and that it should be an individual right.[55]

One of the moments that I will most remember during my years on the bench was a debate between myself and counsel on that very question. Counsel emphatically insisted that social and economic rights should be seen in this way—as individual rights—and we should not rely simply on reasonableness in relation to the state programs. Individuals should be able to come to court and say, *I have a right to a house, I have a right to treatment.*[56] I said to counsel, on this basis, anybody who does not have access to water can come to court and say, *I want a tap in my particular village.*[57]

The government was rolling out a program which gave priority to providing clean, safe, potable water, easily accessible throughout the year, to areas where it reaches the maximum number of poor people.[58] I questioned whether this meant that for somebody who lives high up in a mountain, in a small community, the State must

54. *See id.* at 737–40 (considering the argument that Section 27(1) of the Constitution gives everyone a "self-standing" right to have access to health care services, therefore requiring the government to satisfy certain minimum obligations regardless of available resources).

55. *See id.* at 738 (reviewing the assertion that the minimum core includes the minimum necessities of life mandated by human dignity).

56. *See id.* (restating the applicants' contention that everyone denied access to health care services, allegedly an individual right created by Section 27(1) of the Constitution, can automatically obtain relief from a court).

57. *Cf. id.* at 739-40 (stressing that the Constitution does not require the government to provide immediate access to a "core" service, but merely demands that it act reasonably in achieving progressive realization of socio-economic rights).

58. *See* Rose Francis, *Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power*, 18 GEO. INT'L ENVTL. L. REV. 149 (2005) (describing the evolution of South African water policy).

divert resources from areas where that same money could reach 500 families to reach the one family. And furthermore, who are we as judges to decide?

He said, *Justice Sachs, that is an emotional argument!* I replied, *well, these are emotional questions, but those are the very real kinds of issues that you have.*[59] Our concern is people with the sharpest elbows, with the best lawyers, will get the water, will get the houses. This will muck up all the programs and make planning at the local and national levels impossible; especially if courts are constantly involved in decisions of that kind. That was the critique from the ultra human rights point of view. The critique from the State was that courts have no right to get involved in policy matters at all.

The moment we were about to go into court was quite dramatic. As we know, the whole issue of HIV/AIDS has been a very hot political issue in our country. It has been very divisive, and there has been a lot of criticism of the Minister of Health, and of the President for particular positions that they spoke about some years ago. So this was not just another case coming to court.[60] I still remember the

59. *Cf. Treatment Action Campaign* 2002 (5) SA at 754 (admitting that apart from the HIV/AIDS epidemic, the government also faces daunting problems involving socio-economic rights such as the "access to education, land, housing, health care, food, water and social security").

60. *See id.* at 735 (emphasizing the "political, ideological, and emotional contention" surrounding the South African HIV/AIDS debate); Thabo Mbeki, President of S. Afr., Speech at the Opening Session of the 13th International AIDS Conference (July 9, 2000), *available at* http://www.info.gov.za/speeches/2000/000714451p1001.htm (implying that perhaps extreme poverty, not AIDS, was "the world's biggest killer and the greatest cause of ill health and suffering across the globe"); Manto Tshabalala-Msimang, S. Afr. Minister of Health, Statement to the National Assembly on HIV/AIDS and Related Issues (Nov. 16, 1999), *available at* http://www.info.gov.za/speeches/1999/0001131124a1002.htm (detailing the toxicity of the antiretroviral drug AZT and arguing that its use "at the present time, [is] illegal, aside from it being dangerous"); Michael Specter, *The Denialists; the Dangerous Attacks on the Consensus About H.I.V. and AIDS*, NEW YORKER, Mar. 12, 2007, at 32 (reporting Mbeki's view that "H.I.V. medicines are Western inventions aimed at maiming Africans" and his hints of "C.I.A. involvement in propagating the belief that H.I.V. causes AIDS"); Samantha Power, *The AIDS Rebel; An Activist Fights Drug Companies, the Government–and His Own Illness*, NEW YORKER, May 19, 2003, at 54 (reporting that President Mbeki had "denounced Western antiretrovirals, which suppressed the H.I.V. virus, as 'harmful to health'" and "questioned the link between H.I.V. and [AIDS]").

Minister of Health sitting in the court – I knew her from the old days of struggle. She worked closely with my brother, who both was an immunologist and helped develop HIV policies in this particular area.[61] I thought at one stage that if the TAC was trying to help people with HIV, and the government was trying to help people living with HIV, it was very difficult to see why litigation is absolutely necessary. And when one thinks of this moment, the moment a woman is about to give birth—one of life's most glorious acts—and she knows that if she just takes that one drop, the child she is about to bear has a fifty percent greater chance of living a life of a child and a life of an adult, she thinks it is her right, it is the child's right, it is the doctor's right.

I asked in court whether it was possible for some kind of agreement to be reached. The court adjourned for the parties to consider this possibility, and then there was some debate and discussion. We came back afterwards, however, with no agreement. We had to see the case through.[62]

A couple of years earlier, we heard a case of Mr. Hoffmann, who applied for a job on South African Airways ("SAA") as a steward, serving coffee and so on, on board.[63] He passed all the exams with flying colors, but it turned out that he was HIV positive.[64] SAA said, *we will employ you, but as ground staff. There are a lot of jobs that you can do, but we cannot have you serving coffee on board.*[65] *What*

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61. *See* ANN STRODE & KITTY BARRETT GRANT, INST. FOR DEMOCRACY IN S. AFR., UNDERSTANDING THE INSTITUTIONAL DYNAMICS OF SOUTH AFRICA'S RESPONSE TO THE HIV/AIDS PANDEMIC 23–24, 31 (2004), *available at* http://www.idasa.org.za/Output_Details.asp?n=1&RID=40&OTID=6&PID=23 (documenting Dr. Johnny Sachs' effort to restructure the South African National Aids Council and increase the organization's influence on HIV/AIDS policies).

62. *Cf. Treatment Action Campaign* 2002 (5) SA at 735 (condemning the parties for their displays of animosity and disparagement during litigation because the ongoing fight against HIV/AIDS requires cooperation between the government and non-governmental organizations).

63. *See, e.g.*, Hoffmann v S. Afr. Airways 2001 (1) SA 1 (CC) at 8 (S. Afr.).

64. *See id.* (stating that the airline initially designated Mr. Hoffmann as a suitable candidate for the position of cabin attendant after he completed a four-stage selection process that included a pre-screening interview, psychometric tests, a formal interview, and a final role-play, but reversed its decision after he failed a blood test for HIV/AIDS at a pre-employment medical examination).

65. *See id.* at 9 (noting that the airline attempted to justify its practice of excluding HIV positive people from employment in cabin crew positions by citing

will the passengers say? They will go to another airline. They will just feel nervous. They know that British Airways does not employ people who are HIV positive as stewards, so they will go to British Airways and we will lose.

The case went to the high court, where Mr. Hoffmann claimed SAA's practices constituted unfair discrimination. The high court used an argument based on the fact that some planes would land in Equitorial Guinea where yellow fever injections are needed; because of his HIV status, he could not take those injections, and thus his application was refused.[66]

The case came to us. It was a very emotional case as well. The courtroom was small. It was jam-packed with people wearing T-shirts saying "HIV-positive." The audience was representative of the South African nation, with people of all different races, sex, and age (black, white, brown, male, female, young, and old), all sitting with HIV-positive t-shirts. There was tremendous emotion in the courtroom.

On the day of handing down judgment, Justice Sandile Ngcobo read the judgment he wrote for the court, which said that we cannot allow the commercial practices of foreign airlines to determine the fundamental rights of South Africans under our Constitution.[67] And if there is prejudice against people living with HIV/AIDS, it is the duty of the State not to concede to that prejudice but to combat that prejudice and to educate the public to repudiate that kind of prejudice. There is no justification; it is simply unfair discrimination. He ordered SAA to take on Mr. Hoffman in the job for which he was fully qualified until such time as his condition rendered him unable to serve SAA as a steward. As his CD4+ count was very healthy in

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"safety, medical and operational grounds").

66. *See id.* at 18 (restating the High Court's conclusion that the airline's employment practice did not constitute unfair discrimination against HIV-positive individuals because it was an "inherent requirement" for cabin attendants to be HIV-negative); *see also id.* at 9, 12–13 (rejecting the airline's assertion that it could not vaccinate all HIV positive individuals against yellow fever, regardless of the person's CD4+ count).

67. *See id.* at 19–20 (declaring that neither the public misconceptions of HIV-positive persons nor the policies of commercial interests outside South Africa justified the violation of Mr. Hoffmann's right to equality under Section 9 of the Constitution).

terms of somebody living with the virus, he will probably have a good ten years to be able to do that particular job with proper treatment.[68] SAA was then ordered to take him on.[69]

After the judgment was read, total silence filled the courtroom. We filed out through the back of the court, and after we got out of the courtroom and the last person went through and closed the door, we heard cheering and I started crying. I did not cry just because of the impact of HIV/AIDS in our country. Rather, I started crying because of the feeling that we had a Constitution. I am a judge on the Constitutional Court, with the extraordinary responsibility and possibility of protecting fundamental rights of victims of prejudice.[70] It is not the old apartheid racist prejudice, but it is another form of marginalizing people and treating them in an unfair discriminatory way. I found it quite overwhelming.

We filed back into court with a judgment prepared; however, we did not read the whole judgment. A large part of the judgment dealt with the argument from the amicus curiae, to the effect that under the Convention on Economic, Social, and Cultural Rights, states are obligated to meet a minimum core of rights, and we need a minimum core in South Africa to measure whether or not individuals are entitled to claim those rights.[71] The General Comment made by the U.N. Committee emphasized that states must heed the minimum core of rights in fulfilling the progressive realization of available resources.

Our written judgment did not reject the minimum core argument, but we said the minimum core had to be understood as not necessarily establishing a quantitative norm, but rather as raising a

68. *See id.* at 25–26 (recognizing that Mr. Hoffmann's high CD4+ count meant that he could receive the yellow fever vaccine and would not be prone to opportunistic infections).

69. *See id.* at 27 (concluding that the appropriate relief was an order of instatement because nothing suggested that it would be unfair, impractical, or unsuitable for the airline to employ Mr. Hoffmann as a cabin attendant).

70. *See id.* at 19–20 (asserting that equality must characterize this new era of constitutional democracy and that society must never tolerate prejudice because the Constitution respects "human dignity for all human beings").

71. *See* Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 721 (CC) at 737–38 (S. Afr.) (noting that the applicants' "minimum core" argument focuses on how the language of Sections 26 and 27 of the Constitution separately affirm rights and State obligations).

question of prioritization.[72] The state simply cannot spend a lot of money on hospitals which are only for the middle class and the wealthy, or as one finds in many countries, build houses for the army or civil servants but leave the desperately poor out. From that point of view, the minimum core has a quantitative dimension. It does not necessarily imply a basic platform of entitltments, a poverty datum line, so that anyone falling under a quantitatively determined measure can come to court and claim their rights. We rejected the claim that people should have individual rights justiciable through the courts according to the minimum core argument.[73]

But we said, as far as the reasonableness of the State measure was concerned, it did not meet the standards of reasonableness. To contend that hundreds or thousands of babies can be born with a virus—when that can be easily, safely, and cheaply prevented—simply because one wants to understand better the program management, is not reasonable. We were asked to order the state to report back to us within six months what it was doing for the rollout, but we said no, we do not need to do that. We simply have to declare what the State obligations are. Then it is up to the State to fulfill those obligations. If the State does not, then people can come back to court and claim that the State is not fulfilling its obligations.

We are not saying to the State that we know better than you, that we have this judicial power and are going to rub your noses in it. That is not an appropriate way to function. If the State is manifestly recalcitrant, then you can get a structural interdict, a special order with supervision involved.[74] But we are not, in that sense, looking for a fight. We do not feel that is the way that the separate branches of government should work. We all engage in the same project in that sense; we are all branches of government. And if it is possible

72. *See id.* at 739 (reiterating that minimum core may be relevant to the reasonableness of governmental action but is not an independent entitlement stemming from the socio-economic rights of the Constitution).

73. *See id.* at 740–41 (deciding that, due to the textual linkage between Sections 27(1) and 27(2) of the Constitution, Section 27(1) itself does not create a self-standing right and instead must be considered in conjunction with the reasonableness requirement in Section 27(2)).

74. *See id.* at 763 (explaining that structural interdicts, which require the government to submit a revised policy to the court for constitutional evaluation, are appropriate only when "necessary to secure compliance with a court order" because of the government's "failure to heed declaratory orders or other relief").

through simply declaring the law to clarify what the obligations are, that is the way to do it. If there is continued failure to meet those obligations, then we can get tougher.

These cases brought home to me how fundamental this notion of indivisibility of rights is, the so-called first generation of rights; including civil, political, and classic freedom rights found in the Bill of Rights of the United States, as fought for in the French and American Revolutions. The second generation of rights are those with a strangely mixed pedigree, from Bismarck in Germany, the Russian Revolution, and the social welfare programs of Sweden, Norway, Denmark, and so on before and after World War II. They include the right to freedom and the right to bread, not just to freedom without bread nor to bread without freedom. And the third generation of rights were created more recently to accommodate environmental rights, rights to peace, and developmental rights.

But one sees how these three generations of rights in a way coalesce. If a person does not have the right to go to court, a basic civil political right,[75] and a right to legal representation, that person cannot use the Constitution to get "bread rights." It appears that in the United States some people would say it is not inappropriate simply to have freedom rights; presumably it means that when one is dying of hunger one can use one's last breath to curse the government.

We found in the *Nevirapine* case that human beings were being placed in a situation intolerable in a society that has certain fundamental standards and values.[76] It just was too much. Although judges might not know much about building houses, we do know

75. *Cf.* International Covenant on Civil and Political Rights, *supra* note 422, art. 2, cl. 3 (ensuring competent judicial, administrative, or legislative review of all enumerated civil and political rights violations).

76. *See Treatment Action Campaign* 2002 (5) SA at 750 (reasoning that the government's policy of restricting Nevirapine therapy to HIV-positive women and their newborn children contravened the constitutionally-mandated right to health care services where treatment was readily available, potentially lifesaving, and well within the State's available resources); Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 62 (S. Afr.) (criticizing the denial of adequate housing as a breach of the Constitution's promise of "human dignity, freedom and equality," and observing that the framers included the right to adequate housing in the new Constitution because they valued human beings and wanted to guarantee all citizens this basic human need).

about human rights. The fact that we are not up for election is an advantage. We are not running for office; we are not doling out money to people who are going to vote for us, or trying to be seen to do that. We are simply sticking to the principles, the deep principles of what makes a society basically decent and politically moral, when attempting to adhere to fundamental rights. The fact that we are not up for election is a strength, not a weakness.

Each of the fundamental rights—the dignity rights, material rights, bread rights, litigation rights, voting rights, freedom rights—might in a particular case come to the fore, but they are all interrelated. They are all part and parcel of the character of the society in which we live. So that is the observation. The phrase that all human rights are universal, interrelated, and indivisible, sounds good, but it does not only sound good, it is actually needed in jurisprudence. It becomes vital to finding the right answers to the question that Mrs. Grootboom was asking—or I imagine she was asking, staring up at the sky and saying—*Why am I born? What does it mean to be born? What basic rights do I have as a person on this earth?* People have to understand the global, interrelated, dignity-founded concept of what rights are about.

The story that I will end with, is that of traveling with my partner, Vanessa, to Europe about a year ago. We were traveling on South African Airways, had just settled in our seats, and the flight had just taken off. A very elegant young African woman, a stewardess smartly dressed, bends down and in a near whisper she says, *thank you, Justice Sachs. It's because of people like you that I've got this job.* I thought she was referring to my years in the struggle against apartheid as a member of the African National Congress ("ANC").[77] Vanessa said, *no, no, no. I don't think it's that*; rather, she said, *I think it's the HIV case, the Hoffman case.*

77. Despite detentions, executions, and periods of forced exile, the liberationist African National Congress ("ANC") fought against racial inequality until the fall of apartheid in 1994. *See* African National Congress, Umzabalazo: A History of the African National Congress, http://www.anc.org/za.ancdocs/about/umzabalazo.htm (last visited Mar. 13, 2007). Founded in 1912, the ANC is still the leading political party in South Africa's Government of National Unity. *Id.*

Thinking back on the encounter with her, that was a very beautiful moment for me. I did not cry. But it was just one of those little golden moments of elation that illuminated the work that we do, and what it means to live in a society where these values are seen as core values, and where there are legal mechanisms, legal practitioners, and legal thought to be able to follow through and implement them.

I will now deal with various questions that have been put to me. The first concerns the community's acceptance of judicial decisions, and what kind of experience the Court has had in getting executive support of its decisions.

In the United States, there was massive resistance to implementation of the *Brown* decision. What has the situation been in South Africa?

The second question is on the extent to which the court is taking judicial notice of the work that is being done by committees at the United Nations and other places that are developing the concepts of core content of economic, social and cultural rights.

The third question is about South Africa's truth report and the opening up of a culture of storytelling for people feeling free, open, and that their personal lives were validated in the process. Does that kind of culture validate individual lives in that they are welcome to come and tell their stories?

My replies:

First, the executive branch of the government is not always happy with our decisions. Well, who likes decisions against them? That is why one goes to court. Probably the biggest decision we gave against government was when we declared the Constitution to be unconstitutional.[78] I think that was the first in the world declared to

78. *See In re* Certification of the Constitution of the Republic of South Africa, 1996, 1996 (4) SA 744 (CC) ¶ 484 (S.Afr.) [hereinafter *Certification Judgment I*], *available at* http://196.41.167.18/uhtbin/hyperion-image/J-CCT23-96 (declining to certify that the proposed Constitution complied with the thirty-four Constitutional Principles required by Schedule Four of the Interim Constitution); *see also* S. AFR. (Interim) CONST. 1993 sched. 4 (outlining general principles for the Constitution to uphold, such as "universally accepted fundamental rights, freedoms and civil liberties"); Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. ARK. LITTLE ROCK L. REV. 809 (2001) (detailing the creation and evolution of South Africa's constitutions).

be unconstitutional. It came about through the way in which the Constitution was adopted, that we negotiated in advance—as unelected negotiators—a constitution to create a democratically elected constitutional assembly, which would then draft the final text of the Constitution according to thirty-four principles agreed to in advance.[79] It was left to the Constitutional Court to decide whether the final text was compatible, whether it conformed with those thirty-four principles. Parliament then had two years to draft the final text,[80] and was just able to complete it in time, because it was despite a leap year!

We received the text and heard arguments for ten days.[81] I was put in charge of the logistics. That is another case I will never forget. Approximately seventy different representations were made to us challenging the Constitution, and we upheld nine of the challenges.[82] Overwhelmingly, we said this is a democratic constitution; this fits the bill of rights, the principles on devolution, and all the main features of the thirty-four principles.[83] But we said, in these nine particular respects, it does not measure up.[84]

I still remember one of my old comrades from the struggle sitting in the court. They are now part of government. I am now one of the judges. As we mentioned an item that failed to meet the principles, his jaw dropped. When we declared that another item had failed to meet the principles, his jaw dropped a bit more. By the time we had declared nine provisions incompatible, he had a very long face.

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79. *See* S. AFR. (Interim) CONST. 1993, ch. 5 (observing that the new Constitution shall "comply with the Constitutional Principles contained in Schedule 4").

80. *See id.* § 73.

81. *See Certification Judgment I*, *supra* note 78, ¶ 25. The court heard objections in person and with open debate where "all relevant issues were fully canvassed in argument." *Id.*

82. *See generally id.* ¶ 482 (rejecting nine provisions for their failure to comply with one or more Constitutional Principles). For example, the court determined that the proposed text violated Constitutional Principle XXVIII in that it failed to provide for the right of individual employers to engage in collective bargaining. *Id.*

83. *See id.* ¶ 483 (emphasizing that the proposed text satisfied the majority of Constitutional Principles, and expressing optimism that revising the non-compliant provisions would "present no significant obstacle" to the Constitutional Assembly).

84. *See id.* ¶ 482.

But it went back to Parliament,[85] which made the corrections. A few months later, we accepted and certified the revised text.[86] We later struck down a provincial constitution.[87] I am sure the authors were not happy, but they accepted our decision. In the *Nevirapine* case, the Minister of Health said some things at one stage indicating extreme unhappiness with the judges ordering her in effect to do something that related to medical policy.[88] But she made it very clear afterwards that she accepted the decision, even if she did not feel it was the right decision.

There is some argument about how whole-hearted that was. Well, we always get arguments of that kind. The fact is it indicated to our society and public that these questions were basically political questions that function in the political arena, but to the extent that they had a clear, direct human rights dimension, they could be litigated on, and there would be a carefully reasoned, thought-through response by the judges.

Now, as I mentioned in my presentation, the minimum core argument featured very strongly, quite strongly, in the *Grootboom* case.[89] We did not follow it, although we also did not reject it. Although it was made central to the *TAC* case,[90] we again did not

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85. *See In re* Certification of the Amended Text of the Constitution of the Republic of South Africa 1996, 1997 (2) SA 97 (CC) ¶¶ 2–3 (S. Afr.) [hereinafter *Certification Judgment II*], *available at* http://196.41.167.18/uhtbin/hyperion-image/J-CCT37-96 (noting that, in addition to "conscientiously" addressing the nine grounds for non-certification set forth in *Certification Judgment I*, the Constitutional Assembly made numerous editorial revisions to the newest draft of the Constitution before re-submitting it to the Constitutional Court).

86. *See id.* ¶ 205.

87. *See Certification of the Consitution of the Province of KwaZulu, 1996, In re: Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature* 1996 (4) SA 1098 (CC).

88. *See* Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 721 (CC) at 759–60 (S. Afr.) (affirming the judiciary's power to make and influence policies that are flexible, constitutional, and consistent with separation of powers doctrine).

89. *See* Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 65–66 (S. Afr.) (struggling to delineate a "minimum core obligation" with respect to the right to adequate housing, and concluding that the ultimate constitutional question turns not on the minimum core but on whether the measures taken to progressively realize the right to adequate housing are reasonable given the State's available resources).

90. *See Treatment Action Campaign* 2002 (5) SA at 739–40 (conducting a

adopt it, nor did we use it as the basis for our decision. It was partly because we felt the text of our Constitution is not identical to the text of the Economic, Cultural, Social Rights Convention.[91] The word "reasonable" does not appear in the Convention. In some ways, the lever that we have is a strong lever. We thought that because we are a judicial institution, we balance out the separation of powers and human rights considerations, resource considerations, and the institutional attitude considerations best by going for these programs at the broad level. There was some disappointment amongst some human rights advocates.

I personally feel that we have more or less got it right. I do not usually stand up for and defend our judgments, but because I have been a human rights activist all my life, I reflect about these things. I think after we make decisions, and I respect very much the criticisms that are made. And I feel that to some extent we have to function at the level of generality. It might be that an individual is denied some form of access to something, but we have administrative law to deal with that. And then people use the quite extensive constitutionalized rights that they are vested with under administrative law to deal with individual cases. But I feel that it is appropriate that we work to the level of declaring the obligations of the State and we leave it to the State to fulfill them.

I also think the minimum core argument is particularly important in countries where there might be extensive spending on health, nutrition, housing, etc., but it is not going to those who need it most. That was not the problem in our country. We did not need the minimum core argument as a foundation, the lever, or the platform, to introduce justiciability.

On a related note, the Truth and Reconciliation Commission[92] was based on storytelling. That was its strength. It was very much in the

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minimum core analysis, and concurring with the *Grootboom* court's determination that the minimum core is relevant but not dispositive to the constitutional interpretation of social and economic rights).

91. *See* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, 933 U.N.T.S. 3.

92. *See generally* TRUTH AND RECONCILIATION COMM'N, TRUTH AND RECONCILIATION COMM'N OF S. AFR. REPORT 1 (6th ed. 2003) (documenting the Truth and Reconciliation Committee's findings and recommendations regarding human rights violations).

African tradition for people to speak their own voice, while trying to achieve consensus and listening to everybody. It was very much the way of Oliver Tambo,[93] president of the ANC in exile, to do things, not to come up with a clear line. He would say *this is the position, what do you think*; altering a document, and changing a definition or paragraph. It was important to listen to everybody. So I am very comfortable making our presentations in that way, but that does not explain it all.

I found by the way, that if one wants to deal with questions of social and economic rights, and get focused attention from an audience, then one must not start with an abstraction. One should not begin discussion with "positive and negative rights," and then "positive state obligations." Dealing with the situation's effect on identifiable human beings adds to the discussion. It provides a real-life situation that people can understand, and in understanding that situation, people understand the contradictions, the legal, philosophical, technical, jurisprudential, and other tensions, involved in the case.

Another reason the minimum core argument did not apply in our country is the experiences of our generation. South Africans in my generation feel that we had an interesting life. We do not have to read other people's stories. We lived through our own stories. For example, the other day I was singing to quite an elite legal audience, including many judges, in Toronto. I was singing "Always." A judge singing "Always!" It was a song that I sang to myself when I was in solitary confinement—"I'll be living here always"—this was a way of dramatizing what our generation went through.

There are stories about the making of the Constitution. There are stories about the debates we had on the bill of rights. These are stories of life, of conflict, of debate and argument, and that is how ideas come. Ideas are fantastically important. I love ideas. I can get

93. *See* African National Congress, Oliver Reginald Tambo Biography, http://www.anc.org.za/people/tambo_or.html (last visited Mar. 13, 2007) (identifying Oliver Tambo as President of the ANC from 1969 to 1991 and as National Chairperson of the ANC from 1991 until his death in 1993); African National Congress, Oliver Tambo: Selected Articles, Papers, Speeches, Statements and Other Documents - 1960–1993, http://www.anc.org.za/ancdocs/history/or/ (last visited Mar. 14, 2007) (collecting Tambo's writings and speeches).

high on ideas. Other people are drinking champagne, and I am just soaking up ideas, and it is marvelous. I get drunk. I hope a number of you have learned that form of intoxication, because there is nothing more rewarding for a student, an intellectual, a writer, or a thinker, than to feel the euphoria and excitement from ideas and ideas clashing and ideas merging.

Ideas do not just exist for battling with each other. There is a logic to ideas. There is an internal structure that passes from generation to generation. But it is people who carry, interpret, and give meaning and resonance to the ideas. So that is another method I have in telling these stories. It is not just to grab attention and make the issues more interesting; rather, it is to highlight, with respect to fundamental principles of law and particularly to human rights law, that these rights are about people, and how people see themselves, their relations, and their connection to their community, to their society.

The last point is when we are sitting up there as judges, we are not automatons, we are not machines. If we were machines, it would be a terrible waste of money to pay us salaries. In any event, I am trying to communicate that when we make these decisions, we do not make them on a purely sentimental, subjective, emotional, who-do-I-like, who-don't-I-like basis. If that were the case, we would have given judgment for Mr. Soobramoney. I said to his counsel, *You know, you've represented your client with great dignity, and you're not trying to push his position ahead of anybody else.*[94] In fact, we have to find a way of relating the access to these rights to the resources that are available—the fewest possible, in our circumstances.

I am trying to indicate that judges, in exercising our judgment on other human beings, are people. We live in this society. We feel the drama of the country that we live in, of the world that we live in. These are not just nice games that we are playing. We are aware of these dimensions of the work we do. This knowledge imposes more discipline, not less discipline, upon us. We take responsibility. That is our form of, if one would like, moral accountability for what we are doing, fulfilling our oath of office—to do justice to all, without fear, favor, or prejudice.

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94. *Cf.* Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at 784 (S. Afr.) (stating that "If resources were co-extensive with compassion, I have no doubt as to what my decisison would have been.").

So when I take on this modality, this mode of telling stories, it is not just that it is in an African tradition. It is not just that it is a way of capturing attention and highlighting the contradictions and the issues. And it is not just that it enables one to bring in a certain measure of history and context, and highlight the fact that these rights are about people. Nor just about judges being people. We are human beings, fulfilling our functions to the best of our ability—through our conscience, faithful to our oaths, as part of the very society that we are judging. It is not just one of these factors. It is all these things, all these things together.

Question from the floor: Looking at organizations such as the Institute of Social Medicine and Community Health[95] raises questions of human rights enforcement. For example, can one enforce human rights if there is not a private right of action. Regarding the lack of the non-discrimination standards in health care in the United States, the Supreme Court has basically said, if people cannot prove intentional discrimination, then there is no right to sue.[96] Consider that a federal agency such as the Department of Health and Human Services[97] has not developed non-discrimination standards from civil rights law—in this case, the Civil Rights Law of 1964—even though it has had time to do so. And even under the Clinton administration, in the *Madison-Hughes v. Shalala* case, the court said, there are no standards in the law for the plaintiffs to sue

95. *See* Inst. of Soc. Med. and Cmty. Health, ISMCH History, http://www.ismch.org/2.aboutus/Institute%20History/The%20Institute%27s%20History.htm (last visited Mar. 13, 2007) (describing the Institute of Social Medicine and Community Health, a Philadelphia-based non-profit organization engaged in "health policy development, public education, progressive advocacy, societal research and historical information").

96. *See* Alexander v. Sandoval, 532 U.S. 275, 280, 293 (2001) (affirming earlier decisions holding that Section 601 of Title VI of the Civil Rights Act, which denies public funding to programs that discriminate on the basis of race, color, or national origin, proscribes only intentional discrimination). *But see* Alexander v. Choate, 469 U.S. 287, 292–309 (1985) (arguing that, unlike the statute itself, Section 601's implementing regulations may proscribe unintentional discrimination through disparate impact standards). In any case, *Alexander* rejected the existence of a private right of action to enforce Section 601. *Id.* at 293.

97. *See* U.S. Dep't of Health & Human Servs., HHS – What We Do, http://www.hhs.gov/about/whatwedo.html (last visited Mar. 13, 2007) (defining the Department of Health and Human Services as the U.S. government agency dedicated to "protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves").

the State to collect data on race and ethnicity for health care discrimination.[98] Without this right to sue, how can one enforce the human rights raised in this dicussion?

A.S.: I would be really reluctant to make proposals about how I feel my colleagues on the bench in the United States would or should approach matters. That is another debate. I think what we have established in South Africa, with the *Grootboom* case, is being discussed throughout the world now. And we made one very significant intellectual breakthrough when Professor Cass Sunstein of Chicago University, who had written a powerful paper arguing against social and economic rights being included in the new constitutions in Eastern Europe, changed his mind.[99] He said it was the *Grootboom* case that made him appreciate, through the focus on reasonableness, that the courts were using concepts that were not unfamiliar to the law; we were not in a totally strange kind of an area,[100] and he felt we got the balance right between enforcing certain basic concepts of rights on the one hand and noninterference with the details of how our government should work on the other.

Cass went on further—I think his father was in the Roosevelt administration—and he remembered that it was Franklin Delano Roosevelt who had spoken about the four freedoms even before Eleanor Roosevelt, who became famous for the work that she did with the Universal Declaration at the United Nations. He emphasized that one of the four freedoms is freedom from want.[101] And so he has

98. *See* Madison-Hughes v. Shalala, 80 F.3d 1121, 1124–25 (6th Cir. 1996) (holding that Title VI does not require the Department of Health and Human Services to collect statistical data on the ethnic distribution of federal assistance recipients).

99. *See* Stephen Holmes & Cass. R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, *in* RESPONDING TO IMPERFECTION 275, 297 (Sanford Levinson ed., 1995) (arguing that actual and proposed Eastern European constitutions should make provisions for social and economic rights easy to amend, and suggesting that legislatures are better equipped than constitutional courts to "take [social and economic rights] provisions seriously").

100. *See* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS 211–12 (2004) (praising the Constitutional Court's reasonableness approach as one that "ensure[s] democratic attention to important interests that might otherwise be neglected in ordinary debate").

101. *See* Franklin D. Roosevelt, U.S. President, State of the Union Message to Congress (Jan. 6, 1941), *reprinted in* 87 CONG. REC. 44, 46 (1941) (speaking of "freedom from want" as "economic understandings which will secure to every

written a book entitled, "The Four Freedoms," in which he tries to explore the very issues that have been raised.[102]

People who have heard my presentation make the point that many state constitutions include social and economic rights,[103] and that maybe there should be more attention to the possibilities of getting some measure of enforcement through state constitutions. But one is not just dealing with a textual problem, though the textual problem highlights the wider problem. The tradition in this country of legal thinking about rights has been historically very much focused on the right to be left alone—get the state off our backs, noninterference by the state, and a straightforward reading of the ten provisions in the Bill of Rights.

Well, a couple of hundred years have passed. We now have international conventions, thinking has broadened quite a lot, and rights are not just the rights for the patriarchal male who owned a piece of property. That is not to be messed around with by government. The land-owning patriarch has the right to protect his property, his wife, his children, his slaves, and his animals, from intrusion by the government. (Tough luck for the slaves, indigenous people, Mexicans, and all the others who are non-citizens.) A lot has evolved since then. But still, the very notion of fundamental rights, of human dignity, is something that is implicit in and to some extent explicit, in the original concepts at the time of the American

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nation a healthy peacetime life for its inhabitants"); *see also* SUNSTEIN, *supra* note 1000, at 2–3 (revealing that President Roosevelt's "Four Freedoms" speech, though not as well known within the United States, played a "major role" in the 1948 Universal Declaration of Human Rights).

102. *See generally* SUNSTEIN, *supra* note 1000, at 1–5 (describing the U.S. policy commitment to Roosevelt's "four freedoms" vision as "partial and ambivalent, even grudging," and lamenting their absence in the constitution).

103. *See, e.g.*, A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 70/E, § 1 (establishing the Hungarian right to social security and to public assistance during old age, illness, disability, and periods of unemployment); INDIA CONST. art. 41 (establishing the Indian right to work, education, and public assistance); C.F. art. 227 (establishing the Brazilian adolescents' rights "to life, health, food, education, leisure, professional training, culture, dignity, respect, freedom, and family and community life"); *see also* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 3–4 (2005) (noting the inclusion of State social and economic rights in various constitutions, including Norway, Romania, Syria, Bulgaria, Switzerland, Ireland, Nigeria, and Papua New Guinea).

Revolution which have been built upon in the United States and throughout the world.

I have found when I come to the United States—it is less intense now but some years back, particularly at the academic level, it was violent—that there is a tense intellectual battle between the libertarians and the communitarians. And the libertarians are saying, rights are rights against the state—such as the right to be left alone, and the right to be free. The foundation of such rights really is a man owning a piece of property with a fence around it, and what he does inside that stockade is his own business. That is the notion of the isolated right of the isolated free individual.

The communitarian approach is the opposite. We live in communities. Our rights, in that sense, are indivisible, and we are interdependent. In this sense, rights should be seen in terms of the collective setting in which they are exercised. And these notions fit easily in the freedom verse bread debate—the right to freedom, the right to bread.[104] Our experience has been that it is unfortunate to pose these as incompatible alternatives. One does not want bread without freedom, as happened in many countries and many societies that called themselves socialist. Yes, we are providing people with houses, with education, with health. We have a one-party state perhaps, a president for life; we do not allow opposition parties, nor do we have free and open elections. But we are helping the people. That is what the people want. The people want food in their bellies. They are not interested in all this talk about so-called human rights.

However, that is pernicious and inappropriate. And certainly in our country, people were fighting for the vote, for freedom, for freedom of speech, to be listened to, to be recognized, to feel they are a part of a society. It was the old regime that claimed that all the Bantu wanted was a house and some food, and that they were not interested in politics.[105] This is a pernicious and unacceptable approach.

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104. *See* Roosevelt, *supra* note 101, at 46–47 (declaring that "men do not live by bread alone," and championing true freedom as "the supremacy of human rights everywhere").

105. South Africa's apartheid stemmed, in part, from legislation enacting an "arbitrary and capricious policy of racial classification." Carol M. Kaplan, *Voices Rising: an Essay on Gender, Justice, and Theater in South Africa*, 3 SEATTLE J.

If everything is put towards the collective and the social good, and you deny these individual freedom rights, then society is not free. And we have found that it is the right to go to court, the right to vote, the right to make one's voice heard, and the right to demonstrate in the streets that are absolutely fundamental for the enforcement of social and economic rights. They should be brought to public attention, and focused on. You make the people in parliament aware that you exist, and that you do not exist only once every five years when elections are coming around and they promise you something. Rather, one has rights, including the right to be listened to, and there is a mechanism for enforcing such rights.

On the other hand, to see it purely as individual rights, is so isolating. It is so unreal. We live in communities. We need communities. We get our identity, our personality from our interaction with other people. In South Africa, we use the concept of *ubuntu,* a very central notion from African philosophy. It means, *I am a person because you are a person. I can't separate my humanity from yours—from a mutual acknowledgment of humanity.*

So we are each individuals, but we are interdependent individuals, and we find that we are using the concept of *ubuntu* quite frequently in our judgments now as a South African philosophical quality that has significant application in legal decision-making.[106] If I had to have an approach other than the communitarian or libertarian approach, I would say that I support a dignitarian approach.[107] Human dignity is a binding factor. Human dignity means that one cannot be squashed because of speaking one's mind in a way that

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SOC. JUST. 711, 711 n.2 (2005). "Bantu" was a derogatory term used during the apartheid era to refer to black Africans who did not speak Khoisan languages. *Id.*; SALLY FRANKENTAL & OWEN B. SICHONE, SOUTH AFRICA'S DIVERSE PEOPLES 26–27 (2005).

106. *See* Dikoko v Mokhatla 2007 (1) BCLR 1 (CC) at 33-36 (S. Afr.) (applying the concept of ubuntu in a defamation caim).

107. *See* S. AFR. CONST. 1996, § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected."); *see also* Minister of Health & Others v Treatment Action Campaign & Others 2002 (5) SA 721 (CC) at 738 (S. Afr.) (arguing that anyone "condemned to a life below the basic level of dignified human existence" ought to "be able to obtain relief from a Court"); Gov't of the Republic of S. Afr. v Grootboom & Others 2001 (1) SA 46 (CC) at 62 (S. Afr.) (identifying "human dignity, freedom and equality" as foundational values of post-apartheid South Africa).

power does not like. Human dignity means I have a right to vote, the right of expression, a right to determine my own life in all sorts of ways, and the collective, the community, my neighbors, and my family cannot sit on me, squash me, and tell me what to do, who I am, and what I should be. So individual choice and autonomy is part of human dignity.

But human dignity also means one lives not as an isolated Robinson Crusoe out of touch with the world. Education means being educated. Housing means that you are living in a community in which resources are made available. I cannot speak my language if there are no other people who speak that language. What is the right of being able to say, *I'll be living here always, in a little cell always?* And so it is dignity that emphasizes the importance of the community as well as of the individual. One gets dignity from a relationship with other people, but also from the importance of the right to be oneself.

Now, when it comes to the specific questions asked, in our context, we have a Constitution that is much more favorable to judges asking those questions. But there is also a society out there in which people are asking these questions. There is so much inequality and injustice.[108] Resources have to be used in a fair way. We need so much transformation. We have said in our judgments that our Constitution is one for transformation, for change, from injustice to justice, not just in the formal legal sense, but in the sense of how people live and the expectations of life.[109]

But I live in a nice house with hot and cold water, and I complain if the shower is not strong enough. And Mrs. Grootboom has no water at all, no land, and no place, and that is endemic in our

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108. *See* Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) at 770–71 (S. Afr.) (observing that the vestiges of apartheid—poverty, unemployment, inadequate social security, and lack of access to clean water—are unacceptable in a society committed both by law and in spirit to "human dignity, freedom and equality").

109. *See Grootboom* 2001 (1) SA at 53 (focusing on the ability of constitutional aspirations to improve the practical reality of "intolerable conditions"); *cf.* SUNSTEIN, *supra* note 1000, at 216–17 (hailing South Africa's Constitution as the world's pre-eminent "transformative" constitution). In contrast, "preservative" constitutions "seek to maintain existing practices to ensure that things do not get worse." *Id.*

society.[110] It is not just the few people who have fallen on bad times. Millions of people live in grossly unacceptable conditions.[111] When it comes to health programs, of course, the pressures are enormous. The diseases are enormous; there are diseases of malnutrition, of bad water, in addition to all the other diseases that people get through infection and so on.[112]

So the constitutional dimension does weigh in strongly. Perhaps because the achievement of human rights in our country has been so momentous, I like to feel that our court and the courts have a considerable status. Certainly, they are listened to by the government. Government has never refused to fulfill decisions, or conform to declarations, that our Court has made. Respecting the Constitution is part and parcel of the new culture of South Africa.

Does that mean that all is going well? I would not like to say that. Our institutions are strong. We have committed people. It is exceptionally important that we have public interest groups, committed parties and individuals to take up these questions. Civil society plays a huge role in this regard. But it is also important that many in government were in the struggle. Most of them have come from poor communities. They know what ill-health and disease

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110. *See Grootboom* 2001 (1) SA at 53 (emphasizing that Mrs. Grootboom and the other respondents represented "but a fraction" of South Africans forced into deplorable living conditions).

111. *See* WORLD HEALTH ORG., COUNTRY HEALTH SYSTEM FACT SHEET 2006: SOUTH AFRICA 1 (2006), *available at* http://www.afro.who.int/home/countries/fact_sheets/southafrica.pdf (revealing that over ten percent of the population lives below the poverty line, surviving on the equivalent of less than one U.S. dollar per day); STATISTICS SOUTH AFRICA, GENERAL HOUSEHOLD SURVEY iv–vi (2005), *available at* http://www.statssa.gov.za (indicating that, in 2005, roughly twelve percent of the population lived in shacks, thirty-two percent of the population did not have access to piped water, ten percent of the population used bucket toilets or had no toilet facility, and five percent of households had at least one child who went hungry).

112. The World Health Organization estimates that twenty-one percent of the population in South Africa is HIV positive, which accounts for fifty percent of nationwide deaths each year. *See* WORLD HEALTH ORG., *supra* note 1111, at 3. Yet other diseases, including cerebrovascular diseases, heart and respiratory diseases, tuberculosis, diarrhea, and diabetes also contribute to a low life expectancy of only forty-seven years for males and forty-nine years for females. *Id.* at 1–3. Children under five continue to die of HIV/AIDS, diarrhea, measles, malaria, and pneumonia at alarming rates. *Id.* at 1–3.

means. They know how unequal our society still is. All these factors have to interact.

The press has a huge role to play in this, as do lawyers—creative and pioneering lawyers. And we have many. They are dealing with free schooling, they are dealing with access to clinics, they are dealing with access to water, and access to housing. It creates a very wonderful and lively context in which to work.

Most young law students are still dreaming of getting into the corporate world. Maybe some of them will be lucky enough to be taught how to deal with the IMF and the World Bank. Even though most of them are hoping to get a job in a big company or to take cases at the bar defending people from affluent backgrounds there are still a large number who are very committed to social programs.

And by the way, I do not begrudge people those dreams. That is the freedom we fought for, the freedom to dream your own dreams, to do the things the whites just took for granted. People have a right to occupy those jobs and to think that way. That is their choice. But also, there are huge opportunities for creative lawyers not just to be clever, but to use their brains, their skills, and their techniques both to do something for the society and to feel validated themselves.

You feel your vocation is something. *Gee, gosh, I'm a lawyer.* You do not feel cynical about it. You feel proud about it. You feel those years of study, the things you thought about, even often in abstract terms, are equipping you not only to help your fellow human beings but to work with them, in association with them, and to create the kind of country that you really want to live in. You cannot separate your dignity as a lawyer from the dignity of your clients and the dignity of the people in the country.