RESUSCITATING SOCIO-ECONOMIC RIGHTS: CONSTITUTIONAL ENTITLEMENTS TO HEALTH CARE SERVICES

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ABSTRACT
Notwithstanding the Constitutional Court of South Africa’s rejection of a minimum core approach to the enforcement of the socio-economic rights in the Constitution of the Republic of South Africa, 1996, it is possible to interpret these rights as entailing individual entitlements that may in appropriate circumstances be claimed against the state. Such an entitlement orientated approach is mandated by the rights status and justiciability of socio economic rights. It enables socio economic rights to connect concretely to the needs that they purport to satisfy, contributes to individual empowerment and to the alleviation of individual hardship and facilitates more broad based, structural transformation. Establishment of a minimum core is not the only, or necessarily the best, manner in which to identify and enforce individual entitlements underlying socio economic rights. Focusing on the right to have access to health care services in s 27(1)(a) of the Constitution, it is shown that the Constitutional Court is starting to retreat from its stance against affirming and enforcing individual entitlements inherent to socio economic rights. The Court has acknowledged the existence of equality based entitlements to share in the benefits of socio economic laws and policies, entitlements to the negative protection of socio economic rights and entitlements to meaningful access to socio economic amenities. It is argued that the recognition of more ‘positive’ entitlements, in appropriate circumstances, would not detract from the Court’s ‘reasonableness approach’ to the enforcement of socio economic rights. In fact, a notion of individual, positive entitlement is latent in the application of the reasonableness approach in the Treatment Action Campaign decision. This entitlement should be explicitly articulated and developed.

I INTRODUCTION
There has been much criticism of the approach that the Constitutional Court of South Africa has adopted in relation to the interpretation and enforcement of the justiciable socio-economic rights guaranteed by the Constitution of the Republic of South Africa. In particular, the Court’s rejection of what can be called a ‘minimum core approach’ to the

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enforcement of ss 26(1) and 27(1) of the Constitution, in favour of an administrative law-like ‘reasonableness approach’ (which boils down to an inquiry into the rationality, coherence, flexibility, evenhandedness and inclusiveness of state policy aimed at the progressive realisation of socio-economic rights) in its Grootboom\(^1\) and TAC\(^2\) decisions, has been much lamented. It has been argued, for instance, that the Court’s narrow focus on the reasonableness of legislative or policy measures strips the socio-economic rights of meaningful independent content, shifts the focus of socio-economic litigation away from the satisfaction of urgent and vital material needs, makes nonsense of the progressive realisation standard contained in ss 26(2) and 27(2) of the Constitution and unduly restricts the remedial potential of socio-economic rights.\(^3\)

Moreover, the terms in which the Grootboom and TAC judgments rejected a ‘minimum core approach’ to the interpretation of s 27 of the Constitution suggested a point-blank refusal by the Constitutional Court to accept that socio-economic rights sometimes entail immediately enforceable, individual entitlements. Such a refusal makes a mockery of the justiciability and rights-status of socio-economic rights.\(^4\) As Dennis Davis warned in the debates that preceded the inclusion of justiciable socio-economic rights in the constitutional text:

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\(^{1}\) Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

\(^{2}\) Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC).


[To assert a right is to argue that another party has a duty to provide conditions in terms of which that right can be fulfilled. Once social and economic rights are included in a bill of rights, the constitution trumpets to the society at large that each is entitled to demand enforcement of such rights whether they be rights to housing, to employment, to medical care or to nutrition. To include these rights as being of equivalent status to first generation rights is to raise expectations within a society that these rights can indeed be enjoyed by all. For members of society to then find that all that is entailed thereby is a process of negative constitutional review is to create a situation where expectations are raised only to be dashed on the rock of a technical legal review. . . . Certainly Mr and Ms Citizen will demand more than review from a fully fledged right.  

I argue that the rejection of minimum core arguments in Grootboom and TAC should not be read as preventing the meaningful enforcement, in appropriate circumstances, of individual entitlements underlying ss 26 and 27 of the Constitution. While I am critical of dicta in Grootboom and TAC that appear to deny the existence of such entitlements, I also point to dicta in those and other judgments that indicate the contrary. I show that the Constitutional Court has already backtracked from its rigid stance against the tangible enforcement of socio-economic entitlements in appropriate circumstances, and I urge it to continue doing so.

While I remain of the opinion that the notion of a minimum core is useful for understanding the nature of socio-economic obligations and that it provides a valuable blueprint for an entitlement-based approach to socio-economic rights, I believe such an approach to be possible, regardless of whether the international law minimum core standard and associated terminology are adopted in South Africa. There appears to be several ways in which ‘core-like’ entitlements underlying socio-economic rights may in appropriate cases be identified and enforced. These neither detract from the application of ‘Grootboom-reasonableness’ in appropriate cases, nor require a drastic reconceptualisation of the manner in which courts currently conduct themselves in socio-economic rights matters. Indeed, I go as far as to argue that a latent notion of minimum individual entitlement underlies the Court’s appropriation in the TAC decision of the Grootboom-reasonableness standard. If more expressly articulated, I believe that this flexible notion of minimum entitlement has much potential in guiding the development of a more entitlement-based and need-focused socio-economic rights jurisprudence.

The focus of this article is limited to entitlements derived from a purposive interpretation of the right to have access to health care services in s 27(1)(a) of the Constitution. This is, first, because the Constitutional Court’s rejection of the minimum core approach has been most forceful in relation to s 27(1)(a); secondly, because there may be good reason to depart from a stark minimum core approach to s 27(1)(a); and, thirdly, because the TAC judgment, from which I derive the notion of a latent,
core-like entitlement inherent to *Grootboom*-reasonableness, dealt mainly with s 27(1)(a).

In section II below, I briefly defend the premise that socio-economic rights should be understood as embodying entitlements that are individually enforceable in appropriate circumstances. Thereafter, section III explains the tenets of a minimum core approach to the interpretation and enforcement of socio-economic rights, indicates the implications of such an approach for the interpretation of s 27(1)(a) of the Constitution and critically discusses the Constitutional Court’s rejection of the approach in *Grootboom* and *TAC*. Section IV then looks beyond the rejection of minimum core to consider the vindication of individual socio-economic entitlements in the alternative to, in conjunction with or by way of *Grootboom*-reasonableness. In conclusion, section V argues that Courts should not view the current articulation of *Grootboom*-reasonableness as embodying the totality of the enforceable content inherent to s 27(1)(a) and should in appropriate circumstances award affirmative, individualised remedies to prevent, rectify or compensate for its infringement.

II THE CASE FOR AN ENTITLEMENT-BASED APPROACH TO SOCIO-ECONOMIC RIGHTS

If . . . socio economic rights . . . are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity.6

A rights-based approach to social welfare, unlike a utilitarian approach (seeking to confer the greatest possible socio-economic benefit on society in general), paternalistic approach (viewing the distribution of social benefits as flowing from state benevolence) or market-based approach (viewing socio-economic benefits as commodities capable of alienation and purchase), regards such welfare as ‘an object of morality and as a legitimate purpose of a just society’ and inevitably involves the concept of individual entitlement.7 This is admittedly problematic where individual rights-claims are pursued in an overarching context of social and economic transformation, since rights discourse has the tendency to ‘atomise’ individuals and thereby to divorce rights-claims from their social context. Enforcing individual socio-economic rights-claims therefore runs the risk of frustrating the progression of structural social and economic reforms, by ‘individualising’ universal social problems and by

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6 Liebenberg (note 3 above) 159.

disrupting or inhibiting established processes aimed at overcoming such problems.8

Yet, widespread socio-economic hardship and the need for widespread structural reforms should not mean that legitimate, individual survival interests are sacrificed in favour of a vaguely-defined ‘common good’.9 Rights terminology is used in relation to social goods precisely to counter the self-defeatism of an ‘all-or-nothing’ communalist approach to social upliftment. It acknowledges that ‘we are diminished as a society to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings’.10 The notion of individual entitlement that underlies rights discourse is empowering, in that it allows socially vulnerable and marginalised individuals and groups to draw attention to, and demand the satisfaction of, their particular socio-economic needs.11 More importantly, it allows such individuals and groups to use the legal process in order to actually obtain the satisfaction of these needs, hence affirming the value of human dignity through tangibly alleviating the consequences of poverty and deprivation.12 Furthermore, it contributes to the overarching pursuit of social justice, by demanding the acceleration of structural reforms that would put an end to prevailing hardship and by creating a space for collective mobilisation around such structural reforms.13 While it is therefore necessary to reconcile the individual interests at stake in each socio-economic rights matter with competing societal interests,14 the communal pursuit of social justice may significantly be enhanced by giving effect to the individual entitlements implied by socio-economic rights in appropriate circumstances.


10 S Liebenberg ‘The Value of Human Dignity in Interpreting Socio-economic Rights’ (2005) 21 SAJHR 1, 12. See also 22.

11 Liebenberg (note 8 above) 20; PJ Williams ‘Alchemical Notes: Reconstructing Ideals from Deconstructed Rights’ (1987) 22 Harvard Civil Rights & Civil Liberties LR 401, 411-13; Williams (note 8 above) 446.

12 Liebenberg (note 8 above) 33-4; Williams (note 8 above) 445.

13 Liebenberg (note 8 above) 10, relying on N Fraser ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation’ in N Fraser & A Honneth Redistribution or Recognition? A Political-Philosophical Exchange (2003) 74-80. See also Williams (note 8 above) 446.

14 Bilchitz (note 3 above) 22; Williams (note 8 above) 445.
However, if the empowering and affirmative potential of socio-economic rights is to be realised, it is necessary that the manner of their enforcement connects concretely to the needs and experiences of their subjects. The formulation of abstract legal standards measuring compliance with socio-economic obligations and the institutional settings within which these standards are conceived and implemented are at most of indirect and secondary importance to the beneficiaries of socio-economic rights, for whom the actual alleviation of their hardship carries priority. Such individuals and groups will rely on socio-economic rights and the legal process for the alleviation of their hardship only if there is a distinct possibility that doing so would concretely improve their physical living conditions. If the socio-economic rights in the Constitution were to prove unable to contribute to the alleviation of individual hardship in this manner, their constitutional status as justiciable rights (rather than, for instance, directive principles of state policy) would seem to be inconsequential and the legitimacy of their constitutional inclusion could rightly be questioned.

The constitutional provisions governing the structure of Bill of Rights litigation appear to encourage an affirmative, entitlement-orientated approach to socio-economic rights. In terms of ss 8 and 38 of the Constitution, socio-economic rights are enforceable by a wide range of individuals and groups against the state or certain private entities. The potential negative impact of such enforcement on overarching state programmes aimed at social transformation is in turn curtailed by s 36 of the Constitution, which determines that rights may be limited where this is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. This ‘general limitation provision’ enables

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courts to accord generous and need-focused content to socio-economic
erights, and thereafter to decide whether non-satisfaction of the
entitlements implied by such an interpretation is reasonable and
justifiable in light of overarching societal goals. Where it is not, s 38
gives courts significant flexibility to award appropriate relief to prevent,
correct, or compensate for the non-satisfaction. This remedial flexibility
enables courts to strike an appropriate balance between individual and
communal interests and to further delineate the circumstances in which
the interests of justice permit tangible individual relief to result from
successful vindication of a socio-economic right.19

Courts are therefore empowered, first, to ascertain the extent of the
entitlements implied by socio-economic rights through a generous and
purposive approach to their interpretation, secondly, to ascertain
whether law or conduct has infringed a particular right by balancing
the interests served by any limitation on its ambit against the applicant’s
interests in obtaining relief that satisfies the needs it represents and,
thirdly, to delineate the circumstances in which the benefits implied by a
right should result, by deliberating the appropriateness of a range of
orders through which to remedy the infringement. Thus, the Bill of
Rights appears to require of any court tasked with giving effect to a
socio-economic right to depart from the double premise that the right is
in principle enforceable and that the applicant is in principle entitled to
the tangible relief she seeks. In circumstances where the interests of justice
or some other compelling interest require that the extent of an applicant’s
entitlement be limited, or where it would for some institutional or other
reason be inappropriate to award tangible relief, the court is required to
indicate whether, to what extent and for what reasons it should divert
from this premise.

III MINIMUM CORE, ITS IMPLICATIONS AND ITS REJECTION BY THE
CONSTITUTIONAL COURT

(a) Minimum core and a purposive interpretation of ss 27(1)(a) and 27(2)
of the Constitution

Section 27 of the Constitution determines in relevant part:

(1) Everyone has the right to have access to
(a) health care services, including reproductive health care;

(2) The state must take reasonable legislative and other measures, within its available
resources, to achieve the progressive realisation of each of these rights.

19 For background on this approach to Bill of Rights adjudication see I Currie & J De Waal The
Bill of Rights Handbook 5ed (2005) 26-7 and, on the significance of courts’ remedial flexibility,
192, 195.
Interpreted generously and purposively, the right to have access to health care services in s 27(1)(a) may be understood as conferring, on everyone in South Africa, an entitlement to the availability, accessibility, and acceptability of preventative, diagnostic and curative health care services of adequate quality on primary, secondary and tertiary levels. However, given that there are great variations in the cost and effectiveness of various forms of medical treatment, that there are many competing health-related needs in society (not all of which are equally urgent and vital) and that society has limited resources to meet those needs, the imposition of limits on the enforceability of this entitlement is inevitable. It therefore comes as no surprise that the Bill of Rights envisages the limitation of s 27(1)(a) both in terms of s 27(2) and in accordance with the general limitation clause in s 36 of the Constitution.

Section 27(2) clarifies the obligations of the state in terms of s 27(1)(a) by requiring that it adopt reasonable legislative and other measures to increase population enjoyment of the right. Moreover, the resource-specification in s 27(2) indicates that the state will not fall foul of s 27(1)(a) where it does not have the resources to give effect to all of the entitlements implied by the provision. It is, however, important to view resource scarcity not as qualifying the ambit of s 27(1)(a) but rather as limiting the extent to which its implied benefits may be demanded at a given time. In this sense, the resource specification links to the concept of progressive realisation which, by conceding that certain aspects of socio-economic rights are only capable of realisation over time, limits the extent to which they are immediately enforceable.


23 See Bilchitz (note 3 above) 18; 21; Coomans (note 3 above) 191-92; Currie (note 22 above) 56; Scott & Alston (note 9 above) 255.

The progressive realisation standard and the resource limitation in s 27(2) accordingly allow courts to approach the task of ascertaining the state’s compliance with the obligations imposed by s 27(1)(a) realistically and within the context of every specific matter. However, there remains a real risk that the terms of s 27(2) may be used to deflate the content of s 27(1)(a) to such an extent that they strip the right of significance: ‘[n]o provision should be interpreted in a way that makes its enforcement practically impossible. If section 27(2) is interpreted to be exhaustive of the State’s positive duties, individual right holders have no direct right to claim anything specific from the state’.25 It is accordingly necessary to devise an interpretative approach to s 27 according to which not all obligations engendered by s 27(1)(a) are rendered unenforceable by the limiting effect of s 27(2).

In order to counter the potentially defeatist effect of a substantially similar resource limitation and progressive realisation standard contained in the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), the United Nations Committee on Economic Social and Cultural Rights (‘UNCESCR’) has developed a ‘minimum core approach’ to the interpretation of the substantive rights enshrined in the treaty.26 In line with the premise that human dignity is denied those who are forced to subsist without access to even the most basic of socio-economic amenities, the concept of minimum core entails that there are minimum levels of socio-economic subsistence below which no-one should be allowed to exist, regardless the state’s resource constraints. Aimed at protecting the most vulnerable members of society, the minimum core approach involves identifying such subsistence levels in respect of each socio-economic right and insisting that the provision of ‘core’ goods and services enjoys immediate priority. The minimum core of a right thus represents a ‘floor’ of immediately enforceable entitlements from which progressive realisation should proceed.27

The most important implication of the minimum core approach is that citizens should generally be able to demand to be provided with the goods, facilities and services that comprise the minimum core of a particular right. This is the case notwithstanding the dictates of progressive realisation and despite the resource implications of providing minimum core goods and services. However, states may nevertheless justify non-provision of core goods and services, by showing that complying with their core obligations is objectively impossible, or demonstrably outside of their resource capacity. In relation to the right to the enjoyment of the highest attainable standard of health guaranteed by art 12 of the ICESCR, the minimum core is understood by the UNCESCR to comprise the provision of primary health care services, minimum essential foodstuffs, safe drinking water, adequate sanitation, essential drugs (as defined by the WHO), reproductive and child health care services, immunisation against major infectious diseases as well as basic health education.

If a similar minimum core approach was adopted in relation to the interpretation of s 27(1)(a) of the Constitution, it would mean that rights to access core services (such as those identified by the UNCESCR) are viewed as immediately enforceable, notwithstanding the dictates of s 27(2). But this is not to say that the state would always be forced to deliver relevant goods and services to all without consideration of the

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28 According to Maastricht Guideline 9, minimum core obligations apply ‘irrespective of the availability of resources . . . or any other factors and difficulties’. The UNCESCR nevertheless indicated that non-fulfilment of core obligations could be justified by resource scarcity, but only where states can demonstrate that ‘every effort has been made’ to use all available resources in order to satisfy the core obligations ‘as a matter of priority’. UNCESCR General Comment 3 (note 26 above) para 10. See also ibid paras 11-2; Limburg Principles 25-8; 72 as well as discussions on limitation of core interests in international law by Chapman (note 27 above) 37; MCR Craven The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (1995) 143; S Liebenberg ‘The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa’ (1995) 11 SAJHR 359, 366-67.


30 See Maastricht Guideline 8; D Bilchitz ‘Placing Basic Needs at the Centre of Socio-economic Rights Jurisprudence’ (2003) 4(1) ESR Rev 2, 3; Chapman (note 27 above) 37; 54; Craven (note 28 above) 132-33; Currie (note 22 above) 56; De Vos (note 24 above) 97; Gabriel (note 24 above) 10; Liebenberg (note 25 above) 41; Russell (note 27 above) 15; Scott & Alston (note 9 above) 80-1.
circumstances of delivery, even where delivery would entail severe resource implications for the state, would derail its social reform efforts or would threaten the interests of justice. As in international law, an infringement of s 27(1)(a) may nevertheless be justified as amounting to a reasonable and justifiable limitation of the right, in terms of s 36 of the Constitution. The possibility therefore remains that the state can offer a satisfactory explanation for non-compliance with a core obligation.\textsuperscript{31}

Furthermore, in the event that such explanation is not forthcoming, an order that the good or service in question be provided to the claimant is but one of the myriad ways in which a court can choose to remedy the infringement. A finding that a right to receive a minimum core entitlement had been breached would thus result in tangible benefit for the beneficiary only in circumstances where non-provision of the benefit cannot objectively be justified by the state and where it is appropriate in the circumstances to order that the claimant be provided with the benefit.

It has been argued that adopting a minimum core approach to the interpretation of s 27(1)(a) would be useful because it would determine a concrete starting point for the process of progressive realisation.\textsuperscript{32} Acknowledging that s 27(1)(a) entails a core of claimable entitlements would further enable the right to make a concrete difference to the lives of its beneficiaries and would counter perceptions of socio-economic rights as ‘never being capable of being violated, as constantly receding into the future’.\textsuperscript{33} Moreover, a minimum core approach would affirm the reality that certain socio-economic needs are more vital and urgent than others, and that the immediate satisfaction of the most urgent and vital of these needs is essential in a society that values and protects human dignity. As David Bilchitz argues:

There are two important interests that ss 26 and 27 of the Constitution protect. The first is at a minimum the very basic interest people have in survival and the socio economic goods required to survive. The second is the interest people have in being provided with the conditions that enable them to pursue their own projects and to live a good life by their own lights. The notion of progressive realisation links these two interests: it recognises that what the government is required to do is to provide core services to everyone without delay that meet their survival needs and then qualitatively to increase these services so as ultimately to meet the maximal interests that the state is required to protect. Without protecting people’s survival interests, all other interests and rights that they may have whether civil, political, social or economic become meaningless. The recognition of a minimum core of social and economic rights that must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests.\textsuperscript{34}

\textsuperscript{31} See Bilchitz (note 3 above) 17-8; 23; Liebenberg (note 25 above) 29-31.
\textsuperscript{32} See Bilchitz (note 30 above) 3; Bilchitz (note 3 above) 11; 13.
\textsuperscript{33} Scott & Alston (note 9 above) 227.
\textsuperscript{34} Bilchitz (note 3 above) 11-2. See also Liebenberg (note 25 above) 28-9; Liebenberg (note 10 above) 15; 18; 22.
Through acknowledging and giving effect to the relative urgency of basic health-related needs by awarding direct claims to their satisfaction, a minimum core approach to s 27(1)(a) would therefore enable the right to connect concretely to the needs and experiences of its subjects, by allowing them to demand the immediate satisfaction of the most urgent of the needs it represents.

(b) The Constitutional Court’s rejection of minimum core in favour of ‘Grootboom-reasonableness’

In Grootboom, the Constitutional Court was requested by the amici curiae to interpret the right of access to adequate housing in s 26(1) of the Constitution as encompassing an immediately enforceable minimum core obligation on the state. The Court declined to do so. It stated:

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, availability of land and poverty. . . . Variations ultimately depend on the economic and social history of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right.35

Instead of defining and enforcing a minimum core obligation inherent to s 26, the Court held that the ‘real question’ in terms of the Constitution was whether the current state policy in relation to housing delivery was reasonable under s 26(2).36 The Court then found that the challenged housing policy was unreasonable, mainly because it did not cater for the emergency needs of vulnerable groups.37 A declaratory order to this effect was issued, with the implied demand that government adjust its policy in order to conform to the dictates of reasonableness. However, the Court emphasised that the right to have access to adequate housing did not entitle people ‘to claim shelter or housing immediately on demand’.38

In TAC, the amici contended for an interpretation of s 27(1)(a) that recognised a minimum core obligation similar to that defined by the

35 Grootboom (note 1 above) para 32.
36 Ibid para 33. According to Grootboom (ibid) paras 39-44; 46; 66; 68; 82, socio-economic measures, in order to be reasonable, must be aimed at the effective and expeditious progressive realisation of the right in question, within the state’s financial means and capacity for implementation. Measures must further be comprehensive, coherent, balanced and flexible, must clearly set out the responsibilities of different spheres of government and must ensure that appropriate resources are available for their implementation. Measures may further not exclude a significant segment of society, must plan, budget and monitor the fulfillment of immediate needs and the management of crisis situations, and must cater for the urgent needs of the most vulnerable sectors of society.
37 Ibid para 69.
38 Ibid para 95.
UNCESCR in relation to the right to health at international law. Since the drug Nevirapine (the provision of which was central to the TAC challenge) appeared on the World Health Organisation’s list of essential drugs (which, according to the UNCESCR, should be provided as part of the minimum core of the right to health), a minimum core approach to s 27(1)(a) would have entailed elevating the provision of Nevirapine above the dictates of s 27(2) of the Constitution and would accordingly have required its availability in the public sector (unless, presumably, its non-availability could be justified under s 36).

The Court emphatically dismissed the minimum core argument, characterising it as implying that ss 27(1) and (2) would always engender separate obligations.\footnote{TAC (note 2 above) para 29.} According to the Court, a purposive approach to s 27 precluded a finding that s 27(1)(a) imposed any minimum core obligation. It stated: ‘It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis’.\footnote{Ibid para 35. See also para 34 (‘the socio-economic rights of the Constitution should not be construed as entitling everyone that the minimum core be provided to them’).} The Court went on to hold that courts were not institutionally equipped to ‘make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards . . . should be’, since this would have ‘multiple social and economic consequences for the community’.\footnote{Ibid paras 37-8.} Finally, the Court indicated that s 27(1)(a) should never fulfill more than a definitional role:

section 27(1) of the Constitution does not give rise to a self standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to ‘respect, protect, promote and fulfil’ such rights. The rights conferred by sections 26(1) and 27(1) are to have ‘access’ to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).\footnote{Ibid para 39. See also paras 31-2.}

Accordingly, the Court followed the Grootboom-reasonableness inquiry in relation to s 27. It found that the government policy according to which Nevirapine could not be administered in the public health care sector except at certain designated ‘research and training sites’ (regardless of whether the capacity to administer it existed elsewhere) failed the requirement of reasonableness, primarily due to its rigidity and inflexibility.\footnote{Ibid paras 80; 95.} The Court ordered the government to take reasonable measures to remove restrictions on administering the drug in instances where this was medically indicated and where the capacity to do so
existed, to ‘permit and facilitate’ the use of the drug in these circumstances, to make it available for this purpose and to take reasonable measures to extend HIV-testing and -counseling facilities at public hospitals which still lacked the capacity to administer the drug.\textsuperscript{44} Despite the far-reaching terms of this order and despite viewing universal access to Nevirapine as a goal that needed to be accomplished as soon as possible, the Court was at pains to point out that its finding of unreasonableness ‘does not mean that everyone can immediately claim access to such treatment’.\textsuperscript{45}

The dismissal of the minimum core argument in both \textit{Grootboom} and \textit{TAC} has met with much derision in academic circles. The \textit{Grootboom} Court has been criticised for misunderstanding the minimum core concept and for overstating its complexity, for failing to recognise the universality of basic subsistence needs and for not insisting that the state prioritise satisfying the primal needs of vulnerable sectors of society.\textsuperscript{46} Furthermore, it has been pointed out that, contrary to the Court’s insinuation, the judiciary is perfectly institutionally capable of awarding minimum core content to socio-economic rights, through interpretation on a case-by-case basis.\textsuperscript{47}

As to \textit{TAC}, many of the Court’s reasons for rejecting the minimum core argument simply do not hold water. Besides misrepresenting the role played by minimum core obligations in international law, the Court’s assertion that affirming the existence of minimum core entitlements would require respondents immediately to satisfy claims to core goods or services, even in circumstances where this would patently be impossible or would lead to injustice, is erroneous. As shown above, a finding that a minimum core obligation had been breached would merely require the Court to insist that respondents justify the non-satisfaction of core needs, and to pronounce on the constitutional acceptability of such justification, in exactly the same manner as it decides and pronounces on the justifiability of apparent infringements of civil and political rights.\textsuperscript{48} This

\textsuperscript{44} Ibid para 135. See also paras 64; 69; 71; 95.
\textsuperscript{45} Ibid para 125.
\textsuperscript{47} This is evident for example from the \textit{Grootboom} High Court’s interpretation of children’s right to shelter in terms of s 28(1)(c) as requiring, as a ‘bare minimum’, the provision of tents, portable latrines and safe water. \textit{Grootboom v Oostenberg Municipality} 2000 (3) BCLR 277 (CC) 293A-B. See further Bilchitz (note 46 above) 487-88; M Wesson ‘\textit{Grootboom} and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court’ (2004) 20 \textit{SAJHR} 284, 301.
\textsuperscript{48} Argued also by Moellendorf (note 21 above) 331-32 and, in relation to minimum core entitlements specifically, by Bilchitz (note 3 above) 16-8; K Iles ‘Limiting Socio-economic rights: Beyond the Internal Limitations Clauses’ (2004) 20 \textit{SAJHR} 448, 458; Liebenberg (note 3 above) 188; Liebenberg (note 10 above) 25.
it could achieve either by viewing non-satisfaction of core needs as an
infringement of s 27(1)(a) that requires justification in terms of s 36 of the
Constitution49 or, if it insists on involving s 27(2), by viewing such non-
satisfaction as triggering a presumption of unreasonableness in terms of s
27(2).50 Moreover, in circumstances where adequate justification for non-
satisfaction of core needs is lacking, the Court would retain the flexibility
to minimise any unreasonable, unrealistic or otherwise undesirable
consequences of a finding to this effect, through tailoring the remedy it
awards to suit the circumstances of the case and the interests of justice.51

More disconcertingly, it appeared from the terms of the TAC Court’s
dismissal of the minimum core argument that it was opposed to an
approach to the right of access to health care services that entails the
recognition of enforceable individual claims.52 Its resort to Grootboom-
reasonableness in the alternative seems to support this conclusion. This is
because Grootboom-reasonableness is an essentially procedural standard
that neither requires meaningful engagement with the content of the
right, nor with its limits.53 The only entitlement directly conferred by
Grootboom-reasonableness is a conceptually empty, administrative-law-
like, right to have measures aimed at addressing health-related concerns
in place and to have such measures evaluated for their adherence to
principles of good governance.54 Apart from this, Grootboom-reason-
ableness seems at most to imply a claim for inclusion in the ambit of
policy aimed at satisfying health needs generally, which could in any
event be claimed under s 9(1) of the Constitution.55 This makes apparent
nonsense of s 27’s separate inclusion as a justiciable right in the Bill of
Rights.

It has accordingly been argued that Grootboom-reasonableness has
rendered the material needs of socio-economic rights’ subjects extraneous
to the inquiry into constitutional compliance with socio-economic
obligations.56 This inquiry appears neither to concern itself with

49 See, for example, Iles (note 48 above) 463-65; M Pieterse ‘Towards a Useful Role for Section
36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern
Metropolitan Local Council’ (2003) 120 SALJ 41, 45-8.
50 As suggested by Liebenberg (note 10 above) 23-4; 27-8.
51 See Bilchitz (note 3 above) 18; Liebenberg (note 3 above) 175fn90.
52 Brand (note 3 above) 46; P De Vos ‘So Much to Do, So Little Done: The Right of Access to
Anti-retroviral Drugs Post-Grootboom’ (2003) 7 Law, Democracy & Development 83, 89;
Liebenberg (note 3 above) 187.
53 See Bilchitz (note 30 above) 3; Bilchitz (note 3 above) 6; 8; 10; Brand (note 3 above) 45-6;
Coomans (note 3 above) 190-91; Iles (note 48 above) 451-52; 454; Liebenberg (note 16 above)
255; Liebenberg (note 3 above) 179; Pieterse (note 49 above) 43.
54 Currie (note 3 above) 72; Bilchitz (note 30 above) 2; Bilchitz (note 3 above) 10; Brand (note 3
above) 36-7; 39; 49.
55 See Brand (note 3 above) 49-50; De Vos (note 52 above) 90; Liebenberg (note 3 above) 176;
Roux (note 3 above) 46; Wesson (note 47 above) 293; 295; 297.
56 See Bilchitz (note 46 above) 499; Brand (note 3 above) 36-7; 49; 55; Chetty (note 3 above) 455;
Van der Walt (note 3 above) 200.
evaluating the urgency of applicants’ needs, nor necessarily to demand their satisfaction. The beneficiaries of socio-economic rights stand to gain virtually no tangible benefit from the outcome of an inquiry into the adherence of law or policy to essentially procedural standards. Whereas there may be circumstances in which an order that reasonable measures be adopted or modified is both appropriate and sufficient, and while the adherence of health care policy to the dictates of Grootboom-reasonableness will no doubt have positive consequences for the progressive realisation of s 27(1)(a) generally, an order requiring such adherence will more often than not be of little use to people in urgent need of access to particular health care goods, facilities or services, whose needs will remain unsatisfied.

IV  SOCIO-ECONOMIC ENTITLEMENTS BEYOND THE REJECTION OF MINIMUM CORE

(a) Coming to terms with the rejection of minimum core

It is tempting to conclude from the terms in which the Constitutional Court has dismissed the minimum core argument in Grootboom and (especially) TAC, that it has closed the door on an entitlement-based approach to socio-economic rights and that it has accordingly deprived these rights of much of their remedial and transformative potential. But such a conclusion would not only be premature (being based, after all, on only two judgments), it would also ignore the fact that the effect of applying Grootboom-reasonableness in TAC has been that many women who were previously denied access to Nevirapine can now access the drug. By improving access to the drug, TAC did result in a measure of tangible benefit for individuals, notwithstanding the Court’s reluctance to depict such benefits as flowing from an enforceable right. Moreover, there are suggestions in Grootboom and TAC, supplemented by indications from Constitutional Court judgments subsequent to TAC and from a number of High Court judgments, that the ambit and scope of s 27(1)(a) are not exclusively contingent on the confines of s 27(2) and

57 The harm suffered by claimants in a particular case may well relate specifically to the manner in which legislation or policy is phrased or implemented. For example, terms of legislation or policy may arbitrarily exclude particular individuals or groups from receiving benefits that would otherwise accrue to them, or may otherwise unreasonably hinder them from accessing particular health-related goods or services. In such circumstances, an order that legislation or policy be modified to comply with the dictates of Grootboom-reasonableness, if complied with, would correct for the infringement.

58 Acknowledged by Bilchitz (note 3 above) 1; Coomans (note 3 above) 168; 181; 186; Liebenberg (note 16 above) 250; Liebenberg (note 3 above) 178; 190.

59 See Coomans (note 3 above) 188; 195; Liebenberg (note 3 above) 176; Liebenberg (note 25 above) 30; Pieterse (note 3 above) 29.

60 Liebenberg (note 3 above) 180; Liebenberg (note 10 above) 29; Pieterse (note 3 above); Wesson (note 47 above) 296.
that there may well be enforceable obligations lurking in socio-economic rights.

Commenting on the TAC judgment from a remedy-conscious perspective, Jonathan Klaaren suggests that Grootboom-reasonableness ‘does not entirely shut the door on the direct enforcement of socio-economic rights’. Instead, he claims, Grootboom-reasonableness allows for three distinct remedial paradigms, none of which preclude the judicial recognition and enforcement of a direct remedy for an infringement of a socio-economic right. These are, first, the judicial evaluation of legislative and other measures for compliance with the reasonableness standard (where the remedy granted essentially amounts to an order that reasonable measures be adopted or that existing measures be modified to comply with the dictates of reasonableness), secondly, the provision of a legal framework for the vindication of health rights through developing the common law and, thirdly, the direct enforcement of particular litigants’ rights, through tailoring appropriate remedies in accordance with s 38 of the Constitution.

Despite the TAC Court’s unequivocal rejection of the minimum core argument, Klaaren views the Court’s simultaneous affirmation of its powers to order a remedy that amounts to appropriate relief for each infringement of a socio-economic right, as it reserving the option to vindicate individual or group-based entitlements where this is called for in the circumstances of a particular case. Klaaren adds that such appropriate relief may well, in suitable circumstances, correspond to the enforcement of a minimum core obligation, though it would probably follow from a finding of unreasonableness under subsec 27(2) of the Constitution, rather than from a finding that subsec 27(1)(a) thereof has been breached. This means that, even though the Constitutional Court has rejected minimum core terminology, there may still be cases where a remedy requiring the satisfaction of needs akin to those represented by a minimum core approach would qualify as appropriate relief. This conclusion seems in line with statements in both Grootboom and TAC that the notion of minimum core may sometimes be relevant to an inquiry of reasonableness.

However, the basis of a direct judicial remedy for the infringement of a health-related right would remain concealed unless it is related specifically to an understanding of the entitlements awarded by the right in question and of the extent to which these may be claimed or limited in particular circumstances. Declining to situate a remedy within such an...

63 Klaaren (note 61 above) 461; 464; 467; Klaaren (note 62 above) 113.
64 Grootboom (note 1 above) para 33; TAC (note 2 above) paras 34-5.
understanding would complicate the monitoring of its effectiveness, through obscuring the links between such a remedy and the needs that underlie the right it serves to vindicate. The problem with the TAC order, for instance, is that the jurisprudential basis for the increased access to Nevirapine in the public sector is obscured by the procedural nature of the reasonableness standard. In other words, the significant benefits that evidently resulted from the order is depicted by the TAC Court as incidentally flowing from application of the Grootboom-reasonableness standard, rather than from a discernible notion of individual entitlement. Detaching remedy from right in this manner fails to provide practical guidance to future applicants, as to the extent of their entitlements and to their likelihood of success. Given the onerous burden of proof that such applicants face under Grootboom-reasonableness and given that ‘[t]he stakes are high for the individuals and groups who approach the Court for relief, entailing threats to life, health and the ability to function in society’, uncertainty as to whether the relief they seek is actually capable of resulting is bound to impact negatively on such applicants’ willingness to assert their rights through the judicial process.

The argument therefore remains that, if its jurisprudence is to have any tangible significance for socio-economic rights’ beneficiaries, the Constitutional Court needs to reverse its stance against the recognition of individually enforceable claims and to ground the affirmative remedies it awards in socio-economic rights cases in a purposive understanding of the entitlements entailed by the rights in question.

But this does not mean that the Court should necessarily reconsider its stance against the minimum core approach. Indeed, it may well be that the Court has good reason to be skeptical of the approach. Institutionally, it may be argued that it is unwise for South African courts blindly to incorporate the UNCESCR’s understanding of a provision in a treaty that Parliament has not ratified and that is enforced by way of a reporting mechanism only, into a justiciable constitutional right of which the content corresponds only partially to the treaty-provision. Specifically, the UNCESCR’s elaboration of the minimum core of the right to health may be unsuitable to s 27(1)(a) of the Constitution, since access to health care services is but one of the several components of the overarching right to health in art 12 of the ICESCR, which also guarantees, for instance, autonomy in health-related decision-making.

65 Liebenberg (note 10 above) 22.
66 See also Liebenberg (note 3 above) 188 (‘recognising an individual entitlement to . . . relief would be of immense practical benefit to litigants who seek the courts’ assistance in situations of severe socio-economic deprivation. They would not be required to review a wide range of measures adopted by the state and to assess their reasonableness in the light of its available resources. Instead they would enjoy the benefit of a presumption that placed the burden on the state to justify why it is unable to provide direct relief. Furthermore, it would ensure that, in appropriate circumstances, they are entitled to direct individual relief’).
equality of access to health-related goods and services and access to non-
medicinal determinants of health. In South Africa, this broader right to
health is protected by s 27(1)(a) of the Constitution in conjunction with
several other constitutional provisions, such as ss 12(2); 24(a); 26;
27(1)(b)(c); 27(3) and 28(1)(c). To adopt a minimum core approach to s
27(1)(a) that represents the core interests of the broader right, may
therefore be unduly stretching the ambit of s 27(1)(a).

More fundamentally, it has been pointed out that an internationally-
derived minimum core approach may inadequately respond to particular
socio-economic needs arising in a specific, domestic context. Moreover,
to insist on a comprehensive, once-off definition of minimum core may be
counter-transformative where such a definition over-essentialises the
needs and experiences of a diverse populace, excludes the satisfaction of
certain vital needs, inflexibly prescribes the state’s response to such needs,
or frustrates the satisfaction of legitimate needs that are regarded as
falling outside of the minimum core. Insisting that the state adhere to
accontextual minimum core standards in relation to a particular right, may
further disrupt overarching transformation efforts by directing resources
away from other pressing social needs. Finally, an acontextual
imposition of minimum core standards may also deflect attention from
the underlying, structural causes of hardship and hence 'close down
debate and artificially curtail an evolution in our standards of social
provisioning as processes of struggle around social needs unfold'.

However, these shortcomings of a rigid minimum core approach do
not justify altogether abandoning a needs-focused and entitlement-based
approach to rights. The recognition and enforcement of socio-economic
entitlements need not take the form of a once-off and comprehensive
determination of need, coupled with a rigid insistence on adherence to
contextual standards. Nothing prohibits courts from incrementally
awarding context-sensitive and need-specific, enforceable minimum
content to s 27(1)(a) on a case-by-case basis. Indeed, such a pragmatic
approach would seem to be required if socio-economic rights discourse is
to retain its vitality, adaptability and transformative potential. The
following section of this article investigates the extent to which such a
pragmatic understanding of socio-economic entitlements is emerging
from, or latent to, socio-economic rights judgments.

67 UNCESCR General Comment 14 (note 29 above) paras 1; 3-4; 7-9. See also Van Bueren (note
20 above) 494.
68 Wesson (note 47 above) 303-05. See also Liebenberg (note 10 above) 31; Liebenberg (note 8
above) 31.
69 This concern may be particularly applicable to health rights, given the often exorbitant cost of
70 Liebenberg (note 8 above) 31.
71 Ibid.
72 See also Bilchitz (note 69 above) 34-5 (advocating for the adoption of a "pragmatic minimum
core" in relation to health care); Liebenberg (note 3 above) 174; Liebenberg (note 25 above) 31.
(b) Enforceable entitlements outside and inside ‘Grootboom-reasonableness’

When investigating the extent of enforceable entitlements implied by s 27(1)(a) of the Constitution, the logical first step should be to distinguish between the entitlements entailed by that provision and those guaranteed by other health-related constitutional rights. In fact, it may plausibly be argued that the minimum core of the international-law right to health lies outside of s 27(1)(a), since several other constitutional provisions guarantee the provision of essential health services, without limiting the entitlements they confer by way of a s 27(2)-style modifier. When the various health-related rights in the Bill of Rights are viewed together, it could accordingly be argued that the right to health in South Africa entails entitlements to emergency medical treatment for all (s 27(3)), basic health care services for children (s 28(1)(c)), adequate medical care for detainees (s 35(2)(e)), such services as are necessary to constitute an environment that is not harmful to health (s 24(a)) and such reproductive health care services as are necessary for the unfettered exercise of the right to reproductive freedom (s 12(2)(a)).

However, the constitutional presence of these entitlements does not justify draining the right of access to health care services in s 27(1)(a) of independently enforceable content. Whereas the extent of the entitlements conferred by s 27(1)(a) is obviously limited by s 27(2), its separate constitutional inclusion as a justiciable right indicates that it should at least sometimes be capable of independent enforcement. This is confirmed not only by certain dicta in Grootboom and TAC, but also by findings in subsequent Constitutional Court cases and by a number of High Court judgments that give effect to certain aspects of socio-economic rights. Viewed together, these point to the individual enforceability of entitlements that coincide with the protection of the right to equality, certain negative entitlements underlying s 27(1)(a) and of certain entitlements in relation to access to treatment that has already been established.

First, the Constitutional Court appears to have acknowledged that s 27(1)(a) implies an entitlement to equality of access to health care services, in that laws or policies which confer health-related benefits may not unfairly or arbitrarily exclude needy individuals or groups from their ambit. Textually, this entitlement appears to be located in s 27(1)(a)’s determination that ‘everyone’ is entitled to have access to health care services, and hence to supplement entitlements conferred by the right to

73 Section 28(1)(c) is viewed as illuminating part of the core content of s 27(1)(a) in this manner by Scott & Alston (note 9 above) 260; G van Bueren ‘Alleviating Poverty Through the Constitutional Court’ (1999) 15 SAJHR 52, 57.
equality. While neither *Grootboom* nor *TAC* explicitly interpret the word ‘everyone’ to mean this, the insistence in *Grootboom* that, in order to be reasonable, policies and laws may not exclude a significant segment of society and must pay attention to the needs of society’s vulnerable members, implies that vulnerable members of society are entitled to be included in the ambit of social policies. This was seemingly affirmed in *TAC* where the Constitutional Court held that restricting the provision of Nevirapine to designated sites was unreasonable because it excluded people who could reasonably have been included in the ambit of the policy. While it is true that to insist that policy does not ignore the needs of vulnerable groups does not in itself confer any tangible benefits on them, the outcome of *TAC* further suggests that there are circumstances in which inclusion within the ambit of a policy will entail an entitlement to share in the benefits conferred by the policy.

The Constitutional Court more explicitly indicated the remedial potential of the equality-entitlement inherent in s 27(1)(a) in its subsequent judgment in *Khosa v Minister of Social Development*, where it found that the arbitrary and unfairly discriminatory exclusion of foreigners from statutory social security benefits fell foul of *Grootboom*-reasonableness. The Court accordingly ordered the reading of words into the legislation that would explicitly extend the benefits also to the applicants. Mokgoro J’s majority judgment held that, since equality of access to social goods is implied by the word ‘everyone’ in s 27(1), the exclusion of foreigners from the ambit of the law was unreasonable in terms of s 27(2). Ngcobo J’s minority judgment instead located the constitutional infringement in the ‘everyone’ standard in s 27(1) and proceeded to hold that the exclusion of non-citizens from certain (but not all) of the benefits in question was justifiable in terms of s 36. Whereas one may disagree with this latter finding, the minority’s willingness to transcend *Grootboom*-reasonableness, by acknowledging that s 27(1)(a) embodies interests capable of infringement notwithstanding the provisions of s 27(2), is welcomed.

The Constitutional Court has also over time developed an affirmative approach to the negative obligations imposed by s 27(1)(a). Section 7 of the Constitution determines that the state must respect, protect, promote

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74 See P De Vos ‘Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness’ (2001) 17 *SAJHR* 258, 265-66; Liebenberg (note 22 above) 26-7; Ngwena (note 20 above) 3; 7-9; 27.
75 *TAC* (note 2 above) paras 70; 125.
76 Roux (note 3 above) 47; 49. See also Bilchitz (note 46 above) 498; De Vos (note 46 above) 58.
77 2004 (6) SA 505 (CC).
78 Ibid paras 53; 82; 85; 89 (Mokgoro J).
79 Ibid paras 42-3; 47; 49.
80 Ibid paras 111-12; 134-36 (Ngcobo J).
and fulfill all rights in the Bill of Rights. In international law, the
obligation to respect the right to health entails, inter alia, immediately
enforceable obligations to non-disruption of existing access to health-
related goods, services and facilities and to the removal of arbitrary
barriers to access.\textsuperscript{81} Ever since the Constitutional Court stated in its First
Certification judgment that socio-economic rights could at least be
protected against improper invasion,\textsuperscript{82} there have been arguments that
similar entitlements inherent to the obligation to respect s 27(1)(a) should
be regarded as immediately enforceable.\textsuperscript{83}

That non-compliance with the obligation could uncontroversially be
remedied was illustrated in relation to the right to have access to water in
Residents of Bon Vista Mansions v Southern Metropolitan Council, where
the High Court granted a temporary interdict ordering the respondent to
restore the water supply to the applicants’ apartment complex, holding
that discontinuing the water amounted in the circumstances to non-
compliance with the obligation to respect the right of access to water.\textsuperscript{84}

But while the existence of such a negative dimension of socio-economic
rights was affirmed in both Grootboom and TAC, and while there are at
least some indications in the TAC order that the Court regarded the
challenged policy as contravening this obligation,\textsuperscript{85} neither judgment
explicitly upholds the entitlements inherent to this obligation, both
choosing instead to focus on Grootboom-reasonableness.\textsuperscript{86}

\begin{footnotes}
\item 81 See UNCESCR General Comment 14 (note 29 above) paras 33-4; 50; Limburg Principle 72;
Maastricht Guidelines 14(a); 15(g) as well as Chapman (note 27 above) 46; Chetty (note 3
above) 453; De Vos (note 24 above) 81; De Vos (note 52 above) 88-9; Liebenberg (note 22
above) 28-30; Liebenberg (note 3 above) 163; Pillay (note 29 above) 67.
\item 82 Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of
the Republic of South Africa, 1996 (4) SA 744 (CC) para 78.
\item 83 DM Chirwa ‘The Right to Health in International Law: Its Implications for the Obligations of
State and Non-state Actors in Ensuring Access to Essential Medicine’ (2003) 19 SAJHR 541,
559; 564; De Vos (note 24 above) 92-4; 100; Liebenberg (note 3 above) 178; Liebenberg (note
25 above) 19; 58; Michelman (note 25 above) 504.
\item 84 Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625
(W) paras 11-20; 27. The Court held that the obligation to respect s 27(1)(b) was not subject to
s 27(2) and that an infringement thereof required justification. For discussion, see generally
Pieterse (note 49 above).
\item 85 See Grootboom (note 1 above) paras 34; 88; TAC (note 2 above) para 46; 135.3(a)
(‘Government is ordered without delay to remove the restrictions that prevent Nevirapine
from being made available’) as well as remarks of Bilchitz (note 3 above) 8; Iles (note 48
above) 462; Liebenberg (note 3 above) 170; 177-78; 183; Liebenberg (note 10 above) 18.
\item 86 The Court did, however, endorse the UNCESCR’s understanding of ‘progressive realisation’
in Grootboom (note 1 above) para 45. According to UNCESCR General Comment 3 (note 29
above) paras 2; 9, the state must incrementally make relevant socio-economic amenities
available both to a larger number and a wider range of people, and must show that it is moving
‘effectively and expeditiously’, through concrete and deliberate steps, towards full realisation
of the right. This means that deliberately retrogressive measures (resulting in lesser enjoyment
of the right) amount to non-compliance with the standard unless they are necessitated by
extreme resource scarcity or are in the interest of the progressive realisation of the totality
of socio-economic rights. See also Limburg Principles 16; 21; Maastricht Guidelines 14(c)-(i). It
may therefore be argued that ‘deliberately retrogressive measures’ fall foul of s 27(1)
notwithstanding s 27(2), which may render benefits similar to those implied by the obligation
to respect s 27(1)(a). See Coomans (note 3 above) 194; Liebenberg (note 3 above) 179.
\end{footnotes}
Subsequently however, the Constitutional Court found in *Jaftha v Schoeman*\(^7\) that infringements of negative obligations generated by the right of access to housing may be remedied without reference to *Groothboom*-reasonableness. The Court unanimously dismissed the submission by the respondents that, in line with *TAC*, self-standing obligations could never be generated by s 26(1). It held that the relevant *TAC* dicta pertained only to positive obligations generated by socio-economic rights and that non-compliance with their implied negative obligations had to be justified under s 36 of the Constitution.\(^8\) Given the close textual similarities between ss 26 and 27 of the Constitution, it may be expected that a similar stance may in appropriate cases be adopted in relation to s 27(1)(a). It is therefore possible that entitlements associated with the obligation to respect the right of access to health care services may be demanded where non-compliance with the obligation cannot be justified under s 36.

There have been some further tentative judicial indications that established access to health care services must be meaningful, in line with the UNCESCR’s determination that health care services must be available, accessible, acceptable and of appropriate quality.\(^9\) In *Groothboom*, the Court recognised that housing to which people have access must satisfy certain qualitative requirements, though it did not pursue this further.\(^10\) An acknowledgment that access to health care services must similarly be meaningful was however absent from *TAC*.

In *Strydom v Afrox Healthcare*, the Pretoria High Court held that the right of access to health care services awarded patients a legitimate expectation that the services to which they have access would be rendered with skill and care by professional and trained health care personnel.\(^11\) It accordingly declared that a contractual clause insulating a health care facility from delictual liability arising from the negligent conduct of its personnel was contra bonos mores and unenforceable. The Supreme Court of Appeal overturned this judgment on appeal (since it felt that the exclusion clause did not deny access to treatment and did not explicitly allow for negligent or substandard care), but left open the question of whether s 27(1)(a) presupposed a minimum level of care.\(^12\) More recently, the SCA remarked in *Pharmaceutical Society of South Africa v Tshabalala-Msimang* that ‘access’ to health care services required

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\(^7\) 2005 (2) SA 140 (CC).
\(^8\) Ibid paras 31-2; 34. This aspect of the judgment is welcomed by S Liebenberg ‘Basic Rights Claims: How Responsive is Reasonableness Review?’ (2004) 5(5) *ESR Rev* 7-8; Liebenberg (note 8 above) 27-8.
\(^9\) UNCESCR General Comment 14 (note 29 above) para 12. See also Chapman (note 27 above) 45.
\(^10\) Groothboom (note 1 above) paras 35-6.
\(^11\) Strydom v Afrox Healthcare [2001] 4 All SA 618 (T) 626b-h; 627f-g.
services to be both physically accessible and affordable, and acknowledged that prohibitive pricing of medicines may amount to a denial of access. In the subsequent appeal judgment in this matter by the Constitutional Court, these dicta were affirmed in a separate judgment by Moseneke J.

Overall, whereas the Constitutional Court’s stance against the notion of enforceable entitlements in *Grootboom* and *TAC* may rightly be criticised as overly restrictive, there are clear indications that *Grootboom*-reasonableness is not the be-all-and-end-all of socio-economic rights. Courts are tentatively exploring more entitlement-based enforcement options in relation to distinct aspects of socio-economic rights. It is however notable that, apart from the incidental benefits associated with the entitlement to inclusion in the ambit of existing socio-economic policies implied by the equality-threshold of s 27(1)(a), all of the entitlements conferred by the above judgments relate to existing access to socio-economic amenities. Beyond the entitlement to inclusion, none of the above judgments award or explicitly acknowledge an entitlement to receive health-care goods or services in circumstances where some degree of access to such goods, services or products has not already been established. It may be argued that the value of a minimum core approach to s 27(1)(a) lay precisely in its affirmation of such an entitlement, in relation to those health-related goods, services or products that are necessary for survival. Is it possible to resurrect such an entitlement in light of the dismissal of minimum core?

One seemingly obvious way in which courts could identify and enforce core-like entitlements inherent to s 27(1)(a), without themselves resorting to formulating an all-encompassing definition of what minimum core entails, would be to align their understanding of such entitlements with the understanding evident from legislation or health policy that confers health care-related benefits upon citizens. For example, s 4(3)(b) of the National Health Act 61 of 2003 determines that the state must provide free primary health care services to all persons except to those who are members of medical aid schemes or to their beneficiaries, or to persons receiving compensation in terms of relevant occupational health laws. Section 4(3)(a) of the same Act determines that the state must provide free health services (ie extending beyond primary care) to all pregnant and lactating women and to all children below the age of six years, subject to similar limitations. Viewing the entitlements conferred by provisions such as these as constituting the enforceable core of s 27(1)(a), would minimise the (already slight) separation of powers tensions that may otherwise be occasioned by this interpretative exercise.

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93 *Pharmaceutical Society of South Africa v Tshabalala-Msimang* 2005 (3) SA 238 (SCA) paras 42; 53; 77.
94 *Minister of Health v New Clicks South Africa* 2006 (2) SA 311 (CC) para 706.
However, such an approach obviously runs the risk of depicting core entitlements as contingent on the existence of the legislative provisions or policy documents. More significantly, the rigid, ‘top-down’ definition of minimum entitlements in this manner displays all the weaknesses and counter-transformative tendencies of the minimum core approach, described above. In order to counter these tendencies, it remains necessary to formulate a more context-sensitive, flexible and pragmatic conception of an entitlement to goods and services in the absence of prior access, that may be applied and developed on a case-by-case basis.

In an attempt to establish when direct, mandatory relief would amount to an appropriate remedy to correct for the infringement of a socio-economic right, Thomas Bollyky examined a range of orders made by the Constitutional Court in cases involving civil and political, as well as socio-economic rights. He concluded that the Court would go beyond ordering mere declaratory relief in circumstances where the egregiousness of the constitutional violation outweighed the sum-total of the budgetary and political consequences of the order in question.95 If Bollyky is correct, it should be possible to derive a set of circumstances under which tangible relief may be expected to result from reliance on s 27(1)(a), through engaging with the manner in which the Constitutional Court struck the balance between these competing normative values in TAC. This is so because, even as its use of Grootboom reasonableness in TAC obscured the basis for its order that restrictions on the provision of Nevirapine must be lifted and that its provision must under certain circumstances be permitted and facilitated, that order resulted in a measure of tangible relief for HIV-positive pregnant women. It should therefore be possible to recast the terms of the TAC order, read with the Court’s justifications for its finding of unreasonableness in that case, in terms that reflect a notion of entitlement at the core of s 27(1)(a).

In his critique of the sidelining of need through the ‘proceduralising’ effect of Grootboom-reasonableness as applied in TAC, Danie Brand remarks that the TAC Court’s finding of unreasonableness was essentially motivated by its dissatisfaction with the lack of rational coherence of the challenged policy. The perception that the policy lacked rational coherence, argues Brand, was in turn based on the fact that the policy prohibited the drug being administered in situations where it was

95 Bollyky (note 4 above) 163-77. Bollyky expresses this paradigmatically in algebraic terms as R if C > B + P (where R remedy; C constitutional violation; B budgetary implications and P Policy implications). He summarises the paradigm as follows: ‘The “positive” mandate created by the constitutional violation (C) as a product of its quantitative and qualitative elements is weighed against the “illegitimacy” of a court issuing the relief as defined by the sum of its qualitative and quantitative interference in policy and budgetary decisions (P + B). The common unit, or the basis of comparison, for the variables in this paradigm is whether they add, or detract, from the legitimacy of granting that form of relief. Judges intuitively weigh these competing normative values and ultimately make an assessment of remedies based on their proportionality’. Ibid 175.
medically indicated and where the capacity to administer it clearly existed, despite the drug being affordable, safe and efficacious. That this indeed appears to have been the basis for the TAC decision is borne out by several passages from the judgment and the order.

It is possible to recast this basis of the TAC finding as an entitlement to receive safe and efficacious medical treatment where such treatment has been medically indicated, as long as the treatment is affordable and where capacity to administer it exists. A basic entitlement to medically indicated, safe and efficacious treatment (s 27(1)(a)) is thus carved down by restraints imposed by affordability and capacity (s 27(2)). This is in line with the Constitutional Court’s concern that the positive entitlements implied by s 27(1)(a) should always be understood in light of the restrictions on state responsibility in s 27(2). This conception of the s 27(1)(a) entitlement further seems to avoid most of the weaknesses of a minimum core approach, by not prescribing a rigid definition of ‘core’ goods and services. Moreover, whereas this notion of entitlement may easily be reconciled with the distinction between primary, secondary and tertiary care (in that claims to be provided with primary health care services will more often succeed on this model than claims for secondary and tertiary care), it is also consistent with the progressive realisation

96 Brand (note 3 above) 50-1. See also K Garforth ‘Canadian “Medical Necessity” and the Right to Health’ (Dec 2003) 8(3) Canadian HIV/AIDS Policy & Law Rev 63, 67-8 (reaching a similar conclusion after analysing the judgment and order in TAC).

97 See, for example, TAC (note 2 above) para 48 (‘[i]n deciding on the policy to confine Nevirapine to the research and training sites, the cost of the drug itself was not a factor’); para 64 (‘[h]owever, this is not a reason for not allowing the administration of Nevirapine elsewhere in the public health system when there is the capacity to administer it and its use is medically indicated’); para 80 (‘[a] potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the State without any known harm to mother or child’); para 120 (‘we were informed ... that the government has made substantial additional funds available for the treatment of HIV, including the reduction of mother-to-child transmission’); para 125 (‘[w]e have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV’); para 135(2)(c) (‘[t]he policy ... fell short of compliance with [the Constitution] in that ... [d]octors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine ... even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned’); para 135(3) (‘Government is ordered without delay to: (a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child-transmission of HIV at public hospitals and clinics that are not research and training sites. (b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled. ... (d) Take reasonable measures to extend the testing and counseling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV').
standard and with the principle of non-abandonment,98 in that it does not rule out direct relief for claims to more sophisticated forms of treatment where this is within the state’s financial and human resource capacity.

As to the workability of the standard, it is interesting to note that to explicitly enunciate and demarcate an entitlement to direct relief under s 27(1)(a) in such terms is consistent with all other judgments in which South African courts have thus far had to consider the appropriateness of ordering that an applicant be provided with specific medical treatment, despite the very different remedial contexts of these decisions. In the pre-constitutional Applicant v Administrator Transvaal, the Witwatersrand Local Division overturned a refusal by a hospital authority to provide a patient with medically indicated and beneficial treatment within the financial capacity of the respondent.99 In Van Biljon v Minister of Correctional Services, the Cape High Court ordered that two HIV-positive prisoners had to be provided with the anti-retroviral drug AZT, since it had been medically prescribed to them, was the most effective treatment available for their condition and since the state could not show that it was unaffordable.100 Finally, in Soobramoney v Minister of Health, KwaZulu-Natal, the Constitutional Court refused to overturn a rationing policy of a public hospital, according to which life-prolonging kidney dialysis was denied to an incurably ill patient because the treatment was neither effective nor affordable.101

The nature and extent of the entitlement inherent in s 27(1)(a) admittedly remains vague and unspecific in terms of this interpretative approach. The approach also does not assist courts in devising a sufficiently robust standard of scrutiny for assessing resource-availability and capacity. However, making the implicit basis for the TAC judgment explicit in this manner provides a discernible foundation from which future courts may depart in their efforts to tease out the enforceable content of the right of access to health care services on a case-by-case basis. Using this foundation, rather than Grootboom-reasonableness, as the point of departure in cases where access to a particular form of medical treatment is claimed, would focus the attention of the judicial

98 The principle of non-abandonment, which is sometimes advanced as an appropriate directive for health resource rationing processes, involves that, despite an emphasis on the satisfaction of primary health care needs, a health system should not abandon attempts to satisfy more complex health needs where it is capable of providing more advanced secondary and tertiary health services. See WA Landman & LD Henley ‘Rationing and Children’s Constitutional Health-care Rights’ (2000) 19 SA J of Philosophy 41, 43-4.
99 Applicant v Administrator, Transvaal 1993 (4) SA 733 (W). See specifically 739G-H; 740A-B; 740D.
100 Van Biljon v Minister of Correctional Services 1997 (4) SA 441 (C). See specifically paras 37; 49; 57; 60; 61; 65.
101 Soobramoney v Minister of Health, KwaZulu Natal 1998 (1) SA 765 (CC). See specifically paras 21; 24-5.
inquiry on factors directly related to the claim (the medical appropriateness, safety, efficacy and affordability of treatment claimed by the applicant and the financial and other capacity of the respondent to provide it) rather than on abstract overarching policy factors which are only of indirect relevance to the claimant. It would also force courts to articulate their findings in terms reflecting either an entitlement to particular forms of care or the limits of such entitlement, which will be more conducive than Grootboom-reasonableness to the incremental development of a health rights jurisprudence that is sensitive to need.

It is clear that, over and above enforcing the entitlements to specific kinds of health care services afforded by several other constitutional provisions, there are a variety of ways in which courts could interpret s 27(1)(a) that would amount to the recognition of an individual entitlement to direct relief that effectively and adequately compensates for infringements of the right. Courts should accordingly be encouraged to look beyond Grootboom-reasonableness in appropriate cases and to engage instead in the incremental development of an entitlement-orientated approach to health-related rights. Such an approach would not only assist present and future applicants who would in appropriate circumstances be able to assert their rights with greater ease, but would prove beneficial also to respondents, who would have a clearer notion of what is expected of them in terms of the rights.

V Conclusion

This article argued that the Constitutional Court’s rejection of a minimum core approach to the interpretation and enforcement of socio-economic rights need not be seen as altogether precluding an entitlement-orientated approach to these rights. It indicated the value of an entitlement-orientated approach and has shown that such an approach is permitted by the structure of the Bill of Rights. It criticised the terms in which the Court has dismissed the minimum core argument in Grootboom and TAC, but also showed that a minimum core approach is not the only, or necessarily the best, way in which to vindicate entitlements inherent to socio-economic rights. It then illustrated that, despite the dismissal of a minimum core approach, South African courts are beginning to acknowledge and enforce certain entitlements inherent to socio-economic rights. For example, courts have given effect to entitlements associated with the rights’ equality-threshold, with the obligation to respect existing enjoyment of the rights and with the standard that existing access to socio-economic amenities must be meaningful. Beyond these, the article showed that a latent notion of positive entitlement underlies the manner in which the Constitutional Court has applied the Grootboom-reasonableness standard in the TAC case and argued for the explicit articulation of this entitlement.

An approach to socio-economic rights that acknowledges and enforces
entitlements such as those discussed here, neither excludes the application of *Grootboom*-reasonableness in appropriate cases (such as challenges to the form and content of particular health-related legislation or policies), nor requires a drastic reconceptualisation of the manner in which courts conduct themselves in socio-economic rights matters. It merely expects of courts to explicitly articulate the basis of their findings and to situate this within an entitlement-based and need-sensitive interpretation of the rights concerned. Not only are courts perfectly institutionally capable of awarding such content to rights through interpretation, they also remain empowered to limit the extent of health rights’ enforcement where this is called for. They further retain the flexibility to award less than tangible relief in circumstances where, all factors considered, the interests of justice dictate that this is appropriate.

A finding that a socio-economic entitlement has been limited in particular circumstances, or that tangible relief is not appropriate (notwithstanding the infringement of a right) admittedly involves a loss or an empty victory for a particular claimant. However, the articulation of this loss or empty victory in entitlement-orientated terms remains preferable over *Grootboom*-reasonableness’ denial of the existence of a valid, claimable entitlement in the first place. As David Bilchitz explains:

The idea that people have rights even when these are not presently capable of being fulfilled thus helps to express the idea that there is a moral loss, something deeply disturbing that occurs when not all can be provided with life saving health care, food, water, and shelter. It enjoins us to change this situation as soon as we can so that people can be given what they are entitled to. Without such a recognition, the failure to meet basic needs under conditions of scarcity does not violate any claim people have. The situation does not demand reform as it does in a position where people have rights that are not fulfilled. The recognition that a person’s fundamental rights are being abrogated . . . thus provides a strong sense that there is some injustice or moral tragedy involved in the inability to realise those rights.102

Recognising the existence of a valid and enforceable entitlement inherent to a right, even in circumstances where the right is considered to have been limited, or where it is not appropriate to directly remedy its infringement, opens the door for future applicants to succeed with similar claims in different or altered circumstances (for example, where resources have become available, where relevant policy measures have been put in place, etc). Were courts to indicate that they regard particular aspects of socio-economic rights as being enforceable (whether or not they are actually enforced in a particular case), this would likely also incentivise other branches of government to satisfy the needs in question in order to avoid future litigation.103

Overall, there appears to be sufficient textual backing and institutional leeway for courts directly to remedy infringements of particular socio-

102 Bilchitz (note 3 above) 21.
103 See ibid 21-2.
economic rights in appropriate circumstances, whether or not such remedies flow from endorsement of the minimum core standard as enunciated in international law. It is hoped that courts would, where the circumstances of a particular case allow, venture beyond *Grootboom*-reasonableness to directly enforce certain aspects of socio-economic rights. This would significantly enhance the practical relevance of their judgments for the intended beneficiaries of socio-economic rights.