FIVE YEARS ON: HOW RELEVANT IS THE CONSTITUTION TO THE NEW SOUTH AFRICA?

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INTRODUCTION

Questioning the relevance of the 1996 South African Constitution on its fifth anniversary seems a very strange way to celebrate what is often described as one of the "most admirable constitution[s] in the history of the world." There can be little question that South Africa’s prolonged constitution-making process—from the first meeting of CEDAZ in 1991 until the adoption of the final Constitution by the Constitutional Assembly in 1996—both enabled the nation’s political transition and served as an essential ingredient in the emergence of a stable post-apartheid government. This success, however, raises the issue of the Constitution's
I. WHEN A CONSTITUTION'S FATE IS IRRELEVANCE

It is well recognized that historically some constitutions have played a purely symbolic or aspirational role. In contrast, others contain directly enforceable rights or even empower the judiciary to review and strike down the legislative acts of democratically-elected bodies. In the case of many of the former state socialist societies, for example, constitutions guaranteed a range of political, civil, and socio-economic rights which provided a symbolic characterization of the society, what it had achieved, and its future goals. However, there was often little correspondence between these extraordinary commitments and the realities of daily life. Similarly, the constitutions of many developing countries have often provided little more than a reference point for those who sought to challenge the obvious discrepancies between the promise of orderly government for the people and the realities of autocratic rule and corruption. In the post-cold war democratic wave, these sad examples have been joined by a more complicated yet equally disturbing disjuncture in cases where the
II. BACKGROUND

In order to consider the state of the South African Constitution from...
given the state of gender relations in South Africa, to control any of the practices essential to the success of the ABC policy.\textsuperscript{8}

Finally, it must be acknowledged that in South Africa the health care system still reflects the legacy of apartheid. While over 80% of the population does not have access to private health care, the private sector
development of South Africa's post-apartheid constitutional jurisprudence. In *Treatment Action Campaign v. Minister of Health (TAC)*, the High Court (Transvaal Provincial Division) further defined the content of the right to health care and the obligations of the government to implement the socio-economic rights promised in the Constitution.¹³

The *TAC* decision is also of great significance in the growing social and political conflict over the government's handling of South Africa's HIV/AIDS pandemic. While the government has launched an important prevention effort with its ABC campaign, it has refused to recognize the essential link between treatment and prevention. Effective prevention requires awareness of one's personal status, but there is no incentive to get
government produce a reasonable plan to address the problem of emergency housing faced by the applicants.\textsuperscript{20}

In the \textit{TAC} case, however, the High Court took the next step, holding that in the context of MTCT of HIV, the provision of Nevirapine, one particular drug, is now a constitutional obligation.\textsuperscript{21} But the High Court's context-driven elaboration is now being challenged on appeal by the government as a violation of the doctrine of the separation of powers and as an unjustified interference in the formulation of government policy.\textsuperscript{22}

\textbf{IV. MOTHER-TO-CHILD TRANSMISSION AND NEVIRAPINE}

In order to evaluate these challenges, it is important to first understand the factual context of the High Court's decision in the \textit{TAC} case. First, demonstrating the magnitude of the HIV/AIDS pandemic, approximately "70,000 children are infected each year through mother to child transmission (MTCT) of HIV."\textsuperscript{23} Second, the drug Nevirapine offers a relatively uncomplicated medical response to this particular aspect of the HIV/AIDS crisis, in that a "single oral dose of 200mg to the mother during labour and a single oral dose of 2mg/kg to the infant within 48 to 72 hours after birth" significantly reduces the rate of intrapartum transmission of HIV, although MTCT may still result through breast-feeding.\textsuperscript{24} Third, although at the time of the decision the government had not yet accepted the manufacturer's offer of a free five-year supply of Nevirapine, even the private sector cost had dropped to a near-negligible point.\textsuperscript{25} The court also accepted evidence that the "total cost of MTCT prevention programmes, including testing and counselling, is less than the cost of treating HIV positive children."\textsuperscript{26} Fourth, despite concerns about the long-term side effects of Nevirapine, it was registered in April 2001 by the Medicine

\begin{itemize}
\item \textsuperscript{20} \textit{Id.} \S 62–64.
\item \textsuperscript{21} \textit{Id.} \S 65.
\item \textsuperscript{22} See \textit{Save Lives and Face}, \textit{Daily Mail and Guardian} (Apr. 5, 2002), at http://www.mg.co.za/mg/za/archive/2002apr/features/05apr-editorial.html. These arguments were rejected by the Constitutional Court in its decision of July 5, 2002. While this decision modified the order of the High Court, it upheld the basic claims of the TAC and requires the government to effectively address the issue of MTCT of HIV, including removing the restrictions preventing Nevirapine from being made available for the purpose of reducing the risk of MTCT at public hospitals. See Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC), 2002 SACLR LEXIS 26.
\item \textsuperscript{23} \textit{TAC}, 2002 (4) BCLR 356 (T) at *12.
\item \textsuperscript{24} \textit{Id.} at *14.
\item \textsuperscript{25} \textit{Id.} at *15.
\item \textsuperscript{26} \textit{Id.} at *22.
\end{itemize}
will result in a saving of public resources when compared to the costs associated with the illnesses and deaths of HIV-positive children.39

V. CONTENDING ARGUMENTS

In asserting the government’s constitutional obligation to provide Nevirapine to health care recipients in the public sector, the applicants in the TAC case, TAC, Dr. Haren Selooine, and the Children’s Rights...
to ninth respondents have taken reasonable legislative and other measures within their available resources to achieve the progressive realisation of the right to health care services, including reproductive health care.”

However, the government’s legal arguments failed to address the scope of its obligation under section 27. Instead, the government made essentially three legal arguments, all of which denied the capacity of the court to determine whether the government

where medically indicated is not. Even if the relationship between the availability of donated kidneys and the possibility of a successful transplant, based on the donee’s health condition, may be considered a medical question, the issue of whether it makes sense to provide a particular patient or group of patients with a particular treatment is not solely a medical judgment. Where the public sector is failing to provide a particular treatment regime that is medically necessary and available in the private sector, the issue is clearly one of health policy and resources and thus implicates the progressive realisation of the right to health care services.

Furthermore, in distinguishing *Soobramoney*, the High Court pointed out that whereas *TAC* addresses the progressive realisation of the right to health care, *Soobramoney* “deals with a different right, the right not to be refused emergency medical treatment in terms of section 27(3).”53 The High Court granted the applicants an important victory by distinguishing *Soobramoney*. It suggests that the Constitutional Court’s implied acceptance of the realities of medical rationing, which permeated much of the *Soobramoney* decision, might be subject to a different perspective when the focus is on the progressive realisation of the right to health care, rather than the provision of emergency treatment.

**B. Violating the Separation of Powers?**

Next, the government claimed that granting the applicant’s plea would result in the court violating the separation of powers between the executive
"determine whether the steps taken by the respondents were, in the circumstances, reasonable."\textsuperscript{56}

From the court’s point of view, the government’s argument also implicitly questioned the justiciability of socio-economic rights, an issue that was raised in the certification proceedings.
by the Constitutional Court's jurisprudence, that the legislature and executive have legitimate power to formulate policy for the country as democratically elected bodies. However, the government argued in this case that its alleged democratic right entitles it to undertake the following: first, to define the relevant socio-economic problem and to determine how to address the issue; second, to determine the relevant costs and whether
lowered over time. For the court, then, it is the pace of progressive realisation that is “dictated by available resources.”

Applying the *Grootboom* criteria to the facts of this case, the High Court made a significant distinction between the general implementation of a socio-economic right, such as health care, and the implementation of a particular “programme for the prevention of MTCT of HIV” that may be characterized as a “very important aspect” of the general right. This distinction, based on context as required by *Grootboom*, allows the court to argue that there is “nothing wrong per se with a gradual geographical roll out of a comprehensive programme of health care relating to MTCT,” and even that “respondents cannot be faulted for having decided to establish two research and training sites” per province. Yet the court was also able to conclude that there is no justification for not making Nevirapine generally available to the South African public, including within the public health sector. The crux of the court’s argument is that while it is prudent for the government to establish test sites in order to monitor the effects of this drug, wider distribution will not have an adverse impact on these studies and will only mitigate “the harsh and discriminating effect of the decision to start the programme at two sites” per province.

Significantly, the court relied on the evidence of the Western Cape provincial government’s programme to conclude that the vital element lacking in the programme of the first nine respondents was the failure to progressively extend access to Nevirapine where the capacity exists. As the court stated, the extended programme “merely provides another means of access, less structured, less perfect, but infinitely to be preferred to the choice between all or nothing.” Taking this argument a step further, the court argued that the prohibition of the “use of Nevirapine outside the pilot sites” is unreasonable and an “unjustifiable barrier to the progressive realisation of the right to health care.” Furthermore, the refusal to allow doctors in the public health sector to prescribe Nevirapine amounts to a

65. Id.
66. Id. at *71.
67. Id. at *72.
68. Id.
69. Id.
70. Id. at *73–77.
71. Id. at *77.
72. Id. at *77–78.
73. Id. at 78.
74. Id.
breach of the state’s negative obligation “to desist from impairing the right to health care.”

The court’s conclusion—that the government’s failure to develop a “comprehensive and co-ordinated plan for a roll out of the MTCT prevention plan” cannot be justified either as one of multiple legitimate policy choices, or by the claim that resources are inadequate—is based on two important facts accepted by the court. First, the cost of Nevirapine is
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The court is well justified in its conclusion.
must reasonably address the socio-economic problem under consideration—here the problem of MTCT. Requiring the government to extend the availability of Nevirapine in the context of the HIV/AIDS pandemic broadens and clarifies the parameters of South Africa’s unique socio-economic jurisprudence.

VIII. How Do We Evaluate the Relevance of the Constitution?

It is very easy to be critical of government. However, given the history of apartheid, it is important that we also acknowledge the extraordinary history of South Africa’s post-apartheid governments. Not only has
considered open to judicial challenge. Although the scope of this broadened constitutional review of government decision-making is still limited by the explicit enumeration of the socio-economic topics guaranteed in the Constitution, those who argue that socio-economic rights cannot be made justiciable for fear of paralyzing government point out that health