

JUSTICIABILITY OF THE RIGHT TO HEALTH – ACCESS TO MEDICINES

THE SOUTH AFRICAN AND INDIAN EXPERIENCE

Jennifer Sellin *

1 Introduction

The World Health Organisation (WHO) estimates that the share of people lacking access to essential medicines¹ worldwide is around 1.7 billion, approximately one-third of the world's population.² Lack of access to essential medicines is an especially serious problem for patients in developing and least-developed countries, where many people struggle just to survive from day to day. From the total number of people who lack access to essential medicines, an estimated 1.3 billion, that is to say, about 80%, live in low-income countries.³ The reasons why patients lack access to essential medicines are manifold and complex and will not be set out in this article. Often mentioned are prohibitively high medicines prices, which have been ascribed to the practice of the pharmaceutical industry of protecting their pharmaceutical products and processes from competition through patents. Whatever the exact reason for patients' lack of access to essential medicines, the consequences can be disastrous both for the individual concerned and for society at large when taking into account the scale of the problem worldwide.

Although many academics and (non-governmental) organisations have addressed this particular problem from various perspectives, the aim of this article is to illustrate the different approaches taken by two legal systems with regard to the justiciability of the right to health. Moreover, the article intends to demonstrate how allowing for the justiciability of the right to health can play a role in enhancing access to medicines for patients in developing countries.

For this purpose, and since access to medicines is closely related to the right to health, the article will first examine the international right to health, as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), focusing specifically on access to medicines. Secondly, this article will briefly address the alleged non-justiciability of the right to health as a socio-economic right.⁴ The term 'justiciability' is used to refer to the degree to which an alleged violation of, in this case, a socio-economic right can be reviewed before a judicial or quasi-judicial body.⁵ The traditional notion is that civil and political rights as negative rights, on the one hand, and social, economic and cultural rights as positive rights, on the other, are fundamentally different. Consequently, a number of arguments have been raised against the justiciability of socio-economic rights. A brief mention of these objections and the counter-arguments

* Junior Researcher, Department of International and European Law, Law Faculty, Maastricht University.

¹ In this context, the term 'essential medicines' relates to the WHO's definition: those medicines that 'satisfy the priority health care needs of the population.' WHO, 'The Selection of Essential Medicines' (2002) 4 *Policy Perspectives on Medicines* at 1.

² WHO, *The World Medicines Situation* (2004) at 61.

³ *Id.*, at 63.

⁴ The terms 'socio-economic rights' and 'social and economic rights' are used interchangeably when referring to rights of a social and economic nature as incorporated in the International Covenant on Economic, Social and Cultural Rights.

⁵ Fons Coomans (ed.), *Justiciability of Economic and Social Rights; Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia 2006) at 4; Christian Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (International Commission of Jurists 2008) at 1, 6.

will be given. For a more comprehensive discussion, the reader is referred to the report written by Christian Courtis and published by the International Commission of Jurists.⁶ It is the author's view that the traditional dichotomy between civil and political rights and economic, social and cultural rights is outdated and oversimplified. As argued by Courtis, the notion that social and economic rights by definition are non-justiciable is no longer tenable.⁷ Justiciability of socio-economic rights is not an either-or question but should be considered on a sliding scale. This leads us to the conclusion that the right to health cannot be considered non-justiciable on the basis of its definition as a socio-economic right. Thirdly, case studies are conducted to illustrate the different approaches taken by two legal systems with respect to the justiciability of socio-economic rights. The countries this article will focus on are the Republic of South Africa and India. The emphasis here is on developing countries, since they struggle especially with public health problems, like the HIV/AIDS epidemic, where adequate access to anti-retroviral medicines is of the utmost importance to combat the spread of this disease.

Furthermore, it should be clearly stated that this article by no means presents an exhaustive examination of the case law in the countries under review and that it does not intend to make a comparison between the two legal systems to determine the best approach. Instead, these case studies are intended to serve as illustrations and, perhaps, as an inspiration for other countries dealing with similar public health problems. It is therefore also important also to consider the broader context, which indicates a trend, especially in developing countries in the South, towards more progressive protection of economic and social rights by both the legislature and the judiciary.⁸ However, this does not imply that allowing for the justiciability of the right to health should be considered the only or most effective way to ensure that states abide by their obligations concerning access to medicines.⁹

This article consists of four sections, the first of which is this introduction. The second section examines the right to health under international law to determine its content, specifically whether it includes access to essential medicines and the resulting obligations for states. Additionally, it addresses the alleged non-justiciability of the right to health as a socio-economic right. In the third section, two case studies will be conducted, setting out the different approaches by the South African and Indian legal system. The fourth and final section will conclude the article.

2 The Right to Health in International Law

In order to adjudicate any right, it is essential that its content and the relevant state obligations are clear.¹⁰ Therefore, this section will examine the international right to health. The right to health has been included in a number of international legal documents, most notably Article 25 of the 1948 Universal Declaration of Human Rights (UDHR) and Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights.¹¹ To determine the content of the international right to health, whether it includes access to essential medicines for individuals and the relevant state obligations in that regard, this article will make use of the authoritative interpretation of the right to health by the Committee on Economic, Social and Cultural Rights (CESCR). Moreover, it will focus solely on the right to health as enshrined by the ICESCR which is one of the most important human rights covenants regarding social and economic rights. Due to constraints of time and space, other human rights instruments also protecting the right to health will not be addressed.¹²

⁶ Courtis, above n. 5.

⁷ *Id.*, at 103.

⁸ Coomans, above n. 5, at 8.

⁹ Courtis, above n. 5, at 3.

¹⁰ *Id.*, at 5.

¹¹ At the time of writing (June 2009), the ICESCR had 160 states parties. The text of the Covenant can be found at: <http://www2.ohchr.org/english/law/cescr.htm>.

¹² For example, Articles 11(1)(f) and 12 of the 1979 Convention on the Elimination of All Forms of

2.1 Content of the Right to Health under the ICESCR

The right to health is codified in Article 12 ICESCR. It is a fundamental human right,¹³ recognising:

The right of everyone to the enjoyment of the highest attainable standard of physical and mental health¹⁴

Article 12(2) ICESCR lists a number of steps to be taken by the states parties to the ICESCR to achieve the full realisation of the right to health.¹⁵

The wording of Article 12 ICESCR is extremely broad, though it is clear that the right to health does not entail a right to be healthy.¹⁶ Consequently, it grants every human being a set of freedoms and entitlements enabling them to realise the highest attainable standard of physical and mental health.¹⁷ In more general terms, the right to health can be divided into two broad components: a right to healthcare and the underlying preconditions for health.¹⁸ The first component, timely and appropriate healthcare, includes preventative and restorative medical care directed at the individual; while the second component concerns the traditional areas of public health: access to safe and potable water, adequate supply of safe food and nutrition, a clean environment, safe and sanitary living conditions, vaccination and so forth.¹⁹ Thus, the right to health is intrinsically linked to and dependent on the realisation of a number of other human rights, such as the right to housing, food and clean water.²⁰

2.1.1 General Comment No. 14

The rights enshrined in the ICESCR are further defined by the UN Committee on Economic, Social and Cultural Rights. In this section, therefore, the focus will be on the CESCR's most important explanatory document with regard to the right to health: General Comment No. 14 on the right to the highest attainable standard of health.²¹ General Comments are documents adopted by a treaty-monitoring body. These non-binding comments by the CESCR are authoritative interpretations of states parties'

Discrimination against Women, Article 24 of the 1989 United Nations Convention on the Rights of the Child and Article 5(e)(iv) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

¹³ Preamble to the UDHR; CESCR, General Comment No. 14: The right to the highest attainable standard of health (2000), UN Doc. E/C.12/2000/4, at § 1.

¹⁴ Article 12(1) ICESCR.

¹⁵ Article 12(2) ICESCR lists the following steps:

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

¹⁶ See also General Comment No. 14, above n. 13, at § 8. The wording used here (a right to health) may be misleading. The wording used by the CESCR in General Comment No. 14, which states that individuals have 'a right to the highest attainable standard of health' taking into account the individual's biological and socio-economic preconditions and the state's available resources, is therefore better. The use of the wording 'right to health' in this article should thus be seen as a short form of the longer term (right to the highest attainable standard of health).

¹⁷ *Id.*, at §§ 8-9.

¹⁸ Birgit C.A. Toebes, *The Right to Health as a Human Right in International Law* (Antwerp-Groningen-Oxford: Intersentia 1999) at 245-246; General Comment No. 14, above n. 13, at § 11.

¹⁹ Toebes, above n. 18, at 245-246; General Comment No. 14, above n. 13, at § 11.

²⁰ General Comment No. 14, above n. 13, at § 3.

²¹ *Id.*

obligations as laid down in the ICESCR.²² In General Comment No. 14, the CESCR states that the right to health has four essential and interrelated elements, the application of which will depend on the specific situation within a state party.²³ These elements include:

Availability: According to the CESCR, availability entails that '[f]unctioning public health and health care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State Party'. The precise nature of these facilities depends on various factors within that state party, including its developmental level. Such facilities will also include *essential drugs* as defined by the WHO Action Programme on Essential Drugs.²⁴

Accessibility: 'Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State Party.' Accessibility, according to the CESCR, has four overlapping dimensions. Firstly, accessibility must be ensured on the principle of non-discrimination; secondly, accessibility includes physical accessibility, meaning that health facilities, goods and services and underlying determinants of health must be within safe physical reach, also for rural areas; thirdly, accessibility includes economic accessibility, or affordability, requiring that health facilities, goods and services must be affordable for all; and, fourthly, accessibility also concerns the right to seek, receive and impart information and ideas with regard to health issues.²⁵

Acceptability: 'All health facilities, goods and services must be respectful of medical ethics and culturally appropriate'.²⁶

Quality: Finally, 'health facilities, goods and services must also be scientifically and medically appropriate and of good quality'.²⁷

It can be concluded that the right to health under Article 12 ICESCR entails that essential medicines must be sufficiently available and accessible, which means that they must not only be physically accessible but also affordable to all sections of the population, in addition to being culturally acceptable and of good quality. Now that the content of the international right to health has been determined, and we can conclude that access to essential medicines is part of the right to health, the following question is to assess states parties' obligations in that respect.

2.2 General Principles Regarding States Parties' Obligations under the ICESCR

States parties' obligations with regard to all the rights enshrined in the ICESCR are found in its Article 2, which reads as follows:

- 1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to *achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁸

Article 2(1) ICESCR is the central provision of the Covenant. It states that states parties should progressively realise, to the maximum of their available resources, the rights laid down in the Covenant, and as such recognises that realisation of the rights protected by the ICESCR requires time and (financial) resources. States parties will not be able to fully realise the ICESCR's rights immediately upon ratification or even within a

²² Christian Tomuschat, *Human Rights: Between Idealism and Realism* (New York: Oxford University Press 2008, 2nd ed.) at 190-191.

²³ General Comment No. 14, above n. 13, at § 12.

²⁴ Id., at § 12(a).

²⁵ Id., at § 12(b).

²⁶ Id., at § 12(c).

²⁷ Id., at § 12(d).

²⁸ Article 2(1) ICESCR (emphasis added).

short period of time.²⁹ However, this does not entail that states parties are not required to act, sometimes even immediately, to realise the ICESCR's rights. For example, the prohibition of discrimination³⁰ is an obligation of immediate effect upon ratification by a state.³¹ Although the full realisation of the rights may be achieved progressively, 'steps towards that goal must be taken within a reasonably short time after the ICESCR's entry into force for the states concerned.'³² The Covenant further states that such steps should be deliberate, concrete and targeted as clearly as possible towards realising the rights protected by the ICESCR.³³ Although the obligation of progressive realisation as stated in Article 2(1) ICESCR seems less strong than its counterpart with regard to civil and political rights,³⁴ it should not be interpreted as depriving the obligation of all meaningful content.³⁵ Rather, it means that, as noted by the CESCR, '[s]tates parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation' of the right to health.³⁶ Even in times of severe resource constraints, the Committee underlines that states parties are still obliged to 'strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.'³⁷ The concept of progressive realisation complicates the monitoring of states parties' compliance with their obligations under the ICESCR, since under this concept states parties' obligations under the ICESCR are neither uniform nor universal and are dependent on the state party's level of development and availability of resources.³⁸ However, the Committee holds that there is a strong presumption that retrogressive measures, that is to say, measures which take a step back in fulfilling the ICESCR's rights, are not permissible under the ICESCR.³⁹

In General Comment No. 14, the CESCR has set out a number of general principles for determining states parties' obligations under the right to health. In that regard, it has made use of the tripartite terminology of obligations.⁴⁰ States parties must *respect*, that is to say, abstain from interference, *protect*, by preventing third parties from interfering, and *fulfil* the right to health by adopting appropriate measures.⁴¹ The state party must at the very least ensure the satisfaction of a minimum essential level with regard to the right to health. The CESCR has developed the principle of 'core obligations', those obligations without which the ICESCR's rights would be devoid of any meaning and relevance⁴² and which are therefore non-derogable.⁴³ It has further stated that a state party can only attribute its failure to meet its minimum core obligations to a lack of

²⁹ Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp-Oxford-New York: Intersentia 2002) at 5; CESCR, General Comment No. 3: The nature of states parties' obligations (1990), UN Doc. E/1991/23, at § 9.

³⁰ See Article 2(2) ICESCR, which states: 'The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Additionally, Article 3 ICESCR reads: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.'

³¹ General Comment No. 14, above n. 13, at § 30.

³² General Comment No. 3, above n. 29, at § 2.

³³ *Id.*, at § 2.

³⁴ Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) reads as follows: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

³⁵ General Comment No. 3, above n. 29, at § 9; General Comment No. 14, above n. 12, at § 31.

³⁶ General Comment No. 14, above n. 13, at § 31. See also, General Comment No. 3, above n. 29, at § 9, where the Committee stated that the concept of progressive realisation should be interpreted in the light of the overall objective, the *raison d'être* of the Covenant, namely the establishment of clear obligations for states parties to fully realise the rights under the Covenant.

³⁷ General Comment No. 3, above n. 29, at § 11.

³⁸ Chapman and Russell, above n. 29, at 5.

³⁹ General Comment No. 14, above n. 13, at § 32.

⁴⁰ *Id.*, at § 33.

⁴¹ *Id.*, at § 33.

⁴² General Comment No. 3, above n. 29, at § 10.

⁴³ General Comment No. 14, above n. 13, at § 47.

available resources if it can demonstrate that ‘every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’⁴⁴ Guided by the Alma-Ata Declaration,⁴⁵ the CESCR holds that states parties’ core obligations with regard to the right to health entail a number of duties, including the obligation to ensure the *provision of essential medicines* as defined by the WHO Action Programme on Essential Drugs.⁴⁶

So, according to the CESCR, states parties to the ICESCR have to comply with obligations that are twofold. Firstly, states parties to the Covenant have the obligation to *progressively* realise the fulfilment of the Covenant’s rights; secondly, states parties also have *immediate* obligations under the Covenant, such as the prohibition of discrimination⁴⁷ or the obligation to take deliberate, concrete and targeted steps towards fulfilling the right to health.⁴⁸ Thus, non-compliance with these obligations would result in a violation of a state party’s obligation under the right to health enshrined in Article 12 ICESCR. The CESCR noted, in General Comment No. 14, that, when determining whether a state has violated the right to health, one must distinguish a state party’s inability from its unwillingness to comply with its obligations under the ICESCR.⁴⁹ Moreover, the CESCR stressed that, regardless of the circumstances, a state party has a non-derogable obligation to comply with the aforementioned core obligations. Non-compliance with these core obligations, including the provision of essential medicines, cannot be justified under any circumstances.⁵⁰ Consequently, it has been argued that the core obligation to make essential medicines accessible and available throughout a state party’s jurisdiction is an obligation of immediate effect not subject to progressive realisation.⁵¹

In General Comment No. 9 on the domestic application of the Covenant, the CESCR has elaborated states parties’ duty to give effect to the ICESCR in the domestic legal order.⁵² Here, the CESCR states that the implementation of the ICESCR within the domestic legal order must be considered in the light of two principles of international law:⁵³ firstly, states parties should modify the domestic legal order as necessary to give effect to treaty obligations,⁵⁴ and, secondly, everyone has ‘the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.’⁵⁵ The CESCR states that, although the ICESCR does not prescribe the manner in which states parties must implement the Covenant in their domestic legal order, the methods applied must be appropriate, fulfilling their obligations under the ICESCR.⁵⁶ In that regard, the need to ensure the justiciability of economic and social rights is relevant in order to determine the best way to give domestic legal effect to the ICESCR’s rights.⁵⁷ It must be stated that the ICESCR does not contain a provision explicitly obliging states parties to provide judicial remedies.⁵⁸ However, in the CESCR’s view, not providing any domestic legal remedies for violations of economic, social and cultural rights can only be justified if such remedies are not ‘appropriate means’ within the meaning of Article 2(1) ICESCR or, considering the

⁴⁴ General Comment No. 3, above n. 29, at § 10.

⁴⁵ WHO, ‘Declaration of Alma-Ata’, *International Conference on Primary Health Care*, Alma-Ata, USSR (6-12 September 1978).

⁴⁶ General Comment No. 14, above n. 13, at § 43.

⁴⁷ Chapman and Russell, above n. 29, at 5-6.

⁴⁸ General Comment No. 14, above n. 13, at § 30; Courtis, above n. 5, at 26.

⁴⁹ Id., at § 47.

⁵⁰ Id., at § 47.

⁵¹ Paul Hunt and Rajat Khosla, ‘The Human Right to Medicines’ (2008) 5/8 *SUR – International Journal on Human Rights* at 104.

⁵² CESCR, General Comment No. 9: The domestic application of the Covenant (1998), UN Doc. E/C.12/1998/24.

⁵³ Id., at § 3.

⁵⁴ See also Article 27 of the Vienna Convention on the Law of Treaties: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’

⁵⁵ Article 8 UDHR.

⁵⁶ General Comment No. 9, above n. 52, at § 5.

⁵⁷ Id., at § 7.

⁵⁸ See, for example, Article 2(3) ICCPR.

other means available, unnecessary.⁵⁹ According to the CESCR, this will be difficult to demonstrate.⁶⁰ However, it also notes that the right to an effective remedy need not be interpreted to require a judicial remedy.⁶¹ The next section briefly addresses the alleged non-justiciability of socio-economic rights.

2.3 Justiciability of Socio-Economic Rights Protected by the ICESCR

The justiciability of economic and social rights has been a contentious issue ever since the emergence of such rights. The debate concerning the justiciability of socio-economic rights is closely related to the traditional dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights, on the other.⁶² This dichotomy is argued to be relatively simple. Civil and political rights pertain mainly to guaranteeing personal liberties, ensuring individuals' freedom and protection from interference by the state. They are thus categorised as negative rights, i.e. rights obliging the state not to interfere with one's personal freedom and bodily integrity.⁶³ Classic examples are the right to life, the prohibition of torture and the right to freely express oneself. Economic, social and cultural rights are considered a distinct set of rights demanding economic and social equality. They are categorised as positive rights, i.e. rights that require states to intervene, to act.⁶⁴ Requiring a state to act generally involves the commitment of (financial) resources. Examples of economic, social and cultural rights are the right to education, the right to food and clean drinking water, the right to health and the right to work. This dichotomy has been reinforced at the international level by the adoption of two separate human rights covenants in 1966: the ICCPR, which provided for an individual complaints mechanism from the beginning through an optional protocol, and the ICESCR, which only recently included an optional protocol allowing individual communications (see below).

To be effective and achieve their purpose, namely to guarantee that humans can live their life with dignity, human rights must be enforceable and, at least to a certain extent, justiciable. Here, justiciability⁶⁵ refers to 'the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur.'⁶⁶ The possibility for victims of human rights violations to claim a legal remedy and receive adequate reparation is an essential aspect of a fully fledged right.⁶⁷ However, a number of arguments have been raised against the justiciability of socio-economic rights. The main arguments are that economic and social rights (positive rights) are fundamentally different from civil and political rights (negative rights) and that it is the specific characteristics of socio-economic rights that make them unsuitable for judicial review.⁶⁸ It has been argued that socio-economic rights are too vague or imprecise, making it impossible to adequately determine the content and ensuing obligations of such rights, and that they are aspirations or political goals but not enforceable rights.⁶⁹

⁵⁹ General Comment No. 9, above n. 52, at § 3.

⁶⁰ Id., at § 3.

⁶¹ Id., at § 9.

⁶² In addition to this dichotomy, and as a result of the growing interdependence of states and issues of global importance, a third set of human rights emerged, that of collective or solidarity rights. Examples include the right to development, peace or a clean environment. Tomuschat, above n. 22, at 25.

⁶³ Id., at 25 et seq.

⁶⁴ Id., at 25 and 28 et seq.

⁶⁵ In this regard, a distinction must be made between the 'enforcement' and 'justiciability' of human rights, although both concepts are closely related. Enforceability identifies the entitlements and duties created by a legal system that must be maintained and executed, while justiciability entails the degree to which an alleged violation of a right can be reviewed before a judicial or quasi-judicial body at the domestic level. See Coomans, above n. 5, at 4; J.K. Mapulanga-Hulston, 'Examining the Justiciability of Economic, Social and Cultural Rights' (2002) 6 *The International Journal of Human Rights* at 36-37.

⁶⁶ Courtis, above n. 5, at 6.

⁶⁷ Id. A number of international human rights instruments have incorporated a right to a remedy in case of human rights violations. See, for example, Article 8 UDHR, Article 2(3) ICCPR, Article 13 CAT and Article 6 ICERD.

⁶⁸ Courtis, above n. 5, at 10; Tomuschat, above n. 22, at 54; Mapulanga-Hulston, above n. 65, at 40.

⁶⁹ Courtis, above n. 5, at 15.

Furthermore, socio-economic issues are considered core elements of national policy. Therefore, it is argued that it is not the place for the judiciary, as an undemocratic body, to determine the exact content and scope of socio-economic rights.⁷⁰ It would be inappropriate for courts to decide on budget allocation, and this power should belong exclusively to the executive.⁷¹ According to this view, granting economic and social rights justiciability would seriously endanger the principles of separation of powers and democracy.⁷² In addition, it has been argued that judges lack the professional capacity to adequately analyse complex socio-economic cases.⁷³

It is the author's view that the conceptual distinction between civil and political rights, on the one hand, and economic and social rights, on the other, is oversimplified and outdated.⁷⁴ Human rights are universal, indivisible, interdependent and interrelated.⁷⁵ Consequently, both civil and political rights and economic, social and cultural rights should be considered on an equal footing, as they are both human rights and, thus, intrinsically linked to human dignity and fundamental to all civilised societies.

Moreover, in the author's view, the objections employed against legal enforcement of economic and social rights before the courts are not persuasive.⁷⁶ Firstly, the argument that economic and social rights are too vague and imprecise to determine their content and resulting obligations for states is not convincing. At the outset, it must be stated that this is an issue that is not exclusively associated with socio-economic rights, but one that affects all rights, including broadly formulated civil and political rights, which have not been denied justiciability because of their broad nature.⁷⁷ Moreover, as shown above, the CESCR has defined the content of the right to health and ensuing obligations for states. These include, in addition to an obligation to progressively realise the right to health, duties of immediate effect, which can be justiciable.⁷⁸ The case studies below further illustrate that domestic courts are also able to specify the content of socio-economic rights and the right to health in particular. Secondly, the traditional notion that civil and political rights only entail an obligation for the state to abstain from acting and therefore have no resource implications does not hold true.⁷⁹ For example, the right to free and democratic elections cannot be enjoyed without establishing a cost-expensive electoral system, nor can the right to a fair trial be guaranteed without maintaining a court system and providing legal aid funding if necessary. So, civil and political rights also have certain positive elements requiring resource expenditure, just as economic and social rights also possess negative elements, as in the case of the prohibition of discrimination.⁸⁰ Whether economic and social rights are categorically more resource-intensive than civil and political rights is questionable, but their implementation is clearly context-dependent.⁸¹ However, it is a weak argument to contend that adjudication

⁷⁰ Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' (2006-2007) 22 *American University of International Law Review* at 42-43; Courtis, above n. 5, at 73.

⁷¹ Courtis, above n. 5, at 83; Mapulanga-Hulston, above n. 65, at 40.

⁷² Courtis, above n. 5, at 73.

⁷³ Danie Brand, 'Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia 2006) at 225; Coomans, above n. 5, at 5; Courtis, above n. 5, at 89; Wiles, above n. 70, at 53.

⁷⁴ Courtis, above n. 5, at 10.

⁷⁵ As confirmed by the UN World Conference on Human Rights, Vienna Declaration and Programme of Action (1993), UN Doc. A/CONF.157/23, at § 5; for a comprehensive discussion, see also Asbjørn Eide, 'Interdependence and Indivisibility of Human Rights', in Yvonne Donders and Vladimir Volodin (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (2007).

⁷⁶ For a more elaborate discussion of the arguments in favour of and against the justiciability of economic, social and cultural rights, see also Eric C. Christiansen, 'Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court' (2006-2007) 38 *Columbia Human Rights Law Review*; Courtis, above n. 5; Coomans, above n. 5; Mapulanga-Hulston, above n. 65; Wiles, above n. 70.

⁷⁷ Courtis, above n. 5, at 15.

⁷⁸ Id., at 26-27.

⁷⁹ Id., at 11; see also General Comment No. 9, above n. 52, at § 10.

⁸⁰ Tomuschat, above n. 22, at 53; Mapulanga-Hulston, above n. 65, at 40-41; Wiles, above n. 70, at 46.

⁸¹ Wiles, above n. 70, at 47; Tomuschat, above n. 22, at 29.

of civil and political rights is 'cheap' compared to adjudicating socio-economic rights, which, it is argued, would result in policy making and significant resource expenditure.⁸² Possible budgetary implications as a result of adjudication have not prevented the justiciability of civil and political rights and should also not prevent the justiciability of socio-economic rights.⁸³ Thirdly, as corroborated by the case studies below, there is no reason to assume that when adjudicating socio-economic rights, even in those cases where resource expenditure is necessary, the judiciary would not be aware of its position and respectful of the principle of separation of powers and the fact that resources are not unlimited.⁸⁴ Furthermore, adjudication of socio-economic rights substantially strengthens the standing of such rights and contributes to the protection of the rights of vulnerable minority groups against abuse by the majority.⁸⁵

The notion that socio-economic rights are justiciable is further strengthened by a recent development within the international sphere: the adoption by the UN General Assembly of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,⁸⁶ on 10 December 2008, establishing a new quasi-judicial function for the CESCR.⁸⁷ It allows the CESCR to receive and consider communications by individuals claiming to be a victim of a violation of any economic, social and cultural right protected under the ICESCR.⁸⁸ In its preamble, the Optional Protocol reaffirms the principle that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated and also recalls that states are under an obligation to progressively realise the rights protected by the ICESCR. This is reflected in Article 8 of the Optional Protocol, which was influenced by the South African Constitutional Court's jurisprudence,⁸⁹ stating that

[w]hen examining communications under the present Protocol, the Committee shall consider the *reasonableness* of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.⁹⁰

Furthermore, Article 14 of the Optional Protocol establishes a trust fund with the aim of 'providing expert and technical assistance to States Parties, with the consent of the State Party concerned, for the enhanced implementation of the rights contained in the Covenant'.⁹¹ It has been argued by representatives of developed states that the establishment of such a trust fund puts the Optional Protocol at risk of being ratified only by developing states wishing to access the fund by claiming a lack of resources as a defence in cases where a complaint is raised against them.⁹² Developed states may be reluctant to ratify the Optional Protocol if they consider it possible that the Optional Protocol will impose higher standards upon rich countries.⁹³ However, the reference in Article 8 to the standard of reasonableness and state discretion might mitigate this risk.⁹⁴ It will take some time to evaluate the impact and effectiveness of the Optional Protocol with regard to adjudicating violations of economic, social and cultural rights at international level.

In conclusion, the international right to health enshrined in the ICESCR includes access to essential medicines. Moreover, the CESCR has set out a number of principles regarding states parties' obligations under the right to health, including obligations of

⁸² Courtis, above n. 5, at 83-84.

⁸³ Id., at 84.

⁸⁴ Wiles, above n. 70, at 47; Courtis, above n. 5, at 85.

⁸⁵ Courtis, above n. 5, at 83.

⁸⁶ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly resolution A/RES/63/117 on 10 December 2008 (hereinafter, OP-ICESCR). The OP-ICESCR will be opened for signature at the signing ceremony scheduled for 24 September 2009.

⁸⁷ Claire Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8:4 *Human Rights Law Review* at 628.

⁸⁸ Articles 1 and 2 OP-ICESCR.

⁸⁹ Mahon, above n. 87, at 637.

⁹⁰ Article 8(4) OP-ICESCR (emphasis added).

⁹¹ Article 14(3) OP-ICESCR.

⁹² Mahon, above n. 87, at 644.

⁹³ Id.

⁹⁴ Id.

immediate effect and obligations subject to progressive realisation. The CESCR has authoritatively interpreted the right to health, in General Comment No. 14, as including availability and accessibility – both physical accessibility and affordability – of essential medicines. The CESCR has found that the provision of essential medicines is one of the states parties' non-derogable core obligations. If a state violates the right to health, it is essential for the individual harmed to be able bring his or her claim before a (quasi-) judicial body to be reviewed. Moreover, it is argued that the rigid traditional approach that socio-economic rights are by definition not justiciable, while civil and political rights are, is no longer tenable. This traditional approach is incompatible with the principle that all human rights are indivisible and interdependent.⁹⁵ Both sets of rights encompass positive and negative duties, requiring different types of state measures and variable degrees of resources to fully realise these rights within a national setting. Thus, with regard to the justiciability of socio-economic rights, it is better to make use of a contextual approach where all rights – whether civil, political or socio-economic – are located somewhere along a 'justiciability spectrum'.⁹⁶

3 Domestic Approaches

At the national level, a number of constitutions recognise and protect economic and social rights, including the right to health.⁹⁷ However, these rights are less frequently considered justiciable for many of the reasons touched upon above.⁹⁸ In this section, two case studies are presented to illustrate the different approaches taken by two legal systems with regard to the justiciability of socio-economic rights within the context of access to medicines. The emphasis is on developing countries, although the two countries under review, South Africa and India, cannot be considered representative of all developing countries. However, these two countries provide good illustrations of a larger trend towards the more progressive protection of socio-economic rights, one aspect of which includes allowing for the justiciability of socio-economic rights.⁹⁹

3.1 South Africa

The South African Constitution includes a Bill of Rights that guarantees civil and political rights and social and economic rights on an equal footing.¹⁰⁰ It allows for the judicial review of legislation and executive policies and thus explicitly renders the rights protected in the Bill of Rights justiciable.¹⁰¹ As such, the courts in South Africa

⁹⁵ See also General Comment No. 9, above n. 52, at § 10.

⁹⁶ Brand, above n. 73, at 226.

⁹⁷ Courtis, above n. 5, at 4.

⁹⁸ Lisa Forman, 'Justice and Justiciability: Advancing Solidarity and Justice through South Africans' Right to Health in Jurisprudence' (2008) 27 *Medicine and Law* at 665. For an interesting discussion on the justiciability of economic and social rights within domestic systems, see Coomans, above n. 5; Courtis, above n. 5; and Hans V. Hogerzeil, 'Is Access to Essential Medicines as Part of the Fulfilment of the Right to Health Enforceable through the Courts?' (2006) 368 *The Lancet*.

⁹⁹ See also Aart Hendriks, 'The Right to Health in National and International Jurisprudence' (1998) 5 *European Journal of Health Law*; John Cantius Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation' (2006) 2 *African Journal of Legal Studies* 1; Iain Byrne, *Making the Right to Health a Reality: Legal Strategies for Effective Implementation* (London: Commonwealth Law Conference 2005).

¹⁰⁰ It should be mentioned here that South Africa is not a party to the ICESCR. It signed the Covenant on 30 October 1994 but has not yet ratified it. However, many of the provisions in the South African Constitution are inspired by the text of the ICESCR. The Constitutional Court has also referred to the General Comments issued by the CESCR. See also, Margit Tveiten, 'The Right to Health Secured HIV/AIDS Medicine – Socio-Economic Rights in South Africa' (2003) 72 *Nordic Journal of International Law*.

¹⁰¹ See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (1996) 4 SA 744 (CC) at § 78. Here, the Constitutional Court held that socio-economic rights are, at least to some extent, justiciable. See also Section 38 of the South

are required to interpret explicit provisions protecting socio-economic rights, and the South African Constitution also provides guidance for the courts when interpreting these rights.¹⁰²

An important provision with regard to the right to health is Section 27 of the South African Constitution,¹⁰³ which reads as follows:

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.¹⁰⁴

Section 27 refers to a right of access to healthcare services, which seems to suggest it is narrower in scope than the international right to health protected by Article 12 ICESCR. The latter includes not only access to healthcare but also underlying preconditions for health. However, subparagraphs (b) and (c) of Section 27(1) and Section 24 (the right to a healthy environment) of the South African Constitution cover the underlying preconditions of health. Paragraph 2 of Section 27 mirrors the language of the ICESCR in that it requires states to take all reasonable legislative and other measures, within their available resources, to progressively achieve the realisation of the rights protected in the Constitution. Furthermore, Section 7(2) of the South African Constitution makes use of a similar typology of human rights obligations as established by the CESCR, requiring the state to respect, protect, promote and fulfil the rights in the Bill of Rights.

One of the very first cases decided under the new South African Constitution regarding the right to health was the *Soobramoney v. Minister of Health (Kwazulu-Natal)* case.¹⁰⁵ The appellant, Mr Soobramoney, approached the Constitutional Court after being refused kidney dialysis treatment by a state hospital. The hospital justified its decision on the basis of the limited number of machines available, which were also very expensive to operate. Therefore, the hospital employed strict criteria for selecting those patients who would benefit most from the treatment. Mr Soobramoney, unfortunately, also suffered from ischemic heart disease and diabetes. As a result, the hospital was

African Constitution, which reads: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

¹⁰² See Section 39, which reads:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

¹⁰³ Constitution of the Republic of South Africa (1996) (hereinafter, the South African Constitution).

¹⁰⁴ Section 27 of the South African Constitution further reads:

1. Everyone has the right to have access to –
 - ...
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
 - ...
3. No one may be refused emergency medical treatment.

¹⁰⁵ *Soobramoney v. Minister of Health (Kwazulu-Natal)* (1997) Case CCT 32/97, 1 SA 765 (CC) (hereinafter, *Soobramoney*).

unable to provide him with the dialysis treatment he requested. Mr Soobramoney argued that, on the basis of his constitutional right of access to healthcare services, he had a right to receive dialysis treatment.¹⁰⁶

The question arose to what extent the duty to respect the individual's right to health had been breached by the state in refusing Mr Soobramoney access to medical treatment.¹⁰⁷ The Constitutional Court held that, in these circumstances, the hospital had applied criteria compatible with the Constitutional provisions and used rational grounds for their decision.¹⁰⁸ The selection process was not considered discriminatory because only health grounds were used to determine who would receive treatment. It stated that the right to healthcare services must be interpreted in the context of the availability of healthcare services in general. If Mr Soobramoney would be entitled to renal dialysis, such treatment could not be refused to other patients in similar positions, which would lead to a considerable expansion of the dialysis programme with severe financial costs and at the expense of other people with greater health claims.¹⁰⁹ In this case, the Constitutional Court acknowledged the doctrine of separation of powers and stated that a court would be slow to interfere with government decisions if these were rational and taken in good faith.¹¹⁰ Thus, it held that the denial of treatment did not breach the constitutional obligation to provide access to healthcare services.¹¹¹ In doing so, the Court showed considerable deference to the government's assertion that resources were insufficient to expand the dialysis programme.¹¹² Thus, the South African Constitutional Court clearly considered the right to health to be justiciable. However, this did not mean that it would take no account of the principle of separation of powers and the financial effects that a decision in favour of Soobramoney's arguments would have had.

The *Soobramoney* case led to much dismay in the South African human rights community. However, in a later case, the Constitutional Court was more willing to interfere with government decisions. The *Government of the Republic of South Africa v. Grootboom* case¹¹³ concerned the right to adequate housing guaranteed in Section 26(1) of the South African Constitution and established the so-called reasonableness approach. Mrs Grootboom and her children, who lived in self-made shacks, were rendered homeless when they were evicted from a piece of land earmarked for low-cost housing. Mrs Grootboom went to court and claimed that the state was obliged to provide the homeless with shelter.¹¹⁴

The Constitutional Court was faced with a case in which it had to decide whether or not the state had fulfilled its obligation under the Constitution to progressively realise the right to adequate housing within its available resources. The Constitutional Court focused on the text of Section 26 of the Constitution and found the answer to be that the state must adopt *reasonable* legislative and other measures.¹¹⁵ As such, it developed the reasonableness test as the standard for evaluating state compliance with its constitutional obligations. The Court stated that, irrespective of how extensive and admirable the government's housing programme was, some people were still left in

¹⁰⁶ *Soobramoney*, above n. 105, at §§ 1-7; Albie Sachs, 'Enforcement of Social and Economic Rights' (2006-2007) 22 *American University of International Law Review* at 681-682. In his argument, Soobramoney also based his claim on the right to life and referred to the practice of the Indian Supreme Court in interpreting the right to life, specifically *Paschim Banga Khet Samity v. State of West Bengal* (1996) 4 SCC 37, which is discussed below. The Constitutional Court noted that the facts of that particular case were materially different to those of Soobramoney and that there was no need to infer a right to medical treatment from the right to life, since it was directly protected by Section 27 of the Constitution. See *Soobramoney*, above n. 105, at § 18.

¹⁰⁷ Brand, above n. 73, at 215.

¹⁰⁸ *Soobramoney*, above n. 105, at §§ 24-25.

¹⁰⁹ *Id.*, at § 28.

¹¹⁰ *Id.*, at § 29; Sachs, above n. 106, at 682-683.

¹¹¹ *Soobramoney*, above n. 105, at § 36.

¹¹² Forman, above n. 98, at 669.

¹¹³ *Government of the Republic of South Africa v. Grootboom* (2000) Case CCT 11/00, 1 SA 46 (CC) (hereinafter, *Grootboom*).

¹¹⁴ *Grootboom*, above n. 113, at § 4 et seq.

¹¹⁵ *Id.*, at §§ 34-46.

situations of extreme deprivation.¹¹⁶ The fact that it did not have any special emergency provisions for people living in such dire situations, as in the case of *Mrs Grootboom*, was unreasonable.¹¹⁷ Therefore, the Constitutional Court found that the government's housing policy fell short of the requirements of Section 26(2) of the Constitution.¹¹⁸ It also referred to the indivisibility of all human rights, stating that, when evaluating the reasonableness of state action, account should also be taken of the inherent dignity of human beings.¹¹⁹ Thus, the Court held that Section 26 of the Constitution had been breached and ordered the government to develop a comprehensive housing programme to remedy the situation.

With regard to reviewing broad policy and legislative decisions to assess whether the state has complied with its socio-economic constitutional obligations, the difficulty does not pertain to whether or not the state has taken any measures, as required by the second paragraph of Sections 26 and 27, but whether these measures are adequate.¹²⁰ Therefore, in order to assess state compliance with its constitutional socio-economic obligations, the Constitutional Court has established the standard of *reasonableness*, taking into account the state's available resources and the fact that socio-economic rights cannot always be realised immediately but have to be realised progressively.¹²¹ Consequently, a number of conditions for the *reasonableness* of state measures can be inferred from the Constitutional Court's judgments.¹²² Firstly, to be reasonable, a state programme must clearly allocate responsibilities and tasks and ensure sufficient financial and human resources.¹²³ Secondly, the programme must be comprehensive, coherent and directed towards the progressive realisation of the respective right within the state's available means.¹²⁴ Thirdly, mere legislation is not enough. Legislation must be complemented by policies and programmes that are reasonable both in their conception and implementation.¹²⁵ Fourthly, reasonable measures must be balanced and flexible and provide for possible crises situations. A programme that excludes a significant segment of society cannot be reasonable.¹²⁶ Finally, the state's measure(s) must be transparent, which means that, in order to be properly implemented, a programme must be made known to all concerned.¹²⁷

With regard to the justiciability of socio-economic rights, the *Grootboom* case is an important milestone. The Constitutional Court reaffirmed the justiciable nature of socio-economic rights and, more importantly, set out the criteria for evaluating the state's compliance with its constitutional obligations. The obligation to progressively realise the right to health, as required by Section 27(2), employs the same wording as Section 26(2) with regard to the right to housing. Therefore, the reasonableness test applies equally to the right to health, as confirmed in the following case.¹²⁸

A further important case with regard to the right to health and specifically addressing access to medicines is *Minister of Health v. Treatment Action Campaign*.¹²⁹ In this case, the government's policy concerning the provision of the medicine Nevirapine, a medicine that is able to reduce the likelihood of transmission of the HIV/AIDS virus between mother and unborn child by 50%, was under review. The pharmaceutical manufacturers producing Nevirapine had made an offer to the South African government to supply

¹¹⁶ Id., at §§ 52-53.

¹¹⁷ Id., at §§ 43 and 66.

¹¹⁸ Id., at §§ 69 and 99(c).

¹¹⁹ Id., at § 83.

¹²⁰ Brand, above n. 73, at 220; Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 *Heidelberg Journal of Law* 1 at 175-176.

¹²¹ Brand, above n. 73, at 220-221.

¹²² See also id., at 221-222; Forman, above n. 98, at 670-671.

¹²³ *Grootboom*, above n. 113, at § 39.

¹²⁴ Id., at §§ 40-41.

¹²⁵ Id., at § 42.

¹²⁶ Id., at § 43.

¹²⁷ *Minister of Health v. Treatment Action Campaign* (2002) Case CCT 8/02, 5 SA 721 (CC) (hereinafter, *TAC*) at § 123.

¹²⁸ Forman, above n. 98, at 670.

¹²⁹ *TAC*, above n. 127.

the drug free of charge for five years. However, Nevirapine was made available only in a small number of test sites throughout the country.¹³⁰ The government justified this restricted provision of the medicine on the basis of the necessity to study the effectiveness of a possible future nation-wide programme.¹³¹ Together with a number of doctors, the NGO Treatment Action Campaign (TAC) claimed, on behalf of pregnant HIV-infected women, that the state's refusal to make Nevirapine available within the public sector was a violation of Section 27 of the South African Constitution.

The Constitutional Court was unanimous in stating that the principle question here was not whether social and economic rights were justiciable – ‘clearly they are’¹³² – but whether the governmental measures adopted to provide access to healthcare services for HIV-infected mothers and their newborn babies fulfilled the obligations under the Constitution.¹³³ In this case, the very act of judicial review, in light of the doctrine of separation of powers, was at the heart of the state's defence.¹³⁴ The government acknowledged that the health ministry might be wrong in its decision. However, if so, it would be accountable to the public.¹³⁵ The courts should not get involved in policy issues. On the other side, the TAC and the doctors referred to the *Grootboom* case and argued that not providing a medicine that was safe and had no cost implications was unreasonable.¹³⁶ Referring back to its approach in the *Grootboom* case, the Court contended that the state's policy to restrict the use of the drug Nevirapine to a limited number of test sites did not meet the reasonableness test.¹³⁷ The government itself had stated that the cost of the medicine was not a factor in the decision to restrict the provision of Nevirapine.¹³⁸ Therefore, any arguments centred on the lack of resources did not carry any weight. Furthermore, Nevirapine was safe and effective.¹³⁹

The Constitutional Court did not employ supervisory jurisdiction to assess the roll-out of the programme but decided that it would be sufficient to declare the state's obligations.¹⁴⁰ In that respect, the Constitutional Court was reserved in its judgment and respected the separation of powers between the government and the judiciary. However, the Constitutional Court also made clear that respecting the principle of separation of powers did not mean ‘that courts cannot or should not make orders that have an impact on policy.’¹⁴¹ It therefore rejected the government's argument that the Constitutional Court only had the power to issue a declaratory order.¹⁴² The Court's refusal to employ supervisory jurisdiction led to some difficulties with regard to the implementation of the judgment. It took several months of lobbying by the TAC before the authorities started supplying Nevirapine. This makes clear that a positive judgment in itself does not always bring about change and that ensuring effective implementation can sometimes be an even greater challenge.¹⁴³

The state is obliged to realise socio-economic rights within its available resources.¹⁴⁴ In that respect, the South African Constitutional Court has been hesitant to address the possible budgetary implications of enforcing the state's constitutional obligations. In *Soobramoney*, the Constitutional Court accepted the state's argument that resources were limited and access to treatment had to be rationed.¹⁴⁵ This seems to point to

¹³⁰ Before being made available in these few research sites, the medicine Nevirapine had only been available in the private sector.

¹³¹ TAC, above n. 127, at §§ 51-55.

¹³² Id., at § 25.

¹³³ Id., at § 25.

¹³⁴ Id., at § 22; Forman, above n. 98, at 674.

¹³⁵ Sachs, above n. 106, at 686.

¹³⁶ Id., at 686.

¹³⁷ TAC, above n. 127, at §§ 80-81.

¹³⁸ Id., at § 48.

¹³⁹ Id., at §§ 57-60.

¹⁴⁰ Sachs, above n. 106, at 692; Forman, above n. 98, at 677.

¹⁴¹ TAC, above n. 127, at § 98.

¹⁴² Id., at § 106.

¹⁴³ Byrne, above n. 99, at 10.

¹⁴⁴ See the second paragraph of Sections 26 and 27.

¹⁴⁵ *Soobramoney*, above n. 105, at §§ 24-28; Brand, above n. 73, at 223.

an initial unwillingness to enforce positive duties under the right to health.¹⁴⁶ In the *TAC* case, the issue regarding resources was less relevant, since the pharmaceutical manufacturer was willing to provide the medicine Nevirapine free of charge for a period of five years.¹⁴⁷ In *Grootboom*, the Constitutional Court affirmed that the reasonableness standard is governed by the level of available resources and that the state is not required to do more than its available resources allow.¹⁴⁸ The Constitutional Court stated that the reasonableness test may have budgetary implications but that it is not directed at rearranging budgets.¹⁴⁹ Thus, the Constitutional Court has been willing to prioritise the needs of the vulnerable and poor over the government's competing arguments of incapacity and resource constraints.¹⁵⁰

Notably, in both the *Grootboom*¹⁵¹ and *TAC*¹⁵² cases, the Constitutional Court rejected the arguments by the *amici* to recognise a minimum core obligation, as developed by the CESCR,¹⁵³ within the right to housing and the right to health, respectively.¹⁵⁴ The Court stated that identifying the core content of a right is a complex matter and that courts are ill-equipped to make wide-ranging factual and political enquiries to determine such a minimum core content.¹⁵⁵ It did state that 'there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable.'¹⁵⁶ Furthermore, another decision of interest for the issue of access to medicines is the 2005 *New Clicks* case,¹⁵⁷ where pharmacies challenged government regulations that were intended to reduce medicine prices, partly through a fixed dispensing fee for pharmacists.¹⁵⁸ The Constitutional Court considered the constitutional importance of the governmental regulations aimed at making medicines more affordable and accessible¹⁵⁹ and upheld the constitutionality of the regulations that provided for price controls.¹⁶⁰ It confirmed several times that the purpose of enhancing accessibility and affordability of medicines falls within the state's constitutional obligations under Section 27.¹⁶¹ As such, it can be concluded that the right to health under Section 27 of the South African Constitution includes access to affordable medicines and corresponding state obligations.¹⁶²

In conclusion, although the South African Constitutional Court has decided against establishing the minimum core content of the right to health, it has demonstrated that it is possible to determine the content of the right to health and evaluate state compliance with its constitutional obligations in specific cases. The South African case law reaffirms that the traditional distinction between civil and political rights, as imposing negative duties, and socio-economic rights, as imposing positive duties, no longer holds true.¹⁶³ Justiciability of economic and social rights should be considered on a sliding scale, which is the approach adopted by the South African Constitutional Court.¹⁶⁴ In *Grootboom*, the Constitutional Court stated that the question is not 'whether socio-economic rights are justiciable under the Constitution, but how to enforce them in a given case. This

¹⁴⁶ Forman, above n. 98, at 668.

¹⁴⁷ *TAC*, above n. 127, at § 48; Brand, above n. 73, at 223.

¹⁴⁸ *Grootboom*, above n. 113, at § 46.

¹⁴⁹ *TAC*, above n. 127, at § 38.

¹⁵⁰ Forman, above n. 98, at 677.

¹⁵¹ *Grootboom*, above n. 113, at §§ 29-33.

¹⁵² *TAC*, above n. 127, at §§ 26-39.

¹⁵³ See above and also General Comment No. 3; for the right to health, see specifically General Comment No. 14.

¹⁵⁴ Forman, above n. 98, at 671.

¹⁵⁵ *Grootboom*, above n. 113, at § 33; *TAC*, above n. 127, at §§ 37-38.

¹⁵⁶ *Id.*, at § 33.

¹⁵⁷ *Minister of Health and Professor D. McIntyre No v. New Clicks South Africa (Pty) Ltd and Others* (2005) Case CCT 59/04 (hereinafter, *New Clicks*).

¹⁵⁸ The pharmacies argued that the fixed dispensing fee would cause them to operate at a loss, destroying the pharmaceutical industry and hindering access to medicines. See *New Clicks*, above n. 157, at § 30.

¹⁵⁹ *Id.*, at § 16.

¹⁶⁰ *Id.*, at § 13.

¹⁶¹ *Id.*, at §§ 84, 314, 514, 519 and 704.

¹⁶² Forman, above n. 98, at 679.

¹⁶³ *Id.*, at 666.

¹⁶⁴ Brand, above n. 73, at 226.

is a very difficult issue which must be carefully explored on a case-by-case basis.¹⁶⁵ Consequently, the Constitutional Court developed the reasonableness test to assess state compliance with its socio-economic constitutional obligations. This is an innovative and flexible approach that balances the institutional and democratic implications of enforcing socio-economic rights with the protection of society's most vulnerable.¹⁶⁶ In that regard, the Constitutional Court has overcome many of the arguments posed against the justiciability of socio-economic rights. Even so, the Constitutional Court has not ignored the principle of separation of powers or arguments centred on the lack of resources. It should be noted, however, that one cannot always rely on the goodwill of officials to implement court orders, and the Constitutional Court may have to be more proactive when monitoring implementation of its decisions. Finally, in light of the above-mentioned case law, specifically the *TAC* case, it must be concluded that the justiciability of the right to health has ensured that accessibility and affordability of medicines are taken seriously by the state as part of an enforceable human right.

3.2 India

This section discusses India's legal system of protecting and enforcing social and economic rights. The Indian Constitution, in its desire to ensure the welfare of the Indian people and social justice,¹⁶⁷ protects civil and political rights as well as economic and social rights. However, it does make a distinction between the two sets of rights. Part III of the Constitution enshrines fundamental rights, including the traditional civil and political rights. These fundamental rights are directly enforceable and justiciable before a court of law.¹⁶⁸ Economic and social rights, on the other hand, are incorporated in Part IV as Directive Principles of State Policy (DPSP). Article 37 states that these DPSP 'shall not be enforceable by any court', but that they are nevertheless fundamental in the governance of the country. Article 38 reaffirms it is the state's duty to strive to promote the welfare of the Indian people by securing and protecting a social order of justice.¹⁶⁹

An important element in the enhancement of the protection of socio-economic rights in India was the public interest litigation movement.¹⁷⁰ India's internal problems in the mid-1970s, which led to widespread human rights violations, resulted in a change of perception of the judiciary as regards the working of the Constitution. The judiciary acknowledged that the individualistic and adversarial nature of the existing system of litigation was ill-suited to the demands of the most vulnerable.¹⁷¹ Consequently, at the end of the 1970s, the Supreme Court used its constitutional powers¹⁷² to initiate a movement towards public interest litigation (PIL), a movement that was completely judge-led and judge-dominated.¹⁷³ The judiciary considered that PIL provided a solution to many problems relating to the working of the Indian legal system.¹⁷⁴ Firstly, the definition of standing was expanded to allow any individual to bring a case before the High Courts or the Supreme Court, even if that individual was not seeking any relief but acting on behalf or for the benefit of an indeterminate group of people. Secondly, it is no longer required to submit a formal petition, written in legal language, before the Court. Instead, any letter addressed to the Court suffices. Thirdly, irrespective of how brief the facts of the case, the Court will proceed with the case as long as it is one of

¹⁶⁵ *Grootboom*, above n. 113, at § 20.

¹⁶⁶ Forman, above n. 98, at 672.

¹⁶⁷ See the preamble to the Indian Constitution.

¹⁶⁸ See Article 32 of the Indian Constitution.

¹⁶⁹ Sheetal B. Shah, 'Illuminating the Possible in the Developing World: Guaranteeing the Human Right to Health in India' (1999) 32 *Vanderbilt Journal of Transnational Law* at 464-465.

¹⁷⁰ S. Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp-Oxford: Intersentia 2006) at 240.

¹⁷¹ Shah, above n. 169, at 467.

¹⁷² See Article 32 of the Indian Constitution.

¹⁷³ Muralidhar, above n. 170, at 240; Shah, above n. 169, at 467-469.

¹⁷⁴ Muralidhar, above n. 170, at 241.

genuine public interest. Additionally, the Court may appoint socio-legal commissions to gather and verify information.¹⁷⁵ Finally, the Supreme Court has been able to formulate uniquely suited judicial remedies, often containing detailed enforcement mechanisms.¹⁷⁶

The Supreme Court's most innovative step in protecting socio-economic rights is its recognition of the justiciability of socio-economic rights.¹⁷⁷ The Supreme Court was initially conservative in its interpretation of the DPSP.¹⁷⁸ This changed in the 1970s, when it decided that the fundamental rights under the Constitution and the DPSP were complementary.¹⁷⁹ Furthermore, the Supreme Court, through creative interpretation, expanded the fundamental right to life, which traditionally entails an obligation for the state to abstain from interfering with an individual's right to life and liberty, to include positive obligations for the state.¹⁸⁰ It has thus overcome the arguments raised against the justiciability of socio-economic rights.¹⁸¹ The Supreme Court continued on this path and creatively interpreted the right to life to include 'the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings'.¹⁸²

The Indian Constitution expressly protects the right to health in Article 47 of the DPSP,¹⁸³ which reads:

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.¹⁸⁴

As stated above, Article 37 of the Constitution precludes the justiciability of these DPSP. However, the Supreme Court has found a way around this by interpreting the right to health as forming part of the right to life protected under Article 21,¹⁸⁵ making it directly enforceable and justiciable.¹⁸⁶

One of the first cases in which the Supreme Court explicitly recognised the right to health (in this case of a worker) as an integral part of a meaningful right to life is the *Consumer Education and Research Centre v. Union of India* case.¹⁸⁷ In subsequent cases, the Supreme Court has expanded the fundamental right to life, obliging the state to create the conditions necessary to ensure good health.¹⁸⁸ Another important judgment relating to the right to health is the PIL case of *Paschim Banga Khet Samity v. State of West Bengal*.¹⁸⁹ In that case, an agricultural labourer fell off a train and seriously injured his head. In seeking treatment, he was turned away by seven state-run hospitals because they lacked the necessary facilities for treating that type of injury or because of a lack of vacant beds. The Supreme Court had to address the question whether this non-availability of facilities for emergency medical treatment resulted in a breach of his fundamental right to life guaranteed under Article 21 of the Constitution.¹⁹⁰ The Supreme Court first stated that the Constitution envisaged the establishment of a welfare state, at federal and state level, in which it was the primary duty of the state to secure the

¹⁷⁵ Id., at 241; Shah, above n. 169, at 469-471.

¹⁷⁶ Shah, above n. 169, at 471.

¹⁷⁷ Id., at 474.

¹⁷⁸ Muralidhar, above n. 170 at 239; Manoj Kumar Sinha, *Enforcement of Economic, Social and Cultural Rights: International and National Perspectives* (New Delhi: Manak Publications 2006) at 167.

¹⁷⁹ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

¹⁸⁰ Shah, above n. 169, at 475.

¹⁸¹ Muralidhar, above n. 170, at 240.

¹⁸² *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi* (1981) 2 SCR 516, at § 6.

¹⁸³ See also Article 39(e) and (f) and Article 42 of the DPSP in Part IV of the Indian Constitution.

¹⁸⁴ Article 47 continues to state that the state shall particularly endeavour to bring about prohibition of the consumption, except for medicinal purposes, of intoxicating drinks and of drugs which are injurious to health.

¹⁸⁵ See Article 21 of the Indian Constitution, which reads: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

¹⁸⁶ Sinha, above n. 178, at 166-167.

¹⁸⁷ (1995) 3 SCC 42, at § 26.

¹⁸⁸ Shah, above n. 169, at 476.

¹⁸⁹ (1996) 4 SCC 37.

¹⁹⁰ *Paschim Banga Khet Samity v. State of West Bengal* (1996) 4 SCC 37, at § 4.

welfare of the people, including the provision of adequate medical facilities.¹⁹¹ It further stated that the preservation of human life was of paramount importance and that, under Article 21, the state had an obligation to safeguard the right to life of every person.¹⁹² The Court thus reconceptualised the right to life to impose a positive duty on the state.¹⁹³ In the present case, the labourer's right to life under Article 21 of the Constitution had been breached and he was awarded compensation by way of redress.¹⁹⁴ In addition, the Supreme Court ordered a number of remedial measures to prevent a recurrence of such incidents in the future.¹⁹⁵

In *Paschim Banga Khet Samity v. State of West Bengal*, the Supreme Court recognised, although implicitly, that emergency medical treatment is a core minimum of the broader right to health.¹⁹⁶ It acknowledged that financial resources were required to provide adequate facilities, but at the same time it could not be ignored that the state had a constitutional obligation to provide adequate medical services to the Indian people. It reaffirmed that the state could not avoid its constitutional obligations on the account of resource constraints.¹⁹⁷ Concerning the issue of resource constraints, in *State of Punjab v. Ram Lubhaya Bagga*,¹⁹⁸ the Supreme Court had to address the question whether the state's new policy, which reduced government employees' entitlement to reimbursement of medical expenses incurred in a non-governmental hospital, violated Article 21 of the Indian Constitution. The State of Punjab argued that the reduction in entitlements to medical care was justified by financial constraints. It argued that no right under the Constitution is absolute, and that the right to life had to be balanced with need and available resources. The Supreme Court firstly acknowledged the principle of separation of powers, stating that, in questioning the validity of government policy, it is not within the domain of any court to weigh the pros and cons of such policy, except where it is arbitrary or in violation of any constitutional, statutory or other provision of law. It further stated that Articles 21 and 47 of the Constitution created a primary duty for the state to protect the health of its citizens and that fulfilling this duty would require financial resources. However, it went on to state that:

No State of any country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizen including its employees. Provision of facilities cannot be unlimited. It has to be to the extent finance permits.¹⁹⁹

Thus, the Supreme Court accepted the state's justification of resource constraints and held that the new policy did not breach Article 21. The right to health could not be absolute in a welfare state. In this judgment, the Court extended the state's margin of appreciation.²⁰⁰ Although it had stated in previous cases that 'whatever is necessary ... has to be done',²⁰¹ the Court did not consider the right to health to be absolute. It is probably better to state that arguing resource constraints is not a legitimate excuse for the government to discharge its constitutional obligations. However, just as in the South African legal system, the Indian Supreme Court will take account of the available resources for realising socio-economic rights and grant the state a margin appreciation in achieving these rights.

¹⁹¹ Id., at § 9.

¹⁹² Id., at § 9.

¹⁹³ Byrne, above n. 99, at 16.

¹⁹⁴ *Paschim Banga Khet Samity v. State of West Bengal*, above n. 190, at § 9.

¹⁹⁵ Id., at § 15; Byrne, above n. 99, at 17.

¹⁹⁶ Muralidhar, above n. 170, at 245.

¹⁹⁷ The Indian Supreme Court, by referring to another case, further stated that: 'Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints. (See *Khatri (II) v. State of Bihar* (1981) 1 SCC 627, at 631). The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life.' *Paschim Banga Khet Samity v. State of West Bengal*, above n. 190, at § 16.

¹⁹⁸ *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117, 130.

¹⁹⁹ Id.

²⁰⁰ Muralidhar, above n. 170, at 245.

²⁰¹ *Paschim Banga Khet Samity v. State of West Bengal*, above n. 190, at § 16.

Concerning the issue of access to affordable medicines, which, as has been shown above, is an element of the international right to health enumerated in the ICESCR, it is the author's opinion that the Supreme Court's broad interpretation of the fundamental right to life and its emphasis on health as the foundation for a meaningful life with dignity would appear to include access to medicines. This would be especially true for access to essential, life-saving medicines, which are a prerequisite for a healthy life with dignity. Furthermore, in another PIL case, *Vincent Panikurlangara v. Union of India*,²⁰² where the Supreme Court was asked to ban a number of hazardous drugs, it stated that the state has an obligation to ensure that medicines are available at reasonable prices, so as to be within the common man's reach. Moreover, the Allahabad High Court has also recognised the importance of protecting patients' access to reasonably priced medicines.²⁰³

In conclusion, in light of its case law and creative interpretation of the fundamental right to life, the Indian Supreme Court has played a crucial role in acknowledging the justiciable nature of the right to health. Even though the right to health, which is protected as a DPSP in the Indian Constitution, is considered non-justiciable,²⁰⁴ the Supreme Court has interpreted the fundamental right to life in such a manner to include a number of social elements.²⁰⁵ As such, the Supreme Court expanded the fundamental right to life, which traditionally entails an obligation for the state to abstain from interfering with an individual's right to life and liberty, to include positive obligations for the state.²⁰⁶ It has, furthermore, issued instructions to the government to fulfil its obligations under the Indian Constitution.²⁰⁷ The Supreme Court has been very progressive by interpreting the right to life to include socio-economic rights; but in *State of Punjab v. Ram Lubhaya Bagga* it did acknowledge the principle of separation of powers and accepted that resources are not unlimited and that the right to health could therefore not be considered absolute.²⁰⁸ The possibility of PIL, enabling a wide group of persons to bring a claim regarding alleged human rights violations before the Supreme Court, and the Court's progressive attitude towards enforcing socio-economic rights have substantially strengthened the standing of socio-economic rights within the Indian legal system. This active stance of the Supreme Court and the judge-led movement to a system of PIL has also led to a heated debate on the limits of such overt judicial activism.²⁰⁹ However, the Supreme Court justifies its active stance as being necessary to make up for the lack of a strong executive and legislature.²¹⁰ The South African Constitutional Court referred to the approach of the Indian Supreme Court in its *Soobramoney* decision. In this decision, it noted that, unlike the Indian Constitution, the South African Constitution deals specifically with positive obligations imposed on the state. Where it does so, it is the Constitutional Court's duty to apply the constitutional obligations and not to draw inferences that would be inconsistent with those obligations.²¹¹

²⁰² (1987) 2 SCC 165.

²⁰³ *Prayag Vyapar Mandal and Others v. State of Uttar Pradesh and Others*, Allahabad High Court, 12 April 1996. This case concerned a petition to prohibit the establishment of a pharmacy within the hospital to provide patients with medicines at all hours. It was found that the nearest pharmacy was not open 24 hours a day and charged excessively high prices. The Court dismissed the petition, because it considered the petition to be brought with malafide intentions for the petitioner's personal interest rather than for the public interest.

²⁰⁴ Article 37 of the Indian Constitution.

²⁰⁵ See, for example, *Murli Deora v. Union of India and Others* (2001) 8 SCC 765, where the Supreme Court prohibited smoking in public places. Sinha, above n. 178, at 271.

²⁰⁶ Shah, above n. 169, at 475.

²⁰⁷ Sinha, above n. 178, at 271.

²⁰⁸ Muralidhar, above n. 170, at 240.

²⁰⁹ Id., at 264-265.

²¹⁰ Shah, above n. 169, at 472; see also Courtis, above n. 5, at 85, 87-88.

²¹¹ *Soobramoney*, above n. 105, at § 15.

4 Conclusion

For human rights to be truly effective, they must be enforceable and justiciable. Justiciability, however, is not an absolute concept and should be considered on a sliding scale. The issue is not whether socio-economic rights are justiciable, but how domestic courts have adjudicated alleged violations of socio-economic rights. Therefore, this article has tried to illustrate how two legal systems have dealt with the arguments raised against the justiciability of socio-economic rights, specifically the right to health. In addition, it has tried to demonstrate how the justiciability of the right to health has – and can – play a role in enhancing access to medicines for patients in developing countries.

Both legal systems have overcome the arguments raised against the justiciability of socio-economic rights and have thus substantially strengthened the standing of socio-economic rights and the right to health within their domestic legal systems. This is in line with a broader trend towards a more progressive protection of socio-economic rights worldwide. It has been shown that it is possible to determine the content of the right to health. The authoritative General Comment No. 14 by the CESCR has played an important role in setting out a number of general principles relating to the content of and states parties' obligations regarding the international right to health, which protects access to medicines. Although the South African Constitutional Court has rejected the minimum core content approach as developed by the CESCR, it did make clear that defining the minimum core content in a specific case could be relevant for the purpose of evaluating reasonableness. The reasonableness test, developed by the South African Constitutional Court to assess state compliance with its socio-economic constitutional obligations, is an innovative and flexible approach balancing the institutional and democratic implications of enforcing socio-economic rights with the protection of society's most vulnerable members. In several instances, the Constitutional Court has shown deference to the principles of separation of powers and democracy. As such, the South African approach is more cautious compared to the assertive stance of the Indian judiciary. Unlike the South African Constitution, which incorporates a justiciable right to health, the Indian Constitution protects the right to health as a DPSP not enforceable by any court. However, the Indian Supreme Court has been able to grant the right to health indirect protection through the justiciable right to life. Additionally, the Indian Supreme Court has, over a longer period, more frequently been willing to actively intervene in policy making, handing down detailed orders that often have significant resource implications. Its willingness to enforce the right to health, despite the fact that the Indian Constitution has explicitly classified socio-economic rights as non-justiciable, is remarkable. It illustrates that the Supreme Court has adapted its institutional role to enforce socio-economic rights and even impose positive obligations if necessary. Although this progressive attitude of the Indian Supreme Court has attracted criticism, along with the judge-initiated PIL movement, it has also led to a substantial strengthening of socio-economic rights in the Indian legal system.

In conclusion, the case studies clearly illustrate that the notion that socio-economic rights as a category cannot be justiciable is seriously misguided.²¹² Giving victims of human rights violations – whether civil, political, economic or social – the possibility to claim a remedy before an independent and impartial body significantly increases the level of protection of all human rights and can thus also have a positive impact on patients' access to medicines to the extent that it is part of the right to health. The South African *TAC* case provides a good example of how adjudication of the right to health can play an important role in ensuring that accessibility and affordability of medicines are taken seriously by the state as part of an enforceable and justiciable right to health. As such, it may provide inspiration for other (developing) countries dealing with similar public health problems. It is to be hoped that the South African and Indian experience will encourage other countries to also acknowledge the justiciable nature of socio-economic rights.

²¹² Courtis, above n. 5, at 103.