

The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human rights context: The South African *Nevirapine* case

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1 Introduction

By the end of 2001, an estimated 28 million Africans were living with HIV/AIDS of which 2,4 million were children under the age of 15.¹ Parent-to-child-transmission of HIV (PTCT)² is responsible for over 90% of child infections.³ HIV can be transmitted to an infant from an infected mother during pregnancy, labour, delivery or breastfeeding.

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¹ AIDS epidemic update — December 2001 at <http://www.unaids.org/worldaidsday/2001/Epiupdate2001/Epiupdate2001_en.doc> (accessed 28 January 2002).

² The use of the phrase 'mother-to-child-transmission' could convey a sense of blame to the mother as the one solely responsible for transmission of the virus to the child. This is despite the fact that the mother herself could have contracted the virus from the father of the child. The author prefers to use the phrase 'parent-to-child-transmission' (PTCT) which does not apportion blame unfairly to any of the parents. However, it should be noted that the phrase 'mother-to-child-transmission' is much more widely used. Of particular significance is the fact that even the judgment in the case under discussion in this contribution makes use of the phrase 'mother-to-child-transmission' (MTCT).

³ UNAIDS Global crisis-global action United Nations Special Session on HIV/AIDS Fact Sheets 25–27 June 2001 New York 25.

Reducing PTCT is a vital and indispensable component of the effective prevention and treatment of the disease.⁴ A PTCT prevention programme would in the first instance entail protecting women against infection. The second line of defence would be to avoid unwanted pregnancies among HIV-infected women and women at risk of infection. The focus of this contribution is the third line of defence, the prevention of PTCT during pregnancy, labour, delivery and during breastfeeding.

Ordinarily the third strategy targets antenatal clinics and comprises voluntary counselling and HIV/AIDS testing of expectant mothers, the provision of anti-retroviral drugs, safe delivery practices and infant-feeding counselling.⁵ Short-term anti-retroviral prophylactic treatment has been shown to be an effective and feasible method of preventing PTCT.⁶ In instances where it has been combined with infant feeding counselling and support and the use of safer infant feeding methods, anti-retroviral therapy has been shown to reduce the risk of infant infection by half.⁷

The main anti-retrovirals used in PTCT prevention programmes are Zidovudine and Nevirapine.⁸ Zidovudine is administered daily to the mother from the thirty-sixth week of pregnancy until and during delivery. Nevirapine on the other hand is administered in one dose to the mother at delivery and in one dose to the child within 72 hours of birth. Nevirapine is very cheap compared to other HIV/AIDS drugs.⁹ The indicative cost of Nevirapine from the patent holder is about four US dollars per treatment of each mother/child pair.¹⁰ Significantly, in July 2000 Boehringer Ingelheim, which is the patent holder of Nevirapine,

⁴ According to Koffi Annan, the United Nations Secretary-General, the proper strategy for beating AIDS include first and foremost prevention of new infection above all by teaching young people how to avoid it and by providing medicines that can prevent transmission from mother to child. See Koffi Annan 'We can beat AIDS' *New York Times* (25-06-2001).

⁵ WHO 'Prevention of Mother-to-Child Transmission of HIV: Selection and use of Nevirapine' Technical Notes Geneva (2001) WHO/HIV_AIDS/2001.03WHO/RHR/01.21 <http://www.who.int/HIV_AIDS/MTCT> (accessed 20 February 2002).

⁶ As above.

⁷ UNICEF 'Prevention of mother-to-child transmission of HIV' <<http://www.unicef.org/aids/mother.htm>> (accessed 7 February 2002).

⁸ UNAIDS 'Sources and prices of selected drugs and diagnostics for people living with HIV/AIDS' (May 2001) 10; <http://www.unaids.org/acc_access/access_drugs/Sources0501.doc> (accessed 20 February 2002).

⁹ The availability of short course treatment to prevent PTCT is an affordable option for perhaps the majority of developing countries. Yet short course treatment is often not provided because of a lack of political commitment. See UN Division for Advancement of Women 'The HIV/AIDS pandemic and its gender implications' Report of the Expert Group Meeting Windhoek, Namibia 13-17 November 2000 EGM/HIV-AIDS/2000/Rep1 14.

¹⁰ UNAIDS (n 8 above) 11.

offered to supply the drug free of charge to developing countries for a five year period.¹¹

Nevirapine was registered by the government of South Africa in April 2001 subject to the condition that the manufacturer continue to provide data on the performance of the drug.¹² Due to concerns over the safety of the drug, the government of South Africa decided to make Nevirapine available for the prevention of PTCT at only a limited number of pilot sites (also known as research sites or training centres), two for each of the nine provinces of South Africa.¹³ When operating, these pilot sites serve about 10% of the population. The applicants filed an application in August 2001 requesting the Court to find that by failing to make Nevirapine available to all public health facilities the government had breached its constitutional obligations regarding, among other things, the protection of the right to healthcare. The applicants also asked the Court to order the government to plan and implement an effective and comprehensive national PTCT prevention programme.

Consequently, the case under discussion relates in particular to the use of Nevirapine in PTCT prevention programmes, and the realisation of the right to health care in general. The right to health care will be used as an entry point to a discussion of economic, social and cultural rights on a broader level. Predictably, the context in which this case should be viewed entails an examination of the legal basis for the protection of the wider corpus of socio-economic rights in Africa.

2 Protection of socio-economic rights in Africa: The right to health in African international law

An examination of the protection of socio-economic rights may be done at a continental or national level. At the continental level, the regional human rights instrument, the African Charter on Human and Peoples' Rights (African Charter)¹⁴ recognises not only civil and political rights but also socio-economic rights and group rights such as the right to development. The African Charter provides for the following socio-

¹¹ B Gellman 'A turning point that left millions behind' *Washington Post* (28 December 2000). Also 'Boehringer Ingelheim offers VIRAMUNE (Nevirapine) free of charge to developing economies for the prevention of HIV-1 Mother-to-child Transmission' (7 July 2000) <<http://www.boehringer-ingelheim.com/corporate/asp/archive/ade-tail.asp?ID=101>> (accessed 20 February 2000).

¹² Pat Sidley 'Nevirapine is registered by control council' *Business Day* (19 April 2001).

¹³ Department of Health 'Achievements 2000' *HIV/AIDS newsletter* (24 April 2001); <<http://196.36.153.56/doh/aids/newsletter/2001/0424.pdf>> (accessed 19 February 2002).

¹⁴ Adopted on 27 June 1981 and entered into force 21 October 1986, OAU Doc CAB/LEG/67/3 Rev 5 reprinted in (1982) 21 *International Legal Materials* 58.

economic rights: the right to work under equitable and satisfactory conditions as well as to receive equal pay for equal work;¹⁵ the right to enjoy the best attainable state of health;¹⁶ the right to education¹⁷ and right of children, women, the disabled and the aged to special measures of protection in keeping with their physical and moral needs¹⁸. The right to health is the focus of this contribution.

Article 16(1) of the African Charter states 'every individual shall have the right to enjoy the best attainable state of physical and mental health'. Article 16(2) states that 'state parties to the present Charter shall take measures to protect the health of their people and to ensure that they receive medical attention when they are sick'. An even more comprehensive provision within the African system is article 14 of the African Charter on the Rights and Welfare of the Child¹⁹ which deals with health and health services. The provisions of this article that are particularly relevant to this contribution are as follows:

- (2) State parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
 - a) to reduce infant and child mortality rate;
 - ...
 - e) to ensure appropriate health care for expectant and nursing mothers.
 - ...

It should be noted that South Africa is a state party to both the African Charter and the African Charter on the Rights and Welfare of the Child.

The African Commission — a body charged with monitoring the implementation of the African Charter — has developed a jurisprudence around socio-economic rights in the African Charter. Odinkalu argues that more often than not violations of socio-economic rights in the African Charter have been presented as complaints to the African Commission not in their own right but in association with allegations of violations of civil and political rights.²⁰ Be that as it may, there are a few communications whose focus is primarily the violations of socio-economic rights. One of these is the communication against Zaire.²¹

¹⁵ Art 15.

¹⁶ Art 16.

¹⁷ Art 17.

¹⁸ Art 18(4).

¹⁹ Adopted on 11 July 1990 by the Assembly of Heads of State and Government in Addis Ababa, Ethiopia. OAU Doc CAB/LEG/24.9/49, entered into force on 29 November 1999.

²⁰ CA Odinkalu 'Analysis or paralysis? Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327–362. In his view the majority of the pronouncements by the African Commission on socio-economic rights have emanated in the consideration of nationality and deportation cases. For an examination of socio-economic aspects of these deportation and nationality cases see Odinkalu (2001) 362–365.

²¹ Renamed Democratic Republic of Congo in 1997.

In this communication, several NGOs alleged, among other things, that the Zairean government had breached its obligation under article 16 by failing to provide social services and that there was a shortage of medicine.²² In its decision, the Commission stated that 'the failure of the government to provide basic services such as safe drinking water and electricity and the shortage of medicine constitute a violation of article 16'.²³

At the national level there are various methods of protecting socio-economic rights. Some countries such as South Africa and Namibia have socio-economic rights enshrined as justiciable rights in their constitutions.²⁴ The constitutions of states such as Zimbabwe, Nigeria, Malawi and Tanzania mention certain socio-economic rights such as the right to education not as justiciable rights but as directive principles of state policy.²⁵

Although the African continental system is unique in that it is the first to incorporate civil and political rights and socio-economic rights into a single binding document, this pioneering role has not translated into more effective implementation of socio-economic rights at the national level.²⁶ The potential of these rights has not been exploited sufficiently to improve the standard of living of Africans, particularly in the context of the HIV/AIDS pandemic, a source of grave concern on the continent. It is against this background that the recent decision of the South African High Court on the problem of PTCT should be welcomed. The following part of this contribution sets the stage of our analysis of the case by exploring the constitutional foundation of the protection of the right to health care in South Africa.

3 The legal background to the *Nevirapine* case: The protection of the right to health care under South African Constitution

The right to health care is provided for under section 27 of the South African Constitution.²⁷ The relevant provisions of article 27 are as follows:

²² Communications 25/89, 47/90, 56/91, 100/93 (joined), *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v Zaire*, Ninth Annual Activity Report para 4.

²³ As above, para 47.

²⁴ See for example secs 26–29 of the South African Constitution Act 108 of 1996.

²⁵ See for example sec 11 of the Constitution of the United Republic of Tanzania of 1977 (as amended).

²⁶ For a review of the implementation of socio-economic rights guaranteed in the African Charter, see Odinkalu (n 20 above).

²⁷ Act 108 of 1996.

- (1) Everyone has the right to have access to —
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security . . .
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

The evolving practice in international law regarding socio-economic rights points to a growing consensus over three levels of obligations that these rights impose on states: the obligation to respect, to protect and to fulfil.²⁸ This consensus finds its domestic expression in article 7(2) of the South African Constitution which provides that 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

From the above explanation it is clear that the duty of the state extends beyond merely refraining from violating socio-economic rights to include the additional requirement of positive action.²⁹ For socio-economic rights, positive action necessitates at least two forms of state action.³⁰ First, the creation of an enabling legal framework for individuals to pursue these socio-economic rights on their own. Second, the implementation of measures and programmes designed to assist individuals to realise these rights.

²⁸ A Eide 'Making human rights universal' in H Stokke & A Tostensen (eds) *Human rights in development yearbook 1999/2000: The millennium edition* (2001) 25. According to Eide at the primary level states must *respect* the resources owned by individual, her or his freedom to find a job of preference, and the freedom to take the necessary actions and to use the necessary resources to satisfy his or her own needs. At a secondary level, state obligation to protect entails the protection by state of the freedom of action and the use of resources against other, more assertive or aggressive subjects — more powerful economic interests, protection against fraud, against unethical behaviour in trade and contractual relations, against the marketing and dumping of hazardous or dangerous products. At the tertiary level the state has the obligation to fulfil socio-economic rights by way of facilitation or direct provision. The obligation to facilitate may take many forms. For example as regards the right to food, it entails the state taking measures to improve the production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian reform. The obligation to fulfil by way of direct provision may entail making available what is required to satisfy basic needs such as food or resources that can be used for food in situations where no other possibility exists. For example the government has the obligation to satisfy basic needs such as health care, housing and food during sudden situations of disaster. See generally Eide 25–26.

²⁹ For more information on government obligations regarding socio-economic rights see P De Vos 'Pious wishes or directly enforceable human rights?: Social and economic rights in South Africa's 1996 Constitution' (1997) 13 *South African Journal on Human Rights* 67.

³⁰ T Madala 'Opening remarks on socio-economic rights in South Africa-The right to food and nutrition' unpublished paper presented at the National Seminar on the Right to Food in South Africa (23–25 January 2002) 5.

The state is expected to fulfil its obligation to take positive action progressively, depending on the availability of resources. The jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights indicates that the term 'progressive realisation' is meant to reflect the reality that many countries face difficulties in ensuring the full realisation of socio-economic rights. What this phrase does is to impose an obligation on states to move as expeditiously and effectively as possible towards full realisation.³¹ Regarding the phrase 'available resources' the Committee has stated that resource scarcity does not relieve states of fulfilling a minimum core obligation.³² With this background, the discussion of the case follows.

4 The *Nevirapine* case

The *Nevirapine* case³³ focuses on the problem of PTCT. In South Africa, 24% of all pregnant women are HIV-positive and between 70 000 and 100 000 babies are born HIV-positive each year.³⁴ The government's response to PTCT was to set up limited pilot sites, at least two in each of the nine provinces, where a PTCT prevention programme was available.³⁵ Together, the pilot sites serve about 10% of the population.

The Treatment Action Campaign (TAC)³⁶ together with two other applicants brought an action in the Pretoria High Court attempting to compel the government³⁷ to provide free Nevirapine to all pregnant women with HIV/AIDS in order to prevent parent-to-child transmission of the disease. They alleged that the government had failed to fulfil

³¹ UN Committee on Economic, Social and Cultural Rights, General Comment 3 (1990) para 9.

³² As above, para 10.

³³ *Treatment Action Campaign and others v Minister of Health and others* In the High Court of South Africa, Transvaal Provincial Division, Pretoria; Case No 21182/2001.

³⁴ Economist 'One battle won, still losing the war' 14 December 2001. We would not wish to be drawn into the debate whether HIV causes AIDS. The paper adopts the mainstream view that HIV causes AIDS.

³⁵ The government limited the use of Nevirapine in public sector in only those identified pilot sites. However, in the private sector the doctors could and actually did prescribe Nevirapine if indicated. It could be argued that the upshot of this policy was to discriminate people who rely on public sector. See Editorial 'Taking HIV to court' (2001) 358 *The Lancet* 681.

³⁶ TAC is an NGO launched on 10 December 1998 to campaign for greater access to treatment for all South Africans, by raising public awareness and understanding about issues surrounding the availability, affordability and use of HIV treatments. For more information about TAC, visit their website at <<http://www.tac.org.za>> (accessed 7 February 2002).

³⁷ The Minister of Health and nine other respondents, all of which are Members of the Executive Councils for Health in the provinces.

its constitutional obligations under sections 9, 10, 11, 12(2), 27(2) and 28.³⁸

The Court chose to focus its attention on the state's obligation under section 27(2), read together with section 27(1)(a). The issue before the Court was whether the government had fulfilled its obligations under section 27(2) of the Constitution 'to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to health care services including the right to reproductive health care'. In this respect, just one aspect of governmental healthcare services was in question, namely the programme for the prevention of PTCT. The Court had to use the test of reasonableness developed in the *Grootboom* case³⁹ to decide whether the steps taken by the government with regard to the prevention of PTCT by establishing 18 pilot sites and confining the dispensing of Nevirapine to those sites, may be considered in compliance with the obligation of the state in terms of section 27(2).

There were also two secondary issues: first, whether the measures taken were reasonable, and second, whether in making a ruling on the reasonableness of these measures, the Court was prescribing policy to the government.

The applicants submitted evidence to establish that measures taken by the government were not reasonable. For its part, the government argued that the measures it had taken were reasonable and warned that the relief the applicants requested constituted a court making policy decisions and entailed a breach of the theory of separation of powers.

The Court found that the government's policy of prohibiting the use outside the pilot sites of Nevirapine in the public health sector, is not reasonable and that it is an unjustifiable barrier to the progressive realisation of the right to health care. The Court also found that there is no comprehensive and co-ordinated plan for a roll-out of PTCT prevention programme. In making a finding that the measures taken by government were not reasonable, Justice Botha stated:⁴⁰

Where section 27(2) obliges the state to take reasonable measures to achieve the progressive realisation of the right to health care, I do not think, if one has regard to the fundamental rights at stake, that the steps taken by the state to give the whole affected population access to a MTCT prevention programme can be regarded as reasonable.

³⁸ The content of these provisions is as follows: sec 9 (the right to equality), sec 10 (the right to dignity), sec 11 (the right to life), sec 12(2) (the right to bodily and psychological integrity), sec 27(2) (see above) and sec 28 (the right of the child to basic health services).

³⁹ *Government of the Republic of South Africa and others v Grootboom and others* [2000] 11 BCLR 1169 (CC).

⁴⁰ Judgment in *Nevirapine* case, 64.

On whether in granting relief to the applicant the Court would be breaching the separation of powers principle, the Court was of the view that it 'does not assume the task of the executive when it pronounces on the reasonableness of steps taken by the executive in the fulfilment of a constitutional obligation of the state'. In fact the opposite is true.⁴¹

Where the court, being a part of the judicial arm of government, sits in judgment on the reasonableness of steps taken by the executive arm in the fulfilment of its constitutional obligations, it is exactly a perfect example of how the separation of powers should work.

In the end, the court ruled that the state's failure to distribute anti-retroviral drugs, specifically Nevirapine, to HIV-positive expectant women to prevent them from infecting their unborn babies, violated their constitutional right of access to health care.

The Court ordered state health authorities to make Nevirapine available to pregnant women and newborn babies in public health facilities to which the government's existing PTCT prevention programme has not yet been extended. This should be done in cases where, in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated. This should at least include that the woman concerned has been appropriately tested and counselled. The court also ordered health authorities to plan an effective and comprehensive national programme to prevent or reduce PTCT. This plan should include the provision of voluntary counselling and testing and, where appropriate, Nevirapine or other appropriate medicine and formula milk for feeding. The programme must also provide for its progressive implementation throughout South Africa and should be implemented in a reasonable manner. Health authorities were ordered to report to the Court before 31 March 2002 on the measures they have taken to put in place and implement this national programme.

The government has decided to appeal to the Constitutional Court against the decision of the High Court.⁴²

5 Comment on the case

Of the two main issues that the case dwells on, one that has possibly the most ramifications for protecting socio-economic rights on the continent

⁴¹ Judgment in *Nevirapine case*, 52.

⁴² Some of the reasons behind the decision of the South African government to appeal against the judgment in *Nevirapine case* are outlined in a press release issued after the judgment. See Ministry of Health 'Response of Dr Manto Tshabalala-Msimang, Minister of Health, and MECs to judgment on Nevirapine' (19 December 2001). In this press release the government expressed the intention not to let its decision to appeal against the judgment stand in the way of developing a dynamic and well-articulated PTCT Prevention Programme.

is whether courts should decide on government policy. The concern here is that issues of policy are considered to belong to the government as elected representatives of the people. Hence the court breaches the principle of separation of power when it adjudicates on matters with policy implications.⁴³

It is significant that the South African Constitutional Court has already given guidance on this issue when deciding an application challenging the inclusion on socio-economic rights in the Constitution. The Court stated:⁴⁴

It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state beneficiaries of such benefits. In our view, *it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon them by a bill of rights that it can result in a breach of the separation of powers* (my emphasis).

The Constitutional Court gave its first decision on socio-economic rights contained in the Final Constitution of South Africa in the *Soobramoney* case.⁴⁵ In this case, the Constitutional Court had the following to say regarding the Court's responsibility concerning matters of government policy:⁴⁶

The provincial administration, which is responsible for health services in KwaZulu-Natal, has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult questions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

In the *Grootboom* case⁴⁷ the Constitutional Court indicated unambiguously that it would not prescribe to the state any particular policy option to give effect to socio-economic rights.⁴⁸ The Court recognised that there are 'a wide range of possible measures' that could be adopted by the state to meet its obligations, many of which would meet the constitutional requirement of reasonableness. However, in assessing

⁴³ On the government position in this issue as it applies to *Nevirapine* case, see M Tshabalala-Msimang 'Government, not courts must decide on HIV/Aids and other social policy' *Sunday Times* (30-12-2001).

⁴⁴ *Certification Judgment of the South African Constitutional Court* [1996] 10 BCLR 1253 (CC) para 77.

⁴⁵ *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] 12 BCLR 1696 (CC).

⁴⁶ As above, para 29.

⁴⁷ See n 39 above.

⁴⁸ See generally *Grootboom case* (n 39 above) para 41.

the measures put into place by government, the key question before the Court would be whether these measures are reasonable and not whether more desirable measures could have been adopted or whether public money could have been better spent.

In my view, the Court in the *Nevirapine* case did not show an inclination to depart from *Grootboom* and prescribe policy. Rather, it seems to me that the Court considered itself as having a constitutional duty to evaluate the rationality of the measures put in place by the government to realise the socio-economic rights contained in the Constitution.⁴⁹

I shall accept that the respondents had to make policy decisions, and that there need not be one objectively determinable road to the progressive realisation of the right to health care, but in the end the Court has to determine whether the steps taken by the respondents were, in the circumstances, reasonable. That is the constitutional imperative.

The Court argued that it has a constitutional duty to assess the reasonableness of measures taken by government to realise policy. The Court quoted *Mohamed and others v President of South African and others*⁵⁰ in which the South African Constitutional Court ruled that it would negate the supremacy of the Constitution if a court could not pronounce on the validity of executive action. The Court was of the view that the same would apply if the Court could not pronounce on the reasonableness of steps taken by the state in the fulfillment of its constitutional obligations. According to the Court:

The argument that to make an order as prayed would be tantamount to a policy decision does not take account of the fact that the court is required to pass a value judgment as to whether steps taken in order to effect a gradual realisation of a constitutional right were reasonable.

The key issue here is that which has been referred to as the 'counter-majoritarian dilemma'. Can a judge, who is unelected, on the basis of human rights, rule against the democratically elected leaders who represent the majority? Heyns answers this question in the affirmative.⁵¹ He advances two arguments in support of his view.

The first argument starts from the premise that human rights are unalienable. From this premise, Heyns argues that the concept of human rights should entail not only that there is a right of resistance against authoritarian rulers, but also that there could be a right of resistance against democratically elected rulers should they violate human rights. On the basis of the above, judges can rule against the majority if those elected by the majority violate human rights. In the case at hand, it appeared to the Court that the democratically elected government was violating human rights and therefore the Court felt entitled to make a

⁴⁹ Judgment in *Nevirapine case*, 53.

⁵⁰ 2001 (3) SA 893 (CC) paras 69–71.

ruling against this government, notwithstanding the fact that it represents the majority.

In the second place, Heyns argues that a judge who rules against the current majority on the basis of human rights principles embedded in history has the longer term majority — humanity throughout history — on her side. Since it is difficult to get past, present and future generations to vote in a single referendum, democratic society settles for the second best available alternative. Second best is to appoint those whom they consider the wisest members of their society as judges, give them the power in respect of human rights issues to overrule parliament and to isolate them from the pressures of the current situation and allow them to concentrate on the long-term picture.

I find the second argument appealing as it not only complies with the key tenet of democracy but it is also in line with the African world view. The African world view places the individual within the continuum of the dead, the living and the unborn.⁵² In this context, society comprises not just the present but also past and future generations.

The present case embodies this scenario. If one imagines a referendum 30 years from now on whether Nevirapine should have been provided today or not, it is likely that a future generation, a substantial component of whom would be doomed if Nevirapine is not provided free today, would vote for the provision of free Nevirapine. This would not only guarantee their right to health care but also their most fundamental right, their right to life. I now turn to an analysis of the concrete implications of the case for the rest of the African continent.

6 Implications of the case for Africa

It is to be regretted that in arriving at its decision the Court did not make any reference to the jurisprudence of the African Commission on this right.⁵³ This may be explained by the fact that the African Charter and its jurisprudence are not well known and utilised in courts at the national level, either by the judges or by advocates. Secondly, the jurisprudence of the African Commission, particularly on socio-economic rights, is not very comprehensive and elaborate. In any case, at least in the South African situation, there already exists a set of precedents elaborately setting out government's obligations under socio-economic rights.

⁵¹ See generally C Heyns 'A 'struggle approach' to human rights' in A Soeteman (ed) *Pluralism and law* (2001) 171, especially 185–186.

⁵² JAM Cobbah 'African values and the human rights debate: An African perspective' (1987) 9 *Human Rights Quarterly* 309–323, quoting JS Mbiti *African religions and philosophy* (1970) 141.

⁵³ The 70 page judgment refers to the African Charter on Human and Peoples' Rights only once (at 9) in support for the applicant's case.

The *Nevirapine* case and its predecessors, particularly the *Grootboom* case, provide a rich jurisprudence on the issue of the realisation of socio-economic rights in Africa. There is the potential for the reverse flow of jurisprudence with South African decisions assisting the African Commission to develop its relatively underdeveloped jurisprudence on socio-economic rights. South African socio-economic rights jurisprudence could also inspire and enrich the jurisprudence of other African countries. One imagines the progress that Africa as a continent could make towards the realisation of socio-economic rights if civil society and individuals use these groundbreaking cases as tools to advocate and litigate for greater protection of socio-economic rights in their respective countries.

At this juncture it is perhaps apt to underscore the role of litigation as a means to facilitate the realisation of socio-economic rights. The *Nevirapine* case has highlighted the potential of litigation as a catalyst for progressive change. Litigation has been shown to be a useful advocacy tool. The applicants won the case and it is expected that the judgment will stimulate action on the part of the government towards a human rights compliant, comprehensive and coherent PTCT prevention programme. Even if the applicants were to lose the case, the application could still be regarded as successful in that it served to highlight the PTCT problem. This in turn generated public discussion and debate in the media and academic circles about, among other things, the human rights implications of the non-provision of anti-retrovirals to HIV positive pregnant women.⁵⁴

All African countries that are members of the OAU are party to the African Charter. Given the prevalence of violations of socio-economic rights in the continent, there is ample opportunity to take cases dealing with socio-economic rights to the African Commission.⁵⁵ In this regard it would be useful for prospective applicants to consider making use of jurisprudence on socio-economic rights developed by South African courts in building their case and to persuade the African Commission to apply this jurisprudence.

Very few cases eventually find their way to international mechanisms such as the African Commission. Litigation at the national level offers more promise for the enforcement of socio-economic rights on the

⁵⁴ The impact of the case on the government is well captured by Zakie Achmat of TAC who has been quoted saying 'It is clear public pressure and TAC court action has made the government to listen'. See B Beresford 'Aids battle moves beyond drugs' *Mail and Guardian* (20-12-2001) 3.

⁵⁵ For more information on litigating socio-economic rights in the African Commission, see KA Nana, J Busia & BG Mbaye 'Filing communications on economic, social and cultural rights under the African Charter on Human and Peoples' Rights' (1996) 3 *East African Journal of Peace and Human Rights* 188.

continent. But in order for socio-economic rights to become justiciable nationally it is vital to have the appropriate legal framework in place.

Most often domestic courts enforce domestic law. Constitutions with justiciable socio-economic rights such as the South African Constitution provide a favourable environment for litigating socio-economic rights at the national level. Many African countries do not recognise socio-economic rights as justiciable rights. For these countries having an appropriate legal framework necessitates constitutional changes introducing justiciable socio-economic rights in their constitutions. Ongoing constitutional review in countries such as Swaziland, Congo and Kenya offers an opportunity to include socio-economic rights.

Another option is to lobby for the incorporation of socio-economic rights according to the Nigerian model.⁵⁶ In this connection it is useful to recall that state parties to the African Charter have an obligation to recognise the rights, duties as well as freedoms enshrined in the Charter and that they undertake to adopt legislative or other measures to give effect to them. Incorporation of the Charter into domestic law is one of the measures that can be taken to fulfil the obligations of all state parties to the African Charter. As the African Charter contains socio-economic rights, its incorporation would lead to justiciable socio-economic rights in the laws of the countries that incorporate it into their domestic law.

7 Conclusion

The judgment in the *Nevirapine* case is without doubt an important step in the right direction. It constitutes proof of the justiciability of socio-economic rights, the obligations of government to take measures towards the realisation of socio-economic rights, and the power of courts to assess the progress government makes in this regard. Most African countries are poor in economic terms. Therefore it will not be an easy task for them to fulfil their obligations regarding socio-economic rights under the African Charter. Nevertheless, by ratifying the Charter, African states undertook to take measures to give effect to all rights guaranteed therein. The *Nevirapine* case confirms the position that the government has to act towards the progressive realisation of socio-economic rights and that its policies can be questioned.

The *Nevirapine* judgment also reaffirms that courts have a duty to order government compliance with the Constitution. Implications of this

⁵⁶ Nigeria has shown leadership in fulfilling this obligation by incorporating the African Charter into the Nigerian law through African Charter (Ratification and Enforcement) Act. See ch 10 of the *Laws of the Federation of Nigeria 1990*. Subsequently in the case of *Abacha and Others v Gani Fawehinmi* the Nigerian Supreme Court ruled that the African Charter is part of the laws of Nigeria and like all other laws the courts must uphold it. See 2000 *Federation of Weekly Law Reports* 533.

finding for many African countries where governments do not comply with requirements of their constitutions, particularly in connection with the protection of socio-economic rights, are enormous. This progressive decision unquestionably provides ammunition in the struggle for the realisation of socio-economic rights in South Africa and on the continent in general.