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Transformative Constitutionalism and Section 27: Judicial Restraint and the Enforcement of Socio-Economic Rights in South Africa

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ABSTRACT

Transformative constitutionalism in South Africa aims to advance socio-economic rights and reduce inequality—for example, Section 27 guarantees access to healthcare, food, water, and social security. Yet, courts often act cautiously, limiting the realisation of these rights. This paper examines how courts apply Section 27. It highlights the tension between legal formalism and the Constitution's transformative goals. The study recommends that courts should play a crucial role under Section 27(3) in ensuring these rights are enforceable. This study uses a qualitative, desktop-based research method and relies solely on primary, secondary, and other existing literature from Google Scholar. It explores the accompanying key questions: (i) To what extent does judicial caution limit meaningful access to healthcare under section 27 of the Constitution and the broader framework of social welfare? (ii) In what ways has section 27(3) of the Constitution been applied to hold the state accountable for progressively realising the right to healthcare? The study argues that without a proactive, rights-focused judicial approach, the socio-economic rights guaranteed in section 27, including healthcare and social security, remain promises on paper rather than real protection. In this instance, the author hopes that this research will attempt to strengthen judicial enforcement so that all South Africans can meaningfully access the rights guaranteed under section 27.

Keywords: Transformative Constitutionalism, Section 27, Socio-Economic Rights, Judicial Restraint, Structural Inequality, Access to Healthcare

INTRODUCTION

Section 27 of the South African Constitution promised a revolutionary transformation in healthcare access.[1] Yet three decades into democracy, this right remains largely aspirational. Millions of South Africans continue to navigate a two-tiered healthcare system that entrenches apartheid-era disparities, leaving public healthcare under-resourced while private healthcare caters to the wealthy. The constitutional commitment to ensuring everyone has the right to access health care services has often failed to materialize in practice, with judicial interpretations prioritizing government resource

[1] Section 27 of the Constitution, 1996.

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constraints over the fundamental human dignity that healthcare access embodies.[2] The judiciary's approach to section 27 has been characterised by excessive deference to executive policy choices, limiting the transformative potential of healthcare rights. Instead of compelling systemic improvements, courts have often retreated to administrative-law reasoning, avoiding substantive engagement with the right to healthcare. This judicial caution has had particularly dire consequences in the healthcare context, where delays in intervention translate directly into preventable suffering and deaths, effectively allowing government shortcomings to persist unchallenged.[3] The reasonableness standard applied by courts to section 27 cases has proven inadequate in addressing the urgent needs of marginalised populations. While some scholars defend this standard as offering a doctrinal foundation for transformative interpretation, in practice, it has shielded government inaction rather than compelling meaningful change.[4] Systemic failures, ranging from shortages of essential medicines to insufficient healthcare personnel, remain largely unaddressed, demonstrating that the reasonableness standard serves more as a protective mechanism for the state than as an instrument of social justice.

Judicial timidity, rooted in separation-of-powers concerns, has exacerbated these challenges, allowing structural inequalities in healthcare to persist. Courts' reluctance to intervene in what is perceived as policymaking has had life-and-death consequences, with public healthcare deficits directly harming the most vulnerable citizens.[5] This institutional caution underscores how legal formalism can become a mechanism for perpetuating structural violence rather than ensuring constitutional compliance. The Constitutional Court's record in healthcare rights cases highlights a pattern of missed opportunities for transformative adjudication. By consistently favoring institutional deference over substantive intervention, the Court has failed to mandate improvements in healthcare infrastructure, staffing, and service delivery reforms that could have had tangible, life-saving effects. This failure calls into question the Court's ability to act as a guiding agent for social change, particularly in areas where constitutional rights intersect directly with survival and dignity.[6] The South African experience reveals the limitations of constitutional social welfare guarantees when judicial approaches emphasise government capacity arguments over the constitutional imperative to realise healthcare rights progressively.

Despite the development of a comprehensive rights framework, judicial caution has allowed preventable healthcare crises to persist, undermining the transformative promise of section 27 and perpetuating entrenched inequalities in access and quality of care.[7] Finally, the absence of an equality-promoting interpretation of section 27 has reinforced a two-tiered healthcare system that privileges wealth over constitutionally guaranteed rights. Without judicial mechanisms that address systemic disparities, the constitutional guarantee of healthcare risks becoming largely symbolic. Integrating equality considerations into the interpretation and enforcement of section 27 is essential to dismantling structural healthcare inequalities and to fulfilling the transformative constitutional vision of healthcare as a fundamental aspect of human dignity.[8] Following Part I, which introduces the study, Part II examines the constitutional promise of healthcare and social security under section 27 of the Constitution, highlighting the gap between constitutional guarantees and the lived realities of many South Africans. Part III analyses the judicial application of section 27, focusing on how the courts have interpreted and enforced socio-economic rights. Part IV critically evaluates the extent to which judicial formalism has undermined the transformative objectives of the Constitution and limited the realisation

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[2] Jody Kollapen, "Realising Socio-Economic Rights in an Unequal Society," *Stellenbosch Law Review* 1 (2024): 1.

[3] D. M. Davis, "Adjudicating the Socioeconomic Rights in the South African Constitution: Towards 'Deference Lite'?," *South African Journal on Human Rights* 22, no. 2 (2006): 301–27.

[4] Carol Steinberg, "Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence," *South African Law Journal* 123, no. 2 (2006): 264–84.

[5] Carol C. Ngang, "Judicial Enforcement of Socio-Economic Rights in South Africa and the Separation of Powers Objection: The Obligation to Take'other Measures'," *African Human Rights Law Journal* 14, no. 2 (2014): 655–80.

[6] Jackie Dugard, "Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and Constitutional Court Socio-Economic Rights Decisions, 1994–2015," *The International Journal of Human Rights* 20, no. 8 (2016): 1132–60.

[7] Eric C. Christiansen, "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lesson from South Africa," *UCLA J. Int'l L. & Foreign Aff.* 13 (2008): 369.

[8] Sandra Liebenberg, "Toward an Equality-Promoting Interpretation of Socio-Economic Rights in South Africa: Insights from the Egalitarian Liberal Tradition," *South African Law Journal* 132, no. 2 (2015): 411–37.

of these rights. Part V explores the need to rethink judicial activism under section 27(3), considering the constitutional limits of the courts' role in advancing access to healthcare and social security. The final part presents the study's conclusion and recommendations.

METHODOLOGY

This study employed a qualitative, desktop-based methodology. Qualitative desktop-based research is a method of inquiry that gathers and analyzes information to understand concepts without direct data collection. In this context, the main methodological framework for this paper is desktop research. The information was sourced from primary and secondary sources, including articles, online resources, and other electronic references on the usefulness of Transformative Constitutionalism, Section 27 of the Constitution, and its implications.

DISCUSSION

Healthcare and Social Security: From Promise to Reality

Section 27 of the South African Constitution is widely celebrated as one of the most progressive socio-economic rights frameworks in the world, explicitly guaranteeing access to healthcare and social security as fundamental entitlements. Yet, some scholars highlight a stark divergence between this constitutional promise and the lived reality of millions of South Africans, revealing persistent inequalities that demand urgent redress.[9] Socio-economic rights violations continue to affect vast segments of the population, and scholars argue that these breaches should be treated with the same urgency as violations of civil and political rights. Despite the constitutional guarantees, millions remain without access to basic healthcare and social protection, illustrating how progressive constitutional provisions coexist with deep structural inequality. Nearly half of South Africans remain trapped in poverty, and unemployment hovers around 30%, reflecting a grim reality that undermines the transformative potential of the Constitution.[10] Implementation failures compound these challenges. Social security legislation has proven ineffective and unpredictable, weakening the protections Section 27 was designed to provide. The constitutional values of ubuntu and human dignity remain largely rhetorical without meaningful legislative translation into accessible social assistance programs. Restrictive policies, such as limited access to grants for unemployed adults, perpetuate discrimination and violate fundamental principles of dignity and equality.[11]

Judicial enforcement of socio-economic rights presents additional challenges. Historically, courts have demonstrated reluctance to impose positive obligations on the state, often deferring to government discretion even in cases affecting the most basic human needs. Scholars argue that courts should require a high burden of justification from the state when essential rights are at stake, yet judicial practice frequently falls short of this standard. Legislative measures such as the Medical Schemes Act and National Health Act, while well-intentioned, remain insufficient to address persistent healthcare inequities.[12] Without robust enforcement mechanisms, constitutional provisions risk becoming mere 'ropes of sand'. Section 27's guarantees, while visionary, are hollow unless South Africa commits to transforming both political will and institutional capacity to ensure meaningful access to healthcare and social security. Millions continue to experience preventable deprivation, demonstrating that the existence of constitutional rights alone is insufficient to secure socio-economic justice in practice.[13]

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[9] David Bilchitz, "Poverty and Fundamental Rights-the Justification and Enforcement of Socio-Economic Rights" (HeinOnline, 2009).

[10] David Francis and Edward Webster, "Poverty and Inequality in South Africa: Critical Reflections," *Development Southern Africa* 36, no. 6 (2019): 788–802.

[11] Letlhokwa George Mpedi, "Constitutional Perspectives from the Republic of South Africa," *The Routledge Handbook of African Law*, 2021.

[12] Sandra Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights," *South African Journal on Human Rights* 21, no. 1 (2005): 1–31; Frank I. Michelman, "Justice, Justification and Constitutional Fate in South Africa," *Constitutional Court Review* 15, no. 1 (2025): 1–19;Medical Schemes Act, Act 131 of 1998, and National Health Act 61 of 2003

[13] Patrick Macklem and Craig Scott, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution," *University of Pennsylvania Law Review* 141 (1992).

The Judicial Application of Section 27 of the Constitution

The application of section 27 of the South African Constitution by the courts represents one of the most significant yet problematic areas of post-apartheid constitutional jurisprudence. [14] While the Constitutional Court has made important strides in recognising healthcare as a justiciable right, its approach remains overly deferential to the executive and inconsistent in applying transformative constitutional principles. Despite notable victories, the courts' interpretation of section 27 has too often prioritised administrative convenience over human dignity, perpetuating rather than dismantling the apartheid-era healthcare disparities that the Constitution was designed to redress.[15] In addition, Section 27 establishes a three-part framework:

> "[S]ubsection (1) guarantees the right to access healthcare services;[16] Subsection (2) obliges the state to take reasonable measures within available resources to progressively realise this right;[17] and subsection (3) prohibits the refusal of emergency medical treatment."[18]

Yet, the courts' interpretation has revealed a persistent tension between constitutional aspiration and judicial restraint, with the latter consistently prevailing. For instance, the Constitutional Court's judgment in *Treatment Action Campaign v Minister of Health* recognised the government's unreasonable delay in providing access to Nevirapine for HIV-positive mothers. Yet the Court's cautious tone reinforced the very separation-of-powers concerns that have since justified excessive judicial deference. In this case, the Treatment Action Campaign (TAC), an HIV/AIDS advocacy group, took the South African government to court for failing to make the life-saving drug Nevirapine available to all HIV-positive pregnant women. At the time, South Africa was battling a devastating HIV/AIDS crisis, with more than six million people infected. The government's decision to restrict Nevirapine to a few pilot sites meant that countless mothers and their newborns were denied access to essential treatment that could prevent HIV transmission.[19] Furthermore, the *Soobramoney v Minister of Health* case remains the most controversial precedent in the constitutional enforcement of healthcare rights. In this case,

> "The appellant, a 41-year-old man suffering from chronic renal failure, ischaemic heart disease, and cerebrovascular disease, turned to the Addington State Hospital in Durban after he could no longer afford private care.[20] He sought access to renal dialysis, a treatment vital for his survival. However, the hospital denied his request, citing a policy that prioritised patients with acute renal failure and limited dialysis to those eligible for kidney transplants. This left the appellant without access to life-saving treatment, raising profound questions about the right to healthcare under section 27 of the Constitution and the limits of state resources."[21]

The Court's refusal to compel access to life-saving dialysis for a chronically ill patient effectively prioritised fiscal restraint over the right to life and dignity. By declaring that it would be slow to interfere with rational decisions taken in good faith by political organs, the Court entrenched a doctrine of judicial restraint that continues to limit transformative potential. Scholars argue that the Court's narrow reading

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[14] Eric C Christiansen, "Exporting South Africa's Social Rights Jurisprudence," *Loy. U. Chi. Int'l L. Rev.* 5 (2007): 29.

[15] Charles Maimela, "Does the Right to Access to Health Care Services in Terms of Section 27 of the Constitution of South Africa, 1996 Cater for Cancer Patients?," *Obiter* 39, no. 1 (2018): 1–16.

[16] Section 27(1) of the Constitution.

[17] Section 27(2) of the Constitution.

[18] Section 27(3) of the Constitution.

[19] Minister of Health and Others v Treatment Action Campaign and Others (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002).

[20] *Soobramoney v Minister of Health* case para 1.

[21] *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997). In this case, the Constitutional Court ruled against Soobramoney, upholding the hospital's policy as reasonable in light of the state's limited healthcare resources. The Court recognised that, while section 27 of the Constitution guarantees the right to healthcare, this right is subject to the state's obligation to take reasonable measures within its available resources. The judgment underscored the difficult balance between protecting individual rights and managing scarce public resources, signalling the Court's cautious approach to socio-economic rights enforcement in South Africa.

of emergency medical treatment and its failure to apply international minimum core obligations marked a significant missed opportunity to advance a rights-based approach to healthcare.[22]

The Reasonableness Standard: A Shield for Government Inaction

The judiciary's adoption of the reasonableness standard rather than a minimum core obligation has proven deeply problematic in practice. While some scholars view reasonableness as a pragmatic means of balancing constitutional ideals with institutional limits, in reality, it has become a shield for government inaction. In cases such as Grootboom, courts have accepted broad policy commitments without examining whether such policies meaningfully meet the needs of the poor or marginalised. As a result, reasonableness has evolved into a procedural benchmark easily satisfied by the mere existence of government programmes, regardless of their ineffectiveness.[23] Furthermore, the concept of progressive realisation in section 27(2) has similarly been used to justify indefinite postponement of substantive results. Although international law allows gradual fulfilment of socio-economic rights, it also establishes immediate obligations to ensure minimum essential levels of service. South African courts have largely ignored these obligations, treating progressive realisation as a justification for delay rather than a tool for accountability.[24] The state's failure to provide adequate substance abuse treatment facilities exposes the ongoing weakness of judicial enforcement. Despite section 27's guarantee, courts remain reluctant to find violations where governments can point to policy frameworks, however inadequate. This judicial hesitation effectively normalises policy failure, undermining the Constitution's commitment to transformation and reducing socio-economic rights to aspirational rhetoric rather than enforceable legal entitlements.[25]

The Emergency Treatment Provision

Section 27(3), which guarantees that no one may be refused emergency medical treatment, has been given a restrictive judicial interpretation that undermines its purpose. The Constitutional Court's definition of emergency treatment as responding to a sudden catastrophe excludes many chronic or life-threatening conditions, creating arbitrary distinctions between forms of medical need. This interpretation privileges victims of accidents over those with ongoing illnesses such as cancer or kidney disease, effectively turning health access into a matter of socioeconomic privilege.[26] The consequences of this narrow interpretation are particularly severe for low-income patients dependent on public healthcare. Wealthier patients can access private facilities, while those without financial means are left to face systemic neglect. While South African courts frequently refer to international human rights law in accordance with section 39(1)(b) of the Constitution, the UN Committee on Economic, Social and Cultural Rights' AAAQ (availability, accessibility, acceptability, and quality) framework has not been systematically incorporated into judicial reasoning on socio-economic rights. Instead, the Constitutional Court has predominantly developed and applied its own reasonableness standard.[27]

The Constitutional Court's occasional invocation of ubuntu in healthcare cases reflects an effort to root socio-economic rights in African communitarian values of solidarity and mutual care. This approach has symbolic potential to humanise constitutional interpretation and align it with social justice principles. However, its practical application remains limited, producing little measurable impact on healthcare access or equity. The Ubuntu framework's rhetorical strength has not translated into concrete

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[22] Craig Scott and Philip Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise," *South African Journal on Human Rights* 16, no. 2 (2000): 206–68.

[23] Marius Pieterse, "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services," *South African Journal on Human Rights* 22, no. 3 (2006): 473–502.

[24] Scott and Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise."

[25] Salona Lutchman, "Insufficient Access to Substance Abuse Treatment Centres for Illicit Drug Users and Its Potential Effect on a Foetus: A Breach of the Right to Access Health Care Services," *Law, Democracy & Development* 19, no. 1 (2015): 65–78.

[26] Maimela, "Does the Right to Access to Health Care Services in Terms of Section 27 of the Constitution of South Africa, 1996 Cater for Cancer Patients?"

[27] Lisa Forman, "Justice and Justiciability: Advancing Solidarity and Justice through South Africans' Right to Health Jurisprudence," *Med. & L.* 27 (2008): 661.

mechanisms for state accountability or systemic reform.[28] A central controversy in section 27 jurisprudence concerns the courts' reluctance to review government resource allocation decisions. While Pieterse argues that courts should play an active role in ensuring equitable distribution of resources and fostering public deliberation on health priorities, the judiciary continues to defer to the executive on budgetary matters. This restraint sustains the two-tiered healthcare system that privileges the affluent and marginalises the poor, contradicting the Constitution's transformative vision.[29] Persistent inequality in access to healthcare, particularly for conditions like cancer, underscores the enduring gap between constitutional rights and social reality. The wealthy enjoy world-class private treatment, while the poor face long waiting lists, inadequate facilities, and preventable deaths. Courts have consistently failed to address this inequality by robustly enforcing constitutional rights, thereby allowing economic status to determine the scope of one's constitutional protection. The proposed National Health Insurance scheme offers hope for bridging these divides. Still, its success depends on whether courts adopt a more assertive approach in ensuring state compliance with section 27 obligations.[30]

Judicial Formalism and the Betrayal of Transformative Constitutionalism

The application of section 27 of the Constitution highlights a deep tension between legal formalism and the transformative ambitions that underpin South Africa's constitutional project. The courts' continued adherence to traditional legal reasoning has often undermined the radical redistributive vision intended by the Constitution's drafters.[31] This conflict is most evident in the judiciary's reliance on narrow textual interpretation and procedural rigidity, rather than on embracing the values of substantive equality and human dignity that lie at the heart of transformative constitutionalism. A critical example of this tension is found in the Soobramoney judgment, where the Constitutional Court's overly technical interpretation of the term 'refused' in section 27(3) stripped the provision of its intended power to protect vulnerable patients.[32] By treating constitutional interpretation as a linguistic exercise rather than a vehicle for social justice, the Court reduced the right to emergency medical treatment to an overly narrow category, excluding many life-threatening conditions. In doing so, it privileged legal form over human survival, contradicting the Constitution's commitment to transformation, dignity, and equality.

The transformative vision of the Constitution sought more than symbolic change; it aimed to restructure South African society by addressing historical injustice and entrenched inequality. Yet, the courts' formalistic interpretation of section 27 continues to prioritise legal certainty and institutional restraint over this broader transformative mandate. Although the Constitutional Court has occasionally invoked ubuntu principles to promote collective solidarity and human interconnectedness, this has not translated into tangible mechanisms for dismantling the apartheid-era health care system that continues to privilege wealth over need.[33] This judicial conservatism reflects a broader misunderstanding of transformative constitutionalism: socio-economic rights are treated as limits to judicial power rather than as tools for social and economic redress.

As a result, legal formalism has become a conservative force that protects existing hierarchies under the guise of judicial restraint. Marius Pieterse offers a powerful critique of this judicial passivity, advocating for an entitlement-oriented approach to section 27 that would recognise concrete individual rights rather than rely on abstract notions of reasonableness.[34] His analysis reveals how courts' focus on the existence of government policies, rather than their real-world impact, allows systemic inequality to persist unchallenged. The so-called reasonableness standard, while presented as neutral and pragmatic, often legitimises government inaction by requiring only the appearance of compliance.[35] This approach

[28] Forman, "Justice and Justiciability: Advancing Solidarity and Justice through South Africans' Right to Health Jurisprudence."
[29] Marius Pieterse, "Health Care Rights, Resources and Rationing," *South African Law Journal* 124, no. 3 (2007): 514–36.
[30] Maimela, "Does the Right to Access to Health Care Services in Terms of Section 27 of the Constitution of South Africa, 1996 Cater for Cancer Patients?"
[31] Isolde De Villiers, "South African Legal Culture in a Transformative Context" (University of Pretoria, 2009).
[32] Scott and Alston, "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise."
[33] Forman, "Justice and Justiciability: Advancing Solidarity and Justice through South Africans' Right to Health Jurisprudence."
[34] Pieterse, "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services."
[35] Toto Fiduli, "The Appropriateness of the Reasonableness Standard in Ensuring the Effective Realisation of Socio-Economic Rights in South Africa" (University of Pretoria (South Africa), 2022).

empties socio-economic rights of their transformative content, reducing them to procedural formalities rather than enforceable guarantees. In practice, this failure has profound consequences for millions of South Africans who remain trapped in poverty and excluded from quality health care. The tension between formalism and transformation is therefore not theoretical; it is lived daily by those the Constitution promised to uplift, yet who continue to experience exclusion and deprivation due to judicial conservatism.

Rethinking Judicial Activism under Section 27(3): The Limits of the Court's Role

The argument that courts should play a decisive role in enforcing socio-economic rights under Section 27(3) of the Constitution rests on a fundamental misunderstanding of both the nature of these rights and the judiciary's appropriate role in a democratic state. While judicial oversight is crucial to upholding constitutional principles, the courts' capacity to resolve complex policy questions concerning health care, housing, and education is inherently limited. These rights are often framed in broad and indeterminate terms, leaving significant discretion to the political branches. Generally, when socio-economic rights are expressed in vague language, their implementation requires intricate policy design and resource allocation decisions that are best handled by the executive and legislative branches rather than the judiciary.[36]

The issue of democratic legitimacy intensifies this critique, and constitutions that empower courts to enforce social welfare rights may, paradoxically, erode democratic governance more deeply than those that protect only civil and political liberties.[37] Judicial enforcement in these contexts risks displacing the policymaking authority of elected representatives and substituting judicial preferences for legislative judgment. This dynamic undermines the separation of powers, transforming courts into unelected policymakers and potentially weakening the democratic accountability that underpins constitutional legitimacy. Empirical evidence from comparative jurisdictions strengthens the case against an overly activist judiciary. Judicial enforcement of socio-economic rights often benefits middle- and upper-class citizens rather than the intended poor and marginalized.[38] The litigation processes required to vindicate such rights typically demand legal expertise, financial resources, and social capital advantages disproportionately available to the privileged. This outcome exposes a troubling paradox: judicial enforcement, while rhetorically framed as a tool for empowerment, may in practice exacerbate inequality.

The institutional competence argument further reinforces the case for judicial restraint. Williams observes that the enforcement of socio-economic rights raises difficult questions about the judiciary's capacity to assess technical, quantitative, and policy-oriented matters traditionally reserved for political institutions.[39] Courts, by their nature, are ill-equipped to conduct large-scale assessments of budgetary priorities or to monitor the long-term implementation of social programs. Excessive judicial involvement in these domains risks distorting institutional balance and burdening courts with tasks they are neither designed nor democratically authorised to perform. Even Perry's reflections raise a deeper philosophical concern: should citizens entrust unelected judges with the authority to overturn the choices of democratically accountable officials? Such a transfer of decision-making power, Perry argues, risks subverting the democratic ideal of governance by representatives of the people.[40] The notion of government by the judiciary challenges the foundational principle that legitimacy flows from the consent of the governed, not from judicial interpretation.

The South African experience underscores these concerns, and while the Constitutional Court has delivered landmark judgments under Section 27, these have not always translated into tangible improvements in people's lives. Mubangizi observes that despite the Court's active role in cases related to HIV/AIDS and public health, South Africa continues to struggle with implementing effective

[36] Octávio Luiz Motta Ferraz, "The Court's Dilemma in Social Rights' Enforcement," in *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press, 2021), 202–36.
[37] Mark Tushnet, "Social Welfare Rights and the Forms of Judicial Review," *Tex. L. Rev.* 82 (2003): 1895.
[38] David Landau, "The Reality of Social Rights Enforcement," *Harv. Int'l LJ* 53 (2012): 189.
[39] Lucy A Williams, "The Role of Courts in the Quantitative-Implementation of Social and Economic Rights: A Comparative Study," *Constitutional Court Review* 3, no. 1 (2010): 141–99.
[40] Michael J Perry, "Protecting Human Rights in a Democracy: What Role for the Courts," *Wake Forest L. Rev.* 38 (2003): 635.

responses to these crises.[41] This suggests that judicial enforcement, while symbolically important, may create an illusion of progress without producing substantive social change. These perspectives reveal that the call for a dominant judicial role under Section 27(3) rests on fragile foundations. Judicial intervention in socio-economic rights, though well-intentioned, risks undermining democratic governance, overextending judicial competence, and entrenching existing inequalities. The challenge, therefore, is not to abandon judicial engagement altogether, but to recalibrate it to ensure that courts act as facilitators of accountability and transparency rather than substitutes for democratic policymaking.

Judicial Resistance to Socioeconomic Rights Enforcement

The problem begins with deeply entrenched judicial resistance to the enforcement of socioeconomic rights. Courts have historically shown "judicial resistance to recognising socioeconomic rights like health as appropriately legal, or as appropriately enforceable in light of the doctrine of separation of powers.[42] This resistance manifests in judicial deference to social and economic policy, a reluctance to view socioeconomic claims as invoking fundamental values, and an overall reluctance to recognize positive obligations in social welfare.[43] Such judicial timidity has relegated health to the political rather than legal sphere, allowing governments to systematically ignore their constitutional obligations with impunity.

The Constitutional Court's adoption of the reasonableness standard represents a particularly pernicious form of judicial abdication. While the reasonableness approach can identify some flaws in laws and policies, it is less clear whether it can identify and correct translation failures that result from the failure to pass laws or policies in the first place.[44] This limitation is devastating because it means that only those aspects of socioeconomic rights that the legislature or the executive is willing to implement are realized, leaving vast areas of constitutional obligation unenforceable. The reasonableness standard's failure to engage with the substantive content of constitutional rights creates a systematic enforcement gap. Without a substantive understanding of the rights that legislation or policy aims to translate, a reasonableness inquiry cannot identify untranslated aspects of those rights or insist that translation take place. This approach effectively allows the government to define the scope of its own constitutional obligations, fundamentally undermining the counter-majoritarian function of constitutional rights.

The problem extends beyond mere judicial restraint to active judicial complicity in governmental failures. Analyses of healthcare legislation reveal systematic translation failures where constitutional rights are not adequately converted into claimable individual entitlements.[45] These failures occur when statutory or policy-based socioeconomic entitlements are under-inclusive, rigidly defined, unduly limited, narrower than the rights they give effect to, vague or indeterminate, left without appropriate institutional backing, or insufficiently entrenched. In addition, translation failures have little to do with the resource or capacity constraints often cited as explanations for poor implementation.[46] This finding exposes the dishonesty of judicial deference based on resource concerns, revealing it as a convenient excuse for avoiding difficult constitutional enforcement decisions. The consequences of judicial caution extend far beyond individual cases, creating a systemic enforcement crisis. It has been shown that the government in South Africa has not always complied fully or reasonably speedily with orders granted by the Constitutional Court as regards socio-economic rights, including social security-related rights.[47] The failure to provide appropriate housing in accordance with the Grootboom judgment and the delays in rolling out antiretroviral treatment as directed in Treatment Action Campaign demonstrate that judicial caution encourages governmental non-compliance.

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[41] John C Mubangizi, "HIV/AIDS and the South African Bill of Rights, with Specific Reference to the Approach and Role of the Courts," *African Journal of AIDS Research* 3, no. 2 (2004): 113–19.

[42] Lisa Forman, "Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy," *Journal of Law, Medicine & Ethics* 33, no. 4 (2005): 711–24.

[43] Forman, "Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy."

[44] Pieterse, "Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services."

[45] Marius Pieterse, "Legislative and Executive Translation of the Right to Have Access to Health Care Services," *Law, Democracy & Development* 14, no. 1 (2010): 231–55.

[46] Pieterse, "Legislative and Executive Translation of the Right to Have Access to Health Care Services."

[47] Marius Olivier, "Access to Justice in Welfare Law and Litigation: Judicial Reform in South Africa," *Obiter* 27, no. 3 (2006): 470–501.

This enforcement crisis demands a fundamental shift in judicial approach. It has been argued that extensive judicial reform is still required in order to ensure true access to justice for the millions of people dependent on welfare in South Africa.[48] Specifically, courts must "be more forceful in their insistence on compliance by government with their very orders so as to avoid a situation where the required redress is still wanting, years after a judgment had been handed down.[49] The human cost of judicial caution falls disproportionately on the most vulnerable populations. State failures to provide adequate healthcare services particularly harm vulnerable groups, including pregnant women and their unborn children.[50] Similarly, the economic or financial position of the cancer patient serves as a valid and justifiable reason for denying access to healthcare for 75 percent of people in South Africa who rely on public health care services.[51] Judicial caution creates and perpetuates systemic barriers to healthcare access that extend far beyond individual cases. The failure to develop robust enforcement mechanisms means that even when rights are recognised in principle, they remain practically inaccessible. Constitutional guarantees of healthcare access remain largely theoretical for many South Africans.[52]

The Limits of Judicial Enforcement of Socio-Economic Rights

The judicial enforcement of socio-economic rights represents a dangerous overreach that undermines democratic governance and fails to deliver meaningful results for those most in need. The fundamental problem with judicial intervention in socio-economic rights is the violation of democratic principles and the separation of powers. Courts show judicial resistance to recognizing socioeconomic rights as legally enforceable under the doctrine of separation of powers, a concern that arises from legitimate caution about encroaching on executive and legislative functions.[53] This resistance reflects an understanding that courts lack the democratic mandate to make complex resource allocation decisions that properly belong to elected representatives. The practical results of judicial activism in this area have been disappointing, undermining arguments for expanded judicial intervention. Despite years of constitutional litigation, the judiciary has sought to strike a balance between holding the exercise of public power accountable to the Constitution and deferring to the government's policy choices, resulting in only very modest gains for the poor.[54] This evidence suggests that judicial enforcement promises more than it can deliver, creating false hope while failing to address systemic poverty and inequality.

Moreover, aggressive judicial intervention raises serious questions about institutional competence and democratic legitimacy. Judicial review will need to be weakened, compared to traditional models, before it can be counted as fully legitimate, particularly in enforcing positive socio-economic rights.[55] Courts lack the expertise, resources, and democratic accountability necessary to make complex policy decisions about healthcare delivery, social security systems, and resource allocation across competing social needs. The complexity of socio-economic policy further underscores the limitations of the judiciary. The complex relationship between core and non-core needs, and the difficulty of balancing them, underscores why judicial enforcement often fails to account for broader policy and budgetary consequences.[56] Courts cannot adequately weigh competing priorities or fully understand the implications of their decisions for government budgets and service delivery systems. Even scholars who support some judicial role acknowledge these fundamental constraints. South African jurisprudence has incorporated the concerns of the jurists who argue that courts lack the legitimacy and

[48] Olivier, "Access to Justice in Welfare Law and Litigation: Judicial Reform in South Africa."
[49] Olivier, "Access to Justice in Welfare Law and Litigation: Judicial Reform in South Africa."
[50] Lutchman, "Insufficient Access to Substance Abuse Treatment Centres for Illicit Drug Users and Its Potential Effect on a Foetus: A Breach of the Right to Access Health Care Services."
[51] Maimela, "Does the Right to Access to Health Care Services in Terms of Section 27 of the Constitution of South Africa, 1996 Cater for Cancer Patients?"
[52] Annie Leatt, Maylene Shung-King, and Jo Monson, "Healing Inequalities: The Free Health Care Policy," *South African Child Gauge* 2006 (2006): 51–56.
[53] Forman, "Ensuring Reasonable Health: Health Rights, the Judiciary, and South African HIV/AIDS Policy."
[54] Dennis M Davis, "Socioeconomic Rights: Do They Deliver the Goods?," in *Economic, Social and Cultural Rights* (Routledge, 2017), 609–34.
[55] Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited," *International Journal of Constitutional Law* 5, no. 3 (2007): 391–418.
[56] Murray Wesson, "Grootboom and beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court," *South African Journal on Human Rights* 20, no. 2 (2004): 284–308.

competence to decide such matters, resulting in an affirmative social rights jurisprudence tempered by internalised justiciability concerns.[57] The evidence demonstrates that judicial enforcement of socio-economic rights creates institutional tensions without delivering substantive improvements. Current approaches have resulted in a body of jurisprudence that cannot realistically contribute to eliminating poverty and inequality.[58] Rather than empowering courts to make policy decisions they are ill-equipped to handle, democratic societies should rely on political processes, electoral accountability, and legislative oversight to ensure government responsiveness to social needs. Judicial activism in socio-economic rights ultimately weakens both judicial legitimacy and democratic governance while failing to achieve its stated goals of protecting the vulnerable.

RECOMMENDATIONS

This study recommends that:

South African courts should embrace a more purposive and transformative interpretive framework concerning section 27 of the Constitution, shifting away from excessive judicial restraint towards a proactive, rights-focused model of adjudication. Specifically, courts ought to strengthen enforcement of section 27(3) by mandating clearer standards of reasonableness, transparency, and accountability for state policies related to healthcare, food, water, and social security. This entails a readiness to provide structural relief when necessary, ensuring that compliance is meaningful rather than merely symbolic.

Furthermore, the study advocates that the judiciary explicitly aligns its socio-economic rights jurisprudence with the overarching objectives of transformative constitutionalism, thereby mitigating structural inequality and preventing the progressive realization from serving as a rationale for inaction. Lastly, a more proactive judicial stance is crucial to translating the constitutional promise of section 27 into real, equitable access to socio-economic rights for all South Africans.

CONCLUSION

This study demonstrated that a cautious judicial approach to Section 27 has failed the people of South Africa, leaving millions trapped in a system where constitutional rights exist only on paper. Additionally, courts have repeatedly prioritised legal formalism and deference to government over the urgent needs of citizens, allowing systemic inequality in healthcare, social security, and basic services to persist. This judicial timidity is not neutral; it actively perpetuates deprivation and undermines the Constitution's transformative goals. Section 27(3) is clear: the state must ensure access to essential services, and the courts have a constitutional duty to enforce this mandate. Yet, by hiding behind vague reasonableness standards and procedural technicalities, the judiciary has abdicated its responsibility, rendering socio-economic rights hollow for the most vulnerable. Transformative constitutionalism cannot succeed without an assertive, rights-focused judiciary willing to challenge government inaction and demand compliance. Moreover, the time for passive endorsement of policy failure is over and courts must act decisively to translate Section 27's promises into real protections, ensuring that access to healthcare, social security, and human dignity is not a privilege for the few but a guaranteed reality for all South Africans. The survival, well-being, and equality of millions depend on it.

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[57] Eric Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court," *Columbia Human Rights Law Review* 38, no. 321 (July 12, 2007): 45.

[58] Stuart Wilson and Jackie Dugard, "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights," *Stellenbosch Law Review* 22, no. 3 (2011): 664–82.

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