

**The Treatment Action Campaign (TAC) case as a model for the protection of the right to health in Africa, with particular reference to South Africa and Cameroon.**

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(Human Rights and Democratisation in Africa)**

**by**

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## **TABLE OF CONTENTS**

TITLE PAGE	1
TABLE OF CONTENTS	2
LIST OF ABBREVIATIONS	4
DEDICATION	5
ACKNOWLEDGEMENTS	6

### **Chapter 1: INTRODUCTION**

1.1	Background	7
1.2	Research Question	9
1.3	Hypotheses	10
1.4	Objectives of the study	10
1.5	Limitation of the study	10
1.6	Literature review	11
1.7	Importance of the study	12
1.8	Research Methodology	13
1.9	Chapterisation	13

### **CHAPTER 2: THE ANALYSIS OF THE TAC CASE**

2.1	Introduction	14
2.2	The facts	15
2.3	The arguments	16
2.4	The judgment	21
2.3	Basis of the <i>ratio decidendi</i> of the TAC case	22
2.4	Implications of the decision for South Africa	26
2.5	Conclusion	27

### **CHAPTER 3: THE TAC CASE AND THE RIGHT TO HEALTH**

3.1	Introduction	29
3.2	General considerations of the right to health	29
	3.2.1 Scope of the right to health	29
	3.2.2 Minimum core obligations of the right to health	32
	3.2.3 Progressive realisation of the right to health	34
3.3	The thrust of the interpretation of the theory of separation of powers in favour of the right to health	35
3.4	Conclusion	38

### **CHAPTER 4: THE IMPACT OF THE TAC CASE BEYOND SOUTH AFRICA**

4.1	Introduction	39
4.2	The right to health in the Constitution of Cameroon	39
4.3	The thrust of the interpretation of the theory of separation of powers in favour of the right to health	44
4.4	The independence of the judiciary	46
4.5	The TAC case beyond South Africa	49
4.6	Conclusion	50

### **CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS**

	BIBLIOGRAPHY	56
	ANNEXURES	63

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ARVs	Antiretrovirals
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
ICCPR	International Covenant on Civil and Political Rights
IESCR	International Covenant on Economic, Social and Cultural Rights
MTCT	Mother-to-Child Transmission
N	Note
PLWHA	People Living with HIV/AIDS
SA	South Africa
TAC	Treatment Action Campaign
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly

## **DEDICATION**

*This work is dedicated to all people who are living with HIV/AIDS and all children who have been orphaned by the pandemic.*

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## CHAPTER 1: INTRODUCTION

### 1.1 Background

In Africa, over 25 million people have died of HIV/AIDS pandemic, while over 12 million children are AIDS orphans. The increased likelihood for mother-to-child transmissions (MTCT) of HIV may have major consequences for child mortality.<sup>1</sup> Sub-Saharan Africa is the only region in the world where women are infected at a higher rate than men are.<sup>2</sup> HIV/AIDS infections could be prevented yet the majority of people do not have easy access to health care services and treatments, necessary for prevention and survival.<sup>3</sup> Despite new commitments to provide access to treatment, and decreasing market prices on HIV/AIDS drugs, there are less than four percent people on antiretroviral treatment (ARV), out of an estimated 30 million HIV-positive people in Africa.<sup>4</sup>

South Africa (SA) is one of the hardest-hit countries, in which the epidemic claims six hundred people a day,<sup>5</sup> and over 300,000 people died of HIV/AIDS in 2004.<sup>6</sup> By the end of 2004, an estimated 6.29 million SA were HIV positive, of which 3.3 million were women and 104,863 were babies, infected as a result of MTCT.<sup>7</sup> 70 000 infants are born with HIV each year.<sup>8</sup> These statistics are compounded by the fact that the administration of ARVs could save at least 14 000 lives every year, of people living with HIV/AIDS (PLWHA).<sup>9</sup>

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<sup>1</sup> Mother-to-child transmission of HIV (hereafter 'the MTCT').

<sup>2</sup> Aids in Africa 'Why can't the HIV virus be controlled?' <<http://www.mapleleafweb.com/features/general/aids-africa/aids-africa.html>> (accessed 23 March 2005).

<sup>3</sup> Malinowska-Sepruch, K. *War on Drugs, HIV/AIDS and Human Rights* (2004) International Debate Education Association.

<sup>4</sup> UN Office for the Coordination of Humanitarian Affairs 'AFRICA: Worldwide appeal for free AIDS Treatment' <<http://www.irinnews.org/report.asp?ReportID=44659>> (accessed 31 March 2005).

<sup>5</sup> Avert.org 'HIV & AIDS in South Africa' <<http://www.avert.org/aidssouthafrica.htm>> (12 July 2005).

<sup>6</sup> TAC Electronic Newsletter 'Why TAC says Treat 200,000 by 2006' <[http://www.tac.org.za/newsletter/2005/ns07\\_06\\_2005.htm](http://www.tac.org.za/newsletter/2005/ns07_06_2005.htm)> (accessed 3 July 2005).

<sup>7</sup> Government HIV Statistics 'The South African Department of Health Study' (2003) <[http://www.arc.org.za/HIV\\_STATS\\_GOV\\_SA.htm](http://www.arc.org.za/HIV_STATS_GOV_SA.htm)> (accessed 31 March 2005).

<sup>8</sup> TAC Newsletter 'Treatment Action Campaign (TAC) News' <<http://www.tac.org.za/newsletter/2000/ns000822.txt>> (accessed 3 July 2005).

<sup>9</sup> n 8 above .

In 2001, the SA government, as a response to HIV/AIDS pandemic, introduced a programme in which a single-dose of Nevirapine was chosen to prevent MTCT. Due to concerns over, among other things, the safety and efficacy of Nevirapine, the government decided to make Nevirapine available to prevent MTCT at only 18 pilot sites. The Treatment Action Campaign (*TAC*)<sup>10</sup> questioned the reasonableness of government's programme, and demanded that a comprehensive policy aimed at preventing MTCT be adopted. However, such demands were ignored by the government. It is on this basis that *TAC* brought a legal action against the government at the High Court. The High Court judgment was appealed by government at the Constitutional Court (Court).<sup>11</sup>

*TAC* alleged that the government had failed to fulfil a range of constitutional obligations.<sup>12</sup> However, the Court decided to deal with the obligation of government under section 27(2), read together with section 27(1)(a) of the Constitution. *TAC* made it clear that it is an indisputable obligation of the state to provide health care services to prevent MTCT. The government argued that the efficacy of the drug was questionable and that there was inadequate capacity to administer the drug nationally. Issues pertaining to the separation of powers were also raised on the premise that the relief sought by *TAC* constituted a breach of separation of powers.

The Court in its judgment determined that the right to health was justiciable. The measures taken by government were declared unreasonable to achieve the progressive realisation of the right to health. The Court stated that, pronouncing on the reasonableness of the measures taken by government would not be a breach of the theory of separation of powers. Instead, the Court considered itself to be a perfect example of how the separation of powers should work, in the fulfilment of its constitutional obligations.<sup>13</sup> In the *TAC* case, the Court ordered the SA government to provide ARVs to pregnant women infected with HIV/AIDS to prevent MTCT.

The *TAC* case, as a model for Africa, marks a positive step in protecting the right to health, particularly pregnant women and their infants. It provides a rich jurisprudence on protection of the

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<sup>10</sup> *TAC* is a voluntary association of individuals and organisations dedicated to ensuring access to affordable and quality treatment for all people with HIV/AIDS, to preventing and eliminating new HIV infections, and to improving the affordability and quality of health-care access for all. *TAC* website <[www.tac.org.za](http://www.tac.org.za)> (accessed 15 March 2005).

<sup>11</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (*TAC* case). See chapter 2 for the full analysis of the *TAC* case.

<sup>12</sup> The marginal note of these provisions is as follows: sec 7 (2) (rights), 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) (the right to health), and sec 28 (the right of the child to basic health services) of the Constitution of the Republic of SA, 1996 (Constitution).

<sup>13</sup> *TAC* case (n 11 above) para 113.



right to health in Africa, and particularly in the context of the HIV/AIDS pandemic.<sup>14</sup> The *TAC* case definitely portrays the strength and role of an independent judiciary in the enforcement of constitutional rights such as socio-economic rights. The competence, legitimacy and power of the courts to pronounce on the constitutional validity of socio-economic rights justifies that it is indeed a model for the enforcement of the right to health in Africa. However, the right to health is not justiciable in many African constitutions.

It is submitted that failure to address human rights violations, particularly the right to health fuels the HIV/AIDS pandemic.<sup>15</sup> This calls for governments to take measures to protect the rights of PLWHA, particularly women. The African Charter on Human and Peoples Rights (ACHPR),<sup>16</sup> of which most African countries are state parties to, obligates States Parties to take necessary measures to give effect to the rights enshrined therein, including socio-economic rights. Socio-economic rights, in most African countries, including particularly Cameroon, are not constitutionally protected as justiciable rights. Thus, the jurisprudence of the *TAC* case could inspire African countries whose legislation and case law on socio-economic rights are underdeveloped, to make use of the jurisprudence issued by the Court in this field.<sup>17</sup>

The *TAC* case could also be used to persuade national courts to enforce socio-economic rights, given the prevalence of socio-economic rights violations in Africa. Thus, in this regard, it will be argued that governments have a fundamental obligation to ensure that the right to health is respected, protected, promoted and fulfilled as provided in regional and international human instruments.

## 1.2 Research Questions

The study seeks to address three key research questions, which are pertinent to the discussion:

- to what extent are governments obliged to provide affordable medical treatment to pregnant women living with HIV/AIDS as the basis for the recognition of the right to health?

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<sup>14</sup> E Baimu 'The government's obligation to provide anti-retrovirals to HIV-positive pregnant women in an African human Rights Context: The South African Nevaripine case' (2002) 2 *AHRJ* 172.

<sup>15</sup> Amnesty international 'Amnesty international and the Fight Against HIV/AIDS: Questions and Answers' <<http://web.amnesty.org/library/Index/ENGACT750052004?open&of=ENG-398>> (accessed 21 September 2005).

<sup>16</sup> African Charter on Human and Peoples' Rights O.A.U. Doc.CAB/LEG/67/3/Rev.5 (1982) (entered into force, 21/10/1986).

<sup>17</sup> n 14 above.

- how can national courts compel governments to respect their constitutional obligations, particularly with respect to the right to health, the principle of separation of powers notwithstanding ?
- to what extent is the *TAC* case a model towards the enforcement of the right to health in Africa, and Cameroon in particular?

### **1.3 Hypotheses**

The research seeks to address three hypotheses:

- The failure of governments to provide ARVs has contributed to the overall spread of MTCT.
- The scale of the HIV/AIDS pandemic requires governments to take the right to health seriously in order to prevent the spread of the pandemic.
- The judicial situation in most African countries, particularly Cameroon is not conducive for the application of the *TAC* case jurisprudence.
- a holistic approach may be required to address the root causes of the HIV/AIDS pandemic.

### **1.4 Objectives of the study**

The study, through five issues, aims to enhance the awareness of HIV/AIDS and to provide solutions for addressing the adverse impacts of HIV/AIDS. Specifically, the study aims to:

- analyse the *TAC* case as a model for Africa and its implications on the SA government.
- identify and explore international and regional human rights instruments protecting and promoting the right to health, as well as the obligations imposed by the right to health.
- explore the role played by the Court in SA in enforcing the right to health.
- assess the possibility of applying the jurisprudence of the *TAC* case beyond SA, particularly Cameroon.
- make recommendations regarding the HIV/AIDS prevention programme.

### **1.5 Limitations of the study**

The obligation of governments to protect the right to health, is a broad subject. Thus, this study focuses on the *TAC* case as a model for Africa, and the role of the judiciary in enforcing the right of pregnant women to health in order to prevent MTCT. The right to health in national, regional and international human rights instruments is also considered, and whether the jurisprudence of the *TAC* case could be applied beyond Africa. In addition, the Constitution provides for the right of

access to health care.<sup>18</sup> However, in this research, the right of access to health care services will be referred to as the right to health.

## 1.6 Literature review

There is a considerable amount of literature concerning the obligation of governments to protect the right to health in the context of providing affordable medical treatment to combat the HIV/AIDS pandemic. There is consensus on the need to provide healthcare services, including ARV programmes, to PLWHA, and such consensus indicates the highest priority to prevent the spread of the HIV/AIDS pandemic. However, little has been done in relation to providing free medical health, considering the large scale of the pandemic.

Much work exists that contributes to aspects of understanding the HIV/AIDS pandemic and the right to health. Malinowska-Sepruch makes an analysis between drug policies and their impact on public health, especially the spread of HIV/AIDS.<sup>19</sup> The author highlights the duty of the state to provide drugs to prevent the spread of HIV/AIDS, and how prohibitive drugs policies fail to fulfil this duty. Gostin examines HIV/AIDS in the courtroom, and its social impact.<sup>20</sup> He also discusses HIV/AIDS pandemic in historical perspective, assesses AIDS policies and predicts future directions to effectively prevent the spread of HIV/AIDS.

Dickson draws upon statutes and court decisions from across the United States to provide a comprehensive and current picture of the many facets of HIV/AIDS law, including health policy; confidentiality and privacy.<sup>21</sup> The author attempts to integrate the perspectives from law and social work, with an attempt to give a better understanding to social workers, practitioners and teachers in dealing with people suffering from HIV/AIDS. The work of O' Leary and Jemmott,<sup>22</sup> generally addresses the persistence and severity of the AIDS pandemic and how government strategies and interventions have been grossly inadequate to meet the needs of women, considering the nature of the pandemic. The authors contend that, despite overwhelming circumstances, all relevant actors need to work together to transform our society into one that is responsive to the needs of all people, and grants to each the right to health that is intrinsic to the right to life.

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<sup>18</sup> n 12 above. S 27

<sup>19</sup> n 3 above.

<sup>20</sup> Gostin, L.O. *The AIDS Pandemic: Complacency, Injustice and Unfulfilled Expectations* (2004).

<sup>21</sup> Dickson, D.T. *HIV, AIDS and the Law: Legal Issues for Social Work Practice and Policy* (2001).

<sup>22</sup> O' Leary, A. and Jemmott, L.S. *Women and AIDS: Coping and Care* (1999).

There is quite number of publications on HIV/AIDS and the right to health. Hence, any addition to this volume of literature needs some justification. It is indisputable that further investigation is required to draw together specific studies and place these experiences, both personal and social, in an African context. Rather than one more contribution to the existing literature, this study gives more attention, through a case study, to the obligations imposed on the state to protect the right of access to health. It also addresses implications that arise in the consideration of the failure to protect the right to health.

### **1.7 Importance of the study**

The results of this study are significant in various respects. Studies conducted by Statistics SA and the Medical Research Council have confirmed that the HIV/AIDS pandemic is the leading cause of death in SA.<sup>23</sup> The SA government has conducted, among others, awareness campaigns and HIV/AIDS prevention programmes. However, the prevention programme is marked by, amongst others, poor management and lack of commitment from the government. The right to health is still a right that is costly for PLWHA in SA.

Notwithstanding the important advances made to date, there are a number of issues posed by HIV/AIDS, which require further development of HIV/AIDS research. It is argued that the right to health needs to be addressed, given the enormity of the HIV/AIDS pandemic, which results in violation of the right to health. It also highlights the role played by courts in SA to enforce the right to health, by imposing obligations on government. Consequently, governments may apply these effective strategies from which valuable lessons can be learnt in confronting the HIV/AIDS pandemic, which remains massive.

The ultimate aim of the study is to contribute to the fight against the HIV/AIDS pandemic. This research contributes to the fight against the pandemic, and it provides a clearer understanding of problems that PLWHA have to endure. Moreover, possible recommendations emanating from this research can be disseminated to other organizations undertaking similar work and individuals interested in this domain. The research suggests concrete action plans on how the SA government can improve the implementation of its HIV/AIDS prevention programme.

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<sup>23</sup> Treatment Action Campaign 'Make Treatment Work'  
<[http://www.tac.org.za/Documents/EqualTreatment/equal\\_treatment/ET16PDFversion.pdf](http://www.tac.org.za/Documents/EqualTreatment/equal_treatment/ET16PDFversion.pdf)>  
(accessed 15 September 2005).

## 1.8 Research methodology

Intensive library research was conducted in this study in order to establish the nature and extent of the obligations imposed on the government by the right to health, as well as to gain insight into possible recommendations for the effective implementation of the HIV/AIDS prevention programme. Inductive analysis through means of rich contextual data was adopted. The Constitution of the Republic of SA, the Constitution of the Republic of Cameroon<sup>24</sup>, articles, journals, human rights instruments, reports and case law in relation to the right to health and HIV/AIDS were used as sources.

## 1.9 Chapterisation

Chapter 1 of this study highlights the structure of the whole study. Chapter 2 provides an in-depth analysis of the *TAC* case, the basis of the *ratio decidendi* of the *TAC* case. The analysis includes the implications of the *TAC* case on the SA government. Chapter 3 reviews the application of international and regional human rights instruments protecting the right to health, and how these instruments are interpreted by human rights treaty monitoring bodies and municipal courts to impose on the state the duty to protect the right to health. Section 27 of the Constitution is also lightly considered. The discussion concentrates on the relevance of these norms and jurisprudence to the protection of the right to health in the context of HIV/AIDS in SA.

The thrust of the theory of separation of powers is extensively discussed on the basis that the right to health encompasses seeking redress whenever it is violated. Thus, the study explores the judicial role in the HIV/AIDS era, to ensure that the right to health is enforced. However, it is noted that judicial independence and the theory of separation of powers, amongst others, may impede the enforcement of the right to health when it is challenged. Chapter 4 evaluates the Cameroon approach to the right to health in the Constitution, and seek to find answers as to whether the judiciary has capacity and expertise to impose on the government, the obligation to respect, protect and fulfil the right to health. Furthermore, the reasons are provided as to why the *TAC* case serves as a model for Africa. Chapter 5 is a summary of the conclusions drawn from the whole study and makes some recommendations.

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<sup>24</sup> The Constitution of the Republic of Cameroon, 1996 (Cameroonian Constitution).

## CHAPTER 2: THE ANALYSIS OF THE TAC CASE

### 2.1 Introduction

*'The HIV/AIDS pandemic in South Africa has been described as an incomprehensible calamity and the most important challenge facing South Africa since the birth of our new democracy and government's fight against this scourge as a top priority. It has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'.<sup>25</sup>*

The AIDS pandemic is one of the greatest challenges confronting SA and the pandemic is growing rapidly. The pandemic in SA has already claimed more than one million, mostly rural, lives.<sup>26</sup> "More than 150 children are born with HIV every day, who live short and miserable lives".<sup>27</sup> MTCT is the most important source of HIV infection in children. It is on these basis that the TAC case challenged the reasonableness of the MTCT prevention programme. The TAC case was the third case brought before the Court seeking to enforce socio-economic rights. Until the TAC case, the Court had not imposed on the state any obligation in respect of the right to health, but had had an opportunity to consider the scope and content of the right to health.<sup>28</sup> The Court had also provided extensive analysis of the nature of the duties imposed by socio-economic rights on the state.<sup>29</sup>

The discussion in this chapter mainly deals with the analysis of the TAC case with specific emphasis on the right of women to health as guaranteed in section 27 of the Bill of Rights. It highlights the significance of the case, the basis of the *ratio decidendi* of the TAC case, and reflects on its implications as a model for Africa.

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<sup>25</sup> TAC case (n 11 above) para 1.

<sup>26</sup> Maphophoma Farmers Day 'Speech by Prince Mangosuthu Buthelezi, MP' (2005) <<http://www.ifp.org.za/Speeches/030605sp.htm>> (accessed 15 September 2005).

<sup>27</sup> TAC Newsletter 'TAC Statement on Legal Action Against the Minister of Health on Mother-to-Child Transmission Prevention of HIV/AIDS (MTCTP)' <[http://www.tac.org.za/newsletter/news\\_2001.htm](http://www.tac.org.za/newsletter/news_2001.htm)> (accessed 23 September 2005).

<sup>28</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) (*Soobramoney case*).

<sup>29</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom case*).

## 2.2 The facts

The SA government in 2001, devised a programme to deal with MTCT using Nevirapine, as a response to such crisis.<sup>30</sup> The programme restricted the availability of Nevirapine to two sites in each province, which only served about 10 percent of the population. This was despite the fact that Nevirapine manufacturers offered to make Nevirapine available free to the government, for a five-year period.<sup>31</sup>

Pilot sites were linked to satellite clinics, which provided a full package for the treatment of MTCT.<sup>32</sup> The result was that, while doctors in the private profession were not prohibited from prescribing Nevirapine to their patients, doctors in the public profession were absolutely prohibited. This meant that pregnant mothers who did not have access to satellite clinics, and who could not afford private health care, were left to die because they could not have access to ARVs.

When *TAC* challenged government to provide legally valid reasons as to why Nevirapine could not be made available to patients in the public health sector, the Minister of Health listed a number of social, economic and public health implications of breastfeeding by HIV-positive mothers, and cultural and financial impact of formula-feeding as a substitute. In addition, the Minister of Health outlined the complexity of providing a comprehensive package of care throughout SA.<sup>33</sup> As a result, *TAC* brought an action before the High Court against the SA government, when it became clear that their initial demands for a comprehensive MTCT prevention programme had received a sympathetic ear from government.

The basis of the action was that the government had, amongst others, violated the right to health, on the premise that its measures to provide access to health care services were deficient.<sup>34</sup> The programme that prohibited the administration of Nevirapine at public hospitals and clinics outside

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<sup>30</sup> *TAC* case (n 11 above) para 4. See M Heywood 'Current Developments Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health (2003) 19 *SAJHR* 281.

<sup>31</sup> *TAC* case (n 11 above) para 19.

<sup>32</sup> A full package included testing, counselling, Nevirapine if medically indicated, formula feed substituting for breast-feeding and after care monitoring the progress of the child. See *TAC* case no 11 above para 92.

<sup>33</sup> *TAC* case (n 11 above) para 14.

<sup>34</sup> *TAC* case (n 11 above) para 44.

the research and training sites could not be said to be reasonable as a measure to give effect to the right to health care services in the Constitution.

TAC sought an order compelling government to devise an effective MTCT national programme, including the provision of Nevirapine, voluntary counselling and testing, or other appropriate medicine where appropriate, and formula milk for feeding. Additionally, the petition sought a declaratory order requiring government to provide Nevirapine to all pregnant women giving birth in public health facilities, where medically indicated. The Pretoria High Court ruled in favour of TAC and found that the government had acted unreasonably in refusing to make Nevirapine available in the public health sector. It ordered government to provide ARVs in public hospitals where medically indicated. Dissatisfied with the High Court ruling, the government appealed the judgment of the High Court to the Court.

### **2.3 The arguments**

The issue before the Court was the right to health and the right of children to be afforded special protection. The Court had to address two main issues. Firstly, whether government had fulfilled its duties to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to reproductive health care services, including the right to health. Secondly, whether the Court, in making a ruling on the reasonableness of the measures, was prescribing policy to the government.

It would be important to recall that Section 27 of the Constitution provides that:

- 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, including, if they are unable to support themselves and their dependants, appropriate social assistance.**
- 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.*

### **Section 28**

- 1. Every child has the right -*



c) to basic nutrition, shelter, basic health care services and social services.

The Constitution imposes on the state the fundamental obligation to respect, protect, promote and fulfil all rights enshrined in the Bill of Rights.<sup>35</sup> This fundamental obligation implies that socio-economic rights in the Bill of Rights impose negative and positive duties on the state. In terms of section 27, a positive obligation imposed on the State by the right to health is two-fold.<sup>36</sup> Firstly, it requires the State to adopt a legal framework to facilitate, protect and promote access to the right to health. Secondly, it necessitates the implementation of programmes to ensure that beneficiaries entitled to the right to health gain access to it.

A negative obligation in section 27 (1) requires the government and all other entities to desist from unreasonable and unjustifiable impairing the right to health.<sup>37</sup> Consequently, any government action that obstructs access to the right to health is a violation of a constitutional right. In this regard, it is therefore apparent that the state is under a constitutional duty to take reasonable positive measures, progressively to give effect to the right to health. However, positive state action to progressively fulfil its constitutional obligations depends entirely on the availability of resources.

The Court stated that socio-economic rights and the state's constitutional obligations cannot be measured in the abstract, but in their social and historical context of SA.<sup>38</sup> Arguments raised by government were rejected. The only question that the Court sought to address was whether or not the policy of confining Nevirapine to research and training sites was reasonable. The Court adopted the view that socio-economic rights impose positive and negative obligations, namely the obligation to take reasonable legislative and other measures within its available resources, and the obligation to progressively realize the right to health.<sup>39</sup> Section 27(2) "establishes and delimits the scope of the positive obligation imposed upon the state", since the right to health can only be realized within the state's available resources.<sup>40</sup> Thus, it is patent that citizens should not expect more than what is achievable within the state's available resources.<sup>41</sup>

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<sup>35</sup> Sec 7(2) of the Constitution.

<sup>36</sup> n 12 above.

<sup>37</sup> *Ex parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) (hereafter "the *First Certification case*") para 20; *Grootboom case* (n 29 above) para 34; *TAC case* (n 11 above) para 46.

<sup>38</sup> *TAC case* (n 11 above) para 24.

<sup>39</sup> *TAC case* (n 11 above) para 30.

<sup>40</sup> *TAC case* (n 11 above) para 32.

<sup>41</sup> As above.

The Court rejected the concept of minimum core obligation, and interpreted section 27 as not “entitling everyone to demand that a minimum core be provided to them immediately”.<sup>42</sup> However, the state is expected to provide access to the right to health progressively, as guaranteed by the Constitution.<sup>43</sup> The Court concluded that the right to health is not a “self-standing and independent positive right enforceable irrespective of the lack of resources.”<sup>44</sup> However, “the right to health must be read together as defining the scope of the positive right that everyone has”.<sup>45</sup>

TAC submitted evidence to establish that government’s measures were not reasonable, and that government ought to have had a comprehensive national programme to prevent MTCT, including voluntary counselling and testing, antiretroviral therapy and the option of substitute feeding.<sup>46</sup> The government argued that its measures were reasonable and raised four reasons justifying the administration of Nevirapine to research and training sites. Firstly, concerns were raised about the lack of evidence regarding the efficacy of Nevirapine in the absence of the comprehensive package, since benefits of Nevirapine would be counteracted by MTCT through breastfeeding.<sup>47</sup> Establishing an effective system that would provide formula milk, multi-vitamin supplements and antibiotics were considered by government to be very important.

The government also raised lack of budgetary constraints affecting the expansion of facilities in all state hospitals, and cultural objection to bottle-feeding, and lack of clean water in rural areas which would render the provision of Nevirapine useless.<sup>48</sup> The cost of the drug was not a factor in deciding on the policy of confining Nevirapine to the research and training sites, but other costs which the state could incur to provide operational structures properly geared towards the full comprehensive package.<sup>49</sup> Secondly, there were fears that the administration of Nevirapine would later produce a drug-resistant form of HIV to the efficacy of Nevirapine.<sup>50</sup> Thirdly, concern about the safety of Nevirapine which had not been adequately demonstrated were raised, and fourthly,

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<sup>42</sup> TAC case (n 11 above) para 34.

<sup>43</sup> TAC case (n 11 above) paras 34-35.

<sup>44</sup> TAC case (n 11 above) para 39.

<sup>45</sup> As above.

<sup>46</sup> TAC case (n 11 above) para 45.

<sup>47</sup> TAC case (n 11 above) para 51.

<sup>48</sup> TAC case (n 11 above) paras. 51–54.

<sup>49</sup> TAC case (n 11 above) para 48.

<sup>50</sup> TAC case (n 11 above) para 52.

was the question of capacity to provide the full package of services.<sup>51</sup> All these issues were claimed to preclude a comprehensive scheme from being implemented.

In addition, the government warned that courts are constrained by the principle of separation of powers from ordering a specific government relief order in socio-economic rights cases sought by TAC which was essentially dictating policy for the executive.<sup>52</sup> The argument is based on the premise that courts are not institutionally equipped to adjudicate upon socio-economic issues because they have limited expertise in policy making. The Court rejected government's argument and reaffirmed that the "Constitution contemplates a restrained and focused role for the courts to require the state to take measures to meet its constitutional obligations, and to subject the reasonableness of these measures to evaluation".<sup>53</sup> The evaluation of such measures may have budgetary implications even if they are not directed in rearranging budgets. Thus, the Court held that, respecting the terrain of other branches of government does not mean that courts cannot and should not make orders that have an impact on policy if they find that the government has breached a socio-economic obligation.<sup>54</sup>

On the question of efficacy of Nevirapine, the Court noted that the provision of Nevirapine will save the lives of a considerable number of infants, even if it is administered without the full package and support services. The Court further noted that the possibility of resistant strains of HIV to Nevirapine at a later stage could not be compared with the potential benefit of providing a single tablet of Nevirapine.<sup>55</sup> The nature of suffering is so grave that the risk of resistance is worth risking. The concerns on the safety of Nevirapine were also rejected by the Court on the premise that there was no evidence suggesting that a dose of Nevirapine was harmful to both mother and child.<sup>56</sup> Its registration by the Medicines Control Council and the decision by government to administer it in pilot sites affirmed its quality, safety and efficacy.<sup>57</sup> The Court held that it is unthinkable that government would gamble with the lives or health of thousands of mothers and infants.<sup>58</sup> The capacity of the government was held to be irrelevant by the Court, to the question whether

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<sup>51</sup> TAC case (n 11 above) paras 53-54.

<sup>52</sup> TAC case (n 11 above) para 97.

<sup>53</sup> TAC case (n 11 above) para 38.

<sup>54</sup> TAC case (n 11 above) para 98. See M Pieterse 'Coming to Terms with Judicial Enforcement of Socio-economic Rights' (2004) 20 *SAJHR* 384.

<sup>55</sup> TAC case (n 11 above) para 59.

<sup>56</sup> TAC case (n 11 above) para 60.

<sup>57</sup> TAC case (n 11 above) paras. 61-62.

<sup>58</sup> TAC case (n 11 above) para 62.

Nevirapine should be used to reduce MTCT at public hospitals and clinics.<sup>59</sup> The Court mainly focused on the reasonableness of the measures to determine whether it was in compliance with government's constitutional duties.<sup>60</sup> The Court expressed that:

*'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.'*<sup>61</sup>

The MTCT prevention programme, amongst other things, failed to address the needs of mothers and their newborn infants who had no access to pilot sites. The government raised concerns that lack of funds and infrastructure, which were needed to implement the full package, necessitated withholding Nevirapine from mothers and children who did not have access to research and training sites.<sup>62</sup>

Furthermore, the Court pointed out that the right to health had to be read with the right of children to family care or parental care and the right to basic health care services.<sup>63</sup> While the primary duty to provide basic health care services rests on those parents who can afford to pay for such services, government's policy had to address the needs of those children whose parents could not afford to do so.<sup>64</sup> It held further that the inability of mothers and children who are dependant upon the state to have access to a single dose of Nevirapine, as a result of a rigid and inflexible policy, affects their ability to enjoy other rights to which they are entitled.<sup>65</sup>

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<sup>59</sup> TAC case (n 11 above) para 66.

<sup>60</sup> Grootboom case (n 29 above) paras 53-54.

<sup>61</sup> TAC case (n 11 above) para 68. Grootboom case (n 29 above) para 44.

<sup>62</sup> n 61 above.

<sup>63</sup> Sec 28(1)(b) and (c) of the Constitution.

<sup>64</sup> TAC case (n 11 above) para 77.

<sup>65</sup> TAC case (n 11 above) para 78.

The Court came to a conclusion that measures adopted by government were unreasonable, and fell short of government's constitutional obligations. The policy failed to distinguish between the evaluation of programmes for reducing MTCT and the need to provide access to health care services required by those who do not have access to the sites.<sup>66</sup> In this regard, the policy was unreasonable because it was not balanced and flexible and it excluded a significant segment of society.<sup>67</sup> The state had not provided any cogent and reasonable explanation for their inflexible and unbalanced policy.

The question whether the state had a comprehensive plan to combat MTCT, was held by the Court to be intertwined with the refusal to permit prescription of Nevirapine at public hospitals and clinics outside the research sites.<sup>68</sup> After evaluating the relevant evidence, the Court held that measures taken by government, in respect of the MTCT prevention programme were unreasonable.

#### **2.4 The judgement**

The Court was explicit in declaring that "sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and coordinated program to realize progressively the rights of pregnant women and their newborn children to have access to health services to combat MTCT".<sup>69</sup> Failure by the branches of government to justify the failure of a chosen policy to respect, protect, promote and fulfil a right must lead to a finding of unconstitutionality. The Court stated :

*'The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics that have testing and counselling facilities should be able to prescribe Nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of Nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to*

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<sup>66</sup> TAC case (n 11 above) para 67.

<sup>67</sup> n 61 above.

<sup>68</sup> TAC case (n 11 above) para 82.

<sup>69</sup> TAC case (n 11 above) para 135.

*hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV”.*<sup>70</sup>

The Court ordered the government to remove restrictions that prevent Nevirapine from being made available in public health facilities; permit and facilitate the use of Nevirapine for the purposes of reducing MTCT.<sup>71</sup> This should be done in cases where it is medically indicated, in the opinion of the attending medical practitioner. Furthermore, the Court ordered that provision, if necessary for counsellors based at public hospitals and clinics, other than the pilot sites, to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of MTCT. Finally, the government was also ordered to plan an effective and comprehensive national programme to prevent MTCT.<sup>72</sup> The Court stressed that these orders did not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods became available.<sup>73</sup>

## **2.5 Basis of the *ratio decidendi* of the TAC case**

The Court, in the *TAC* case, based its reasoning on *Soobramoney* and *Grootboom* as its earlier decisions relating to socio-economic rights.<sup>74</sup> These two cases shall be examined to show their thrust as they have a direct relation and impact on the *TAC* case. The *Soobramoney* case was the first socio-economic rights matter brought before the Court under section 27(3), challenging government policy which denied a terminally-ill diabetic patient access to dialysis treatment in a public hospital. The hospital, due to high demands on its limited dialysis machines, was constrained to adopt a policy which stipulated guidelines qualifying patients whose life would be extended through the use of the machines and giving less priority to terminally-ill patients.

*Soobramoney* argued that the government policy violated his constitutional rights to life and not to be refused emergency medical treatment.<sup>75</sup> The Court, after reviewing government policy held that it would be reluctant to interfere with matters adopted in good faith by political organs concerning

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<sup>70</sup> *TAC* case (n 11 above) para 95.

<sup>71</sup> n 69 above.

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> *Grootboom* case (n 29 above) and *Soobramoney* (n 28 above).

<sup>75</sup> Secs 11 and 27(3) of the Constitution.

budgetary priorities.<sup>76</sup> *Soobramoney's* claim could not be construed as emergency medical treatment, thus section 27(3) was declared inapplicable in the case. The Court further held that, even though section 27(1) was applicable, its application was limited by the limitation clause in terms of section 36 of the Constitution.<sup>77</sup> The Court stated such relief were to be granted, everyone would claim expensive medical treatments from the government purse which has limited resources, thus prejudice the other needs which the state has to meet.<sup>78</sup> It was held that the whole system would collapse, if dialyses treatment were to be offered at government expense, with the purpose of prolonging an individual life.<sup>79</sup>

The *Grootboom* case, however, was premised on the right of access to adequate housing and the right of every child to shelter.<sup>80</sup> *Grootboom* challenged government's policy for failure to meet its constitutional obligation to which the Bill of Rights entitled them. The case was brought by a group of illegal squatters who had applied unsuccessfully for permanent post-apartheid housing in their local municipality. They approached the Court for temporary housing after governmental authorities forcibly evicted squatters from the privately owned land which they had encroached as a result of failure to secure proper housing after seven years in a municipal waiting list. The Court, in determining whether the government policy in *Soobramoney* case was justified, relied on whether the policy was adopted in good faith.<sup>81</sup> This approach was rejected in the *Grootboom* case by setting a standard of reasonableness which requires the government to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.<sup>82</sup>

The Court inquired at length into the reasonableness of government's housing policy, and concluded that, even though the housing policy was a step in the right direction, it fell short of the state obligation to provide relief to people in desperate need. The principle of reasonableness as adopted in the *Grootboom* case was also applied in the *TAC* case. In the context of this work, the approach adopted by the Court is highly relevant to the interpretation of other socio-economic rights in the Bill of Rights and its reasoning in the *Grootboom* case formed the basis of the *ratio decidendi* of the *TAC* case. The Court, in both the *Grootboom* case and the *TAC* case,

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<sup>76</sup> *Soobramoney* case (n 28 above) para 29.

<sup>77</sup> *Soobramoney* case (n 28 above) para 11.

<sup>78</sup> *Soobramoney* case (n 28 above) para 12.

<sup>79</sup> *Soobramoney* case (n 28 above) para 26.

<sup>80</sup> *Grootboom* case (n 29 above). See secs 26 and 28(1)(c) of the Constitution.

<sup>81</sup> *Soobramoney* case (n 28 above) paras 29-30.

<sup>82</sup> *Grootboom* case (n 29 above) paras 24 and 33.

commenced by stating that socio-economic rights cannot be interpreted in a vacuum, but need to be interpreted in a relevant context. Yacoob J expressed as follows:

*'Millions of people are living in deplorable conditions and in great poverty with high level of unemployment, inadequate social security and no access to clean water and adequate health services; and such conditions existed when the constitution was adopted'.<sup>83</sup>*

Given the social, economic and historical background of SA, it is not surprising that the parameters of what constitutes "reasonable measures" was defined to address vast socio-economic imbalances. The need for government to adopt and implement reasonable policies was stressed, to give special attention to the needs of the poor and vulnerable. The Court's point of view on socio-economic rights reaffirms the state's obligation to address inequality, poverty and historical socio-economic policies. The Court stated that its constitutional mandate is to enquire into the reasonableness of the measures and to subject them into evaluation.<sup>84</sup> It referred to key principles, in giving effect to the right to health, which were adopted in the *Grootboom* case. It enquired into the coherence, flexibility, inclusiveness, feasibility and transparency of government policy by setting out the extent to which the state's health policy fell short of the requirements of reasonableness, and stressing the state's obligation to act positively to address issues concerned with the basic needs of people.<sup>85</sup>

According to the reasoning of the Court, in both the *Grootboom* case and *TAC* case, the standard of reasonableness does not require the Court to make an enquiry as to whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The state has a wide range of possible measures to meet its constitutional obligations.<sup>86</sup> A key feature into the enquiry of the reasonableness of the policy, is the emphasis made by the Court by stating that "an otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."<sup>87</sup> The same standard of reasonableness in the *TAC* case has led to the conclusion that government policies will be evaluated by courts when they are challenged for being unreasonable and unconstitutional.

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<sup>83</sup> *TAC* case (n 11 above) para 35.

<sup>84</sup> n 53 above.

<sup>85</sup> *Grootboom* case (n 29 above) paras 39-44. N 54 above, 410.

<sup>86</sup> *Grootboom* case (n 29 above) para 41.

<sup>87</sup> *Grootboom* case (n 29 above) para 42.



The Court did not address the question of how the availability of resources would be assessed. Nevertheless, the judgment makes it clear that different spheres of government must make reasonable budgetary provision to give effect to the obligations imposed by socio-economic rights. The Court went further to link the right to equality with socio-economic rights. It reaffirmed that all the rights enshrined in the Bill of Rights are inter-related and mutually supporting. Yacoob J noted as follows:

*'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 of the Bill of Rights. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential'*<sup>88</sup>

Therefore, the right to health is entrenched because of the value of human beings. The Court's approach seeks to entrench the perception that socio-economic rights are rooted in the respect for human dignity, freedom and equality. It makes it clear that any policy which has the effect of limiting people's access to constitutionally guaranteed rights violates the right to human dignity, freedom and equality. This reasoning leads to the conclusion that government's MTCT policy, in limiting the administration of Nevirapine in public hospitals, indirectly, violated the right of women and children to human dignity, freedom and equality.

The Court has stressed that government policies should be flexible, dealing with short, medium and long term needs. As far as the right to health is concerned, the policy should adopt a regulatory framework that anticipates short, medium and long term health needs to pass the constitutional test of reasonableness.<sup>89</sup> HIV/AIDS as a threat to human existence in SA requires the government to prioritise and give special attention to people in desperate situations. The programme must not only be reasonable in theory, but practically, it must be implemented reasonably.

In the *TAC* case, the Court required that MTCT prevention policy should have time-frames to ensure that women whose needs are the most urgent are not ignored by the measures aimed at achieving realisation of the right.<sup>90</sup> It went further to stress that, government policy must take account of differences in the positions of those who can afford to pay for medical services and

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<sup>88</sup> *Grootboom* case (n 29 above) para 23.

<sup>89</sup> n 61 above.

<sup>90</sup> *TAC* case (n 11 above) para 44, *Grootboom* case (n 29 above) para 43.

those who cannot, because it is the poor that will suffer when the government limits the supply of Nevirapine.

It is worth noting that if the *Grootboom*, and subsequently the *TAC* case had applied the same yardstick applied in *Soobramoney*, government policy would be declared in compliance with government's constitutional obligations to progressively realize socio-economic rights. The *ratio decidendi* of *TAC* case is that the Court affirms that the inclusion of justiciable socio-economic rights in the Constitution were aimed at improving the historical *status quo* of poor people to ensure that government addresses their needs in a manner that is consistent with its constitutional obligations.

## **2.6 Implications of the decision for South Africa**

The *TAC* case has been regarded as the landmark case affirming the justiciability of socio-economic rights, and giving hope to millions of impoverished PLWHA in SA. It serves to emphasize the impact of HIV/AIDS in SA and the lack of commitment from government to provide treatment to PLWHA. The *TAC* case contributes to the existing jurisprudence on socio-economic rights, particularly the right to health. While it sought to enforce government obligations in the context of the right to health, it has possible applicability to a large number of violations of socio-economic rights. As such, it is a useful tool for activists and advocates in respect of the right to health.

The government, as noted above, has a fundamental obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. The *TAC* case demonstrates that the government should adhere to these fundamental obligations during planning and implementation process to ensure that its social policies and programmes are reasonable. The *TAC* case has great implications, given the high scale of HIV/AIDS and the growing number of AIDS orphans in SA. The government could use it as a directive to ensure that its policies and programmes cater to people who are in desperate situations. It is particularly remarkable that the government began to administer Nevirapine, even before the judgment on the *TAC* case was handed down. The lifting of the ban on providing Nevirapine beyond the designated pilot sites led to the implementation of a current MTCT prevention plan. Further delays by government to implement the MTCT prevention programme would have resulted in negligently loss of infants' lives, and could have led to further constitutional suits.

The significant aspect of the decision, is its implications on the theory of separation of powers between government branches, since SA courts are empowered to interfere, within the bounds of such a theory, to make a finding on the constitutionality of government policies. The Court does not follow a traditional interpretation of the theory of separation of powers, where it is clear that the

government has violated its constitutional obligations, since socio-economic rights give people the possibility of receiving help from government.<sup>91</sup> The government is bound by the Constitution. Thus, where government policies are declared unconstitutional by courts, they should be adjusted to comply with the requirements of the Court.

The *TAC* case has the potential to impact on HIV/AIDS policy at all levels of government, since the reasonableness of government policy requires each level of government to accept responsibility for its implementation.<sup>92</sup> Reasonable and effective implementation can only be guaranteed if the national government plays a monitoring role in the execution and continuous evaluation of the HIV/AIDS prevention programme. This is based on the premise that the Court stressed that the assessment of reasonableness focuses on both the design and the implementation of government's policy. Therefore, national government bears the final responsibility to ensure that provinces meet all that is constitutionally required of them.

It is not without irony that the *TAC* case was a success after all the strategies that were deployed. The case is an important result of activist pressure. Without this case the government would never have changed its policies. Therefore, this decision stands for the proposition that measures or policies taken by government are not immune from being questioned when they are in breach of their constitutional obligations. Despite the fact that the *TAC* case pertains to the right to health, the same principles could be used in similar challenges seeking protection of socio-economic rights.

## 2.7 Conclusion

The *TAC* case is, indeed, an important step in the right direction, and a model for Africa. It affirms the justiciability of socio-economic rights, the obligations of government to take reasonable measures towards the realisation of socio-economic rights and the power of the courts to enforce these rights. The Court's approach in socio-economic rights cases establishes the view that the Bill of Rights should be seen as an instrument designed to protect the poor and disadvantaged segment of society, despite the fact that it was reluctant in *Soobramoney* to define constitutional obligations of government towards realising socio-economic right, which the Court later did.

It is patent that all three spheres of government bear certain obligations in realizing the right to health in general and with complying with the Court's framework as set out in *TAC* case. In the absence of effective measures being implemented, government measures are susceptible for being unconstitutional and unreasonable. The judicial activism with respect to enforcement of

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<sup>91</sup> N J Udombana 'Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies' (2005) 5 *AHRL* 50.

<sup>92</sup> *Grootboom* case (n 29 above) para 40.

socio-economic rights has shown that the time has come to move beyond the rigid interpretation of the doctrine of separation of powers. This position has absolutely transformed the role of the judiciary in SA, thus the judiciary has contributed meaningfully to the social transformation of SA society.

## CHAPTER 3: THE TAC CASE AND THE RIGHT TO HEALTH

*“We can win. We can stop the spread of AIDS. We can prevent new infections. We can better treat those who suffer. In time, we can hope to find a cure. I propose to confidently hold up the prospect of a world free of AIDS.”* James Wolfensohn, World Bank President (2001).

### 3.1 Introduction

Health is a fundamental human right, indispensable for the exercise of other human rights, including an adequate standard of living.<sup>93</sup> Lack of access to HIV/AIDS treatment impedes the enjoyment of the right to health. There is a consensus on the need to provide free or cheap and affordable HIV/AIDS treatment, twenty years into the HIV/AIDS epidemic shows that the vast majority of people living with HIV/AIDS still lack access to cheap and affordable HIV/AIDS treatment to prolong their lives.

This chapter examines the right to health as a justiciable right. The analysis focuses on the text of regional and international human rights instruments, specifically, the ACHPR<sup>94</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>95</sup> in order to understand the scope, minimum core obligation, and progressive realisation of the right to health. The analysis provides a platform for evaluating the theory of separation of powers, as to how it was considered by the Court in order to enforce the right to health.

### 3.2 General considerations of the right to health

#### 3.2.1 Scope of the right to health

The right to health is enumerated in numerous regional and international human rights instruments and declarations as a fundamental human right. Foremost in this regard are, the United Nations Universal Declaration of Human Rights (UDHR),<sup>96</sup> the International Covenant on Civil and Political

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<sup>93</sup> General Comment 14: The right to the highest attainable standard of health (2000) CESCR, E/C.12/2000/4, para 1.

<sup>94</sup> n 16 above.

<sup>95</sup> ICESCR, *entered into force* 3 Jan 1976, 933 UNTS 3.

<sup>96</sup> UDHR, UNGA Resolution 217 (III) of 10 December 1948.

Rights (ICCPR),<sup>97</sup> the Convention on the Rights of the Child (CRC),<sup>98</sup> the Convention on the Elimination of Discrimination against Women (CEDAW),<sup>99</sup> ICESCR,<sup>100</sup> and the ACHPR.<sup>101</sup>

The most important regional treaty protecting the right to health, for SA and Cameroon, is the ACHPR mandates States Parties are to take necessary measures to ensure the best attainable state of physical and mental health, which encompasses the supply of adequate medicine by government to protect the health of its people.<sup>102</sup> It is important to recall that there is no general clause in the ACHPR limiting the enforcement of socio-economic rights to progressive realisation within available resources. Moreover, the Preamble of the ACHPR recognises the indivisibility and interrelatedness of both civil and political rights and socio-economic rights.<sup>103</sup> Thus, States Parties are bound to respect, protect, and fulfil both categories of rights, without distinction. The African Commission jurisprudence provides testimony to this interconnectedness.<sup>104</sup>

ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and mandates States Parties to take measures, for the full realisation of, amongst others, the prevention, treatment and control of the epidemic, endemic, occupational and other diseases.<sup>105</sup> The right of everyone to the enjoyment of the highest attainable standard of physical and mental health includes the provision of clean water, adequate sanitation safe food.<sup>106</sup> States Parties are required to realise the right to health "by all appropriate means" within their domestic legal system. "Appropriate means of redress must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in

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<sup>97</sup> ICCPR, *entered into force* 23 March 1976, 99 UNTS 171.

<sup>98</sup> CRC, *entered into force* 2 September 1990, 28 ILM 1456.

<sup>99</sup> CEDAW, *entered into force* 3 September 1981, 1249 UNTS 13.

<sup>100</sup> n 95above.

<sup>101</sup> n 16 above.

<sup>102</sup> Art 16(2) of ACHPR. See C Heyns (ed) *Human Rights Law in Africa* (2004) 409.

<sup>103</sup> n 16 above, the Preamble of ACHPR.

<sup>104</sup> *Free Legal Assistance Group, Lawyers Committee for Human Rights, Union Interfricaine des Droits de l'homme, Les Témoins de Jehovah v Zaire, African, Commission on Human and Peoples' Rights, Communications 25/89, 47/90, 56/91 and 100/93 (joined), Ninth Annual Activity Report of the ACHPR 1995/96.*

<sup>105</sup> n 95 above, art 12.

<sup>106</sup> n 95 above, art 2.

place”.<sup>107</sup>

The Committee on Economic, Social and Cultural Rights (CESR), has interpreted provisions under ICESCR to impose obligations on States Parties.<sup>108</sup> Extensive interpretation of the right to health means that, governments have both a negative obligation to respect the right to health, by refraining from impairing the enjoyment of the right to health, but also a positive obligation to protect and fulfil the right to health.<sup>109</sup> The realisation of the right to health imposes two positive obligations. It requires a state to give effect to the right to health, and that obligation is delimited by a requirement, that the right must be realised progressively through reasonable legislative and other measures, within the state’s available resources.<sup>110</sup>

It is clear that the right to health is not an absolute right, but it is limited by the requirement that its realisation is dependent upon the availability of resources. However, governments do not have any basis to deny their citizens those rights which are guaranteed and protected by an international convention, and which represent the minimum on which the States Parties agreed to guarantee fundamental human freedoms.<sup>111</sup> Human rights are premised on the belief human beings are entitled to a basic standard of dignity. Thus, the Court linked the right to health with dignity, by affirming that it includes basic decencies consistent with human dignity since the right to health is crucial to the realisation of many other fundamental human rights and freedoms.<sup>112</sup> Governments have to manage their limited resources, in order to ensure that their citizens have access to primary health care services and facilities.

It is instructive to note that the right to health encompasses immediate obligation for governments to provide either free or affordable essential medicines to their citizens.<sup>113</sup> Minimum core obligations require governments to ensure the satisfaction of the minimum essential levels of primary health care, essential drugs, equitable distribution of health facilities and services of basic

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<sup>107</sup> General Comment 9: *The domestic application of the Covenant*. (1998) CESCR, E/C.12/1998/24, para 2.

<sup>108</sup> CESR is the supervisory body which has powers to monitor the implementation of the ICESCR by States Parties. CESR has develop international standards, guides to monitoring and evaluation of human rights.

<sup>109</sup> n 93 above.

<sup>110</sup> n 106 above.

<sup>111</sup> *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR2000).

<sup>112</sup> TAC case (n 11 above) paras 66 and 28.

<sup>113</sup> n 93 above, para 43 (a-e).

shelter.<sup>114</sup> In this regard, States Parties have an obligation to develop a policy that will ensure that significant proportion of the population has access to medication in the context of pandemics such as HIV/AIDS.

### 3.2.2 Minimum core obligation on the right to health

Minimum core obligation is defined as the essence of a right to ensure the satisfaction of, at the least, the minimum levels of the right to health.<sup>115</sup> It is an element without which a right loses its substantive significance as a human right.<sup>116</sup> Failure of a State Party to provide, amongst others, access to essential primary health care to a significant number of individuals, is *prima-facie* failure of the state to discharge its obligations.<sup>117</sup>

CESR has stated that the right to health contains four important elements, namely availability, accessibility, acceptability, and quality. This means that States Parties, particularly SA and Cameroon, have to ensure the “availability of health care facilities, goods and services in sufficient quantity within their jurisdiction”.<sup>118</sup> These resources must be of appropriate quality, acceptable and accessible to everyone.<sup>119</sup> The implementation of HIV/AIDS prevention programmes in Cameroon and SA must ensure that they meet these obligations to combat the HIV/AIDS pandemic.

A minimum core obligation requires a state to take necessary steps to the maximum extent of its available resources and not to go beyond what is available at its disposal to realise the right to health immediately.<sup>120</sup> The state can only attribute the failure to provide a minimum core obligation on lack of resources if it has demonstrated that all its resources have been exhausted towards the realisation of the right to health. The concept of “minimum core” obligation was rejected by the Court as being difficult to define. However, it noted that the right to health includes at least the

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<sup>114</sup> As above.

<sup>115</sup> The minimum core obligation is a standard developed by the United Nations Committee on Economic, Social and Cultural Rights to determine whether the state has discharged its obligations under the Covenant. n above, para 28. General Comment 3, para 10.

<sup>116</sup> Brand D. and Russell S. *Exploring the core content of Socio-economic Rights: South African and International Perspectives* (2002) page 20

<sup>117</sup> General Comment 3: The nature of States Parties Obligations (1990) CESCR, reprinted in Compilation of General Comments, 1994 UN Doc HRI/GEN/1/Rev 1 45, para 10.

<sup>118</sup> n 93, para 12.

<sup>119</sup> As above.

<sup>120</sup> n 117 above.



minimum decencies of life, consistent with human dignity, and as such, no one should be condemned to a life below the basic level of dignified human existence.<sup>121</sup>

The concept of minimum core obligation, according to the Maastricht Guidelines, has been refined to comprise an obligation of conduct which requires state action to realise a particular right, and obligations of results which requires the adoption and implementation of a plan of action to reduce, for example, the HIV/AIDS pandemic.<sup>122</sup> The obligation remains for a state party, to ensure the widest possible enjoyment of the relevant rights even where the available resources are demonstrably inadequate.<sup>123</sup> As such, it must demonstrate that it has made every effort to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum core obligations.<sup>124</sup> The state should still strive to ensure the widest possible enjoyment of the right under the prevailing resource constraints. This means that governments cannot hide behind the curtain of lack of resources for failure to realise these rights, since scarcity of resources does not relieve governments from meeting certain minimum obligations.<sup>125</sup> Minimum core obligation applies to States Parties irrespective of the scarcity of resources.

It is assumed that States Parties to ICESCR have access to resources that are required to meet their minimum core obligations. Therefore, it is their duty to prioritise and to ensure that allocated resources are designed to realise the right to health. Thus, the SA and Cameroonian government should consider their international obligations in their budgeting process, and should classify their spending patterns on socio-economic rights. Progressive realisation of health care service delivery to the poor will be easy to monitor.

It has also been stressed that while the full realisation of the right to health may be achieved progressively, nevertheless, deliberate and concrete steps towards meeting obligations recognized in the ICESCR must be taken within a reasonably short time after its ratification.<sup>126</sup> While there is no formula to determine whether a government has taken adequate measures, within the constraints of available resources, to implement the right to health, but the measures should

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<sup>121</sup> TAC case (n 11 above) para 28.

<sup>122</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, guideline 4, reprinted in (1998) 20 *Human Rights Quarterly* 691.

<sup>123</sup> n 117 above, para 11.

<sup>124</sup> As above.

<sup>125</sup> UN Economic and Social Council 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Cultural and Social Rights' <[http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf)> (accessed 28 September 2005).

<sup>126</sup> n 117 above, para 11.

include, amongst others, taking appropriate legislative, administrative, budgetary, judicial and other measures.<sup>127</sup> Government budgets on health care services should be transparent to meet these standards.

### **3.2.3 Progressive realisation of the right to health**

The obligations of States Parties relating to the realisation of the right to health are limited by the concept of progressive realisation. As highlighted in preceding chapters, obligations imposed by the right to health are dependant upon the availability of resources to fulfil them. As such, corresponding rights may be limited by reason of the lack of resources. The question as to whether the government has discharged its minimum core obligation to primary health care depends largely on its available resources. Thus, generally, obligations imposed by the right to health can be measured in terms of whether the state has a policy to progressively realise its obligations within its available resources.

Progressive realisation entails that, in addition to legislative measures, administrative, judicial, economic, social and educational measures must be taken. The government of Cameroon has an obligation to adopt reasonable legislative and other measures, as expeditiously as possible, in order to give effect to the right to health. However, the imposition of the obligation to realise socio-economic rights progressively is often used as a scapegoat by governments to avoid realising socio-economic rights. As highlighted above, lack of resources and the obligation to realise the right to health progressively does not relieve governments from fulfilling their minimum core obligations.

The CESR General Comment No 3, stresses that the rights contained in ICESCR must be recognized in “appropriate ways within the domestic legal order, ensuring that appropriate means of redress are made available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.<sup>128</sup> States Parties cannot invoke their internal laws to justify their failure to fulfil their obligations under ICESCR. ICESCR requires States Parties to modify their domestic law in order to give effect to their treaty obligations.<sup>129</sup> State

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<sup>127</sup> n 116 above, 18.

<sup>128</sup> General Comment 9: The domestic application of the Covenant (1998) CESCR, reprinted in *Compilation of General Comments*, 2003 UN Doc HRI/GEN/1/Rev 6, paras 2.

<sup>129</sup> n 107 above, para 3.

Parties are required to give effect to the right to health in a manner that is consistent with the state's full discharge of the its obligations.<sup>130</sup>

“Progressive realisation of the right can be measured by putting in place a national public health strategy and a transparent plan of action which includes health indicators and benchmarks with timeframes to ensure that progress is closely monitored”.<sup>131</sup> The plan of action has to be periodically reviewed based on a participatory and transparent process.<sup>132</sup> In the *TAC* case, the Court held that a plan of action should take into account the poor segment of the society, which would lead to equal and universal access to HIV/AIDS treatment.<sup>133</sup>

### **3.3 The thrust of the interpretation of the theory of separation of powers in favour of the right to health**

In light of the above-discussed background on the right to health and its justiciability, it is important to discuss the thrust of the constitutional law theory of separation of powers at this juncture, to show how the Court fostered the realisation of the right to health in the *TAC* case. It seems paradoxical to say that the theory of separation of powers is the power by which the executive, legislative, and judicial arms of government are to be independent and not infringe upon each other's rights and duties. However, respect for the theory of separation of powers does not mean absolute separation, because on the strength and bounds of the theory itself, one arm of government can call the other to order when it violates its constitutional obligations. The calling of one arm of government to order by courts is neither an intervention nor giving instructions, since their primary constitutional duty, as in *SA*, is to the Constitution.

The theory of separation of powers, as tacitly incorporated in the Constitution, underlies the *SA* constitutional order to promote accountability, responsiveness, transparency, openness and a culture of justification.<sup>134</sup> It has for long time, raised some controversies over the judicial competence in socio-economic rights cases. The ideological legitimacy of socio-economic rights, the institutional legitimacy and competence of the courts to adjudicate on socio-economic rights has been extensively contested as a result of the inclusion of the justiciable Bill of Rights in the

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<sup>130</sup> n 107 above, para 4.

<sup>131</sup> n 93 above, para 43 (f).

<sup>132</sup> As above.

<sup>133</sup> n 90 above.

<sup>134</sup> *TAC* case (n 11 above) para 36.

Constitution.<sup>135</sup> The inclusion of socio-economic rights was seen as a threat to traditional theory of separation of powers on the basis that it would require the judiciary to depart from its judicial role.<sup>136</sup>

Concerns about the institutional legitimacy were based on the fact that socio-economic rights are positive in nature, and that they would require state action in order to be realized. These concerns led to arguments that socio-economic rights are incapable of judicial enforcement, unlike civil and political rights, since they would involve judicial adjudication on issues with budgetary implications, thereby altering the traditional theory of separation of powers.<sup>137</sup> Added to these are claims that courts lack economic expertise and a capacity to make the wide-ranging factual and political enquiries, and thus are incompetent to adjudicate on issues with budgetary impact.<sup>138</sup>

These arguments were rejected by the Court in the *First Certification* case, but were later raised by government in the *TAC* case in an attempt to avoid accountability for its policies.<sup>139</sup> The contention of the government was that, “courts are ill-suited to make orders that have the effect of requiring the executive to pursue a particular policy, on the basis that the making of policy is the prerogative of the executive and not the courts”.<sup>140</sup> The Court, however, held that no system of separation of powers is absolute, since “there are certain matters that are pre-eminently within the domain of one or other of the arms government, and not the others”.<sup>141</sup>

The Court noted in the *TAC* case that courts, “are not institutionally equipped to make enquiries that would determine what the minimum-core standards should be, nor for deciding how public revenues should most effectively be spent since there are many pressing demands on the public purse”.<sup>142</sup> However, the Court stressed that the restrained and focused role of the courts, is to require government to adopt measures necessary to meet its constitutional obligations.<sup>143</sup> Courts have powers to evaluate the reasonableness of measures taken by government, where they are

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<sup>135</sup> *First Certification* case (n37 above), paras 76-78.

<sup>136</sup> n 54 above, 384.

<sup>137</sup> As above.

<sup>138</sup> As above.

<sup>139</sup> *First Certification* case (n 37 above) para 77.

<sup>140</sup> n 52 above.

<sup>141</sup> *TAC* case (n 11 above) para 98.

<sup>142</sup> *TAC* case (n 11 above) para 37.

<sup>143</sup> n 53 above.

challenged for being unconstitutional. Thus where appropriate, the theory of separation of powers would not preclude the Court from making orders that have policy implications, and such a ruling does not result in a breach of the theory of the separation of powers.

The Constitution gives courts broad remedial powers. SA courts are only subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.<sup>144</sup> Where government policy is challenged for being unconstitutional, the Court has to evaluate it and then declare whether or not it is constitutional.<sup>145</sup> The constitutional mandate of the Court is to uphold the Constitution, and if that mandate constitutes an intrusion into the domain of the executive, it is an intrusion mandated by the Constitution itself.<sup>146</sup> It is mandated to declare invalid, any law or conduct that is inconsistent with the Constitution, to the extent of its inconsistency. In addition, SA courts may make any order that is just and equitable, including an order suspending a declaration of invalidity on any conditions to allow the competent authority to correct the defect.<sup>147</sup>

The Court held further that it is mandated by the Constitution to grant any appropriate remedy for the infringement of any right that is entrenched in the Constitution to ensure that rights and values underlying the Constitution are properly upheld.<sup>148</sup> Appropriate relief is determined by the nature of the right infringed and the nature of its infringement gives guidance to the Court as to the appropriateness of relief to be granted in a particular case.<sup>149</sup> Ackerman J expressed as follows:

*"I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate relief must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The*

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<sup>144</sup> Sec 165(2) of the Constitution.

<sup>145</sup> TAC case (n 11 above) para 101.

<sup>146</sup> TAC case (n 11 above) para 99.

<sup>147</sup> Sec 172 (1) (a) and (b) of the Constitution. See Sandra Liebenberg 'South Africa's Evolving Jurisprudence on Socio-economic Rights' (2002) Socio-economic Rights Project, CLC, UWC.

<sup>148</sup> Sec 38 of the Constitution. See TAC case (n 11 above) para 102.

<sup>149</sup> TAC case (n 11 above) para 106.

*courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.*<sup>150</sup>

The Court reminded the government that the constitutional limitation to its judicial powers to remedy non-compliance could only be limited by the appropriateness, justness and equity of its orders.<sup>151</sup> It reaffirmed that it was up to the courts to decide on the appropriateness of relief, and as such, its judicial powers could only be restricted by ensuring that its orders are not phrased in a manner that would render the flexibility of policy impossible for the executive to formulate and adapt policy when necessary. Therefore, declaratory relief sought by *TAC* could not be said to be a violation of the doctrine of separation of powers.<sup>152</sup> The Court is empowered to call the executive to order when it fails to meet its obligations diligently.

### **3.4 Conclusion**

The scale of the pandemic, particularly in SA and Cameroon, calls for governments to consider the HIV/AIDS pandemic a priority, which must be addressed in order to guarantee the future of their citizens. Governments as guarantors of the right to health should take appropriate steps to ensure that their citizens have access to health care services, including HIV/AIDS treatment. It is submitted that the right to health cannot be achieved overnight. Thus, governments should take effective measures to ensure progressive realisation of the right to health.

SA courts have played an important role in enforcing the right to health. The courts have proved to be a watchdog over government branches adherence to the theory of separation of powers and a primary protector and enforcer of citizen's rights, by ensuring accountability and responsiveness in the formulation and implementation of its policies on socio-economic rights.<sup>153</sup> The Court explicitly stressed that it has constitutional powers to decide who decides on institutional competence and compliance, affirming that the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>154</sup> The challenge facing all SA is how to make justiciability of these rights contribute to social deconstruction and reconstruction.<sup>155</sup>

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<sup>150</sup> *TAC* case (n 11 above) para 102. See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 69.

<sup>151</sup> n 54 above. See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 45.

<sup>152</sup> *TAC* case (n 11 above) paras. 104-106.

<sup>153</sup> n 54 above.

<sup>154</sup> n 53 above.

<sup>155</sup> n 54 above, 384.

## CHAPTER 4: THE IMPACT OF THE TAC CASE BEYOND SOUTH AFRICA

*“No one is above the law, and no one should be denied its protection... The rule of law starts at home. But in too many places it remains elusive. Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse, while the powerful manipulate laws to retain power and accumulate wealth....”*

Kofi Annan, United Nations Secretary-General

### 4.1 Introduction

HIV/AIDS prevalence rates in Cameroon constitute national emergency, even though its prevalence is not as high as in SA. The government of Cameroon considers the AIDS battle a national priority, which must be addressed in order to guarantee the future of the nation. The problem has reached staggering proportions, such that it affects the economy of the country. In 2002, the national HIV/AIDS prevalence rate was approximately 11.8 percent.<sup>156</sup> Despite government's efforts, the official number of PLWHA has grown to 920,000 of which 500 000 are women and 69 000 were children between 0-14 years.<sup>157</sup>

The aim of this chapter is to analyse the impact of the jurisprudence of the TAC case beyond SA generally, and Cameroon in particular. The specific discussion on Cameroon, reflects on the framing of the right to health in the Constitution, with an attempt to find answers to the question whether the Constitutional Council would impose on government the obligation to respect, protect, promote and fulfil the right to health under similar circumstances as the Constitutional Court in SA.

### 4.2 The right to health in the Constitution of Cameroon

Cameroon is a State Party to a range of international and regional human rights instruments such as the UDHR,<sup>158</sup> ICCPR,<sup>159</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),<sup>160</sup> CRC,<sup>161</sup>

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<sup>156</sup> National Aids Control Committee 'Public-Private Sector Partnership for HIV/AIDS Control' (2003) 3.

<sup>157</sup> National Aids Control Committee 'Cameroon's Response to HIV/AIDS Decentralised and Multi-sectorial Programme (2004) 8.

<sup>158</sup> n 96 above.

<sup>159</sup> ICCPR, ratified by Cameroon on 27 September 1984.

<sup>160</sup> ICERD, ratified by Cameroon on 24 July 71.

<sup>161</sup> CRC, ratified by Cameroon on 10 February 1993.

CEDAW,<sup>162</sup> ICESCR,<sup>163</sup> and ACHPR.<sup>164</sup>

Cameroon has signed, ratified and acceded to almost all of the international human rights instruments, which protect socio-economic rights generally, and the right to health in particular.<sup>165</sup> A number of these instruments do not specifically address the right to health but several provisions refer to the right to health. These instruments can be invoked to protect the rights of PLWHA. The Constitution provides in the Preamble that, its people are attached to the fundamental freedoms enshrined in the UDHR,<sup>166</sup> the Charter of the United Nations,<sup>167</sup> ACHPR,<sup>168</sup> and all duly ratified international conventions.<sup>169</sup>

Duly approved or ratified treaties and international agreements, following their publication, override national laws.<sup>170</sup> This means that Cameroon has indicated her desire to be bound by protecting the rights enshrined therein. However, domestic application and enforcement of rights enshrined in these regional and international human rights instruments in Cameroon is questionable. Firstly, the Cameroonian Constitution does not contain a Bill of Rights, fully incorporating socio-economic rights in general, and the right to health in particular. The Preamble makes mention of the right to health. However, the Supreme Court Report stated that any provision in the Preamble is not justiciable.<sup>171</sup>

It is submitted that for any citizen to claim any right, the right must be justiciable. A right is justiciable if it can be challenged for non-compliance in a court of law leading to possible measures

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<sup>162</sup> CEDAW, ratified by Cameroon on 27 September 1984.

<sup>163</sup> ICESCR, ratified by Cameroon on 27 Sep 84.

<sup>164</sup> n 16 above.

<sup>165</sup> Office of the United Nations High Commissioner for Human Rights 'Status of Principal International Human Rights Treaties' <<http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>> (accessed 29 September 2005).

<sup>166</sup> UNDHR, 96

<sup>167</sup> The Charter of the United Nations, *opened for signature* 26 June 1945, *entered into force* 24 October 1945, UN GA Resolution 2847 (XXVI) , (1971) (UN Charter).

<sup>168</sup> ACHPR, ratified by Cameroon on 20 June 1989.

<sup>169</sup> Para 5 of the Preamble of the Cameroonian Constitution.

<sup>170</sup> Art 45 of the Cameroonian Constitution. n 57 above.

<sup>171</sup> Rapport de la Cour Suprême du Cameroun (2000) <[http://www.accpuf.org/congres2/II-RAPPO/rapport\\_cmr.pdf](http://www.accpuf.org/congres2/II-RAPPO/rapport_cmr.pdf)> (accessed 30 September 2005).



of enforcement or the provision of remedies.<sup>172</sup> These may be embodied within a bill of rights governing the domestic protection of human rights or they may take the form of "directive principles" whose purpose is to guide governmental policymakers rather than give rise to enforceable individual rights.<sup>173</sup> However, in Cameroon this is not the case. Instead of creating a comprehensive document with all factors in one place, the Constitution is much less specific, despite its commitment to international law. Thus, if the jurisprudence of the *TAC* case were to be applied in the Cameroonian situation, there will be a need for a legal reform incorporating the right to health.

It is important to note that the preamble to a constitution normally does not include justiciable provisions. The legal status of the preamble is that it does not express legally binding commitments, but it is read together with the provisions guaranteed in the constitution with the aim of explaining its purport and object.<sup>174</sup> The preamble does not grant or restrict power to anyone, but it only provides context for the original version. Therefore, one may conclude that, in the context of the Cameroonian Constitution, public and individual liberties contained in the Preamble and acts of government cannot be challenged.<sup>175</sup>

Nevertheless, a preamble is not legally binding; it is worth mentioning that the judiciary in SA has, on several occasions, referred to the preamble to interpret constitutional provisions, with the purpose of giving effect to the rights therein. However, it has been submitted that the preamble can and should be used more positively to guide the interpretation of the constitution to clarify ambiguity.<sup>176</sup> This could be done in the Cameroonian situation with respect to the right to health.

Secondly, the government of Cameroon has not enacted any legislation to respect, protect, and fulfil the right to health, twenty-five years after it ratified ICESCR. It is also important to note that the Committee recognizes that legislative measures such as enacting laws to protect the right to health are, in many instances, highly desirable and in some cases indispensable.<sup>177</sup> Legislation on health remains an indispensable element in Cameroon, to protect children and women, particularly PLWHA.

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<sup>172</sup> A Circle of Rights 'Economic, Social and Cultural Rights Activism: A training resource' <<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>> (accessed 30 September 2005).

<sup>173</sup> As above.

<sup>174</sup> Constitution of Kenya Review Commission 'Constitutional Reform in Kenya: Basic Constitutional' <<http://www.kenyaconstitution.org/docs/07d010.htm>> (accessed 30 October 2005).

<sup>175</sup> n 171 above.

<sup>176</sup> n 174 above.

<sup>177</sup> n 123 above, para 3.

It could be argued that Cameroon's ratification of all human rights instruments, ICESCR and ACHPR in particular, impose on the government the obligation to respect, protect, and fulfil the right to health. In the absence of a sound legislative foundation for the necessary measures, women and children remain vulnerable. Therefore, it would not be possible in Cameroon to claim that the right to health has been violated because the government has not created legislative, administrative, and judicial enforcement frameworks to prevent or redress violations.

The concept of minimum core obligation, as discussed in Chapter 3, comprise obligation of conduct, which requires the implementation of a plan of action with specific targets.<sup>178</sup> Although the government in Cameroon has adopted and is currently implementing its policy on HIV/AIDS, including the MTCT prevention programme, however, it is failing to meet specific targets, which the government intends to achieve. The objectives of the National AIDS Control Plan, 2000-2005, are to reduce HIV infection and its impact on individuals, families and communities. Priority areas are prevention, treatment and care. However, Cameroon has not included all opportunistic infection drugs on the essential drug list, and district health centres do not have the necessary capacity to allow for decentralisation of ARV prescription and follow up services.<sup>179</sup>

The government has not adopted any legislative measure. Since May 2003, a Bill seeking to protect the rights of PLWHA, and improve health care service delivery was tabled in Parliament for discussion. As such, the rights of PLWHA in Cameroon are not protected, and they remain vulnerable to all kinds of violations. It is on this same basis that *TAC* challenged the SA government, on the premise that the latter had failed to implement a comprehensive programme for the prevention of MTCT. The existence of a good MTCT programme was not enough, the programme had to be reasonable, target specific and respond to the needs of those most desperate.

Thirdly, the Cameroonian Constitution neither provides provisions on legal standing nor remedies to its citizens to seek redress when their constitutional rights are violated.<sup>180</sup> It is instructive to note that the accessibility and efficacy of constitutional rights depends on having provisions relating to legal standing to enforce rights in the courts, as well as the power of the courts to grant speedy and effective remedies.<sup>181</sup> Legal standing is the first step in access to justice, which ensures the enforcement of the rule of law by citizens. In Cameroon, standing provisions are restrictive; citizens do not have equal access to justice, which has the effect of keeping members of civil

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<sup>178</sup> n 116 above.

<sup>179</sup> Cameroon's Response to the HIV/AIDS Pandemic (2004).

<sup>180</sup> Art 47(1) of the Cameroonian Constitution.

<sup>181</sup> n 147 above.

society out of court. “Where standing is available to all, democracy, the rule of law, and justice are more likely to be for all as well”.<sup>182</sup> The question as to, who has access to the Constitutional Council, is only guaranteed to six categories of public authorities, who may refer constitutional matters to the Constitutional Council.<sup>183</sup> In the context of remedies, the Cameroonian Constitution is completely silent.

Fourthly, article 48 of the Cameroonian Constitution, further provides that “any candidate, political party or any person acting as government agent at the election may lodge a case before the Constitutional Council in respect of the regularity of one of the elections”.<sup>184</sup> This provision is very restrictive because it leaves out a broad range of individuals and groups who should have been granted legal standing in order to enforce their rights. The Constitution is used as an instrument for exercise and control of political power, expanding executive powers and reducing the scope of individual liberties. Since 1996, when the current Constitution was adopted, there has been one incident by one-third of the members of the National Assembly (NA) who challenged the constitutionality of a law which was scheduled in the NA.<sup>185</sup> Those who suffer the most when rights are not protected, and freedoms are not upheld, are the poor.<sup>186</sup>

The proceedings against the government in the *TAC* case were brought by a non-governmental association.<sup>187</sup> According to Arthur Chaskalson, “where there is a more vibrant civil society, there is a greater likelihood that rights and freedoms will be respected”. “Unless rights are vigorously and assertively enforced, they may have no substance”.<sup>188</sup> Fortunately, the activism of the civil society in policy-making processes has produced positive results towards the enforcement of socio-economic rights in SA. Since the Cameroonian Constitution is clear as to the categories of people that may refer matters to the Constitutional Council, an association does not have standing to challenge government to fulfil its constitutional obligations before the Constitutional Council.

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<sup>182</sup> Bonine, J E ‘Standing to Sue: The First Step in Access to Justice’ (1999) <<http://www.law.mercer.edu/elaw/standingtalk.html> > (accessed 29 September 2005).

<sup>183</sup> Art 47(2) of the Cameroonian Constitution.

<sup>184</sup> Art 48(2) of the Cameroonian Constitution.

<sup>185</sup> n 171 above.

<sup>186</sup> Partners in Law ‘Author Chaskalson’ <<http://www.ourplanet.com/imgversn/153/chaskalson.html>> (accessed 1 October 2005).

<sup>187</sup> n 148 above.

<sup>188</sup> n 186 above.

It is worth mentioning in this context, that the civil society should be active in demanding, at the very least, information from government on the status of socio economic policies that are either being planned or implemented by government, as it may be essential for filing an action against the state for failure to implement the obligations it has assumed.<sup>189</sup> This will ensure that financial and administrative decisions are designed to achieve the delivery of socio-economic rights. The realisation of the right to health will remain on paper, if the civil society does not make clear demands to government.

The mere failure to provide citizens with legal standing reduces the constitution into a document that attempts to expand the President's authority, and not a supreme document guaranteeing rights to its citizens. The ambiguity of the phrasing in the Preamble and the lack of a constitutional guarantee of a right to health remains a big problem. This merely leads to the conclusion that an attempt to vindicate a right to health in Cameroon could be a mission impossible.

Notwithstanding the provision that, duly approved or ratified treaties and international agreements override national laws, the additional failure is that the Constitution does not provide appropriate sources of authority to guide its interpretation, and what relative weight should be assigned to the various appropriate sources, if any. However, the Constitution provides an interpretation clause, which requires courts, when interpreting the Bill of Rights, to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>190</sup> The implication of the clause is that the legislature, by passing legislation, is presumed to have intended to promote the values that underlie the Bill of Rights. Any legislative provision that is found to be inconsistent with the Bill of Rights must be declared unconstitutional.

It cannot be overemphasised that the enforcement of socio-economic rights and the right to health in particular, calls for an independent and active judiciary. If we are to assume that the right to health is protected, the next question is whether there exists any independent and impartial judiciary capable of enforcing that right in Cameroon. At present, neither the right to health, nor any socio-economic right has been challenged in the courts of Cameroon to establish a precedent obliging the government to respect its constitutional obligations.

#### **4.3 The thrust of the interpretation of the theory of separation of powers in favour of the right to health**

The Cameroonian Constitution does not have any explicit provision on the separation of powers, but it is clear on the face of the Constitution that there is separation of powers between three arms

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<sup>189</sup> n 172 above.

<sup>190</sup> Sec 39 of the Constitution.

of government. The President is the guarantor of the country's independent legal system and has a constitutional mandate to ensure respect for the Constitution.<sup>191</sup> This implies that the President, as chief of executive provides oversight of the judicial branch.

The President of Cameroon, in terms of article 38 of the Constitution, appoints members of the bench and for the legal department, assisted by the opinion of Higher Judicial Council on all nominations for the bench and on disciplinary action against judicial and legal officers. The judicial system includes the Supreme Court, Court of Appeals, High Courts and courts of first instance.<sup>192</sup> Lower courts in Cameroon do not have competence to deal with constitutional matters, unlike in SA where lower courts may decide any constitutional question.<sup>193</sup> The Supreme Court in Cameroon is composed of a judicial bench, an administrative bench and an audit bench.<sup>194</sup> The Constitution provides for the establishment of the Constitutional Council, which has been established but is not yet operational.<sup>195</sup> In this judiciary set-up, only the administrative bench of the Supreme Court can handle constitutional matters for the time being while awaiting the operability of the Constitutional Council.<sup>196</sup>

The administrative bench of the Supreme Court, sitting as the Constitutional Council, would therefore, be competent to enforce the right to health if this right were to be constitutionally challenged. The contention is that it would be impossible for the Supreme Court in Cameroon to enforce the right to health because, amongst other reasons, the administrative bench is composed of judicial judges that lack the requisite competence and expertise in constitutional matters. This is evident in twelve petitions brought in terms of article 48 of the Cameroonian Constitution. The Supreme Court judges dismissed petitions on procedural lapses, instead of upholding the Constitution as the supreme law of the country.<sup>197</sup> In one case, the Supreme Court held that signing a petition on behalf of the client, and representing a client in the Constitutional Council was a violation of the law creating the Constitutional Council.<sup>198</sup>

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<sup>191</sup> Art 37(3) of the Cameroonian Constitution.

<sup>192</sup> Art 37(2) of the Cameroonian Constitution.

<sup>193</sup> Secs 168(3), 169 and 170 of the Constitution.

<sup>194</sup> Art 38 of the Cameroonian Constitution.

<sup>195</sup> Art 47 of the Cameroonian Constitution.

<sup>196</sup> Art 67(4) of the Cameroonian Constitution.

<sup>197</sup> In 2004, twelve petitions calling for the cancellation of the election were quashed by the Supreme Court because of procedural lapses. See n 207 above.

<sup>198</sup> Arts 55 and 58 of the Law Governing the Constitutional Council of Cameroon, 2004.

Secondly, the enforcement of the right to health would be thwarted by the mere fact that the President appoints members of the bench and the legal department.<sup>199</sup> In reality, there is no separation of powers where the President appoints the judiciary, and also guarantees its independence.<sup>200</sup> The provision is too far-fetched, even if the Constitutional Council were operational, the same situation would occur, if one were to go by the selection of its future judges. In terms of article 51 of the Constitution, three out of eleven judges, including the President of the Council are appointed by the President, three by the President of the NA,<sup>201</sup> three by the President of the Senate,<sup>202</sup> two by the Higher Judicial Council.<sup>203</sup> It is obvious that the judicial system is, technically speaking, part of the executive branch. The facts speak for themselves. As such, it would be difficult, if not impossible for these judges to breathe life into constitutional provisions, due to lack of skill, competence and expertise in constitutional matters.

Thirdly, the Constitution provides that Constitutional Council judges “shall give a final ruling on the constitutionality of laws, treaties and international agreements”.<sup>204</sup> However, despite such a provision, it is patent that judges may only deal with the question whether the provisions of such treaties and conventions are consistent with the Cameroonian Constitution. In light of this background, the right to health is not likely to be given favourable status, and be enforced by courts as a legal right considering the state of affairs in Cameroon. In general, the executive is vested with a lot of power, and such excessive power that is concentrated in one branch of government has the potential to be used to oppress the will of the people. Theoretical rule of law that is a mere fiction is not enough; laws must be put into practice.

#### **4.4 The independence of the judiciary**

The Cameroonian Constitution provides that judicial power is independent of the executive and legislative powers.<sup>205</sup> However, the judiciary is subordinate to the executive influence in that the President is also the Chairperson of the Supreme Council of Magistrature.<sup>206</sup> Lack of independence

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<sup>199</sup> Arts 37(3) and 51(2) of the Cameroonian Constitution.

<sup>200</sup> n 191 above.

<sup>201</sup> The political party of the President has 149 of 180 seats in the NA.

<sup>202</sup> See article 20 of the Cameroonian Constitution on how the Senate is appointed.

<sup>203</sup> The President is also the Chairperson of the Higher Judicial Council.

<sup>204</sup> n 180 above.

<sup>205</sup> Art 37(2) of the Cameroonian Constitution.

<sup>206</sup> This means that the President appoints, promotes and dismisses the judges.

has been one of the criticisms directed at the Supreme Court as being a political court that tailors its ruling to please the executive.<sup>207</sup>

There is no system of checks and balances since Parliament does not have the power to impeach the President. Corruption and inefficiency of the judiciary have contributed to the scale of the problem.<sup>208</sup> As expressed by Kofi Annan, "states have created an impressive body of norms and law, and yet the framework is riddled with gaps and weaknesses because too often they apply it selectively, and enforce it arbitrarily, thus it lacks teeth that turn it into effective legal system".<sup>209</sup>

It would seem that courts in Cameroon have developed a protective attitude towards the executive. The practice is evidenced in the manner in which the Constitution is interpreted, and the decisions rendered by the courts always weigh in favour of the executive.<sup>210</sup> It is not just the appearance of the lack of judicial independence, but also lack of impartiality. Judicial independence is only on paper and not in practice. The "evils of the judiciary" as recently criticised by the Minister of Justice, include violations of procedure, delayed judgements, and illegal detention.<sup>211</sup> The Minister stated that he believed these evils caused some observers to refer to court decisions as "judicial robbery" and gave the judiciary a bad image and weakened its powers.<sup>212</sup>

It should be kept in mind that there can be no effective protection of rights without an independent judiciary, which is the ultimate guarantor of rights. Thus, the ACHPR mandates States Parties to guarantee the independence of the courts which requires governments to take active steps to set independent institutions and to refrain from interfering with such institutions.<sup>213</sup> The judiciary should be active, setting in motion the machinery that guarantees the enjoyment of the right to health

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<sup>207</sup> See Post Newspaper 'Supreme Court Clears Way for Biya's Victory' (2004) <[http://www.postnewspaper.com/2004/10/strongsupreme\\_c\\_2.html](http://www.postnewspaper.com/2004/10/strongsupreme_c_2.html)> (accessed 30 September 2005).

<sup>208</sup> Cameroon was rated as the sixth most corrupt country in the world out of 146 countries. See Transparency International 'Transparency International Corruption Perceptions Index' (2004) <<http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004>> (accessed 29 September 2005).

<sup>209</sup> Secretary-General Office of the Spokesman 'Secretary-General's address to the General Assembly' (2004) <<http://www.un.org/apps/sg/sgstats.asp?nid=1088>> (accessed 28 September 2005).

<sup>210</sup> In *Divine Kingdom People's Party of Cameroon v Minister of Territorial Administration* Case no. 405/91-92.

<sup>211</sup> Research/Evaluation 'U.S. Department of State Country Report on Human Rights Practices: Cameroon' (2002) <<http://www.unhcr.ch/cgi-bin/txis/vtx/rsd/rsddocview.htm?tbl=RSDCOI&id=3e918c1817>> (accessed 21 September 200).

<sup>212</sup> As above.

<sup>213</sup> n 102 above.

through its legal and interpretive expertise, since it bears the responsibility of breathing life to constitutional provisions. This may also be attributed to the prevailing situation pointed out above.

It is also important to note that courts in Cameroon, despite Cameroon's formal commitment to international law,<sup>214</sup> regional and international human rights instruments are not used for persuasive value in Cameroonian courts. This may have an impact on the effective enjoyment of fundamental freedoms in Cameroon. As noted by Udombana:

*'Indeed, Africa's transitional judiciaries have managed to produce a corpus of constitutional case law, though not many of them are active participants in the comparative constitutional dialogue. Some are not even aware of the existence of many international human rights tribunals, let alone draw inspiration from their dynamic and rich jurisprudence'*<sup>215</sup>

International law is a valuable source of interpretation for socio-economic rights in SA, since courts and other bodies are required to prefer any interpretation that is consistent with international law over any alternative interpretation that is inconsistent with international law.<sup>216</sup> The Court has held that both binding and non-binding international law can be used in the interpretation of the Bill of Rights.<sup>217</sup> Despite the minimal impact of ACHPR in SA, courts have, in many cases, referred to international human rights instruments and foreign law to give effect to constitutional rights.<sup>218</sup>

Other concerns that have been attributed to the inefficiency of the judicial system are dissemination of the law, access to justice and judicial delays.<sup>219</sup> The problems of disseminating the law in Cameroon concern both the common man and the judicial professionals. While the common man does not always know his rights or the functioning of the judicial system, professionals do not have access to the right information.<sup>220</sup> In this context, the circumstances surrounding the right to health, separation of powers and the independence of the judiciary,

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<sup>214</sup> n 170 above.

<sup>215</sup> n 91 above, 63.

<sup>216</sup> Secs 39(1) and 233 of the Constitution.

<sup>217</sup> *S v Makwanyane* 1995 (6) BCL 665 (C) para 36-37.

<sup>218</sup> *TAC* case (n 11 above); *Soobramoney* case (n 28 above); *Grootboom* case (n 29 above). N 102 above, 417.

<sup>219</sup> The Draft Copy of the Revised Document of the National Governance Programme ("the NGP") (1999) 119.

<sup>220</sup> As above.



indicate that the jurisprudence of the *TAC* case may be influential in Cameroon, but if the right to health was to be challenged, the outcome would certainly not be the same.

#### 4.5 The *TAC* case beyond South Africa

The SA Court has produced dynamic constitutional litigation in the last decade, which is parallel to none other on the continent.<sup>221</sup> As this study has shown, the *TAC* case is remarkable particularly for applying international and comparative law, which contributes to the development of SA constitutional jurisprudence. It shows the wisdom of judicially protecting socio-economic rights, and demonstrates how governments may be held accountable in domestic courts for failure to comply with their constitutional obligations, particularly the right to health, considering the desperation of hundreds of thousands of poor people, and devastation caused by HIV/AIDS pandemic in SA.<sup>222</sup>

The *TAC* case has highlighted the potential of litigation as a useful advocacy tool for progressive change aimed at ensuring that power-wielders are held accountable for their action or inaction.<sup>223</sup> In addition, the case shows how constitutional rights should be interpreted to ensure their progressive realisation by the state. The Court assumed that an expansive comparative constitutional analysis was necessary in determining the obligations imposed on the state to provide access to ARVs. The purposive and creative interpretation of the *TAC* case could also help governments to understand their positive and negative obligations.

Indeed, the *TAC* case could also assist in mainstreaming respect for the values associated with socio-economic rights as it offers the opportunity to other African countries to translate its results into concrete actions to enforce socio-economic rights in their respective countries. The *TAC* case has large potential for use in claims against a number of other socio-economic rights that remain unrealised by government. It is of great significance in countries where socio-economic rights are justiciable, because there are a number of government programmes that are susceptible to attack, and to which the precedent of this case could be used. Today, citizens look to the judiciary to ensure executive accountability and for protection of their interests.<sup>224</sup> Therefore, the judiciary

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<sup>221</sup> n 91 above, 50.

<sup>222</sup> n 54 above.

<sup>223</sup> As above.

<sup>224</sup> As above.

should act both as a watchdog over the other branches' adherence to the doctrine of separation of powers, and as a primary protector of citizens rights within its confines.<sup>225</sup>

The *TAC* case as a model could be used as a resource for information and guidance for policymakers, since it has been contended that socio-economic rights are ill suited to judicial enforcement. The question whether socio-economic rights are justiciable has been put to rest by the Court, since resource implications flow from litigating both categories of rights. It is thus clear that, arguments about the lack of institutional legitimacy and competence of the judiciary to enforce socio-economic rights do not hold water.

Given the prevalence of socio-economic rights violations in Africa, the case is a challenge to African countries in which socio economic rights are mentioned as fundamental directives to the state, to provide a favourable environment for litigating socio-economic rights at the national level.<sup>226</sup> For example, the Cameroonian Constitution makes reference to the right to health in the Preamble,<sup>227</sup> and the Kenyan Bill of Rights does not even make mention of socio-economic rights as directive principle of state policy.<sup>228</sup> It is important to note that, "out of 53 African Union member states, only two had not become parties to ACHPR in 1996".<sup>229</sup> Thus, most African countries that are parties to ACHPR are obliged to recognise the rights, duties and freedoms enshrined therein, and to adopt legislative or other measures to give effect to the rights in ACHPR.<sup>230</sup> Therefore, it is vital for these countries to ensure that socio-economic rights are justiciable in their respective countries.

#### 4.6 Conclusion

The government has been committed from onset to fight the pandemic, but in the face of escalating HIV/AIDS pandemic, Cameroon is unlikely to achieve progress in improving the levels of health. Despite escalating HIV/AIDS statistics, and the fact that the right to health has been enumerated in regional and international human rights instruments for nearly a half century, Cameroon still fails to take its obligations seriously. The civil society should explore strategies to pressurise government to set up legal frameworks that improve people's access to socio-economic

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<sup>225</sup> As above.

<sup>226</sup> n 14 above.

<sup>227</sup> The Preamble of the Constitution of the Republic of Cameroon.

<sup>228</sup> AW Munene 'The Bill of Rights and Constitutional Order: A Kenyan Perspective' (2002) 2 *AHRLJ* 152.

<sup>229</sup> n 102 above, 90.

<sup>230</sup> n 16 above, art 1.

rights, particularly the right to health. Financial and administrative decisions should be designed to achieve delivery of health care services for PLWHA.

The conclusion is that, if the right to health in Cameroon could be challenged, it would not produce similar results, considering the significance of the *TAC* case ruling, which recognized government's obligations to administer MTCT programmes. Additionally, the civil society in Cameroon is not vibrant, as compared to SA, which contributes to the likelihood that rights and freedoms will not be respected. The obvious conclusion one arrives at is that the absence of judicial independence accounts for the country as it is a prerequisite for the enforcement of the rule of law.

## CHAPTER 5: CONCLUSION AND RECOMMENDATION

It is necessary to recollect that this research endeavoured to address three research questions. Firstly, to what extent are governments obliged to provide affordable medical treatment to pregnant women living with HIV/AIDS as the basis for the recognition of the right to health? Secondly, how can national courts compel governments to respect their constitutional obligations, particularly with respect to the right to health, the principle of separation of powers notwithstanding? Thirdly, to what extent is the *TAC* case a model towards the enforcement of the right to health in Africa, and Cameroon in particular?

The research was guided by four hypotheses, which the research intended to prove. Firstly, the failure of government to provide ARVs has contributed to the overall spread of MTCT in SA. Secondly, the scale of the pandemic requires governments to take the right to health seriously in order to prevent MTCT. Thirdly, the situation in most African countries, particularly Cameroon is not conducive for the application of the *TAC* case jurisprudence. Fourthly, a holistic approach may be required to address the root causes of the pandemic.

The research has shown that the failure of government to provide ARVs has contributed to the overall spread of MTCT in SA. We have also seen that the scale of the pandemic calls for governments to take the right to health seriously. The protection of the right to health is indispensable to reduce the scale of HIV infection and to enhance the survival of women living with HIV/AIDS. Furthermore, the research has highlighted that the judicial situation in most African countries, particularly Cameroon is not conducive for the application of the *TAC* case jurisprudence. The normative elaboration on the right to health in general and Cameroon in particular, have illustrated that the right to health is not enforceable in Cameroon, while in SA, citizens are benefiting from its justiciability, as the *TAC* case demonstrates.

The judges of the Constitutional Council in Cameroon does not have capacity compel the government to respect its constitutional obligations, particularly the right to health due to a non conducive atmosphere of the true operation lack of independence and separation of powers. A point that emerged is that SA courts do not accept the rigid, traditional interpretation of the theory of separation of powers, and such an interpretation has guaranteed that poor people are treated with dignity as citizens and not as objects of administration.<sup>231</sup> Despite criticisms levelled by legal scholars and academicians against the Court's activism, the Court has proved itself to be independent and effective.

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<sup>231</sup> n 54 above.

The Court has sought to protect the interests of vulnerable sectors of society by requiring, and even reminding and instructing government to meet its constitutional obligations with respect to socio-economic rights, while at the same time trying to avoid imposing policy that may budgetary implications on government. The *TAC* case proves and maintains that the duty of the courts is to the Constitution in SA, and of course, that should be the case elsewhere. The Court has so far left it to the executive to coordinate socio-economic programmes and to adjust its unconstitutional policies to be consistent with the Constitution and the law.<sup>232</sup>

A holistic approach may be required to address the root causes of the HIV/AIDS pandemic. The pandemic has an impact on a broad range of human rights. If the rights of PLWHA are not addressed, the violation of these rights may increase the scale of the pandemic. The fight against the pandemic should advocate a holistic approach, because HIV/AIDS is a social disease.

Cameroon is still facing problems despite progress made to fight the HIV/AIDS pandemic. Despite further reduction of subsidies, financial sustainability of these programmes cannot be guaranteed for the long term.<sup>233</sup> Health personnel capacity building is still necessary to scale up ARV access and offer full AIDS care services at all levels of the health care system.

While not undermining the measures already taken by SA and Cameroon, there are a range of measures that are likely to have a considerable effect if adopted to ensure effective implementation of HIV/AIDS policies and particularly the MTCT programme that is currently being administered.

SA needs a strategic framework for action and a holistic response to prevention and treatment that addresses the spread of HIV/AIDS, poverty and gender-based violence. It is highlighted in the research background that women are infected at a higher rate than men. These factors require government to adopt a policy that considers gender-related issues. The development of policies and programmes should be guided by the principle of public participation. HIV/AIDS programmes should address developing concerns of the efficacy and safety of the drugs, for programmes to be a success. Consequently, understanding and addressing such problems should be a central focus of the government.

The Constitutional Court affirmed that the right to health encompasses the duty to provide ARVs. Access to ARVs should be government's priority to ensure effective implementation of the Court's decision in the *TAC* case. It is recommended that government should ensure access to affordable

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<sup>232</sup> *TAC* case (n 11 above) para 114.

<sup>233</sup> Subsidies include all ARV protocols and laboratory follow up examination.

health care services, including the administration of ARVs for PLWHA. Given the scale of problems confronting SA as a whole, there is a need for an intensive effort. The magnitude of the problems confronting HIV/AIDS pandemic, community participation is highly recommended in the design, implementation, and evaluation of HIV/AIDS policies and programmes.

Community-based prevention education and training is indispensable, not only to prevent the spread of HIV, but also to help people living with AIDS. As such, governments should ensure that the needs of PLWHA are met, as well as to sensitise people who are working with communities affected by HIV/AIDS. SA, like Cameroon lack resources and infrastructure to address the scale of the pandemic. Lack of adequate and reliable funding has been an obstacle in the implementation of the MTCT prevention programmes. Thus, the little resources that these countries have should be allocated to HIV/AIDS programmes to ensure adequate support for the infrastructure that may be required to implement MTCT programmes and to expand service provision on HIV/AIDS. Both SA and Cameroonian should lobby for more funding since financial constraints are a major obstacle to service delivery.

It cannot be gainsaid that government partnerships with civil society organizations are vital for effective implementation of HIV/AIDS policies. It is clear that there will be no change without pressure against government to advance socio-economic rights. Thus, the civil society should challenge government financial and administrative decisions that obstruct the realisation of the right to health. Continuous proper monitoring and evaluation of policies is critical to leave enough room for changes, should government deems it appropriate. This will also ensure that PLWHA have continuous access to health care services when there are unpredictable constraints. In this regard, progressive realisation of the right to health requires transparent and flexible policies, consistent with government's constitutional requirements of reasonableness. Thus, the civil society should ensure that decisions on resource allocation are designed to realise progressive realisation of improved health service delivery.

Despite the successful progress that has been made so far in Cameroon, with regard to the implementation of MTCT prevention programme, there is still unwillingness of government to take the right to health seriously. What is evident is that the Cameroonian Constitution makes a veiled attempt to recognise socio-economic rights in its Preamble. Several reasons have been advanced on account of the right to health in Cameroon. What transpires is that there is an urgent need for legal reform in Cameroon to ensure that the Constitution includes a Bill of Rights, recognising socio-economic rights and the right to health in particular.

Constitutional amendment should ensure the legitimacy of the public realm by being inclusive and participatory in decisions that affect the people. The Constitution has to reflect the political reality

of Cameroon as a whole. As it is, the Constitution is merely a document with a set of rules that simply validates and legitimises government actions without guaranteeing the enjoyment of fundamental rights and freedoms. The lack of protection of the right to health in a supremely held document denies citizens what rightfully should have been protected by government.

It has indeed been held that, “there is no liberty if the power of judging is not separated from the legislative and executive powers, since liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments”.<sup>234</sup> The contention is that if the Cameroonian Constitution is to be the supreme law of the land, it should provide for a democratic system of government. There must be a concise framework that ensures judicial institutional independence from the executive and legislative branches. The interpretation of rights by courts in Cameroon, should clearly determine the obligations of government to realise socio-economic rights.

## **Word Count**

16306 (excluding footnotes)

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<sup>234</sup> Siegan, BH *The Supreme Court's Constitution: In Inquiry into Judicial Review and Its Impact on Society* (1987) New Brunswick and Oxford: Transaction. See Franck, MJ *Against the Imperial Judiciary: The Supreme Court vs the Sovereignty of the People* (1996) Lawrence: University Press of Kansas.

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## **ANNEX A**

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## **ANNEX B**

### **CONSTITUTION OF THE REPUBLIC OF CAMEROON**

**Adopted on 18 January 1996, amendment to the Constitution of 2 June 1972**

#### **PREAMBLE**

*We, the people of Cameroon,*

*Proud* of our linguistic and cultural diversity, an enriching feature of our national identity, but profoundly aware of the imperative need to further consolidate our unity, solemnly declare that we constitute one and the same Nation, bound by the, same destiny, and assert our firm, determination to build the Cameroonian Fatherland on the basis of the ideals of fraternity, justice and progress;

*Jealous* of our hard-won independence and resolved to preserve same; convinced that the salvation of Africa lies in forging ever-growing bonds of solidarity among African Peoples, affirm our desire to contribute to the advent of a united and free Africa, while maintaining peaceful and brotherly relations with the other nations of the World, in accordance with the principles enshrined in the Charter of the United Nations;

Resolved to harness our natural resources in order to ensure the well-being of every citizen without discrimination, by raising living standards, proclaim our right to development as well as our determination to devote all our efforts to that end and declare our readiness to co-operate with all States desirous of participating in this national endeavour with due respect for our sovereignty and the independence of the Cameroonian State.

*We, people of Cameroon,*

*Declare* that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights;

*Affirm* our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations and The African Charter on Human and Peoples' Rights, and all duly ratified international conventions relating thereto, in particular, to the following principles:

- all persons shall have equal rights and obligations. The State shall provide all its citizens with the conditions necessary for their development;
- the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law;
- freedom and security shall be guaranteed to each individual, subject to respect for the rights of others and the higher interests of the State;
- every person shall have the right to settle in any place and to move about freely, subject to the statutory provisions concerning public law and order, security and tranquillity;
- the home is inviolate. No search may be conducted except by virtue of the law;
  
- the privacy of all correspondence is inviolate. No interference may be allowed except by virtue of decisions emanating from the Judicial Power;
- no person may be compelled to do what the law does not prescribe;
- no person may be prosecuted, arrested or detained except in the cases and according to the manner determined by law;
- the law may not have retrospective effect. No person may be judged and punished, except by virtue of a law enacted and published before the offence committed;
- The law shall ensure the right of every person to a fair hearing before the courts;
- every accused person is presumed innocent until found guilty during a hearing conducted in strict compliance with the rights of defence;
- every person has a right to life, to physical and moral integrity and to humane treatment in all circumstances. Under no circumstances shall any person be subjected to torture, to cruel, inhumane or degrading treatment;
  
- no person shall be harassed on grounds of his origin, religious, philosophical or political opinions or beliefs, subject to respect for public policy;
- the State shall be secular. The neutrality and independence of the State in respect of all religions shall be guaranteed;
- freedom of religion and worship shall be guaranteed;
- the freedom of communication, of expression, of the press, of assembly, of association, and of trade unionism, as well as the right to strike shall be guaranteed under the conditions fixed by law;
- the Nation shall protect and promote the family which is the natural foundation of human society. It shall protect women, the young, the elderly and the disabled;
- the State shall guarantee the child's right to education. Primary education shall be compulsory. The organization and supervision of education at all levels shall be the bounden duty of the State;



- ownership shall mean the right guaranteed to every person by law to use, enjoy and dispose of property. No person shall be deprived thereof, save for public purposes and subject to the payment of compensation under conditions determined by law;
- the right of ownership may not be exercised in violation of the public interest or in such a way as to be prejudicial to the security, freedom, existence or property of other persons;
- every person shall have a right to a healthy environment. The protection of the environment shall be the duty of every citizen. The State shall ensure the protection and improvement of the environment;
- every person shall have the right and the obligation to work;
- every person shall share in the burden of public expenditure according to his financial resources;
- all citizens shall contribute to the defence of the Fatherland:
- the State shall guarantee all citizens of either sex the rights and freedoms set forth in the Preamble of the Constitution.

## **PART I**

### **The State and Sovereignty**

#### **Article 1**

(1) The United Republic of Cameroon shall, with effect from the date of entry into force of this law, be known as Republic of Cameroon (Law No 84-1 of 4 February 1984).

(2) The Republic of Cameroon shall be a decentralized unitary State.

- It shall be one and indivisible, secular, democratic and dedicated to social service.
- It shall recognize and protect traditional values that conform to democratic principles, human rights and the law.
- It shall ensure the equality of all citizens before the law.

(3) The official languages of the, Republic of Cameroon shall be English and French, both languages having the same status. The State shall guarantee the promotion of bilingualism throughout the country. It shall endeavour to protect and promote national languages.

(4) Its motto shall be " Peace-Work-Fatherland".

(5) Its flag shall be three equal vertical stripes of green, red and yellow charged with one gold star in the centre of the red stripe.

(6) Its national anthem shall be "O Cameroon, Cradle of our Forefathers".

(7) The seal of the Republic of Cameroon shall be a circular medallion in bas-relief, 46 millimetres in diameter, bearing on the obverse and in the centre the head of girl in profile turned to the dexter

towards a coffee branch with two leaves and flanked on the sinister by five cocoa pods, with the French words "Republique du Cameroun" inscribed below the upper edge and the national motto "Paix-Travail-Patrie" inscribed above the lower edge; on the reverse and in the centre the coat of arms of the Republic of Cameroon, with the English words " Republic of Cameroon " inscribed beneath the upper edge and the national motto " Peace-Work-Fatherland " inscribed above the lower edge.

The coat of arms of the Republic of Cameroon shall be an escutcheon surmounted chief by the legend "Republic of Cameroon" and supported by two crossed fasces with the motto " Peace-Work-Fatherland " base. The escutcheon shall be composed of a star on a field vent and triangle gules, charged with the geographical outline of Cameroon azure, and surcharged with the sword and scales of justice sable.

(8) The Capital of the Republic of Cameroon shall be Yaounde.

## **Article 2**

(1) National sovereignty shall be vested in the people of Cameroon who shall exercise same either through the President of the Republic and Members of Parliament or by way of referendum. No section of the people or any individual shall arrogate to itself or to himself the exercise thereof.

(2) The authorities responsible for the management of the State shall derive their powers from the people through election by direct or indirect universal suffrage, unless otherwise provided for in this Constitution.

(3) The vote shall be equal and secret, and every citizen aged twenty years and above shall be entitled to vote

## **Article 3**

Political parties and groups shall help the electorate in the making of voting decisions. They shall be bound to respect the principles of democracy, national sovereignty and unity. They shall be formed and shall exercise their, activities in accordance with the law.

## **Article 4**

State power shall be exercised by:

- The President of the Republic;
- Parliament.

## **PART II**

### **Executive Power**

## **CHAPTER 1 The President of the Republic**

### **Article 5**

- (1) The President of the Republic shall be the Head of State.
- (2) Elected by the whole Nation, he shall be the symbol of national unity.
  - He shall define the policy of the nation.
  - He shall ensure respect for the Constitution.
  - He shall, through his arbitration, ensure the proper functioning of public authorities.
  - He shall be the guarantor of the independence of the Nation and of its territorial integrity, of the permanency and continuity of the State and of the respect of international treaties and agreements.

### **Article 6**

- (1) The President of the Republic shall be elected by a majority of the votes cast through direct, equal and secret universal suffrage.
- (2) The President of the Republic shall be elected for a term of office of 7 (seven) years. He shall be eligible for re-election once.
- (3) The election shall be held not less than 20 (twenty) days and not more than 50, (fifty) days before the expiry of the term of the President of the Republic in office.
- (4) Where the office of President of the Republic becomes vacant as a result of death, resignation or permanent incapacity duly ascertained by the Constitutional Council, the polls for the election of the new President of the Republic must be held not less than 20 (twenty) days and not, more than 40 (forty) days after the office becomes vacant.
  - (a) The President of the Senate shall as of right. act as interim President of the Republic until the new President of the Republic is elected. Where the President of the Senate is unable to exercise these powers, the shall be exercised by his Vice, following the order of precedence.
  - (b) The interim President of the Republic - the President of the senate or his Vice - may neither amend the Constitution nor the composition of the Government. He may not organize a referendum or run for the office of President of the Republic.
- (5) Candidates for the office of President of the Republic must be Cameroonian by birth, enjoy their civic and political rights and must have attained the age of 35 (thirty-five) by the date of the election.
- (6) the conditions for electing the President of the Republic shall be laid down by law.

## **Article 7**

- (1) The president-elect shall assume office once he has been sworn in.
- (2) He shall take the oath of office before the Cameroonian people, in the presence of the members of Parliament, the Constitutional Council and the Supreme Court meeting in solemn session.  
He shall be sworn in by the President of the National Assembly.
- (3) The wording of the oath and the procedure for implementing the provisions of paragraphs (1) and (2) above shall be laid down by law.
- (4) The office of President of the Republic shall be incompatible with any other elective public office or professional activity.

## **Article 8**

- (1) The President of the Republic shall represent the State in all acts of public life.
- (2) He shall be Head of the Armed Forces.
- (3) He shall ensure the internal and external security of the Republic.
- (4) He shall accredit ambassadors and envoys extraordinary to foreign powers. The ambassadors and envoys extraordinary of foreign powers shall be accredited to him.
- (5) The President of the Republic shall enact laws as provided for in Article 31 below.
- (6) The President of the Republic shall refer matters to the Constitutional Council under the conditions laid down by the Constitution.
- (7) He shall exercise the right of clemency after consultation with the Higher Judicial Council.
- (8) He shall exercise statutory authority.
- (9) He shall set up and organize the administrative services of the State.
- (10) He shall appoint to civil and military posts of the State.
- (11) He shall confer the decorations and honorary distinctions of the Republic.
- (12) The President of the Republic may, if necessary and after consultation with the Government, the Bureaux of the National Assembly and the Senate, dissolve the National Assembly. The election of a new Assembly shall take place in accordance with the provisions of Article 15 (4)

## **Article 9**

- (1) The President of the Republic may, where circumstances so warrant, declare by decree a state of emergency which shall confer upon him such special powers as may be provided for by law.
- (2) In the event of a serious threat to the nation's territorial integrity or to its existence, its independence or institutions, the President of the Republic may declare a state of siege by decree and take any measures as he may deem necessary. He shall inform the Nation of his decision by message.

## **Article 10**

(1) The President of the Republic shall appoint the Prime Minister and, on the proposal of the latter, the other members of Government.

- He shall define their duties.
- He shall terminate their appointment.
- He shall preside over the Council of Ministers.

(2) The President of the Republic may delegate some of his powers to the Prime Minister, other members of Government and any other senior administrative officials of the State, within the framework of their respective duties.

(3) Where the President of the Republic is temporarily unable to, perform his duties, he shall delegate the Prime Minister and, should the latter also be unavailable, any other member of Government to discharge his duties within the framework of an express delegation of some of his powers.

## **CHAPTER 2 The Government**

### **Article 11**

The Government shall implement the policy of the nation as defined by the President of the Republic.

It shall be responsible to the National Assembly under the conditions and procedures provided for in Article 34 below.

### **Article 12**

(1) The Prime Minister shall be the Head of Government and shall direct its action.

(2) He shall be responsible for the enforcement of the laws.

(3) He shall exercise statutory authority and appoint to civil posts, subject to the prerogatives of the President of the Republic in such areas.

(4) He shall direct all the government services required for the accomplishment of his duties.

(5) He may delegate some of his powers to members of Government and to senior State officials.

### **Article 13**

The office of member of Government and any office ranking as such shall be incompatible with that of member of Parliament, Chairman of the Executive or Assembly of a local or regional authority, leader of a national professional association, or with any other employment or professional activity.

## **PART III**

### **Legislative Power**

## **Article 14**

(1) Legislative power shall be exercised by the Parliament which shall comprise 2 (two) Houses:

- (a) The National Assembly;
- (b) The Senate.

(2) Parliament shall legislate and control Government action.

(3) Both Houses of Parliament shall meet on the same dates:

- (a) in ordinary session during the months of June, November and March each year, when convened by the Bureaux of the National Assembly and the Senate after consultation with the President of the Republic;
- (b) in extraordinary session, at the request of the President of the Republic or of one-third of the members of both Houses. However, the two Houses shall be convened simultaneously only if the business of the day concerns both of them.

(4) The two Houses of Parliament shall meet in congress at the request of the President of the Republic in order to:

- be addressed by or receive a message from the President of the Republic ;
- receive the oath of members of the Constitutional Council;
- take a decision on a draft or proposed constitutional amendment.

When Parliament meets in congress, the Bureau of the National Assembly shall preside over the proceedings.

(5) No person, shall be member of both the National Assembly and the Senate.

(6) The conditions for the election of members of the National Assembly and of the Senate, as well as the immunities, ineligibilities, incompatibilities, allowances and privileges of the members of Parliament shall be determined by law.

## **CHAPTER 1 The National Assembly**

### **Article 15**

(1) The National Assembly shall comprise 180 (one hundred and eighty) members elected by direct and secret universal suffrage for a five-year term of office.

- The number of members of the National Assembly may be modified by law.

(2) Each member of the National Assembly shall represent the entire Nation.

(3) Any imposed mandate shall be null and void.

(4) In case of serious crisis, the President of the Republic may, after consultation with the President of the Constitutional Council and Bureaux of the National Assembly to decide, by a law,

to extend or abridge its term of office. In this case, the election of a new Assembly shall take place not less than 40 (forty) days and not more than 60 (sixty) days following the expiry of the extension or abridgement period.

#### **Article 16**

(1) At the beginning of each legislative year, the National Assembly shall meet as of right in ordinary session under the conditions laid down by law.

(2) Each year, the National Assembly shall hold 3 (three) ordinary sessions, each lasting not more than 30 (thirty) days.

(a) At the opening of its first ordinary session, the National Assembly shall elect its President and Bureau members.

(b) The National Assembly shall, during one of its sessions, adopt the State budget. Where such budget is not adopted before the end of the current financial year, the President of the Republic shall be empowered to extend the previous budget by one-twelfth until a new one is passed.

(3) The National Assembly shall meet in extraordinary session for not more than 15 (fifteen) days on a specific agenda and at the request of the President of the Republic or of one-third of its members. The extraordinary session shall wind up as soon as the agenda for which it was convened is exhausted.

#### **Article 17**

(1) Sittings of the National Assembly shall be public. Exceptionally, the National Assembly may hold sittings in camera at the request of the President of the Republic or of an absolute majority of its members.

(2) The National Assembly shall, in a law, draw up its standing orders.

#### **Article 18**

(1) The agenda of the National Assembly shall be drawn up by the Chairmen's conference.

(2) The Chairmen's conference shall be composed of Presidents of Parliamentary Groups, Chairmen of Committees and members of the Bureau of the National Assembly. A member of Government shall participate in the conference meeting.

(3) Only bills falling within its area of jurisdiction by virtue of Article 26 below may be included in the agenda of the National Assembly.

(a) All private members' bills and amendments which, if passed, would result in the reduction of public funds or in an increase of public charges without a corresponding reduction in other expenditure or the grant of equivalent new supply of funds, shall be inadmissible.

(b)

(b) Any doubt or dispute on the admissibility of a bill shall be referred by the President of the Republic, the President of the National Assembly or by one-third of the members of the National Assembly to the Constitutional Council for a ruling.

(4) The agenda shall give priority, and in the order decided by the Government, to the consideration of the government bills and private members' bills accepted by it. The other private members' bills admitted by the Chairmen's Conference shall be considered subsequently. Where a private members' bill has not been considered during two successive ordinary sessions, it shall automatically be considered at the very next ordinary session.

(5) Any item on the agenda shall, at the request of the Government, be treated as a matter of urgency.

#### **Article 19**

(1) Laws shall be passed by a simple majority of the members of the National Assembly.

(2) Bills submitted to the National Assembly for reconsideration by the Senate shall either be passed or, rejected in accordance with Article 30 below.

(3) The President of the Republic may, before enacting any law, ask for a second reading. In such case, bills shall be passed by an absolute majority of the members of the National Assembly.

### **CHAPTER 2 The Senate**

#### **Article 20**

(1) The Senate shall represent the regional and local authorities.

(2) Each region shall be represented in the Senate by 10 (ten) Senators of whom 7 (seven) shall be elected by indirect universal suffrage on a regional basis and 3 (three) appointed by the President of the Republic.

(3) Candidates for the post of Senator and personalities appointed to the post of Senator by the President of the Republic must have attained the age of 40 (forty) by the date of the election or appointment.

(4) Senators shall serve a term of 5 (five) years.



## **Article 21**

(1) At the beginning of each legislative year, the Senate shall meet as of right in ordinary session under the conditions laid down by law.

(2) Each year, the Senate shall hold 3 (three) ordinary sessions, each lasting not more than 30 (thirty) days. At the opening of its first ordinary session, the Senate shall elect its President and Bureau members.

(3) The Senate shall meet in extraordinary session for not more than 15 (fifteen) days on a specific agenda and at the request of the President of the Republic or of one-third of its members.

The extraordinary session shall wind up as soon as the agenda for which it was convened is exhausted.

## **Article 22**

(1) Sittings of the Senate shall be public. Exceptionally, the Senate may hold sittings in camera at the request of the President of the Republic or of an absolute majority of its members.

(2) The Senate shall, in a law, draw up its standing orders.

## **Article 23**

(1) The agenda of the Senate shall be drawn up by the Chairmen's conference.

(2) The Chairmen's conference shall be composed of Presidents of Parliamentary Groups, Chairmen of Committees and members of the Bureau of the Senate. A member of Government shall participate in the conference meeting.

(3) Only bills falling within its area of jurisdiction by virtue of Article 26 below may be included in the agenda of the Senate.

(a) All private members' bills and amendments which, if passed, would result in the reduction of public funds or in an increase of public charges without a corresponding reduction in other expenditure or the grant of equivalent new supply of funds, shall be inadmissible.

(b) Any doubt or dispute on the admissibility of a bill shall be referred by the President of the Republic, the President of the Senate or one-third of the Senators to the Constitutional Council for a ruling.

(4) The agenda shall give priority, and in the order decided by the Government, to the consideration of the government bills and private members' bills accepted by it. The other private members' bills admitted by the Chairmen's Conference shall be considered subsequently.

Where a private members' bill has not been considered during two successive ordinary sessions, it shall automatically be considered at the very next ordinary session.

(5) Any item on the agenda shall, at the request of the Government, be treated as a matter of urgency.

## **Article 24**

- (1) Laws shall be passed by a simple majority of the Senators.
- (2) The Senate may amend or reject all or part of a bill submitted to it for consideration, in accordance with Article 30 below.
- (3) The President of the Republic may, before enacting a law, ask for a second reading  
In such case, bills shall be passed by an absolute majority of the Senators.

## **PART IV**

### **Relations Between the Executive and Legislative Powers**

## **Article 25**

Bills may be tabled either by the President of the Republic or by members of parliament.

## **Article 26**

- (1) Bills shall be passed by Parliament.
- (2) The following shall be reserved to the Legislative Power:
  - (a) The fundamental rights, guarantees and obligations of the citizen:
    1. safeguarding individual freedom and security;
    2. the rules governing public freedoms;
    3. labour legislation, trade union legislation, rules governing social security and insurance;
    4. the duties and obligations of the citizen in respect of national defence requirements.
  - (b) The status of persons and property ownership system:
    1. nationality, status of persons, matrimonial system, succession and gifts;
    2. rules governing civil and commercial obligations;
    3. movable and immovable property ownership system.
  - (c) The political, administrative and judicial organization:
    1. rules governing election of the President of the Republic and elections into the National Assembly, the Senate, Regional and Local Bodies and referendum operations;
    2. rules governing associations and political parties;
    3. the organization, functioning, powers and resources of regional and local authorities;
    4. general rules governing the organization of national defence;
    5. judicial organization and the creation of various types of courts;
    6. the definition of felonies and misdemeanours and the institution of penalties of all kinds, criminal procedure, civil procedure, measures of execution, amnesty.

- (d) The following financial and patrimonial matters:
1. rules governing the issue of currency;
  2. the budget;
  3. the creation of duties and the determination of their basis of assessment, rates and methods of collection;
  4. land tenure, State lands and mining;
  5. natural resources.
- (e) Programming the objectives of economic and social action.
- (f) The system of education.

### **Article 27**

Matters not reserved to the legislative power shall come under the jurisdiction of the authority empowered to issue rules and regulations.

### **Article 28**

(1) However, with regard to the subjects listed in Article 26 (2) above, Parliament may empower the President of the Republic to legislate by way of ordinance for a limited period and for given purposes.

(2) Such ordinances shall enter into force on the date of their publication. They shall be tabled before the bureaux of the National Assembly and the Senate for purposes of ratification within the time-limit laid down by the enabling law. They shall be of a statutory nature as long as they have not been ratified.

(3) They shall remain in force as long as Parliament has not refused to ratify them.

### **Article 29**

(1) Government bills and private members' bills shall be tabled at the same time before the bureaux of the National Assembly and the Senate. They shall be studied by the appropriate committees prior to their being debated in plenary session.

(2) The bill debated in plenary session shall be that tabled by the President of the Republic. The private members bill debated in plenary session shall be the next tabled by its author or authors.

(3) Such bills may be amended in the course of the debate.

### **Article 30**

(1) A bill passed by the National Assembly shall be immediately forwarded to the President of the Senate by the President of the National Assembly.

(2) The President of the Senate shall, upon receiving the bill forwarded by the President of National Assembly, submit it to the Senate for consideration.

(3) Within 10 (ten) days, with effect from the date of receipt of the bill or 5(five) days for a bill declared urgent by the Government, the Senate may:

(a) Pass the bill.

In which case, the President of the Senate shall return the adopted bill to the President of the National Assembly who shall forward same within 48 (forty-eight) hours to the President of the Republic for enactment.

(b) Amend the bill.

- Such amendment must be approved by a simple majority of the Senators. In which case, the amended bill shall be returned to the National Assembly by the President of the Senate for reconsideration.

- The amendment proposed by the Senate shall be passed or rejected by a simple majority of the members of the National Assembly.

-The final bill adopted shall be forwarded by the President of the National Assembly to the President of the Republic for enactment.

(c) Reject all or part of the bill.

- Such rejection must be approved by an absolute majority of the senators. In which case, the rejected bill with reasons therefore shall be returned to the National Assembly by the President of the Senate for reconsideration.

1. The National Assembly shall, after deliberations, pass the bill by absolute majority of its members. The final bill adopted by the National Assembly shall be forwarded to the President of the Republic for enactment.

2. Where an absolute majority cannot be reached, the President of the Republic may convene a meeting of a joint commission comprising equal representation of both houses to propose a common formulation of the provisions rejected by the Senate.

- The text prepared by the joint commission shall be submitted to both Houses by the President of the Republic for approval.

- No amendment shall be admissible, except with the approval of the President of the Republic.

- Where the joint commission falls to agree on a common text, or where such text is not adopted by both Houses, the President of the Republic may:

- either request the National Assembly to take a final decision thereon; or

- declare the government bill or private members' bill null and void.

### **Article 31**

(1) The President of the Republic shall enact laws passed by Parliament within 15 (fifteen) days of their being forwarded to him unless he requests a second reading or refers the matter to the Constitutional Council.

(2) Upon the expiry of this deadline, and after establishing the failure of the President of the Republic to act, the President of the National Assembly may himself enact the law.

(3) Laws shall be published in the Official Gazette of the Republic in English and French.

### **Article 32**

The President of Republic may, at his request, address the National Assembly, the Senate or the two Houses meeting in congress. He may also send messages to them; but no such address or message may be debated in his presence.

### **Article 33**

The Prime Minister and the other members of Government shall have access to Parliament and may participate in its deliberations.

### **Article 34**

(1) At the session during which the finance bill is considered, the Prime Minister shall present to the National Assembly the Government's economic, financial, social and cultural programme.

(2) The Prime Minister may, after the deliberations of the Council of Ministers, commit the responsibility of the Government before the National Assembly on a programme or, as the case may be, on a general policy statement.

- Voting shall take place not less than 48 (forty-eight) hours after the vote of no confidence has been requested.

- A vote of no confidence shall be passed by an absolute majority of the members of the National Assembly.

- Only votes against a vote of confidence shall be counted.

(2) The National Assembly may question the responsibility of the Government through a motion of censure. Such motion may be admissible only when it is signed by at least one-third of the members of the National Assembly. Voting shall take place not less than 48 (forty-eight) hours after the motion has been tabled. A motion of censure shall be passed by a two third majority of the members of the National Assembly. Only votes in favour of a motion of censure shall be counted.

Where a motion of censure is rejected, its signatories may not propose a new motion before a period of one year except as provided for in paragraph (4) below.

(4) The Prime Minister may, after the deliberations of the Council of Ministers, commit the responsibility of the Government before the National Assembly on the adoption of a bill. In such case, the bill may be considered adopted, except where a motion of censure tabled within the next 24 (twenty-four) hours is passed under the conditions provided for in the preceding paragraph.

(5) Where the National Assembly adopts a motion of censure or passes a vote of no confidence, the Prime Minister shall tender the resignation of the Government to the President of the Republic.

(6) The President of the Republic may re-appoint the Prime Minister and ask him to form a new Government.

### **Article 35**

(1) The Parliament shall control Government action through oral or written questions and by setting up committees of inquiry with specific terms of reference.

(2) The Government shall, subject to the imperatives of national defence, the security of the State or the secrecy of criminal investigation, furnish any explanations and information to Parliament.

(3) During each ordinary session, a special sitting shall be set aside each week for question time.

### **Article 36**

(1) The President of the Republic may, after consulting with the President of the Constitutional Council, the President of the National Assembly and the President of the Senate, submit to a referendum any reform bill which, although normally reserved to the Legislative Power, could have profound repercussions on the future of the Nation and national institutions.

This shall apply in particular to:

(a) bills, to organize public authorities or to amend the Constitution;

(b) bills to ratify international agreements or treaties having particularly important consequences;

(c) certain reform bills relating to the law on persons and property.

(2) Such bills shall be adopted by a majority of votes cast.

(3) The referendum procedure shall be laid down by law.

## **PART V**

### **Judicial Power**

### **Article 37**

(1) Justice shall be administered in the territory of the Republic in the name of the people of

Cameroon.

(2) Judicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals. The Judicial Power shall be independent of the executive and legislative powers. Magistrates of the bench shall, in the discharge of their duties, be governed only by the law and their conscience:

(3) The President of the Republic shall guarantee the independence of judicial power.

- He shall appoint members of the bench and for the legal department. He shall be assisted in this task by the Higher Judicial Council which shall give him its opinion on all nominations for the bench and on disciplinary action against judicial and legal officers.
- The organization and functioning of the Higher Judicial Council shall be defined by law.

### **Article 38**

(1) The Supreme Court shall be the highest court of the State in legal and administrative matters as Well as in the appraisal of accounts.

(2) It shall comprise:

- a judicial bench;
- an administrative bench;
- an audit bench.

### **Article 39**

The judicial bench shall give final rulings on:

- appeals accepted by law against final rulings given by the various courts and tribunals of the judicial system;
- judgement's passed, by the lower courts of the judicial system that have become final in cases where the application of the law is challenged,
- all matters expressly devolving upon it by law.

### **Article 40**

The administrative bench shall examine all the administrative disputes Involving the State and other public authorities. It shall:

- examine appeals on regional and council election disputes;
- give final rulings on appeals against final judgements passed by lower courts in cases of administrative disputes;
- examine, any other disputes expressly devolving upon it by law.

#### **Article 41**

The audit bench shall be competent to control and rule on public accounts, as well as on those of public and semi-public enterprises.

It shall:

- give final rulings on final judgements passed lower audit courts;
- examine any other matters expressly devolving upon it by law.

#### **Article 42**

(1) The organization, functioning, composition and duties of the Supreme Court and the benches it comprises, the conditions for referring matters to them as well as the procedure applicable before them shall be laid down by law.

(2) The organization, functioning, composition and duties of the Courts of Appeal and judicial, administrative and lower audit benches as well as the conditions for referring matters to them and the procedure applicable before them shall be laid down by law.

### **PART VI**

#### **Treaties and International Agreements**

#### **Article 43**

The President of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the Legislative Power as defined in Article 26 above shall be submitted to Parliament for authorization to ratify.

#### **Article 44**

Where the Constitutional Council finds a provision of a treaty or of an international agreement unconstitutional, authorization to ratify and the ratification of the said treaty or agreement shall be deferred until the Constitution is amended.

#### **Article 45**

Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement.

### **PART VII**

#### **The Constitutional Council**



**Article 46**

The Constitutional Council shall have jurisdiction in matters pertaining to the Constitution. It shall rule on the constitutionality of laws. It shall be the organ regulating the functioning of the institutions.

**Article 47**

(1) The Constitutional Council shall give a final ruling on:

- the constitutionality of laws, treaties and international agreements;
- the constitutionality of the standing orders of the National Assembly and the Senate 'prior to their implementation;
- conflict of powers between State institutions; between the State and the Regions, and between the Regions.

(2) Matters may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators.

Presidents of regional executives may refer matters to the Constitutional Council whenever the interests of their Regions are at stake.

(3) Laws as well as treaties and international agreements may, prior to their enactment, be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly, one-third of the Senators, or the Presidents of regional executives pursuant to the provisions of paragraph (2) above.

- Enactment deadlines shall cease to lapse once an instrument has been referred to the Constitutional Council.

(4) The Constitutional Council shall advise in matters falling under its jurisdiction.

**Article 48**

(1) The Constitutional Council shall ensure the regularity of presidential elections, parliamentary elections and referendum operations. It shall proclaim the results thereof.

(2) Any challenges in respect of the regularity of one of the elections provided for in the preceding paragraph may be brought before the Constitutional Council by any candidate, political party that participated in the election in the constituency concerned or any person acting as Government agent at the election.

(3) Any challenges in respect of the regularity of a referendum may be referred to the Constitutional Council by the President of the Republic, the President of the National Assembly the President of the Senate, one-third of the members of the National Assembly or one-third of the Senators.

#### **Article 49**

In any case, the Constitutional Council shall give ruling within a period of 15 (fifteen) days once a matter has been referred to it. However, at the request of the President of the Republic, such time-limit may be reduced to 8 (eight) days.

#### **Article 50**

(1) Rulings of the Constitutional Council shall not be subject to appeal. They shall be binding on all public, administrative, military and judicial authorities, as well as, on all natural persons- and corporate bodies.

(2) A provision that has been declared unconstitutional may not be enacted or implemented.

#### **Article 51**

(1) The Constitutional Council shall comprise 11 (eleven) members designated for a non-renewable term of office of 9 (nine) years.

These members shall be chosen from among personalities of established professional renown.

They must be of high moral integrity and proven competence.

(2) Members of the Constitutional Council shall be appointed by the President of the Republic.

They shall be designated as follows:

- three, including the President of the Council, by the President of the Republic;
- three by the President of the National Assembly after consultation with the Bureau;
- three by the President of the Senate after consultation with the Bureau;
- two by the Higher Judicial Council.

Besides, the eleven members provided for above, former Presidents of the Republic shall be ex-officio members of the Constitutional Council for life.

In case of a tie, the President of the Constitutional Council shall have the casting vote.

(3) In the event of the death or resignation of a member or any other cause of incapacity or inability duly established by the competent bodies provided for by law, a replacement shall be designated by the competent authority or body concerned and appointed. to complete the term of office.

(4) Members of the Constitutional Council shall take the oath of office as laid down by law before Parliament meeting in congress.

(5) The duties of member of the Constitutional Council shall be incompatible with those of member of Government, of member of Parliament or of the Supreme Court. Other incompatibilities and matters relating to the status of members, namely obligations, immunities and privileges shall be laid down by law.

#### **Article 52**

A law shall lay down the organization and functioning of the Constitutional Council, the conditions for referring matters to it as well as the procedure applicable before it.

### **PART VIII**

#### **The Court of Impeachment**

#### **Article 53**

(1) The Court of Impeachment shall have jurisdiction, in respect of acts committed in the exercise of their functions, to try the President of the Republic for high treason and the Prime Minister, members of Government and persons ranking as such and senior government officials to whom powers have been delegated in pursuance of Articles 10 and 12 above, for conspiracy against the security of the State.

(2) The organization, composition and the conditions under which matters shall be referred to it as well as the procedure applicable before the Court of Impeachment shall be laid down by law.

### **PART IX**

#### **The Economic and Social Council**

#### **Article 54**

There shall be an Economic and Social Council whose composition, duties and organization shall be laid down by law.

### **PART X**

#### **Regional and Local Authorities**

### **Article 55**

(1) Regional and local authorities of the Republic shall comprise Regions and Councils.

Any other such authority shall be created by law.

(2) Regional and local authorities shall be public law corporate bodies. They shall have administrative and financial autonomy in the management of regional and local interests. They shall be freely administered by councils elected under conditions laid down by law.

The duty of the councils of regional and local authorities shall be to promote the economic, social, health, educational, cultural and sports development of the said authorities.

(3) The State shall exercise supervisory powers over regional and local authorities, under conditions laid down by law.

(4) The State shall ensure the harmonious development of all the regional and local authorities on the basis of national solidarity, regional potentials and inter-regional balance.

(5) The organization, functioning and financial regulations of regional and local authorities shall be defined by law.

(6) The rules and regulations governing councils shall be defined by law.

### **Article 56**

(1) The State shall transfer to Regions, under conditions laid down by law, jurisdiction in areas necessary for their economic, social, health, educational, cultural and sports development.

(2) The law shall define:

- the sharing of powers between the State and Regions in the areas of competence so transferred.

(3) The resources of the Regions.

(4) The land and property of each region.

### **Article 57**

(1) The organs of the Region shall be the Regional Council and the President of the Regional Council.

The Regional Council and the President of the Regional Council shall function within the framework of powers transferred to the Region by the State.

(2) The Regional Council shall be the deliberative organ of the Region. Regional Councillors whose term of office shall be 5 (five) years shall comprise :

- divisional delegates elected by indirect universal suffrage;

- representatives of traditional rulers elected by their peers.

The Regional Council shall reflect the various sociological components of the Region.

The system of election, number, proportion by category, rules governing ineligibility, incompatibilities and emoluments of Regional Councillors shall be laid down by law.

(3) The Regional Council shall be headed by an indigene of the Region elected from among its members for the life of the Council.

The President of the Regional Council shall be the executive organ of the Region. In this capacity, he shall be the interlocutor of the State representative. He shall be assisted by a Regional Bureau elected at the same time as himself from among the members of the Council. The Regional Bureau shall reflect the sociological components of the Region.

(4) Members of Parliament of the Region shall sit in the Regional Council in an advisory capacity.

#### **Article 58**

(1) A delegate, appointed by the President of the Republic shall represent the State in the Region. In this capacity, he shall be responsible for national interests, administrative control, ensuring compliance with laws and regulations, as well as maintaining law and order. He shall, under the authority of the Government, supervise and co-ordinate civil State services in the Region.

(2) He shall exercise the supervisory authority of the State over the Region.

#### **Article 59**

(1) The Regional Council may be suspended by the President of the Republic where such organ:

- carries out activities contrary to the constitution;
- undermines the security of the State or public law and order;
- endangers the State's territorial integrity.

The other cases of suspension shall be laid down by law.

(2) The Regional Council may be dissolved by the President of the Republic, after consultation with the Constitutional Council in all the cases provided for under paragraph (1) above.

The other cases of dissolution shall be laid down by law.

(3) The automatic replacement of the said organ by the State in the cases provided for under paragraphs (1) and (2) above shall be decided by the President of the Republic.

(4) The conditions of implementation of this article shall be determined by law.

#### **Article 60**

(1) The President and the Bureau of the Regional Council may be suspended by the President of the Republic where such organs:

- carry out activities contrary to the Constitution;
- undermine the security of the State or public law and order;
- endanger the State's territorial integrity.

The other cases of suspension shall be laid down by law.

(2) The President and the Bureau of the Regional Council may be dismissed by the President of the Republic, after consultation with the Constitutional Council in all the cases provided for under paragraph (1) above.

The other cases of dismissal shall be laid down by law.

(3) The automatic replacement of the said organ by the State in the cases provided for under paragraphs (1) and (2) above shall be decided by the President of the Republic.

(4) The conditions of implementation of this article shall be determined by law.

### **Article 61**

(1) The following provinces shall become Regions:

- Adamaoua;
- Centre;
- East;
- Far North;
- Littoral;
- North.
- North-West;
- West;
- South;
- South-West.

(2) The President of the Republic may, as and when necessary:

- a) change the names and modify the geographical boundaries of the Regions listed in paragraph (1) above;
- b) create other Regions. In this case, he shall give them names and fix their geographical boundaries.

### **Article 62**

(1) The aforementioned rules and regulations shall apply to all regions.

(2) Without prejudice to the provisions of this Part, the law may take into consideration the specificities of certain Regions with regard to their organization and functioning.

## **PART XI**

### **Amendment of the Constitution**

### **Article 63**

(1) Amendments to the Constitution may be proposed either by the President of the Republic or by Parliament.

(2) Any proposed amendment made by a member of Parliament shall be signed by at least one-third of the members of either House.

(3) Parliament shall meet in congress when called upon to examine a draft or proposed amendment. The amendment shall be adopted by an absolute majority of the members of Parliament. The President of the Republic may request a second reading; in which case the amendment shall be adopted by a two-third Majority of the members of Parliament.

(4) The President of the Republic may decide to submit any bill to amend the Constitution to -a referendum; in which case the amendment shall be adopted by a simple majority of the votes cast.

### **Article 64**

No procedure for the amendment of the Constitution affecting the republican form, unity and territorial integrity of the State and the democratic principles which govern the Republic shall be accepted.

## **PART XII**

### **Special Provisions**

#### **Article 65**

The preamble shall be part and parcel of this Constitution.

#### **Article 66**

The President of the Republic, the Prime Minister, Members of Government and persons ranking as such, the President and Members of the Bureau of the National Assembly, the President and Members of the bureau of the Senate, Members of Parliament, Senators, all holders of an elective office, Secretaries-General of Ministries and persons ranking as such, Directors of the Central Administration, General Managers of public and semi-public enterprises, Judicial and Legal Officers, administrative personnel in -charge of the tax. base, collection and handling of public funds, all managers of public votes and property, shall declare their assets and property at the beginning and at the end of their tenure of office.

The other categories of persons to whom the provisions of this article shall apply and the conditions of implementation thereof shall be determined by law.

## **PART XIII**

### **Transitional and Final Provisions**

#### **Article 67**

(1) The new institutions of the Republic provided for under this Constitution shall be set up progressively.

(2) While the institutions are being set up and until such time that they are set up, the existing institutions of the Republic shall remain in place and shall continue to function:

a) The incumbent President of the Republic shall remain in office until the end of his current term, subject to the implementation of the provisions of Article 6 (4) of this Constitution;

b) The Members of Parliament of the National Assembly shall remain in office until the end of their current term, subject to the implementation of the provisions of Article 8 (12) above.

(3) The National Assembly shall exercise full legislative power and enjoy all Parliamentary prerogatives until the Senate is set up.

(4) The Supreme Court shall perform the duties of the Constitutional Council until the latter is set up.

(5) The territorial organization of the State shall remain unchanged until the Regions are set up.

#### **Article 68**

The legislation applicable in the Federal State of Cameroon and in the Federated States on the date of entry into force of this Constitution shall remain in force insofar as it is not repugnant to this Constitution, and as long as it is not amended by subsequent laws and regulations.

#### **Article 69**

This law shall be registered and published in the *Official Gazette* of the Republic of Cameroon in English and French and implemented as the Constitution of the Republic of Cameroon.

**Yaounde, 18 January 1996. Paul Biya, *President of the Republic***