

## **COURT PRACTICE OF THE SOUTH AFRICAN REPUBLIC ON PROTECTION OF THE RIGHT TO HEALTH**

**Anastasia Belousova<sup>1\*</sup>, Alexander Belousov<sup>2</sup>**

<sup>1</sup>Dr. of International Law, RUDN-University, RUSSIAN FEDERATION, belousova.rudn@gmail.com

<sup>2</sup>Full Professor of History, RUDN-University, RUSSIAN FEDERATION, a.belousov@rudn.ru

\*Corresponding Author

### **Abstract**

The article explores the issues regarding the protection of the right to health under the Constitutional Court of South Africa and focuses on the analysis of specific court decisions, which are an example of the good practice of the state and testify to the importance of the right to health as one of the fundamental human rights.

The purpose of the research is to study the judgments of the Constitutional Court of South Africa that bear positive examples of judicial protection of the human right to health, which can be adopted by other states for the effective realization of the human right to health..

The research findings laid grounds for recommendations to states on judicial protection of the right to health.

The relevance of the research topic is due to the importance of the human right to health and the state's obligations to protect this right, which is also confirmed by the fact that one of the Millennium Development Goals until 2030 (SDG 3) is dedicated to ensuring a healthy lifestyle and promoting well-being for everyone in any age.

The theoretical significance of the research stems from the fact that the a detailed analysis of court decisions of the Constitutional Court of South Africa is useful as an example of the promising practice of states regarding the protection the right to health.

In conclusion, conclusions are drawn on the effectiveness of judicial protection of the right to health in South Africa.

**Keywords:** right to health, human rights, health care, judicial protection.

### **1. INTRODUCTION**

Recently, there has been a tendency to intensify the judicial authorities of various states in the interpretation and application of the right to health in accordance with international legal standards. Such activity of the national judicial authorities in this area has a beneficial effect not only on improving the work of the national healthcare system, but also on increasing the number of states parties to the main international human rights agreements (for example, due to the recommendation of the Constitutional Court of South Africa in 2015 it became the 163rd state -participant of the ICESCR), which is important in the matter of universalization of the main international human rights treaties.

However, despite the recognition of the importance of the right to health, as well as its universal recognition and consolidation in various international and national regulations, the achievement of the goal of universal coverage of the population with medical services encounters many obstacles of an economic, social, legal, scientific and other nature, which requires diverse efforts of states and other subjects of international

relations to overcome them. Judicial defense plays a huge beginning in ensuring health, and decisions of national judicial bodies can be regarded as a positive practice of states.

### **1.1 Research Hypothesis**

The analysis of the jurisprudence of a number of states confirmed that the number of cases of violation of the right to health examined in the courts of these states does not reflect the real picture. Obviously, with all the necessary conditions of legal protection in these states, the number of cases in courts on violations of the right to health could be much larger. Moreover, it is revealed that wealthy people often resort to means of judicial protection of the right to health than citizens living in poverty.

The positive practice of the South African court is of interest in the context of the obligations of states to ensure access to effective remedies in violation of the right to health.

Today, the world has seen a positive trend towards the effective protection of the right to health by national judicial institutions. Judicial decisions (1) are increasingly being made in favor of victims of infringement of their right to health, especially for people from among the most vulnerable categories of the population.

### **1.2. Research Goal**

The above goal has specified a list of relevant tasks. It includes an analysis of specific judgments of the Constitutional Court of South Africa, the identification of important conceptual elements that indicate the obligation of the state to guarantee the availability, availability, acceptability and quality of health services, as well as the task to determine the relationship between the human right to health, protected in court and other social human rights

### **1.3. Research methods and materials**

The methodological basis of the study rested on qualitative approach to analysis. It incorporated dialectic, historical, inductive, deductive, analytical methods, as well as formal legal, comparative legal, statistical methods to process the data obtained.

## **2. RESEARCH FINDINGS**

### **2.1. The Obligation to Ensure full Coverage of the Population with Drugs**

In this case, one can cite the judicial practice of the state of South Africa as a vivid example. One of the most interesting cases is the case "Minister of Health against the campaign for free access to medicines" (2). The South African Constitutional Court ruled that a restriction imposed by the South African government on the free distribution of an antiretroviral drug that is designed to prevent mother-to-child transmission of HIV infection is nothing more than a violation of a section of the South African Constitution that "everyone has the right to access to medical care and treatment, including reproductive health care ... "(3). Despite the fact that this case concerned access to the drug "nevirapine" in the course of its clinical trials, the Court made a resonant conclusion, which stated that the need for such a drug is so huge that its use should be ensured everywhere. The court in this case established: there should be no restrictions in the distribution of this drug until medical research work on the development of its analogue is completed. Based on these needs, the Court concluded that the state program for the implementation of socio-economic rights should "be balanced and have sufficient flexibility to take into account crisis situations", it should be designed for both short and medium term and long term; and the program, under which "a significant segment of society is excluded, can not be called either balanced or acceptable" (4)

The installation that the financial burden arising from the requirement to ensure full coverage of the population with the required drug rests entirely with the government, despite the fact that the drug indicated in the case was provided for 5 years free of charge by a private manufacturer (2).

This decision is also interesting because it prohibits the cessation of the provision of drugs to patients, which is carried out as part of an experiment for a certain period of time: if this drug helps patients, the latter have the right to receive this drug after the experiment expires, for which the government itself is directly responsible.

### **2.2. Ensuring the Constitutional Human Right to Health in the Context of a Lack of Resources to Finance the Health System**

However, in another case of Soobramani v. Minister of Health should be cited (5) court accepted took the opposite position. In this case, the same Constitutional Court of South Africa, on the contrary, upheld the

restriction imposed by local government on access to treatment (in this case, it was hemodialysis), on the basis of the fact that treatment was very expensive, and financial means were limited. According to the Constitutional Court, the position of the local authorities was “correct and correct”, taking into account the current situation and the circumstances of the case. This case, based on its comprehensive nature, deserves a more detailed analysis. The crux of the matter: the applicant (a 41-year-old unemployed) had diabetes, suffered from coronary heart disease and cerebrovascular accident, as a result of which he suffered a stroke in 1996 and kidney failure. By the time of applying to the Court, the patient was in the last stage of renal failure. The patient's life could only be prolonged by regular use of renal hemodialysis. The patient requested treatment at a local state hospital. However, the hospital was able to treat dialysis only to a limited number of patients. In the corresponding department of the hospital, there were only 20 devices for conducting dialysis treatment sessions, some of which were malfunctioning. It took four hours to conduct one treatment session, after which another two hours were spent on cleaning the device before it could be used again for the next patient.

Due to the limited technical base, the hospital administration was forced to refuse treatment to the patient. The reasons why the hospital refused to treat the patient were described in the official response signed by the doctor, who was a specialist in kidney diseases, who had worked in this hospital for 18 years. This doctor at that time also served as president of the South African Renal Society. In an official response, the doctor confirmed that the relevant hospital did not have sufficient resources for dialysis treatment of all patients suffering from chronic renal failure. This required additional devices and an additional number of medical personnel, however, the hospital's budget did not allow purchasing additional equipment and expanding the staff. It was also reported that the hospital's administration had repeatedly asked the authorities to increase the budget, but the regional medical department did not approve the application due to lack of funds in the regional budget. Due to lack of resources, the hospital followed the established order, namely: only patients suffering from acute renal failure who could be cured as a result of the use of dialysis therapy received automatic access to a doctor dealing with kidney diseases in the hospital. Those patients who, like the plaintiff, suffered from chronic renal failure (which is irreversible), did not receive automatic access to the dialysis therapy program.

The plaintiff, pointing to the requirement of section 27 (3) of the South African Constitution that “no one can be denied emergency medical treatment”, considered the refusal of him to be treated by the administration of the state hospital, a violation of his constitutional right - the right to life guaranteed in Section 11 of the Constitution of South Africa.

According to the Constitutional Court, in accordance with sections 26 and 27 (paragraphs 1, 2 and 3) of the Constitution, the South African government is obligated to provide people with housing, medical care, food suitable for drinking water and social security, the implementation of which depends on the state's availability of appropriate resources. Given the hospital's insufficient material and technical resources and high demand for procedures, a commitment to meet existing demand would mean that this demand cannot be met. It is in this context that paragraph 3 of section 27 of the Constitution should be considered, the Constitutional Court of South Africa pointed out.

In response to the plaintiff's claim that the state has an obligation regarding incurable diseases of citizens, the Constitutional Court did not support the plaintiff in the broad interpretation of the term “emergency medical treatment”, i.e. so that it covers the treatment of chronic diseases in order to prolong the patient's life. In this regard, the Constitutional Court noted that in order to prolong the life of the patient, regular renal dialysis sessions 2-3 times a week were required. This, in the Court's opinion, was not an “emergency medical treatment”, which was carried out on an emergency basis. The patient's condition, according to the Court, was the result of a deterioration in kidney function, which refers to an incurable disease. Consequently, the Court concluded that the requirement of paragraph 3 of section 27 of the Constitution did not apply to such cases.

The significance of this Decision of the Constitutional Court of South Africa is that it was the first case in South Africa, which directly addressed the issue of ensuring the constitutional human right to health in the context of a lack of resources to finance the health system. The Constitutional Court of South Africa found that lack of resources is an integral part of the problem of providing medical services in both public and private medical institutions. However, the South African Constitutional Court emphasized that the denial of medical care should be fully justified and justified.

### **2.3. Human Rights Restrictions**

The Supreme Court of South Africa has repeatedly supported the position of the Constitutional Court of

South Africa regarding restrictions on human rights. In particular, in case *B and Others v. Minister of Corrections*, the South African Supreme Court, reaffirming the state's obligation to provide antiretroviral drugs to HIV-infected patients, nevertheless concluded that this obligation is not absolute, because it is limited by the state's capabilities. In the framework of the case under review, the Supreme Court specified: in the event that the prison administration, due to budgetary constraints, cannot allow the treatment of patients from among the prisoners with any particular medicinal product, or in the event that treatment with such a drug places an unbearable financial burden on the state, it is perfectly acceptable for patients to be treated with a less effective drug that is not burdensome for the state budget, and this may be considered an "adequate medical treatment" in situations like these are (6).

## **2.4. Violation of the Right to Housing**

In the case «*Government of the Republic of South Africa and Ors v Grootboom and Ors*», 2000 (11), the Constitutional Court issued a verdict on the failure of the South African government to comply with the requirements of Art. 26 and 28 of the Constitution of South Africa, which guarantee the right to adequate housing (art. 26) and the right of the child to shelter (art. 28). The Constitutional Court recorded the absence in the current Housing Program of provisions that take into account the needs of homeless citizens, as well as relevant measures and procedures applied in such cases. The absence of these provisions in the current Housing Program, according to the Constitutional Court of South Africa, did not meet the minimum constitutional requirements in this matter. This lawsuit was initiated in connection with the eviction of illegal settlers who arbitrarily built slums from plastic and other materials in a sports center in the areas of Vollesedans. These slums lacked basic sanitation and electricity. A group of persons from these settlers, based on the provisions of Art. 26 and 28 of the Constitution of South Africa complained to various government agencies. Subsequently, the case came to the Supreme Court of South Africa. Considering the merits of the complaint, the Supreme Court of South Africa relied on the position of the Constitutional Court in the *Soobramoney* case, namely on the position of "judicial deference". As a result, the Supreme Court of South Africa confirmed the rights of illegal immigrants to use judicial remedies in order to achieve the progressive realization of the right enshrined in Art. 26 of the Constitution of South Africa (i.e. access to decent housing) and in Art. 28 of the South African Constitution, which provides for a child's right to shelter.

Considering this case, the Constitutional Court of South Africa, unlike the Supreme Court of South Africa, did not find any grounds for violation of Art. 28 of the Constitution of South Africa. At the same time, the Constitutional Court more widely interpreted the provisions of Art. 26 of the Constitution of South Africa. In his opinion, Art. 26 of the Constitution of South Africa obliges the Government of South Africa to develop and launch a comprehensive and integrated housing program. The Constitutional Court found that the Government of South Africa did not fulfill its constitutional obligation to those citizens who were deprived of their homes, and also did not provide appropriate measures for the progressive realization of the right to housing. In this regard, the Constitutional Court ordered the relevant state bodies of South Africa to develop a strategic plan of action on housing issues, create an appropriate housing fund, and establish permanent monitoring of the results of progressive measures taken in this area.

The South African Human Rights Commission fully supported the conclusion of the Constitutional Court and agreed to monitor the implementation of the Constitutional Court order and, if necessary, provide a report to the South African government on the results of the measures taken.

This decision of the Constitutional Court of South Africa was important to clarify the state policy of South Africa on housing issues. Subsequently, many municipalities took into account the prescription of the Constitutional Court in the preparation of the budget, especially with regard to persons in need of housing. For information, it should be noted that the plaintiffs in this case were satisfied in all aspects before the substantive consideration of the case in the Constitutional Court of South Africa. However, unfortunately, this ruling of the Constitutional Court of South Africa was not automatically extended to similar cases pending in court.

This case of the South African Constitutional Court is fundamentally different in that, based on the obligation of the ICESCR member states to progressively implement economic, social and cultural human rights, the South African Constitutional Court allows its application not only at the substantive law level, but also at the stage of the procedure choice legal protection. The Supreme Court of South Africa supported the position of the Constitutional Court expressed in the *Soobramoney* case, and the Constitutional Court reaffirmed its previous position.

### **3. CONCLUSION**

Based on the fact that the right to health, enshrined in international law, is clearly individualistic in nature, as well as on the basis of a study of judicial practice in South Africa, we can conclude that any lawsuit filed for violation of the right to health is conditional, those. in one case, the lawsuit may be acceptable for judicial review, and in the other case, inadmissible. A trend characterized, on the one hand, by an increase in the number of court cases on the protection of the right to health in national courts, and, on the other hand, by an increase in the fears of scientists that forensic remedies in states can overshadow the real causes that give rise to violation of the right to health, which ultimately will not lead to a global decrease in mortality due to disease.

Extremely important from a theoretical point of view is the position of the Constitutional Court of South Africa, especially on the concept of “progressive realization” of the right to health, namely: gradually, depending on the state’s availability of appropriate resources, the right to health in all cases of violation must be ensured by the possibility judicial protection, because the full observance of the right to health directly depends on ensuring other fundamental human rights, especially the right to life.

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