
JUSTICIABILITY OF THE RIGHT TO HOUSING – THE SOUTH AFRICAN EXPERIENCE

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Everyone has the right to have access to adequate housing

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right

No one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances. No legislation may permit arbitrary evictions.

Sec 26, Constitution of the Republic of South Africa, 1996

The UN Committee on Economic, Social and Cultural Rights has adopted the analysis of a number of commentators, that human rights create three forms of state obligation: ‘The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*’ the right.¹ Some commentators add a further element, namely the obligation to ‘*promote*’ the right.²

The South African Constitutional Assembly explicitly adopted this formulation. Section 7(2) of the Constitution states that ‘The State must respect, protect, promote and fulfil the rights in the Bill of Rights’.

In this paper I examine how the right to housing is justiciable, using this typology as a convenient means of analysis.

¹ *General Comment 14*, E/C.12/2000/4 (The right to the highest attainable standard of health), paragraph 33

² Craven *The International Covenant on Economic, Social and Cultural Rights* (Clarendon, Oxford, 1995) at 109.

The leading South African case on the right to housing - in fact our landmark case on social and economic rights generally - is *Government of the Republic of South Africa and others v Grootboom and others*.³

I will refer later to the case in more detail. At this stage, it may be helpful to set out the Constitutional Court's explanation of how the three parts of sec 26 of our Constitution are connected with each other. Section 26(1) delineates the general scope of the right: everyone has the right of access to adequate housing. Section 26(2) speaks to the positive obligations imposed upon the state. And sec 26(3) spells out aspects of the negative right, by prohibiting arbitrary evictions.⁴

This analysis is important because it explains that sec 26(1) creates a general right. The content of the right is not limited to the duties in sec 26(2) or the prohibitions in sec 26(3): they are simply manifestations of the general right set out in 26(1).

To what extent, then, is the right to housing justiciable?

The obligation to 'respect' the right to housing

The obligation to 'respect' the right, requires the state to refrain from interfering directly or indirectly with the enjoyment of the right.⁵ In the words of the Constitutional Court,

*'Although the subsection [sec 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to housing.'*⁶

The obligation to 'respect' a right is of particular significance where the individual already enjoys the right to some extent, and there is a threat to remove it. In its General Comment 12, issued in 1999, the UN Committee explained the duty to 'respect' rights of access as follows, in relation to the right to food:

*'The obligation to respect existing access to adequate food requires State parties not to take any measures that result in preventing such access.'*⁷

³ 2001 (4) SA 46 (CC)

⁴ *Grootboom* at para [34], [38]

⁵ *General Comment 14*, E/C.12/2000/4, paragraph 33

⁶ *Grootboom* at para [34].

⁷ *General Comment 12*, E/C.12/1999/5, para 15.

In similar vein, Liebenberg has written that a violation of the duty to ‘respect’ a right ‘arises when the state, through legislative or administrative conduct, deprives people of the access they enjoy to socio-economic rights’.⁸

This approach was followed by the High Court in a matter involving a local council’s termination of water supply to a block of flats.⁹ The Court held that this amounted to a failure to ‘respect’ the right (of continuing access) to water, that this was prima facie in breach of the obligations of the local council (which was part of the state), and that accordingly there was an onus on the council to justify it in a manner consistent with the Constitution.

One can readily contemplate two sorts of situations in which the state may act in breach of the obligation to ‘respect’ the right to housing, resulting in a justiciable dispute.

First, a statute may permit procedurally or substantively unfair evictions. In that event, the validity of the law may be challenged; alternatively it may be contended that the law is to be interpreted in a manner which does not lead to a breach of the right to housing. In essence, this is what happened in the celebrated *Olga Tellis* case in the Supreme Court of India.¹⁰

Section 26(3) of the Constitution expressly gives effect to this meaning of ‘protect’: ‘No law may permit arbitrary evictions’. A law is ‘arbitrary’ when it does not provide sufficient reason for the eviction, or is procedurally unfair.¹¹

Secondly, the state (or a private party)¹² may bring proceedings for the eviction of persons who will be left homeless if they are evicted. In that event, a court will have regard to the obligation on the state¹³ to

⁸ Liebenberg ‘Socio-economic rights’ in Chaskalson and others (eds) *Constitutional Law of South Africa* at 41-28

⁹ *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W)

¹⁰ *Tellis and others v Bombay Municipal Corporation and others* [1987] LRC (Const) 351

¹¹ *First National Bank v Commissioner for SARS; first National Bank v Minister of Finance* 2002 (7) BCLR 663 (CC) at [100]

¹² The passage I have quoted from *Grootboom* is particularly interesting because it clearly places a negative duty upon non-state actors as well as upon the state. The ‘horizontal’ application of the Bill of Rights, in relations between private individuals, is expressly contemplated by sec 8(2) of the Constitution. Whether a provision in the Bill of Rights binds natural or juristic persons, and if so the extent to which this happens, depends upon the nature of the right and the nature of the duty imposed by the right. However, in the paper I focus on the question of justiciable obligations on the state.

¹³ The courts are part of the state, and are bound by the Bill of Rights: sec 8(1). This helps to avoid the tortuous US ‘state action’ doctrine, with all of its inconsistencies.

‘respect’ the right to housing, in deciding whether to order an eviction, and if so, when and under what circumstances the eviction may take place. A court may for example stay the eviction to a stipulated date, in order to enable the evictees to find another place where they can live. A court may also order an eviction conditional upon the state’s first finding another place where the evictees may settle.

An example of the potential reach of the duty to ‘respect’ is found in a case presently before our High Court.¹⁴ A firm of attorneys in a small town obtained judgments on behalf of their clients against poor debtors, in respect of very small amounts of money. They then had the debtors’ houses sold in execution, and themselves bought the houses at the sale, at knock-down prices. This became a very lucrative practice for the attorneys concerned. The consequence has been that poor people have been rendered homeless as a result of trifling debts. In this case it is contended that the relevant section of the Magistrate’s Courts Act,¹⁵ which permits the sale in execution of immovable property where less invasive means are available of satisfying the debt, is inconsistent with the obligation on the state to ‘respect’ the right to housing.

The argument may or may not be sustained:¹⁶ but there can be no doubt that it raises a justiciable issue. The obligation to ‘respect’ the right to housing creates classically justiciable negative duties.

The duty to ‘protect’ the right to housing

The obligation to ‘protect’ a right requires the state to take measures that prevent third parties from interfering with the right.¹⁷

In South Africa, the state has given effect to this duty through the enactment of statutes which give protection to people whose tenure of their homes is insecure, and who are vulnerable to eviction.¹⁸ The statutes set out fair procedures and criteria for eviction. The duty on the state to ‘protect’ the right to housing is critical to the process of judicial interpretation of these statutes. This is so because of the constitutional origin of the statutes, and because the statutes require judgments to be made on matters such

¹⁴ *Van Rooyen and others v Stoltz and others* (Cape Provincial Division case no 8618/01)

¹⁵ Section 66(1)(a), Act 32 of 1944

¹⁶ A similar argument was raised by the *amicus curiae* in the Constitutional Court in *De Beer NO v North Central Local Council and others* 2002 (1) SA 429 (CC). In that case, a provincial ordinance empowered local councils to sell the property of ratepayers in execution in order to satisfy arrears in respect of municipal rates, without first executing against the movable property of the ratepayer. The Constitutional Court did not address this issue in its judgment.

¹⁷ *General Comment 14*, E/C.12/2000/4, paragraph 33; Craven *op cit* at 112

¹⁸ The most important statutes are the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Informal Land Rights Act 31 of 1996; the Extension of Security of Tenure Act 62 of 1997; and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

as whether eviction is 'just and equitable' under the circumstances. The constitutional obligation on the state to 'protect' the right to housing is thus an important interpretive tool.

The new statutes inevitably impact on the traditional rights of land-owners. As our Constitution also protects the right to property, it is not surprising that questions are raised about the validity of the statutes. This in turn raises issues which are familiar to courts which have a constitutional jurisdiction, and which usually arise in the context of challenges to the validity of rent control statutes.¹⁹

In this context, the right to housing becomes justiciable in another way. Where the constitutionality of the legislation is challenged, as has happened in a case currently before the High Court,²⁰ the defence can and will be raised that the state was in fact under a constitutional duty to protect the existing housing of people who are otherwise vulnerable. The obligation to 'protect' the right to housing will therefore give rise to justiciable issues in relation to the validity of the statutes which have been enacted.

If the obligation to 'protect' the right to housing places an obligation on the legislature to enact protective legislation, this raises the difficult question of what is to happen when the state fails in its duty to do this, thus leaving people vulnerable to an infringement of their rights by third parties.

There is no reason why a court can not, in appropriate circumstances, declare that the legislature is under a duty to protect the right concerned, and that it has failed to perform its duty by failing to enact suitable legislation. The European Court of Human Rights has done this.²¹ It has in effect happened in Germany, where the Federal Constitutional Court has on occasion instructed the legislator to enact laws to remedy a constitutional defect in the civil code. The court describes the defect, but does not prescribe the form of the legislation.²² The UN Committee has similarly had no difficulty in finding such a duty to legislate in specific circumstances.²³

¹⁹ See for example *Thakur Baksa Singh v United Provinces* 1946 AC 327; *Morgan v Attorney-General* [1988] LRC (Const) 468 (PC); *Velosa Barreto v Portugal* European Court of Human Rights, Series A, No 334 (21 November 1995); *Yee v City of Escondido* 503 US 519 (1992); *Mellacher v Austria* (1990) 12 EHRR 391; *La Compagnie Sucriere Bel Ombre v Government of Mauritius* Privy Council Appeal 46 of 1995 (13 December 1995); *Blake v Attorney-General* [1982] IR 117.

²⁰ *City of Cape Town v Rudolph and others* (Cape Provincial Division case no 8860/01)

²¹ *X & Y v The Netherlands* 8 EHRR 235

²² Unpublished remarks by Judge Dieter Grimm at a CALS Conference, South Africa, July 1997.

²³ For examples of resolutions to this effect by the UN Committee, particularly (but not limited to) the sphere of employment, see *Craven op cit* at 112-113

There is however an obvious difficulty: what is to happen if the legislature persists in its breach of its obligations even after a court has made such a declaration? In theory, the court could order the legislature to enact appropriate legislation. However, such an order would be very difficult to enforce.

Justiciability is very clear in relation to the common law, which is under the control of the courts. Our law is replete with instances, particularly in the law of delict (tort) and administrative law, where the question which the courts have to determine is whether the defendant or respondent acted 'reasonably'. Where a court has to decide this, it can and should develop the nature and extent of the duty on state officials with due regard to the requirements of the Constitution, and in particular the obligation of the state to 'protect' the rights of people affected by state action or inaction.²⁴

In South Africa, there has been a vigorous judicial debate about the impact on the common law rights of land-owners of the constitutional injunction that 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all of the relevant circumstances'. The first part of the injunction is clear: extra-judicial evictions, of the kind which were common in apartheid South Africa, are prohibited. But what is one to make of the statement that the court is to make the order 'after considering all of the relevant circumstances'? Four possibilities present themselves.

One possibility is that the words have no real meaning. After all, courts must always consider 'all relevant circumstances' before making their decisions - that is in the nature of the judicial process. But it seems unlikely that the courts will decide that the Constitutional Assembly has created a meaningless phrase.

²⁴ For an example of this, see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC). This was a delictual action for damages based on the failure of the courts and the police to protect a woman against assault, where there was good reason to anticipate such assault. The Constitutional Court has held that the common law must be developed in a manner which has regard to the positive duties placed on the state by the Bill of Rights.

A second possibility is that the legislature, in carrying out its duty to ‘protect’ the right to housing, must prescribe what circumstances are ‘relevant’ in particular situations. This is what the South African Parliament has in fact done, particularly through the statutes to which I have referred.

A third possibility is that it reverses the onus in proceedings for eviction. Under our common law, it is a long-established rule that in eviction proceedings the owner of land needs only to allege and prove that he or she is the owner, and that the defendant is in possession. The onus then shifts to the defendant to prove justification for his or her occupation.²⁵ It has been contended that the effect of the constitutional injunction is to shift the onus onto the owner, to prove ‘all the relevant circumstances’.²⁶

A fourth possibility is that it gives the courts an equitable discretion to refuse to order eviction, even where under the common law the plaintiff would have been entitled to such an order, or a discretion to stay the eviction order. This approach has been rejected by the Supreme Court of Appeal, the highest court in non-constitutional matters. It has held that ‘all the relevant circumstances’ are those circumstances which are relevant in terms of the generally applicable law.²⁷ On this approach, the Constitution does not confer on the courts an equitable discretion to consider other circumstances other than those laid down in the prevailing law.

But whatever the meaning of the injunction in sec 26(3), one thing is clear: the obligation to ‘protect’ the right to housing is justiciable in a number of different ways.

The obligation to ‘promote’ the right to housing

To ‘promote’ a right means to further it or advance it.²⁸ The obligation to advance the right to housing clearly places a positive duty on the state.²⁹

²⁵ *Graham v Ridley* 1931 TPD 476

²⁶ For conflicting views on this see for example *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) and *Ellis v Viljoen* 2001 (4) SA 795 (C). The weight of judicial opinion favours the approach in *Ellis*, that the defendant bears the onus of justifying his or her occupation. The Supreme Court of Appeal has held that under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, the evidential onus lies on the occupier. It has left open the question of where the ultimate onus lies: *Ndlovu v Ngcobo*; *Bekker v Jika* (SCA case no 240/2001 and 136/2002, judgment delivered 30 August 2002).

²⁷ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at [42]

²⁸ *S v Letaoana* 1997 (11) BCLR 1581 (W)

²⁹ Van Hoof ‘The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views’ in Alston and Tomasevski (eds) *The Right to Food* (1985) 97

In the context of the right to housing, this appears to mean the duty to create an enabling environment which will further or advance the realisation of the right to housing. In the words of the Constitutional Court in the *Grootboom* case,

‘... it is not only the State who is responsible for the provision of houses, but ... other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all levels of our society.’³⁰

I would suggest that the obligation to ‘promote’ is of particular relevance to the decisions of administrative bodies. In their decisions, they must have proper regard to the obligation on them to promote the realisation of the right to housing.

Assume, for example, that a town planning decision prescribes minimum plot sizes in a residential area. This has the effect of preventing people from obtaining housing in a well located area. If an application is made for judicial review of that decision, the fact that the decision has the effect will be relevant to the determination of the validity of the decision. It will in the nature of things be only one of a number of factors - but it will be a highly relevant factor.³¹

³⁰ *Grootboom* at [35]

³¹ An interesting question is whether a decision by a public authority to bring judicial proceedings for the eviction of people living on its land, is reviewable on these grounds, or whether it is reviewable at all: see the pre-constitutional decision of *Kayamandi Town Council v Mkhwaso and others* 1991 (2) SA 630 (C), and *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W).

A practical example of the relevance of the right to housing to administrative decisions, arose in a recent case in the Constitutional Court. The homes of several hundred people had been washed away by floods. The government decided to establish a temporary settlement camp on land which it owned. The neighbours objected, *inter alia* on the basis that would adversely affect the value of their property, and would disturb the peaceful environment in which they lived. They obtained an interdict, and the government appealed (with the support of the flood victims) to the Constitutional Court. That Court commented as follows:

‘Although the interests of the Kyalami residents [the neighbours] may be affected this case concerns not only their interests, but also the interests of flood victims. The flood victims have a constitutional right to be given access to housing.... The fact that property values may be affected by low cost housing development on neighbouring land is a factor that is relevant to the housing policies of the government and to the way in which government discharges its duty to provide everyone with access to housing. But it is only a factor and cannot in the circumstances of the present case stand in the way of the constitutional obligation that government has to address the needs of homeless people, and its decision to use its own property for that purpose.’³²

This illuminates the fact that the right to housing (like other social and economic rights) is a factor which has to be taken into account, with due weight, in all administrative decisions which bear on the realisation of the right. It creates almost a constitutional presumption in favour of that administrative decision which most favours the realisation of the right to housing. Of course there will be other relevant factors - which may include other provisions of the Bill of Rights. The weighing of all of those factors is a classic exercise of the judicial power.

The obligation to ‘fulfil’ the right to housing

For good reason, the obligation to ‘fulfil’ the right has traditionally been regarded as the most contentious of the components of social and economic rights. It requires the state to ‘adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realisation of the right’.³³ It has led some to the conclusion that these are not rights at all, but simply aspirations.

³² *Minister of Public Works and others v Kyalami Ridge Environmental Association and another* 2001 (3) SA 1151 (CC) at [107] to [108]

³³ *General Comment 14*, E/C.12/2000/4, paragraph 33

The Constitutional Court firmly rejected that approach in the *Certification* judgment:

*'... these rights are, at least to some extent, justiciable.... many of the civil and political rights ... will give rise to similar budgetary implications without compromising their justiciability.'*³⁴ *The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.'*³⁵

I have referred above to some of the ways in which the right to housing can be 'negatively protected'. In *Grootboom*, the Constitutional Court ventured into the question of when the right can be positively enforced.

What were the facts in *Grootboom*? About 900 people (adults and children) lived in appalling conditions. They decided to move out, and occupied vacant privately-owned land across the road. The owner, supported by the local council, obtained a magistrate's court order for their eviction. Their homes were

³⁴ It was not long before the Constitutional Court came face to face with the truth of this observation. In *August v Electoral Commission and others* 1999 (3) SA 1 (CC), an election was pending. The applicants were prisoners who asserted that they were being denied a classic civil and political right - the right to vote. To set up the necessary administrative infrastructure to enable them to vote, would have significant financial implications. The Court had no hesitation in finding that the state was obliged to take these steps to enable prisoners to vote.

³⁵ *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at [78].

demolished. They were now truly homeless: they could not go back to where they had come from, because other people had occupied that land. They had literally nowhere they could live. While there is a very large government housing programme, the waiting list is such that they would have to wait for many years, perhaps as many as twenty, for proper housing to be made available to them. Meanwhile they would have simply nowhere they could lawfully live. The government said that it could and would do nothing to assist them. They applied to court for an order on the government to provide them with housing or shelter, and basic services.

At the outset of the hearing in the Constitutional Court, counsel for the government made an offer of access to a piece of land, some building materials, and access to basic services to ameliorate their situation. The community accepted the offer. However, the government failed to honour the undertaking. While the case was still pending, the community brought an urgent interlocutory application to compel the government to honour its undertaking. The Court made an order accordingly, by consent.

Two weeks later, the Court gave its judgment in the main case. The Court noted that the state is under a constitutional duty to take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right of access to adequate housing. The Court noted that

*A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.*³⁶

However,

*The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.*³⁷

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 achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the

³⁶ At [41]

³⁷ At [43]

*measures are capable of achieving a statistical advance in the realisation of the right.... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*³⁸

*... the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.*³⁹

*The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight.*⁴⁰

*The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.*⁴¹

³⁸ At [44]

³⁹ At [64]

⁴⁰ At [65]

⁴¹ At [66]

So the government was in breach of its duties: it had focussed on its medium- to long-term housing programme, which aims to deliver adequate housing to all of those who are inadequately housed, to the exclusion of any immediate relief for those in a situation of crisis. This was not 'reasonable', as required by the Constitution. The question then became one of remedy.

Here the Court faced obvious difficulties. The question had been intensely debated at the hearing. On the one hand, the Grootboom community were only part of a much larger class of homeless people, or people in crisis. Why should they be given an order for immediate relief which would privilege them above so many other people similarly placed? Is this a right which can be enforced 'on demand'? What would the cost be? On the other hand, the Grootboom community were the only people before the Court. How could the Court not order relief for them, when they were in crisis, there had been a breach of their rights, and it was patently possible to remedy this at very limited cost? If we wish to encourage a human rights culture in which people assert their rights, surely we should reward them when they do so successfully?

These two approaches are set out in two carefully balanced passages:

*Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately.*⁴²

But

*I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.*⁴³

⁴² At [68]

⁴³ At [94]

The Court was spared having to decide this aspect of the matter. The government had made an offer of relief, which the Court had since made an order of Court. There was therefore no need for any specific relief to be ordered for the Grootboom community. So the Court made a declaratory order:

- (a) *Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated program progressively to realise the right of access to adequate housing*
- (b) *The program must include reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.*
- (3) As at the date of the launch of this application, the State housing program in the [relevant] area ... fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people ... with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.’⁴⁴

The impact of the judgment has been varied. Government has started shifting its housing programme to have regard to the needs of people in intolerable conditions, or threatened with eviction - a process which has recently been accelerated by a highly publicised land invasion. When local councils seek to evict homeless people, they no longer obtain a court order for the asking - courts increasingly ask the councils what they have done, and what they are going to do, to meet their *Grootboom* obligations in respect of the people concerned. But the Grootboom community are still living under highly unsatisfactory circumstances. Further litigation may result. Many other people continue to live in desperate circumstances. The picture is generally uneven, but I think there is no doubt that we have taken a major step forward.

Three reflections on the international law aspects of this may be relevant here.

First, the Court showed a great deal of interest in the General Comments of the UN Committee on Economic, Social and Cultural Rights. These General Comments were helpful both because of their standing in international law, and because they are authoritative interpretations of an instrument (the Covenant) which clearly had a major influence in the drafting of the South African Constitution.

⁴⁴

At [99]

Secondly, the Court's approach that particular attention has to be given to the needs of 'those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril' is consistent with the findings in the General Comments which require the prioritisation of the needs of vulnerable members of society, and which specifically require that 'disadvantaged groups ... should be ensured some degree of priority consideration in the housing sphere'.⁴⁵

Thirdly, the Court did not adopt the 'minimum core obligation' approach of the UN Committee in General Comment 3, which is to the following effect:

*'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were not to be read to establish such a minimum core obligation, it would be largely deprived of its raison d'être.... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'*⁴⁶

It has been argued that the concept of a minimum core was inherent in the requirement that the state take 'reasonable' measures to achieve the progressive realisation of the right. The Court concluded that there might be cases in which it would be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state were reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information was placed before the court to

⁴⁵ General Comment 4 *The Right to Adequate Housing* E/1992/23 paragraph 8(e). See also General Comment 3 *The Nature of State Parties' Obligations* E/1991/23 paragraph 12; General Comment 4 paragraph 11; and see also General Comment 7 *The Right to Adequate Housing: Forced Evictions* E/C 12/1997/4 paragraph 11.

⁴⁶ *General Comment 3*, paragraph 10

enable the court to determine it in any given context. In this case, there was not sufficient information for the court to determine what would constitute the minimum core obligation in the context of the Constitution.⁴⁷

⁴⁷

At [33]

Subsequently, the Constitutional Court has rejected the argument that there is a minimum core inherent in the general right of access to health care services in sec 27(1).⁴⁸ This subsection is in similar terms to the section 26(1) general right of access to adequate housing.

What *Grootboom* tells us is that the positive obligation to ‘fulfil’ the right to housing is justiciable even in resource-constrained situations. A judgment may not always result in an order for provision of specific benefits to specific individuals, but even where this does not happen, it can have results of a far-reaching and fundamentally important nature in the achievement of the right to housing.

That leaves one further, tantalising question: when will a court be most likely to make an order of specific housing benefits for specific litigants? Let me suggest some circumstances in which this is likely to happen:

First, when the case raises an equality issue. Equal access to the social and economic rights is plainly fundamental. The state may not discriminate in its fulfilment of the right to housing.⁴⁹ The right becomes directly enforceable through the mutual reinforcement of the equality right and the right to housing.

Secondly, where the case involves an administrative decision which raises familiar administrative justice issues going to the question of reasonableness.⁵⁰ And as I have suggested, the existence of the right to housing will itself have an impact in the judicial determination of whether the decision was reasonable.

Thirdly, where there has been a prior promise of a benefit, which has been broken. This of course raises the question of the doctrine of substantive legitimate expectation. The Court of Appeal in the UK has shown in the *Coughlan* case⁵¹ that a promise of a specific benefit to specific individuals can give rise to an enforceable claim to the actual benefit, and particularly where it is underlined by a constitutional or quasi-constitutional right.⁵² The matter has not yet been settled in South Africa.

⁴⁸ *Treatment Action Campaign and others v Minister of Health and others* (Case no 8/02, judgment delivered 5 July 2002) at [26] to [30]

⁴⁹ On the (justiciable) duty to ensure non-discriminatory enjoyment of the rights, see for example General Comment 3 paragraph 5, and General Comment 9 *The domestic application of the Covenant* E/C 12/1998/24 paragraph 9.

⁵⁰ I use the term ‘reasonableness’ as shorthand for the various tests which the courts in different jurisdictions use in assessing the validity of an administrative decision by reference to its substance.

⁵¹ *R v North and East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR, [2000] 3 All ER 850.

⁵² In *Coughlan*, this was article 8(1) of the European Convention on Human Rights, which provides that ‘Everyone has the right to respect for ... his home ...’. The Human Rights Act was shortly to come into effect, and would oblige the court to give effect to the European Convention.

Fourthly, where the government has already decided to provide the benefit, but has failed to implement that decision.⁵³ In such a case, there is no reason for the court to show any deference to governmental decisions about whether these particular people should receive some priority. The government has already made that decision, and has decided in favour of the people concerned. This situation is similar to the *Grootboom* interlocutory application. It is also similar to *State of Himachal Pradesh v Sharma*, where the Supreme Court of India ordered the government to proceed with a road which it had decided to build. The executive decision had been made, and the question of deference to the executive as to what should be provided, and where, did not arise:

*‘There is also no dispute that the State Government was willing and has indeed sanctioned money for the construction of the road. Constitutional and legal imperative on the part of the State to provide roads for the residents of hilly State is not in issue. So in this petition we need not examine how far is the obligation to provide roads.’*⁵⁴

Conclusion: Justiciability of the right to housing

There seems now to be general agreement that the various human rights are indivisible and interdependent. They are also all justiciable, in a variety of different ways. As it was put in *Grootboom*

⁵³ The *Grootboom* judgment at [42] is instructive here: ‘The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.’

⁵⁴ *State of Himachal Pradesh v Umed Ram Sharma* (1986) SCC 68 at para 13

'The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.' ⁵⁵

We will all have to learn how to do this, and to learn from one another. There will be continuing difficulties. But these difficulties should not blind us to the things that can plainly be done. As Professor Charles Black has pointed out in this context

⁵⁵

At [20]

‘When we are faced with the difficulties of “how much”, it is often helpful to step back and ask not “What is the whole extent of what we are bound to do?” but rather, “What is the clearest thing we ought to do first?”’⁵⁶

⁵⁶

Black A New Birth of Freedom (1997) 136-137