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Economic and Social Rights: Reflection to Celebrate the 60th Anniversary of the Declaration of Human Rights

STEVE KAHANOVITZ*

It was an honor to be gathered with the Maryland Law Symposium's audience, whose members, in a whole range of both individual and collective ways, have played an enormous role in the development and implementation of human rights throughout the world. In the brief space that this short essay allows, I am going to try to explain the developments in respect of socio-economic rights, particularly the right of access to housing in South Africa, and reach a conclusion.

I work at the Legal Resources Centre.¹ I have had the honor of leading it and some of its offices at different stages. My personal reflection stems from seeing houses often destroyed by an apartheid state, the enactment of the Constitution, the initial cases where we nervously litigated on socio-economic rights, and now the continued enforcement and interpretation of our Bill of Rights. In a country where unemployment and poverty are the most striking characteristics, and in a city where more than 400,000 people live in shacks, my reflection here is to set out briefly the manner in which the realization of socio-economic rights, as contained in the Constitution, can deliver a better life for all in the country; ensure that there is substantive equality before the law; and, in the words of the Preamble to the Constitution, "improve the quality of life of all citizens and free the potential of each person."

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1. More information about this organization is available at <http://www.lrc.org.za/About>.

My job primarily is to ensure that people who often would not be able to easily get access to lawyers enjoy what the Constitution provides. We seek to ensure that, as provided for in section 7(2) of the Constitution, the South African state strives to “respect, protect, promote and fulfil the rights in the Bill of Rights;” the constitution thus is intentioned to encourage transformation.²

How do we capture what clients often say about rights? I think, as Arthur Chaskalson pointed out during his opening speech,³ clients often know that their rights have been infringed. They come and see us as lawyers, not to tell them that their rights have been infringed, but to help them understand what is happening and to seek remedies. And under South Africa’s apartheid system, there were very few remedies. We grappled with the law; we looked for gaps as we interpreted statutes. Due to the influence of the Universal Declaration of Human Rights, and the adoption of our new South African Constitution, there are now remedies available in our courts, and hopefully our courts will continue to order them. Our state needs to create conditions in which poor communities are able to grapple, to mediate, and to negotiate on the basis of their rights, and if we are not able to achieve that—to go to court and actually ensure that there is a way in which their rights are respected, protected, promoted, and fulfilled—then we have not fulfilled what our Constitution provides.

On the day this symposium began, a letter written by the Centre on Housing Rights and Evictions (COHRE) was delivered to the Mayor of Durban, a city committed to the fulfillment of constitutional rights. COHRE works very closely with the social movement Abahlali baseMjondolo in Durban, which now represents thousands of homeless people in one of the fastest growing social movements in South Africa. In the letter, COHRE writes:

COHRE recently learnt of the threatened forced relocation of shack-dwellers in Siyanda in KwaMashu, to make way for the construction of a freeway in the area. According to a press statement by the newly-formed Siyanda branch of Abahlali baseMjondolo, at least 50 shacks have been demolished this year in the area by the eThekweni Municipality without notice, a court order or the provision of alternative accommodation.

2. See, e.g., *Bato Star Fishing v Minister of Env'tl. Affairs & Tourism* 2004 (4) SA 490 (CC) paras. 74, 76 (S. Afr.).

3. Arthur Chaskalson, *Dignity and Justice for All*, 24 MD. J. INT’L L. 24 (2009).

COHRE has learnt that eThekweni Municipality promised that all those displaced by the new MR-577 freeway would be moved to newly-constructed houses in the Kulula Housing Project. Siyanda residents have now been informed that an unspecified number of families will be moved to eNtuzuma and placed in 'transit camps,' which consist of government-built shacks or temporary structures, ordinarily used for emergency housing. As eNtuzuma is further on the periphery of the city, transport costs will be much higher for families as they will be further from jobs and schools. At the same time, the Municipality has reportedly decided to move families from other areas like Umlazi and Lamontville, who are not affected by the freeway construction, into the newly constructed Kulula houses. This has understandably caused much confusion within the community, and the situation is extremely tense at present.⁴

Now, none of that is particularly surprising in a rapidly urbanizing environment. None of it is particularly surprising in South Africa. The question that we need to ask is not why it is happening, but rather, whether and to what extent the government's carrying out, and people affected by, evictions and relocations are going to be informed and governed by the Constitution? Furthermore, to what extent do those most prejudiced accept that the Constitution will protect, respect, promote, and fulfil their rights, and that they will not have to face a situation where they feel so unprotected by the Constitution that letters like COHRE's have to be written on a daily basis.

THE DECLARATION AND THE SOUTH AFRICAN CONSTITUTION'S BILL OF RIGHTS

The South African people held their first democratic election on April 27, 1994. Legislatively, it was preceded by Act 200 of 1993—the Constitution of the Republic of South Africa—that enshrined South Africa's first Bill of Rights. It also provided for a whole range of transitional mechanisms and the creation of a Constitutional Assembly, which was to be the engine room for the drafting of South Africa's first democratically accepted constitution.

4. Letter from Salih Booker, Executive Director, Centre on Housing Rights and Evictions, to Obed Mlaba, Mayor, Durban, South Africa (Oct. 24, 2008), *available at* <http://www.abahlali.org/node/4266>.

The Universal Declaration of Human Rights (“Declaration”), signed sixty years ago and celebrated here at this symposium, has its roots in the U.N. Charter, which was signed on June 26, 1945. Notably, South Africa was one of the eight abstentions when forty-eight nations approved the Declaration. On June 26, 1955, exactly ten years after the signing of the U.N. Charter and seven years into the apartheid state, the Freedom Charter was signed in South Africa by those struggling against apartheid. The origins of South Africa’s Bill of Rights can be seen in it, and, significantly, it contains a range of aspirations in regard to socio-economic issues that today have been enshrined in our Constitution as socio-economic rights.⁵ In Mark Gevisser’s biography of Thabo Mbeki, he writes of a recognition within the African National Congress to move the Freedom Charter from the stage of being a Charter to ensuring that there could be a programmatic enshrinement of the rights referred to in the Charter—and perhaps that was one of the beginning points of ensuring that the South African Constitution eventually contained socio-economic rights.⁶

The South African Constitution was subjected to extensive debate, consultation, and thereafter certification⁷ by the Constitutional Court to ensure that its provisions complied with the principles for the Constitution which had been adopted as part of the transitional process. It was only after the Constitutional Court had certified the new Constitution that it became law as Act 108 of 1996.

The Constitution provides that in interpreting it, reference should be made to international law. Section 233 of the Constitution requires that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” Therefore, the Universal Declaration of Human Rights and the Covenants (even the not-yet-ratified International Covenant on Economic, Social and Cultural

5. The Freedom Charter’s recognition of civil, political, and socio-economic rights preceded the international Covenants by more than twenty years (in 1976, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) came into force). After the fall of the apartheid regime, South Africa later signed both Covenants on October 3, 1994, but has ratified only the ICCPR.

6. MARK GEVISSER, *THABO MBEKI: THE DREAM DEFERRED* (2007).

7. *In re Certification of the Amended Text of the Constitution of the Republic of S. Afr.*, 1996, 1997 (2) SA 97 (CC) (S.Afr.) (certifying the final constitution).

Rights) are key to the interpretation of our Bill of Rights. Chapter 2 of the South African Constitution provides for a Bill of Rights. Its last clause, section 39, provides that:

1. When interpreting the Bill of Rights, a court, tribunal or forum
 - a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.

Thus is set the constitutional and statutory basis for a solid relationship between international human rights law and the South African Constitution.

Following the Universal Declaration of Human Rights and the subsequent development of the Covenants, we have regularly identified the socio-economic rights in our constitution as those dealing with education, health, housing, and social welfare. The distinctions at times are problematic, and our courts have emphasized the indivisibility of all rights and the need to balance them.

The first Constitutional Court attempt to obtain definition in respect of economic, social, and cultural rights was in the *Soobramoney* case, in which the Constitutional Court considered whether a terminally ill diabetic was entitled to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution which entitle everyone to have access to health care services provided by the state.⁸ As practitioners representing poor people, the judgment quite honestly scared us: the defendant government had set out extensively and in a detailed fashion the financial position regarding KwaZulu hospitals and medicine, and we feared that in the future we would land up dealing with these matters almost as accountants and auditors rather than as defenders of constitutional rights.

SECTION 26 AND SOUTH AFRICA'S CONSTITUTIONAL RIGHT TO HOUSING

In the housing field, the South African Constitution at section 26 provides that:

8. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (interpreting section 27 of the South African Constitution) (S. Afr.).

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.⁹

The new democratically elected post-apartheid government was particularly keen to ensure delivery of housing. In the first five years of our democracy, various significant pieces of legislation were enacted to realize the rights contained in section 26, including the Housing Act,¹⁰ the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,¹¹ the Extension of Security of Tenure Act,¹² and several others.

Private land owners and the government often evict poor people, with the government often alleging it is for their own good and necessary for development purposes. Millions of poor people, who faced the brunt of eviction under the Prevention of Illegal Squatting Act¹³ of the apartheid state, and who had often been evicted without court order, could now rely on the housing provisions in the Constitution and the new legislation that was being enforced.

Accordingly, a single mother, Mrs. Ross,¹⁴ came to us after receiving an eviction notice, which we successfully challenged by arguing that the court summons was defective as it had been issued without the applicant even pleading the constitutionally required “all the relevant circumstances,” and was thus in violation of her section 26 rights under the Constitution.¹⁵

A gamut of cases followed in many of our provincial divisions of

9. S. AFR. CONST. 1996 s. 26.

10. Housing Act 107 of 1997.

11. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

12. Extension of Security of Tenure Act 62 of 1997.

13. Prevention of Illegal Squatting Act 52 of 1951.

14. *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C). Note that in later subsequent matters, this judgment was correctly held by the Supreme Court of Appeal to have been incorrect.

15. S. AFR. CONST. 1996 s. 26(3) (“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”).

the court. Conservative commentators regularly decried the judgments and stated that we were about to become like Zimbabwe (we still hear that sometimes), that private property was not being respected, etc.

Then came along the case which is now celebrated as the seminal case on socio-economic rights—the *Grootboom* case.¹⁶ It *inter alia* provided:

- (1) that socio-economic rights are justiciable;
- (2) that while the city of Cape Town had developed a plan for poor people in respect of housing, as it did not make provision for those most desperately in need, it did not pass constitutional muster; and
- (3) that ‘reasonableness’ was the key test for establishing whether policy met constitutional muster. The Court did not accept (and at a later stage outright rejected) the submission that it should develop a concept of the core content of a right to assist in interpretation.

For our purposes in celebration of the Universal Declaration of Human Rights, it is notable that the Court in *Grootboom* grappled with the extent to which the ICESCR should be used as a “guide to an interpretation of section 26 [of the Constitution]”:¹⁷

Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane* Chaskalson P, in the context of section 35(1) of the interim Constitution, said: “. . . public international law would include nonbinding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood”

. . . .
The amici submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant) is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. . . .

. . . .
The differences between the relevant provisions of the Covenant and our Constitution are significant in determining

16. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

17. *Id.* para. 28.

the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

- (a) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.
- (b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.¹⁸

The Court in *Grootboom* determined that concepts such as a state's "minimum core obligation" to provide housing may play out differently under the South African Constitution, and found the analysis of the U.N. committee interpreting the Covenant "helpful in plumbing the meaning of 'progressive realisation' [of the right to housing] in the context of our Constitution."¹⁹

The housing area remains one of the most litigated and contested areas in our law. We have seen since *Grootboom* several developments, and I will briefly try and explain them. Firstly, it has increased procedural protections available to poor people. Secondly, the rights first outlined in section 26 of the Constitution have now developed much more substantive content. The substantive issues that have generated the most comment are the rights to consultation²⁰ and provision of alternative accommodation prior to eviction.²¹

Thirdly, in opposing evictions, the litigation has assisted in developing an extended range of remedies available to poor people including: in *Fose* (not a housing rights case), the Constitutional Court held that "appropriate relief" must mean an effective remedy and therefore courts are not limited only to those remedies that existed prior to the new Constitution, and could fashion new types of remedies so as to enforce the Bill of Rights;²² thereafter in the

18. *Id.* paras. 26–28 (quoting *State v Makwanyane* 1995 (3) SA 391 (CC) para. 35 (S. Afr.)) (first emphasis added) (first and second alterations in original) (footnotes omitted).

19. *Id.* paras. 33, 45.

20. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.); *Occupiers of 51 Olivia Road, Beria Twp. v City of Johannesburg* 2008 (3) SA 208 (CC) (S. Afr.).

21. See *Port Elizabeth Municipality*, (1) SA 217; *Occupiers of 51 Olivia Road*, (3) SA 208.

22. *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC) para. 69 (S. Afr.).

Valhalla Park decision,²³ use was made of structural interdicts; *Modderklip*,²⁴ which required compensation; and in *Dada and Others*,²⁵ in which the Court went so far as to order the local authority to purchase property for the use of those living in it and facing eviction. Thus we have seen, in a range of different cases, courts grant declarators, or structural interdicts, or order damages, or the rebuilding of unlawfully demolished structures, and more as they develop these remedies.

Briefly stated, the owner and landlord of old now has to come to terms with the fact that neither international nor domestic law will allow apartheid-style evictions without court orders, as they took place at the behest of security forces, and that in seeking the evictions of persons who possibly are unlawfully occupying property, they would of necessity and obligation have to apply to evict those not wanting to leave by court order, which application would not be granted simply on the basis of non-payment of rent, or illegality of occupation.

In the course of these developments in our constitutional housing law, there has been much reliance on the Universal Declaration of Human Rights and on the Covenants. I have already pointed out how the Court referred to the International Covenant on Economic, Social and Cultural Rights in the *Grootboom* matter,²⁶ and has further done so since then. In other matters dealing with socio-economic rights, the following is also worthy of note.

In *Jaftha v Schoeman*,²⁷ when the Court considered the constitutionality of a law permitting “the sale in execution of peoples’ homes because they have not paid their debts, thereby removing their security of tenure,”²⁸ the Court noted:

Although the concept of adequate housing was briefly discussed in [*Grootboom*,] this Court has yet to consider it in any detail. This subject has however been dealt with by the United Nations Committee on Economic, Social and Cultural

23. *City of Cape Town v Rudolph* 2004 (5) SA (C) (S. Afr.).

24. *President of the Republic of S. Afr. v Modderklip Boerdery (Pty) Ltd.* 2005 (5) SA 3 (CC) at 4 (S. Afr.).

25. *Dada v Unlawful Occupiers of Portion 41*, No. 05/16270, slip op. (WLD Feb. 15, 2008) (S. Afr.), available at <http://www.saflii.org/za/cases/ZAGPHC/2008/48.pdf>.

26. *South Africa v Grootboom* 2001 (1) SA 46 (CC) (S. Afr.).

27. 2005 (2) SA 140 (CC) (S. Afr.).

28. *Id.* para. 1.

Rights . . . in the context of the International Covenant on Economic, Social and Cultural Rights In terms of section 39(1)(b) of the Constitution, this Court must consider international law when interpreting the Bill of Rights. Therefore, guidance may be sought from international instruments that have considered the meaning of adequate housing.²⁹

The Court then referred to Article 11(1) of the Covenant, which recognizes the right of everyone to an adequate standard of living for himself and his family, including *adequate food, clothing, and housing*, and to the continuous improvement of living conditions. The Court continued:

In its General Comment 4, the Committee, giving content to article 11(1) of the Covenant, emphasised the need not to give the right to housing a restrictive interpretation and to see it as “the right to live somewhere in security, peace and dignity.” The position of the Committee reflects the view adopted by this Court in *Grootboom*, that the right to dignity is inherently linked with socio-economic rights. It is important, for the purposes of this case, to point to the Committee’s recognition that “the concept of adequacy is particularly significant in relation to the right to housing.” While acknowledging that adequacy “is determined in part by social, economic, cultural, climatic, ecological and other factors”, it has identified “certain aspects of the right that must be taken into account for this purpose in any particular context.” Of relevance is the focus on security of tenure. The Committee points out that security of tenure takes many forms, not just ownership, but that “all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”³⁰

In a subsequent matter—one in many ways equally important to *Grootboom*—where the Court ordered the government to roll out Nevirodene to HIV-positive women,³¹ it again turned to international law and noted in *Minister of Health v Treatment Action Campaign*:

It was contended that section 27(1) of the Constitution

29. *Id.* para. 23 (footnotes omitted).

30. *Id.* para. 24 (footnotes omitted).

31. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para. 135 (S. Afr.).

establishes an individual right vested in everyone. This right, so the contention went, has a minimum core to which every person in need is entitled. The concept of “minimum core” was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by state parties to the International Covenant on Economic, Social and Cultural Rights. According to the Committee: “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 to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps ‘to the maximum of its available resources’. 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.”³²

The Court then reiterated a central holding of both *Soobramoney* and *Grootboom*: that in considering an alleged constitutional violation of socio-economic rights, judges should evaluate the reasonableness of the state’s policy rather than calibrate a minimum core individual entitlement to socio-economic rights.³³

These cases, all read together, demonstrate a very significant shift in the power balance between those who have unfairly always been able to own, occupy, and control property in South Africa to one where even the law, notwithstanding provisions protecting private property, recognizes the need to establish a far more equitable arrangement.

In addition to what already appears in judgments, written arg-

32. *Id.* para. 26.

33. *Id.* paras. 29–39.

uments in many cases now refer to international law, and in housing cases we now often also rely on the general comments of the U.N. Committee on Economic, Social and Cultural Rights. The recently adopted Report of the U.N. Special Rapporteur on Adequate Housing³⁴ is already cited, so as to ensure that international law is used.

The private property brigade has often viewed this with great disdain. There have been various attempts to amend the key legislation. The private law shift, however, is one which ensures that rights are “respected, protected, promoted and fulfilled, according to the values of our constitution,” and most eminent of property lawyers, Professor Van Der Walt, has been cited with approval by the Court when he viewed the need:

to move away from a static, typically private law conceptualist view of the Constitution as a guarantee of the status quo to a dynamic typically public-law view of the Constitution as an instrument for social change and transformation under the auspices [and I would add ‘and control’] of entrenched constitutional values.³⁵

Lastly, there were 6,000 people living on the railway line in Khayelitsha who were facing eviction. They instructed their lawyers not to oppose the eviction necessarily, but to reply that they were willing to relocate on condition that there was an alternative place to move. The 6,000 people on the railway line joined three spheres of government to the litigation. They joined the local government, provincial government, and the national government. And they said that *Grootboom* held that there were particular responsibilities in regard to the government making provision for those most desperately in need. They were not concerned about which sphere of government took on the responsibility, but that it was particularly important that at least one of them took responsibility for “if and when” these 6,000 people were to move. The three spheres of government pleaded, and a week before the case was to commence, the case was settled.

34. U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (prepared by Miloon Kothari).

35. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para. 16 (S. Afr.) (alteration in original).

The important aspect of that case is that now, three years after its settlement, and in the last year, those 6,000 people have moved off the railway line. They have used the policies that were developed post-*Grootboom*, the policies in regard to urgent emergency housing programs and the policies in regard to the upgrading of informal settlements, as the bases for negotiating new residences five kilometers from where they were living. They have moved onto fully serviced sites that have electricity and water connected. Thus there is a noticeable shift from a situation before the Constitution came into operation, and now, thankfully, people are able to mobilize and organize around the rights developed and enforced in our courts, and are actually able to ensure that there is no eviction or an agreed-upon relocation. Hopefully for those who are asserting their rights in Durban, as I quoted at the beginning of this reflection, similar type provisions can operate.

CONCLUSION

The South African Constitution is unique in that it mandates consideration of international law in interpreting our Bill of Rights. This mandate has resulted in a careful consideration of the Declaration and its subsequent Covenants in over thirty cases so far in the Court's short history. Several of these cases concern socio-economic rights, and the International Covenant on Economic, Social and Cultural Rights in particular has been a significant guide to the Court as it struggles to give meaning to the ambitious guarantees of our Constitution.