

Grootboom

Student Materials

- Decided by the South African Constitutional Court in October 2000
- Key topics: human rights (economic, social, and cultural rights)

Learning Objectives

- Understand and apply:
 - international rights to economic and social assistance
 - minimum core obligations under human rights law
- Analyze and evaluate:
 - how state capacity affects legal rights
 - how states incorporate international rights into domestic law

Background Information

Throughout most of the twentieth century, South Africa was ruled by white-minority governments that severely restricted the rights of the black-majority population. After decades of domestic and international pressure, the white-minority government agreed in the early 1990s to a new Constitution that granted voting rights to all citizens, regardless of their race, and prohibited apartheid. This Constitution also included many different rights to economic and social assistance for all South Africans. Yet despite these legal rights, hundreds of thousands of black South Africans were either homeless or living in shantytowns (which are also sometimes called squatter camps or informal settlements) with limited access to clean water, electricity, and sanitation.

In the late 1990s, a group of about 900 homeless individuals (including Irene Grootboom) were living in such a shantytown. After waiting for years for low-cost housing, the group decided to leave the shantytown and illegally build new housing structures on private land. The owner of the private land later

had the group evicted from his property, but the group could not return to the shantytown because their former shelters had been taken by other individuals. The group then began sleeping in a public field.

In 1999, the group sued the government of South Africa for not providing them with low-cost housing. They argued that the government had violated section 26 of the South African Constitution, which says: “Everyone has the right to have access to adequate housing.”¹ A year later, the *Grootboom* case was decided by the South African Constitutional Court, which is the highest court in South Africa.

The Court’s 2000 judgment was based on the domestic law of South Africa. However, the Court used international law help interpret South Africa’s Constitution. The *Grootboom* judgment has since influenced international law. Many human rights experts consider the *Grootboom* judgment to be a key interpretation of international rights to economic and social assistance.

Relevant Legal Texts

South African Constitution (1996)

Section 26

- (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 ...

ICESCR (1966)

Article 2(1)

Each state party to the present Covenant undertakes to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

¹ The Grootboom case also involved arguments about Article 28 of the Constitution, which addresses the rights of children. We do not include that section of the judgment in the edited text below.

Article 11(1)

The states parties to the present Covenant recognize 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 ...

Judgment

The Court began by introducing the right to housing as an issue of racial justice. The Court described how contemporary housing shortages were a legacy of racist policies that were imposed by previous white-minority governments. It then described how the litigants became homeless.

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.” This case grapples with the realisation of these aspirations for it concerns the state’s constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order ...

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas.² Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the “coloured labour preference policy.” In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas

² EDITOR’S NOTE: During the time period described, the South African government used the term “European” to describe the white minority, “African” to describe the black majority, and “coloured” to describe individuals of Asian ancestry or who had a mixed racial background (e.g. both black and white ancestors).

had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements ... The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100,000 units in the Cape Metro ... in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else ...

Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene ... The conditions under which most of the residents of Wallacedene lived were lamentable ... About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about twenty metres square.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene ... They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing.

They did not have the consent of the owner and ... he obtained an ejection order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others ...

At the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions

destroyed. Many of the residents who were not there could not even salvage their personal belongings.

The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the respondents' attorney wrote to the municipality describing the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents.

The Court began by discussing its approach to interpreting section 26 of the Constitution. It argued that it must pay attention to both the textual context of section 26, and the social and historical context of the Constitution.

Like all the other rights in ... the Constitution ..., section 26 must be construed in its context ... On the one hand, rights must be understood in their textual setting. This will require a consideration of ... the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context.

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights ... are inter-related and mutually supporting. 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 ... 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.

The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. [The Court previously wrote]:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

The Court then described relevant international law, and how this law would affect its ruling. Note that the Court discusses both a treaty (i.e. the ICESCR) and an interpretive document issued by a special-treaty body (i.e. General Comment 3).

During argument, considerable weight was attached to the value of international law in interpreting section 26 of our Constitution ... The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

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.³ ...

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

³ EDITOR'S NOTE: When it mentions the "*amici*", the Court is referring to various human rights organizations that wrote legal briefs in support of the *Grootboom* litigants.

- (a) The Covenant provides for a right to adequate housing [in Article 11(1)] while section 26 [of the Constitution] provides for the right of access to adequate housing.
- (b) The Covenant obliges states parties [in Article 2(1)] to take appropriate steps which must include legislation while the Constitution obliges the South African state to take reasonable legislative and other measures.

The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee). The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of General Comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

On the basis of the extensive experience gained by the Committee, ... over a period of more than a decade of examining states parties' reports the Committee is of the view that 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 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 obligation 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.

It is clear from this extract that the committee considers that every state party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-

economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A state party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

The concept of minimum core obligation was developed by the committee to describe the minimum expected of a state in order to comply with its obligation under the Covenant. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a “minimum essential level” that must be satisfied by the states parties ... The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the Covenant. The committee has also used the general comment “as a means of developing a common understanding of the norms by establishing a prescriptive definition.” Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right ...

The Court then began to analyze the meaning of section 26 of the South African Constitution. It argues that “the right to have access to adequate housing” involves land, services, and financing. It also argues that government policy must assist both those who are able to afford housing and those who are not. Finally, it notes that the government must devise a plan to achieve “the right to have access to adequate housing.”

The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that 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 economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state’s primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention ...

Subsection (2) ... requires the state to devise a comprehensive and workable plan to meet its obligations ... The extent of the state’s obligation is defined by three key elements that are considered separately: (a) the obligation to “take reasonable legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.”

The Court then considered these three elements separately. First, it discussed the concept of “reasonable legislative and other measures.”

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are

reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. 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 ...

In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. 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. Conditions do not remain static and therefore the programme will require continuous review.

Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. 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 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 ...

Second, the Court discussed the concept of “progressive realisation.”

The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The committee has helpfully analysed this requirement in the context of housing as follows:

“Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d’être*, of the Covenant which is to establish clear obligations for states parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.” ...

Third, the Court discussed the concept of “available resources.”

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources ... There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

The Court then applied its analysis of these various concepts to South Africa’s housing program. It began by reviewing numerous domestic laws and policy programs (which we have removed from this edited judgment for brevity). The Court concluded from this analysis that while the government has many

programs to promote “permanent residential structures,” it lacks programs for those individuals who need “temporary relief” from homelessness and “intolerable conditions.” Therefore, the Court concluded, the government had violated its Constitutional obligations.

The concept of housing development ... seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements. What is more, it endeavours to ensure convenient access to economic opportunities and to health, educational and social amenities. All the policy documents before the Court are postulated on the need for housing development as defined. This is the central thrust of the housing development policy ...

There is no express provision to facilitate access to temporary relief for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability ...

In conclusion it has been established in this case that ... the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution ... In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need ...