CHAPTER 3

BALANCING COMPETING INDIVIDUAL CONSTITUTIONAL RIGHTS: RAISING SOME QUESTIONS

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"[L]aw is a compromise of contending forces and interests in society."[1]

Introduction: The Debate about Constitutionalizing Socio-economic Rights

In 1996 United States Supreme Court Justice Ruth Bader Ginsburg noted that many of the more than 200 new constitutions adopted since 1970 contain guarantees of socio-economic rights like housing, health care and education. But, she opined, Americans would quickly reject amending their Constitution to include these rights.[2] The Justice reminded her audience that in 1944 President Franklin D. Roosevelt urged the enactment of a "second bill of rights" that would take care of human needs because "necessitous men are not free men."[3] And for a brief period, as American constitutional scholar Cass Sunstein points out, the Warren Court quietly, but unsuccessfully, attempted to move the country in that direction.[4] Instead of constitutionalizing socio-economic rights the United States chose a federal-state arrangement of entitlements, many of which have been, or currently are being, dismantled by a hostile executive and congress. Without constitutional protection socio-economic benefits once conferred easily can be withdrawn.

Despite increasing support for global human rights, as exemplified by the International Covenant on Civil and Political Rights[5] and the International Covenant on Economic and Cultural Rights,[6] some scholars and constitutional democracies, like the United States, continue to resist constitutionalizing socio-economic rights. Socio-economic rights, unlike political and civil constitutional rights that usually prohibit government actions, are thought to impose positive obligations on government. As a result, constitutionalizing socio-economic rights raises questions about separation of powers and the competence of courts to decide traditionally legislative and executive matters.[7]

Sunstein, writing about the late twentieth century constitutions in Eastern Europe, also argued that constitutionalizing socio-economic rights compels governments to interfere with free markets.[8] He even argued, somewhat patronizingly, that constitutionalizing socio-economic rights "may promote attitudes of welfare-dependency and become a counterincentive to self-reliance and individual initiative."[9] Others argue that the inherent difficulty in judicial enforcement of socio-economic rights weakens public faith that constitutional rights will be enforced.[10]

Concerns about the enforceability of rights even plague those countries whose constitutions protect only political and civil rights. Most courts find it difficult to insure equality when faced with competing constitutional rights claims. In Germany,

for example, the Constitutional Court in reconciling conflicting constitutional rights refers to the structural unity of its constitution applying "the principle of 'practical concordance' (*praktische Konkordanz*)" by which conflicting constitutional rights are "harmonized" and balanced so that each is "preserved in creative tension with one another."[11]

Thus there are no absolute rights.[12] The German Constitutional Court in harmonizing and balancing conflicting constitutional rights has created a de facto hierarchy of rights. As a result, the jurisprudence of that court is inconsistent and unpredictable. Sometimes the court's jurisprudence rests on rigorous analysis, and other times on bewildering ex cathedra pronouncements.[13]

Another approach to the balancing problem adopted by the United States Supreme Court, among others, is to create a formal hierarchy of constitutional rights privileging some individual rights over others. First Amendment rights, including freedom of association, are considered fundamental rights, whereas the right to equal protection of law is not. Yet this formal hierarchy is not absolute. There are a few exceptional cases where the Supreme Court prefers a non-fundamental right over a so-called fundamental right.

Perhaps the most well-known example is the U.S. Supreme Court's seminal 1954 decision, Brown v. Board of Education.[14] In Brown the right of black Americans to equality under law in access to public education was protected at the expense of the associational rights of white Americans hostile to being educated with blacks. Some constitutional scholars, while applauding the demise of the separate but equal doctrine, complained about the court's departure from its articulated hierarchy of rights.

Legal scholar Herbert Wechsler in a 1959 essay about the Brown decision wrote:

> [A]ssuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved . . . .
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> But if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension, not unlike many others that involve the highest freedoms . . . .[15]

Constitutional scholars raised similar questions about the U.S. Supreme Court's departure from its stated hierarchy of constitutional rights in the restrictive covenants cases, Shelly v. Kramer[16] and Jones v. Mayer.[17] Neil Gotanda writes: "Legal scholars who believed in a constitutionally required freedom of contract and private sector right to discriminate (subject to certain restrictions), found [the Supreme Court's refusal to enforce racially] restrictive covenant[s] ...hard to justify."[18] The questions raised by Herbert Wechsler and other American constitutional scholars about these exceptional departures from the accepted formal hierarchy of rights, continue to generate discussion today within academic circles.

As Justice Ginsburg suggests, the American constitution once a model of modern constitutions, looks antiquated next to late twentieth century models like the South African Constitution. That country's constitutionalizing of socio-economic rights, while the United States gradually dismantled much of the New Deal and 1960s socio-economic programs, caused Cass Sunstein to reconsider his position on constitutionalizing those rights.[19] The transformative nature of the South African

Constitution is evident in the document's repeated references to the protection of human rights.[20]

But when transitional democracies, like South Africa, choose to constitutionalize socio-economic rights, courts inevitably must grapple with their role in the realization of those rights. Where courts have both declaratory and enforcement obligations under the constitution, a commitment to human rights, while laudable, may be difficult to attain. Two questions immediately come to mind: (1) whether it is possible to treat conflicting constitutional rights equally, or whether a hierarchy of rights, either formal or informal, is an inevitable result; and (2) whether in a true participatory democracy courts should be placed in the position of determining this hierarchy of constitutional rights, or whether the ordering of rights is an inherently political task.[21]

A related question is whether when vast socio-economic inequities exists among the citizenry a judicial approach is more appropriate until that society has reduced those inequities. Citizens who lack adequate food, shelter and basic education are disadvantaged politically even in the most liberal democracy. A nation-state's approach to these questions is reflected in the mechanisms adopted to enforce socio-economic rights.

Modern state constitutions that incorporate socio-economic rights usually adopt one of three approaches to enforceability of these rights. Some constitutions treat socio-economic rights as judicially enforceable, the same as other individual rights.[22] Other constitutions distinguish socio-economic rights from political and civil rights by making the former non-justiciable aspirational targets for the legislature and executive branches.[23] Still other constitutions adopt a middle position designating some socio-economic rights as justiciable and others not.[24]

The South African Constitutional Court was mindful of the controversy surrounding constitutionalizing socio-economic rights.[25] Former Constitutional Court Justice Richard Goldstone writes that the court "has successfully enforced the constitution's provisions for social and economic rights while balancing the state's interest in managing its political affairs."[26] He rejects as a false dichotomy the distinction many legal scholars and jurists draw between socio-economic and civil or political rights arguing that enforcement of both sets of rights often involves expenditures of public funds, citing as an example the costs of school bussing to enforce the U.S. Supreme Court's integration mandate in Brown v. Board of Education.[27] But, as mentioned previously, even American scholars concede that Brown was an exceptional case. Thus the South African Constitutional Court's treatment of socio-economic constitutional rights during its first decade of existence merits closer scrutiny.

When modern democracies like South Africa constitutionalize socio-economic rights and declare these rights justiciable, judicial enforcement is an issue.[28] This chapter argues that some hierarchy of rights that privileges one set of rights over another is inevitable, especially where neither the state constitution nor the court clearly creates a formal hierarchy of rights. It uses the right to housing cases decided during the Constitutional Court's first decade to explore this question.

Enforcing Constitutional Socio-Economic Rights in South Africa

The South Africa Constitution provides that everyone, citizen and non-citizen[29], is entitled to reasonable access to health care, food, water, social security, housing

and education.[30] The Constitution also prohibits government from carrying out arbitrary evictions or refusing emergency medical treatment.[31] Although phrased in the negative, these last two provisions compliment or reinforce the positive socio-economic rights to housing and health care. Also reinforcing these socio-economic rights are the constitutional rights to equality, human dignity and life[32] which impose restraints as well as affirmative obligations on government. But the Constitution also qualifies some socio-economic rights like access to housing and health care by explicitly providing that those rights are to be progressively realized "within available resources" of government.[33]

In early decisions interpreting socio-economic rights, the Constitutional Court addressed many questions raised by opponents of constitutionalizing socio-economic rights. It sought to assuage separation of powers concerns by normalizing the enforcement of socio-economic rights saying that courts traditionally make decisions that have budgetary implications. Thus the enforcement of socio-economic rights is not substantially different from judicial tasks normally conferred on courts by a bill of rights.[34] Therefore, under the South African Constitution all socio-economic rights are, with certain limitations, justiciable.[35]

Conceding justiciability raises two important questions: what standard of review is appropriate in reviewing constitutional socio-economic rights claims, and how do courts enforce these rights when violated by government. These are difficult questions that the Constitutional Court says "must be carefully explored on a case-by-case basis."[36] Addressing the appropriate standard of review the court initially adopted, and then discarded, a rationality test. In Soobramoney v. Minister of Health, Justice Chaskalson wrote that "[a] court will be slow to interfere with rational decisions taken in good faith by ...authorities whose responsibility it is to deal with such matters."[37]

In Soobramoney the court ruled that access to dialysis treatment could be restricted because of limited government resources and not violate the right to health care. The court said that limiting dialysis treatment to individuals eligible for a kidney transplant was a rationale policy decision. But application of a rationale basis standard results in an extremely deferential attitude toward those governmental entities responsible for health care decisions. This minimal review standard also seems inconsistent with the transformative view of the new South African Constitution and Constitutional Court.

Four years later in Republic of South Africa v. Grootboom, a seminal socio-economic rights case, the court replaced the rationality test with a reasonableness test,[38] a more demanding standard. Thus the issue when socio-economic rights are asserted is whether "the measures taken by the state to realize the right ... are reasonable."[39] The exact meaning of reasonable, however, is to be worked out case-by-case. The reasonableness test as announced seems an ad hoc and somewhat unpredictable approach to constitutional decision-making. Undoubtedly the court adopted this cautious approach mindful of separation of powers concerns. Arguably, a reasonableness standard preserves executive and legislative prerogatives in determining how limited financial resources should be allocated.

Scholars characterize the court's reasonableness test as an "administrative law" approach to the adjudication of socio-economic rights.[40] The unit of government whose policy is challenged, and to whom the Constitution assigns the responsibility, must explain the rationale for its policy— why it prioritized the allocation of its limited resources the way it did. The court's role is one of oversight only, namely to guard against "unreasonable" resource allocation.

Separation of powers concerns also may explain the court's resistance to arguments for a minimum core of socio-economic rights.[41] The United Nations Committee General Comment 3 states: "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."[42] Although amicus briefs in Grootboom argued for a minimum core obligation, the Constitutional Court, for the moment at least, rejects this argument.[43] Justice Yacoob writes that the court does not have enough information "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."[44]

At the same time the court concedes that there might be circumstances where this type of inquiry would be appropriate.[45] Since, as the court acknowledges, lack of shelter can result in the denial of "human dignity, freedom and equality,"[46] it is instructive to look at whether, when balancing the rights of private property owners against the access to housing rights of landless people, the Constitutional Court tends to favor the former or latter. In other words, the inquiry is whether the court, in fact rather than by formal policy, treats access to housing for homeless society members as a minimum core obligation.

Access to Housing: Grootboom as Setting the Stage

In a series of cases the South Africa Constitutional Court explored one aspect of the access to housing right – the protection against arbitrary evictions. During the apartheid era arbitrary evictions by government and third parties were commonplace, and disproportionately affected non-whites.[47] Mindful of this unfortunate past, section 26(3) of the Bill of Rights provides: "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." The Constitutional Court acknowledges that section 26 (3) is designed to prevent apartheid-type evictions and property-related injustices from recurring in the new South Africa.[48]

Debates about whether to preserve common law property rights persisted throughout drafting of the new South Africa Constitution. Ultimately, nationalization of land was rejected. Instead, the Bill of Rights protects both "existing entrenched rights and privileges ... [while] extending 'the enjoyment of rights to all.'"[49]

The protection of property rights is contained in section 25 of the Bill of Rights. Section 25 (1) provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Under section 25 (2) "[p]roperty may be expropriated only in terms of law of general application - for a public purpose or in the public interest" and only where the landowner has been compensated. Unanswered by sections 25 and 26 is how to balance the rights of homeless society members with those of private property owners, some of whom acquired land during the apartheid era.[50] Specifically, the question is whether the dignity and access to housing rights of South Africans include the right not to be left homeless and if so, whether the enforcement of these rights often will occur at the expense of private landowners.

The South African Constitutional Court in Grootboom said in passing that the right of access to housing contained in section 26(1) implicitly imposes, "at the very

least, a negative obligation ... upon the state and *all other entities and persons* to desist from preventing or impairing the right of access to housing."[51] (emphasis added) Whether this negative constitutional obligation to take no action that would leave individuals homeless applies horizontally to non-governmental entities is left unresolved.[52] Other language in Grootboom can be read either way. The Constitutional Court said, for example, that in addition to the State "other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing."[53] Since the court's role in these cases is oversight, not policymaking, the court's language seems purposefully vague deferring to those branches of the State assigned the responsibility by the Constitution of determining the means of fulfilling the government's housing obligation.

When the State fails to provide access to adequate housing for those members of society most in need, individuals are forced to resort to self-help measures, like land invasions. In turn land owners whose property is invaded, to protect their rights, must initiate ejectment proceedings against the unlawful occupants. But under Section 8 (1) of the South African Constitution, courts are considered state actors, so they are bound by provisions of the Bill of Rights, including section 26, when issuing ejectment orders. As a result, according to Geoff Budlender, a "court may... stay the eviction to a stipulated date... to enable the evictees to find another place ... [to] live... [or] order an eviction conditional upon the state's first finding another place where the evictees may settle."[54] Thus the right of a property owner to eject squatters is qualified. Grootboom illustrates some of resulting problems faced by property owners in this situation.

In Grootboom hundreds of adults and children living in an informal community under intolerable conditions moved on to vacant privately owned property designated for government subsidized low-cost housing and built makeshift homes rather than wait indefinitely for better housing.[55] The landowner obtained an eviction order from the magistrate court but Mrs. Grootboom and the others resisted saying that they would be homeless if evicted.[56] Nevertheless, they were forcibly evicted during harsh weather and under conditions reminiscent of "apartheid-style evictions."[57] They sued alleging, among other things, that they were being denied access to housing as guaranteed by section 26 of the South African Constitution.[58]

In Grootboom Justice Yacoob notes that the post-apartheid government, consistent with section 26 (2), was making progress in addressing the housing problem.[59] Had the court applied the rationality test announced in Soobramoney the court might have concluded that the government's decision to focus on permanent rather than temporary housing could be justified as rational. But applying a reasonableness standard the Constitutional Court found that the government housing plan was unreasonable and fell short of its constitutional obligation[60] because it did not provide temporary housing for society members living in "intolerable conditions" or crisis situations.[61] To make matters worse, the Cape Metro Council, the government entity responsible for housing, took no action after it became aware of the squatters, and its inaction allowed the settlement to grow substantially.[62] So the problem in Grootboom was the result of a two-fold failure by government of its constitutional obligation.

The court, in passing, also noted that the state may have failed to have executed the evictions of the plaintiffs in a humane manner. Section 26 (3) prohibits unreasonable evictions. In determining whether to grant an ejection order the court must consider all the "relevant circumstances." An important factor in determining

the reasonableness of an eviction is whether the evictees will be left homeless.[63] But since this issue was not raised by the plaintiffs in Grootboom the court did not rule on the reasonableness of the evictions.[64] Thus the Grootboom case did not squarely pit the right of private property owners against the right to housing for the poorest of the poor. Mrs. Grootboom and the other plaintiffs already had been ejected. But the Constitutional Court's decision in that case suggested that private landowners might have difficulty ejecting some unlawful occupants.

Balancing the Rights of Landless and Landowners

The Grootboom decision triggered a vigorous debate within South Africa about its impact on common law landowner rights.[65] Legal scholars wondered whether the Constitutional Court was saying that the new constitution modified common law property rules by limiting the power of courts to order an otherwise lawful eviction because of the impact on those ejected.[66] Six months after Grootboom another case, Minister of Public Works v. Kyalami Ridge, raised a similar issue and provided some insights on the question. But once more the court was not squarely faced with a case that directly pitted the rights of private landowners against landless individuals.

Kyalami Ridge involved 300 people in Alexandra Township outside of Johannesburg who lost their housing due to flooding. Initially the flood victims were given temporary shelter "in overcrowded and unhealthy circumstances without sufficient water and sanitation."[67] Subsequently the government, responding to the court's mandate in Grootboom, allocated money to provide temporary housing on state-owned land located near an affluent white neighborhood. The neighboring property owners, who had not been consulted about the relocation beforehand, objected, raising environmental concerns and questioning the authority of government to act without a public meeting. When the landowners obtained an order from the High Court to stop the construction, the government, joined by a flood victim, appealed, and the Constitutional Court reversed the order.[68]

The property owners conceded that government has an obligation to act reasonably to provide adequate access to housing for the flood victims, but argued that the proposed relocation would adversely affect their property values.[69] The Constitutional Court rejected their argument saying that the interests of neighboring landowners were insufficient to constitute a constitutional violation.[70] Instead the court treated the matter like a common law nuisance claim. Thus the court reasoned that the neighboring property owners had no right to object to another landowner's reasonable use of its property, even when it adversely affected neighboring property owners.[71] The State, like any private landowner, could make reasonable use of its property and that was what it was doing.[72]

Theoretically, however, the State in this instance really was not acting like a common law landowner because it has an affirmative obligation under the Constitution to assist homeless or intolerably housed residents find adequate housing.[73] This constitutional obligation trumped the conflicting, but tangential, rights of the neighboring landowners. Despite the absence of any direct impact on private property rights, the court volunteers that in reconciling conflicting constitutional rights, "proportionality which is inherent in the Bill of Rights is relevant to determining what fairness requires."[74]

If proportionality is the measure of how to strike the balance between competing constitutional rights, then the rights of private property owners will almost always have to give way to the rights of poor homeless persons or poor people living in intolerable conditions. This approach seems consistent with the overall goal of the South African Constitution to ensure that the government brings about the progressive realization of socio-economic rights. As the Court in Grootboom says, "Those whose needs are the most urgent and whose ability to enjoy all rights ... is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."[75]

Mass land invasions by homeless members of South African society have become more commonplace as dissatisfaction with the slow pace of the government's housing program increases. Anticipating South Africans' increasing frustration about government's slow response to the housing problem the Constitutional Court in Grootboom warned the State that if "people in desperate need are left without any form of assistance with no end of sight.... [t]he consequent pressure on existing settlements inevitably results in land invasions by the desperate."[76] This is exactly what happened after Grootboom.

Three years after that decision the housing situation in the area had deteriorated because the government still had not prioritized emergency or temporary housing for the poorest of the poor in allocating its limited financial resources.[77] When the City of Cape Town, the successor to the government entity in Grootboom, applied to evict land invaders from a public park, a High Court judge, while condemning land invasions, refused the city's application.[78] The High Court judge noted when Grootboom was decided the house backlog was 206,000 houses and this number was being reduced by 2000 housing units per year.[79] But by November 2001 the backlog had grown to 250,000 houses, and the backlog was increasing at a rate of 15,000 annually. Further "[t]he yearly demand was growing by 25,000 units as against a supply of 10,000 per year."[80] The housing crisis had become even more severe. But like Kyalami Ridge, the land invasion in this lower court case involved public, not private land so no private property rights were at issue. Nevertheless, the import of this court's reading of the Grootboom mandate was clear. When government fails to fulfill its obligation under section 26 to provide adequate temporary housing for people most in need of shelter, they cannot be evicted from land they occupy unlawfully if they will be left homeless.

Four years after Grootboom the Constitutional Court in Port Elizabeth Municipality v. Various Occupiers squarely faced the problem of balancing the interests of property owners and homeless unlawful occupants who invade private lands.[81] Here 68 people, including 23 children, had been living in an informal community on private property located within the Municipality of Port Elizabeth for two to eight years. The property owners and their neighbors, a total of 1600 people, appealed to the city to evict the squatters.

The unlawful occupants agree to leave if "given reasonable notice and provided with suitable alternate land."[82] But the parties could not agree upon a suitable existing housing site, and the municipality resisted building housing for the squatters. The government argued that the squatters would be "queue-jumping", benefiting from their unlawful conduct at the expense of law abiding individuals equally in need of housing.[83] The Supreme Court of Appeals set aside the High Court's ejectment order because the unlawful occupants would be homeless if evicted, and the municipality appealed to the Constitutional Court. Thus the issue of conflicting constitutional rights was squarely framed.

The Constitutional Court recognized that the protection of property rights in section 25, and the housing and eviction rights in section 26 of the Bill of Rights "are closely intertwined,"[84] but noted that under the new Constitution private property rights are qualified and "subject to societal considerations."[85] A consideration that courts must take into account when interpreting section 25 rights is the need to redress "the grossly unequal distribution of land" which is a legacy of the apartheid era.[86] But exactly how the new constitution reconfigures conventional views of private property rights remains unclear.[87] The only guidance is that the end goal in striking this balancing of rights, according to the court, is the affirmation of "the values of human dignity, equality and freedom."[88] Invoking these values as components of section 26 (3) restrictions on evictions automatically establishes a basis for some informal ranking or hierarchy of rights. This qualification also sounds a lot like the balancing language used by the German Constitutional Court.

According to Justice Sachs the role of the court in cases where these two rights are in conflict is "to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[89] The end result in these cases seems clear, if the unlawful occupants will be left homeless, eviction is unlikely. As Geoff Budlender predicted, unlawful occupants will remain on the private property until the government finds suitable alternate housing.

The unlawful occupants in Port Elizabeth Municipality lived in a relatively settled community, thus Justice Sachs reasoned, courts should be "reluctant" to issue ejectment orders unless reasonable alternative housing or land is available.[90] Reflecting the court's growing frustration with government's housing program, and the complex balancing required in the ejectment cases he opined: "[t]he judiciary cannot of itself correct all the systemic unfairness to be found in our society.... [but] it ...[can] soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails."[91]

But in these cases the private landowner is caught in the middle, unable to eject unlawful occupants until the government provides suitable housing. The adverse effect on individual property rights is not mitigated by the court's characterizing the eviction provisions of section 26(3) as "defensive rather than affirmative," a negative rather than a positive right.[92] Under the Constitutional Court's rationale the property rights of private landowners will be restricted or subject to limitations until the housing situation in the country is more equal.

In the abstract this outcome seems like a reasonable compromise given the alternative, nationalization of private property and more equitable redistribution by the government. But the reality of having an informal settlement of strangers in your backyard for years must be disquieting for landowners. For the moment, at least, private property rights must gave way whenever the choice is between leaving groups of people homeless and protecting a property owner's right to use his or her property. Homeless individuals will prevail and thus an informal hierarchy is created that privileges the right of temporary housing for homeless individuals over the right of private property owners to eject unlawful occupants.

The Constitutional Court in a more recent decision illustrates how application of the court's balancing approach tries to minimize the adverse affects on private landowners. In President of the Republic of South Africa v. Modderklip, approximately 40,000 individuals were living on approximately 50 hectares (approximately 123 acres) of the Modderklip Company's land.[93] In the 1990s the squatters had moved from an overcrowded township to a neighboring informal

settlement from which they subsequently were evicted by the municipality. They moved onto the Modderklip property in May 2000, believing it to be public land. The municipality notified the company saying that the law required the company to institute ejectment proceedings.[94]

Given the number of unlawful occupants Modderklip believed that the ejectment proceeding was a government responsibility, and initially declined to sue for an order.[95] The company also tried, without success, to sell the occupied land to the municipality. Finally, Modderklip sought and obtained an ejectment order within the legally established time limits. But the cost of executing the order and lack of an alternate settlement for the squatters caused the order not to be effectuated. Frustrated the company sought relief in the court on constitutional grounds.

Modderklip claimed that its property rights under section 25 (1), as reinforced by section 7(2) of the Constitution, had been infringed Section 7(2) provides that "the state must respect, protect, promote and fulfill the rights in the Bill of Rights." The company also alleged that the rights of the unlawful occupants to adequate housing under section 26 had been violated. In other words, the government's failure to comply with its housing obligations under section 26 also resulted in a violation of the landowner's property rights as protected by section 25.[96] The government countered that the case presented no constitutionally enforceable infringement of property rights because the controversy was between private parties.[97] But a unanimous Constitutional Court disagreed.[98]

The court acknowledged that under the Constitution private property owners are primarily responsible for protecting their property.[99] Thus Modderklip could not sit idly by and leave a mass invasion of its land unchallenged. While once more condemning land invasions, the court reaffirmed government's affirmative duty under section 26 to "progressively ... ensure access to housing or land for the homeless."[100] Acting Chief Justice Langa writes sympathetically: "I am mindful of the fact that those charged with the provision of housing face immense problems.... [Nevertheless] the progressive realization of access to adequate housing... requires careful planning and fair procedures made known in advance to those most affected."[101]

At the same time government is obligated to provide more than the legal mechanisms and institutions to enforce Modderklip's property rights.[102] In this case the court concluded that an award of compensatory damages was appropriate.[103] Arguably, there had been a de facto expropriation of the company's land caused by the government failure to provide temporary housing in accordance with the Grootboom mandate and thus compensation was warranted. Rather than construing this result as evidence that socio-economic rights might be horizontally enforceable, the court characterizes the situation in Modderklip as "extraordinary."[104]

Unfortunately, the land invasion at issue in Modderklip is far from extraordinary. A quick glance through any South African newspaper indicates that mass land invasions by homeless individuals are increasing and wide-spread. For the moment at least, the Constitutional Court continues to side-step the question of whether property rights under section 25 are horizontal, and if so, under what circumstances.[105] It also avoids answering whether the state can order expropriation of privately held land in these circumstances.[106] Thus, the rights and obligations of private property owners' in relation to homeless society members remain unclear.

Conclusion

There was no judicial review provision or Bill of Rights in the old South African Constitution. Instead, during the apartheid era, the parliamentary-based legal system "was essentially one of 'repressive law' [leaving black South Africans] deep[ly] alienation from the formal legal structures."[107] The Bill of Rights in the new South African Constitution was designed to restore faith in the rule of law by serving as a check on potential political government abuses. In Jaftha v. Schoeman and others (2005) Justice Mokgoro wrote that section 26 of the Bill of Rights represents a "decisive break from the past,"[108] and a recognition that "access to adequate housing is linked to dignity and self-worth."[109] Yet the Constitutional Court's approach to the enforcement of socio-economic rights is cautious and largely declarative rather than transformative.

Years after the Constitutional Court's decision in Grootboom the people of that community continued to live in intolerable conditions.[110] In a country that has some of the world's widest disparities in wealth, and where approximately 60 percent of its children and more than 40 percent of the total population live in poverty,[111] the realization of adequate access to housing is an enormous task. "[T]he South African Human Rights Commission's annual reports on Economic and Social Rights consistently indicate[]... a significant gap between the promise of housing, medical care, basic infrastructure and the delivery thereof."[112] Thus the court's access to housing cases illustrate that judicial declarations of socio-economic rights do not necessarily translate into realization of those rights.

One disillusioned South African scholar writes that for socio-economic relief to be meaningful it must be "capable of immediate implementation," especially where government grants relief to the most desperate segment of society.[113] While the Constitutional Court is unwilling to concede the immediacy point, in Fose v. Minister of Safety and Security (1997) it noted that: "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.... [and t]he courts have a particular responsibility ... and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[114] But the court has not been forthcoming in fashioning new tools and innovative remedies in this area.

The Constitutional Court, by ordering payment of compensatory damages to the landowner in Mudderklip directly affected by land invasions, has taken only a small step in this direction. The ongoing debate within South Africa is whether the Constitutional Court can and should fashion more effective remedies to realize its orders involving socio-economic rights.[115] This debate over the proper role of the court in enforcing socio-economic rights goes to the very heart of the criticism about constitutionalizing socio-economic rights.

In Minister of Health and Others v. Treatment Action Campaign and Others (TAC)[116] the High Court's order included a structural interdict requiring the government to revise its policy about not providing the anti-viral drug Nevirapine to reduce mother-to-child transmission of HIV and submit it to the court for review.[117] The Constitutional Court upheld the ruling but substituted its own order declaring the government's refusal to provide appropriate treatment in public clinics within its available resources unreasonable, and a violation of the right of access to health care. Rather than squarely address the lawfulness of the interdict order, the court avoided the issue saying that the order was unnecessary because "[t]he government has always respected and executed orders of this Court [and t]here is no reason to

believe that it will not do so in the present case."[118] Articulating separation of powers concerns the Constitutional Court added: "Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community."[119]

The government in response to the court's ruling almost immediately developed a program for pregnant HIV-positive women which included, when appropriate, access to Nevirpine. To many the court's ruling in the TAC case was a bold move with financial implications, and a far cry from its more deferential stance on access to health care in Soobramoney. But without the internal and world-wide political pressure on the government generated by South African AIDS activists, one wonders whether the government would have responded so quickly.

Scholars remain divided when assessing the Constitutional Court's record on socio-economic rights during its first decade. Few question whether the court can issue declaratory orders or, in extreme cases, exercise supervisory jurisdiction over the implementation of its orders.[120] Some scholars applaud the court while others express disappointment, especially about the court's record on enforcement of rights. The court's critics divide along two lines. One group argues for bold remedies like constitutional damages.[121] Even bolder remedial suggestions include preventive damages[122] or reparation in kind, where the court might order the state "to provide appropriate remedial services for the benefit of a whole community that has suffered a long-term violation of its socio-economic rights."[123]

A second group criticizes the court's approach to deciding socio-economic rights cases. High Court judge and law professor Dennis Davis, for example, argues that there is no suggestion in the court's jurisprudence of "a new legal method which could assist in the implementation of the promise held in ... the constitutional text."[124] Instead the Constitutional Court prefers to rely on administrative law and the occasional, perfunctory application of international law.[125] Further, Davis argues, the court seems reluctant "to impose additional policy burdens upon government" or hold the government accountable for the socio-economic rights it declares, especially in cases involving the right to housing, health care and rights of children.[126] He concludes that for the moment, at least, South Africans seeking enforcement of their socio-economic rights may find quicker relief following the political rather than the judicial route.[127]

There is some merit to Davis' argument. Many observers believe that the court never would have ruled in favor of the litigants in TAC but for the political pressure generated world-wide by AIDS activists. Unlike TAC there are no major politicized housing organizations nationally or internationally, only small housing rights movements throughout South Africa. Currently, these organizations do not have the visibility and political clout of South Africa's AIDS activists.

Land invasions and questionable evictions continue throughout the country. Housing in some urban areas, like Cape Town, has become unaffordable or unavailable for all but the very affluent. On one hand, wealthy Europeans, Americans and South Africans push up the prices of homes; on the other, poor people from rural areas and other African countries continue to crowd into already overcrowded informal communities or invade land to create new communities. Local residents continue to be displaced or threatened by floods and unhealthy living conditions. Perhaps in the end, the political branches of government will be forced by both landowners and landless people to make access to adequate housing for the poorest of the poor more readily available.

Finally, there is an alternate less damning interpretation of the Constitutional Court's first decade. Arguably, the South African Constitutional Court, mindful of the arguments against constitutionalizing socio-economic rights, is proceeding cautiously hopeful that the State will fulfill its constitutional obligations as declared by the court. Perhaps the court is giving the State time to stabilize its economy and more completely actualize its plans for progressive realization of socio-economic rights like access to housing. If so, then the court may be unwilling to act more forcefully until there is a longer record of inaction by the political branches of government.

More importantly, it may be too early to judge the direction of the South African Constitutional Court. Perhaps another decade must pass and more founding court members be replaced before any meaningful predictions of direction can be made. In twenty years the court will have a longer record and more expertise and may be more willing to take bold steps, especially if the plight of residents like Mrs. Grootboom and her neighbors has not improved or worsened.

But there also is a real danger in the court's delaying bolder action. South Africans may lose faith in the ability of the courts to enforce socio-economic rights and rights in general. Memories of the apartheid era abuses are still fresh in their minds. Judicial pronouncements of rights that are not actualized weaken the public's respect for the rule of law. Perhaps the Constitutional Court judges will be motivated by the bolder actions of some high court judges. The High Court judge in Grootboom, for example, in directing the government to provide the evictees with adequate basic temporary shelter pursuant to their right of access to adequate housing spelled out these requirements rather than leave it to the State to determine.[128]

Human rights advocates worldwide will be watching and hoping that South Africa succeeds in its transformative mission. South Africa and its Constitutional Court in particular, have an opportunity to serve as a model for other nations seeking to transform their societies into more egalitarian communities that respect human rights. Time will tell whether it is possible to realize this goal while humanely balancing competing constitutional rights.

[1] Jack M. Balkin, "Plessy, Brown, and Grutter: a play in three acts," *Cardozo Law Review* 26 (2005):1689, 1691. Balkin continues: "when law participates in social change, law is complicit in the new forms of social stratification that replace older, discredited forms. As law recognizes and outlaws some forms of inequality, it fails to recognize or it legitimates others." Id.

[2] Peter Shinkle, "Justice Ginsburg: Constitution "Skimpy"," *The Advocate*, October 25, 1996, News section, B1, free abstract *available at* http://www.2theadvocate.com/. Specifically, Shinkle reported that Justice Ginsburg said "Any bid to add the types of rights found in other constitutions to this country's Constitution would be dealt a defeat "far more stunning" than the Equal Rights Amendment for women, which failed in the 1980s." Most "post-World War II European constitution-makers . . . supplemented traditional negative liberties with certain affirmative social and economic rights or obligations." Mary Ann Glendon, "Rights in Twentieth-Century Constitutions," *University of Chicago Law Review* 59 (1992): 519, 520-21.

[3] Shinkle, "Justice Ginsburg."

[4] *See generally*, Cass Sunstein, *The Second Bill of Rights: FDR'S Unfinished Revolution and Why We Need It More than Ever* (New York: Basic Books, 2004).

[5] G.A. Res. 2200A, U.N. GAOP, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force January 3, 1976.

[6] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 entered into force January 3, 1976.

[7] "One commentator, invoking the separation of powers doctrine, has suggested that constitutional courts should not make decisions that have significant effects on social and economic policy." Amanda Littell, "Can a Constitutional Right to Health Guarantee Universal Health Care Coverage or Improved Health Outcomes?: A Survey of Selected States," *Connecticut Law Review* 35 (2002): 289, 307 (citing David Beatty, "The Last Generation: When Rights Lose Their Meaning," in *Human Rights and Judicial Review: A Comparative Perspective*, ed. David Beatty (Boston: Springer, 1994), 321, 350-51). "Critics of positive rights argue that such provisions are inherently nonenforceable, at least by courts, which are said to be poorly positioned to compel compliance with open-ended social and economic concerns." Helen Hershkoff, "Positive Rights and the Evolution of State Constitutions," *Rutgers Law Journal* 33 (2002): 799, 827 (discussing positive rights in the context of American state constitutional law).

[8] Cass Sunstein, "Against Positive Rights," *East European Constitutional Review* 2 (1993): 35, 36.

[9] Id. at 37. But c.f., Sadurski Wojciech, "Post Communist Chapters of Rights in Europe and the U.S. Bill of Rights," *Law and Contemporary Problems* 65 (2002): 223, 230.

[10] Frank B. Cross, "The Error of Positive Rights," *UCLA Law Review* 48 (2001): 857, 901(arguing that "positive rights offer a poor bargain for the disadvantaged"). Further, Sunstein and others argue that enforceable socio-economic rights could adversely affect negative constitutional rights. Sunstein, "Against Positive Rights," 254 (citing John Elster, "Human Rights and the Constitution-Making Process," in *Papers of the International Conference: Human Rights and Freedoms in New Constitutions in Central and Eastern Europe*, ed. Andrzej Rzeplinski (Warsaw: Helsinki Foundation for Human Rights, 1992), 25.

[11] Donald P. Kommers, "Comparative constitutionalism: German Constitutionalism: a Prolegomenon," *Emory Law Journal* 40 (1991): 837, 851. Thus even a constitutional amendment could be unconstitutional if it does not conform to the notion of the structural unity. Id. at 852. While the German Constitutional Court claims the authority to find constitutional amendments unconstitutional, unlike the Indian Supreme Court, it has never actually exercised this authority. Although the German Constitutional Court's claim may stem in part from more general considerations, most scholars would say that this authority flows primarily from Article 79 (3) of the Basic Law, which prohibits amendments that "affect" the principles of human dignity (including, in part, the principles set forth in the Basic Rights of Part I of the Basic Law), or certain structural principles of the Basic Law set forth in Article 20.

[12] Id. at 857. Although some rights "are cast in unqualified language, others in conditional language [i]n actuality ... no right under the Constitution is absolute. . . . [T]he task of the Court [when rights conflict] is to apply a balancing test consistent with the interpretive principle of concordance. The broad principle of human dignity, ... which under the explicit terms of Article 1 (1) binds all state authority, may also serve to limit the exercise of a so-called unconditional right." Id.

[13] *See, e.g.*, the discussion of the court's jurisprudence in the area of freedom of expression in David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994), 33 et seq.

[14] 349 U.S. 294 (1955).

[15] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 1, 34. Neil Gotanda writes:

> "The constitutional guarantee of freedom of association—the right to choose whether to associate with another person—has also served to protect racially discriminatory conduct in the private sector. .... Wechsler's article anticipated modern analyses of private sector discrimination. Constitutional protection of an individual's right to limit personal associations requires constitutional protection of that individual's decision to discriminate on the basis of race.... The effect of focusing exclusively on associational issues is a promotion of white people's freedom to exercise economic and social domination."

Neil Gotanda, "A Critique of "Our Constitution is Color-Blind,"" *Stanford Law Review* 44 (1991): 1, 9-10.

[16] 334 U.S. 1 (1948).

[17] 392 U.S. 409 (1968).

[18] Gotanda, "A Critique," 9, n. 32 (citing Wechsler, "Toward Nuetral Principles of Constitutional Law," 29). Wechsler writes: "Assuming that the Constitution speaks to state discrimination on the ground of race but not to such discrimination by an individual even in the use or distribution of his property, although his freedom may no doubt be limited by common law or statute, why is the enforcement of the private covenant a state discrimination rather than a legal recognition of the freedom of the individual? . . . What is not obvious, and is the crucial step, is that the state may properly be charged with the discrimination when it does no more than give effect to an agreement that the individual involved is, by hypothesis, entirely free to make." Id.

[19] Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Incorporated: Oxford University Press 2001), 221-38.

[20] *See, e.g.*, the Preamble which declares among its objectives strong regard for human rights where two of the four objectives stated in the Constitution are: "To heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental rights. . . . [and] "To improve the quality of life of all citizens and to free the potential of each person." Further, the first provision in the Constitution's Bill of Rights reaffirms this commitment to "human dignity, equality and freedom," cornerstones of human rights. Section 7 (1). *See also* sections 1 (a) (stating the values upon which the Constitution is based are "human rights, dignity, the achievement of equality and the advancement of human rights and freedoms."), 36 (1) (limitations of rights is "reasonable and justifiable" only after taking "human dignity, equality and freedom" into account) and 39(1) (a) (interpretation of Bill of Rights "must promote... human dignity, equality and freedom.").

[21] One American scholar suggests using popular referendums to determine fundamental rights. *See* Benjamin N. Smith, "Using Popular Referendums to Declare Fundamental Rights," *Boston University Public Interest Law Journal* 11 (2001): 123. Given that the tyranny of popular democracies is widely acknowledged, perhaps Smith is overly optimistic in suggesting that the majority will not act "inappropriately" and trample the rights of various minority or political less powerful groups, at least with respect to gay rights. Id. at 138-39.

[22] Wojciech, "Post Communist Chapters," 234. The author cites as an example the post communist constitutions in Belarus, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Romania, Russia, Ukraine, Yugoslavia, Montenegro, and Serbia. Id.

[23] Littell, "Can a Constitutional Right," 293. The author calls these programmatic socio-economic rights found in the constitutions of Nordic countries, France, Greece, Italy, and Spain. Id.

[24] Wojciech, "Post Communist Chapters," 235. The author cites as an example the post communist constitutions in Albania, Moldova, Poland, and Slovenia. Id. at 235, n. 73.

[25] *R.S.A. v. Grootboom*, 2001 (1) S.A. 46 (CC), ¶ 20, n. 20. (citing numerous articles debating this point in South African political and legal journals).

[26] Richard J. Goldstone, "A South African Perspective on Social and Economic Rights," *Human Rights Brief* 13 (2006): 4.

[27] Id.

[28] According to the Constitutional Court of South Africa, the socio-economic rights contained in the 1996 Constitution are justiciable, but as the Court acknowledges, the problem is "how to enforce them in a given case." *Grootboom*, 20.

[29] Goldstone, "A South African Perspective," 5, n. 4. The author notes that in *Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development*, 2004 (6) SA 505 (CC), the Constitutional Court held that the use of the term "everyone" in the Constitution included non-citizens as well as citizens. Id. at 4.

[30] Constitution of the Republic of South Africa, ch. 2 §§ 26 (1), 27 (1), 29 (1)(a) (Oct. 11, 1996), *available at* http://www.polity.org.za/html/govdocs/constitution/saconst.html?rebookmark=1. In addition, § 28 (1)(c) provides for children's socio-economic rights and § 35 (2)(e) grants socio-economic rights to incarcerated individuals whether convicted or awaiting trial.

[31] Id. at §§ 26 (3), 27(3).
[32] Id. at §§ 9, 10, 11.
[33] § 26 (2) guaranteeing a right to housing provides: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The same qualification is found in § 27 (2) guaranteeing health care, food, water and social security along with similar language in § 29 (1) (b) guaranteeing a right to education.
[34] *In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), ¶ 77.
[35] Ex Parte Chairperson of the Constitutional Assembly: *In Re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 774 (CC), ¶ 78. "[T]hese rights are, at least to some extent, justiciable.... At the very minimum, socio-economic rights can be negatively protected from improper invasion." Id. ¶ 8.
[36] *Grootboom*, ¶ 20.
[37] *Soobramoney v. Minister of Health* [KwaZulu-Natal], 1997 (12) BCLR 1696 (CC), ¶ 30.
[38] *Grootboom*.
[39] Id. ¶ 33.
[40] *See, e.g.*, Sunstein, *Designing Democracy*, 224-37. But c.f., Murray Wesson, "*Grootboom* and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court," *South African Journal on Human Rights* 20 (2004): 284, 289-95.
[41] The Constitutional Court in *Minister of Health v. Treatment Action Campaign (TAC)*, 2002 (10) BCLR 1033 (CC), reaffirmed its limited role in this area saying: "The Constitution contemplates ... a restrained and focused role for the Courts.... In this way the judicial, legislative and executive functions achieve appropriate constitutional balance." Id. ¶ 67-70. For a discussion of the debate about a minimum core obligation, compare Sandra Liebenberg, "The Right of Social Assistance: the Implications of *Grootboom* for Policy Reform in South Africa," *South African Journal on Human Rights* 17 (2001): 232; Pierre De Vos, "*Grootboom*, the Right of Access to Housing and Substantive Equality as Contextual Fairness," *South African Journal on Human Rights* 17 (2001): 258 with David Bilchitz, "Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance," *South Africa Law Journal* 119 (2002): 484; Wesson, "*Grootboom* and Beyond," 297-305.
[42] General Comment 3, *The Nature of State Parties' Obligations* E/1991/23 paragraph 10.
[43] *See, e.g., Grootboom*, ¶ 31-33.
[44] Id. at ¶ 32. He continues: "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." Id.
[45] Id. at ¶ 33. "The determination of a minimum core in the context of 'the right to have access to adequate housing' presents difficult questions. ... There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context." Id. The Court concluded that *Grootboom* was not such a case. Id.
[46] Id. at ¶ 23.
[47] For an overview of apartheid era evictions see, Kate O'Regan, "No More Forced Removals? An Historical Analysis of The Prevention of Illegal Squatting Act," *South Africa Journal Human Rights* 5 (1989): 361.
[48] *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268; 2004 SACLR LEXIS 25, ¶¶ 8-10. Justice Sachs wrote: "In the pre-democratic era the response of the law to a situation like the present [eviction proceeding] would have been simple and drastic....Once it was determined that the occupiers had no permission to be on the land, they not only faced summary eviction, [but] were liable for criminal prosecution.... PISA (Prevention of Illegal Squatting Act) was an integral part of a cluster of statues that gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations.... Residential segregation was the cornerstone of the apartheid policy....Differential on the basis of race was ... not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones." Id.
[49] Marie Huchzermeyer, "Housing Rights in South Africa: Invasions, Evictions, the Media and the Courts in the Cases of *Grootboom*, *Alexandra* and *Bredell*," *Urban Forum* 14(1) (2003), *available at* http://www.ihrn.gov.za/Seminars/March%202004/23%20Huchzermeyer.pdf (citing de Vos, "*Grootboom*, the Right of Access to Housing," 261).
[50] For a discussion of this point *see* Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000), 124-38. According

to Klug: "The final property clause.... Not only guarantees the restitution of land taken after 1913 and a right to legally secure tenure for those whose tenure is insecure as a result of racially discriminatory laws or practices, but also includes an obligation on the state to enable citizens to gain access to land on an equitable basis." Id. at 135.

[51] *Grootboom*, ¶ 34. The court in *Jaftha v. Schoeman*, 2005 (1) BCLR 78 (CC), 2004 SACLR LEXIS 23, more directly addresses the right to access to adequate housing contained in § 26(1) of the Bill of Rights.

[52] South African litigator Geoff Budlender raises, but does not explore, the extent to which application of a negative constitutional obligation contained in the South African Bill of Rights applies to non-governmental parties. Geoff Budlender, "Justiciability of the Right to Housing – The South African Experience," (Paper delivered at ICJ conference in New Delhi, India, 2001) *available at* http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers/budlender_housing_ms.pdf.

[53] Id. at 8 (citing *Grootboom*, ¶ 35). The court continues: "The State must create the conditions for access to housing for people at all levels of our society." Id.

[54] Id. at 4.

[55] Prior to moving onto the private land the litigants in this case, 510 children and 390 adults, lived in an informal settlement which was prone to flooding and had no water, sewage, trash collection and little electricity. Some of the litigants had been on the waiting list for municipal provided subsidized low-cost housing for seven years with no idea of when they would get housing. *Grootboom*, ¶ 7.

[56] Id. at ¶ 9.

[57] Id. Following their eviction Mrs. Grootboom and the others sought shelter on a sports field constructing temporary structure with plastic sheeting which proved ineffective when the winter rains began. Id. at ¶ 11.

[58] The plaintiffs alleged that the government's action violated their constitutional right to access to housing under section 26 and the right of children to shelter contained in section 28 (1) (c) . Id. at ¶ 15.

[59] Id. at ¶ 53.

[60] Id. at ¶ 95.

[61] Id. at ¶ 52.

[62] *Grootboom*, ¶ 87.

[63] Id. at ¶ 88.

[64] Id. at ¶ 6.

[65] Budlender, "Justiciability of the Right to Housing," 6.

[66] Id. at 7. Budlender writes that in 2002 the Supreme Court of Appeal, the highest court in South Africa, except the Constitutional Court for constitutional matters, rejected the idea in *Brisley v. Drotsky*, 2002 (4) SA 1 (SAC), ¶ 42. Id.

[67] *Minister of Public Works v. Kyalami Ridge Environmental Association*, 2001 (7) BCLR 652 (CC), 2001 SACLR LEXIS 154, ¶ 2.

[68] Id. at ¶ 17.

[69] The neighboring property owners also argued that they have a constitutional right to procedurally fair administrative actions. See § 33 (b) of the Constitution.

[70] Kyalami Ridge, ¶ 99.

[71] Id. at ¶ 95. The State property at issue was formerly a prison farm and according to the Court well suited as a temporary housing site. Id. at ¶ 98. Lawyers for Mr. Mukwevho, the flood victim, argued that he and the others were destitute, and that the housing guarantee in sections 26 (1) and (2) of the Constitution obligates the State "to take reasonable measures" to help the flood victims achieve this right. Id. at ¶ 19. The State agreed saying that as owner of the property sections 85 (2) (b) and (e) of the Constitution vests it with the executive authority to carry out its constitutional functions, in this case to fulfill its obligation under sections 26 (1) and (2). Id. at ¶ 40. These sections give the President along with the Cabinet the power to "develop[] and implement [] national policy" and perform[] any other executive function provided for in the Constitution or national laws." §§ 85 (2) (b) and (e).

[72] Id. at ¶ 105.

[73] The Court notes that the government even as a private property owner must act lawfully in carrying out its constitutional obligations. Id. at ¶ 114.

[74] Id. at ¶¶ 101-03.

[75] *Grootboom*, ¶ 44.

[76] *City of Cape Town v. Rudolph*, 2003 (11) BCLR 1236 (C),2003 SACLR LEXIS 43, ¶ 65.

[77] Id. at ¶¶ 107-12. Cape Metro Council, the applicant in *Grootboom*, was the predecessor of the City of Cape Town, the applicant in this case. Id. at ¶ 112. The High Court noted that in 2000 the house backlog was 206,000 houses and this number was being reduced by 2000 housing units per year (citing *Grootboom*, ¶¶ 57-58. By November 2001 the backlog had grown to 250,000 houses and "the backlog was no longer being reduced, but was increasing at the rate of 15,000 houses per year. The yearly demand was growing by 25,000 units as against a supply of 10,000 per year. Id. at ¶ 111.

[78] *City of Cape Town v. Rudolph*, 2003 (11) BCLR 1236 (C),2003 SACLR LEXIS 43.

[79] Id. at ¶ 112 (citing *Grootboom*, ¶¶ 57-58).
[80] Id. at ¶ 111.
[81] *Port Elizabeth Municipality*.
[82] Id. at ¶ 2.
[83] Id. at ¶ 3.
[84] Id. at ¶ 19. In balancing the competing constitutional rights the court discussed the apartheid government's approach to illegal squatting as exemplified by the Prevention of Illegal Squatting Act 52 of 1951 and contrasting it to approach adopted in the Prevention of Illegal Eviction from and Unlawful Occupation of Las Act 19 of 1998. Id. at ¶¶ 8-13.
[85] Id. at ¶ 16.
[86] Id. (citing Justice Ackermann's words in *First National Bank of SA Limited t/a Westbank v. Commissioner for the South African Revenue Services*; *First National Bank of SA Limited t/a Westbank v. Minister of Finance*, 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC)).
[87] Id. Later in the opinion the court writes: "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law....The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation." Id. at ¶ 23.
[88] Id. at ¶ 15.
[89] Id. at ¶ 23.
[90] Id. at ¶ 28.
[91] Id. at ¶ 38.
[92] Id. at ¶ 20.
[93] *President of the Republic of South Africa v. Modderklip*, 2005 (8) BCLR 743 (CC).
[94] Both the High Court and the Supreme Court of Appeals ruled that the government's inaction violated Modderklip's property rights under section 25(1) and the occupiers' right to adequate housing under sections 26(1) and (2). Id. at ¶ 4. The court cited section 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Act 19 of 1998 which requires the landowner "to institute eviction proceedings against the unlawful occupiers." Id.
[95] Id. at ¶¶ 4-5. The company chose instead to bring criminal trespass charges against the squatters.
[96] The High Court ruled that the government's inaction constituted an unlawful expropriation of Modderklip's property, also infringing on the company's equality rights under sections 9(1) and (2) of the Constitution by requiring the to bear what should be a state burden of providing accommodation to the occupiers. Id. at ¶ 15. The court also imposed a structural interdict whereby the state had to develop and present a comprehensive plan to implement the court's order and present it to the court and other parties in the matter. Id. at ¶ 16. The Supreme Court of Appeals agreed with the High Court's basic rationale for its ruling but went a step further ordering the state to pay Modderklip "constitutional damages." Id. at ¶¶ 18-21. The Supreme Court of Appeals ordered the State to pay the company compensatory damages to compensate it for the loss of the use of its property, since the private property owner was performing essentially a state obligation – providing temporary housing for homeless individuals. Id. at ¶ 20 (citing *Modderfontein Squatters v. Modderklip Boerdery (Pty) Ltd.*, 2004 (6) SA 40 (SCA), ¶ 43).
[97] The state also argued that Modderklip was not entitled to prevail because it had failed to comply with state law requiring it apply for a timely eviction order. Id. at ¶ 22.
[98] Id. at ¶ 66.
[99] Id. at ¶ 29.
[100] Id. at ¶ 49.
[101] Id.
[102] Id. at ¶¶ 43-46.
[103] Id. at ¶ 66.
[104] Id. at ¶ 47.
[105] Id. at ¶ 26.
[106] Id. at ¶¶ 63-64.
[107] For a discussion of this point *see* Alfred Cockrell, "The South African Bill of Rights and the "Duck/Rabbit,"" (1979), 60 *The Modern Law Review* 60 (1979): 513, 516.
[108] *Jaftha*, ¶ 29. The court imposed limitations based on the constitutional right to housing on the circumstances under which debtors who failed to satisfy judgments against them could be forced to sell their homes to satisfy their debts.
[109] Id. at ¶ 27.
[110] See, Mia Swart, "Left Out in the Cold, Crafting Constitutional Remedies for the Poorest of the Poor," *South African Journal on Human Rights* 21 (2005): 215-16.
[111] Id. at 216, n. 8 (citing two 2002 reports).

[112] Dennis Davis, "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards "Deference Lite?,"" *South African Journal on Human Rights* 22 (2006): 301, 314 (the five Commission annual reports can be found at http://www.sahrc.org.za).
[113] Swart, "Left Out in the Cold," 217.
[114] *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (CC); 1997 BCLR 851 (CC), ¶ 69.
[115] *See, e.g.*, Davis, "Adjudicating" 301 (arguing that the South African Constitutional Court's record on enforcement of socio-economic rights as been less than transformative).
[116] *Minister of Health v. TAC*.
[117] Id. at ¶ 28. The High Court in Modderklip also ordered a structured interdict. *Modderklip*.
[118] Id. at ¶ 129.
[119] *Minister of Health v. TAC*, ¶ 38.
[120]The Court in at least one case, *August v. Electoral Commission*, issued mandatory interdicts directing the Electoral Commission "to make all reasonable arrangements necessary to enable prisoners to register as voters … and to vote in [an] upcoming election." Swart, "Left Out in the Cold," 227. (citing *August v. Electoral Commission*, 1999 (3) SA 1 (CC)). *See also* Sandra Liebenberg, "South Africa, Evolving Jurisprudence on Socio-economic Rights: An effective tool in challenging poverty," (2002), *available at* http://www.communitylawcentre.org.za.
[121] Swart, "Left out in the Cold," 225-26.
[122] Wim Trengove, "Judicial Remedies for Violations of Socio-Economic Rights," *ESR Rev.* 1(4) (1999), *available at* http://www.communitylawcentre.org.za/ser/esr1999/1999march_trengove.php.
[123] Swart, "Left out in the Cold," 238. In *Port Elizabeth Municipality* Justice Sachs wrote that "courts may need to find expression in innovative ways." *Port Elizabeth Municipality*, ¶ 39. He was referring in this case to voluntary or compulsory face-to-face mediation. Justice Sachs calls on poor and landless people not to view themselves as "helpless victims" but mediation is hardly an effective tool in eviction cases when there is considerable socio-economic imbalance of power between the two sides.
[124] Davis, "Adjudicating," 304.
[125] Id.
[126] Id. at 304. Davis cites *Soobramoney v. Minister of Health* (Kwa-Zulu), 1998 (1) SA 765 (CC) and *Minister of Health v. TAC* as examples of the Court limiting the right to health care contained in sec 27. Id. at 305-306. He also cites *Grootboom*, Id. at 306-307.
[127] Davis, "Adjudicating," 326.
[128] *Grootboom*, ¶ 4 (citing *Grootboom v. Oostenberg Municipality*, 2000 (3) BCLR 277 (C). According to the High Court "tents, portable latrines and a regular supply of water…would constitute the bare minimum." Id.