

AFRICAN JOURNAL OF LEGAL STUDIES

Protecting Human Rights Amidst Poverty and Inequality: The South African Post-Apartheid Experience on the Right of Access to Housing

John C. Mubangizi*

.....

Abstract

A significant gain of the new political and constitutional dispensation ushered in South Africa in 1994 was a commitment to the protection of human rights. However, protecting human rights in a country where the gap between the rich and the poor is among the largest in the world was always going to be a daunting challenge. The challenge is even more daunting with the protection of socio-economic rights such as the right of access to adequate housing. This article explores the challenges that South Africa faces in protecting human rights in the face of persistent poverty of over half of the country's population, vast economic disparities and gross inequality. Focusing on the right of access to adequate housing, the author explores some prospects arising from the roles played by the constitution; domestic courts; other state institutions as well as non-state actors. The article concludes that although the challenges are real, the prospects are promising. However, a lot must be done if the democratic miracle that has characterized South African society over the last fifteen years is to be maintained.

*Professor of Law, Deputy Vice-Chancellor and Head: College of Law and Management Studies, University of KwaZulu-Natal, Durban, South Africa.

©2008. The Africa Law Institute. All rights reserved. Cite as: 2 *Afr. J. Leg. Stud.* 2 (2008) 130-146. The *African Journal of Legal Studies* ("AJLS") is a free peer-reviewed and interdisciplinary journal published by The Africa Law Institute ("ALawI"). ALawI's mission is to engage in policy-oriented research that promotes human rights, good governance, democracy and the rule of law in Africa. The views expressed in the articles and other contributions to the AJLS are those of the authors only, not of our Editorial or Consultative Boards or ALawI. To download or comment on current articles, sign-up for future issues or submit a manuscript, please visit <<http://www.africalawinstitute.org/ajls>> or e-mail ajls@africalawinstitute.org. AJLS is also available on CIAO Net, HeinOnline, Lexis-Nexis, ProQuest, Quicklaw and Westlaw. The journal welcomes books for review and inquiries from experts wishing to serve on our consultative board. E-mail Charles Chernor Jalloh, Founding Editor-in-Chief, at ajls.editor@gmail.com.

I. Introduction

Protecting human rights can be a daunting challenge in a country like South Africa where about half of the population is considered poor and the gap between the rich and poor is among the largest in the world. The challenge is aggravated by the fact that South Africa is a society of unprecedented diversity. Such diversity manifests itself in terms of race, colour, gender, language, ethnicity, religion, culture and disability. This challenge also has to be seen against the background of South Africa's unique history which was characterized by gross violations of human rights, institutionalized racism, denial of access to social and economic resources and political disenfranchisement of the majority. As a result, before 1994, inequality was a defining feature of the South African society and was given expression through a variety of forms that were inconsistent with human rights. It is as a result of this very same history that South Africa faces an acute housing shortage today. As the Constitutional Court acknowledged in *Government of the Republic of South Africa v Grootboom*¹, '[t]he cause of the acute housing shortage lies (at least partly) in apartheid...and its system of influx control that sought to limit African occupation of urban areas.'²

It is against that background that this article seeks to explore the challenges and prospects facing the protection of human rights in a predominantly poor and unequal society. In doing this, the emphasis will be on the right of access to housing because shelter is a critical basic necessity of life that has a significant bearing on the lives of the poor. It is also because the right to housing is a basic human right whose particular importance is linked to a wide range of other rights. Indeed, as noted by the United Nations Committee on Economic, Social and Cultural Rights, '[t]he human right to adequate housing... is of central importance for the enjoyment of all economic, social and cultural rights.'³ The preamble of the Draft International Convention on Housing Rights⁴ also underscores that 'adequate housing is essential to freedom, dignity, equality and security for everyone.'

At this juncture, it is imperative to offer working definitions of the terms 'poverty' and 'inequality'. 'Poverty' has been defined in various ways and the debate over poverty definitions is never-ending.⁵ For purposes of this discussion, we shall follow *The New Encyclopaedia Britannica* which defines 'poverty' as 'the state of one who lacks the usual or socially acceptable amount of money or material possessions.'⁶ Under this definition, poverty exists when people lack the means to satisfy their basic needs. The term 'inequality' is much easier to define as it simply means the condition of being unequal in respect of opportunity, treatment or status. As used in this article, 'inequality' refers to social and economic disparity.

¹ 2001 (1) SA 46 (CC).

² Ibid [6].

³ General Comment No. 4, Article 1.

⁴ Prepared by the UN Special Rapporteur on Housing Rights, Rajindar Sachar, in August 1994.

⁵ See JC Mubangizi, 'Know Your Rights: Exploring the Connections between Human Rights and Poverty Reduction with Specific Reference to South Africa' (2005) 21 *SAJHR* 32, 33.

⁶ *The New Encyclopaedia Britannica* (Encyclopaedia Britannica, Chicago 1993) 652.

II. Some important realities

While many see South Africa as a productive and industrialized economy that exhibits many characteristics associated with developed countries, the reality is that the overwhelming majority of South Africans are poor. This is because South Africa has a two-tiered economy – one rivalling many developed countries and the other similar to those of several African and other developing countries. For that reason, South Africa is often referred to as a country of two nations – one for the rich and the other for the poor. The main reason for this is that in South Africa, living standards are closely correlated with race. According to *Africa Focus*, poverty is concentrated among blacks, particularly Africans – about 61 per cent of Africans and 38 per cent of mixed-race (or so-called ‘coloureds’) are poor, compared with five per cent of Indians and one per cent of whites.⁷

Similarly, the United Nations Development Programme (UNDP) South Africa Human Development Report (2003) stated that about 48.5 per cent of the South African population fell below the poverty line.⁸ Other statistics show that in South Africa, about 11 per cent of the population live on less than one dollar per day and about 34 per cent on less than two dollars per day.⁹ Although this is much better than in other African countries, it is still cause for concern. Another study conducted in 2004 concluded:

The single most important issue facing South Africa 10 years after the transition to democracy is breaking the grip of poverty on a substantial portion of its citizens. There is a consensus amongst most economic and political analysts that approximately 40 percent of South Africans are living in poverty - with the poorest 15 per cent in a desperate struggle to survive.¹⁰

Although (and maybe because) South Africa is a country of unprecedented diversity, it is unfortunately also a nation with vast economic disparities. The Gini Coefficient, which measures the distribution of a country’s national income (and hence the degree of inequality), serves as the clearest and harshest indicator of South Africa’s unequal distribution of income and well-being. With a Gini Coefficient of about 0.6, South Africa has one of the most unequal income distributions in the world – second only to Brazil.¹¹ The main consequence of this situation is what is usually referred to as ‘poverty amidst plenty’.

In relation to housing, the reality of the problem has to be understood in the context of the legacy of apartheid. Under that legacy, black people were only allowed to live in townships or in impoverished rural areas. Very few houses were

⁷ Africa Focus, ‘South Africa: Poverty Debate’ (Quoting a report entitled ‘Social Security Policy Reform in Post-Apartheid South Africa - A focus on the Basic Income Grant’) <<http://www.africafocus.org/docs04/big0411.php>> accessed 9 June 2008.

⁸ UNDP, ‘South Africa Human Development Report 2003: The Challenge of Sustainable Development in South Africa: Unlocking People’s Creativity’ (Oxford 2003).

⁹ See World Resources Institute ‘Poverty Resource: South Africa’ (Washington 2007) <<http://earthtrends.wri.org/povlinks/country/south-africa.php>> accessed 9 June 2008.

¹⁰ ‘Poverty and Inequality in South Africa 2004 – 2014’ (Quoted in *SOUTH AFRICA: Inequality a Threat to Social Stability*) <<http://www.irinnews.org/report.aspx?reportid=50816>> accessed 9 June 2008.

¹¹ Ibid.

built for them. As a result, at the time of the new constitutional and democratic dispensation (1994), there was, on average, only one formal brick house for every 43 Africans compared to one for every 3.5 whites.¹² It is estimated that between 7.5 and 10 million people lived in informal housing such as shanties in squatter camps and townships.¹³ According to the 2006/2007 Department of Housing Annual Report, the 1994 backlog of approximately three million houses has now been reduced to about 2.2 million. This means that today, millions of people still live in shanties and squatter camps. It is in the context of these realities that we must appreciate the challenges of protecting human rights in South Africa, particularly with respect to the right of access to housing.

III. The challenges

The right of access to housing belongs to the so-called 'second generation' human rights, also referred to as socio-economic rights. The South African Bill of Rights contains a number of socio-economic rights, which include rights dealing with labour relations; environmental rights; property rights; the right of access to health care, the right to sufficient food and water; the right of access to social security; and the right to basic and on-going education. It is noteworthy that most of these rights have important social and economic ramifications as they reflect specific areas of basic needs or delivery of particular goods and services.¹⁴ Furthermore, they tend to create entitlements to material conditions of human welfare.¹⁵

For this particular reason, sections 26 and 27 of the South African Constitution are seen as the most significant of all the socio-economic rights in the South African Bill of Rights. Section 26(1) provides for the right of access to adequate housing while section 27(1) provides for the right of access to health care services; sufficient food and water; and social security. The significance of these rights is grounded in the fact that they guarantee everyone the right of access not only to important components of an adequate standard of living but also to things that are ordinarily regarded as basic necessities of life. This has to be seen in the context of the preamble to the Constitution, which envisions the adoption of the Constitution as the supreme law of the Republic in order to, *inter alia*, 'improve the quality of life of all citizens and [to] free the potential of each person.'¹⁶

Given this commitment, there is no doubt that the main challenge to the protection of human rights in South Africa lies in the poverty and inequality that characterizes the South African society. I have argued elsewhere that of all the social phenomena that have a significant impact on human rights, poverty

¹² See R Knight, 'Housing in South Africa' (New York July 2001) <<http://richardknight.homestead.com/files/sisahousing.htm>> accessed 9 June 2008.

¹³ Ibid.

¹⁴ See JC Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Political Guide* (Juta & Co, Cape Town 2004) 118.

¹⁵ See D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) 2.

¹⁶ See S Nadasen, *Public Health Law in South Africa* (Butterworths, Durban 2000) 80.

probably ranks highest.¹⁷ Some have actually argued that poverty is in itself a human rights violation.¹⁸ In the particular context of South Africa which, ironically, is more resource-rich and potentially affluent than the rest of the African continent, the situation is compounded by unequal access to social and economic amenities and resources. This inevitably results in a society characterized by inequality and discrimination, the violation of socio-economic rights and the denial of civil liberties. All these are impediments to the protection of human rights.

The problem of poverty, particularly in South Africa, is unfortunately compounded by the scourge of HIV/AIDS which has reached pandemic proportions in many parts of sub-Saharan Africa with South Africa now regarded as the epicentre of the disease. In fact, South Africa is currently experiencing one of the most severe AIDS epidemics in the world. According to UNAIDS statistics, there are 5.7 million people living with HIV in South Africa. The HIV prevalence rate among adults aged 15 to 49 is about 18.1 per cent.¹⁹

The impact of HIV/AIDS occurs not only in terms of the human toll and suffering, but also in terms of human rights and health care. I have argued elsewhere that issues of human rights in general and the right to health care specifically have become paramount not only in trying to stem the spread of HIV/AIDS, but also in dealing with those who are infected or affected.²⁰ As such, several human rights norms are quite relevant both in the fight against HIV/AIDS and also in the protection of the rights of people infected with the disease. Although the right to health care is perhaps the most relevant, there are other important rights such as the right to privacy, the right to human dignity, the right to life, the right not to be discriminated against and of course the right of access to housing. In that context, HIV/AIDS poses an enormous challenge to the protection of human rights particularly in those countries where the disease is prevalent. Today South Africa ranks very high among such countries.

In the particular context of South Africa, the inescapable link between poverty and HIV/AIDS cannot be overemphasized. *Africa Renewal*, an online journal which highlights issues affecting the African continent, makes reference to a May 2000 government report on social conditions in South Africa at the time emphasizing the linkages between poverty and HIV/AIDS.²¹ According to the journal, the report

estimated that HIV/AIDS will worsen poverty, while at the same time noting that limited access to health services, low educational levels and patterns of labour mobility within South Africa and the region tend to speed the disease's

¹⁷ See JC Mubangizi (n 5) 32.

¹⁸ Ibid.

¹⁹ UNAIDS, 'South Africa: HIV/AIDS Estimates'

<http://www.unaids.org/en/CountryResponses/Countries/south_africa.asp> accessed 31 July 2008.

²⁰ See JC Mubangizi, 'Poverty Production and human rights in the African context' (2007) 11 *Law, Democracy and Development* 9.

²¹ E Harsch, 'South Africa's Mounting AIDS Toll' January 2001 *Africa Renewal* Vol. 14(4)

<<http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144aids2.htm>> accessed 11 June 2008.

advance. In this way...South Africa's legacy of apartheid and inequalities are contributory factors to the rapid rate at which HIV is spreading.²²

Besides its obvious link with poverty, one might ask what HIV/AIDS has to do with the right of access to housing. A lot, actually. Lack of affordable housing is a critical problem facing a growing number of people living with HIV/AIDS. According to the findings of a study conducted and published by the National Coalition of the Homeless (USA) in August 2007, the prevalence of HIV/AIDS is higher among people who are homeless than among those who are housed. The study recommends that housing assistance such as grants should be made available to persons with HIV/AIDS as they need safe, affordable housing and supportive, appropriate health care.²³ In the context of South Africa, what all this means is that for as long as HIV/AIDS continues to be a problem, the protection of human rights, including the right of access to housing, will continue to be a challenge.

An important challenge to the protection of human rights in South Africa is the level of crime. The length and scope of this paper do not lend themselves to a detailed discussion of crime statistics, save to say that crime is a major problem in the country. This fact was clearly borne out in the national crime statistics released in June 2008. Although the statistics show a general decrease of 4.6 per cent on the preceding year (2006/2007), there is no doubt that crime levels in South Africa are exceedingly high. Commenting on the 2006/2007 statistics, the online *Mail and Guardian* had this to say:

South Africa, which is to host the Soccer World Cup in 2010, has one of the world's heaviest crime burdens. With around 50 murders, 148 rapes and nearly 700 serious assaults committed each day, violent crime is a particular concern.²⁴

This might be an unfair assessment given that South Africa's crime situation is usually compared to that in developed countries. Indeed, research on the victims of crime has shown that the picture of South African crime is more typical of a developing country.²⁵ Be that as it may, there is no doubt that high levels of crime have had a profound impact on the South African public's feelings of insecurity, a situation inconsistent with the universal human right norms relating to the right to security of a person.

There are other major and obvious implications of crime on human rights. These do not only relate to the rights of the victims of crime but also to the rights of suspects, including arrested, detained and accused persons. Considering the

²²E Harsch, 'South Africa's Mounting AIDS Toll' January 2001 *Africa Renewal* Vol. 14(4) <<http://www.un.org/ecosocdev/geninfo/afrec/subjindx/144aids2.htm>> accessed 11 June 2008.

²³National Coalition for the Homeless, 'HIV/AIDS and Homelessness: NCH Fact Sheet #9' (Washington June 2008) <www.nationalhomeless.org/publications/facts/HIV.pdf> accessed 11 June 2008.

²⁴— 'Crime Stats a Wake-up Call' *Mail and Guardian Online* (Johannesburg 4 July 2007) <<http://www.mg.co.za/article/2007-07-03-crime-stats-a-wakeup-call-for-govt>> accessed 18 October 2008.

²⁵Ibid.

present status of the South African criminal justice system, crime will continue to be a big challenge to the development of a human rights culture for the foreseeable future.

An interesting and relevant dimension is the obvious link between crime and poverty. Some believe that the enormous poverty problem in South Africa is the major reason for the high crime rates. Although this view is sometimes seriously contested, one cannot deny that crime lies at the centre of a conundrum of factors that include past apartheid policies, social and economic exclusion, unemployment, inequality and poverty. Although there is no justification for crime whatsoever, there is no denying that these factors are some of the root causes in South Africa and they have obvious implications for the protection and enjoyment of human rights.

The link between crime and the specific right of access to housing is inescapable. Although young homeless people are often the victims of crime, they are just as often the perpetrators of it. This is because homeless people lack access to safe housing and therefore also lack the economic and social supports that a home normally affords. As a result, they resort to crime in order to survive. In that way, crime becomes one of several challenges that have an indirect impact on the right of access to housing.

Unemployment is another. The rate of unemployment in South Africa is one of the highest in the world. This fact is borne out by statistics which show that, using a broad definition, the unemployment rate has grown from 36 to 42 per cent since the year 2000.²⁶ It is important to note that unemployment in South Africa is closely correlated to race (being more prevalent among African blacks) and that rural unemployment rates are higher than urban rates. There is no doubt therefore that unemployment is one of the most pressing socio-economic problems facing the government. It may well be argued that seen together, poverty and unemployment are a violation of human rights because they create social marginalization, a precarious quality of life and instability. As such, unemployment becomes a serious challenge to the protection of human rights. In the specific context of the right of access to housing, there is no doubt that the ability to afford adequate housing is directly related to a person's earnings.

Over the last decade or so, the South African government has implemented housing programmes at national, provincial and local government levels. These programmes include a range of measures aimed at promoting access to housing, including provision of rental housing, allocation of land for purchase and subsidizing the building of houses through, for instance, a housing subsidy scheme. This subsidy scheme is a measure through which the government provides a once-off grant to qualifying individuals. The problem is, only those who are in some form of formal employment qualify. Because those who are unemployed do not qualify, their right of access to housing is adversely affected.

Another significant challenge to the protection of human rights in South Africa, as in many other developing countries, is corruption. Money stolen from

²⁶ Global Poverty Research Group, 'Unemployment, race and poverty in South Africa' (Oxford 2005) <<http://www.gprg.org/themes/t2-inc-ineq-poor/unem/unem-pov.htm>> accessed 15 June 2008.

government coffers, bribery in the public and private sectors, corruption in government departments and embezzlement of public funds are good examples of practices that not only lead to violations of human rights, but also contribute significantly to poverty and inequality. According to Ize Charrin of the United Nations Office of the High Commissioner for Human Rights, '[equal] treatment and equality before the law and non-discrimination are very important tenets of human rights instruments, and corruption effectively undermines these principles.'²⁷

It has therefore been argued that 'the struggle to promote human rights and the campaign against corruption share a great deal of common ground.'²⁸ According to Rajkumar:

A corrupt government that rejects both transparency and accountability is not likely to respect human rights. Therefore, the campaign to contain corruption and the movement to protect and promote human rights are not disparate processes. They are inextricably linked and interdependent and both the elimination of corruption and the strengthening of human rights require a strong integrity system.²⁹

It is no wonder therefore, that in countries where corruption is rampant, human rights violations also abound. In such countries, any talk of protecting human rights is rather meaningless. In the particular context of South Africa, it may be said that although the levels of corruption are not as high as in other African countries, recent high profile cases have revealed evidence of serious corrupt practices at high levels of government. The on-and-off investigations in the so-called 'arms deal' court cases involving the President of the ruling African National Congress (ANC) and his former financial advisor Shabir Shaik, and the so-called 'travelgate' scandal in the national parliament are all cases in point.

Insofar as the right of access to housing is concerned, there is sufficient documented evidence that shows rampant corruption in the allocation of building tenders, the allocation of housing subsidies and the allocation of completed houses for occupation. It is, for example, generally believed that anger at corrupt housing allocation was one of the major factors behind the outburst of xenophobic violence that rocked South Africa and shocked the world in May 2008.³⁰ More than 60 foreigners were killed in the violence and thousands were displaced.

Corruption is closely related to yet another challenge – service delivery. Mention was made earlier that socio-economic rights, which directly affect the poor, have important social and economic ramifications as most of them reflect

²⁷ MF Ize Charrin (Opening statement to the United Nations Conference on Corruption, Good Governance and Human Rights, Warsaw, 8, 9 November 2006)
www.unhchr.ch/hurricane/hurricane.nsf/view01/5E36EDDCB5134A34C125722C00751584?opendocument accessed 18 June 2008.

²⁸ C Rajkumar 'Corruption and Human Rights' (2002) 19(19) *Frontline* at
<<http://www.hinduonnet.com/fline/fl1919/19190780.htm>> accessed 20 October 2008.

²⁹ *Ibid.*

³⁰ See M Plaut 'South Africa: Behind the Violence' *BBC News* (London 4 June 2008) at
<<http://news.bbc.co.uk/2/hi/africa/7433472.stm>> accessed 18 June 2008.

specific areas of basic needs or delivery of particular goods and services. Any efforts to fight poverty need to focus on ensuring sustainable public service delivery. Over the years however, public service delivery in South Africa has been, and continues to be, a serious problem – a problem that has sometimes led to public protests and demonstrations. Poor service delivery mainly affects the poor. This is borne out by the 2000 Poverty and Inequality Report which concluded that ‘welfare service delivery still bears the hallmarks of apartheid inequalities, with people in disadvantaged and rural areas having very limited access, or no access at all, to the services of either government or NGO’s.’³¹ This conclusion is still valid today if the never-ending public protests and demonstrations are anything to go by.

In the particular context of housing, some believe that service delivery is so poor that it amounts to a national housing crisis. According to the Anti-Privatization Forum, ‘there is a huge backlog in the delivery of houses nationally and this can be witnessed in Durban and in Cape Town where the community of Delft has been evicted to the streets and they are left stranded’.³² It would appear therefore that in spite of several government programmes, poor service delivery remains a huge challenge to the realization of the right of access to housing. The same may be said about other socio-economic rights such as the right of access to health care services, sufficient water and food and social security, all of which have significant implications for the poor.

Finally, a very important challenge to the protection of human rights in South Africa is related to ignorance and the lack of public awareness of those rights. As previously argued, the level of public awareness of human rights is directly linked to levels of poverty in South Africa because ignorance and lack of knowledge and public awareness of human rights are mainly prevalent among the poor.³³

Several surveys have been conducted in South Africa over the years aimed at determining the level of human rights public awareness and the public perceptions towards such rights.³⁴ These surveys are all consistent in their findings that firstly, in South Africa the level of public awareness of human rights is very low and secondly, that this is mainly prevalent among the poor. Although the situation may have improved slightly over the last few years, there is no doubt that many South Africans, particularly the poor, do not enjoy certain human rights simply because they are unaware of their existence.

As far as housing is concerned, knowledge of human rights is important not only because it enables ordinary people, particularly the poor, to know how to

³¹ J May (ed), *Poverty and Inequality in South Africa: Meeting the Challenge* (2000) quoted in BC Mubangizi, ‘Improving Public Service Delivery in the New South Africa: Some Reflections’ (2005) 14 (1) *Journal of Public Administration* 633-648.

³² Ahmed, ‘Arrested for demanding housing - the trial of Kliptown protestors continues’ at <http://apf.org.za/article.php3?id_article=298> accessed 20 October 2008.

³³ See JC Mubangizi (n 5) 32.

³⁴ Two such studies were conducted by the Community Agency for Social Enquiry (CASE) in 1998 and 2000 respectively. A more recent study was conducted by the author in 2003. The results of this study are published in JC Mubangizi, *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Juta and Company Ltd, Lansdowne 2004), chapter 7; and in JC Mubangizi ‘Protection of Human Rights in South Africa: Public Awareness and Perceptions’ (2004) 29(1) *Journal of Juridical Science* 62.

fight and enforce their right of access to housing, but it also empowers them to resist evictions and object to discriminatory housing allocations. Moreover, knowledge of property rights would promote higher levels of security of tenure and enhance investment and development thereby reducing poverty and inequality. As one commentator recently remarked, 'for many rural and urban households, the lack of legal recognition of their property rights can result in insecurity of tenure and can also hamper development.'³⁵

IV. Some prospects

Despite the realities of poverty and inequality discussed earlier and the challenges outlined above, South Africa has made significant strides over the last fourteen years in the protection of human rights. Among African and many other developing countries, South Africa has proved to be a leader in the protection and enforcement of socio-economic rights including the right of access to housing. Consequently, the prospects for protecting human rights generally and, in the context of this paper, the right of access to housing, are real and worth exploring. It is to those prospects that we now turn our attention.

A. The role of the constitution

The intention to create a human rights culture in South Africa through constitutional means is unequivocal in the preamble to the 1996 Constitution which sets out four objectives, including '[healing] the divisions of the past and [establishing] a society based on democratic values, social justice and fundamental human rights.' This intention is further emphasized in the opening section of the Constitution which lists a number of values on which the Republic of South Africa is founded as a sovereign, democratic state. These include 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'³⁶ Reference to some of these values is repeated in several other sections of the Constitution.³⁷ The emphasis on these values highlights the fact that the new democratic order envisaged by the constitution places significant importance on the protection of human rights.

Such protection of human rights mainly takes place through the Bill of Rights in the constitution. Indeed, one of the most outstanding features of the South African Constitution is that it contains a Bill of Rights which is described in the Constitution as 'the cornerstone of democracy'³⁸ and is generally believed to be one of the most progressive in the world. This is because it contains all categories of human rights that are ordinarily included in most international human rights instruments. In that regard, the Bill of Rights in the Constitution provides a powerful mechanism through which human rights are protected in South Africa. However, for such protection to be meaningfully sustained there

³⁵ U Pillay, 'The "mystification of capital": Legal title for the low-income market' (2008) 6(2) *HSRC (Human Sciences Research Council) Review* 25.

³⁶ Constitution of the Republic of South Africa, No. 108 of 1996, s 1(a).

³⁷ *Ibid* s 7, 36 and 39.

³⁸ *Ibid* s 7.

ought to be reasonable mechanisms for the implementation and enforcement of these rights. To that end, section 7(2) of the Constitution enjoins the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' The implication here is that the state must not only refrain from interfering with the enjoyment of rights but must act to protect, enhance and realise their enjoyment.³⁹

For purposes of the discussion in this article, the role of the constitution in the protection of human rights in South Africa has to be seen not only in the context of poverty and inequality but also with specific reference to the right of access to adequate housing. With regard to inequality, section 9 of the constitution is significant. Besides guaranteeing the right to equality before the law and equal protection of the law, section 9 provides for the achievement of equality through affirmative action measures and prohibits unfair discrimination. In the context of poverty, it was mentioned earlier that the Bill of Rights contains a whole array of socio-economic rights. The relevance and significance of these rights is that their protection and realization can easily be seen as a means of fighting poverty and fostering equality.

In the particular context of the right of access to adequate housing, section 26 of the South African Constitution states as follows:

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

When one reads this section together with section 7 of the Constitution which enjoins the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights', one gets a clearer sense of the prospects presented by the Constitution in protecting the right of access to adequate housing in the face of poverty and inequality. This is because the state is obliged to take several measures (taking into account available resources) to ensure the realization (albeit progressively) of that particular right. It may do this in several ways: through the legislature by enacting legislation; and through the executive and state administration by adopting the necessary policies and making the appropriate administrative decisions.

With respect to legislation, the state has enacted a number of statutes, the most relevant of which include the Housing Act,⁴⁰ the Extension of Security of Tenure Act,⁴¹ the Rental Housing Act,⁴² and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.⁴³ These statutes form a web of

³⁹ See D Brand, 'Introduction to socio-economic rights in the South African constitution' in D Brand and C Heyns (eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, Pretoria 2005) 9.

⁴⁰ Act No. 107, 1997.

⁴¹ Act No. 62, 1997.

⁴² Act No. 50, 1999.

⁴³ Act No. 19, 1998.

protection that has considerably improved the position of the poor whose legal rights of access to land and housing have traditionally been weak or non-existent. As for policies, the first post-apartheid policy on housing: *A New Housing Policy and Strategy for South Africa*, was adopted as a 1994 White Paper. Since then, a number of other policies have been adopted including *A Social Housing Policy for South Africa* (2003). The most recent attempt at a national housing policy was in the form *Breaking New Ground*, a national housing strategy that is aimed at the creation of viable human settlements and the removal of blockages that have been slowing housing delivery. Released in 2004, the policy was seen as a significant departure from the previous housing programme as 'the need to meet delivery targets is replaced by a focus on housing provision to address poverty alleviation, economic growth, improving the quality of life of the poor, creating an asset for the poor, and ultimately developing sustainable human settlements.'⁴⁴

From the foregoing discussion, it can be seen that the Constitution offers promising and interesting prospects. It is mainly through judicial enforcement however, that the realisation and enjoyment of human rights generally (and the right of access to adequate housing specifically) takes place, and it is to that aspect that we now turn our attention.

B. The role of the courts

One of the seminal functions of the courts is to protect human rights. In performing this function the courts play an important role in developing a culture of human rights. This happens mainly through the interpretation of the Bill of Rights as stipulated in section 39 of the Constitution and also through their law-making powers of interpreting legislation and developing the rules of the common law. It also happens through the courts' exercise of their judicial and adjudicatory powers, specifically 'by adjudicating constitutional and other challenges to state measures intended to advance those rights.'⁴⁵ This is particularly true with respect to socio-economic rights. Indeed, through a number of ground-breaking decisions, the South African Constitutional Court has demonstrated, rather innovatively it must be added, by using the common law and existing legislation, that socio-economic rights are enforceable and justiciable. In actual fact this underlines the particular and unique role of the Constitutional Court in protecting human rights.

In the particular context of the judicial enforcement of socio-economic rights, which in turn have a bearing on poverty and inequality, the Constitutional Court has passed several innovative and land-mark judgments. The framework within which the judicial enforcement of those rights can be evaluated is mainly provided by four important Constitutional Court decisions. The first one is *Soobramoney v Minister of Health, KwaZulu-Natal*⁴⁶ which involved an application for an order directing a state hospital to provide the appellant with ongoing dialysis treatment and interdicting the respondent from refusing him

⁴⁴ Pillay (n 35) 25.

⁴⁵ Brand (n 39) 38.

⁴⁶ 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.

admission to the renal unit. The Constitutional Court held that the applicant could not succeed in his claim and found that the denial of the required treatment did not breach the section 27(1) right of access to health care services, and the section 27(3) rights to emergency medical treatment. A number of criticisms have been levelled at the judicial reasoning and approach of the Court in this case.

The second case is *Minister of Health and Others v Treatment Action Campaign and Others*⁴⁷ in which the Treatment Action Campaign (TAC), a non-governmental organisation, in a bid to force government to provide anti-retroviral drugs under the public health care system, specifically demanded that nevirapine, a drug that could reduce by half the rate of HIV transmission from mothers to babies, be freely distributed to women infected with the virus. The Court held that the government's policy and measures to prevent mother-to-child transmission of HIV at birth fell short of compliance with section 27(1) and (2) of the Constitution and ordered the state to provide the required medication and remedy its programme. The other case is *Khosa v Minister of Social Development*⁴⁸ in which legislation that excluded permanent residents and their children from access to social assistance was successfully challenged and found to be inconsistent with the section 27(1) right of access to social security and assistance and also with the section 9(3) prohibition of unfair discrimination.

Although a few other cases involving socio-economic rights have come before South African courts,⁴⁹ the fourth and most relevant Constitutional Court decision involving the judicial enforcement of socio-economic rights dealt with the right of access to housing. This was *Government of the Republic of South Africa v Grootboom*.⁵⁰ In that case, a group of adults and children had been rendered homeless when they were evicted from their informal dwellings situated on private land that was ear-marked for low cost housing. They applied for an order directing the local government to provide them with temporary shelter, adequate basic nutrition, health care and other social services. The Constitutional Court held that the state had failed to meet the obligations placed on it by section 26 and declared that the state's housing programme was inconsistent with section 26(1) of the Constitution.

Besides providing a framework within which the right of access to housing and the legal consequences that flow from it can be evaluated, the *Grootboom* decision contains specific pointers as to the nature and scope of the state's obligations engendered by that right.⁵¹ The Constitutional Court's view in that case was that the right to basic shelter was an unqualified constitutional right, and it was therefore inappropriate to consider whether the state had requisite resources. In the particular context of the poor, Judge Yacoob was unambiguous.

⁴⁷ 2002 (5) SA 703 (CC).

⁴⁸ 2004 (6) SA 505 (CC).

⁴⁹ These include *B v Minister of Correctional Services* 1997 6 BCLR 789 (C) also cited as *Bav Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C); *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W); *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC); *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC); and *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (1) BCLR 78 (CC).

⁵⁰ 2001 (1) SA 46 (CC).

⁵¹ See Brand and Heyns (n 39) 87.

He stated as follows: "The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing."⁵²

On the effective guarantee on the basic necessities of life for the poor, Judge Yacoob further said:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis.⁵³

Hence the Court affirmed that the government had a duty to adopt reasonable policy, legislative, and budgetary measures to provide relief for poor people who had no access to land, no roof over their heads, and who were living in intolerable conditions.⁵⁴ It is perhaps for that reason that the *Grootboom* case is not only the *locus classicus* in the South African jurisprudence in so far as the right of access to housing is concerned, but it is also widely regarded as an international test case of the enforceability of socio-economic rights.⁵⁵ More importantly, the *Grootboom* case and the other cases discussed above clearly demonstrate the role that courts can and do play in redressing poverty and in protecting socio-economic rights such as the right of access to housing.

C. The role of other state/constitutional institutions

The protection and enforcement of human rights in South Africa is not confined to the legislature, executive and judiciary. Chapter 9 of the 1996 Constitution establishes certain institutions supporting constitutional democracy.⁵⁶ Although most of these institutions play an important role in the protection of human rights, the South African Human Rights Commission and the Public Protector are particularly significant. The main functions of the Human Rights Commission are laid down in section 184 as follows:

- (a) To promote respect for human rights and a culture of human rights;
- (b) To promote the protection, development and attainment of human rights; and
- (c) To monitor and assess the observance of human rights in the Republic.

⁵² *Grootboom* (n 50) [24].

⁵³ *Ibid* [93].

⁵⁴ See P Andrews, "The South African Constitution as a mechanism for redressing poverty" in M Ndulo (ed), *Democratic Reform in Africa: Its Impact on Governance & Poverty Alleviation* (Ohio University Press, Athens 2006) 61.

⁵⁵ *Ibid*.

⁵⁶ These include the Public Protector; the Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; and the Electoral Commission.

Regarding socio-economic rights and problems of poverty and inequality, section 184(3) is of particular importance. It obliges relevant organs of state to provide the Human Rights Commission with information on an annual basis on the measures that they have taken towards the realisation of socio-economic rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. Insofar as the right of access to housing is concerned, the Human Rights Commission has played and continues to play an important role in various other ways. In 2004 for example, it produced a report on the right of access to adequate housing whose urgent recommendation was the establishment of a dedicated fund for acquiring well-located land for low-cost housing.⁵⁷ Other recommendations included, *inter alia*, reducing policy incoherence and institutional fragmentation, improving monitoring and evaluation, and ensuring effective participation in the delivery of housing. And in November 2007, the Human Rights Commission held a public hearing into housing evictions and how they affected the constitutionally guaranteed right of access to adequate housing. The hearing investigated service of process and notification of eviction proceedings, the role of banks and estate agents in selling occupied houses, allegations of the inhumane treatment of evictees by members of the South African Police Service and the Sheriff's office, and the role of government and the Ministry of Housing in providing housing for people who have been evicted and whose houses have been repossessed. At the time of writing, the Commission's report had still not been released.

The Office of the Public Protector plays a more indirect but no less important role than the Human Rights Commission. A close look at section 182, which establishes this office, reveals that the functions of the Public Protector are threefold, namely, to investigate any improper conduct in state affairs or public administration, to report such conduct, and to take appropriate remedial action. It may be argued that in performing these functions the Public Protector not only curbs human rights abuses resulting from state misconduct and public maladministration but also protects and enforces constitutional rights including the right of access to housing.

D. The role of non-state actors

By 'non-state actors' we mean civil society organizations such as non-governmental organisations (NGOs), community based organisations (CBOs) and certain public interest groups. Indeed, South Africa has a vibrant network of civil society organisations that play an important role in the protection of human rights. This role has to be seen against the background of the country's unique history. It is perhaps because of this reason that South Africa has the most highly developed non-governmental sector on the entire continent, with more than 50,000 NGOs.⁵⁸ More than one hundred of these may be described as human

⁵⁷ See South Africa Human Rights Commission, 'The Right of Access to Adequate Housing' (21 June 2004) 5th Economic and Social Rights Report Series, 2002/2003 Financial Year, at www.sahrc.org.za/old_website/5th_esr_housing.pdf accessed 22 July 2008.

⁵⁸ See Olisa Agbakoba and Richard Carver, 'The Status of Human Rights Organizations in Sub-Saharan Africa' University of Minnesota Human Rights Library, at

rights organizations.⁵⁹ It has to be pointed out that the ways in which NGOs operate shift over time. An abrupt change in the national political climate, such as occurred in South Africa in 1994, can easily permit the rapid sprouting and flowering of civil society organisations.⁶⁰ With the advent of a new political and constitutional dispensation and the establishment of democratic institutions, new challenges in South Africa led to many NGOs changing their ways of operating.⁶¹ This explains the steady rise in the number of human rights NGOs in the country over the last fifteen years.

According to Abdullahi, civil society organisations play the role of protecting human rights in the following ways:

- gathering, evaluating and disseminating information;
- advocating for relief or legal aid to human rights victims and their families;
- building solidarity among the oppressed and those whose rights are violated;
- internationalizing and legitimizing local human rights concerns; and
- lobbying national and inter-governmental authorities.⁶²

Additionally, some civil society organisations carry out valuable monitoring and investigative work, while others undertake litigation on behalf of individuals who would otherwise not have been able to bring their matters to court. Some of these organisations actually take part in court proceedings as *amicus curiae* (friends of the court) and make important submissions that may bring to the attention of the court relevant matters not already brought to its attention by the parties.

An example of a non-governmental organization that has played and continues to play an important role in the protection of the particular right of access to housing is the Legal Resources Centre (LRC), an organization that is committed to serving the interests of the poor.⁶³ The LRC began its operations in 1979 but before 1994 it was mainly preoccupied with the dismantling of apartheid and the transition to democracy. In post-apartheid South Africa, the LRC has reorganized itself to focus on two major areas: (i) constitutional law and (ii) land, housing and development.⁶⁴ The new constitutional order has obviously enabled the LRC to do more for the poor of South Africa. In the particular context of the right of access to housing, the LRC played an important role in *Grootboom*. Through its lead lawyer on the case, Geoff Budlender, the LRC presented arguments on behalf of Irene Grootboom and 900 other people. In its judgment, the Constitutional Court did not only explicitly acknowledge the organisation's

< <http://www1.umn.edu/humanrts/africa/safrica.htm> > accessed 22 July 2008.

⁵⁹ Ibid.

⁶⁰ See CE Welch Jr, *Protecting Human Rights in Africa: Strategies and Roles of Non-Governmental Organizations* (University of Pennsylvania Press, Philadelphia 1995) 50.

⁶¹ See Mubangizi, *Legal and Practical Guide* (n 34) 204.

⁶² See ANM Abdullahi, 'Human Rights Protection in Africa: Towards Effective Mechanisms' (1996) 3 *East African Journal of Peace and Human Rights* 1, 27.

⁶³ The Legal Resources Centre is a client-based public interest non-governmental organization with offices in Johannesburg, Durban, Cape Town, Port Elizabeth, Pretoria and Grahamstown.

⁶⁴ See D Manning, 'Realising rights through advocacy' in M Ndulo (n 54) 186.

role, but it also accepted their arguments, ruling that the government housing programme did not meet the constitutional test of reasonableness and that the state had failed to meet the obligations placed on it by section 26.

Another example of the LRC's role in the protection of the right of access to housing is its work with the Port Elizabeth Land and Community Restoration Association (PELCRA). Through the LRC, poor people of the community have been successful in pursuing individual land claims or group restitution claims. They have also been able to access prime residential land and high value commercial land at discounted prices.⁶⁵ This has resulted in the development of housing and community facilities. *Grootboom* and the PELCRA case are just two examples of how the LRC protects the right of access to housing. They are also a demonstration of how non-state actors can and do play a significant role in the realization of the right of access to housing specifically and the protection of human rights generally. It should be added that because most civil society organizations in South Africa operate in poverty-stricken areas, their activities present an important prospect for human rights protection albeit in the midst of poverty and inequality.

V. Conclusion

The South African post-apartheid experience has shown that it is possible to protect human rights in a society despite problems of poverty and inequality. For this to happen, certain factors have played an important role. These include: the existence of a comprehensive constitutional bill of rights; respect for the constitution and its values and the existence of a vibrant, innovative and independent judiciary. Relevant state/constitutional institutions and non-state actors have also played a role.

In the context of the right to housing, South Africa still faces an acute housing shortage. Nevertheless there is no doubt that through legislative and policy initiatives, the state has made significant strides in providing housing to the poor. Although the challenges are real, the prospects are promising. In order to maintain and sustain the momentum however, the South African government clearly needs to do everything possible to fight and eradicate crime, corruption and ignorance. More importantly, the root causes of poverty and inequality have to be addressed. That however, is a topic for another discussion.

⁶⁵ *Grootboom* (n 50) [188].