

CHAPTER NINE

ANALYSIS OF DISCOURSES ON THE RIGHT TO HOUSING

9.1 Introduction

My selection of a thesis research was guided by two difficult questions in the debate about rights Hunt (1990:326) identifies; first, whether they are bourgeois and, second, can they work, particularly for subordinate classes. The gestation of the “new” South Africa has been a product of the “Age of Rights”. Rights discourse about the equal enjoyment of all citizenship rights was prominent in the liberation struggle, and, since the political transition to an inclusive democracy, a rights based constitution guides the government’s vision and choices of policies to effect social, political and economic transformation. In the preceding chapters I examined prominent instances and events involving, as well as the positions taken by, a configuration of forces expected to contribute to the blossoming of a human rights culture. What can be said, or concluded, of the impact of these forces on the interpretation of the notion of “rights”, of the right to housing in general, and, where possible, in Gauteng province in particular? The CASE study (Pigou et al 1998) concluded that, because the Constitution’s statement of concrete obligations about the realisation bears certain silences, an arena of contestation over the meaning of rights will take shape, with possibly the courts and civil society organisations playing a prominent role in their interpretation. What underlaid my research questions was a concern whether rights discourse limits the aspirations of the black working classes or is it significantly positively impacting the gradual transformation from the apartheid legacy of race and class inequality and improving the socio-economic conditions of poorer classes. The foregoing has pointed to concerns that there are limitations to the dominant rights discourse to effect transformation; it is a discourse which protects the interests of the powerful and

privileged and dismisses subordinated class's contestation of the discourse. I sought to examine whether resistance to post-apartheid relations of power and inequality, through the language of particularly the socio-economic and housing rights protected in the Constitution, has made gains for subordinate classes by offering new approaches to a hegemonic regime on the meaning and the statements that can be made about rights. My conclusions depended on a detailed historical analysis and empirical evidence of developments on the broader scope of socio-economic rights, an emphasis on the conceptualisation of the right of access to adequate housing and the framework of policies adopted towards the realisation of that right. I gave attention to the qualitative experiences of certain key social agents affected by social, political and economic structural constraints, and their engagement with these.

9.2 Assessing the key forces in the unfolding rights discourse and rights-based transformation process

Civic movements were a formidable force that challenged apartheid authorities. The process of drafting a post-apartheid constitution to secure the rights to goods which civics fought for was an open process in which the public could make submissions. However, despite the quantification of products delivered and the huge annual amounts spent on low-income housing, there are problems about: slow delivery; public observation and confusion about the actual proportional decrease in the housing allocations in the national budget since 2000; anger about the standards and quality of the products delivered; tensions about the shortage of land for low-income housing developments; and, anger about evictions from occupied land and inner-city buildings. The right to housing is a volatile issue posing a potential threat to political stability, respect for election procedures, as well as possibly partly contributing to declining levels of participation in elections which legitimise the institutions of a new democracy. Housing protests are some of the many protests which the Minister of Safety and Security, Charles Ngqakula, acknowledges ignited across the country, and is

evident of social conflict, which Bond (2006) argues is endemic to middle-income countries where elite-pacted transitions to democracy adopted neo-liberal policies due to pressures from international agencies and international capital. Such policies have limited the extent of wealth redistribution.

Besides the constraints of the neo-liberal framework in which SA's government facilitates the realisation of socio-economic rights, incidents of housing protest and violence suggest there is a sense of "relative deprivation" (see Gurr 1970:3, 13, 37-9) of these rights, meaning there is a discrepancy between the goods and conditions of life people feel they are rightfully entitled to, such as their notions of adequate housing and related water and electricity services, and a rise in people's expectations of the goods and conditions they feel they are capable of attaining or what they think they could get, given the social means available to them. A consequence of people's frustration with housing matters has been varying degrees of violent collective action. A discrepancy about attaining adequate housing occurs despite their formal guarantee in the Constitution. Rights discourse is one of the foremost of several other strategies for dealing with a legacy of inequality and to effect significant wealth redistribution. To a great measure, ANC rule has effected the ownership of productive capital for a small black elite. Kunnie (2000:114) argues the co-option of the black elite into the economic restructuring programme of the white economic elite in the post-apartheid era has facilitated a sharper separation of their interests from those of the broader black working class. He illustrates his argument about how distant the aspirations and lifestyle capacities of the black elite has become from that of the working class by pointing to the fact that it is mainly construction workers drawn from the ranks of the black working class who build the plush, comfortable, and expensive homes of the elite and affluent middle-classes (who increasingly are black), but, the persistence of a racially skewed income, makes it impossible for the black construction workers to enjoy owner-occupation of such housing units, let alone modest subsidised low-income housing. While some theorists (see Agnew 1981) argue home-ownership strategies co-opt the working class and contributes to political stability, several developments about

housing in SA and the economic policy choices to build low-income houses show it is unable to meet the rising expectations of low-income blacks, and suggests the political and economic elite is overlooking the political expediency and legitimisation benefits some theorists (see Peattie 1979) argue could be made through accelerating the conditions that facilitate home-ownership among the working classes and impoverished masses. Despite the imperative of a constitutionally guaranteed right, and an official programme to address the poorer classes's housing needs, housing protests are evidence of disappointment about many of its outcomes.

The optimism of the 'critical legal studies' movement that legal doctrine may be manipulated for an infinite spectrum of possibilities, suggests we could assess the South African situation in terms that, after the first fourteen years of an inclusivist democracy, the understanding and interpretation of the Constitutional promises of the realisation of socio-economic rights likely is still at an early stage, but there is still plenty of opportunity to challenge legal institutions to rule in ways that favour the homeless. Each element of the configuration of forces expected to advance a human rights culture may have some ambiguities as far as defending or challenging the hegemonic rights discourse in SA. The notion of rights is linked to both the concepts of "ideology" and "discourse". I feel it is also crucial to ask whether the various agents in the different elements of the configuration treat rights in a manner that effectively conceals continuing relations of domination and inequality in the elite transition. I took the position there is a duality about the notion of rights --- rights can be both ideology and discourse, a false consciousness about relations of domination and inequality in the social structure, as well as a language which can empower subordinate classes. My critical social theory orientation had an emancipatory project in mind: to uncover structures of domination, to offer an alternative discourse on rights from that taken thus far by the key elements in the configuration, to assist subordinated classes or groups realise their potential as humans, and to change a world where there is unequal control of society's resources. In this chapter I critically explore and analyse a "discursive regime" and prospects for changing

it; I focus on the perspectives and activities of significant social agents on rights-based post-apartheid transition and on some key elements of that discourse, such as the notions of rights and state obligations, perspectives on state resources, policy priorities, availability of land and claims to land.

9.2.1 To have rights or not, and how to conceptualise rights

My preceding chapters demonstrated how apparent optimism as well as distrust of rights discourse has been historically, internationally, and in South Africa. Kennedy's (2002) study of how the language of rights shaped the transformation projects of the American 'Left', a broad category in which he includes both socialists' projects for public ownership of the means of production as well as reformers' projects to reconstruct the market and influence it, claims the 'Left' had lost faith in the phenomenon of rights yet both liberal and conservative trends played a role in reviving a rights-based view of reconstruction. The spectrum of 'Left', socialist, and Marxist projects, seek broader transformation of social structures; their critiques of rights culture and language are wary of its incapacity to pursue an egalitarian and communitarian social order. These projects must, however, deal with historical lessons; particularly the fact that Stalinist and Nazi totalitarianism were forged by aspects of 'Left', socialist and Marxist projects, but, because of the absence of a rights culture, people living under these political orders suffered tremendous injustices. Distrust of rights philosophy must always bear in mind the record of totalitarian social orders and invigorate pragmatic theorisations of the continuing importance of rights as symbols of an emancipatory project. A pragmatic theorisation of the alliance of Left projects with that of rights culture, rather than constant critique and abandonment of rights culture, is a wiser vehicle to move these projects forward.

Makau wa Mutua's (1997) pessimism about the Constitution's conceptualisation of rights discourse sees limitations to effecting transformation. It also appears that this conceptualisation where rights will be gradually realised dependent on

available state resources is another factor which sustains the elite transition. He (wa Mutua 1997) notes SA drew from the American model where rights language protects the property interests of the wealthy and powerful, which makes the rights framework adopted in SA traditional and conservative; it is unlikely to alter patterns of power, wealth and privilege; effectively, SA is a victim of the pitfalls of rights discourse. This pessimistic conclusion relied on an analysis of the implications of the constitutional protection to the right to property, which protects the interests of white property and landowners and constrains land reform (wa Mutua 1997:93). Land reform is a major issue of post-apartheid redress, but the “willing buyer/willing seller” policy simultaneously respects the legacy of property rights while other policies and legislation seek to effect land reform. Consequently, developments around land reform and land restitution have been slow up to the time of writing his article in 1997, that is, seven years before the Land Summit of 2005, which reconsidered that policy approach of dealing with the legacy of unequal ownership of land.

A pragmatic theorisation of rights philosophy may also address pessimism about rights discourse in SA as well as be strategic in the issue of claims to land where Kunnie (2000) advocates land occupations in his generalised view that it is a means to reclaim ‘ancestral land’. Additional useful points for strategic decisions about rights emerge in the critical legal studies debates, where a predominant trend argued the bourgeoisie dominates in rights definitions, the granting of rights in its terms, and co-opts social movements who use that discourse. The argument in opposition thereto is to see rights as a potential resource, where the struggles of the subordinate classes are for hegemony about the good sense of political issues.

Regardless of the critique of the ontological status of rights, Kennedy (2002:180, 184-5, 212, 214) says the work of “fancy theory” intellectuals (elite legal academic intellectuals such as Ronald Dworkin who use the philosophical ideas of John Rawls and Jürgen Habermas, among others) restores the potential for values-based, inclusivist, and redistributive outcomes in rights language and law-

making. One way to picture this notion may be through considering a situation where there is an interfacing of a complex of ideas and institutions, that includes the Constitution and the state, which contend the individualist rights of private property owners must accommodate the social rights of the homeless to access adequate housing. Rights discourse might then be transformed into utilitarian and communitarian projects. Partisan politics and counter-hegemonic politics on the part of the homeless requires using the Constitution and courts to argue that individuals or private companies' enjoyment of the right to private property cannot persist in a manner that excludes homeless people from enjoying the same right through ownership of plots and houses on unused land.

The recently enfranchised black majority, many of whom are still ravaged by poverty and repression of protests about poor service delivery and slow delivery of houses, are confronted by dominant power structures better organised to shape the discourse of rights. Interpretation of the nature of rights and state obligations is dominated by institutions of "rarefied speaking subjects" (Foucault 1972) with the authority to do so, such as Constitutional Court judges. The macro-economic discourse of market processes realising access to adequate housing, has further impoverished subordinate classes in terms of their making inputs to the discourse on housing rights. In addition, key agents in market processes, such as, developers, contractors and financing institutions, all driven by profit motives, are not easily committed to the housing needs of low-income citizens where profit margins are low and the solvency risks of clients are high.

Government is wary of sections of the public viewing the right of access to adequate housing as an absolute entitlement, a situation where government merely delivers (sometimes on demand) with no reciprocal contributions by beneficiaries of government services. Consequently, it sees a need to undermine such a culture of entitlement; former Minister of Housing Sankie Mthembu-Mahanyele expressed this in Parliament, saying it was normal in a context where people were excluded from government processes and government not being accountable to them, but the new government's approach to controlling this was to nurture a discipline of paying mortgages and ending rent and service boycotts

through its Masakhane [let us build together] campaign (RSA, Debates 1997:2231-2).

An alarming issue has been the calls by civil society groups fed up with delays about housing and other service deliveries for a rejection of the voting rituals important to consolidation of a fledgling democracy. LPM organisers of the 2004 elections boycott contend (iafrica.com 2004) the “political elite” uses the impoverished and landless electorate as “pawns” and neglects them after elections. The spontaneous and episodic violent protests many communities have resorted to as a means of stating their disillusionment about slow delivery of houses and related services is also alarming. Violence, in other places, played a key role in furthering the evolution and realisation of citizenship rights. Turner (1990:193-4) sees a connection between violence, the development of citizenship rights, and conflict over resources. Although not all housing protest has been violent, nevertheless, instances of violent housing protest to realise housing rights are a strong signal of an urgent need to transform a particular discursive regime of rights, which neo-liberal economic ideology and practices are able to comfortably operate within, or, to change the neo-liberal economic policies which are not satisfactorily delivering houses.

Although the Constitutional Court reiterates the dominant discourse of protecting the individual rights of property owners, its rulings must be prompted to use the language of rights to chide the executive authority’s slowness about realising social rights such as housing. Hunt (1990:314) talks of such a counter-hegemonic strategy where the struggle for collective rights must transcend the dominance of individual rights; it is a struggle where an idea is not discarded but there is a struggle to arrive at “good sense” in a matter. With regard to the foregoing, the responses to the *’Modderklip’* ruling have been interesting in showing the dominant trend to protect the interests of landowners. The new chief justice of the Constitutional Court, Pius Langa, gave attention to the social unrest consequences of land invasions, while a newspaper editor also appreciates the protection of private property rights, but, both do not speak out, in utilitarian

fashion, for the homeless land invaders' right to also enjoy the right to property such as a house and land:

“The state said it had no obligation because Modderklip’s property rights had been infringed by individuals. Our new chief justice Pius Langa, writing for the court, however held that laws are not enough.”

“He said that land invasions of this scale threaten far more than the private property rights of a single owner and have the capacity to be socially inflammatory and have the potential to have serious implications for stability and public peace. These sentiments by the court should be commended.” (The Star, editor. 18 May 2005)

The Constitutional Court justices need constant reminding of the weight of Justice Chaskalson’s remark in May 2000 that, while the state slowly developed houses, many people would wander around serially invading land and being evicted (Steinberg 2005), a situation which more seriously whittles away the homeless’ patience with rights discourse.

The Constitution’s gradualist approach (“progressive realisation”) to the realisation of socio-economic rights, and the actual slow delivery of adequate housing products makes the situation untenable and indefensible, because class inequalities are demonstrably worsening, and housing protests and calls for election boycotts are evidence of patience running out among the recently enfranchised. There is a sense of deprivation of rights, which is expressed in political violence that may be harmful to the continuation of normal political processes. Prior to the negotiation of the Interim and Final Constitution, the SA Law Commission (SALC 1991a:1430-33, 1453) noted political parties favoured a constitution that could be amended, as well as very stringent rules about how this would be done. Although the Constitution is a written document, it has had about 13 amendments since 1996 (Njobeni 2006), evidently, it is “flexible”, as Charles Strong (1972:xv, 126-7) categorises constitutions. Thus, it can be

reformed in consideration of the changing nature of political conflicts. Although my research uncovered considerable agreement that changing constitutional clauses about socio-economic rights is unnecessary, Seleokane's (2001) argument that the Constitution is limited because its definition does not use other international instruments, remains an unresolved complication. Furthermore, this restricts the SAHRC's influence on shaping rights discourse, despite the SAHRC's defence that, because it uses instruments such as the *International Covenant on Economic Social and Cultural Rights* (ICESCR) in its monitoring, it feels it is not bound by a restricted discourse (Interview: C Mphephu). Drawing on the broader spectrum of international instruments as a means of reshaping the discursive regime about socio-economic rights may be a strategy the SAHRC could use when it avails its services as an *amicus* in the courts. More specific international treaties on housing which it could draw from do exist, such as the *Istanbul Declaration on Human Settlements* (1966). However, this document too does not appear to impose any obligations on signatory states; it talks of the "[8]... progressive realisation of the right to adequate housing as provided for in international instruments ...", and "[9] ... to expand the supply of affordable housing by enabling markets to perform efficiently...", which is easily accommodated by the neo-liberal policies chosen by SA's political and economic elite.

SAHRC researchers (Interview: C Mphephu), on the question as to whether constitutional clauses need to be changed in order to prioritise social and economic spending, also support the view that the Constitution is adequate in how it is a guideline for social spending, and that the actual capital expenditures that the state embarks on do affect the realisation of social and economic rights:

“there's no need to reprioritise ... there's no need to change the Constitution”

Nevertheless, SAHRC researchers acknowledge there are “political ramifications” to the state's plans and actions of clearing slums and eradicating shacks by 2015 . However, the SAHRC approach is to see these actions in

terms of the broader picture of necessary actions by the state to “protect”, and “promote” the “progressive realisation” of access to adequate housing. Thus, SAHRC researchers maintain, one cannot say these actions are violations of housing rights. My SAHRC informant stressed that there is a contentious matter which arises when evictions happen, namely, whether alternative accommodation has been provided, a matter that has been raised several times in the proceedings of different levels of the courts system.

LPM members are ambivalent about amending constitutional clauses dealing with state obligations on realising socio-economic rights. Some remarkably patient members (Interview: Mangaliso Kupheka) do not call for the changing of these clauses while others (Interview: Mkhululi Zulu) feel changes should affect a more explicit statement of the obligations. However, changing the Constitution to make more explicit the obligations of government on the realisation of socio-economic rights will have to deal with the reality that this requires a two thirds majority in an ANC dominated parliament: the party’s leadership is unlikely to succumb to pressures which would restrict the policy choices it prefers. Another LPM member (Interview: P Phosa), however, is not supportive of people who are “overdemanding” of constitutional rights, but of those who are “disadvantaged” in the face of these promised rights. His view is that people should not “abuse” the recognition of their rights, but should operate patiently in terms of the state’s rationalisation of budgetary allocations, and the timeframes it sets towards realising certain rights. A homeless community must be patient with government plans and its announced timeframe to realise the right of access to adequate housing; thus, Mr Soobramoney and Mrs Grootboom cannot demand the state immediately act on their demands. A problem he acknowledges is the states’ complicity in a “communication breakdown”, in mismanagement, and fraud, which prompts forceful actions from civil society groups. This LPM member’s opinion is that there is no need to change constitutional statements of the state’s obligations. Although there is some doubt in the minds of organisers about whether promises of rights can really change the circumstances of the disadvantaged, there is still an appreciation that the language of rights is

important to mobilise disadvantaged communities. It might be that repression of the civil and political rights of LPM members when they organise communities, has influenced their ambivalence about rights language.

An LPM organiser (Interview: P Phosa) feels there is “bias” on the part of government officials towards the “disadvantaged”, in favour of more “advantaged” groups. His view is that LPM activities are not just about resistance to the government, but to remind them of their promises to the people who vote them into power. The disadvantaged often do not know procedures and the law when it comes to forced removals in the post-apartheid era, nevertheless, the LPM claims they found they can use the prevailing law to resist removals. My informant (P Phosa) illustrates this claim with an account of how the LPM organised the community of Thembelihle informal settlement, next to Lenasia, south of Johannesburg, when they were threatened with eviction even further south to Vlakfontein. The pretexts for the removal were that the land on which Thembelihle is situated is dolomitic, hence dangerous for human settlement. Later, it was argued Indian entrepreneurs wanted to set up factories on the land occupied by the informal settlement. The LPM contends the Johannesburg city officials did not use the correct procedure because it took their case to the High Court, when, in fact, it should have been taken to the Land Court. Eventually, the City of Johannesburg had to withdraw their case. This victory did not require resistance through marches and road blockades. Instead, the LPM employed another company to send a team of scientists to do a geo-technical survey; these scientists found the area was a “low-risk” dolomitic zone.

While for some LPM members (Interview: M Zulu), contestation over the meaning of the Constitution, and clarity on the obligation of state departments may be a fruitful strategy to realise housing rights, for private sector developers and civil society groups wary of the problem of corruption in the civil service, there is another angle to be attacked first. Changing constitutional clauses, in order to invoke a vigorous performance from government towards increasing housing stock, seems as though it would not help much, because inefficiency of

the housing civil service must first be dealt with. In response to my question as to whether constitutional clauses should be changed in order to get government more pro-active about its obligations, one private sector low-income housing developer disagrees. Her first hand experience with tardiness and inefficiency of local government structures and individuals prompts a disdainful sentiment that their objectionable performance is an obstacle:

“The rot is right at the bottom” (Interview: B Harding)

The Housing Department appears comfortable operating under existing constitutional guidelines; the preferred strategy is for government to deal with existing housing laws, which inhibit the housing delivery process. Minister Sisulu feels a judicial commission of inquiry should examine the amendment or scrapping of certain laws (News24 17 May 2005); creating a housing “meta-law” to “override” all other laws would create an enabling environment for low-income housing processes. It is expected this law-based approach also would pre-empt a countrywide trend where the developers of vast tracts of privately-owned land prefer to develop golf-course estates, a conspicuous consumption indulgence of upper-income groups, rather than low-income housing developments.

Although many scholars are enthusiastic about the prospects of transformation through a rights culture and argue there is a mutually indispensable interplay between the different generations of rights, struggles for the realisation of socio-economic rights, in many instances, have been met with the repression of civil and political rights. Teeple (1995:109-112) concludes from his study of the decline of welfare state types of policies in Europe and North America that social struggles to restore social citizenship entitlements, in an era of globalising neo-liberalism, will be countered by attacks on civil and political rights. LPM organisers (Interview: M Zulu) complain of similar repression:

“As the LPM we had a big march ... last year ... during the polling ... we were far, far away from any polling station ... ten years of democracy ... but us who are the poor people don't see any changes, we don't experience any changes and

democracy ... what we actually experience is ten years of pain and crying, ten years of suffering, and torture ... an army of policemen came to arrest us for no apparent reason, on trumped up charges like we want to disturb the vote ... its in court now, we'll never win that case ...”

LPM organisers complain of their treatment by police and equate it with apartheid-style ‘political torture’ tactics being used on their members when they are held in detention, and of police frame-ups of their members, resulting in long periods of detention. But the cases are withdrawn eventually (Bond 2004a:45; Molosankwe 2005). The Freedom of Expression Institute said of the incident where torture allegedly was used to get information about the activities of the LPM that “torture and harassment of political activists who are critical of government policy will have a chilling effect on the right to dissent in the country.” (International Freedom of Expression Exchange 2005). The LPM placed charges against members of the Crime Intelligence Unit, making allegations of torture while in prison after being arrested when protesting the elections under their “no land, no vote” campaign. Such claims of incidents of torture of LPM activists and violation of their civil and political rights vindicates broader claims of a growing culture of repression of the “new” social movement critics of government among members of the state security forces, and invite comparisons with the methods of the apartheid security forces (Molosankwe 2005):

“We are reliving the 1970s, the June 16th and stuff. Because we are being shot at and stuff. For no apparent reason, just because I’m complaining about my rights. I’m complaining of what is rightfully mine is being stolen by somebody else.” (Interview: M Zulu)

Instructing the intelligence agencies to seek out a “third force”, which is stoking housing rights unrest, I argue, vindicates an instrumentalist view of the state: the security forces of the state appear as an instrument for the new elite coalition,

an instrument that represses and silences what Gurr (1970:199) calls “dissonance” and the popular unrest of the poorest. Whether it is due to budget constraints or an underperforming bureaucracy, those protesting poor service delivery end up with sedition charges (McKinley & Veriava 2007) and not the bureaucracy. Although housing unrest may be portrayed in Gurr’s language of the sources of protest, it must still be noted most of the protest has happened because of poor communication channels between government departments and communities waiting for houses and delivery of services; the long waits for the realisation of housing rights only fuels a “time bomb” where people have come out in violent protest. During the apartheid era, state security agencies brutally repressed black community struggles on rent and housing issues (besides repression of the youth education struggles and trade unions too), as well as spied on activists who organised people for these struggles. To depict the housing protest as stoked up by a “third force” or *agent provocateurs*, which the state’s intelligence agencies should investigate, only encourages people’s beliefs that the post-apartheid state is likely to act on community organisers and housing protesters in ways similar to that used by the apartheid state. The state in an inclusivist post-apartheid democracy hardly appears to be a neutral actor, particularly when we examine the words of Ronnie Kasrils, Minister for Intelligence Services, a state agency that may be categorised in Althusser’s (1971) notion of the “state’s repressive apparatuses”. For Kasrils (2005), although the state and Constitution guarantee the right to protest, the spontaneous actions of impatient communities, however, have the potential to cause political instability, and there may be persons who use “illegal” means to organise protest; thus, he feels the latter must be monitored by the state’s security agencies. This is a poorly conceived propagandistic tactic that avoids commentary on the real source of the protest --- the slow delivery of services by government departments that would realise constitutionally guaranteed socio-economic rights, and unfortunately fuels comparison of aspects of the new government with the apartheid government. The National Intelligence Agency (NIA) became an advisor on identifying sources of discontent, and managing spontaneous protest. It set itself to this task in the face of the reality that

government does not have the resources and expertise to provide shelter for millions of citizens living in shacks (Marrs 2005), whereas, one could argue, urgent work needs to be done about organising government departments for speedier and efficient delivery of services to pre-empt protests which lead to conclusions about political instability. But, the ANC's Western Cape provincial premier, Ebrahim Rasool, is more appreciative of the services of the NIA in that they play a role in bringing communities in line with the pace at which government departments actually do work and assist government departments to pre-empt protest actions that undermine their work on housing and service delivery. Furthermore, the provincial government prioritises and rewards communities that the NIA's information presents as patient (Essop 2005).

Protest has not been the only response to slow delivery on housing rights. While housing development is a slow process, civil society groups can put more pressure on government, by using post-apartheid legislation, to halt evictions, where private property claims conflict with social citizenship claims on access to adequate housing. In this way a resistance discourse on rights is offered to the dominant one. The struggle of evictees in Johannesburg's inner city demonstrated how communities may use the Constitution, post-apartheid legislation (the 'PIE' Act), and the courts, to further their struggle through rights discourse. However, private property owners and judicial authorities counter this strategy by resorting to outdated apartheid legislation. The involvement of the Centre for Applied Legal Studies in the latter evictions demonstrates a determination to use and wrestle with the framework of individual and social rights and institutions set up to enforce that legal culture in order to address the housing needs of the homeless.

The different levels of the judiciary have had to deal with the practice of peri-urban land occupations because of slow delivery of housing and impatience among people on subsidised low-income housing waiting lists. In these instances, the constitutionally protected right to private property of land-owners (white persons in most cases) collided with the housing demands of homeless

blacks who protest the delay in realising their constitutionally guaranteed right of access to housing by wilfully invading privately- and state-owned land. This conflict of interests between white private owners of undeveloped land and homeless blacks brings to the fore the racial basis of the conflict over resources and the problem of constitutional protection of private property which entrenches a legacy of a small sector of the white population group's privileged access to a large proportion of the land surface.

How are we to assess the role of the Constitutional Court in meeting the challenges to have homeless black people realise their housing rights? American historians of social unrest across Europe during the Industrial Revolution Charles and Louise Tilly (Tilly & Tilly 1981:17) refer to the problem of how this collective action of the masses was referred to in prejudged terms as "protest". Does the Constitutional Court transcend a prejudged view of the homeless' collective action towards realising their goal as "protest"? Does the Constitutional Court accommodate the homeless' sense of "relative deprivation" of what they feel entitled to, as understood by Gurr (1970)? Does the Court understand that their violent actions augments the means of realising their claims to social citizenship and necessary resources, as Turner (1990:193) argues about the growth of social citizenship? These seem to be some of the issues which need to be raised in strategies to reshape the discursive regime about housing and land rights.

9.2.2 Land claims and realising housing rights

Delivery of housing to low-income classes depends on the availability of vacant land, although, sometimes, existing office or commercial use buildings may be converted into adequate housing units. The political transition protected the private property rights of landowners, but the land reform process is moving slowly. Ten years after 1994 the total land delivered through land reform was 2.8 million hectares or 2.4 percent of the country's land surface (Department of Land Affairs 2003:6). The ANC's land compromises affects homeless black Africans

who, since the incremental scrapping of apartheid influx control measures in the mid-1980s, steadily moved out of crowded, unproductive rural areas and caused the mushrooming of urban and peri-urban squatter settlements filled with unemployed workseekers that have become marginalised as a result of the government's macro-economic policies. President Mbeki's recapitulation of the land compromise contrasts with that of the PAC and other dissenters pressurising government to shift to a policy of expropriating white farms below their market price. Bernstein (2005) notes, however, white people prefer not to understand the depth of the sacrifice to respect property rights. Another concern is that land restitution focused on land for agricultural use, and demonstrates the problem of a land shortage for housing in urban and peri-urban areas is not being urgently addressed, despite the *Housing Act of 1997* allowing municipalities to do this at Section 9 (3). Can this discursive regime be challenged? How do subjugated discourses challenge the dominant position in ways that hopefully accelerate the availability of land for low-income housing?

The land compromise is at the root of similar views of the PAC, the LPM and pan-Africanist scholars (Kunnie 2000). The Land Summit's outcomes did not satisfy organisations to the left of the ANC, noted for being historically critical of its *Freedom Charter*, and for persistently mobilising communities against aspects of the ANC government's policies: the PAC urged that the property clause in the Constitution be reviewed because it stalled land reform; AZAPO mooted the view that the state should own all land; the LPM wanted a moratorium on all evictions (Department of Agriculture 2005:40, 42, 47). Greenberg (2004:15-6, 26-7) asserts that the shaping of a "landless" identity among black Africans is a vital aspect of the poor addressing their poverty and inequality in ways that the new political elite leadership has failed to do. The LPM has been pre-eminent in this space of post-apartheid politics organising 'good sense' about unequal land access, while also linking their mobilisation about land to housing. The fortunes of the fractured PAC may be bleak, but the tradition lives on in the LPM: the LPM's claim to the land is a similar aboriginalist position. An LPM (2003) press statement on their distrust of the land reform process says it is "... forcing us to

sit and wait patiently for more than 150 years for our stolen land to be returned to us". The claim challenges both the "empty land" myth of apartheid ideologues and the historic land compromise of the ANC negotiators who anticipated an orderly land reform process that respected prevailing property rights. This alternative position to the empty land myth and the historic land compromise may be an important adjunct to transform the hegemonic discourse on how housing rights are to be realised, but the land occupation strategy it supports still presents chaotic problems to the development of 'adequate housing'. LPM activists claim that their mobilisation on landlessness opposes the market-driven land reform process, thus, in the simplistic labeling of ANC authorities, they are an anachronistic socialist cause.

The LPM's mobilising document, the *Landless People's Charter*, and its constitution, invoke the aboriginal claims to the land that apartheid ideologues contested. The LPM prompts its members to look further back into the country's past to understand present day struggles:

"Almost 350 years have passed since the first colonists arrived on our shores to force us off our land." (Landless People's Charter 2001)

And:

"Whereas colonialism and apartheid brutally and systematically dispossessed our people of most of the land of South Africa, leaving the African population on 13% of the land, with the remaining 87% of land held by white farmers and the state." (constitution, Landless People's Movement 2002)

The *Landless People's Charter* expresses dissatisfaction with the pace of undoing this heritage of dispossession, claiming it is at the heart of black poverty, despite election promises and the Constitution's promises too. The LPM is dissatisfied that the promises of the RDP to redistribute 30% of agricultural land between 1994 and 1999 has not met its goals; at the time of the LPM's

formation in 2001 it claimed that less than 2% of land --- mostly of poor quality --- had been redistributed through land reform.

The land compromise is the root of the similar views of the PAC, which sought to revive its aboriginalist claims to the land (Pan Africanist Congress 1992:1) under the “one family, one plot” slogan (Dempster 2001). Pan-Africanist scholars such as Julian Kunnie (2000) raise the problematic nature of the ANC’s historic land compromise in their generalised rhetorical view about black Africans having primary claim over land, and that “squatters are essentially African people who are now reclaiming their ancestral lands pillaged by white colonial settlers” (Kunnie 2000:115, 118; also interview with M Zulu of LPM). Although such claims do not deal with the reality that different African traditional ethnic states were relatively stably located in different geographic regions, the political rhetoric is essentially that black Africans have prior claim to the land, in contrast to the empty land myth which sustained the segregation and apartheid era policies to advantage white claims to the land. Nevertheless, the position is supported by non-government organisations in civil society such as the National Land Committee and the Land Research Action Network as well as individual activists who express views in support of land occupations:

“[i]n South Africa, [land occupation] is widely referred to as land invasion, an apartheid borne concept that sought to politically despise the concerted effort by [dispossessed] blacks to acquire land that was taken from them. ... Therefore, land invasion is a racist concept to demonise the efforts of the black people to get access to land. Unfortunately, the post-apartheid government flippantly inherited the land problem with its conceptual malaise and has used it as well.” (Sihlongonyane 2003).

My LPM informant (Interview: M Zulu) talks in terms of resisting the theft of something his organisation’s followers feel entitled to. The *Landless People’s Charter*, as well as pan-Africanist scholars (see Kunnie 2000:115, 118), bear a sense of the land, on which low-income housing developments should proceed,

as a generalised ancestral heritage of black Africans, the theft of which is legitimated by the historic land compromise of the elite pact. However, rampant land occupations would be a chaotic situation that hinders the actual development of 'adequate housing', which requires land surveying and plans to provide water and electricity services, as well as the rationalised allocation of the state's financial resources to complement the income resources that homeless low-income households can set aside for the realisation of a house. Land occupations may be an adequate protest statement that prompts authorities to act more speedily on housing delivery or land reform, or as a statement to express disappointment about the legal authorities' discourse of housing rights. The LPM and Kunnie's generalised argument about land claims needs to be tempered and requires that where private land ownership hinders low-income housing programmes, the exact historical circumstances of how ownership arose in a specific geographic area should be investigated as a preliminary step to a process of low-income housing construction in areas of high housing demand.

Land occupations are not always steered by an aboriginalist land claim rhetoric. The events at the Gabon settlement on the Modderklip farm near Benoni show how land occupation is spontaneous, regardless of whether the occupiers are properly informed whether the land is privately- or state-owned. A subsequent court ruling, namely, that the state had infringed on the squatters right of access to adequate housing because it failed to provide alternative land for the squatters to occupy, opens the possibility for successful struggles for temporary relief through the courts when homeless communities, threatened with evictions, demand the state provide alternative land while they wait for houses.

Commentary in the public sphere on the consequences of the Constitutional Court's *Modderklip* judgement, such as that of legal scholar G Devenish (2005), suggest an appreciation of the interplay between threats of protest if needs are not met, and the positive consequences that may result from the interpretation of the law in the court system. Devenish also points out that while the law

protects property owners threatened by land occupation or squatting by the homeless, the executive authority needs to act more urgently about their responsibility to get the homeless to enjoy property rights such as a house and land, and this type of argument may form the basis of a counter-hegemonic strategy on rights discourse. Devenish warns that while the socio-economic conditions of the poor persist, the Constitution's civil and political rights will have little significance. In developing such a counter-hegemonic strategy it is also important to point out how slow progress on low-income housing development, while unemployment and poverty worsens, only increases the possible incidences of protest and land occupations that diminish political stability.

Changing the discursive regime about land occupations through the SAHRC's intervention seems unlikely. The organisation can make some recommendations on policy. For instance, they hold views on (Interview: C Mphephu) land invasions, the copy effect of land invasions on backyarders who see the success of such strategies for queue jumping, and the state's contemplation of a "rapid land release" policy. Mphephu argues land invasions should be discouraged: "the other way of discouraging that is to release land to ensure that people have access to land", and because land invasions may interrupt progress to develop houses or schools on invaded land. To put their recommendations into effect, it may be that Klaaren's (2005) approach to the organisation's role, where it pre-empts the actual policy choices of departments and requests information on what is to be done about the land and housing rights of a particular community, would be a valuable way of doing so. Policy recommendations obviously require the country's highest law making body to heed the SAHRC's views, but the latter complain this can be futile: they complain that their engagement with Parliament has been very poor, and Parliament does not seriously consider the issues and required actions raised in SAHRC reports (Mokate nd). Conclusively, the SAHRC's impact on changing the discursive regime is further diminished by the fact that more influential lawmaking bodies can overlook its advice.

9.2.3 State resources as an element in realising rights

Recognising and enjoying socio-economic rights implies the allocation of a significant proportion of the state's limited fiscal resources (see Gough 1979; O'Connor 1973; Offe 1984). A fiscal dilemma stems from the fact that state resources for spending on social citizenship come from taxation, but increasing taxation to increase social spending capacity has an inhibiting impact on the capital accumulation process. Nevertheless, social spending is a Constitutional imperative, but that document is not specific on the spending imperatives, and it is an imperative aimed at cultivating social harmony in societies with extreme class inequalities. Leftwich (1984) sees the essence of politics as the struggle for the distribution of resources. The national Housing Minister acknowledged that much when she responded to housing delivery protest that the size of the cake is limited (Mail & Guardian 2005b), and that there is contestation over scarce resources, but that the housing demand can only be dealt with one project at a time (Merten 2005c). A crucial focus in the discourse on housing rights is the extent of fiscal resources allocated to housing and changing the dominant views about such spending.

Despite a record of tremendous fiscal resources spent on housing since the 1994 political transition, there have been contrary developments. The housing backlog has grown tremendously and there is concern about the effect of the declining national budget housing allocation on the backlog's growth. The housing allocation remains between 1 and 1.4 percent in the last ten years (Mail & Guardian 2007a:7). The SAHRC's bold criticism of the reduced allocations to the low-income housing programme as a violation of this right offered much promise to challenge the discourse of a limit to the state's social spending resources, and it challenged our thinking on when it is that violations of socio-economic rights may be seen to be occurring. The SAHRC said:

“A disturbing issue regarding budgetary measures relating to the right to housing is the progressive decline of the budget, and under-utilization of resources by some provinces.” (SAHRC 2001a:21)

But in more bolder terms it says the declining housing allocations are retrogressive and, together with the problem of underspending, amount to a violation of a constitutional right:

“... As a share of the national budget, the housing budget has been declining over the years. The State is reducing the enjoyment of a right without reasonable grounds for the reduction being provided.”

...

“Another disturbing trend, also related to the allocation of budgetary resources, relates to under-spending. Almost all provincial Departments under-spent on their budget over the three year period under review, including the reporting period. It is therefore clear that the State is not even able to prove that it is applying resources efficiently, meaning that housing rights are being violated.” (SAHRC 2001:301)

This approach opens space for challenges to the legislature and executive to rethink their approach to “reasonable legislative measures” and how it uses its “available resources”, especially in the light of the issue of households having difficulty with making improvements to their starter houses, or even acquiring bank loans at the prevailing interest rates to be able to make such improvements. Effectively, the notion of the rational planning of the executive is under question, more specifically, that of the Housing Department and its provincial adjuncts. However, despite its Constitutional mandate being stated, the exact role of the SAHRC in promoting the realisation of socio-economic rights appears to be something it still needs to explore and develop.

Legal scholars (Brand 2003) also find fault with the Constitutional Court settling into a particular procedure of dealing with socio-economic rights based on its view of the “reasonableness” of the policies of state departments, that is, they

act competently, rationally, reasonably, or by “good governance” standards, when allocating available resources towards the progressive realisation of these rights; this effectively removes the Court from dealing with the social and economic realities such rights are meant to address. I find it difficult to disagree with a further point Brand (2003:36, 52) makes, namely, that this “proceduralisation” discourages future creative socio-economic rights litigation which uses the law to effect social change. Pieterse (2007:798) also expresses his disappointment about the Court’s failure to embrace the transformative potential of rights discourse because of this proceduralisation. In view of considerable service delivery protest, it is reasonable to assert that homeless communities will increasingly engage in violent protest because their retrospective perception of the Court’s judgements suggests the Court would rule that, despite peoples’ long wait for service delivery, their provincial and local authorities have acted reasonably in using available resources towards the progressive realisation of socio-economic rights. The fear that creative socio-economic rights litigation is discouraged also raises doubts about Thompson (2001) and Gramsci’s (1971) similar contention that the law is not simply the ideology and instrument of dominant classes, but may be used by subordinate classes to further their interests.

With reference to my concerns about housing standards and quality, Brand (2003:45-6) raises a useful point about the Court’s adjudication of socio-economic rights being about substantive standards these rights require government to meet. Brand notes, except for a brief reference to the standards and elements that make up adequate housing in the *Grootboom* trial, the Court avoids describing the constitutionally required ends or “outcomes” government policies should pursue, it does not prescribe to government what actions would be more substantive about fulfilling the right of access to adequate housing.

Although most scholars emphasise that socio-economic rights make greater demands on state resources, all generations of rights require the allocation of the state’s budget resources towards their realisation (see Holmes & Sunstein

1999). The protection of negative rights through holding elections and providing legal aid also make intrusions on the budget (Sachs 2003:587). Any elected government deals with the allocation of these resources in the framework of its macro-economic policies. The Court has been vexed by the question of its institutional competence to make judgments on the state's administration of its resources and the Constitutional Court judges are acutely aware of this. Justice Sachs offers some of the most consistent commentary and analysis of the Court's perspective on how it operates. Simply stated, he feels judges do not take positions on the wisdom of the decisions of politicians who make law after the electorate heard their positions and voted them into office (Sachs 2003:587). Furthermore, there is the issue of the institutional capacity of the Constitutional Court or its judges to enforce socio-economic rights, as well as recognition that parliamentarians balance out rival interests when contemplating the allocation of available resources (Sachs 2003:588-9). Judges are not deemed suited to take decisions on housing, schools, and electricity, in the way that they can make wise judgements about human dignity and oppression. It is thus the domain of Parliament to have hearings and to receive inputs about housing, schools, and electricity services from experts in those respective areas, and the political process is about making compromises and balancing out interests.

The Constitutional Court justices' decision was guided by the Constitution's statement of the state's obligations, that it had to take "reasonable legislative and other measures" towards the "progressive realisation" of the right of access to adequate housing. The justices felt they could decide on the concept of reasonable measures, and, that if the state failed to satisfy the standard of reasonableness in relation to its chosen policies, then it was not fulfilling its obligations. Sachs (2003:595) noted, however, that there was one "serious gap", despite claims to the state's programme being reasonable: there was no plan, even at national level, to handle the situation of desperately homeless people or victims of disaster (Sachs (2003:595). Because the state's programme did not use its available resources for people in crisis situations or in intolerable conditions, only these aspects of its programme were unreasonable and in

conflict with the Constitutional promise of a right to dignity, especially for those in emergency situations. In the event of providing emergency shelter, the state would then have to find resources elsewhere, which actually sacrifices allocations to other programmes. The latter point is precisely the argument the state proffered in the course of the *Grootboom* trial where the *amicus curiae* argued the state should plan in such a manner that it meets the 'minimum core obligation' to those in most desperate need (Huchzermeyer 2003:87).

The Court's decisions, its appreciation of the states resources, and whether the state is taking reasonable measures in using those resources towards realising socio-economic rights, is bound by the dilemma of the fiscal limits of the state's capacities. Burton & Carlen's (1979:36-7. 48, 51) understanding of official discourse is useful in understanding how the Court's discourse on the state's reasonable allocation of available resources actually reproduces and legitimises the state's knowledge of the economy; although the Court is quasi autonomous of the state, its limited mandate to deal with constitutional matters, restricts it from appraising the state's economic policies and its preferred modes of intervention in the economy in order to expand its resources. The Court accepts the state's rationale on the extent of its resources, and how the different levels of the state bureaucracy, scientifically and rationally, allocate their available resources. In Justice Sachs' (2003:587) view, it is not up to judges to decide on the best use of resources, it is a matter for public opinion and the electorate to deliberate. This discourse has the hegemonic effect of imposing consent on subordinated classes, or individual subjects such as Mr Soobramoney, whose absolute and individual entitlement sense of rights and redistributive demands, pressure the state to expand its resources for the type of service he demanded. Justice Sachs (2003:598) contends the Bill of Rights must not be seen to be based on the notion of individual rights, that individuals could demand a house or health care services, but the rights must be understood as a guideline, which encourages the state to make the best use of its resources to realise rights. He elaborated on his view in reference to Mr Soobramoney's case arguing that

fulfillment of socio-economic rights is bound by limited resources, and thus by nature have to be rationed (Sachs 2003:592).

Since the simultaneous progressive realisation of the various socio-economic rights depends on and compete for available resources, there has to be “a system of apportionment”, and they have different legal characteristics from the exercise of classical individual civil rights (Sachs 2003:592-3). He (Sachs 2003:593) expects that, over time, the reach of resources for the fulfillment of socio-economic rights is expected to become “progressively larger”. Contrarily, the overarching macro-economic policy, in tandem with World Bank prescriptions, advises on reducing state resources allocated to social spending while attempting to get the reluctant banking sector to play an increased role in availing funds for low-income housing. It may be through continued political activism and contestation that the state’s available resources can be made larger, perhaps in a shorter time-span, such as in the good sense position of the People’s Budget Campaign in the matter of the controversy over exorbitant and poorly thought-through defense spending. Making the resources for socio-economic spending larger amounts to a political and public campaign to force a reduction in the controversial arms spending diverting these financial resources towards socio-economic spending items in the national budget. In Mr Soobramoney’s case, the judges had to be content that the state’s overall budget had a health allocation, and that there was a rational plan about its use for different health needs, as well as a plan for its progressive expansion.

There also may be an ambiguity about the role of the Constitutional Court. In a reformist orientation, there is an appreciation that the Court may serve to constantly remind the state of its obligation to visibly expand its services and its resources. This emerged in the *Modderklip* case in Gauteng, which had an antecedent in the *Grootboom* case in the Western Cape. In the *Grootboom* case, Justice Yacoob provided an analysis of the constitutional obligations on the state, and of how these also shaped the High Court decision on the squatters and their demand for housing. In this instance the judges’ discourse on “within

available resources” reiterated the state’s fiscal dilemma: the obligation did not require the state to spend more than its available resources permitted, the rights are clearly qualified and if they were not qualified, they simply would not be fulfilled (BCLR (CC) 2000(11)1169:1192-3).

The Constitution’s qualifications to the right to housing are that the state take “reasonable legislative and other measures” for the “progressive realisation” of the right. So, the fact that the state can show that it has adopted housing development legislation since 1994, and, in line with the thinking behind international rights covenants that these rights cannot be realised immediately, the state can always argue the progressive realisation of the right will be slow because of limited resources. But, I would add, this will hold only up to a point where the patience of homeless communities is exhausted. The state’s defense has been that it acknowledged it was slow in fulfilling its constitutional obligation to house people, but this would be realised “in the long run”. Steinberg (2005) reminds us of Constitutional Court president Arthur Chaskalson’s teasing remark in the *Grootboom* case, specifically, that, in the long run, “we are all dead. What about people who are homeless here and now? Are you saying they must wander from place to place until they find land from which no one will evict them?” An additional problem about the use of the defence that “reasonable” measures are in place and their progress as progressive realisation is that it must deal with the reality of the actual increase in the housing backlog. The summary of the *Grootboom* case points out how conditions change and although state department’s (or the different tiers of government) can show they have plans in place to make some statistical advance on realising housing rights, this does not give an answer to the problem of the growth in the size of the backlog, suggesting a need to review claims of the reasonableness of the plans in place (BCLR 2000 (11)1172 (CC) para. E).

Contestation over the meaning of rights and state obligations is expected to play out in courts and the SAHRC availed its services as *amicus curiae* in the *Grootboom* case to enhance understanding of the nature of the constitutionally

guaranteed rights and the state's obligations therein. Sadly, for the land occupiers with an absolutist sense of the immediate delivery of housing rights, the SAHRC's (2000) submissions to the Court echoed the "progressive realisation" because of the limited available resources type of statements permitted by the dominant discourse and the SAHRC conclusion that: "Implementation is necessarily an incremental matter."

In their assessments of the impact of their involvement in the enforceability of housing rights in the *Grootboom* case, SAHRC officers are hardly impassioned about enjoining the state to do more than it has already done in terms of more speedily increasing the size of the resources for the progressive realisation of the right and about the homeless realising housing rights more speedily. Former SAHRC Chief Executive Officer's Lindiwe Mokate's words on this landmark event are quite hollow and pedestrian reiterations of the dominant discourse's permitted statements about progressive realisation (Mokate nd).

While the various state departments, the Constitutional Court judges, and the SAHRC have well articulated positions about delivering services in terms of available resources, it may be up to civil society organisations to take up more activism on this issue. An LPM organiser, expressing the notion in a very generalised manner, argues the state must be pressured further to spend on the poor, and asserts that one way of doing this is to effect some minor changes to the Constitution that would direct the state to act in this way:

"As the LPM we feel the Constitution should be changed ... to benefit the poor." (Interview: M Zulu)

However, my interviews revealed that LPM members do not speak with one voice about whether there is a need to change the Constitution's statement of the state's obligations.

10.2.4 Policy priorities and obligations to rights

Social policies, a scope of government activities under which low-income housing programmes fall, are about purposive actions to affect individual behaviour or command resources or influence the economy in some way (Levin 1996:25). Contrary to Adler and Webster's (1995) challenge about the appropriateness of elite transition theory to account for developments in South Africa, it appears that, while the labour movement may have been mobilised to secure important reforms, the outcome of the political transition and the subsequent negotiation of housing policy ultimately marginalised the civic associations from the events and discourses shaping the latter processes. Furthermore, the ANC elite leadership's 'non-negotiable' adoption of the GEAR macro-economic policy saw the marginalisation of trade unions too. The use of finite state fiscal resources to meet social policy goals competes with other modern state activities that demand considerable portions thereof, such as arms purchase for the defense of its territory, although those purchases may be flawed by the wisdom of the items purchased and the problem of corruption, as the People's Budget Campaign contend. Under these circumstances, the popular ideal of setting aside five percent of the state's fiscal resources for the housing programme also suffered, as is evident in the declining annual allocation to housing in the national budget.

These circumstances are also compounded by the legal culture which has developed in adjudication around socio-economic rights. The Constitution enjoins the different arms of government, which work in terms of the *trias politica* principle of separating the powers of the three branches of government, to 'respect', 'promote', 'protect' and 'fulfill' the rights recognised in the Bill of Rights. The *Grootboom* case pointed to the problem of the executive arm's rationality in promoting the right to housing, but it still expected people to wait twenty years to realise the right to housing. The Constitutional Court's explicit adherence to the *trias politica* principle limits its impact on shaping the rights discourse as it is circumscribed by the Constitution. The Court accepts that the legislature and executive are mandated to develop and implement policies, to decide on budgets, it accepts that the different branches of the state's bureaucracy know

better about housing processes, it accepts that they plan and act reasonably and rationally in the use of their available resources. Except for rulings which raised the argument that housing authorities and local government must use part of those available resources for persons in desperate need, the courts shy away from increased influence on the housing authorities' policies and programmes. Thus the Constitutional Court's reviews of and rulings on the state's housing policy are governed by this perception of the different spheres of the state's bureaucracy acting in the best manner.

The lawyer for the *amici curiae* in the *Grootboom* trial (Budlender 2001), aptly pointed out the problem of the drawn out process involved in state rationality, while many homeless waited for years and could not enjoy the minimum core of the right to housing. Budlender's (2001:para. 5) sense of the homeless' resort to use the courts to advance their rights was that they expected the courts to be more creative than executive government: "... the disadvantaged often ask the courts to take actions the other branches have decided not to take." Given that adjudication about socioeconomic rights in SA was still in its infancy, his input about 'minimum core obligations', as understood in international rights instruments such as the ICESCR, also opened the possibility of using rights instruments that broaden the discourse beyond the Constitutional Court's justices' strict focus on interpretation of the SA Constitution. His input perhaps also challenges state departments' sense of using available resources only toward the 'progressive realisation' of housing, whereas housing also requires access to land that can be purchased, or lawfully expropriated with compensation, for rapid land release and the provision of minimum services through state fiscal resources, an issue that points to problems about the rural orientation of the land reform policy in contrast to the demand for peri-urban land for low-income housing.

Whatever the technical intricacies of the constitution in a democratic state, which restrict the judiciary from exercising legislative or executive powers, arguably, the Court is protective of the elite compromise, of the position the elite leadership

of the ruling party took on economic policy, and how the different branches and tiers of the state subsequently design policies and spending programs aimed at meeting constitutionally guaranteed social rights. The Court is effectively swayed by the argument there is a housing programme and the belief that the state does have a “reasonable” policy in place, it has not been critical of the state’s shrinking allocation of expenditure on housing as was the SAHRC, but more is expected of the Court to more scrupulously examine economic policy. Sampie Terreblanche (2002:442), a campaigner for a social democratic orientation to government polices, proposes that the Court be much braver in challenging branches of government on their interpretations and measures to meet social rights. It is a proposal that may be considered an element of a counter-hegemonic strategy, which constructs a new intellectual and moral order, and exerts particular pressures on those branches of government.

Perhaps to overcome these technical difficulties of the separation of powers limiting the Court’s intervention in the operations of other branches of government, judges would have to be creative as they were in the *Makwanyane* case where they elaborated on *ubuntu* philosophy and values to determine the unconstitutionality of the death sentence. The constitutionalisation and justiciability of socio-economic rights had been expected to make a tremendous contribution to post-apartheid transformation, however, it appears that in their socio-economic adjudication the Court’s judges have developed a “legal culture” which uses rhetorical strategies, persuasive legal arguments, a legal discourse, that is not creative and innovative as they had been in the *Makwanyane* case where they invoked *ubuntu* values in order to oppose the death penalty (see Klare 1998). It may be a means of exploring the use of that philosophy’s notions of communalism and human dignity to transform the discourse on the state’s obligations on realising socio-economic rights in a manner that addresses concerns about the substantive standards that should be attained.

The position that the SAHRC took in condemning the trend of decreasing the size of the housing allocations in the national budget, how it impedes the

“progressive realisation” of housing rights (HRC 2001:301), and how it may be seen as a backward step because it means the full realisation of the right to housing possibly may not be realised as quickly as possible (Seleoane 2001:91-2), initially appeared to offer some possibilities to challenge the state rationality behind the trend. There is, however, an ambiguity about this --- in international thinking, this “retrogressive measure” is not a violation. SA’s experience of economic growth and a budget surplus (see Soggot 2001) meant social spending allocations could have increased. In fact, non-interest expenditure on education and health spending has increased, but the problem of underspending and skills shortages or capacity constraints in most provincial housing departments justifies the decreasing allocations; so, it becomes a very circular type of argument --- the housing allocations will continue to be reduced because provincial housing departments are still underspending. Boland District Municipal Manager, Kam Chetty (2002:11) also notes that macro-economic and budget policies are crucial to the building of “available resources” and observes that, while capacity constraints persist in state departments, a large part of the increases in non-interest expenditures that have occurred since the 2001 budget are on infrastructure. Until the latter conditions are improved, there is little chance of success in using international instruments to sustain the SAHRC’s critical position on the possible violation of housing rights because of the decreased size of the housing allocation.

It appears that these conditions devalue the effect of international treaties and conventions for advancing a respect for rights culture and a reformist redistributive strategy in South Africa. The position is also worth considering in view of the fact that the SAHRC condemned the trend to decrease the national budget’s housing allocation as a violation of the right to housing and it occurred in a context where there was no economic crisis which made the state unable to increase the allocation, an acceptable basis for reducing such spending. Judge Pillay, a Member of the ICESCR committee, argues that by ratifying the latter treaty, South Africa can resist the pressure of international financing institutions to organise its housing spending in line with the “minimum state”

neo-liberal policies of the latter institutions (Pillay 2002:3). The ICESCR's provisions can, then, also be used more directly in the interpretation of economic and social rights in SA courts. However, given that the state's neo-liberalist housing programme slowed down, especially where its protracted attempt to get co-operation from financing institutions slowed down delivery to the more better-off though low-income households, it might be that the ICESCR Committee would still endorse the state's housing programme as adequately working to the progressive realisation of housing rights over time since that body accepts it is not a right that can be realised immediately. Even the Limburg Principles and Maastricht Guidelines on the enforcement of the ICESCR accept that, regardless of the type of political system or whether it is a market or non-market economy, the rights in the ICESCR are to be met "progressively" (Eide 1989:41).

9.2.5 Access to adequate housing

Following the European Union Foundation for Human Rights and the Built Environment Support Group (1999) report on the deplorable quality and standards of a large proportion of RDP houses, another indictment of low-income housing emerged a year later in the *Grootboom* case when an official from the Department of Housing reiterated the official interpretation of "adequate housing" as found in the *White Paper on Housing* (Budlender 2001:para. 43). The rationality of the housing programme is in question when, clearly, adequate evidence has emerged that there are real problems about one-roomed structures lacking privacy and structures being unable to withstand the elements. While convinced by the discourse of the rationality of the state bureaucracy, the Constitutional Court restricts itself from making an impact on the reality of the nasty and precarious life of the recipients of some of the deplorable state housing products, the "*abantu basemkukhwin*" (the people of the chicken coops). The housing products the poor receive do little to enhance their social status; in John Walton's (1990) language, their "injuries of class" is overlooked. The quality of the goods they receive to realise social citizenship rights, are still

far from a civilised life based on prevailing standards (see Marshall & Bottomore 1992:8). The Court's interpretation of the "right to dignity" does not go further and look into the notion of "adequate" housing, as well as complaints about quality; it is bound by the *trias politica* principle to leave this to the executive to deal with. Alternatively, this leaves an avenue which civil society groups could use to challenge housing products. Sachs (2003:596) acknowledges a connection between the right to housing and human dignity, that the state's quantitative focus is not enough, and that the qualitative dimension must not be overlooked. Although there may be a concern about "dignity" in the Constitutional Court judges' deliberation, the limitations of the powers of the judiciary in terms of the *trias politica* principle, causes it to overlook the social stratification consequences of many of the products of the state's housing programme, and the subjective experiences and identities resulting from it. This outcome is probably similar to Brand's (2003:36-7, 45-6) concern that the Court's belief that the executive branch of government acts in terms of "good governance standards", or that the Court's proceduralisation approach is not on substantive standards that (housing) rights requires government to meet, misses the point that the end goal of welfare rights that government should work towards are equality and an egalitarian society (Brand 2003:44).

The commitment to substantive equality in s 9 (2) of the Constitution and to dignity in s 10 is probably most pertinent to the problems of standards and quality that have emerged in many state-subsidised low-income housing projects and to elaborate on what are the minimum core in the state's obligations in housing delivery. In this regard, the SAHRC is also mindful of the issue of housing being "adequate" housing, a concept which is guided by international covenants. Many occupants of the government's subsidised low-income housing have complained of the quality and standards of the products and a number of non-government organisations have also drawn attention to a range of problems too. The SAHRC (2001:274) has pointed to the issue of "habitability", one of the criteria in the concept of "adequate" housing, which vindicates many of the complaints of the occupants. Adequate housing means it must be "habitable",

that is, have adequate space and protection from environmental hazards and curb the high mortality and morbidity rates associated with inadequate and deficient housing. The SAHRC, however, has not pursued any violations type of action on this aspect of housing rights. It may have to come from organised civil society groups working together with the SAHRC that has noted such problems in its monitoring and annual reports.

One notable event offered the possibility for the insurrection of a subjugated position, however, the opportunity was lost. When deciding on the *Grootboom* ruling, the Constitutional Court judges declined to base their decision on the concept of a “minimum core” of rights as put forward by the United Nations Committee on Economic, Social and Cultural Rights (Sachs 2003:594); the concept relates to a minimum threshold of conditions to realise a right and those conditions being country specific (see Eide 1989:45). Fourteen years into democracy, although Constitutional Court judges have settled into a particular approach on the adjudication of socio-economic rights, South Africa’s judges are still feeling their way through such adjudication, and it is precisely because of the “paucity of domestic jurisprudence and judicial unfamiliarity with social and economic rights” that Canadian scholar Bruce Porter (1999:1) feels domestic discourse should turn to the ICESCR Committee’s periodic reports’ observations and recommendations on these rights, which would undoubtedly contribute to transforming the hegemonic socio-economic rights discourse in SA. Minimum core obligations are the minimum levels of socio-economic conditions which have to be met as a priority. They are, however, not specified in the Constitution’s statement of the state’s obligation, but can be used by lawyers and activists to challenge government on whether it has acted reasonably in realising socio-economic rights (Pillay 2002:4), and, it may be added, particularly regarding the quality and standards of a large number of housing products which really do not realise the rights of substantive equality and dignity recognised in the Bill of Rights (see de Vos 2002:30). The *amicus curiae* had attempted that strategy of referring to the ‘minimum core obligation’ notion found in the ICESCR, which the SA government had signed but Parliament had not ratified,

as a means of bringing relief for the homeless. Justice Sachs (2003:594), however, points out there is no such specification of minimum core to guide the Constitutional Court. Nevertheless, in the *Grootboom* case, the judges were prompted to mull over the rudiments of what would constitute the adequate housing the homeless land occupants, who had to suffice with emergency shelter, should eventually attain, and open possibilities for new statements in the discourse about adequate housing.

9.3 Conclusion: Outline of the perspectives of the main forces

Patterns of domination and inequality endure past the political transition of 1994; changing this requires the advancing of a resistance discourse of rights and moving beyond wa Mutua's (1997) pessimism about rights discourse to change the material conditions of the formerly disenfranchised black majority. Access and ownership of a house is a crucial asset to changing the circumstances of the black majority. An improved quality of life results from a life in a dwelling that is more than a shelter, but also a "home". The unfolding rights discourse has done a significant amount towards defending a legacy of private property rights and ownership of land, which alternately could be used for the construction of low-income housing.

My research focused on several key elements in a configuration of forces expected to contribute to the unfolding of a rights culture in post-apartheid South Africa. The foremost is certainly the Final Constitution which sets the parameters of the discourse on the enjoyment of all generations of citizenship rights. It is pre-eminently a liberalist framework protecting civil, political and private property rights. The Constitution does, however, make provision for state obligations towards the realisation of redistributive social citizenship rights subject to the available resources it can muster. Acquiring fiscal resources occurs without overburdening the most lucrative contributors, the taxpaying corporate capital sector. Furthermore, enjoying the right to housing, a social right, has come into

conflict with private property rights in the peri-urban areas and the inner-city. The difficulties are far from resolved as long as land reform occurs at a slow pace and worsening poverty and unemployment levels limit households from contributing to the subsidised housing programme, forcing households to invade private land or privately-owned buildings.

Taking its cue from Parliament and Cabinet, which elaborate on the Constitution's requirement that "reasonable and other legislative measures" be taken towards the realisation of socio-economic rights, perhaps the next important element complementing the Constitution is the executive arm of government, the various departments whose activities and delivery of specific services amount to the realisation of social and economic rights. The official discourse here is that they operate in terms of a rational allocation of the fiscal resources sourced from the national budget, allocating these resources to a diversity of competing needs. The Housing Department must rationally allocate its resources towards the "progressive realisation" of housing rights, but it also has to use part of those resources to provide for the homeless with emergency shelter needs. In court trials, the latter aspect of the obligations of local governments, has been found to be unsatisfactory, and opened possibilities to question the claims to rationality in the operations of this tier of the state.

The Constitution constrains the SAHRC's input to rights discourse. Despite the SAHRC acknowledging that other important international rights instruments exist and should be drawn into local debates and events, there appears to be limited success. Although such instruments were referred to in significant socio-economic rights trials, the absolute and unqualified statement of the right to housing in the *International Convention on Economic, Social and Cultural Rights* (ICESCR), which SA has signed but not ratified, holds some possibilities for shifting the discourse. Although it is not ratified, signatory states nevertheless indicate some commitment to its clauses and should feel bound by them. The *amicus curiae* in the *Grootboom* trial, and Judge Jajbhay in the Johannesburg High Court trial on inner-city evictions, attempted to shift the discourse by noting

that state organs should feel compelled to uphold the ICESCR's specifications on 'minimum core' requirements. However, the Constitutional Court justices differ on this obligation as it is not stated in the parameters of the Constitution.

As the chief interpreter of the Constitution, the Constitutional Court appears to consistently abide by the Constitutions' strict statement of the state's obligations. The policy of the party in government is that enjoying rights will be a consequence of the state promoting market delivery processes, however, the overarching neo-liberal macro-economic policy, a defining feature of SA's elite transition, has produced considerable unemployment and impoverishment, and increased dependence on the state. Nevertheless, the Court has fervently abided by its position not to intervene in the presumably rational operations of the other sectors of the state. It is precisely here where the Court could attempt to be creative in its adjudication. Judge Jajbhay questioned the supposed rationality of local authorities; he dwelled considerably on *ubuntu* in seeking relief and prompting the City authorities to use and increase their available resources for emergency shelter, however, Constitutional Court justices steer clear of that creative option in the adjudication of socio-economic rights cases.

It is widely accepted that civil society activism and pressure will be important in shifting the discourse on socio-economic rights rather than consenting to the dominant interpretations of how they are to be progressively realised (see Huchzermeyer 2003:89; Pieterse & van Donk 2002:11). The LPM, although dealing primarily with a more urgent approach to the right to land or land reform and land restitution, has given considerable attention to the right of access to adequate housing, and appears forced into an adversarial engagement with the state and, to some extent, the dominant discourse of rights. The activities of the LPM appear to make possible a discourse on rights as entitlement claims, which in Wesley Hohfeld's (1966:6-7, 35-8) analysis means it depends on another party to perform a duty. One LPM member (Interview: P Phosa) sees politicians as making verbal claims about human rights and democracy, but, "they are not practical" about them, furthermore, rights and democracy "are not yet proven". There is sense among LPM activists that they organise a segment of the

population that is still struggling for significant socio-economic improvements to their lives, but they find themselves in conflict with a segment of the population whose circumstances have improved and have a different outlook. LPM activists consequently say they know they cannot go “empty-minded” into a struggle against the “petty bourgeoisie”, because they would be “defeated” (Interview: P Phosa). Rights talk would still be a useful weapon in their struggles. In order to mobilise communities, the LPM claims to have run workshops to provide rights education in communities, but claim, because of a disappointment with politicians, they still find a reason for “forceful methods of struggle”.

In contrast to the LPM, the politics of KwaZulu Natal housing activism civil society organisation, Abahlali baseMjondolo, Neocosmos (2007) contends, is not one that seeks dependency on, or even incorporation into, the state’s hegemonic neo-liberal orientation to the realisation of citizenship rights. Their politics appear unlikely to engage in transforming the discourse of social citizenship rights which require the state to deliver resources and thus the realisation of rights:

“Citizenship, from an emancipatory perspective, is not about subjects bearing rights conferred by the state, as in human rights discourse, but rather about people who think becoming agents through their engagement in politics as militants/activists not politicians” (Neocosmos 2007:11).

And, further:

“There is conceivably, a politics beyond Human Rights Discourse, a politics of prescriptions on the state. ... These prescriptions are assertions of rights to be fought for, not pleas for human rights to be conferred by the state.” (Neocosmos 2007:12)

Such prescription politics is possible only if organisations remain completely independent of the state (Neocosmos 2007:23). Although Abahlali baseMjondolo is described as: “... it has fought the local state tenaciously for the *provision* (my

emphasis) of decent housing for its members” (Neocosmos 2007:47), but remains outside of civil society (that is, not seeking incorporation into the state’s projects nor participating in elections), yet it wants to engage state structures for “the right to co-determine their future” (Neocosmos 2007:52). Unless that prescription is linked to something like Klaaren’s (2005:554-61) suggestion that monitoring bodies such as the SAHRC pre-empt state bodies on how they plan to act to realise specific rights, it is still not clear to me how, from this emancipatory model, prescriptions of the *Freedom Charter*, such as, “All shall have the right to occupy land wherever they choose”, “There shall be houses, security and comfort. All people shall have the right to live where they choose, be decently housed, ...” (see Karis, Carter & Gerhart 1977), are put into practice or achievable without some form of centralised state’s (or even its regional organs) involvement in allocating financial resources to assist with the acquisition of land or building houses or surveying land for distribution and for housing projects.

In its steadfastness to push its own programme on how its delivery strategies lead to the realisation of socio-economic rights, government has not considered that groups it marginalises may, in fact, be co-opted to work together with it, or that these groups wish to find ways of co-operation with government, rather than be seen as confrontational. An LPM activist (Interview: M Kupheka) says:

“This is what we always say to the government: “We don’t want to be an opposition to the government. But we are here because the government doesn’t know what is happening on the ground.” So we are the people who are going to tell the government that the authorities that you have got on the ground, they are not working! The government is supposed to listen to us because we are the agent of telling the government that the person you have employed ... is not doing the right thing. ... That is why we are criticising you as a government. The people you have employed, you are protecting them. ... We are not supposed to be in conflict with the government, we are supposed to be working together with

the government. ... We are the *impimpis* [informers] of the government, now the government is pushing us away.”

In contrast to Abahlali baseMjondolo’s mode of politics, Kupheka’s position reveals that the LPM is one civil society movement willing to be part of the state’s programme on housing rights, that government needs to be open to dialogue with it. Greenberg (2004:29) reaches a similar conclusion:

“The lack of a single ideological line in the LPM means that strategies and tactics are sometimes contradictory, are unstable and fluctuate, and are highly sensitive to state responses.”

“The LPM operates both inside and outside the hegemonic framework. This is partly conscious and partly by default. Inside the hegemonic framework, the LPM’s demands are constructed around the development agenda, on the terrain defined by the dominant power.”

...

“... meaningful participation in official decision-making processes is also important to members of the movement. ...”

“Demands are thus both for democratisation - in particular, effective participation - and a redistributive agenda. Both of these can be considered within the hegemonic discourse of development, i.e. they do not necessarily question or threaten the capitalist underpinnings of the developmental project.”

Contrary to the decline of democracy in southern Africa’s neighbours which were much earlier swept up in Huntington’s third wave of democracy, adversarial civil society groups in SA can have positive effects on deepening democracy, through campaigns for ethical government. The LPM has filled a vacuum left by civics organisation SANCO. Kenneth Good (2003:110) feels that the tradition of civic

organisations' opposition to the state must continue and critically engage government in order to avoid the setbacks seen elsewhere in Africa. The LPM could play this critical engagement role if it develops a conception of rights and duties to challenge the hegemonic discourse. Despite its adversarial language and confrontations with the government, LPM organisers have a very tempered notion of rights, and of the adequacy of the Constitution to obligate government in taking action towards the realisation of rights to land and of access to adequate housing. Most of their concern is about the inadequate nature of the structures, perceptions of corruption in the civil service as an obstacle to efficiency, and the management of the budget. It is hardly an attempt to produce a new discourse or regime of statements about what rights are; it is likely that they would still work within the framework of "progressive realisation" of land and housing rights through the state's use of its "available resources" in a context where they can have dialogue with government departments before the latter make any plans without public participation. The LPM hardly pushes for a utilitarian or communitarian discourse on rights, which would reveal how the Constitutional protection of private rights is contrary to the needs of landless blacks and the homeless majority.