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## Affordable Housing, Zoning and the International Covenant on Economic, Social and Cultural Rights: Some Lessons from the Spanish and South African Experiences

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## **AFFORDABLE HOUSING, ZONING AND THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SOME LESSONS FROM THE SPANISH AND SOUTH AFRICAN EXPERIENCES**

**Juli Ponce**<sup>1</sup>

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### **1. INTRODUCTION**

The purpose of this article is to briefly explain why the International Covenant on Economic Social and Cultural Rights (ICESCR) is relevant to housing and urban issues. We are going to use the Spanish and the South African experiences here because both countries are members of the ICESCR and for a long time both have been concerned about affordable housing and urban segregation.

Spain and South Africa seem to be very different.<sup>2</sup> Spain is a developed country and a member of the European Union whilst South Africa is an African country with a very specific situation derived from the apartheid legacy. But

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<sup>2</sup> A comparison between both countries can be found in:

<http://countryeconomy.com/countries/compare/south-africa/spain>

beyond obvious differences, both share some common trends (similar population, a concern about inequality and its serious impacts on land use and housing, the desperate need for more affordable housing, etc.). These problems are quite similar to those of modern societies in our progressively globalized world, although they exist on different scales and with non-equal social, environmental and economic consequences.<sup>3</sup>

As Tristan Görgens and Stuart Denoon-Stevens stated, “a review of international best practice” could be useful “in order to gain insight into how South Africa could potentially do land use management better.”<sup>4</sup> We believe that it is also true in relation to the rest of the countries in the world. From a legal perspective, more specifically, the usefulness of comparative land use approaches has been underscored by many authors.<sup>5</sup>

In that regard, Spain, which signed the ICESCR in 1976 and ratified it in 1977, was the first European country to ratify its optional protocol that came into effect in 2013, and to develop legal techniques to link land use and affordable housing for fighting urban segregation in Spain, may be of interest for other countries, including South Africa.

In the South African case, the country has a modern Constitution modeled on the ICESCR, a very interesting case law and ratified the ICESCR in 2015.

Consequently, both countries can learn from their respective experiences and can also encourage the enforcement of constitutional socio-economic rights in other countries, like the U.S., which beyond its “exceptionalism” in relation to socio-economic rights in the federal

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<sup>3</sup> About globalization and cities, I have developed this argument further in PONCE, J. “GLOBALIZATION, LAW, URBAN DEVELOPMENT AND HOUSING” , RDUyMA, number 297 bis, special issue, pp. 27 ff.

<sup>4</sup> Tristan Görgens and Stuart Denoon-Stevens “Towards Facilitative and Pro-Poor Land Use Management in South African Urban Areas: Learning from International Experience”, paper available at: [http://urbanlandmark.org.za/conference/2010\\_papers/13.pdf](http://urbanlandmark.org.za/conference/2010_papers/13.pdf)

<sup>5</sup> I have also developed this point in PONCE, J. “Affordable Housing as Urban Infrastructure: A Comparative Study from a European Perspective”, *The Urban Lawyer* 42-4/43-1 Fall 2010/ Winter 2011, pp. 223 ff.

Constitution,<sup>6</sup> could find new judicial perspectives and sources of inspiration at State level.<sup>7</sup>

Moreover, we will underline how the ICESCR, the South African Constitution and the case law from its Constitutional Court are advancing the conversion of the rhetorical idea of the right to the city towards a system of rights in interaction that can be used in the Courts with a legal approach.<sup>8</sup>

## **2. THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR) AND ITS IMPACTS ON ZONING AND AFFORDABLE HOUSING**

### **a. THE INTERNATIONAL COVENANT, ITS PROTECTION AND THE OPTIONAL PROTOCOL**

In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR), was launched. It has been legally binding for States parties, among them Spain, since 1977, and for South Africa since 2015. States must

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<sup>6</sup> Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" (University of Chicago Public Law & Legal Theory Working Paper No. 36, 2003).

Regarding the ICSECR, Amnesty International explains how "The United States signed the Covenant in 1979 under the Carter administration but is not fully bound by it until it is ratified. For political reasons, the Carter administration did not push for the necessary review of the Covenant by the Senate, which must give its "advice and consent" before the US can ratify a treaty. The Reagan and Bush (Sr.) administrations took the view that economic, social, and cultural rights were not really rights but merely desirable social goals and therefore should not be the object of binding treaties. The Clinton Administration did not deny the nature of these rights but did not find it politically expedient to engage in a battle with Congress over the Covenant." See ECONOMIC, SOCIAL AND CULTURAL RIGHTS: Questions and Answers, available at: [http://www.amnestyusa.org/pdfs/escr\\_qa.pdf](http://www.amnestyusa.org/pdfs/escr_qa.pdf)

The Bush (W.) administration followed in line with the view of the previous Bush (Sr.) administration. The Obama administration did not take any action in relation to this issue. The future (at the time of writing this paper) Trump Administration will have a new opportunity for ratification.

<sup>7</sup> As Christiansen states "although social welfare rights are enshrined in many state constitutions, they are not generally enforced", see "Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons From South Africa", 13 UCLA J. of Int'l Law and Foreign Affairs 369 (2008), p. 376, footnote 18, quoting Sarah Ramsey & Daan Braveman, "Let Them Starve": Government's Obligation to Children in Poverty, 68 TEMP. L. REV. 1607, 1628 (1995) ("discussing the state courts' reliance on highly deferential federal standards in interpreting distinctive state constitutional welfare clauses") and Helen Hershkoff, Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights, 13 TOURO L. REV. 631, 640 (1997) ("finding that although the New York courts will occasionally review questions of exclusion, it takes a "hands-off approach to questions of adequacy, on the view that these involve choices best left to the electoral process").

<sup>8</sup> See COGGIN AND PIETERSE, "Rights and the City: An Exploration of the Interaction Between Socio-economic Rights and the City" *Urban Forum* (2012) 23:257–27.

respect, promote and protect economic, social and cultural rights included in this covenant, among them the right to adequate housing (article 11).

The ICESCR is protected by the Committee on Economic, Social and Cultural Rights (herein, the Committee), a treaty body formed by independent experts, which performs their duties through periodic review reports on States' implementation of treaties, examining complaints known as communications and petitions from individuals and groups and by conducting inquiries and by making a series of general comments. They have articulated the contents of each economic, social and cultural right, including the right to adequate housing.<sup>9</sup>

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights came into force in 2013, and it allows the Committee to receive individual complaints. The first case decided under this protocol was the complaint from a Spanish citizen against Spain, as we will see hereinafter.

Moreover, the UN Human Rights Council appoints independent experts called special rapporteurs who address specific country situations or thematic issues. In the field of the right to adequate housing there is one: the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (since 2000).<sup>10</sup>

According to the United Nations (in the same vein as an increasing stream of academic literature)<sup>11</sup> it is necessary to remove some prejudices and myths surrounding economic, social and cultural rights:

- a) They are real human rights, most of them, like the right to housing, individual human rights. They “contain dual freedoms: freedom from the State and freedom through the State. For example, the right to adequate housing covers a right to be free from forced evictions carried out by State agents (freedom from the State) as well as a right to receive assistance to access adequate housing in certain situations (freedom through the State).”<sup>12</sup>

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<sup>9</sup> See <http://ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>

<sup>10</sup> <http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>

<sup>11</sup> See the UN document *Frequently Asked Questions on Economic, Social and Cultural Right*, elaborated by the *Office of the United Nations High Commissioner for Human Rights*, available here: <http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf>

<sup>12</sup> See the above-mentioned UN document, p. 2.

The same idea can be found in the case law of the European Court of Human Rights. This is not the approach of the US Supreme Court. A comparison between both courts in PONCE, J. “Public Responsibilities and Liabilities before and after disasters: the case law of the European court of human rights”, *Bahcesehir Univeritei Law Review*, Hukuk Fakultesi Dergisi, Istanbul Turkey, Special Issue: Planning for Disaster: Place, Population, Culture and the Environment, pp. 377 ff. see footnote 12.

- b) The distinction between civil and political rights and economic, social and cultural rights (showed by the existence of two international different covenants) was a contingent result of the Cold War. The second type of rights do not always need a high level of public investment (the first category, in some cases, do – think about elections or protection of private property with police forces, for example). The social rights like the right to housing are not always vaguer or more unclear than other classic rights (e.g. The right not to be subjected to *torture* or *cruel, inhuman* or *degrading* treatment or punishment: it is full of undetermined concepts which do not prevent the existence of the right but imply specific determination case by case).
- c) Violating economic, social and cultural rights can cause a violation of so-called civil and political rights, and vice versa. Let's take the example of violation of the right to adequate housing (e.g. with a forced illegal eviction) and privacy. Thus, the UN states that “the enjoyment of all human rights is interlinked. For example, it is often harder for individuals who cannot read and write to find work, to take part in political activity or to exercise their freedom of expression. Similarly, famines are less likely to occur where individuals can exercise political rights, such as the right to vote. Consequently, when closely scrutinized, categories of rights such as “civil and political rights” or “economic, social and cultural rights” make little sense. For this reason, it is increasingly common to refer to civil, cultural, economic, political and social rights.”<sup>13</sup>
- d) Public authorities must protect (i.e. refrain from interfering with the enjoyment of the right), respect (i.e. prevent others from interfering with the enjoyment of the right) and fulfil (i.e. adopt appropriate measures towards the full realization of the right)
- e) It implies that public authorities must avoid any kind of discrimination and implement immediately the part of the rights able of being enforced. Moreover, they must guarantee their “progressive realization, according to the clause included in the ICESCR:

“(art. 2 (1))

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available

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<sup>13</sup> Regarding the right to adequate housing, the UN document says: “The denial of economic, social and cultural rights can lead to violations of other human rights. For example, it is often harder for individuals who cannot read and write to find work, to take part in political activity or to exercise their freedom of expression. Failing to protect a woman’s right to adequate housing (such as lack of secure tenure) can make her more vulnerable to domestic violence, as she might have to choose between remaining in an abusive relationship or becoming homeless.”

resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

- f) It also implies that retrogressive measures are prohibited unless there are strong justifications for them. A State would have to demonstrate that it adopted the measure only after carefully considering all the options, assessing the impact and fully using its maximum available resources.<sup>14</sup>
- g) Public authorities must respect minimum core obligations: they are obligations considered to be of immediate effect to meet the minimum essential levels of each of the rights. According to the UN, “If a State fails to meet these because it does not have the resources, it must demonstrate that it has made every effort to use all available resources to satisfy, as a matter of priority, these core obligations. Even if a State has clearly inadequate resources at its disposal, the Government must still introduce low-cost and targeted programmes to assist those most in need so that its limited resources are used efficiently and effectively”<sup>15</sup> (e.g. ensure access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water).
- h) Rights like the right to housing do not oblige Governments to supply goods and services free of charge in all the cases; they do not impose a particular form of service delivery or pricing policy; they seek to empower individuals so that they have the capacity and the freedom to live a dignified life. If the rights in action means making people dependent on welfare states, the problem could be the specific policies in place not the rights themselves; as the UN underlines, those rights do not automatically come with democracy and markets, and “unless specific action is taken towards the full realization of economic, social and cultural rights, these rights can rarely, if ever, be realized, even in the long term”<sup>16</sup>
- i) Finally, the responsibility for making those rights real is a global one, affecting society (lobbies, media, NGOs, etc.) and public authorities. Among them, legislative and executive branches are the most important. But we must not forget the relevant role of the Courts as the last guardians of the social, economic and cultural rights (and of the frequently associated civil and political rights). They are justiciable as

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<sup>14</sup> PONCE, J. *El derecho y la (ir) reversibilidad limitada de los derechos sociales de los ciudadanos. Las líneas rojas constitucionales a los recortes y la sostenibilidad social*, INAP, Madrid, 2013, available free at: <https://dialnet.unirioja.es/servlet/libro?codigo=578436>

<sup>15</sup> UN Document, p. 16.

<sup>16</sup> UN Document, p. 22

many cases around the world demonstrate, some of them affecting Spain and South Africa, as we will see hereinafter.

Therefore, the importance of adequate respect, protection and fulfillment of those rights, including the right to housing, is undeniable. As Louise Arbour, United Nations High Commissioner for Human Rights, has stated (Geneva, 14 January 2005):

“The importance of economic, social and cultural rights cannot be overstated. Poverty and exclusion lie behind many of the security threats that we continue to face both within and across borders and can thus place at risk the promotion and protection of all human rights. Even in the most prosperous economies, poverty and gross inequalities persist and many individuals and groups live under conditions that amount to a denial of economic, social, civil, political and cultural human rights. Social and economic inequalities affect access to public life and to justice. Globalization has generated higher rates of economic growth, but too many of its benefits have been enjoyed unequally, within and across different societies. Such fundamental challenges to human security require action at home as well as international cooperation.”

#### **b. ARTICLES OF THE COVENANT RELATED TO HOUSING AND ZONING**

Article 11 of the Conventions establishes that States parties:

“recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”

Although this is the most explicit article establishing the right to housing in the convention, there are other articles related to it that are equally important, considering the connection between the rights emphasized above. In that regard, the General Comment number 4 from the Committee pointed out that:

“In the Committee’s view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This “the inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to take account of a variety of other considerations, most importantly



that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities all at a reasonable cost.”

### **3. THE SPANISH EXPERIENCE. THE COMMITTEE’S DECISION OF 2015.**

The Spanish Constitution is young in comparison to other countries, although it is older than the South African Constitution. It was enacted in 1978 and was written taking into account international developments in the field of human rights (which must be taken into account by Courts when deciding cases, in accordance with article 10.1)<sup>17</sup>.

The Spanish Constitution recognizes the right to housing in article 47:

“All Spaniards are entitled to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and shall establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation. The community shall participate in the benefits accruing from the urban policies of the public bodies.”

This article has opened the door to an interesting case law related to Spanish public authorities, coming from the Spanish Supreme Court and other regional Spanish courts, which declared that the right to housing is not a rhetorical clause but a right with a remedy, that can be protected in the courts, in close connection to other related rights, like equality.<sup>18</sup>

Moreover, the legal development of this article of the Spanish Constitution has led the Spanish legislators of several legal techniques to increase affordable housing and avoid urban segregation during the last decades.<sup>19</sup> Those techniques have brought about interesting experiences that could be significant for South Africa and other countries in the future. This is

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<sup>17</sup> The text of the Spanish Constitution in English can be found here: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

<sup>18</sup> See, for example, PONCE, J. “Affordable housing...”, *op. cit.*, pp. 243 ff.

<sup>19</sup> See PONCE, J., “THE “IGNORED CHALLENGE”, URBAN SPRAWL AND ITS NEGATIVE IMPACTS IN POLAND: A COMPARISON BETWEEN THE EU AND U.S”, *The Studia Iuridica*, LXIII, 2016, pp. 161 ff.

the case concerning the use of land use management as a way to incubate and protect livelihoods developed in the area known as @22 in Barcelona.<sup>20</sup>

As previously stated, Spain joined the ICSECR in 1977 and the Optional protocol in 2013. According to the latter, which entered into force in 2013, an individual can sue the national public authorities in the Committee if they breach the Convention.

This was exactly what happened in 2015 giving way to the first decision under the protocol. The Committee found Spain guilty of violating the right to adequate housing protected by the ICESCR. We are going to briefly explain the case herein, which can be a source of inspiration for other citizens all around the world.<sup>21</sup>

In *I.D.G. v. Spain*, September 17, 2015, a leading case, which has been called a “historic step,”<sup>22</sup> the Committee ruled that Spain has the obligation to provide for effective remedies in foreclosure procedures related to defaulting on mortgage payments, in order to ensure that all appropriate measures are taken to guarantee personal notification in foreclosure procedures, and to guarantee that legislative measures are adopted to prevent repetition of similar violations in the future.

The Committee decided in accordance with the third-party interventions presented by the Socio-Economic Rights Institute of South Africa (SERI) among others. It mentioned principles established through international and comparative case law and other sources. It recalls how States parties must interpret and apply domestic law in accordance with their obligations under the ICESCR and must ensure effective judicial protection for Covenant rights, including the right to adequate housing.

The right to adequate housing implies state obligations to consider all feasible alternatives to eviction, ensure the greatest possible security of tenure, provide for adequate and reasonable notice in cases of eviction, ensure that evictions do not render persons vulnerable to other human rights violations, and provide adequate compensation for violations.

According to Professor Ebenezer Durojaye:

“This case seems to have broadened the meaning of the right to housing under article 11 of the Covenant. By this decision, the

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<sup>20</sup> Tristan Görgens and Stuart Denoon-Stevens “Towards Facilitative and Pro-Poor Land Use Management in South African Urban Areas: Learning from International Experience”, paper available at: [http://urbanlandmark.org.za/conference/2010\\_papers/13.pdf](http://urbanlandmark.org.za/conference/2010_papers/13.pdf)

<sup>21</sup> The following countries had ratified the optional protocol of the ICESCR: Argentina, Belgium, Bolivia, Bosnia and Herzegovina, Cabo Verde, Costa Rica, Ecuador, El Salvador, Finland, France, Gabon, Italy, Luxembourg, Mongolia, Montenegro, Niger, Portugal, San Marino, Slovakia, Spain and Uruguay

<sup>22</sup> See Open Democracy

CESCR seems to suggest that the right to adequate housing does not merely impose positive and negative obligations on states, but also requires states to ensure effective judicial remedies for vulnerable and marginalized groups in order to assert their socio-economic rights. More importantly, this case seems to imply that non-state actors have the duty to respect the right to housing and that mortgage transactions will be carefully scrutinized so that their enforcement in the event of default will not undermine an individual's right to adequate housing."<sup>23</sup>

#### **4. SOUTH AFRICA'S RATIFICATION OF THE INTERNATIONAL COVENANT**

The Spanish experience and the aforementioned Committee's decision are of the most interest for the rest of the State parties, including South Africa, after its ratification of the ICSECR in 2015.

Protection of the right to housing was not unknown in the South African context. Litigation has been a useful tool for South African citizens who have been suing public authorities and have helped to create a relevant Constitutional Court case law thanks to such litigation.

##### **a. THE SITUATION BEFORE THE RATIFICATION: ART. 26 OF THE CONSTITUTION OF 1994.**

According to the OECD, South Africa has been and still is a very unequal country with spatial consequences.<sup>24</sup> The infamous apartheid helped to boost urban segregation and spatial discrimination and injustice, which is still affecting South African cities. As Wertman said in an article in 2015, "Nearly twenty years after the end of apartheid, far too many South Africans are without stable homes."<sup>25</sup>

The end of apartheid brought a new constitution, which recognized the right to housing in art. 26 with a language that immediately reminds us of what the ICSECR mentioned before:

"(1) Everyone has the right to have access to adequate housing

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<sup>23</sup> See Ebenezer Durojaye, "Bringing justice to the disadvantaged A commentary on CESCR's decision in *IDG v Spain* (Communication No. 2/2014)", *ESR Review*, Vol. 16, N.3, 2015, p.11

<sup>24</sup> See the OECD South Africa Policy Brief of 2015, entitled Regional, urban and rural development. Territorial development for more inclusive growth, available at: <https://www.oecd.org/policy-briefs/south-africa-territorial-development-for-more-inclusive-growth.pdf>

<sup>25</sup> See for example the monographic number of the journal *Urban Forum* on urban issues in post-apartheid South Africa, Volume 23, Issue 2, June 2012, Special Issue: South Africa's townships two decades after apartheid. In relation to housing, see Clarissa A. Wertman, *There's No Place Like Home: Access to Housing for All South Africans*, 40 *Brook.J.Int'lL.*(2014). Available at: <http://brooklynworks.brooklaw.edu/bjil/vol40/iss2/8>

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

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

It has been noted that this article must be interpreted in accordance with many others that recognize rights to be developed in urban spaces (e.g. equality, section 9; life and dignity, sections 10 and 11; security of the persons, section 12; freedom of expression, section, 16; freedom of assembly and demonstration, section 17; freedom of association, section 18; freedom of movement, section 21; freedom of trade and occupation, section, 22; water, section 27; right to education, section 29; healthy environment, section 24). The interaction of those rights give form to a pack of rights that can be described as a right to the city which is based above all on substantive equality in the exercise of those rights in cities, avoiding segregation and inequality.<sup>26</sup>

The Constitution also recognizes housing rights in relation to two categories of persons— children and detained persons. Section 28(1)(c) guarantees children’s right to shelter. Section 35(2)(e) of the Constitution provides for their right to adequate accommodation at the expense of the state.

#### **b. THE SOUTH AFRICAN CONSTITUTIONAL COURT CASE LAW.**

The application of article 26 of the Constitution in several cases has created a sophisticated, modern and interesting Constitutional Court case law, which has attracted the attention of the legal world.

The Constitutional Court is required to consider international law when interpreting the Bill of Rights in accordance with section 39.1 of the Constitution. In this context, as Justice Yacoob stated in the famous Grootboom case of 2001, housing is “more than bricks and mortar.”

Thus, in the aforementioned Grootboom case, for example, the interdependence and indivisibility of human rights has been established, adopting an approach that allows for the interaction between different rights to be acknowledged and given effects in specific contexts (paragraphs 23 –24 and 83).

The Constitutional Court held in that case that “the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter,” adding that:

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<sup>26</sup> Coggin and Pieterse, “Rights and the City: An Exploration...”, op.cit.

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

In 2008 in the *Olivia Road* case, the Constitutional Court follows the path of the interdependence between rights in the city, opens the door to the idea of the right to the city although without explicit mention by stating that:

“[16] The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage the involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the Constitution to “[i]mprove the quality of life of all citizens and free the potential of each person.” Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.”

The notion of meaningful engagement refers to mandatory consultation processes between the parties to a case and can be based on section 152(1), on the obligation to provide democratic and accountable government for local communities, provide services in sustainable manner and encourage involvement of communities and community organizations in matters of local government; section 7(2) on the obligations to respect, protect, promote and fulfill rights; the Preamble’s recognition of the need to improve the quality of life and free potential of people; section 26(2)’s reasonable measure obligation and the need to dignity and life. The Constitutional Court also wants all parties involved to be taken into account in the decision-making process, which reminds us of the European notion of good administration.<sup>27</sup>

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<sup>27</sup> See CHENWI: “Implementation of Housing Rights in South Africa: Approaches and Strategies”, *Journal of Law and Social Policy*, Vol. 24 [2015], Art. 4, p. 79 ff. Regarding the connection between the European notion of good administration and the South African concept,

The Constitutional Court also established the reasonableness test in relation to public activities to guarantee the right to housing. The test includes considerations related to the aforementioned ideas of progressive realization and availability of resources, as well as a minimum core or the right to be protected:

“there may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the State are reasonable” (see Grootboom, *supra* note 20 at paras 27-29, 32-33)”

This interesting case law was not accompanied by the development of specific techniques to promote affordable housing and its equitable inclusion in the cities in order to guarantee territorial cohesion and social inclusion, like for example inclusionary zoning.<sup>28</sup>

### c. THE RATIFICATION OF THE COVENANT IN 2015

In 2015, South Africa ratified the ICSECR and opened the door to a possible new stage in the protection of the right to housing and the right to city. As Professor Liebenberg, recently appointed as the South African member of the Committee, has stated, it is a very relevant time.<sup>29</sup>

In any case, it is necessary to consider that the country has not yet ratified the optional protocol - a ratification that would give citizens more opportunities to protect their rights. In any case, better judicial protection is important, but not enough. International experiences show how land use management and some legal techniques (e.g. inclusionary zoning<sup>30</sup>) can help to fight against spatial injustice and territorial discrimination.<sup>31</sup>

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see section 33 of the Constitution and Mark Elliott and Christopher Forsyth: A right to administrative justice?, University of Cambridge Faculty of Law Research Paper, Forthcoming, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2160221](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2160221)

<sup>28</sup> In relation to possibilities and limits of inclusionary housing, see NEIL KLUG • MARGOT RUBIN • ALISON TODES “Inclusionary housing policy: a tool for re-shaping South Africa’s spatial legacy”, *J Hous. and the Built Environ* (2013) 28:667–678

<sup>29</sup> In relation to the relevance of this ratification, see for example: LIEBENBERG, S. “The potential of the International Covenant on Economic, Social and Cultural Rights as a tool for poverty reduction in South Africa”, *ESR Review*, Vol 15 No. 1 2014

<sup>30</sup> Tristan Görgens and Stuart Denoon-Stevens “Towards Facilitative and Pro-Poor Land Use Management in South African Urban Areas: Learning from International Experience”, paper available at: [http://urbanlandmark.org.za/conference/2010\\_papers/13.pdf](http://urbanlandmark.org.za/conference/2010_papers/13.pdf)

<sup>31</sup> About the concept of spatial justice, see Edward Soja | Frédéric Dufaux | Philippe Gervais-Lambony | Chloé Buire | Henri Desbois, «La justice spatiale et le droit à la ville : un entretien avec Edward SOJA», [«Spatial Justice and the Right to the City: an Interview with Edward SOJA», translation: Frédéric Dufaux], justice spatiale | spatial justice, n° 03 mars | march 2011, <http://www.jssj.org>

## 5. FINAL CONSIDERATIONS: TOWARDS A RIGHT TO THE CITY

The ratification of the covenant and in the future of its optional protocol may result in a better protection of the right to housing and the right to the city in South Africa.

In that regard, the decisions of the Committee and the consideration of other national case laws (e.g. Spain) can help to create a common international background of judicial review of public decisions in the field of land use and housing which could be useful when faced with future domestic and international violations of legal texts and human rights.

The judicial review can also be improved in the future by means of the concept of right to the city, which is known in Spain but still not recognized in the domestic legal framework, that prefers the reference to *urban environment*.

According to article 2 of the national land use act, applicable throughout Spain,<sup>32</sup> that establishes a legal principle (not a rule, according to Rawls, but a mandate of optimization, in accordance with Alexy<sup>33</sup>)

“2. In virtue of the principle of sustainable development, the aforementioned policies (in last paragraph) must promote the rational use of natural resources, harmonising the requirements of economy, employment, social cohesion, equal treatment and opportunities for men and women, health, people's security and environmental protection, contributing to reducing pollution and promoting, in particular:

a) The efficiency of the measures for the conservation and improvement of nature, flora and fauna, as well as of the protection of landscape and cultural heritage. b) Specific protection of the rural environment and preservation of the values of the land which is unnecessary or inappropriate for meeting the needs of urban transformation. c) An *urban environment* with efficient land occupancy, with sufficient specific infrastructures and facilities, in which the different uses are combined in a functional manner and effectively implemented, whenever they fulfil a social function.

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<sup>32</sup> SPANISH LEGISLATIVE ROYAL DECREE 2/2008 20th June 2008, approving the Consolidated Text of the Land Act. The text is available in English at: [http://www.eukn.eu/fileadmin/Lib/files/ES/2010/2008-06-20\\_ConsolidatedTextLandAct\\_EN.pdf](http://www.eukn.eu/fileadmin/Lib/files/ES/2010/2008-06-20_ConsolidatedTextLandAct_EN.pdf)

Now the text of this article has been included again in a new Act of 2015, the Land Act and Urban Renewal 2015, which has replaced this act of 2008.

<sup>33</sup> The references are to *Theory of Justice by the well-known RAWLS*, and to ALEXY'S *Teoría de la argumentación jurídica*. Spanish translation by Manuel Atienza and Isabel Espejo. Madrid: Centro de Estudios Constitucionales.

Those aims shall be pursued according to the specificity of the spatial model stated by the Public Administration with attribution on urban and spatial planning.”

In the South African case, Coggin and Pieterse explain how they:<sup>34</sup>

“... do not view the right to the city as an enforceable, legal right in and of itself, but find it helpful in informing our understanding of a whole range of human rights, insofar as such rights may find application within the city. In this regard, the right to the city imbues justiciable rights with a distinctly spatial meaning. This is critical to many rights-based claims, given the increasing importance of cities to people, as well as the spaces in and through which people inhabit, appropriate and participate in the city. It also provides for a normative and interdependent reading of constitutional rights, which transcends disciplines and which brings urban geography into the law in a manner that can transform the way in which people relate to cities, as well as the way in which cities relate to people.

In the specific legal context of the Constitution, (...) the right to the city is best understood as implicating a package of interrelated rights, comprising, mainly, the rights to equality, life, freedom of movement and physical safety, freedom of assembly and association, freedom of trade and occupation, the right to political participation, the right to a healthy environment as well all of the socio-economic rights guaranteed by the Bill of Rights. To this list, we would add a number of un-enumerated rights, for instance, access to work, energy, sanitation, telecommunications, public transport and urban mobility, as well as the right to development, all of which are understood as forming part of the right to the city in the World Charter on the Right to the City proclaimed in 2005.

Understood thus, the exercise of the right to the city is not only dependent on protest and activism, but can also be articulated through the courts. Courts should thus be viewed as spaces of contestation in the city, provided that they have the institutional legitimacy to function as such and conduct themselves in a manner facilitative of dialogue over the shape and form of the city. Hence we have urged South African courts to pay heed to the right to the city, and to all of its interdependent constituent

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<sup>34</sup> A RIGHT TO TRANSPORT? MOVING TOWARDS A RIGHTS-BASED APPROACH TO MOBILITY IN THE CITY, (2015) 31 SAJHR, pp. 299 ff. See also T Coggin & M Pieterse ‘Rights and the City: An Exploration of the Interaction between Socio-economic Rights and the City’ (2012) 23 Urban Forum 257, 259–60



elements, in their interpretation and enforcement of the rights enumerated in the Bill of Rights, especially in cases turning on access to the city, its opportunities and its services.”

Fighting the heavy legacy of apartheid in terms of inequality and spatial injustice will require a strong political will, smart new legal developments and a judicial review based on this idea of this right to the city, which can become a useful tool to face problems like housing segregation and gated communities.<sup>35</sup>

To use Sunstein’s words, the Spanish judicial decisions, the case law of the South African Constitutional Court, and the decisions of the Committee applying the ICSECR help to provide:

“the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.”<sup>36</sup>

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<sup>35</sup>Gregory D. Breetzke • Karina Landman • Ellen G. Cohn, *J Hous and the Built Environ* (2014) 29:123–13, “Is it safer behind the gates? Crime and gated communities in South Africa”

<sup>36</sup> Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (John M. Olin Program in Law and Economics Working Paper No. 124, 2001).