

**KEEP IT
CONSTITUTIONAL**



Episode 07

HOUSING

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The Keep It Constitutional campaign is a 20-part series brought to you by the Foundation for Human Rights. The campaign aims to provide South Africans – particularly learners – with an introduction to the Constitution and its contents. The campaign consists of animated episodes, audio episodes, and lesson plans.

For more information visit www.keepitconstitutional.co.za.

The lesson plan is designed to assist educators and group leaders lead an introductory session on the Constitution. Educators can follow the lesson plan word-for-word, but may improvise as desired.



Episode 7:

HOUSING

Time required 45 minutes

Learning objectives

- The right of access to housing helps protect a number of other rights, including the right to safety and security of the person, the right to life, the right to education and the right to dignity.
- The right isn't just about providing people who don't have houses with houses – it also about making sure that people who do have access to housing have their rights protected.
- The Constitutional Court has played an important role in understanding what the right of access to housing entails, and the findings of the Court help government to design appropriate policies

Resources

- Keep It Constitutional animation series: Episode 7
OR
 - Keep It Constitutional radio series: Episode 7
 - Handouts included at the end of this module – 3 per group
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Introduction

Time required 1 minute

Educator:

Having somewhere to live is pretty important, right? Why?

ADVICE TO EDUCATORS

Allow learners to respond.

The goal of this question is to get the learners to think about how fundamental housing is to life. Try to get the learners to think about how housing is linked to rights like the right to a healthy environment, the right to safety and security of the person, the right to dignity. Try to get learners to think about how housing protects these, and other, rights.

Educator:

Okay, so, if housing is so important, what does the Constitution tell us about your right to housing?



PLAY VIDEO/RADIO EPISODE

Time required 5 minutes



DISCUSSION

Time required 12 minutes

Educator:

The right to housing is a right that has to be progressively realised, which means that more and more people each year need to be able to access the right. The government had a massive job to do. In 1994, the government estimated that it needed to build 1 and a half million houses just to deal with the number of people who needed housing in 1994 – and that, every year, an extra 180 000 houses would be added to this. So, it was a big problem. And even though the government has built well over 3 million houses, and also helped other people access housing, helping more than 14 million people find decent housing. There is still more to do. And sometimes the housing that has been built hasn't been that helpful – sometimes the houses are built far away from places where jobs are, from schools and other services.

South Africa is still learning about what exactly right to housing entails. You might remember that the courts have an important role to play in deciding what our Constitution says. We are going to look at some of the decisions of the Constitutional Court later today.

Before we do though, can you remember what the three arms of government are? And what role would each arm of government have in relation to helping ensure that the right to housing is realised in South Africa?

ADVICE TO EDUCATORS

Divide the class into groups (the groups will be used again in the next exercise).

Allow the learners to discuss the arms of government, and what each arm of government would do in relation to the right to housing, in their groups. Allow 5 minutes for the groups to discuss, and 5 minutes to feed back in a class discussion.

If necessary, ask the class what the arms of government are, and remind them that there is a legislature (parliament), an executive, and the judiciary. It may be worthwhile asking the learners what each of the arms of government does – briefly, the legislature makes the law, the executive is responsible for executing



the laws adopted by parliament, and forming policy to do so, and the courts are responsible for making sure that the other two arms of government fulfil their constitutional obligations and fit in with the Constitution.

After you are sure that the learners are clear on what the arms of government are and what each arm of government does, encourage them to think of what each arm of government would need to do in relation to housing in South Africa.

Answers should be that parliament will pass laws that promote the right to housing, which might include protecting people who have access to housing or providing access to housing for more people. The executive will be responsible for adopting policies that will ensure the rights of people in South Africa to access housing is realised – this would include adopting policies to realise the right and dedicating resources to ensure that the policies can be realised. The courts are responsible for ensuring that that the laws adopted by Parliament do enough to protect and promote the right. The courts also might tell us about how to understand the right – sometimes new situations arise that require government to act, and the courts will consider whether the action that the government has selected is an acceptable approach.

Educator:

Okay, so, we've heard a little about who has important roles to play in realising rights. Let's learn a little bit about how the right to housing has been understood in our law.



Case DISCUSSIONS

Time required 25
minutes

ADVICE TO EDUCATORS

Ensure that the handouts are distributed to the groups – each group should have three cases to discuss.

Educator:

The best way for us to understand the way that the right of access to housing operates is by looking at cases that have been heard in the Constitutional Court. The handouts give us information on 3 cases and tell us a little bit about what the right to housing means in different situations.

In your groups, read the cases, and, thinking about the cases together, try to determine what the Constitutional Court has told us about what would constitute a reasonable housing policy. Think about what other rights have been involved. Think about the cases – do you think that they should have been decided differently? If you had your own way, how would you ensure that the right of access to housing is put into effect?

Using the information from the cases, and thinking about the resource constraints that may be placed on the government's ability to build houses, what do you think would be important elements of a housing policy that ensures that the right to housing is properly respected?

ADVICE TO EDUCATORS

Divide the class into groups small enough for discussion to take place.

Allow the learners 15 minutes to discuss the cases and their strategy in their groups, and 10 minutes for class discussion.

Prompt the learners to think about who the Constitutional Court is protecting in each case.



Try to highlight the different aspects of a housing policy – protecting people who aren't able to access reasonable housing (like in *Grootboom*) and ensuring that people who do have access to housing don't lose it (like in *Port Elizabeth Municipality* and *51 Olivia Road*). Try to get the learners to think about what the government has to do in these different situations. The answers that the learners provide should focus on the two different elements – protecting existing access to housing and helping people gain access to housing. The learners should also focus on the extent to which resource constraints mean that the State has to make difficult decisions.

Try to get the learners to think about whether they think the Constitutional Court could have done more to protect people's rights, or whether the Court could have done something else – maybe allowing the other arms of government more space to make the policies that they thought were right?

At the end of the exercise:

Educator:

Okay, we've spent a lot of time looking at cases. Why?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers should focus on the fact that the cases are important. They tell us – and they tell the government – how what will constitute a constitutionally correct housing policy. Emphasise that the Constitutional Court doesn't tell the Executive or the Legislature exactly what to do. Instead, the courts tell the government what a policy or law needs to think about and will let the other arms of government put this into effect.

Try to get the learners to link this to the separation of powers – the Constitutional Court is responsible for ensuring that the other arms of government act constitutionally, but not for making law itself.



CONCLUSION

Time required 1 minutes

Educator:

Realising the right of access to housing is really complicated. It involves all sorts of different strategies. And yes, South Africa is making progress – but so many people in our country still live in housing that doesn't properly protect their rights. And, as we have established, this isn't just about the right of access to housing – lots of other rights are involved too. Matters are even more complicated because we need to recognise that the right of access to housing isn't just about building houses anywhere – the government needs to make sure that people can access jobs and services. That's why it is important for all government departments to work together – to make sure that plans are made together, and that people can actually claim all of their rights.



HANDOUTS FOR LEARNERS

CASE 1

Government of the Republic of South Africa v Grootboom and Others (2001)

What happened?

A community illegally occupied land and were evicted from the informal settlement that they had set up in Wallacedene, in the Western Cape, where they had set up basic shelters of plastic and other materials. They lacked basic sanitation or electricity. Before the illegal occupation, the occupiers had sought assistance from the government, but hadn't had the assistance they wanted.

What rights did the group claim?

The group brought an action under sections 26 (the right of access to adequate housing) and 28 (children's right to basic shelter) of the South African Constitution for action by various levels of government.

What questions did the court have to answer?

What are the State's obligations in relation to housing? Does the State bear a particular obligation in relation to people in crisis situations?

Notable quotation:

The Constitutional Court said: "This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, healthcare, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done...Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand... However, section 26 does oblige the State to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the



obligations imposed upon the State by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.”

What did the Court say about the right to housing?

The State is required to formulate a reasonable housing programme, capable of progressively realising section 26. A reasonable housing programme has to allocate responsibilities and tasks to the different spheres of government and has to ensure that there are sufficient financial and human resources to implement the programme. A reasonable programme has to pay attention to housing crises, the short-, medium-, and long-term needs of people living in South Africa, and to ensure that all sectors of society have their needs taken care of.



HANDOUTS FOR LEARNERS

CASE 2

Port Elizabeth Municipality v Various Occupiers (2005)

What happened?

The Port Elizabeth Municipality wanted to remove 68 people, including children, who were occupying shacks that had been erected on private land. The occupiers had been living on the land for between 2 and 8 years. The people were willing to leave the land if they were given a reasonable time before being moved and if they were given access to alternative land.

What rights were at stake?

The Court had to balance between the right to housing and the right to property. The court also had to consider whether vulnerable groups, like children, had any special rights.

What questions did the court have to answer?

The government had introduced a law called the Prevention of Illegal Evictions and Unlawful Occupation (this is normally called the PIE Act). This law says that “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.”

Eviction is when someone is forced to leave their house. Eviction can't take place unless it is fair. The PIE Act says that a court order is required, and that the court will consider all of the circumstances – in this case, the Constitutional Court considered what some of the relevant factors were.

Notable quotation:

The Constitutional Court said: “PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of



ubuntu, part of a deep cultural heritage of the majority of the population, suffuses the whole constitutional order.”

Important to note: *Ubuntu* is a philosophy that focuses on the fact that humans all live together and rely on each other. It is sometimes defined as a philosophy that says ‘A person is a person because of other people’. The judges of the Constitutional Court have sometimes said that *ubuntu* underlies our Constitution, and reinforces the values of dignity, equality and freedom.

What did the Court say about the right to housing?

The State is required to balance section 25 and section 26 interests in light of all of the relevant considerations, on a case-by-case basis. Sometimes, the right to property can be limited, if eviction would lead people to become homeless.

Before ordering an eviction, a Court must consider

- How the occupation of the land took place – how desperate were the people in the period before the occupation?
- How long the land had been occupied for, and would an eviction uproot a settled community?
- The availability of alternative land/accommodation.
- Meaningful engagement between the parties is a vital step in attempts to reconcile the competing interests and find a mutually acceptable solution.

The Court also said that the housing policy adopted by the government should not only focus on giving the most people housing in the shortest amount of time – instead, housing programmes need to be flexible enough to respond to immediate housing needs, including needs that arise as a result of evictions.



HANDOUTS FOR LEARNERS

CASE 3

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others (2008)

What happened?

An Act passed by Parliament allowed for people to be removed from unsafe buildings without the PIE Act eviction process being followed. The reason for this was that the health and safety of people living in unsafe buildings would be threatened. In this case, the City of Johannesburg wanted to evict 400 people from two buildings, and didn't have a plan to provide alternative accommodation, which would have been required under the PIE Act. However, because the City claimed that the buildings were unsafe, it claimed it did not have to provide alternative accommodation.

What rights were at stake?

The right to housing, the right to safety and security of the person, the right to life and the right to dignity were all discussed in this case.

What questions did the court have to answer?

- How should municipalities balance the rights to housing and the right to safety and security?
- How important is it for the State to prevent people from becoming homeless?

Notable quotation:

"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 'improve 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 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.”

What did the Court say about the right to housing?

- The right to housing must be considered in light of the inherent dignity of human beings. This means that the State has an obligation to act reasonably in all circumstances, with the full weight of its constitutional obligations upon it (including to “improve the quality of life of all citizens and to free the potential of each person”, and to “respect, protect, promote and fulfil the rights in the Bill of Rights”). Municipalities have an obligation to engage meaningfully with the people threatened with eviction.
- The State’s actions must also take into account the housing rights of people who might be rendered homeless by an eviction. Engagement with the people threatened with an eviction is a pivotal step in determining what be reasonable.
- The context of each case is important in considering whether eviction should take place. Relevant issues include:
 - 1) The consequences of the eviction;
 - 2) Whether the City could help to improve these consequences;
 - 3) Whether it is possible to make buildings safer and less of a health risk for an interim period;
 - 4) Whether the City has any obligations to the occupiers; and
 - 5) When and how the City could or would carry out its obligations

