Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India

by

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Declaration

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I declare that Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

___________________
SIGNATURE

DATE: 15 June 2015

Mr B O Mmusinyane
…there can be no individual freedom, that is, when the group with which the individual identifies himself is not free. There can be no full development of the individual personality as long as the individual is told, by men who have the power to enforce their commands, that the way of life of his group is inferior to that of those who wield the power.

Summary
The central hypothesis of this thesis is that the universal fundamental right to adequate housing must be equally enforced by all states irrespective of its non-entrenchment as a constitutional, legislative and/or policy entitlement. Despite being a minority, poor Canadians still face the same sordid living conditions that the majority are experiencing in South Africa and India. If a developed country such as Canada, despite its available resources and housing policies, and, similar to South Africa and India as third world countries, fails to improve the poor’s standard of living, the right to adequate housing will remain a distant dream for many.

Any housing implementation strategy must be able to reduce housing backlogs, eradicate homelessness and slums and in general improve the poor’s standard of living. The thesis considers the diverse implementation strategies of the right to adequate housing as adopted by South Africa, Canada and India and reveals how each country has experienced systemic challenges. Against the background of international and regional human rights obligations, key issues are investigated to determine how to properly implement, enforce and monitor the right, include the role of a constitutionally entrenched right, the adoption of a housing legislative and/or policy measures, the role of the judiciary, (in)action on the part of government and the part played by national human rights commissions. While each of these three countries approaches the issue in their own unique way, and each country makes its own contribution, what is required is a coordinated and multi-faceted housing implementation system.

Although the point of departure was to determine what South Africa could learn from Canada and India, the conclusion is that both Canada and India can draw inspiration from South Africa. Nevertheless, the main conclusions are that South Africa must urgently conduct a comprehensive review of its regressive 20 year housing implementation strategy and India’s 61 years five year plans. The Canadian judiciary should be looking at ways to enforce the right within the Canadian Charter as well as its domestic legislation to include ‘social condition’ as a discrimination ground. While both Canada and India must review their housing policies their judiciaries should be evaluating the history of homelessness and the reasonableness of their adopted housing policies.
Key Terms

Right to adequate housing, Housing rights - South Africa; Housing rights - Canada, Housing rights – India; Justiciability of housing rights; Housing implementation strategy; Housing policy; Reasonableness of housing measures; Housing implementation challenges; Homelessness; Housing backlog
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Chapter 1

1. Introduction

1.1 Introduction

Violation of the right to adequate housing particularly to the homeless and inadequately housed poor and marginalised people by states is a universal and contentious issue, even in the most industrialised and richest nations.\(^1\) A consequence of the absence or denial of the right to adequate housing is homelessness,\(^2\) with the attendant problems of dysfunction, poverty, joblessness and inequality. Since housing is a basic necessity, it plays an important part in an individual’s life,\(^3\) requiring constitutional recognition and the unconditional right to enjoyment at a minimal level.\(^4\) Stable, affordable and good quality housing contributes to positive outcomes for individuals, families and communities. It also influences many aspects of life: individual health and well-being, educational achievement, social connections, labour market attachment and community identity.\(^5\) Housing also provides and safeguards most of the fundamental human needs. Hohmann captures the significance of housing by referring to a house as a place that one needs in order to enjoy both physical and psychological well-being:

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Safe and secure housing shields us from the elements and provides refuge from external physical threats. It gives us a material base from which to build a livelihood and take part in the life of the community and state. But housing also provides a space in which our psychological needs can be met. Secure housing is both intrinsically and instrumentally important in the formation and protection of community, belonging and place in the world. Those whose housing is inadequate, who are forced from their homes, and who are homeless suffer severe personal and social deprivations with both psychological and material impacts.  

Whether developed or not, every country has its own distinct history and challenges when it comes to its duty to provide adequate housing to its citizens. Some countries have distanced themselves from making a commitment to fulfil this right, whilst others have accepted a binding obligation to realise this right, despite experiencing difficulty in terms of how it must be implemented, and the implementation itself. The right to adequate housing is included in a group of fundamental human rights, classed as socio-economic rights (SERs). Introduced in 1966 in terms of the International Covenant on Economic, Social and Cultural Rights (ICESCR), SERs have suffered setbacks and delays since their introduction, when compared with the justiciability of civil and political rights (CPRs). The manner adopted for the implementation of all SERs leaves much to be desired. The delay in implementing SERs by the international community clearly has an adverse impact on the visibility and protection of SERs at international level. Furthermore, their delay has influenced the manner in which states view such rights. Besides being fully recognised under the international human rights law regime and most national laws,

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6 Hohmann J The right to housing: Law, concepts, possibilities (2013) 4-5.
SERs still experience disconcerting implementation challenges at international, regional and national levels. Therefore, their separate recognition is an essential step to remind states of their obligation to protect, promote and fulfil these rights in the same way as the CPRs. It is thus difficult to evaluate the right to adequate housing separately, without invoking the group of rights within which it falls, as the automatic realisation of SERs also means full realisation of the right to housing.

Considering the fact that a recognition battle has been won at international level for the justiciability of the right to adequate housing as part of SERs, numerous regional human rights systems, namely the African and Inter-American systems, have adopted their own human rights treaties, which give effect to this notable right. However, the developing Asian human rights system has its own challenges that must first be overcome before the right to adequate housing can be separately invoked. Nevertheless, the implementation strategies adopted to realise this right remain a major challenge for the international and regional communities, as well as national states, as they grapple to devise an appropriate way of reducing the number of homeless, poor and unemployed people. According to Kenna:

Effective implementation of the right to housing requires a deconstruction of housing systems, which will vary widely between states, both in terms of market role, development and complexity, as well as the extent of legally defined institutional, regulatory and consumer norms.

In evaluating the right to adequate housing, this study compares South Africa’s position with that of Canada and India to determine whether there is a need for South Africa, as a young democracy, to draw inspiration or lessons from these two countries, or if these two countries could draw inspiration from South Africa. It is essential to determine how

\[\text{22-26 January 1997 available at } \langle \text{http://www1.umn.edu/humanrts/instree/Maastrichtguidelines_.html}\rangle \text{ (date all accessed 2015-04-25).}
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\[\text{Pillay AG ‘The International Covenant on Economic, Social and Cultural Rights: Time for South Africa to ratify’} \text{ ESR Review} (2002) \text{vol 3(1) 1-42 3-4.}
\]

\[\text{Mmusinyane B ‘The complexity of invoking and enforcing the Right to (Adequate) Housing separately, and as part of the Socio-Economic Rights within the African, Inter-American and Asian Regional Human Rights Systems’ US-China Law Review} (2011) \text{vol 8(11) 84 1008-1034 1025, 1029 and 1033.}
\]

\[\text{Kenna ‘Can housing rights be applied to modern housing systems?’ 111.}\]
the jurisprudence developed in one system might be related to that of another jurisdiction, either because the idea attempts either to capture the same normative value or to organize a government to carry out the same tasks.\textsuperscript{14}

\section*{1.2 Research Problems}

\subsection*{1.2.1 South Africa pre-1994}
It cannot be denied that the apartheid legacy significantly and detrimentally influenced the socio-economic and cultural lives of many black people,\textsuperscript{15} and its impact is still being felt today.\textsuperscript{16} During apartheid, the minority government played a passive role within the housing sector, as it provided either limited or no housing to black people.\textsuperscript{17} However, it played a very active role in passing various draconian laws\textsuperscript{18} which enabled it to carry out mass evictions of black people from their land and relocate them to densely populated areas, without consideration of the subsequent hardships that they suffered.\textsuperscript{19} Therefore, the current state of housing conditions, the proliferation of informal settlements throughout South Africa and the illegal occupation of vacant land and buildings by black people in desperate need of housing or land cannot be viewed in isolation, but must be linked to the systemic impact of the these apartheid laws. The apartheid government segregated groups through the establishment of homelands/Bantustans,\textsuperscript{20} to which it believed all black people should be relocated. This failed, however, as only about 55\% of blacks...

\begin{thebibliography}{9}
\bibitem{14} Tushnet M \textit{Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law} (2008) 5.
\bibitem{16} Mah KW and Rivers PL ‘Negotiating difference in post-apartheid housing design’ \textit{African Identities} (2013) vol 11(3) 290-303 291-293.
\bibitem{17} Spier A ‘Beating the housing crisis: Strategic options for the next two decades’ (1989) 33; Del Mistro R and Hensher DA ‘Upgrading informal settlements in South Africa: Policy, rhetoric and what residents really value’ \textit{Housing Studies} (2009) vol 24(3) 333-354 334.
\end{thebibliography}
resided in these homelands and many remained within the so-called white South Africa living on its cities outskirts, residing in townships, shanty towns and slums.\textsuperscript{21} Clearly, black people were left to fend for themselves, with no regard for their fundamental rights. This is the reason why they pinned their hopes on the new democratic South Africa that aimed to redress the inequalities created by the apartheid regime, amongst others, through the provision of adequate housing within its new democratic constitutional framework.

\textit{1.2.2 South Africa post-1994}

In 1994 the new democratic South Africa inherited, amongst other things, a huge and complex housing crisis\textsuperscript{22} that required a concerted effort and commitment to eradicate. Evidently, when the new dispensation took over, it did have some idea as to how many blacks were homeless or inadequately housed, compared to the whites and those staying in informal settlements. Therefore, it is important to understand that apartheid created an unequal society that had to be addressed by the new government in an inclusive manner. This was not an easy task with which to deal with. However, the progressive implementation of the right to adequate housing cannot continue to blame or apportion blame to the apartheid legacy, when in fact the government is now in control and has devoted maximum resources to adequate housing.

\textsuperscript{21} Townships spread across Johannesburg and the other main urban centres—Cape Town, Durban, Pretoria, Port Elizabeth, East London, the Vaal, Bloemfontein and Pietersburg, such as Crossroads, Nyanga, Khayelitsha, South Western Townships (Soweto), Alexandra, Bosmont, Daveyton, Diepsloot, Duduza, El Dorado Park (colored), Etwatwa, Evaton, Ivory Park, Kagiso, Katlehong, KwaThema, Lenasia (Indian), Orange Farm, Tembisa, Thokoza, Tsakane, Vosloos and Wattville, Ladd B ‘Townships’ in \textit{International Encyclopedia of the Social Sciences} (2008 2 ed) vol 2 405-407 405-406; \textit{Apartheid Shanty Towns in Cape Town} available at \texttt{<http://www.capetown.at/heritage/history/apart_influx_shanty_art.htm>} (date accessed 2015-05-06).

To address homelessness and housing inequalities, a number of policy initiatives23 were implemented on a progressive basis from 1994, with section 26 of the 1996 Constitution24 as the main framework guiding South Africa’s housing mandate. Also section 28(1)(c) of the 1996 Constitution caters for the right to shelter of every child. The South African government must be commended for having included housing as an enforceable right25 in its Constitution, and for having delivered over 3 million houses to the homeless, unemployed and poor since 1994.26 These 3 million delivered houses multiplied by the average household size of 3.6 people means that:

…nearly a quarter of the South African population has been housed under this delivery program. Yet during the same two decades since 1994, the number of informal settlements has increased more than nine-fold. Currently, between a quarter and a third of urban South Africans live in informal housing. This might take the form of informal settlements. Despite one of the most substantial housing delivery programs in modern history, urban informality mushroomed during the two decades following apartheid.27

Clearly, the manner in which the housing delivery mandate was implemented leaves a lot to be desired, because the number of people registered for the housing subsidy system continues to annually increase. This in turn has resulted in a greater desperation by more people demanding access to adequate housing. The adopted housing subsidy system

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experiences implementation challenges as organs of state fail to administer the delivery of housing in accordance with it. As a result, manipulation, irregularities and the preference of beneficiaries is commonplace. In addition, the frustration of those who have waited for a long time for houses that they were promised has led to an increase in service delivery strikes. In dealing with the manner in which the housing subsidy system has been implemented, the Supreme Court of Appeal, in upholding the High Court decision rejecting the eviction of illegal occupiers of constructed houses, confirmed that:

What informed the conclusion of the high court were the following three broad yet overlapping considerations: first, the appellants had displayed uncertainty and confusion as to the identity of those persons who were to be evicted; second, the integrity of the waiting list and the allocation process had been compromised, accordingly, so the high court stated ‘the possibility, indeed the probability [existed], that there had been arbitrariness to the process which renders it unacceptable’; and third, the appellants adopted an ‘exclusionary’ eviction process that did not have proper regard to the personal circumstances of each of the unlawful occupiers.

It is argued that government seems to have no control over the housing delivery process and improving the poor’s standard of living. For this reason South Africa is still categorised as an unequal society, where the economy is still in the hands of the white minority, with the majority of blacks still being unemployed and poor 20 years later. The fact that the housing demand has increased despite government having delivered over 3 million houses is illustrated by the fact that in 1994 the backlog was estimated to be 1.5

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29 An example is the case of Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 2014 (1) All SA 386 (SCA) paras 4-6.


31 Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 para 10.

while by 2012 it was found to be approximately 2.1 or 2.5 million. This on its own signify a significant implementation hiccup which questions government’s housing delivery mandate, in terms of whether or not it is winning the alleviation of poverty war, as a multi-dimensional phenomenon, and improve the poor’s standard of living through housing. It appears that government is losing sight of the objective of using housing as a poverty alleviation measure. Despite the fact that government has set 5 year targets to deliver housing, none of these targets has been achieved yet it continues to increase its annual delivery targets. The question that needs to be asked is whether or not

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34 Kota-Fredericks Z ‘Statement delivered by Republic of South Africa’s Deputy Minister of Human Settlements,’ at the 6th World Urban Forum Special Session on South-South Co-operation-Naples, Italy: 04 September 2012 available at <http://www.dhs.gov.za/sites/default/files/speeches/Statement_by_Deputy_Minister_of_Human_settlements_at_WUF6-04-09-2012.pdf> (date accessed 2015-05-05). Unfortunately from 2013 to 2015 it appears the Department of Human Settlements and or Minister or its agencies avoided to state the housing backlog and it is my argument in Chapter 5 at paragraph 5.4.2 that the government has no knowledge of the actual housing backlog it intends to eradicate. For example the Chief Executive Officer of the National Home Builders Registration Council, in an undated report, indicated that the country is facing a housing backlog of about 2.3 million and no source is provided where he obtained the said number. See the National Home Builders Registration Council Affordable housing strategies around the world: South African approach (undated) available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCEQFjABahUKEyWmN7byN_hAhVCPbQKHQtUb2L&url=http%3A%2F%2Fwww.nhbrc.org.za%2Fwp-content%2Fuploads%2F2014%2F11%2FAddressing-Social-Housing-Needs-by-Mongezi-Mnyani.pdf&usg=AFQjCN7kHhqOY6d9TknWLSt0mKsNkw&sig2=BPjGfVLybs4XJ5DeHkJeQ&bvm=bv.102022582,d.d24> (date accessed 2015-09-05).


government is seriously considering its target failures, or whether it believes that it can do housing delivery better this time around, even though it failed before. This is evident from the words of Minister L Sisulu, who stated at the Human Settlement Indaba that:

We have resolved that to regain our delivery pace our target for this next five years is 1.5 million housing units, fifty catalytic projects, 200 000 housing units in the mining towns over the next three years.37

Nonetheless, government has already failed to phase out slums and informal settlements by 2014,38 although it is not only people from slums who require housing from the government. It remains to be seen, however, whether or not what the housing policies39 dictate will be practically achieved, considering the abovementioned challenges. On the one hand, concerns have been raised about the sustainability of the housing delivery model in South Africa and this study therefore also aims to review the sustainability of low cost housing to the poor, unemployed and homeless 20 years later. In this regard, the Financial and Fiscal Commission 2013 report found that:

The delivery of over three million houses since 1994 is not enough to address the many housing needs. Despite significant increases in the budget allocated to


human settlements and the delivery of over three million houses housing backlogs remain at levels similar to those in 1994. Population growth and migration to cities add to the demand for housing and housing subsidies.\footnote{Financial and Fiscal Commission Exploring alternative finance and policy options for effective and sustainable delivery of housing in South Africa 4.}

Moreover:

The high levels of unemployment in South Africa mean that 60 per cent of households are potentially eligible for fully subsidised houses. This has resulted in an increasing burden and dependence on the State for housing.\footnote{Financial and Fiscal Commission Exploring alternative finance and policy options for effective and sustainable delivery of housing in South Africa 4.}

It remains to be seen if whether or not the National Development Plan’s 2030 target of ensuring that most South Africans will have affordable access to services and a quality environment\footnote{National Planning Commission National Development Plan, adopted 11 November 2011, 233-259, available at <http://www.gov.za/sites/www.gov.za/files/devplan_2.pdf> (date accessed 2015-05-05).} will become a reality when there is little that the poor can celebrate. After two decades many systemic implementation challenges continue to hinder government’s objective of delivering housing that could significantly improve the poor’s standard of living and alleviate poverty.\footnote{National Treasury ‘Chapter 6: Human Settlements’ in Provincial budgets and expenditure review, 2005/06-2011/12 (2009) 103-104; available at <http://www.treasury.gov.za/publications/igfr/2009/prov/11.%202009%20PBER%20-%20Full%20Document.pdf> (date accessed 2015-05-05).} Courts have been kept busy by litigants attempting to give substantive meaning to section 26 of the 1996 Constitution. In one of the first the right to adequate housing cases to be decided in South Africa, the Constitutional Court held, in the \textit{Grootboom} case, that it cannot be denied that the fact that millions of South Africans face such a shortage of houses is partly due to the apartheid policy of influx control, which

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sought to limit black people’s occupation of urban areas.\textsuperscript{44} Despite the number of housing units already completed, it was found in the \emph{Grootboom} case that because the Constitution requires everyone to be treated with equal care and concern, measures, though statistically successful, could be unreasonable if they fail to respond to the needs of the most desperate and vulnerable individuals or groups in society.\textsuperscript{45} Essentially, since 1994, there have been about 17 court cases dealing with the interpretation and the implementation of South Africa’s adopted housing policies. This signifies an enabling environment in which rights are challenged and government is urged to properly implement, both directly and indirectly, the right to adequate housing.\textsuperscript{46} The mentioned challenges and judicial activism in this regard demonstrate that there is an urgent need for South Africa to review its implementation approach and determine how it can continue to improve the lives of the poor in compliance with its constitutional mandate. Furthermore, it must be determined what approach can best be adopted to reduce the number of people in need of housing and to ensure that housing achieves its objective of being viewed as a poverty alleviation measure. On a positive note, the jurisprudence of the South African Constitutional Court provides a normative framework that seems to be the best way to ensure the practical enforceability of the right to housing.

\textsuperscript{44} Government of the Republic of South Africa and Others \textit{v} Grootboom 2001 (1) BCLR 1169 (CC) (hereafter Grootboom case) para 6.

\textsuperscript{45} Grootboom case para 44; Langford ‘Housing rights litigation: Grootboom and beyond’ 192-194.

\textsuperscript{46} Fischer \textit{v} Persons Unknown 2014 (3) SA 291 (WC); Motswagae \textit{v} Rustenburg Local Municipality 2013 (2) SA 613 (CC) (Hereafter Motswagae case); City of Johannesburg Metropolitan Municipality \textit{v} Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) (hereafter Blue Moonlight Properties case); Abahlali base Mjondolo Movement of South Africa and Another \textit{v} Premier of the Province of KwaZulu–Natal and Others 2010 (2) BCLR 99 (CC) (Hereafter Abahlali base Mjondolo case); Mazibuko \& Others \textit{v} City of Johannesburg \& Others 2010 (3) BCLR 239 (CC) (hereafter Mazibuko case); Residents of Joe Slovo Community, Western Cape \textit{v} Thubelisha Homes and Others 2009 (9) BCLR 847 (CC) (Hereafter Joe Slovo case); Occupiers of 51 Olivia Road and Others \textit{v} City of Johannesburg and Others 2008 (5) BCLR 475 (CC) (hereafter Olivia Road case); City of Johannesburg \textit{v} Rand Properties (Pty) Ltd and Others 2007 (1) SA 78 (SCA); Minister of Health and Another NO \textit{v} New Clicks South Africa (Pty) Ltd and Others 2006 (8) BCLR 872 (CC); Port Elizabeth Municipality \textit{v} Various Occupiers 2005 (1) SA 217 (CC); President of the Republic of South Africa and Other \textit{v} Modderklip Boerdery (Pty) Ltd (Agri SA \& Others, Amicus Curiae) 2005 (5) SA 3 (CC) (hereafter Modderklip case); Jattha \textit{v} Schoeman and Others 2005 (2) SA 140 (CC); Van Rooyen \textit{v} Stoltz and Others 2005 (1) BCLR 78 (CC); Khosa \textit{v} Minister of Social Development 2004 6 SA 505 (CC); Ekurhuleni Metropolitan Municipality and Another \textit{v} Various Occupiers, Eden Park Extension 5, City of Cape Town \textit{v} Rudolph and Others 2003 (11) BCLR 1236 (C); Minister of Public Works and Others \textit{v} Kyalami Ridge Environmental Association and Another 2001 (7) BCLR 652 (CC); Grootboom case.
At the international level and relevant to the right to adequate housing is the fact that South Africa only ratified the ICESCR in January 2015. Nevertheless, South Africa entrenched SERs under its 1996 Constitution and has been commended for being one of the first countries in the world to ensure the justiciability of SERs in its Constitution. It is interesting to note that the Special Rapporteur, in his 2003/5 report, referred to South Africa as one of the countries that separately recognises the right to adequate housing by including it in its Constitution, in line with the ICESCR. This separate recognition is an essential step towards full and progressive realisation of this right.

At regional level South Africa ratified the African Charter on Human and Peoples’ Rights in 1996, but it did not enact the African Charter by national legislation. Nevertheless, the African Charter is applicable as a source of interpretation in South Africa in accordance with section 39(1)(b) of the 1996 Constitution, and must be considered by courts when any provision within the Bill of Rights is adjudicated. Thus, the South African legal system mirrors the protection of rights as provided for in the African Charter, thereby ensuring the protection of human rights through the incorporation of African Charter norms into the

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South African legal system.\textsuperscript{52} It is also essential to determine South Africa’s compliance with its regional obligations, as well as whether or not the regional system is likely to offer any enforcement remedies aimed at improving the rights of the marginalised in South Africa.

\textbf{1.2.3 Canada}

The Canadian government in an endeavour to progressively realise the right to adequate housing, has proposed, adopted and implemented a number of housing policies.\textsuperscript{53} For example the Affordable Housing Initiative (2001-2011) (AHI),\textsuperscript{54} which is a partnership agreement between provinces and territories aim at providing affordable housing across Canada. However the revised framework on Investment in Affordable Housing (2011-2014) (IAH) devoted more resources aiming at reducing, in particular, the number of poor and homelessness.\textsuperscript{55} On the other hand the Canada’s Economic Action Plan (CEAP) aimed at providing both new housing and renovation of existing housing to benefit, among others, single-parent families and senior citizens.\textsuperscript{56} Also the federal government’s Social Housing Policy, through the Canadian Mortgage and Housing Corporation (CMHC), caters for the provision low-income households to boast the existing social housing in Canada.\textsuperscript{57} However, the mentioned housing policies are the extent to which the Canadian government has gone in an endeavour to


\textsuperscript{55} The Framework boasts a budget of total investment over the three years to be $1.4 billion toward reducing the number of Canadians in housing need. The federal portion of this funding is some $716 million (One Canadian Dollar is equivalent to R9.88 as of 2015-05-09) over three years. Canadian Housing Observer 2012 5.2.


\textsuperscript{57} Canadian Housing Observer 2012 5.3.
progressively realise the right to adequate housing. Therefore this is a demonstration that SERs such as the right to adequate housing is merely pursued through a policy measure and not a fundamentally recognized human right.\(^{58}\)

Despite these efforts, Canada, as a developed country\(^{59}\) where the majority of its people are able to afford their own housing requirements,\(^{60}\) has demonstrated, on various levels, its unwillingness to improve and advocate for an improved standard of living of the inadequately housed minority, who are vulnerable and marginalised.\(^{61}\) Therefore, amongst the challenges ensuring the justiciability of the right to adequate housing is the fact that government pursues all SERs, of which the right to adequate housing is part, as merely policy-driven. Not only is government reluctant to change its approach through adopting separate housing legislation, but the Supreme Court of Canada also shies away from reviewing government adopted housing policies\(^{62}\) on the basis that they are not


entrenched and protected under the Canadian Charter.\textsuperscript{63} Such a reluctance to review existing housing policies is also exacerbated by the reluctance of the Supreme Court to recognise and/or enforce the right to adequate housing within the existing provisions of the Canadian Charter.\textsuperscript{64} Consequently, the marginalised minority is facing the daunting task of challenging and enforcing its right to adequate housing in Canada. At the same time, Canada has a unique view of its international obligations, mainly due to the fact that it has a different understanding and implementation of its international obligations. In addition, it is not a signatory to pertinent regional SERs instruments, thereby preventing victims from seeking effective remedies before the Inter-American human rights enforcement system.\textsuperscript{65} Therefore, the Canadian position seems to be a mixed bag of progress and regress, and as it stands seems to contribute relatively little in terms of lessons that can be learnt from its right to adequate housing implementation approach.

1.2.4 India

Indian adopted the five-year plans policy approach which is also used to implement its various housing policies/programmes. Included are shelter/housing policies that have been adopted and implemented since World War II.\textsuperscript{66} To date India has adopted and implemented about 12 five-year plans that deal amongst others with implementation measures relating to the right to shelter/housing.\textsuperscript{67} However, the implementation of these

\textsuperscript{63} Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on April 17, 1982 (hereafter the Canadian Charter).

\textsuperscript{64} Porter B ‘The right to adequate housing in Canada’ in Leckie S (ed) National Perspectives on Housing Rights 107.


five-year plans has led to an open-ended reviews and criticism relating to the manner in which such policies are being implemented. Despite such a long history of shelter/housing policy implementation in India, the country also seems to have failed to reduce the number of poor Indians and/or improve the poor Indians’ standard of living through shelter/housing provision. Shelter/Housing policies have been subjected to judicial scrutiny on a number of occasions in India. In comparison with Canada the Indian position is interesting as there is no separate recognition and protection of the right to shelter/housing under the 1949 Constitution.\textsuperscript{68} Instead, one has to interpret the existing provisions of the 1949 Constitution as safeguarding all SERs. This is despite the fact that all SERs are regarded as unenforceable directive principles of state policy (DPSP) in India.\textsuperscript{69} The judiciary has played a significant role in giving meaningful content to the un-entrenched right, thereby safeguarding and enforcing the right to shelter/housing. On the other hand, the country is experiencing challenges in complying with the decisions of its national courts, as well as its international obligations, despite the commitment to uphold

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\textsuperscript{68} Article 21 of the 1949 Constitution adopted on 26\textsuperscript{th} of November 1949 (Hereafter the 1949 Constitution), as modified up to the 1st December, 2007 <http://lawmin.nic.in/coi/coiason29july08.pdf> (date accessed 2015-04-29).

them. At the same time, the country is situated within a region that still finds it difficult to adopt its own regional human rights systems.\textsuperscript{70} Therefore, all countries in Asia are on their own, with sub-regional human rights systems being established but not having much authority over their members. Within such an environment, it is still difficult to advocate the justiciability of an individual right to shelter/housing, while the group within which it falls struggles to find its way through the establishment of Asian regional enforcement system.\textsuperscript{71}

1.3 Aims of study
The ‘right to adequate housing’ is a right that is commonly violated by states, irrespective of whether or not there is express protection of it, either under international or regional human rights systems, or national jurisdictions. No extensive comparative study has been conducted to determine if the implementation approaches in South Africa, India and Canada are appropriate to eliminate housing backlogs and homelessness, and if there are alternative implementation approaches for the provision of adequate housing by these states for their poor, homeless and unemployed citizens. These three countries’ historical housing position is of significant interest to this study, which seeks to explore, compare and contrast the measures they have adopted to implement the right to adequate housing in relation to the homeless, unemployed and poor.

The reasons for choosing these particular countries is motivated by the fact that all three of them share a common law-based system,\textsuperscript{72} and the fact that South Africa has, over the

\textsuperscript{71} Mmusinyane ‘The complexity of invoking and enforcing the Right to (Adequate) Housing separately, and as part of the Socio-Economic Rights within the African, Inter-American and Asian Regional Human Rights Systems’ 1011.
years, looked to Canada and India’s jurisprudence in shaping its transformational human rights jurisprudence. What is common to these countries is that a particular group in society experiences challenges in the provision of housing. A shared characteristic is that diverse ethnic groups are found within each country. However, where they differ is that in both South Africa and India it is the majority who are poor, unemployed and homeless while in Canada it is the minority who are poor, unemployed and homeless. Because of its huge population India has the highest number of people who are homeless while Canada has the lowest. In an economic sense South Africa finds itself to be closer to India than to Canada, which can count itself amongst the world’s most developed nations with less poverty and homelessness than both South Africa and India. Yet, each of these countries has significant challenges when it comes to the implementation of the right to adequate housing. Therefore, it is essential to determine the extent to which the implementation approaches adopted by these common-law countries to realise SERs are similar, or what makes them different and which one seems to tackle the right well.

There are various ways in which states can implement the right to adequate housing under their respective domestic systems, namely through constitutional entrenchment,\textsuperscript{73} the adoption of housing legislation\textsuperscript{74} and or housing policy objectives.\textsuperscript{75} Many Constitutions refer to general obligations within the housing sphere or contain explicit references to the individual or family’s ‘right to housing.’\textsuperscript{76} In South Africa, for example, the right is expressed as the ‘right of access to adequate housing’ under the 1996 Constitution.\textsuperscript{77} In India, there is no explicit ‘right to shelter/housing’ under the 1949 Constitution,\textsuperscript{78} but the Indian Supreme Court indirectly recognises the protection of housing as an integral part of the fundamental right to life as enumerated in Article 21 of

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  \item \textsuperscript{73} Such as section 26 of the 1996 Constitution.
  \item \textsuperscript{74} Such as the Housing Act 107 of 1997 - see Chapter 5.
  \item \textsuperscript{75} Such as the National Housing Code of 2009 of South Africa and various housing policies adopted and pursued by Canada, as discussed in Chapter 3 and India in Chapter 4 respectively.
  \item \textsuperscript{77} The 1996 Constitution.
  \item \textsuperscript{78} The 1949 Indian Constitution.
\end{itemize}
the 1949 Constitution\textsuperscript{79} in order to afford victims a remedy.\textsuperscript{80} However, not all states have recognised the need to implement the right to adequate housing through national law. In Canada, SERs are characterised as ‘mere policy objectives of government and have no attachment to fundamental human rights contained in the Canadian Charter.’\textsuperscript{81} Whereas the Canadian judiciary continues to be reluctant to interpret the existing provisions of the Canadian Charter to give equal protection to victims of the right to adequate housing.\textsuperscript{82} Therefore, this study aims to critically analyse the diverse interpretation approaches adopted by each country’s judiciary and national human rights commission, in the enforcement and monitoring of the right to adequate housing. In addition, an in-depth analysis of these three countries’ internationally imposed obligations in relation to the right to adequate housing will help to highlight their respective understanding and interpretation of their international obligations.

Internationally, South Africa has a clear and separate recognition of the ‘right of (access) to adequate housing’ and has only recently become a state party to the ICESCR. Canada has for long been a state party to the ICESCR,\textsuperscript{83} but does not recognise or protect SERs under the Canadian Charter, and its judiciary is reluctant to do so. India, on the other hand, is a state party to the ICESCR, but does not have express protection of the ‘right to housing’ under its Constitution, although the judiciary indirectly invokes the 1949 Constitution\textsuperscript{84} to protect this right. As a result, implementation is complex, as many states

\textsuperscript{79} Chameli Singh v State of Uttar Pradesh AIR 1996 SC 1051.
\textsuperscript{82} See Canada chapter at 3.5 hereunder.
have ratified international and regional human rights instruments, and yet have minimal or no evidence of domestic measures to comply with their imposed obligations. The same applies to the domestic guarantee of fundamental human rights, where states are reluctant to, fail to or only partially comply with their imposed constitutional obligations. The historical and contextual understanding as well as the interpretation of the right from government’s perspective plays a central role in implementation as does the manner in which the judiciary deals with challenges relating to this right. Consequently, the right to adequate housing at the domestic level has produced mixed results from the three countries examined.

This study contends that the only way to tackle the right to adequate housing problem is through the development of comprehensive and coordinated constitutional/legislative programmes that enable independent judicial scrutiny to determine the extent to which such reasonably adopted measures achieve the objective of reducing poverty and improving the lives of the poor. Moreover, in order for the right to adequate housing to be fully enjoyed, it requires a commitment from all three branches of government to collectively execute their mandate in a manner that is likely to benefit the enforcement of this right. For example, the fact that the South African Constitution made history by incorporating SERs into one document needs further elaboration, in order to indicate the effectiveness and importance of SERs in relation to CPRs. The findings of this study should not be regarded as definite solutions to the challenges faced by these countries. However, such findings will provide a forum for the three branches of government to possibly revisit their roles and obligations to move towards improving the lives of their poor citizens through an actual reduction in housing demand and increase in housing provision.

The question whether the inclusion of the right to adequate housing in the Constitution and/or the mere ratification of the SERs instruments at international and regional levels are a guarantee of the enjoyment of the right concerned will be interrogated. Although the approach in implementing the right to adequate housing differs from country to country, all adopted housing strategies that are adopted should be measured against the necessity to
improve the unemployed and poor’s standard of living as well as homelessness. Therefore, the adopted housing initiatives should in a practical sense be moving towards reducing the state of homelessness.

1.4 Research question, hypothesis and methodology
The central research question of this study is whether or not the poor, homeless and unemployed are most likely to enjoy an improved standard of living in South Africa, Canada and India, irrespective of which right to adequate housing implementation strategy is adopted. Relevant to this is the extent to which the adopted right to adequate housing implementation strategies of these countries have eradicated or reduced homelessness and improved the poor's standard of living. Moreover, an issue that must be addressed is how the existing right to adequate housing policies/laws have contributed to the increasing state of homelessness and poor living conditions, and deepened the victims’ marginalisation. These questions are based on the systemic challenges experienced by the three countries, despite assurances that their housing policies and laws are contributing significantly to the betterment of their citizens’ lives.

The central hypothesis of this study is that in South Africa the 1996 Constitution, in India the 1949 Constitution and in Canada the Canadian Charter advocate for equal rights based on dignity, similar to the ICESCR and other international and regional human rights instruments, as ratified by each country. In ensuring that protection is afforded to the poor, homeless and unemployed, the obligations of states must be interpreted in light of the countries’ domestic, international and regional obligations, irrespective of their failure to expressly entrench the right to adequate housing under their Constitutions. While the three states have adopted diverse implementation strategies relating to this right, these strategies must be unreservedly subjected to independent judicial scrutiny. Inspiration can be drawn from the adopted South African reasonableness standards. It is also contended that governments must take seriously the necessity to undertake evaluations of their adopted and implemented housing policies in determining if they have made any significant impact in reducing inadequate living conditions, informal settlements, as well as the number of poor. In other words, the adopted housing implementation strategies
should be measured in terms of the extent to which they reduce homelessness and improve people's standard of living. Such scrutiny must be understood against the background of the equal claim of the marginalised to enjoy their constitutionally protected rights to life, dignity and equality through the provision of adequate housing. Therefore, the judiciary should not allow itself to be conservative and have a narrow interpretation of fundamental rights that is likely to exclude reviewing implemented housing policy objectives. As a result curtailing the judicial powers to scrutinise the reasonableness of such implemented right to housing policies. Furthermore, it is essential for governments to implement court decisions in compliance with their constitutional and international, as well as regional, human rights mandate.

The judiciary can be a catalyst for change in evaluating the reasonableness of adopted housing policy measures and realigning government's implementation plans with the fundamental rights contained in national policies or legislation, as well as their international and regional obligations. Enforcement of judicial decisions can also be monitored by competent institutions such as the national human rights commissions and their powers need to be broadened to include SERs. It is the researcher's contention that it is impossible to realise the rights to adequate housing without invoking, both directly and indirectly, constitutional provisions before the judicial system that fully appreciates the indivisibility and justiciability of all [un]-entrenched rights. In addition, the failure to entrench the right to adequate housing domestically should never be an impediment to the judiciary's efforts to ensure the enforcement of such rights domestically, considering the international and regional human rights obligations that require such rights to be fully implemented and enforced by states parties. Therefore, the implementation of the right to adequate housing is a collaborative mandate from the three branches of government, and an all-inclusive mandate of the international and regional enforcement bodies, to work together towards ensuring that the marginalised fully enjoy their right to adequate housing. While each of the three countries has its own domestic system it must be remembered that they also operate within an international and regional human rights frameworks. International and regional human rights instruments that can be considered
by South African, Canadian and Indian courts in strengthening the enforcement of the right to adequate housing within the domestic system of each country are evaluated.

The methodology proceeds from a comparative right to adequate housing perspective, where the adopted right to adequate housing law and policy implementation approaches of the three countries are critically evaluated. Such an evaluation involves a review of applicable literature, to include the examination of adopted housing policies, legislation, and constitutional, international and regional SERs instruments that directly and indirectly protect the right. Moreover, court decisions are examined to determine the manner how they interpret, apply and enforce the right to adequate housing. Further, the methodology embarks on an evaluation of all the significant international and regional SERs instruments that directly and indirectly protect the right to adequate housing, ratified or not ratified by these countries. The jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR) and the regional enforcement bodies, in interpreting and applying the right to adequate housing, is applied to demonstrate how it can be used by the courts to realise the enjoyment of this right by those who are marginalised by the domestic system. Lastly the methodology adopts a descriptive and analytical evaluation of the critical role that is played or could be played by the national human rights commissions in enforcing the right to adequate housing at domestic level. With the assistance of a review of applicable literature, the approach of the different governments in the implementation of the right to adequate housing is identified.

1.5 Chapter overview
Chapter 1 provides a brief background to the study by setting out a synopsis of the three countries existing and implemented right to adequate housing policies. It also sets out research questions relevant to the thesis.

Chapter 2 traces the challenges and development of housing as a human right, and evaluates some of the reasons that delayed the recognition of SERs, of which the right to adequate housing is part of. It identifies international and regional human rights instruments that can be considered by South African, Canadian and Indian courts in
strengthening the enforcement of the right to adequate housing within their respective domestic systems. Considering the fact that South Africa, Canada and India all fall within different regions of the world, the second part of the chapter fully discusses the regional development and jurisprudence of the right to adequate housing within the African and Inter-American human rights systems, as well as the challenges faced by the Asian region in establishing a unified regional human rights system. An evaluation of all the significant international and regional instruments that directly and indirectly protect the right to housing is undertaken.

Chapter 3 provides a background to Canada’s legal system and positions the country, as a developed country, in terms of its historical housing status and housing-related policy development. It then questions and evaluates the political will of the country to realise the right to adequate housing and analyses the attempts made to utilise the existing provisions of the Canadian Charter to safeguard the right. The critical role of the domestic courts in adjudicating all SERs, in particular the right to adequate housing, is explored. In light of the fact that the right to adequate housing is pursued as a mere policy objective, the judiciary can be a catalyst for change in evaluating the reasonableness of such adopted housing policy measures and realigning the government’s implementation plan with the fundamental rights contained in the Canadian Charter. The way in which the national human rights commission could be used to monitor and enforce right to adequate housing cases is also discussed. Since Canada was one of the first countries to ratify the ICESCR, its record of [non]-compliance is also analysed to determine the extent of the country’s commitment to comply with its international obligations. In this regard it is relevant to determine how Canada interprets and/or understands its ICESCR-imposed obligations. Lastly, an analysis is undertaken of the Inter-American human rights system, as well as the impact, how and why Canada is reluctant to ratify the applicable regional human rights (SERs) instruments. The role of Canada within the region is important to determine if victims of the right to adequate housing may have redress in instances where the domestic system has proven to be ineffective. This examination highlights the systemic challenges faced by the poor minority in Canada and its vulnerability, despite the
domestic courts theoretically asserting their independence from the executive and legislative arms of government.

Chapter 4 explores India’s legislative background and the country’s position in terms of the right to shelter/housing, despite not being entrenched as an enforceable right, within the 1949 Constitution. It looks at how public interest litigation is used as the main vehicle to indirectly enforce the right to shelter/housing. The chapter also traces the historical development of shelter/housing policy measures in India and looks at its current position in some detail. In particular the series of five-year plans adopted since the end of the World War II are evaluated. In addition, considering the country’s complex shelter/housing policy, the chapter critically evaluates the necessity for India to adopt a legislative approach to enforce the right to shelter/housing. At the same time, an evaluation of decided cases related to shelter/housing and how the judiciary deals with them is made within the context of the 1949 Constitution and India’s international obligations. However while the judiciary has questioned government’s housing policy, it has not critically and adequately evaluated the reasonableness of adopted housing policy measures. In addition, the court seems to view itself as the only competent institution to enforce and monitor compliance with its orders. In this regard the Supreme Court of India has not acknowledged the critical role that the Indian Human Rights Commission could play in assisting it to monitor compliance with international and domestic laws relating to the right to shelter/housing. In light of the fact that India is also one of the first nations to ratify the ICESCR, it is essential to analyse compliance with its imposed obligations in as far as the right to shelter/housing is concerned. Furthermore, the challenges facing the Asian region and India in particular, due to the reluctance and/or delay in establishing a unified regional human rights system, are analysed.

Chapter 5 introduces the right to adequate housing in South Africa by providing the historical context to the right by first discussing the apartheid legacy in relation to housing provision up until the time of the democratic dispensation and then setting out the post-1994 position. The chapter traces the development of housing as a human right in accordance with section 26(1) of the 1996 Constitution and the adopted implementation
approaches, setting out the housing policy timeline in South Africa. Considering the fact that the country's democracy is still in its infancy, an evaluation of 20 years of housing delivery performance is essential to determine if the country is on the right path to improving peoples' standard of living. Of critical importance is the interpretive role adopted by the Constitutional Court in relation to the right to adequate housing in South Africa. An evaluation of the courts' handling of the right to adequate housing cases is done to determine if they have had any impact in helping government to achieve its housing provision mandate or if there is a lack of progress in this regard. An in-depth analysis of conflicting reports dictating the progress made is highlighted, and a way forward in terms of how progress should be monitored and evaluated is proposed. Compliance with court orders is crucial to determine whether housing legislation and policy have resulted in an improved standard of living for the poor. The complementary role of the South African national human rights commission in monitoring and enforcing the right to adequate housing is investigated. This chapter also discusses the impact of the recent ratification by the South Africa of the ICESCR and how South Africa is likely to approach the implementation of the right domestically, keeping in mind South Africa’s compliance with its international and regional obligations. Examining all these issues will help to highlight the systemic challenges that are not being adequately addressed in order for the adopted right to adequate housing policies to make a meaningful impact where they are supposed to and to persuade government to determine whether or not its mission of housing the poor is likely to be achieved.

Chapter 6 presents the findings of the study, providing a clear picture of the most appropriate and challenging housing implementation approaches needed to realise the right to adequate housing. The chapter identifies which model seems best to safeguard the right to adequate housing, especially the right of the marginalised. It also looks at which country has the best international/regional compliance record and which judiciary offers the most protection, as well as which national human rights commission is most empowered to monitor and enforce the right to adequate housing. Highlighting the weaknesses and strengths of all three countries and extracting the relevant principles and practices from the comparative studies, the chapter recommends the most appropriate
and relevant approaches for serving the poor and improving the standard of living of the homeless, poor and unemployed.
1.6 Scope and terminology
The right to adequate housing as a human right is the main focus of this study, and is therefore applicable in each of the three selected countries, despite their adoption of different terminologies within their jurisdictions. According to Hohmann, ‘a human right to housing represents the most direct and overt legal protection of housing and home,’ as it makes housing itself of principal significance. As a human right, it is accorded to everyone by virtue of being human, and is codified in international and regional treaties and declarations. In South Africa the right is understood in terms of section 26 of the 1996 Constitution to refer to ‘a right of access to adequate housing’ and court decisions have referred interchangeably to shelter or housing, the latter becoming a central focus. However the thesis does not consider section 28(1)(c) of the 1996 Constitution in detail and only refers to it where relevant. The deliberate exclusion is primarily based on

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85 For example, the Fischer and Another v Persons Unknown decision reiterated this broad interpretation of the right to housing to also include protecting a home, where the City of Cape Town defended the demolition of unoccupied informal structures by stating that according to them, they did not demolish homes and structures demolished were not homes. The court held that the City's approach was fundamentally flawed, as the actual question should have been whether or not those structures were occupied at the time that they were demolished. Furthermore, the court found that it is important therefore to properly locate the concept of 'home' as it is contemplated in s 26(3) of the constitution - for it is that form of structure that may not be demolished without due process. Applying a contextual interpretation to the word 'home' in the section of the constitution which deals with socio-economic rights, I believe that the interpretation should be wider rather than restrictive. People with limited, if any, resources, such as the occupiers in this case, who have managed to scrape together enough money to buy some basic materials (wood, iron and plastic sheeting) to erect the most basic structures in which they wish to live peacefully, would undoubtedly call those structures 'home'. Therefore, the court held that the short duration of time of those structures in which people were found to be present at the time that the ALIU moved onto the land did not disqualify those structures from being regarded as 'homes'. There is therefore no logical basis not to regard those completed, but empty, structures as homes as well, paras 24, 67, 72, 91 and 96; Hohmann The right to housing: Law, concepts, possibilities 1.

86 Hohmann The right to housing: Law, concepts, possibilities 6-7.

87 Discussed in Chapter 2.

88 With the Grootboom case making significant references to the shelter right without implying that there is a distinction between shelter and housing:

The Constitution draws any real distinction between housing on the one hand and shelter on the other, and that shelter is a rudimentary form of housing. Housing and shelter are related concepts and one of the aims of housing is to provide physical shelter. But shelter is not a commodity separate from housing. There is no doubt that all shelter represents protection from the elements and possibly even from danger. There are a range of ways in which shelter may be constituted: shelter may be ineffective or rudimentary at the one extreme and very effective and even ideal at the other. The concept of shelter in section 28(1)(c) is not qualified by any requirement that it should be “basic” shelter. It follows that the Constitution does not limit the concept of shelter to basic shelter alone. The concept of shelter in section 28 (1)(c) embraces shelter in all its manifestations, para 73, see also para 70-74, 77 and para 95.

89 Grootboom case.
the fact that the South African adequate housing rights jurisprudence relies heavily on section 26 and is considered to be an encompassing reference to cater for the rights of all those in need of housing/shelter in South Africa.

The 1996 Constitution refers exclusively to the right of access to adequate housing as opposed to the reference in the International Covenant on Economic, Social and Cultural Rights to the right to adequate housing. The said distinction is clear from the *Grootboom* judgment where Yacoob J stressed the difference:

The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.\(^{90}\)

However, at international level the right to adequate housing has recently been interpreted similarly to the *Grootboom* decision to encompass ‘access’ to adequate services in addition to the house itself. In that:

There must also be sustainable and non-discriminatory access to facilities essential for health, security, comfort and nutrition. For example, there must be access to safe drinking water, energy for cooking, heating, lighting, sanitation and washing facilities, means of storing food, refuse disposal, site drainage and emergency services.\(^{91}\)

In this regard the thesis argues that the right of access to adequate housing terminology adopted in South Africa is similar to the right to adequate housing interpretation at international level.

\(^{90}\) *Grootboom* case para 35.

\(^{91}\) UN Habitat *The right to adequate housing*, Fact Sheet No. 21 (Rev 1), May 2014, 8-9.
In India, the right is interchangeably referred to as the right to shelter/housing, but in its housing policies, it refers mostly to the ‘right to housing’. The Indian judiciary extensively applies the term ‘right to shelter’. Whereas in Canada the right to housing is referred to in the context of housing to shelter allowances\(^92\) and the provision of shelter to the homeless.\(^93\) The judiciary\(^94\) has also adopted the same terminology. The recent case of *Tanudjaja et al. v Ontario and Canada*\(^95\) refers to the right to housing.

It is evident that the terminology surrounding the right to housing and shelter is used interchangeably in the countries that are examined and the term used throughout this work follows that practice. Such differences in references do not in any way detract from the terminology associated with the human right to housing. Therefore, it is essential not to be too deeply engaged in the definition, concept and understanding of the different terminologies as adopted by each country.

Moreover it is the focus of the thesis to evaluate, compare and contrast only the jurisprudence of higher courts of the mentioned three countries namely the Constitutional Court in South Africa, the Supreme Court of Canada and the Supreme Court of India.

Although there is developed jurisprudence from other UN treaty bodies that advance the right to adequate housing it is the focus of this thesis to only evaluate the jurisprudence that of the ICESCR/CESCR.

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\(^92\) *Investment in Affordable Housing 2011-2014: Framework Agreement.*


\(^95\) *Victoria (City) v Adams* 2008 BCSC 1363 paras 85-92 95 100 available at <http://www.courts.gov.bc.ca/jdb-txt/sc/08/13/2008bcsc1363.htm> (date accessed 2015-05-06).

Chapter 2

2. The protection, and enforcement of the right to adequate housing under international and regional human rights systems

2.1 Introduction
An exposition of how states are bound under international and regional human rights law and on how to measure the fulfilment of the right to adequate housing is essential in determining the extent to which South Africa, when compared with Canada and India, complies with its obligations. An in-depth evaluation of the visibility and separate enforcement of the right to adequate housing in an international and regional framework is the focus of this chapter. All the international and regional human rights instruments and their obligations that deal directly and indirectly with the right to adequate housing are traced and evaluated. The objective of this chapter is, despite the visibility of the right to adequate housing, to expose the existing challenges between the visibility of this right and the actual enforcement of the right on its own and as part of the socio-economic rights (SERs).

An analysis is made of why the regional human rights systems seem better placed than the international human rights system to enforce the right to adequate housing against state parties’. Considering that the regional human rights systems seem to have stricter and better enforcement mechanisms (especially through the courts) it is expected that they can foster and develop the right to adequate housing jurisprudence that addresses all SERs claims. The chapter also addresses the challenges of invoking the right to adequate housing within a human rights system that still struggles to recognise and enforce SERs and how the right struggles to survive. An examination of international obligations with emphasis on SERs should be the starting point to determine the visibility and extent to which the right to adequate housing enjoys international recognition.
2.2 The right to adequate housing under international law

2.2.1 Introduction

‘International human rights law is seen as a normative beacon, beckoning states to an internationally agreed upon minimum standard of behaviour and a safety net for individuals who are denied their rights under their domestic systems, or who fall through the cracks of the national legal system.’\(^1\) The right to adequate housing forms an integral part of SERs which require separate protection and enforcement at international, regional and national levels.\(^2\) The right to adequate housing has been expressly entrenched in a range of human rights treaties, declarations, resolutions and commitments, expressly and implicitly as part and parcel of SERs. These instruments provide a foundation upon which state parties’ must ensure implementation directly or through the adoption of domestic legislation. Despite its express entrenchment, however, there are grave concerns regarding the right to adequate housing, particularly in respect of its practical enforcement before international forums. In a nutshell:

Compliance with and enforcement of binding decisions of international courts is marginal in international law. International law remains a compliance-based system not an enforcement-based system...compulsory binding settlement of disputes occupies a very tiny volume of the settlement of disputes in international relations. Most disputes are settled through diplomatic means.\(^3\)

As a result we cannot begin to talk about enjoyment of all human rights at domestic level by individuals of such states if some international and regional enforcement mechanisms such as the practicalities of monitoring state compliance remain a challenge.

2.2.2 Impact of state parties ratification of international human rights treaties

A state can agree to be bound by a human rights treaty in various ways. The most common are ratification, acceptance, approval and accession which mean ‘in each case the international act so named whereby a state establishes on the international plane its

consent to be bound by a treaty.\textsuperscript{4} The ratification\textsuperscript{5} of instruments imposes a binding obligation upon state parties' to either domesticate and or enforce the provisions of the said treaty under its domestic law.\textsuperscript{6} In other words by ratifying/acceding to international human rights treaties, states undertake, amongst others, to adopt domestic measures such as legislation to implement ratified treaty obligations and duties.\textsuperscript{7} A country's decision to ratify may be followed by other actions of international legal significance such as asserting the treaty's fundamental principles, insisting on joining the treaty, signing the treaty, adopting domestic legislation implementing the treaty and/or withdrawing a reservation entered.\textsuperscript{8} Once ratified it is clear that the domestic initiation of an individual legal claim can rely on the said treaties' substantive guarantees before national courts.\textsuperscript{9} Even though a state may ratify a treaty and not domesticate it in accordance within its national laws it is argued that the state is still bound by it and the judiciary has an obligation to interpret the said treaty in holding the state in violation of its international obligations.\textsuperscript{10} That would be the first point of departure in trying to hold the state accountable for protecting human rights irrespective of whether such a right is protected under the respective country's constitution or not.

\textsuperscript{4} Vienna Convention on the Law of treaties (with annex). Concluded at Vienna on 23 May 1969, Treaty Series, vol 1155 331. To see what human rights treaties have been ratified by South Africa see Chapter 5, what Canada has ratified see Chapter 3 and what human rights treaties have been ratified by India see Chapter 4 hereunder.

\textsuperscript{5} It should be noted here that ratification is not a uniform process, and it may vary from state to state. For example, states may issue declarations of reservation upon ratification, which may express an unwillingness to accept in full the provisions of the treaty, Dancy G and Sikkink K 'Ratification and human rights prosecutions: towards a transnational theory of treaty compliance' International Law and Politics (2012) vol 44 751-790 771.


\textsuperscript{8} Goodman ‘Measuring the effects of human rights treaties’ 174.


\textsuperscript{10} See Chapter 3 at 3.6.3.
For states to become parties to international treaties, they must assume a three-tier set of obligations and duties which are to respect, protect and fulfil human rights.\textsuperscript{11}

According to Reus-Smit:

This sense of obligation is a crucial factor in explaining both the attraction of international law as a regulatory institution, as well as the lengths some states will go to avoid legal entanglements - if international law incurred no obligations, it would have little attraction in a world where narrow self-interest and fear of sanctions are insufficient on their own to sustain extensive cooperation.\textsuperscript{12}

\subsection*{2.2.3 The Universal Declaration of Human Rights}

Housing as a right was foreign to human rights law for a very long time after 1948 although it has been taken more seriously since 1980s. The Universal Declaration of Human Rights (UDHR)\textsuperscript{13} of 1948 is considered to be the foundation of human rights and has gained international acceptance and customary international law status,\textsuperscript{14} thereby having a binding effect.\textsuperscript{15} Its original intention was to have a common standard of achievement that must form the basis for both domestic and international human rights policies and protection.\textsuperscript{16} It is through the UDHR that the world began to see the right to adequate housing as an integral part of the human rights framework.\textsuperscript{17} Article 25(1) stipulates that:

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

\begin{itemize}
\item \textsuperscript{12} Reus-Smit C ‘Politics and international legal obligation’ European Journal of International Relations (2009) vol 9 591-624 592 594 596 598.
\item \textsuperscript{13} UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html> (date accessed 2015-05-15).
\item \textsuperscript{14} Hohmann The right to housing: Law, concepts, possibilities 1.
\item \textsuperscript{15} UN Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers - The role of the courts in protecting economic, social and cultural rights Chapter 14 692.
\item \textsuperscript{16} Leckie ‘Housing as a human right’ 92.
\end{itemize}
The UDHR recognises that ‘every human being is born with the fundamental right to equality and dignity’ and denounces any kind of discrimination, affording every individual and group in society the same right to adequate housing, irrespective of gender, age, race, ethnicity, religion, political or other opinion, national or social origin and property.’ Therefore:

The Universal Declaration remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations.

To Hohmann the fact that no difference is drawn between SERs and CPRs means that the fulfilment of the basic material needs of life is heavily dependent on the interconnectedness of all rights, including life and dignity. Whilst Article 25(1) of the UDHR does not impose any limitation, Article 2(1) of the ICESCR internally restricts the realisation of SERs to the involvement of the actions and responsibilities of other states and subjects these rights to a progressive realisation. As a result states are required to adopt steps aimed at the progressive realisation of the right and such steps are required to be deliberate, targeted and concrete and must move as expeditiously and effectively as possible towards the realisation of rights goal. Emphasis is however placed on the adoption of legislative measures giving effect to the right under the domestic system. Therefore, it is disappointing that the implementation of SERs to date remains a challenging item on the agenda of the international community as states remain reluctant to guarantee, at domestic level, the enjoyment of these rights in compliance with their international obligations. Following the recognition of housing as a right

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18 Article 1 of the UDHR.
19 Article 2 of the UDHR.
20 Hurst ‘The status of the Universal Declaration of Human Rights in national and international law’ 290;
21 Hohmann The right to housing: Law, concepts, possibilities 16-17.
22 General Comment No. 3 para 2.
23 General Comment No. 3 para 3.
24 Hohmann The right to housing: Law, concepts, possibilities 19.
25 For example Canada, despite being one of the developed countries, fails to comply with its international obligations as imposed by the ICESCR. UN Development Programme Table 1: Human Development Index and its components: 2013, available at <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components>; Clark C ‘Canada falls out of top 10 in UN’s human development index’ The Globe and Mail 14 March 2013, available at <http://www.theglobeandmail.com/news/national/canada-falls-out-of-top-10-in-uns-human-development-index/article9758218/> UN Human Development Index Trend Table 2: Human
within the UDHR, several human rights treaties were adopted where SERs, including the right to adequate housing, were formally given separate recognition and protection.

2.2.4 Prominence of the International Covenant on Economic, Social and Cultural Rights

The main international human rights instrument dealing with the right to adequate housing at international level is the ICESCR. In terms of Article 2(1):

Each state party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economical and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.²⁶

The right to adequate housing under Article 11(1) of the ICESCR states that:

The states parties to the present Covenant recognise 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. The states parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.

The progressive realisation principle in Article 2(1) is understood as recognition of the fact that full realization of all SERs will generally not be able to be achieved in a short period of time.²⁷ Nevertheless, the fact that realization over time, or in other words progressively, as foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is, on the one hand, a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of SERs. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful

²⁷ Chenwi L ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ De Jure (2013) 742-769 744.
consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.\(^{28}\)

The concept of progressive realisation is primarily based on the fact that SERs’ obligations necessitate economic resources. The financial constraints faced by many developing countries that often makes equal enjoyment of all SERs simultaneously and immediately impossible\(^{29}\) since states are required to devote and use the maximum level their available resources even when faced with economic resource constraints.\(^{30}\)

As a result it is important what states do within their maximum available to progressively realise SERs. To Chenwi:

the progressive realisation qualification requires a state to strive towards fulfilment and improvement in the enjoyment of socio-economic rights to the maximum extent possible, even in the face of resource constraints.\(^{31}\)

On the other hand a minimum core obligation is a concept developed by the CESCR to interpret the substantive rights contained in the ICESCR. The concept of a minimum core obligation has become a contentious matter particularly when the domestic system is reluctant to adequately adjudicate SERs claims.\(^{32}\) The minimum core obligations aims at

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\(^{29}\) General Comment No. 3: para 9.


\(^{31}\) Chenwi ‘Unpacking “progressive realisation”, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ 743.

\(^{32}\) In South Africa the concept was rejected outright in the country’s first housing case (the Grootboom case) as a concept developed through time by the CESCR on the basis of submitted reports. South Africa as country does not have any information upon which it can infer interpretation of the minimum core within the context of our Constitution (paras 32-33). In Canada the judiciary has persistently failed to interpret SERs/housing rights policies, making it difficult to even consider the minimum core obligations. See chapter 3 below. In India, although the judiciary has adjudicated adopted housing rights policies, it nevertheless failed to determine the reasonableness standards of such housing rights policies and even fell short of evaluating the applicability of the minimum core obligations despite several states parties’ reports submitted to the CESCR. See chapter 4 below.
protecting those vulnerable by requiring immediate enjoyment of core essentials and services be accorded priority.\textsuperscript{33} To Pieterse: citizens should generally be able to demand to be provided with the goods, facilities and services that comprise the minimum core of a particular right.\textsuperscript{34}

Such a demand needs to be met irrespective of the progressive realisation and limitation of resources that the state may raise. To that end General Comment No. 3 held that:

The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.\textsuperscript{35}

Clearly Article 2(1) and 11(1) of the ICESCR call upon state parties’ to take appropriate steps, within the limits of available resources, to fully realise SERs. The ICESCR further requires state parties’ to ensure that everyone is equally entitled to full enjoyment of SERs without any discrimination, particularly in respect of an adequate standard of living which includes housing.\textsuperscript{36} The ICESCR is the foundational backbone of the, protection, and enforcement of SERs. It emphasises that, once ratified, states parties are directed to adopt domestic legislation giving effect to the right to adequate housing. Whilst it is clear from the ICESCR that states need to demonstrate an effort in complying with all SERs it cannot do much more than to reiterate its wish that state parties’ comply with their imposed obligations. However Bilchitz set out some instances where there could be possibilities whereby the concerned state can offer a satisfactory

\begin{footnotesize}
\begin{enumerate}
\item Pieterse M ‘Resuscitating socio-economic rights: Constitutional entitlements to health care services’ \emph{SAJHR} (2006) vol 22(3) 473-502 481.
\item Pieterse ‘Resuscitating socio-economic rights: Constitutional entitlements to health care services’ 482
\item UN CESCR General Comment No. 3 para 10. \textsuperscript{36} Articles 2(2) and 11 of the ICESCR. See also Articles 5 and 14 of the UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965. Adopted and opened for signature and ratification by UN General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969 available at <http://www.refworld.org/docid/3ae6b3940.html> (date accessed 2015-05-06).
\item Articles 2(2) and 11 of the ICESCR. See also Articles 5 and 14 of the UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination 21 December 1965. Adopted and opened for signature and ratification by UN General Assembly Resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969 available at <http://www.refworld.org/docid/3ae6b3940.html> (date accessed 2015-05-06).
\end{enumerate}
\end{footnotesize}
explanation for non-compliance with the minimum core obligation. Such explanations can be seen as limiting even compliance with the minimum core obligations under certain circumstances.

In order for a state party to be able to attribute its failure to meet at least minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all the resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. It is the intention of the minimum core obligation to establish certain classes of needs as enjoying priority over others and the state is obliged to realise these core needs immediately, as a matter of individual rights. To Wesson there are numerous advantages in adopting the minimum core obligations: (1) they direct resources to exactly where they are needed; (2) they introduce clarity to a court’s economic, social and cultural jurisprudence, by ensuring that the state has a clear understanding of its priorities; (3) they allow for a clearer formulation of the concept of progressive realisation, ensuring that the state has a starting point from which to work; (4) they convert programmatic SERs into individual entitlements.

On the other side states often voluntarily opt to comply with their human rights treaty obligations. To Hathaway:

Compliance does not occur unless it furthers the self-interest of the parties by, for example, improving their reputation, enhancing their geopolitical power, furthering their ideological ends, avoiding conflict, or avoiding sanction by a more powerful state.

Compliance trends are evident from the manner, in which South Africa, Canada and India have viewed, interpreted or implemented the ICESCR’s obligations within their

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38 General Comment No. 3 para 10.
respective jurisdictions. While the international human rights treaties advocate having all state parties' to implement their respective rights, it does not offer much assistance in tackling insufficient compliance capacity. The role of the international monitoring treaty is normally limited to the evaluation of reports submitted by submitted states parties and responding to the progress made by states to every right in the treaty. Failure to implement or comply with recommendations made by monitoring bodies is addressed mainly by putting pressure on the domestic political regime to improve compliance with human rights obligations and the exertion of peaceful political pressure on government. Powerful countries can assist by putting pressure on those countries that violate their human rights obligations, but only if such pressure is consistently applied and with a long-term commitment. However, challenges ensue if one of the human rights violators is one of these powerful countries such as Canada. Hathaway asserts that:

The observation by a state of the human rights of its citizens provides little or no direct benefits to other states. It is therefore difficult for realists to explain why states would be willing to incur the costs of setting up a regime to protect human rights, surrender to that regime the power to control and monitor some aspects of their interactions with their own citizens, commit to bring themselves into line with treaty requirements, and agree to engage where necessary in sanctioning activity to bring others into compliance.

As a result the lack of binding nature of the decisions of these international monitoring bodies signifies lacunae that states such as Canada take advantage of in not complying fully with their concluding observations as stated in Chapter at paragraph 3.6 and 4.9 hereunder. In this regard, amongst all international human rights instruments, the ICESCR remains the most controversial human rights treaty to be fully complied with by state parties'. The ICESCR deals with rights considered to be resource competitive in

41 Illustrated in chapters 3, 4 and 5.
43 Articles 16(1), 18, 19 and 20 of the ICESCR.
45 Neumayer ‘Do international human rights treaties improve respect for human rights?’ 930 931.
46 Neumayer ‘Do international human rights treaties improve respect for human rights?’ 931.
47 Hathaway ‘Do human rights treaties make a difference?’ 1946.
the sense that one right may achieve a particular distribution of resources at the expense of some other SERs. This is demonstrated by the manner in which South Africa, Canada and India have taken divergent approaches in interpreting the justiciability and implementing the SERs within their territories.

2.2.5 Reporting and monitoring obligations under the ICESCR

While the ICCPR is supervised by the Human Rights Committee, the ICESCR is supervised by the CESCR, which is a body of independent experts established in 1985. The CESCR mainly interprets the content of human rights provisions in the form of concluding observations on thematic issues. Without a doubt there is an existing obligation upon states to implement SERs in instances where they are legally bound to do so. Not only does the CESCR oversee the implementation of the ICESCR by states parties but equally other established committees monitor and report on SERs progress, amongst others through General Comments. However, this study is only limited to the evaluations of the CESCR’s jurisprudence. The CESCR’s published General Comments give further substance to the norms and provisions found in the ICESCR. These General Comments and those adopted by other human rights bodies are valuable statements outlining the content, intent and legal meaning of the subjects they address.

2.2.5.1 The CESCR monitoring obligations under the ICESCR

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49 This is dealt with extensively in chapters 3, 4 and 5.
Since the CESCR monitors SERs under the ICESCR in 1991 it adopted the first General Comment on the right to adequate housing, with emphasis on adequacy. General Comment No. 4 makes an elaborate exposition of Article 11(1) of the ICESCR, particularly on the adequacy standard with regard to the right to adequate housing. In terms of the General Comment No. 4 the human right to adequate housing, which is derived from the right to an adequate standard of living, is of central importance to the enjoyment of all SERs. The CESCR identified seven aspects of the right to adequate housing that determine adequacy to be:

(a) **Legal security of tenure.** Security of tenure means that all people in any living arrangement possess a degree of security against forced eviction, harassment, or other threats. States are obliged to confer this security legally.

(b) **Availability of services, materials, facilities and infrastructure.** To ensure the health, security, comfort, and nutrition of its occupants, an adequate house should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

(c) **Affordability.** Affordable housing is housing for which the associated financial costs are at a level that does not threaten other basic needs. States should take steps to ensure that housing costs are proportionate to overall income levels, establish subsidies for those unable to acquire affordable housing, and protect tenants against unreasonable rent levels or increases. In societies where housing is built chiefly out of natural materials, states should help ensure the availability of those materials.

(d) **Habitability.** Habitable housing provides the occupants with adequate space, physical security, shelter from weather, and protection from threats to health like structural hazards and disease.

(e) **Accessibility.** Adequate housing must be accessible to those entitled to it. This includes all disadvantaged groups of society, who may have special housing needs that require extra consideration.

(f) **Location.** The location of adequate housing, whether urban or rural, must permit access to employment opportunities, health care, schools, child care and other social facilities. To protect the right to health of the occupants, housing must also be separated from polluted sites or pollution sources.

(g) **Cultural adequacy.** The way housing is built, the materials used, and the policies supporting these must facilitate cultural expression and housing diversity. The development and modernisation of housing in general should

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maintain the cultural dimensions of housing while still ensuring modern technological facilities, among other things.\textsuperscript{54}

The CESCR further defined a number of steps required to be taken with immediate effect, irrespective of the state’s development status:

1. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others.\textsuperscript{55}

2. While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one state party to another, the Covenant clearly requires that each state party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which ‘defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures’. Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.\textsuperscript{56}

3. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a state party to satisfy its obligations under article 11(1) it must demonstrate, inter alia, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction.\textsuperscript{57}

It is clear from General Comment No. 4 that governments are urged to take proactive steps, through concrete housing policies, to ensure that the needs of those eligible for housing are met through participation and consultation. General Comment No. 7, which deals extensively with the right to adequate housing in the context of forced evictions, is essential in evaluating the extent to which forced evictions disrupt the enjoyment of the


\textsuperscript{55} General Comment No. 4 para 11.

\textsuperscript{56} General Comment No. 4 para 12.

\textsuperscript{57} General Comment No. 4 para 13.
right to adequate housing.\textsuperscript{58} It encourages state parties’ to adopt national housing strategies to guide their housing programmes having the needs of the beneficiaries in mind. Theoretically it is acknowledged that comparative housing data is of poor quality and the declaration of the right to adequate housing does not automatically bring about better housing conditions.\textsuperscript{59} In other words, the mere entrenchment of the right to adequate housing within an international instrument does not mean that such a right is enjoyed by all. To Seleoane, a right may place an obligation on a state to act rationally and in good faith, and require that it justifies its failure to carry out its obligation.\textsuperscript{60} Therefore, there must be a good reason for the state not to respect, protect, promote and fulfil a right.\textsuperscript{61} As a result the CESCR must follow a certain process when dealing with states parties’ compliance with the ICESCR.

\textbf{2.2.6 Adoption of the Optional Protocol to the ICESCR}

As a result of the marginalisation of SERs, the ICESCR was the only human rights instrument that did not have a petition mechanism that allowed individuals to take their states before an international enforcement body. After many struggles and delays – and after the 60 year anniversary of the UDHR - the UN adopted an Optional Protocol to the ICESCR.\textsuperscript{62} An important point to note is that this Optional Protocol only came into force after the respective ratification and accession of a minimum of at least 10 states in accordance with the procedure as set out in Article 18. The signature ceremony took


\textsuperscript{59} Ellickson ‘The untenable case for an unconditional right to shelter’ 17.


place in September 2009. To date 45 states have signed and 21 states have ratified the Optional Protocol to the ICESCR.

It is a serious concern if one looks at the number of about 115 states that have ratified the Optional Protocol to the ICCPR while only 4 are signatories to it. Similarly concerning is the low number of those that have ratified the Optional Protocol to the ICESCR. One wonders if Neumayer’s assertion that ‘things happen if powerful countries want them to happen’ – means certain states do not have an interest in the equal protection and enforcement of the SERs. In essence it can be argued that the interpretation and the enforceability of the ICESCR by certain states have been relegated to the back seat. The dominance of the ICCPR has been advocated and CPRs are often utilised to protect SERs. Nevertheless, the visibility of rights such as adequate housing has gained prominence even in other international human rights instruments. In essence the Optional Protocol to the ICESCR now affords victims of SERs’ abuses who apparently failed to obtain an effective remedy from their respective domestic fora an opportunity to seek redress by lodging a complaint before the CESCR. In other words, the CESCR has been appointed to carry out all the functions of the Optional Protocol. The Optional Protocol further attempts to give guidance to state obligations internationally as well as nationally in ensuring the progressive realisation of SERs. According to the Optional Protocol’s preamble, states parties commit to take steps individually and through international assistance and cooperation to ensure that their available resources are maximally utilised on a progressive basis to fully realise SERs. The preamble further notes that everyone must be treated with dignity and respect without any distinction, the

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67 Article 2 of the Optional Protocol to the ICESCR.
68 Preamble to the Optional Protocol to the ICESCR.
entitlement of everyone to all the rights and freedoms, the equal enjoyment of all civil and political SERs. Furthermore, human rights are universal, indivisible, interdependent and interrelated.\(^6^9\)

It has been acknowledged that while there was a delay in adopting a SERs enforcement body it was emphasised that UN agencies, while taking every effort to promote CPRs, must also take cognisance of SERs.\(^7^0\) For example there are several instances whereby the CPRs have been interpreted to also safeguard most SERs. For example, the right to life as guaranteed in Article 6(1) of the ICCPR is regarded as an appropriate right to be invoked for violation of SERs.\(^7^1\) It is obvious that the adoption of CPRs to safeguard SERs thereby relieves the SERs’ burden of being marginalised since they are now able to be adjudicated on an equal basis. However, this approach is likely to diminish the role of the CESCR to separately develop its own SERs jurisprudence\(^7^2\) without necessarily relying on the Human Rights Committee jurisprudence to highlight the justiciability of SERs. Therefore, it is essential that states parties, if they view CPRs to be equal in status to the SERs, to afford the latter the required status by ratifying the Optional Protocol to the ICESCR so that they can be taken to task in the same way as they are treated by the Human Rights Committee.

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\(^7^0\) CESCR International technical assistance measures (Art. 22): 1990/02/02. UN CESCR General Comment No. 2 para 6, available at <http://www.refworld.org/docid/47a7079f0.html> (date accessed 2015-05-09).

\(^7^1\) UN Human Rights Committee (HRC) CCPR General Comment No. 6: Article 6 (Right to Life) 30 April 1982 para 5, available at <http://www.refworld.org/docid/45388400a.html> (date all accessed 2015-05-08).

\(^7^2\) For example pending cases before the CESCR does demonstrate a developing separate right to housing jurisprudence such \textit{Communication 2/2014/Spain} relating to the denial of access to court to protect the author’s right to housing and \textit{Communication 5/2014/Spain} relating to the forced eviction of a tenant as a result of proceedings instituted by landlord, see CESCR ‘\textit{Table of pending cases before the Committee on Economic, Social and Cultural Rights},’ considered under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-CESCR), available at <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx> (date accessed 2015-09-06).
2.2.6.1 State imposed obligations by the Optional Protocol to the ICESCR

The Optional Protocol seems to adopt a strict approach in enforcing SERs as it empowers the CESCR ‘to transmit, in its discretion, to a state party concerned, for urgent consideration, a request that the state take interim measures to avoid possible irreparable harm to the victims of alleged violations.’\(^73\) In addition to the procedural element, the Optional Protocol also has the potential to shift the substance of the ICESCR.\(^74\) Moreover:

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the state party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the state party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.\(^75\)

In terms of the inquiry procedure, Article 11 provides that when the CESCR receives reliable information pertaining to grave or systematic violations of the ICESCR, it must invite the state party concerned to assist in the assessment of the provided information and even thereafter submit observations to the parties concerned. If necessary the CESCR may visit the state party to monitor the situation.\(^76\) Moreover, it is the responsibility of the state party concerned, in the process, to ensure that no one under its jurisdiction will be subjected to any form of ill-treatment and/or intimidation as a result of the referral of the complaint to the CESCR.\(^77\)

The CESCR may make recommendations, through General Comments, as to the set minimum core obligation that states are required to implement. In terms of the General Comment No. 3 minimum core obligations are to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights and duties that rest upon every state party.\(^78\) It is argued that the right to live a dignified life can never be attained unless all the basic necessities of life - work, food, housing, health care, education and

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\(^{73}\) Article 5 to the Optional Protocol to the ICESCR.

\(^{74}\) Hohmann The right to housing: Law, concepts, possibilities 30.

\(^{75}\) Article 8(4) to the Optional Protocol to the ICESCR.

\(^{76}\) Article 11 to the Optional Protocol to the ICESCR.

\(^{77}\) Article 13 to the Optional Protocol to the ICESCR.

culture - are adequately and equitably distributed to everyone.\(^{79}\) With the empowerment of the CESCR, states are likely to bear pressure for accepting their responsibilities in promoting, protecting, enforcing and fulfilling them in the same way as CPRs, in the name of progress. Of interest to highlight is the fact that the Optional Protocol to the ICESCR is open for signature, ratification and accession only to states parties that have already signed, ratified and acceded to the ICESCR.\(^{80}\) The fact that only 21 states have so far ratified the Optional Protocol to the ICESCR is seen as a setback to the function of the CESCR to effectively interpret the ICESCR obligations of state parties’.

The CESCR has widened its scope through the years when dealing with other rights to include redress of housing as a right. Visible protection of housing as an interdependent and inseparable right with other human rights\(^ {81}\) has also been noted by the CESCR. In entrenching and formally raising awareness of their existence and emphasis on the need to protect and enforce the right to adequate housing, the CESCR has, on several occasions, made reference to the right to adequate housing even though it was dealing with other SERs. Examples of such rights are the rights of people with disabilities, elderly persons, their right to health, and against forced evictions.\(^ {82}\) However, until such time that states parties ratify the Optional Protocol to the ICESCR, the CESCR will continue to be disempowered to produce SERs’ justiciability jurisprudence unlike the Human Rights Committee’s body of established jurisprudence of the ICCPR.\(^ {83}\)

\(^{79}\) UN OHCHR Fact Sheet No.16 (Rev.1).

\(^{80}\) Article 17(2) of the Optional Protocol to the ICESCR. In this regard South Africa is falling behind with the SERs developments from international monitoring body perspectives.


\(^{83}\) Hohmann The right to housing: Law, concepts, possibilities 19.
2.2.7 Justiciability of SERs at international level

2.2.7.1 Traditional distinction between civil and political rights (CPRs) and SERs

The struggle for equal enforcement mechanisms for SERs and CPRs dominated international human rights law for a long time.\(^{84}\) Despite being regarded as indivisible by the UDHR and complementary\(^{85}\) the different methods of enforcement of SERs and CPRs demonstrate their multifaceted understanding and interpretation. Considering that the right to adequate housing is part of SERs, it is often difficult to deal with it without highlighting the general challenges that SERs encounter.\(^{86}\) Both SERs and CPRs are justiciable rights at international level but the implementation measures adopted are difficult to comprehend. It is well established that CPRs have for decades been preferred over SERs as witnessed by the differences in their respective enforcement mechanisms. For example, the ICCPR\(^{87}\) has an established enforcement mechanism whereby petitions can be lodged against a state party if it has ratified the Optional Protocol to the ICCPR that enables individuals to take their states before an international body.\(^{88}\)

On the other hand, criticisms have been levelled that SERs cannot be equated with CPRs since the former lack oversight whilst the latter are capable of being practically

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\(^{85}\) Preambles to the ICESCR and the ICCPR.


implemented as set out in the First Protocol to the ICCPR.\footnote{Dennis JD and Stewart DP ‘Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?’ The American Journal of International Law (2004) vol 98(3) 462-515 462.} For years now there has been a discrepancy in the different nature of CPRs and SERs in terms of their required obligations and realisations. This fact seems to have hampered the enforcement of SERs when compared to CPRs. For example, the unequal treatment of SERs in the international arena can be seen from the manner in which United Nations’ systems delayed and, only after 43 years\footnote{UN General Assembly Optional Protocol to the ICESCR: Resolution/adopted by the UN General Assembly, 5 March 2009, A/RES/63/117, available at <http://www.refworld.org/docid/49c226dd0.html> (date accessed 2015-05-06).} established the SERs complaints mechanism similar to that dealing with the CPRs. Therefore the CPRs have far more advanced jurisprudence developed with their entrenched procedure\footnote{Article 4(1) and 4(2) and 5(1) of the Optional Protocol to the ICCPR. Rule 92 of the UN International Human Rights Instruments Compilation of rules of procedure adopted by human rights treaty bodies HRI/GEN/3/Rev.3, 28 May 2008 available at <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (date accessed 2015-09-05).} whereas SERs are merely at an infancy stage developing and testing their processes.

Despite these divergent views it must be noted that the ICCPR and ICESCR were adopted on the same day under the same resolution by the United Nations’ General Assembly and these two instruments have similar clauses throughout. Examples are:\footnote{UN General Assembly Resolution 2200A (XXI) ICESCR, ICCPR and Optional Protocol to the ICCPR, Twenty-first session, Agenda item 62 16 December 1966 available at <http://www.un-documents.net/a21r2200.htm> (date accessed 2015-05-06). Dennis and Stewart ‘Justiciability of economic, social and cultural rights’ 476.}

\begin{itemize}
  \item[(i)] Respective Preambles;
  \item[(ii)] Common general principles (Article 1 - the right to self-determination); Article 3 - the rights to equality of rights of men and women); Article 5 – safeguards), as well as
  \item[(iii)] Concluding Articles (for ICESCR-Articles 24-32 and for ICCPR-Articles 46-53).
\end{itemize}

Nevertheless, SERs were perceived as being too complex in nature to have a similar enforcement and monitoring body as CPRs.\footnote{Dennis and Stewart ‘Justiciability of economic, social and cultural rights’ 476.} In accordance with the preamble to the ICESCR the interconnection and interdependence of SERs and CPRs is recognised:

\begin{itemize}
  \item[(i)] Respective Preambles;
  \item[(ii)] Common general principles (Article 1 - the right to self-determination); Article 3 - the rights to equality of rights of men and women); Article 5 – safeguards), as well as
  \item[(iii)] Concluding Articles (for ICESCR-Articles 24-32 and for ICCPR-Articles 46-53).
\end{itemize}
in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.95

The argument that these rights are not equal and/or related is misguided as these two instruments expressly complement each other. The view seems to be that although these two categories of rights are seen as being equal, CPRs are clearly more important to states parties than SERs with regard to enforcement mechanisms. CPRs impose guarantees that bind states parties to immediately take action while SERs are left to the discretion of states parties. Article 2 to the ICCPR provides that:

1. Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each state party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant.96

3. Each state party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;

95 The corresponding preamble to the ICCPR states that states parties recognise that:  
In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights.  
See also preamble to the ICESCR.  
96 See Article 2 of the ICCPR.
(c) To ensure that the competent authorities shall enforce such remedies when granted.\footnote{97}{See Article 3 of the ICCPR.}

For a period of over 40 years the differential treatment of these rights has been debated and argued without any substantive conclusion.\footnote{98}{Dennis and Stewart ‘Justiciability of economic, social and cultural rights’ 472 477.} In that process CPRs enjoyed full recognition and a credible enforcement system that is still overseen by the Human Rights Committee, while SERs were monitored by the CESCR. This is demonstrated by the number of countries that have committed to the ICESCR and ICCPR respectively. On 24 October 2014 about seven (7) states were signatories to the ICESCR while 163 had ratified it.\footnote{99}{United Nations Human Rights: Ratification status for CESCR - International Covenant on Economic, Social and Cultural Rights, available at <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en> (date accessed 2015-09-05).} To date the ICCPR has been ratified by 168 states and only six (6) states have signed and not ratified it.\footnote{100}{UN Treaty Collection: Ratification status of the ICCPR, available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> (date accessed 2015-09-05).} The complaints resolution mechanism within the ICESCR through an Optional Protocol to the ICESCR was adopted 43 years later to put the ICESCR on a par with the ICCPR, thereby validating the unequal treatment of SERs to CPRs claim. In addition there have been other international instruments and declarations that have notable references to housing as a fundamental human right. In addition, the ICESCR is complemented by numerous international human rights instruments that also invoke the right to adequate housing as a human right.

### 2.2.8 Other housing related human rights instruments

In addition to the main right to adequate housing treaties there are several equally important international human rights instruments that have incorporated the right to adequate housing in their agendas and regard such a right as an entitlement that needs to be realised as much as any other human right.\footnote{101}{Such as Article 9(1)(a), 28(1), 28(2)(d) of the UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> (date accessed 2015-09-05), Article 21 of the UN Convention Relating to the Status of Refugees 1951 and Protocol Relating to the Status of Refugees 1967 <http://www.unhcr.org/3b66c2aa10.html>; UN Strategy for Shelter to the year 2000, A/RES/48/178, 86th plenary meeting, 21 December 1993} Such instruments play a meaningful
role in entrenching housing as a right and continuous reference to such instruments draws the attention of states to take the right seriously.

2.2.8.1 International Convention on the Elimination of All Forms of Racial Discrimination
In compliance with the fundamental obligations laid down in Article 2 of the ICERD, states parties must undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of a number of rights. These include economic, social and cultural rights, in particular the right to adequate housing.102

2.2.8.2 Convention on the Elimination of all Forms of Discrimination against Women
Article 14(2)(h) of the CEDAW states that states parties must take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on the basis of equality of men and women that they participate in and benefit from rural development. Women must be assured of the right to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

2.2.8.3 Convention on the Rights of the Child
The first international binding instrument to combine both CPRs and SERs is the CRC as it urges state parties’ to undertake suitable measures to enable parents and others in

102 Article 5(e)(iii) of the ICERD.
charge of children to implement the right to an adequate standard of living that includes the right to adequate housing.\textsuperscript{103}

\subsection*{2.2.9 Soft law}

There are a number of declarations that were adopted that refer to or deal with the need to realise the right to adequate housing. With the exception of the UDHR\textsuperscript{104} international declarations are generally not legally binding instruments on states. As a result of these declarations states now find it more difficult to exercise their respective territorial sovereignty in regard to the treatment of their citizens without external influence.

(a) \textit{The Declaration on the Right to Development}

The 1986 Declaration on the Right to Development was adopted taking into consideration the provisions of the UDHR and the ICESCR. It recommends that states, in terms of Article 8.1, must locally commit themselves to taking necessary measures to realise the right to development and to afford equal opportunities concerning access to social resources and other needs including housing.\textsuperscript{105}

(b) \textit{Declaration on the Rights of Indigenous Peoples}

The adoption of this declaration in 2007 was sparked by the ever-increasing exploitation and violations of indigenous peoples’ resources and rights without explicit protection under international law.\textsuperscript{106} In terms of the declaration, the improvement of indigenous peoples’ economic and social conditions, including housing, must be regarded as a

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special measure which states are required to fulfil.\textsuperscript{107} In the fulfilment of that right indigenous people must be actively involved in determining, planning and administering housing and other programmes affecting them.\textsuperscript{108} Moreover, indigenous people should be given an autonomous role in all matters affecting their own affairs, including housing.\textsuperscript{109}

\textit{(c) Vancouver Declaration on Human Settlements}

Before the 1976 Vancouver Declaration the human settlement concept perceived housing to be separate from other elements of human settlement.\textsuperscript{110} The Vancouver Declaration was initiated as a result of the ever-increasing number of human settlements especially in developing countries and the challenges that these countries face in fulfilling the basic needs in terms of the principles of human dignity. Section III (8) of the Vancouver Declaration states:

Adequate shelter and services are a basic human right which places an obligation on Governments to ensure their attainment by all people, beginning with direct assistance to the least advantaged through guided programmes of self-help and community action. Governments should endeavor to remove all impediments hindering attainments of these goals. Or special importance is the elimination of social and racial segregation, inter alia, through the creation of better balanced communities, which blend different social groups, occupation, housing and amenities.\textsuperscript{111}

The Vancouver Declaration noted that human settlement is unmistakeably inseparable from housing, buildings, planning, environmental change, national and international development.\textsuperscript{112}

\textit{(d) Copenhagen Declaration on Social Development and Programme of Action

\textsuperscript{107} Article 21(1) of the Declaration on the Rights of Indigenous Peoples.

\textsuperscript{108} Article 23 of the Declaration on the Rights of Indigenous Peoples.

\textsuperscript{109} Article 26 of the Declaration on the Rights of Indigenous Peoples.


\textsuperscript{111} Clause 8 of the Vancouver Declaration.

\textsuperscript{112} Clause 2 of the Vancouver Declaration.
In 1995 the Copenhagen Declaration on Social Development and Programme of Action was adopted.\textsuperscript{113} It was as a result of concerns by states regarding the nature of their citizens and the conditions they live under, especially poverty, unemployment and social exclusion. Therefore, governments committed themselves to effectively address the material and spiritual needs of their people. The Copenhagen Declaration set out 10 commitments to assist states in their endeavour to eradicate poverty and promote social development. States committed themselves to laying down procedures aimed at improving productive resources and infrastructure, among others.\textsuperscript{114} The relevant procedures are as follows:

- Promoting public and private investments to improve for the deprived and overall human environment and infrastructure, in particular housing, water and sanitation and public transportation;\textsuperscript{115}

- Promoting social and other essential services, including, where necessary, assistance for people to move to areas that offer better employment opportunities, housing, education, health and other social services.\textsuperscript{116}

\textit{(e) The Beijing Platform for Women}

In the same year that the Copenhagen Declaration was adopted, the Beijing Platform for Women was adopted.\textsuperscript{117} It deals with a wide range of issues that affect women in their personal, economic, political and cultural lives and how governments, international agencies and corporations can contribute towards the advancement of women’s rights. During the conference it was found that poverty, and in particular homelessness and inadequate housing for women, is a major barrier to the realisation of human rights in general.\textsuperscript{118} Consequently governments are required to take steps in ensuring access to housing.\textsuperscript{119}

\textsuperscript{114} Articles 34, 35(b) and 35(h) of the Copenhagen Declaration.
\textsuperscript{115} Article 34(c) of the Copenhagen Declaration.
\textsuperscript{116} Article 34(e) of the Copenhagen Declaration.
\textsuperscript{118} Paras 31, 47 and 92 of the UN Beijing Declaration and Platform of Action.
\textsuperscript{119} Paras 58(m) and 256(k) of the UN Beijing Declaration and Platform of Action.
(f) Habitat Agenda and Plan of Action

The 1996 Habitat Agenda resulted from the UN Conference on Human Settlements (Habitat II) with its focus on adequate shelter for all and sustainable human settlements. Out of this summit over 100 commitments and 600 recommendations for unified action and cooperation were made to realise the right to adequate housing. Governments subsequently affirmed their commitment to objectives, principles and recommendations as made by Habitat II and articulated in the 1996 Istanbul Declaration on Human Settlements. In terms of Article 37 governments committed themselves to take efforts at a domestic and regional level and to craft regional plans of action to fully implement the Habitat Agenda in consideration of the fact that human beings are at the forefront of sustainable development that includes adequate shelter for all. Consequently these governments committed themselves to:

- sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure.

(g) The Millennium Declaration

After reviewing the 1996 Habitat Agenda the General Assembly found that the Declaration on Cities and Other Human Settlements in the New Millennium would continue to be the basic foundation for sustainable human settlements development. Nevertheless, the 2000 Millennium Declaration was adopted with prescribed new initiatives to meet the commitments made in the two declarations as well as an

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121 The Habitat Agenda para 39.

endorsed target of 100 million slum dwellers to be improved by 2020.\textsuperscript{123} All of these instruments highlight the significance of the right to adequate housing as an independent right within the human rights framework.

### 2.2.10 2000 Global Strategy for Shelter

The UN called upon and encouraged all countries to prepare their respective national shelter strategies and to adopt other measures to promote the achievement of the goal of shelter for all.\textsuperscript{124} The UN call was based on the premise that, despite efforts already underway, more than one billion people had shelter unfit for human habitation and that this number would increase dramatically, as a result of both population and urbanisation trends. The full potential and resources of all governmental and non-governmental actors in the field of human settlements must be exploited and such efforts must be at the heart of national and international efforts.\textsuperscript{125} There is therefore a need to intensify national and international initiatives to produce, deliver and improve shelter for all, with specific emphasis on the poor and disadvantaged.\textsuperscript{126}

### 2.2.11 Special procedure: UN Special Rapporteur on Adequate Housing

In addition to the numerous declarations mentioned above and the already existing international human rights instruments a need arose to establish a body that would complement the role of the CESCR, in particular to investigate and monitor compliance with the right to adequate housing at international level. To that end the UN Special


\textsuperscript{125} Global Strategy for Shelter para 2 (a).

\textsuperscript{126} Global Strategy for Shelter para 2.
The Rapporteur on Adequate Housing was established in 2000. The recent 2014 report of the Special Rapporteur on Adequate Housing reflects on the role of local and subnational governments in enforcing the right to adequate housing. The objective of the Special Rapporteur is to promote better realisation and operationalization of the right to adequate housing in a constructive manner, to close the gap between the legal recognition of the right and practice as well as to find solutions to housing challenges as experienced throughout the world. The Special Rapporteur’s reviewed mandate is to report, on an annual basis, to the UN Commission on Human Rights about progress made, emerging issues and challenges as well as recommendations made for future activities in as far as:

(a) The promotion of the full realization of adequate housing as a component of the right to an adequate standard of living;
(b) The identification of best practices as well as challenges and obstacles to the full realization of the right to adequate housing, and identify protection gaps in this regard;
(c) Giving particular emphasis to practical solutions with regard to the implementation of the rights relevant to the mandate;
(d) Applying a gender perspective, including through the identification of gender-specific vulnerabilities in relation to the right to adequate housing and land;
(e) Facilitation of the provision of technical assistance;
(f) Working in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant UN bodies, the treaty bodies and regional human rights mechanisms;
(g) Submitting a report on the implementation of the present resolution to the General Assembly and to the Council.

129 Office of the High Commissioner for Human Rights Question of the realisation in all countries of the Economic, Social and Cultural Rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Resolution 2000/9, para 7(d)(i)-(vii).
130 Para 5 of the Human Rights Council Adequate housing as a component of the right to an adequate standard of living: Resolution 6/27, Adopted without a vote 33rd meeting 14 December 2007,
Simultaneously the Special Rapporteur must provide the required information or reports to the CESCR. In 2001 the Special Rapporteur issued its first report that highlighted the increasing trends of the UN institutions in noting violations and the need to realise housing as a right when dealing with other human rights. In this regard, the proactive role of civil society must be praised for raising its voice in the progressive realisation of the right to adequate housing and the ever growing threat posed by globalisation, particularly for the poor and the marginalised. The Office of the Special Rapporteur should ensure that housing as a right must be practically realised at all levels, and that the housing right should have a close working relationship with the regional human rights systems. The attention of such regional human rights systems must be drawn to focus their work on SERs, particularly violations of the right to adequate housing and ensure that measures are put in place to address the violations concerned.

Therefore, any violations of SERs should have access to effective judicial or other appropriate remedies both at national, regional and international level. To date the Office of the Special Rapporteur has issued over 21 reports dealing with thematic issues relating to the right to adequate housing thereby signifying the visibility and the importance of this right and its impacts on our society and the role governments play in promoting it.


131 Part 1 and 2 of the Special Rapporteur on Adequate Housing.
133 The Special Rapporteur on adequate housing: Commission Resolution 2000/9, para 104.

2.2.12 Summary

It can no longer be said that the right to adequate housing is not visible enough at international level where there is reference to it in almost every human rights treaty. However, it is clear that there is still a significant enforcement gap at international level. This must be addressed to ensure an established right to adequate housing jurisprudence. Obviously, state parties’ are failing the SERs’ agenda by their reluctance to ratify the Optional Protocol to the ICESCR. This is particularly prevalent when CPRs are seen as providing a more effective remedy than SERs. Should more ratification occur, a separate jurisprudence could develop through the Optional Protocol to the ICESCR complaints system. Such reluctance is further deepening the marginalisation of rights such as housing from being evaluated to meet the international norms and standards that the right expects to enjoy.

The battle for the equal recognition and enforcement of CPRs and SERs seems to be close to being achieved if the CESCR is capacitated by the adoption of the Optional Protocol to the ICESCR. Exposing the CPRs as the alternative enforcement tool to promote SERs constitutes a setback to the equal enforceability of SERs. As a result scholars and enforcement systems need to continue to invoke and separate the two categories of rights. What is required at international level is a form of visibility campaign advocating solutions for all SERs using the appropriate enforcement systems.

2.3 Regional protection and enforcement of housing as a human right

2.3.1 Introduction
The establishment of regional agencies to deal with international peace and security was seen as the best way of unburdening the overloaded UN system in accordance with the purpose and principles of the UN.\textsuperscript{136} The UN Charter encourages its state parties’ to be members of such regional agencies in order to ensure that any disputes that arise will be settled at the regional level by such agencies before being referred to the Security Council.\textsuperscript{137} A regional human rights system constitutes a fundamental pillar in the human rights framework, being a complex network of norms and institutions that


\textsuperscript{137} Article 52(1) of the UN Charter.
shapes the international human rights regime.\textsuperscript{138} Having a regional human rights system enables a region to uniformly guide state parties' about the need to respect, promote, protect and fulfil human rights.\textsuperscript{139} It allows the region to have a consistent approach in dealing with human rights protection and violations. Moreover, it unburdens, monitors, evaluates and assists the international human rights system about progress made and challenges in developing compliance with international human rights instruments. An established regional human rights system facilitates a wide participation in expert workshops, exchange of information on relevant activities, exchange of views on substantive issues, working methods and collaborative action concerning specific situations.\textsuperscript{140}

Therefore, with the exception of Asia,\textsuperscript{141} the three established human rights systems, namely the European,\textsuperscript{142} Inter-American\textsuperscript{143} and African systems,\textsuperscript{144} complement the UN human rights system.\textsuperscript{145} This leaves Asia that does not yet see the significance of a unified regional human rights system mainly due to its deep rooted conflict and indecisiveness on having uniform human rights framework. An evaluation of the regional


\textsuperscript{139} Article 52 of the UN Charter.

\textsuperscript{140} Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People Special procedures and regional human rights systems: Areas for strengthening cooperation.


\textsuperscript{143} Organisation of American States available at \textless http://www.oas.org/en/default.asp\textgreater  (date accessed 2015-05-08).


\textsuperscript{145} Article 52(1) of the UN Charter; Buergenthal T ‘The evolving international human rights system’ \textit{American Journal of International Law} (2006) vol 100(4) 783-807 791-792.
human rights systems is required to determine the extent to which the right to adequate housing is entrenched and enforced. In turn it is critical to measure states’ compliance with their regional human rights obligations. The African human rights system is the oldest regional system, followed by its counterparts in Europe and the Inter-American human rights systems.  

\[\textit{2.3.2. The African human rights systems}\]

\[\textit{2.3.2.1 African Charter on Human and Peoples’ Rights}\]

Of great importance to Africa’s human rights discourse is the African Charter on Human and Peoples’ Rights\(^{146}\) that has been ratified by 53 state parties’\(^{148}\) of the African Union.\(^{149}\) The main objective of the African Charter is to deal with the widespread human rights violations that the continent experienced during the 1970s and 1980s.\(^{150}\) However, Africa now faces new challenges which include the need to ensure maximum protection of all human rights including the much neglected SERs. State parties’ have a duty to recognise the rights, duties and freedoms enshrined in the African Charter and they are obliged to adopt legislative or other measures to give effect to these rights\(^{151}\) without any distinction.\(^{152}\) Article 1 of the African Charter states that:

\[\textit{146}\] Odinkalu ‘Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights’ 184.


The member states of the Organisation of African Unity (now African Union), parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the present Charter and shall undertake to adopt legislative or other measures to give effect to them.

Considering the African Charter is silent on the progressive realisation of all SERs under it, the African Commission found such an obligation to be implicit in the African Charter by virtue of Articles 61 and 62. The African Commission held that:

The obligation to progressively and constantly move towards the full realisation of economic, social and cultural rights, within the resources available to a State, including regional and international aid, is referred to as progressive realisation. While the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.153

However, the existence of claw-back clauses (internal limitations) within the African Charter seems to place great obstacles in the path to the progressive realisation of rights such as housing. Hansungule captures the essence of the claw-back clauses as:

The most notable shortcoming in the African Charter is the imprecise and incomplete formulation of the system of human rights. Due to the political realities prevailing in African countries at the time of drafting the Charter, it was not possible to provide for some of the human rights guarantees in the instrument as they are in equivalent treaties.154

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In this way the African Charter enables states to derogate or resort to claw-back clauses when realising the enshrined rights and freedoms. The claw-back clauses seem to recognise the right in question only to the extent that such a right is not infringed upon by national law. In other words, the availability of claw-back clauses permits limitations of all the human rights contained in the African Charter in accordance with the domestic laws. This is seen as a serious shortfall in the full enjoyment of these rights taking into consideration the history of the continent. However it has been held that the term ‘law’ in these clauses should be interpreted to refer to international law. In other words the absence of the derogation clause under the African Charter, unlike the ICESCR, permits states, through the claw-back clauses, to openly abuse/take advantage of or suspend, de facto, many fundamental rights in their municipal laws. As a result the implementation of the provisions of the African Charter remains a distant dream.

The African Charter nevertheless has been commended as having been the first (innovative) regional and even international instrument to embody both CPRs and SERs in one document. In other words, both categories of rights are justiciable and therefore guaranteed but left to the mercy of states to determine the implementation strategy if any. This is despite the fact that all the rights under the African Charter are treated equally and even enforced without any distinction on grounds such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Countries on the African continent did not see any need to make a distinctive description of rights and thus the African Charter

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155 Examples of such clauses are Articles 9 (2), 11 and 12 of the African Charter.
159 Article 5 of the ICESCR.
162 Article 2 of the African Charter.
views human rights as indivisible, interdependent and inseparable. In its preamble it stipulates that CPRs cannot be separated from SERs since they are universal in nature. Therefore, the fulfilment of SERs is a guarantee for the enjoyment of CPRs. For the African Charter to have been the first regional instrument to entrench both SERs and CPRs under one document is not necessarily the best model, since there is minimal SERs minimal jurisprudence compared to that of CPRs. With this difficulty the question is raised whether arguments to enforce the right to adequate housing on its own have any merit in Africa. Unfortunately it is impossible to advocate an individual right while the group (SERs) within which the right falls still struggles with enforcement. Therefore, the automatic protection and enforcement of all SERs equally with CPRs would lead to the realisation of the right to adequate housing within state parties’ and would be likely to contribute to the application of appropriate remedies and the development of individual SERs’ jurisprudence.

Although the African Charter does not explicitly provide for a right to adequate housing there are a number of provisions that could and have been applied to encompass the right to adequate housing such as the right to property, the right to the highest attainable standard of physical and mental health, the right to protection of the family as the natural unit and basis of society and the right to a general satisfactory environment. The full examination of how some of these rights have been interpreted to encompass the right to adequate housing will be dealt with under paragraph 2.3.2.2.2 below. In addition, in terms of Articles 1 and 2 state parties’ would still be held liable for violations of the right to adequate housing. The African Commission adopted the ‘Guidelines and principles on economic, social and cultural rights in the African Charter on Human and Peoples’ Rights’. These guidelines and principles set out expressly and in full right to adequate housing obligations within the African context. In that:

(i) In SERAC & CESR v Nigeria, the Commission held that, although the right to housing or shelter is not explicitly provided for under the African Charter,

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163 Preamble of the African Charter.
164 Article 14 of the African Charter.
165 Article 16 of the African Charter.
166 Article 18(1) of the African Charter.
Housing rights are protected through the combination of provisions protecting the right to property (Art 14), the right to enjoy the best attainable standard of mental and physical health (Art 16), and the protection accorded to the family (Art 18(1)).

(ii) The human right to adequate housing is the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity. It includes access to natural and common resources, safe drinking water, energy for cooking, heating, cooling and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

(iii) The right to housing imposes, amongst others, the following obligations on States parties to:

Minimum Core Obligations

a. Refrain from and protect against forced evictions from home(s) and land, including through legislation. All evictions must be carried out lawfully and in full accordance with relevant provisions of national and international human rights and humanitarian law. States should apply appropriate civil or criminal penalties against any public or private person or entity within its jurisdiction that carries out evictions in a manner inconsistent with applicable national and international law, including due process.

b. Guarantee to all persons a degree of security of tenure which confers legal protection upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land, against forced evictions, harassment and other threats.

c. Ensure at the very least basic shelter for everybody

National Plans, Policies and Systems

d. Carry out comprehensive reviews of relevant national legislations and policies with a view to ensuring their conformity with international human rights provisions. Such reviews should also ensure that existing legislation, regulation and policy address the privatization of public services, inheritance and cultural practices, so as not to lead to, or facilitate forced evictions.

e. Implement housing programmes, including subsidies and tax incentives, to expand housing construction to meet the needs of all categories of the population, particularly low-income families;

f. Prioritise in national plans and policies the provision of shelter for all persons in desperate need of emergency housing;

g. Protect the tenure of tenants including by the use of rent control and legal guarantees;

h. Implement programmes designed to address the special problems of housing, water supply and sanitary conditions in rural areas;

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i. Ensure that housing is affordable and that the attainment and satisfaction of other basic needs are not threatened or compromised by the costs of housing;

j. Ensure the habitability of housing, including providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, including violence, structural hazards and disease vectors;

k. Ensure that housing developments allow access to employment, health care services, schools, child-care centres and other social facilities. Housing should not be built on either polluted sites or in proximity to pollution sources;

l. Ensure that the construction of housing, including the materials used, are culturally acceptable and appropriately enable the expression of cultural identity and diversity;

m. Entrust an independent national body, such as a national human rights institution, to monitor State compliance with these guidelines and international human rights law, including investigation of forced evictions and other violations and ensuring prosecution of perpetrators;

Vulnerable Groups, Equality and Non-discrimination

n. Ensure that priority in housing and land allocation should be given to members of vulnerable and disadvantaged groups

o. Ensure that the provision of housing, particularly regarding construction and the building materials used is culturally appropriate for vulnerable and disadvantaged groups, including indigenous communities/populations.

Lastly the guidelines reiterate in relation to evictions that ‘evictions are used as a last resort and must be carried out in accordance with the law with dignity and human rights to life and security with appropriate notices to those affected.’ Also, ‘sufficient and alternative accommodation or restitution is given to those affected with access to basic necessities of life.’ In instances of ‘resettlement a better alternative land is given to those affected with access to basic necessities of life and appropriate and effective remedies are given to those affected by evictions. Lastly, adequate compensation should be given to those affected by evictions.’

Thus, Guidelines and principles on economic, social and cultural rights in the African Charter has brought the African Charter’s interpretation to be receptive to the SERs’ discourse and to be the most significant instrument within the African human rights system to protect and enforce the right to adequate housing. Similarly to the ICESCR the progressive realisation of SERs under the African Charter requires states to utilise

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their available resources to realise right to adequate housing, regardless of the hostile economic conditions of state parties’ at any time. If one looks at the measures taken or adopted by state parties, much still needs to be achieved and one wonders if the right to adequate housing separately and as part of SERs is ever likely to progressively realised taking into account the availability of state resources. The main challenge to the enforcement of the right to adequate housing within the African system is that most state parties’ do not adopt legislative measures or constitutional provisions or do not apply and interpret the African Charter in domestic courts. Some states refer to SERs as Directive Principles of State Policy. On the other hand the adoption of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa brought content and hope to this non-noteworthy right (housing).

This Protocol was driven by the need to specifically highlight the plight of African women

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and found a need to specifically ensure the separate protection of their rights. In terms of Article 16 women have a right to equal access to housing and acceptable living conditions in a healthy environment. Also, the African Charter on the Rights and Welfare of the Child contains express provisions relating to adequate housing, namely Article 20(2)(a) dealing with parental responsibilities. As a developing Protocol that also encompass right to adequate (shelter) is the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Older Persons in Africa.

In determining if the measures adopted by states are within the progressive realisation principles the African human rights system relies on its dual enforcement structures that oversee the enforcement of the right to adequate housing by state parties’. These are the African Commission on Human and Peoples’ Rights established in accordance with Article 30 of the African Charter and the African Court of Human and Peoples’ Rights, established in accordance with Article 1 of the Protocol on the Establishment of an African Court on Human and Peoples’ Rights and is still operating. However it will cease to operate once the African Court of Justice and Human Rights comes into operation. It is the mandate of the African Commission and the African Court of Justice and Human Rights to interpret and enforce the protection of, among others, the right to adequate housing.

179 As it provides that States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures; (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing.
2.3.2.2 The African Commission on Human and Peoples' Rights

2.3.2.2.1 The mandate of the African Commission

The African Commission, as a treaty monitoring body, has a wide range of functions\(^{184}\) and ensures the protection and interpretation of human rights as embodied under the African Charter. Furthermore, the African Commission is mandated to examine reports as submitted by states regarding legislative and other measures they have undertaken to give effect to the African Charter in their respective jurisdictions.\(^{185}\) The African Commission has been empowered to receive complaints from three spheres, namely:

(i) State;\(^{186}\)

(ii) Individual;\(^ {187}\)

(iii) Non-governmental organisations.\(^{188}\)

2.3.2.2.2 The jurisprudence of the African Commission in enforcing the right to adequate housing

Generally, as a point of departure the work of the African Commission in enforcing the right to adequate housing leaves a lot to be desired. Despite the express enactment of SERs under the African Charter, the African Commission’s jurisprudence in this regard is uninspiring and its main focus has been mainly on the adjudication of CPRs.\(^{189}\)

28 years after the adoption of the African Charter only three decisions of the African Commission relating to the right to adequate housing have been recorded in comparison with an abundance of CPRs’ jurisprudence by the African Commission. The African Commission managed to adopt a read-in approach to incorporate SERs that are not explicitly provided, such as the right to food and housing. In this regard the African Commission used the substantive rights in the African Charter such as the right to life,

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\(^{184}\) Article 45 of the African Charter.

\(^{185}\) Article 62 of the African Charter which provides that ‘Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken from the view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter’.

\(^{186}\) Article 47 of the African Charter.

\(^{187}\) Article 55 of the African Charter.

\(^{188}\) Article 55 of the African Charter.

the right to respect one’s own private life and home, the right to health, to culture and the right to the peaceful enjoyment of one’s possessions.\textsuperscript{190}

The \textit{SERAC v Nigeria}\textsuperscript{191} decision became the first African regional case to interpret existing provisions of the African Charter to safeguard right to adequate housing violations.\textsuperscript{192} For a period of three years, Nigerian security forces attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). The ruthless attacks carried out by the Nigerian security forces resulted in thousands of villagers becoming homeless. Furthermore the Nigerian government destroyed and threatened Ogoni food sources through a variety of means such as the destruction of farm lands, rivers, crops and animals. This resulted in malnutrition and starvation among certain Ogoni communities.\textsuperscript{193}

The African Commission held that the ‘right to adequate housing is implicitly protected in the African Charter and also encompasses the right to protection against forced evictions.’\textsuperscript{194} Furthermore, ‘whenever forced evictions occur they cause physical, psychological and emotional distress, they entail losses of means of economic sustenance and increase impoverishment.’\textsuperscript{195} The African Commission recommended that the Nigerian government protect the environment, health and livelihood of the Ogoni people by stopping all the attacks on Ogoni communities and ensuring that adequate compensation was paid to victims of human rights violations. Resettlement assistance to victims of government sponsored raids was included.\textsuperscript{196} However, the African Commission did not set out what exact measures should be put in place to ensure that the victims enjoy an adequate standard of living. The \textit{SERAC} case did not

\textsuperscript{190} Articles 4 14 16 18 and 20 of the African Charter.

\textsuperscript{191} \textit{Social and Economic Rights Action Centre (SERAC) and Another v Nigeria} (2001) AHRLR 60 (ACHPR 2001).

\textsuperscript{192} One of the allegations in the case was that for a period of three years, the Nigerian security forces attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of the Survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP’s non-violent campaign in opposition to the destruction of their environment by oil companies, the \textit{SERAC} case para 7.

\textsuperscript{193} The \textit{SERAC} case para 7-9

\textsuperscript{194} The \textit{SERAC} case para 60.

\textsuperscript{195} The \textit{SERAC} case para 65.

\textsuperscript{196} The \textit{SERAC} case para 65.
achieve much since the African Commission failed to evaluate if domestic measures relating to housing adopted (if any) were adequate or likely to comply with the African Charter objective. Compensation as awarded was too broad and how it was to be paid was left to the Nigerian government. Without proper evaluation of any measures adopted or guidelines in place compensation can never be seen as the appropriate remedy for violations of the right to adequate housing in the absence of a comprehensive housing strategy or policies.

The second case that dealt with violations of the right to adequate housing in the context of Article 14 of the African Charter is the Centre for Minority Rights Development (Kenya) and Minority Group International on behalf of Endorois Welfare Council v Kenya.\textsuperscript{197} The case dealt with, amongst others, the displacement of the indigenous Endorois community from its ancestral lands, failure to adequately compensate it for the loss of property, disruption of the community's pastoral enterprise and violations of the right to practise its religion and culture, as well as the overall process of development of the Endorois people.\textsuperscript{198} After referring to numerous international and regional human rights instruments the African Commission held that:

\begin{quote}

The removal of people from their homes violated Article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also guaranteed by Article 14.\textsuperscript{199}
\end{quote}

As a result the African Commission recommended, amongst others, that Kenya pay adequate compensation to the Endorois community for all the loss suffered, recognise rights of ownership to the Endorois community and restitute their ancestral land.\textsuperscript{200} Unfortunately, the complaint does not even state if the Endorois peoples' homes were destroyed during the evictions and if they should be restored. It would seem that this was mainly land dispute and not so much about houses Endorois people lived in.

\textsuperscript{197} Centre for Minority Rights Development and Others v Kenya (2009) AHRLR 75 (ACHPR 2009).
\textsuperscript{198} Centre for Minority Rights Development and Others v Kenya case para 1.
\textsuperscript{199} Centre for Minority Rights Development and Others v Kenya case para 191. See further paras 200, 202, 218, 278. See also Malawi African Association & Others v Mauritania (2000) AHRLR 149 (ACHPR 2000) para 126-128.
\textsuperscript{200} Centre for Minority Rights Development and Others v Kenya case 80.
The third right to adequate housing case is *Centre for the Right to Adequate Housing and Eviction (COHRE) v Sudan*.\(^{201}\) It dealt with the state of emergency in Darfur that resulted in the killing, forced evictions of hundreds of villagers and the destruction of the victims’ homes.\(^{202}\) Drawing inspiration from the international human rights law the African Commission found that forced evictions and the destruction of victims’ houses amounted to cruel, inhuman and degrading treatment particularly when the state fails to protect the human rights of the victims of such violations.\(^{203}\) The destruction of housing within a conflict between the state and rebel forces constitutes a violation of the state’s duty to respect and protect human rights as it is responsible for violations committed by both its own forces and rebel forces.\(^{204}\) However, the African Commission failed to specifically order the Sudan government to provide housing as a recommendation since it merely requested government generally to ‘take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation’.\(^{205}\)

It can be argued that such a recommendation can be interpreted as referring to only land dispossessed and not directing government to, in addition to restitution, ensure the provision of housing as part of the effective remedy similar to the *Centre for Minority Rights Development and Others v Kenya* decision. Despite the boast of having the oldest regional human rights system, the African SERs’ jurisprudence is still in its infancy. The much celebrated decisions in the *SERAC, Kenyan* and the *Sudan* cases cannot be substantively referred and relied upon for too long as there seems to be a remarkable escalation in violations of SERs requiring separate adjudication. It is further argued that these three cases do not provide an adequate and effective redress to the victims of the right to adequate housing. This is particularly based on the African Commission’s failure to evaluate the extent of the respective countries adopted (legislative/housing) measures and/or their respective failure to adopt/comply with their legislative/policy measures if any. Recommending compensation and restitution as

\(^{201}\) *Sudan Human Rights Organisation and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009).
\(^{202}\) *Sudan Human Rights Organisation and Another v Sudan* para 14.
\(^{203}\) *Sudan Human Rights Organisation and Another v Sudan* para 159.
\(^{204}\) *Sudan Human Rights Organisation and Another v Sudan* paras 202, 203, 209.
\(^{205}\) *Sudan Human Rights Organisation and Another v Sudan* para 229(d).
remedies do not essentially materialise in the adoption of housing policies. It was
expected that the African Commission should have, amongst others, used this
opportunity to determine the extent to which these states have gone to domesticate
housing measures compliance with the African Charter obligations. Progressively, it
must be acknowledged that the African Commission has indicated its willingness,
capacity and readiness to change its legacy and directly address the right to adequate
housing violations within the African human rights system. These cases have brought
hope to the African human rights system and they are strongly viewed as an eye opener
for individuals, civil societies and even states parties that fail to entrench, protect or
enforce the right to adequate housing under their respective constitutions. However, the
weaknesses of the African human rights systems have been exposed and have
simultaneously dampened the visibility of the right to adequate housing in the African
continent.

Another challenge facing the African human rights system is the African Commission’s
struggle for credibility. Hohmann argues that the fact that the African Commission draws
inspiration from or relies on interpretation and case law from regional human rights
covenants to which African states are not, and cannot be, parties is more
controversial.206 This is evident from the three cases mentioned above207 where
European and the Inter-American human rights case law were heavily relied upon and
that was found to be:

…a representation of the cross-fertilisation of all human rights norms, but as yet it
not clear whether the interpretations would stand in the face of hostility to
reliance on the human rights jurisprudence of other regions.208

As stated above209 the fact that African Charter views SERs and CPRs as interrelated
leaves many questions unanswered when examining the work of the African
Commission.210 It is vital to ask whether or not it is the African Commission, individuals
or civil societies that failed to advocate for the protection of SERs’ violations or whether

206 Hohmann The right to housing: Law, concepts, possibilities 82.
207 SERAC, Centre for Minority Rights Development and Others v Kenya and Sudan Human Rights
Organisation and Another v Sudan cases.
208 Hohmann The right to housing: Law, concepts, possibilities 82.
they did not view them as worthy of adjudication. Without a doubt, Africa is at the forefront of a systemic failure to afford basic necessities of life such as food, healthcare or a secure place to live. It is unfortunate that this situation has existed for decades and that there are few related African Commission cases addressing them. Despite praising the uniqueness of the African Charter to embody both types of rights (i.e. CPRs and SERs) and treating them as equally enforceable, the African Commission seems to have failed vulnerable Africans in the achievement of the aspirations of the African Charter.211

The reason why, after 28 years, the African Commission has dealt with so few SERs' cases and draws inspiration mainly from other regional human rights systems can be attributed to a number of factors. Its reluctance to deal with individual SERs' violations in its deliberations is possibly influenced by failure by state parties' to submit regular reports or the late submission of state reports212 on legislative or other measures taken to realise rights under the African Charter. If such reports are submitted they seldom refer to or address SERs’ concerns.213 In addition there are state capacity-related constraints that hinder states from preparing comprehensive reports.214 It can also be argued that failure could be attributed to the African Commission’s weakness to fully police the enjoyment of all SERs’ violations through appropriate remedies. A lack of expertise in SERs by commissioners could have contributed to this weakness although it appears that people with diverse expertise now heed the need to address all human rights.215 Furthermore, there is the possibility of civil society’s fear of African states and individuals not reporting or being aware that they may invoke SERs' violations separately. In addition, the manner in which civil societies argue their cases before the

African Commission probably affects how the African Commission makes its decisions, as well as the possibility that SERs are viewed as being unworthy of adjudication.

The decisions of the African Commission are not legally binding but merely serve as recommendations which have largely not been backed by concrete action.\(^{216}\) They rely on the willingness and good faith of state parties’ for their implementation.\(^{217}\) However Rule 112 of the African Commission Rules of Procedure of the African Commission on Human and Peoples’ Rights’ set out the monitoring process the African Commission will follow from issuing a decision against a member state in as far ensuring compliance and also in instances where there is non-compliance.\(^{218}\) While there is willingness amongst certain African states to enforce such recommendations other states refuse to even be bound by them.\(^{219}\) However, little is known about whether or not African states comply with the African Commission’s recommendations as there are no mechanisms in place to monitor if the states concerned have indeed implemented recommendations made.\(^{220}\)

The African Commission put the matter as follows:

> It was particularly stated that the non-compliance of concerned states parties to the recommendations constituted one of the major factors of the erosion of the Commission’s credibility.\(^{221}\)

In instances of non-compliance with decisions of the African Commission by any state party the matter may be referred to the African Court\(^ {222}\) however no such step thus far has been invoked by the African Commission. The work of the African Commission in

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\(^{222}\) Rule 118 of the African Commission ‘Rules of Procedure of the African Commission on Human and Peoples’ Rights’
this regard is undoubtedly unsatisfactory and it is not taken seriously by many African states. To Mbazira there seems to be inadequate legal research on the African Commission’s decisions and little justification of findings with reference to authoritative international human rights law. On the other hand the establishment and the continued extension of the Working group on economic, social and cultural rights in Africa must be seen as a further step in complementing the mandate of the African Commission with a special focus on SERs in particular housing. Although the African Court on Human and Peoples’ Rights is still operating, its SERs’ adjudication role is yet to be tested and it is the only hope as the operating court to make substantive contribution to the much contested SERs claims in Africa.

Ultimately the African Court on Human and Peoples’ Rights is on the brink of being replaced by the African Court of Justice and Human Rights as the only judicial organ of the AU. Due to the binding nature of court judgements the African Court of Human and Peoples Rights seems to provide much anticipated hope to victims of SERs’ abuses.

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224 1. develop and propose to the African Commission on Human and Peoples’ Rights a draft Principles and Guidelines on Economic, Social and Cultural Rights;
2. elaborate a draft revised guidelines for State reporting;
3. undertake studies and research on specific economic, social and cultural rights; and
4. make a progress report to the African Commission at each Ordinary Session.
In resolution 141 of the 44th Ordinary Session (Abuja, Nigeria – November 2008), the Working Group was mandated to further define State obligations related to access to medicines and to develop model monitoring and assessment guidelines.


225 The African Court on Human and Peoples Rights has dealt with about 24 cases none of which are related to SEs claims. See African Court on Human and Peoples Rights ‘Finalised cases and decisions’ available at <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/all-cases-and-decisions> (date accessed 2015-09-06).
2.3.2.3 The African Court on Human and Peoples’ Rights and enforcing the right to adequate housing enforcement

The African Court on Human and Peoples’ Rights is the most recently established judicial human rights body. The other two are the Inter-American Court of Human Rights (Inter-American Court)\(^{226}\) and the European Court on Human Rights (European Court).\(^{227}\) The African Court on Human and Peoples Rights is the first continental judicial body empowered to enforce any relevant human rights instruments ratified by any of the AU members\(^{228}\) and is likely, upon ratification, to be replaced by the African Court of Justice and Human Rights.\(^{229}\) Although the African Court on Human and Peoples Rights is competent to adjudicate cases emanating from violations of rights that are also contained in various international instruments most of which do not have the judicial mechanism to implement them it has not done so. Examples of such instruments are the ICCPR, the CEDAW,\(^{230}\) the CRC\(^{231}\) or any other relevant legal instrument codifying human rights. Whether or not the African Court of Justice and Human Rights is likely to change that enforcement lacuna remains questionable. In that the Protocol on the Statute of the African Court of Justice and Human Rights is not yet in force as it must first be ratified and acceded to by 15 states.\(^{232}\) By 12 July 2014 it had been ratified by only five (5) state parties’.\(^{233}\) Until ten (10) more state parties' resolve to ratify the said Protocol not much can be said about the enforcement of SERs in general before the African Court on Human and Peoples’ Rights and until such time, SERs shall

\(^{226}\) Statute of the Inter-American Court on Human Rights

\(^{228}\) Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights.
\(^{229}\) Article 7 of the Protocol on the Statute of the African Court of Justice and Human Rights
\(^{230}\) See paragraph 2.2.6.2 above.
\(^{231}\) See paragraph 2.2.6.3 above.
\(^{232}\) Article 9(1) of the Protocol on the Statute of the African Court of Justice and Human Rights.
continue to be dealt with by the quasi-judicial system that has to date proven to be ineffective in enforcing rights such as housing. On June 2014 the African Heads of States amended the Protocol on the Statute of the African Court of Justice and Human Rights\(^{234}\) which, thus far, do not seem to have any negative effect on SERs’ adjudication.\(^{235}\) Therefore the African Court on Human and Peoples Rights remains a white elephant to the enforcement of all fundamental human rights in Africa.\(^{236}\)

Undoubtedly much hope has been placed on its shoulders to solidify the interpretation and enforcement of the right to adequate housing. Despite some differences the African human rights system does show some similarities with the Inter-American human rights system as will be analysed below.

### 2.3.3 The Inter-American human rights system

In view of the fact that Canada falls within the Inter-American system, an evaluation of this system is justified to better understand how the regional human rights system operates and how Canada fits within it. An evaluation of the Inter-American human rights system is justified in understanding how it operates and how Canada, upon ratification of certain human rights instruments, is likely to fit in that system. The Inter-American human rights system comprises the Organisation of American States (OAS), an intercontinental body that aims to achieve regional solidarity and cooperation among its state parties'. The human right instrument that establishes enforcement mechanism for SERs within the OAS is the American Convention on Human Rights.\(^{237}\) The Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.


\(^{235}\) Such amendments include the new court name to be now being called ‘African Court of Justice and Human and Peoples Rights’ (the ACJHPR Article 8; see also Article 46Abis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

\(^{236}\) Bekker G ‘The protection of asylum seekers and refugees within the African regional human rights system’ AHR LJ (2013) vol 13(1) 1 – 29 27

Rights are responsible for monitoring and enforcing compliance with all human rights within the Inter-American region.

2.3.3.1 The Organisation of American States

The OAS is a multilateral political organisation that is made up of 35 independent countries. The year 1948 can be regarded as a significant year for the OAS as three of its most important multilateral treaties were adopted, namely the American Declaration of the Rights and Duties of Man, the Charter of the OAS and the Inter-American Charter of Social Guarantees. The American Declaration and the Charter of the OAS are the main human rights instruments. The former clearly sets out a number of CPRs and SERs while the latter contains vague references to human rights. In terms of Article 34k of the Charter of the OAS state parties’ commit to the basic goals of equal opportunities, elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their citizens in decisions relating to their own development. The conditions for the achievement of these goals are focused on providing adequate housing for all sectors of the population. However, when a

238 The member states of the OAS are Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela. Organisation of American States Member States and Permanent Missions, available at <http://www.oas.org/en/member_states/default.asp> (date accessed 2015-05-08).


242 Church J, Schulze C and Strydom H Human rights from a comparative international law perspective (2007) 256.

243 Article 34k of the Charter of the Organisation of American States.
state legislates in this area, it does not create or grant rights, but rather recognises rights that exist independently of the formation of the state.\textsuperscript{244}

The Protocol of Amendment to the Charter of the Organisation of American States, (Protocol of Buenos Aires) was adopted and entered into force in 1970.\textsuperscript{245} Its purpose is to set forth specific provisions aiming at ensuring that SERs are protected. In this regard Article 31(k) provides as follows:

\begin{quote}
To accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system the member states agree to dedicate every effort to achieve the following basic goals: adequate housing for all sectors of the population.
\end{quote}

This provision expresses the agreement of the state parties’ on basic goals for equality of opportunity, elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their people in decisions relating to their own development. Among the conditions for the achievement of these goals is adequate housing for all sectors of the population. Article 31(k) further emphasises the distinct nature of SERs and therefore requires an active and a dedicated effort from state parties’ in achieving them. The Inter-American Commission on Human Rights\textsuperscript{246} has acknowledged that there is no political, economic, and or individual development model that has demonstrated a superior capability that is likely to promote economic and social rights.\textsuperscript{247} Nevertheless, states are required to adhere to their respective obligations as imposed by the ratified/acceded human rights instruments as well as their domestic constitutions.

\textsuperscript{244} Carlos Martinez Riguero Nicaragua, Resolution No 2/87 Case No 7788 paras 46-49, available at <https://www.cidh.oas.org/annualrep/86.87sp/Nicaragua7788.htm> (date accessed 2015-05-08).


\textsuperscript{246} One of the Inter-American human rights system’s enforcement mechanisms to be discussed hereunder.

An implied right to adequate housing is found in Article XI of the American Declaration of the Rights and Duties of Man:

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing, and medical care to the extent permitted by public and community resources.

This is an important provision aimed at realising all SERs within the Inter-American system that seems to place a huge emphasis on the territorial independence of its state parties’ with little interference if any, with an affirmed sovereignty. However, in terms of Inter-American solidarity and cooperation states are encouraged to be united in the achievement of social justice and for the integral development of their respective people. Integral development includes economic, social, and cultural fields through which the goals that each country sets should be achieved. The full realisation of a person’s aspirations can only be achieved where there is no discrimination on the grounds of sex, race, nationality, creed, or social condition.

The central instrument for the enforcement of human rights in the OAS is the American Convention on Human Rights. Although it does not contain an explicit acknowledgement of SERs, it does provide for the generic formulation of SERs as referred to in the Charter of the OAS. 23 states have ratified the American Convention, also known as the Pact of San José. However, Canada is not a party. As

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248 Article 3(e) of the Charter of the Organisation of American States enables states to choose, without any external interference, their political, economic and social system and to organise themselves in a way suitable to them as well as an obligation not to intervene in the affairs of another state member.

249 Article 30 of the Charter of the Organisation of American States.


252 Article 26 of the American Convention.

253 Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, , and Uruguay. Trinidad and Tobago and Venezuela have denounced their membership. See OAS American Convention on Human Rights ‘Pact of San Jose, Costa Rica’ (B-32)-Signatories and Ratifications <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> (date accessed 2015-09-06). See further Chapter 3 hereunder.
part of the necessity to define the content of the fundamental rights and freedoms, their limitations and scope and to create an appropriate mechanism for the protection of these rights, the San Salvador Protocol was adopted. This Protocol aims to ensure that the protection of SERs are fully enjoyed, without any discrimination of any kind, in the same way as CPRs. It provides, in the absence of legislation guaranteeing the exercise of SERs or otherwise, that the state party must, through its constitutional mandate, adopt the necessary legislation or other measures to ensure that these rights are practically enforced. State parties’ of the OAS are obliged to take measures necessary, particularly economic and technical, through local and international cooperation, within their available resources and taking into account their extent of development, to progressively achieve the realisation of SERs under the Protocol. However, the San Salvador Protocol appears to be silent about the advancement of peoples’ standard of living or particularly the right to adequate housing. These regional instruments have become a strong base of the Inter-American system to protect and promote human rights in general. The culture of the American system of human rights was extended to specifically recognise, protect and promote SERs that require a positive duty on the state as well as interventionist policies in progressively realising them. With regard to the discretion of governments in the progressive realisation of SERs and to use their available resources, the 1979-80 report of the Inter-American Commission, noted that:

254 Article 77 of the American Convention.
256 Such as race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition. Article 3 of the Protocol of San Salvador.
258 Protocol of San Salvador Article 2.
The Commission has been extremely cautious in this sensitive area, because it recognised the difficulty of establishing criteria that would enable it to measure the states fulfilment of their obligations. It has also seen the very difficult options that the governments face when allocating resources between consumption and investment, and, between current and future generations. Economic policy and national defence are closely related to national sovereignty.\textsuperscript{261}

Under the Inter-American human rights system it is apparent that state parties’ are given a wide discretion in how they want to approach the realisation of their domestic SERs. For example, due to its territorial sovereignty Canada makes little effort in enforcing these rights under its domestic system.\textsuperscript{262} Within the Inter-American system, it would seem that the realisation of SERs in general has been greatly hampered by issues such as illiteracy, poverty, discrimination and the need for reform in some judicial systems.\textsuperscript{263}

2.3.3.2 Jurisprudence of the Inter-American human rights enforcement system

The Inter-American human rights system has a dual enforcement system that plays a crucial role in monitoring, enforcing and supervising compliance with all human rights. It comprises the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights.

2.3.3.2.1 The Inter-American Commission on Human Rights

Article 106 of the Charter of the OAS provides that the Inter-American Commission must:

\begin{quote}
\ldots promote the observance and protection of human rights and to serve as consultative organ of the Organisation in these matters.
\end{quote}

In terms of Article 33 of the American Convention, the Inter-American Commission is tasked with observing and protecting human rights within the OAS territories. In support of its main function, which is to promote respect for and defence of human rights.\textsuperscript{264}

\begin{footnotesize}
\textsuperscript{262} See Canadian Chapter 3.
\textsuperscript{263} Buergenthal ‘The evolving international human rights system’ 797.
\textsuperscript{264} See also Article 41 of the American Convention.
\end{footnotesize}
It is the duty of the state parties’ to provide the Inter-American Commission with copies of their respective reports that must be submitted to the executive committees of organisations such as the American Economic and Social Council so that progress required to be made is monitored.\(^{265}\) In the same manner, the American Convention obliges state parties’ to give any information to the Inter-American Commission concerning the manner in which their national laws provide for the effective application of any of the provisions of the American Convention.\(^{266}\) In instances of a violation of any right under the American Convention any individual or any non-governmental organisation has the right to directly approach the Inter-American Commission in the form of a petition with full information regarding the violation by the state party concerned.\(^{267}\) This form of direct approach enables victims of SERs, without any fear, upon failure to obtain redress domestically, to bring their states before the Inter-American Commission as a possible avenue for resolution of their dispute. Therefore, exhaustion of local remedies before referring the matter to the Inter-American Commission is of profound importance as it limits the type of complaints that must be brought and heard by the Inter-American Commission.\(^{268}\) Within the Inter-American human rights system SERs are seen as justiciable as they are intertwined, interwoven, indivisible and cannot be dissected or distinguished from one another.\(^{269}\) There are numerous cases relating to the right to adequate housing violations which surfaced through the interpretation of the existing provisions of the American Convention. This is based on the fact that the right to adequate housing within the Inter-American system is implied. Essentially only those regarded as closely related to violations of the right to adequate housing within the right to property will be evaluated.\(^{270}\)

\(^{265}\) Article 42 of the American Convention.

\(^{266}\) Article 43 of the American Convention.

\(^{267}\) Articles 44 and 45(2) of the American Convention.

\(^{268}\) Article 46(1) of the American Convention.

\(^{269}\) Tinta ‘Justiciability of economic, social and cultural rights in the Inter-American system of protection of human rights: Beyond the traditional paradigms and notions’ 435.

In the *Carlos Garcia Saccone v Argentina* case, the Inter-American Commission found that:

In the Inter-American system, the right to property (Article 21 of the American Convention) is a personal right. The Commission is empowered to vindicate the rights of an individual whose property is confiscated.\(^{271}\)

In the *Comadres v El Salvador* case,\(^{272}\) several rights under the American Convention were violated, including the right to property. The Inter-American Commission found that there was a violation of the right to property and the right to be free from arbitrary and abusive interference.\(^{273}\)

It is apparent that the Inter-American Commission's trend is to deal with SERs as secondary rights to CPRs.\(^{274}\) The *Communidad Yanomami v Brazil* case\(^{275}\) concerns allegations of violations of various provisions of the American Declaration of the Rights and Duties of Man.\(^{276}\) For a decade the government of Brazil was reported to have exploited the natural resources within the Amazon region that is predominantly a residence area for Yanomami Indians. During that process the Yonamami were evicted and displaced without any regard for their use and benefit of their natural resources by

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\(^{273}\) *Comadres v El Salvador* 24.3.

\(^{274}\) For example the case of *Corumbiara v Brazil* Report No 32/04 Case No 11.556, March 11, 2004 para 169, where the Inter-American Commission in relation to the eviction of communities and killings of victims the Commission found that Brazil violated amongst others the right to life in Article 4 and the right to human treatment under the American Convention, available at <http://cidh.org/annualrep/2004eng/Brazil.11556eng.htm> (date accessed 2015-05-08).


\(^{276}\) Article I-Right to Life, Liberty, and Personal Security; Article II-Right to Equality before the Law; Article III-Right to Religious Freedom and Worship; Article XI-Right to the Preservation of Health and to Well-being; Article XII-Right to Education; Article XVII-Right to Recognition of Juridical Personality and of Civil Rights; and Article XXIII-Right to Property of the American Declaration of the Rights and Duties of Man.
foreign mining companies.\textsuperscript{277} Their displacement resulted in the breakdown of their old age organisation, led to the introduction of prostitution among women which had been unknown to them and the resultant death from various diseases which, likewise, were unknown to them. Furthermore, the Yonamami were made vulnerable by the Brazilian government, and this subsequently resulted in them becoming beggars on their own land.\textsuperscript{278} The Inter-American Commission found that the Brazilian government was in violation of the right to life, liberty and personal security, the right to residence and travel and the right to the preservation of health and well-being.\textsuperscript{279} Therefore, the Brazilian government was urged to continue to take preventive and curative health measures to protect the lives and health of these Indians exposed to the relevant contagious diseases.\textsuperscript{280} Despite the case dealing with many SERs’ violations, the Inter-American Commission referred mainly to Article 27 of the ICCPR and made no substantive reference to SERs in regional and or international human rights law.

About 80\% of cases that have been reported before the Inter-American Commission illustrate an intense adjudication of the right to property in Article 21 of the American Convention which has often been utilised to also protect the right to adequate housing. As a result, Article 21 is likely to be seen as the only hope of both right to adequate housing\textsuperscript{281} and right to property within the American Convention. The reason is that it addresses a range of rights violations such as the destruction of housing within communities resulting in homelessness,\textsuperscript{282} which differs from the expropriation of shares,\textsuperscript{283} destruction of business properties,\textsuperscript{284} and confiscation of property.\textsuperscript{285} It is

\textsuperscript{277} Communidad Yanomami case para f-g.
\textsuperscript{278} Communidad Yanomami case para 3(a) and (d).
\textsuperscript{279} Communidad Yanomami case para 3(a) and (d).
\textsuperscript{280} Communidad Yanomami case para 3(a) and (d).
\textsuperscript{281} COHRE Enforcing housing rights in the Americas: Pursuing Housing Rights Claims within the Inter-American System of Human Rights 34-37.
argued that while this approach provides relief to the right to adequate housing violations it also deprives the SERs jurisprudence dedicated to housing. However, it must be understood that because it is the only human rights instrument ratified by a majority of states it assumes the burden of protecting an implied right to adequate housing within the region. In other words there is not much else that the Inter-American Commission can do at this stage than to invoke Article 21 to protect and enforce the right to adequate housing. Such an approach seems to be progressively making an impact on those rendered homeless.

2.3.3.2.2 The Inter-American Court of Human Rights

This court came into being as a result of the adoption of the American Convention. Article 1 of the Statute of the Inter-American Court provides that:

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.\textsuperscript{286}

The Inter-American Court is tasked with observing and protecting human rights within the OAS territories.\textsuperscript{287} Moreover, if the court -

...finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of.\textsuperscript{288}


\textsuperscript{285} Octave Cayard, v Haiti, Resolution No 15/83, Case No 2976, June 30, 1983, available at \textless http://www.cidh.org/annualrep/82.83eng/hafti2976.htm\textgreater (date accessed 2015-05-08).


\textsuperscript{287} Article 33 of the American Convention.

\textsuperscript{288} Article 63(1) of the American Convention.
Unlike the African Court of Justice and Human Rights, the Inter-American Court is only accessible through state parties' and the Inter-American Commission. Unlike the African Court of Justice and Human Rights, individual petitions are not allowed other than through referral by the Inter-American Commission. Similar to the African Court of Justice and Human Rights, the Inter-American Court is competent to offer adjudicatory and advisory services to state parties'. The adjudicatory jurisdiction of the court is extended to all matters relating to the interpretation and application of the provisions of the American Convention as submitted to it provided that the state party concerned recognises or has recognised its jurisdiction. The Inter-American Court's advisory jurisdiction enables it, upon consultation by state parties', to offer its opinions regarding the interpretation of the American Convention or other treaties relating to the protection of human rights. In addition, it may offer opinions concerning the compatibility of the domestic laws of state parties' with international/regional instruments. A point to note is that the court is empowered to offer advisory opinions in cases where any member of the OAS is or is not a member, as long as the issue involves the protection of human rights in general or specifically. An example of such an advisory opinion is the request, by the Government of Peru, regarding Article 64 to the American Convention. The Inter-American Court found unanimously that:

The advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.297

290 Article 61(1) of the American Convention.
293 Article 62(3) of the American Convention.
294 Article 64(1) of the American Convention.
295 Article 64(2) of the American Convention.
296 Article 64 of the American Convention.
Caution should be exercised to not reduce the Inter-American Court to providing advisory opinions as opposed to adjudicating SERs against state parties'. The Inter-American Court noted its role in the protection of SERs in terms of its advisory jurisdiction when referring to the interpretation of the American Convention and other treaties that protect human rights in the American states.298

SERs before the Inter-American Commission and Inter-American Court surfaced mostly when they dealt with other rights. Similar to the approach adopted by the Inter-American Commission, the Inter-American Court has dealt extensively with cases that directly challenge government’s right to provide housing to those rendered homeless. To a certain extent there is an abundant right to adequate housing jurisprudence within the Inter-American human rights system, as developed by the Inter-American Court.

The *Mayagna (Sumo) Awas Tingni Community v Nicaragua*299 case dealt with the issue of security of tenure. The complainants requested Nicaragua to compensate the Mayagna Awas Tingni community for the encroachment on its land caused by government’s approval of destructive logging concessions on indigenous communal lands, without consultation with or agreement from the affected communities.300 The Inter-American Court held that the state impinged on the community’s right to the use and enjoyment of its property, and further that it had granted concessions to third parties to utilise the property and resources located in an area that corresponded, either fully or in part, to the lands that had to be delimited, demarcated and titled.301 The Inter-American Court ordered Nicaragua to, *inter alia* adopt measures necessary to create an effective mechanism for the delimitation, demarcation and titling of the property of indigenous communities within 15 months.302

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298 Article 64 (1) of the American Convention.
300 *Mayagna (Sumo) Awas Tingni Community* para 2.
301 *Mayagna (Sumo) Awas Tingni Community* para 153.
302 *Mayagna (Sumo) Awas Tingni Community* para 164.
The indirect protection of the right to adequate housing in the context of communal property rights was the subject in the case of *Moiwana Village v Suriname*. It dealt with an indiscriminate attack by members of the armed forces of Suriname on the village of Moiwana whereby over 40 men, women and children were massacred and the village razed to the ground.\(^{303}\) Those who escaped the attack supposedly fled into the surrounding forest and then into exile or internal displacement.\(^{304}\) The Inter-American Court held, with reference to the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* case, that:

In the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership. That conclusion was reached upon considering the unique and enduring ties that bind indigenous communities to their ancestral territory. The relationship of an indigenous community with its land must be recognized and understood as the fundamental basis of its culture, spiritual life, integrity, and economic survival.\(^{305}\)

In the subsequent case of *Moiwana Village v Suriname* the issue concerned the government of Suriname’s continued displacement - to the detriment of the indigenous and tribal communities - from their traditional lands.\(^{306}\) The Inter-American Court directed the state, as a measure of reparation, to ‘adopt such legislative, administrative and other measures as are necessary to ensure’ those rights, after due consultation with the neighbouring communities.\(^{307}\) Consequently, it is evident that the Inter-American Court interprets existing human rights to safeguard an implicit right to adequate housing under Article 4(1) of the American Convention which states that:

> Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

On the right to life Pasqualucci asserts that it:

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\(^{304}\) *Moiwana Community v Suriname* para 3.

\(^{305}\) Compare the case of *Mayagna (Sumo) Awas Tingni Community* para 149.


\(^{307}\) *Moiwana Community v Suriname* para 19.
…is the most essential of human rights, in that it is basic to a person's enjoyment of all other rights.\textsuperscript{308}

The case of \textit{Yaky Axe Indigenous Community}\textsuperscript{309} is one in which the right to life was interpreted to include at least the improvement of inhuman living conditions that must be dignified.\textsuperscript{310} It stated that:

The State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.\textsuperscript{311}

It is clear that the manner in which the Inter-American Court deals with the right to adequate housing cases seems to not impede an effective adjudication of the right to adequate housing disputes since most often other rights - such as the right to property in Article 21 and the right to life in Article 4(1)\textsuperscript{312} - are invoked as they seem to offer the right to adequate housing umbrella kind of remedies. Examples of remedies already made by the court range from rehabilitations, satisfaction and guarantees of non-repetition.\textsuperscript{313} In the case of \textit{Plan de Sánchez Massacre} the state was ordered to

\begin{itemize}
\item It dealt with failure by Paraguay to safeguard the ancestral property rights of the Yakye Axe Indigenous Community and its members. The Community's land claim has been processed since 1993 but no satisfactory solution has been attained. As a result it was argued that this made it impossible for the Community and its members to own and possess their territory, and kept it in a vulnerable situation in terms of food, medical and public health care, constantly threatening the survival of the members of the Community. \textit{Yakye Axe Indigenous Community v Paraguay}, Inter-American Court of Human Rights, Judgment of June 17 2005, (Merits, Reparations and Costs) para 1, available at <http://www.corteidh.or.cr/index.php/en/decisions-and-judgments> see also \textit{Sawhoyamaxa Indigenous Community v Paraguay}, Inter-American Court of Human Rights, Judgment of March 29 2006, (Merits, Reparations and Costs) paras 9, 18, available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf> (date accessed 2015-05-09).
\item Juvenile Reeducation Institute v Paraguay para 162.
\item As well as Article 1(1) (Obligation to Respect Rights) of the American Convention.
\end{itemize}
implement a housing programme.\textsuperscript{314} The case concerned the Guatemalan Army relying upon the ‘Doctrine of National Security.’ Members of the Mayan indigenous people were regarded as ‘domestic enemies’, since they were seen or suspected of being the social base for the guerrilla forces.\textsuperscript{315} As a result the Mayan indigenous people were massacred and scorched earth operations took place. These involved the complete destruction of their communities, houses, livestock, harvests, and other means of survival, their social, economic, and political institutions as well as their cultural and religious values, symbols and practices.\textsuperscript{316} The military accused the inhabitants of Plan de Sánchez of belonging to the guerrilla forces, as they refused to participate in the Civil Defense Patrols or Patrullas de Autodefensa Civil (the ‘PAC’). Their refusal resulted in a heavy climate of terror that lead to men leaving the community and hiding from the army in Plan de Sánchez.\textsuperscript{317} With regard to the responsibility of government towards victims\textsuperscript{318} of Plan de Sánchez on the right to adequate housing the court held that:

The State must implement a housing program to provide adequate housing to the surviving victims who live in that village and who require it. The state must implement this program within five years of notification of this judgment.\textsuperscript{319}

From this case it is evident that the Inter-American Court has the necessary power to enforce violations of the right to adequate housing and even order full compliance with the right against all state parties’. Clearly an effective remedy exists within the Inter-American system whereby the right to adequate housing fully enjoys an effective and efficient remedy likely to ensure that state parties’ implement, at domestic level, the realization of the right to adequate housing. Furthermore, the court reiterated that:

In accordance with its consistent practice, the court reserves the authority inherent in its attributes to monitor full compliance with this judgment. The case shall be filed once the state has fully complied with its provisions. Within one year


\textsuperscript{315} Plan de Sánchez Massacre v Guatemala paras 42(2).

\textsuperscript{316} Plan de Sánchez Massacre v Guatemala paras 42(20) - 42(23), 49(4).

\textsuperscript{317} Plan de Sánchez Massacre v Guatemala para 42(12).


\textsuperscript{319} Aloeboetoe et al v Suriname paras 105 117.
from notification of the judgment, Guatemala shall provide the court with a first report on the measures taken to comply with it.\textsuperscript{320}

The fact that the court has created equitable remedies\textsuperscript{321} and methods of monitoring compliance\textsuperscript{322} with its court decisions has elicited the following response from Huneeus:

This link provides a unique and, so far, under-utilized opportunity to deepen relationships with actors beyond the executive, and to shape those actors into compliance partners. Specifically, the court could use its remedial regime to heighten actors’ sense of accountability, and to demonstrate the benefits of partaking in transnational judicial dialogue by deferring to, citing to, and otherwise promoting national jurisprudence that embeds the court and its rulings in national settings\textsuperscript{323}

The Inter-American human rights system has a unique\textsuperscript{324} and realistic approach to enforcing implementation of the right to adequate housing violations. As a result there is hope that SERs can equally and separately be worthy of being enforced in the same way as CPRs. The Inter-American Court can be commended for having accepted the interpretation and application of the existing provisions of the American Convention to protect an implicit right to adequate housing and even issue direct substantive remedies. As an adjudicatory authority at regional level the court’s approach is a progressive step towards ensuring full compliance with SERs’ claims that are most often not protected under the domestic systems. In light of the fact that the court closely monitors compliance (or lack thereof) with its rulings, the decisions of the Inter-American Court require a national judge to take action before there can be full

\textsuperscript{320} Aloeboetoe et al v Suriname para 124.


\textsuperscript{322} On its report the court held that:

The Court’s monitoring of compliance with its decisions implies, first, that it must request information from the State on the actions carried out to implement compliance, and then obtain the comments of the Commission and of the victims or their representatives. When the Court has received this information, it can assess whether the State has complied with its judgment, guide the State’s actions to that effect, and comply with its obligation to inform the UN General Assembly, in the terms of Article 65 of the Convention. Inter-American Court on Human Rights \textit{Annual Report} 2008 39-41, available at <http://www.corteidh.or.cr/docs/informes/eng2008.pdf> (date accessed 2015-05-09).

\textsuperscript{323} Huneeus ‘Courts resisting courts: Lessons from the Inter-American Court’s struggle to enforce human rights’ 496-497.

\textsuperscript{324} Huneeus ‘Courts resisting courts: Lessons from the Inter-American Court’s struggle to enforce human rights’ 500-502.
compliance with the court’s ruling.\textsuperscript{325} It is evident that there are an increased number of compliance records in this approach, something that the court is pleased with.\textsuperscript{326} Considering the level of responsibility and non-compliance records of international obligations of the countries investigated this is commendable.\textsuperscript{327} However, there are still serious concerns that some state parties’ do not fully comply with the Inter-American Court decisions,\textsuperscript{328} a symptom that is prevalent in Africa.\textsuperscript{329} It was found that about 50\% of court remedies were not complied with, 14\% of remedies were partially complied and 36\% of remedies were fully complied with.\textsuperscript{330} Amongst the reasons for not complying with court decisions are:

...due in part to the resource challenges that perpetually confront the Inter-American System. Additionally, however, the task of monitoring (as well as achieving) compliance is complicated by the system’s expansive reparations measures. Such measures are essential to ensuring full reparation of victims and guaranteeing nonrepetition, but they necessarily broaden the areas to be monitored by the Court.\textsuperscript{331}

However, it is argued that compliance culture is deeply rooted and at times is a process which the court seems to be engaged in:

\textsuperscript{325} Huneeus ‘Courts resisting courts: Lessons from the Inter-American Court’s struggle to enforce human rights’ 502.
\textsuperscript{326} Huneeus ‘Courts resisting courts: Lessons from the Inter-American Court’s struggle to enforce human rights’ 503-504; Inter-American Court on Human Rights Annual Report (2008) 72-73.
\textsuperscript{329} Wright-Smith K The decision to comply: examining patterns of compliance with the Inter-American Human Rights bodies, 4-6 available at <https://www.academia.edu/243361/The_Decision_to_Comply_Examining_Patterns_of_Compliance_with_the_Inter-American_Human_Rights_Bodies> (date accessed 2015-05-09).
\textsuperscript{331} Camilleri and Krsticevic ‘Making international law stick: Reflections on compliance with judgments in the Inter-American human rights system’ 239, see also 243-244.
It is quite rare for states to completely fail to comply with court judgments, and most states advance significantly over time toward implementing these judgments.\footnote{Camilleri and Krsticevic ‘Making international law stick: Reflections on compliance with judgments in the Inter-American human rights system’ 241.}

Another unique feature of the Inter-American Court is that it is empowered to present its non-compliance report before the General Assembly of the OAS. The Inter-American human rights system has developed a profound jurisprudence on the right to adequate housing that goes beyond merely providing compensation and restitution but also ensures that state parties’ adopt housing programmes. This is particularly true in light of the number of regional SERs’ treaties that are not ratified by majority of OAS.\footnote{Article XI and Article XXIII of the American Declaration (note 228), Article 34 of the Charter of the American States and Article 31 k of the Protocol of Buenos Aires.}

Considering that the Inter-American Court has now relaxed its rules to allow individuals to appear before it,\footnote{Rules of Procedure of the Inter-American Court on Human Rights, approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009 available at <http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf> (date accessed 2015-05-09); De Los Compos AF ‘Access to Court (IACHR) - From Locus Standi to Jus Standi’ European Public Law Series, (2008) vol XCIV 15-24 17 20.} access to court by victims has been enabled.

\subsection*{2.3.4 Asia and its politics regarding a unified regional human rights system}
Asia is the largest and the most populous continent in the world with its population estimated to be 4.3 billion, which is about 60\% of the world’s current population.\footnote{World Population Statistics Asia population 2013, by 20 May 2013, available at <http://www.worldpopulationstatistics.com/asia-population-2013/> (date accessed 2015-05-09).} Asia is the only region in the world today that does not have an established human rights system.\footnote{Wilde R ‘NGO proposals for an Asia-Pacific human rights system’ Yale Human Rights & Development Law Journal (1998) vol 1(1) 137-142 137.} The region has long-standing conflicts, deeply entrenched poverty, gender inequality and patterns of discrimination, oppressive military systems to the extent that in some parts conflicts are spearheaded by insecurity and political uncertainty.\footnote{Office of the High Commissioner for Human Rights - Human Rights Programme for Asia-Pacific (2008-2009) – Regional Human Rights Context, available at <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AsiaPacificProgramme0809.aspx> (date accessed 2015-05-09).} The reason for this is that several countries are still undergoing democratic, legal and
institutional reform processes. On the other hand some countries in the Asian region continue to enjoy a rapid economic boom which burdens the marginalised and some disadvantaged groups. Many countries in the Asian region have established legal frameworks and national human rights protection systems although there is a persistent political will directed at undermining any implementation and enforcement thereof.

2.3.4.1 Regional efforts to establish a unified human rights system

The absence of a unified human rights system in Asia triggered a non-governmental organisation to establish the Asian Human Rights Commission by jurists and human rights activists in 1986. The function that should have been performed by an Asian human rights system but taken up by the Asian Human Rights Commission is to promote and sensitise the Asian region about the existence and realisation of human rights. Furthermore, it lobbies the region and international public opinion for relief and redress in cases of human rights violations of both of CPRs and SERs. Although many Asian states, including India, have ratified international human rights instruments and despite some of their respective constitutions provide for most of the basic human rights there is an increasing gap between the reality and the realisation of rights concerned.

In 1967 the Association of South-East Asian Nations (ASEAN) was founded, adopting the Asean Declaration (Bangkok Declaration). In an effort to speak with one voice

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and put forward the Asian region’s aspirations and commitments with regard to human rights, the ASEAN community, in 1993, adopted the Final Declaration of the Regional Meeting for Asia and the World Conference on Human Rights (Bangkok Declaration). It indirectly reiterated the universality, interdependence and indivisibility of SERs and CPRs as well as the inherent link between development, democracy, universal enjoyment of all human rights, and social justice, which must be in a just balance and a non-confrontational approach. Furthermore, it also highlighted the need to understand that the concept of human rights must accommodate Asian values and respect the sovereignty of states and their respective laws. On 20 July 2009 the Ministerial Meeting adopted the terms of reference for the Asian Inter-Governmental Commission on Human Rights, facilitating the launching of the regional body at the ASEAN Summit in Phuket, Thailand in October 2009. The establishment of a body like this has profound importance in promoting universalism of human rights and creating a human rights system in Southeast Asia. It has a major impact on regional politics within the ASEAN history by moving towards a more people-orientated system. In 2012 the ASEAN Human Rights Declaration was adopted and is considered to be a landmark document that establishes a framework for human rights cooperation in the region and contributes to the ASEAN community building process.


350 Adopted on the occasion of the 21st ASEAN Summit, by the Heads of State/Government of ASEAN Member States at Phnom Penh, Cambodia, this 18/November 2012, available at
Undoubtedly, these regional initiatives have already sparked a human rights debate within a divided Asian region. They can also be regarded as having a positive impact on the establishment of a unified regional human rights system representing the whole Asian continent.\textsuperscript{351} On the occasion of the 50\textsuperscript{th} anniversary of the UDHR the Asian Human Rights Charter was adopted in 1998.\textsuperscript{352} This Charter provides a foundational basis upon which the Asian regional human rights system is likely to be based. Generally, in terms of the Asian Human Rights Charter, the protection of human rights must be pursued at all levels - local, national and international - though the primary responsibility rests with states.\textsuperscript{353} The Asian Charter recommends that:

Asian states should adopt regional or sub-regional institutions for the promotion and protection of rights. There should be an inter-state Convention on Human Rights formulated in regional forums with the collaboration of national and regional Non-Governmental Organisations. (it) must address the realities of Asia, be fully consistent with international norms and standards. … An independent (Human Rights) commission and or a court (Asian Court on Human Rights) must be established to enforce the Convention. Access to the commission or the court must be open to non-governmental organisations and other social organisations.\textsuperscript{354}

From the contents of the Asian Charter, it is apparent that a foundation has already been laid for Asia to implement the purported regional human rights system and is likely to adopt or draw an inspiration from the three (3) existing human rights systems in operation in the world today. It is only through a unified human rights system that the aspirations of the Asian Charter can fully guarantee the desire for the people of Asia to live in peace and harmony.\textsuperscript{355} However, Asia believes that the advancement of human rights in the region should exist in harmony with their respective unique ‘Asian values.’\textsuperscript{356} Encapsulated in 'Asian values' are common values in the region that incorporate a plurality of cultures and religions including Islam, Buddhism and

\begin{itemize}
\item \textsuperscript{351} Phan 'The ASEAN Intergovernmental Commission on Human Rights and beyond' 2.
\item \textsuperscript{353} Article 16(1) of the Asian Charter.
\item \textsuperscript{354} Article 16(2) of the Asian Charter.
\item \textsuperscript{355} Preamble to the Asian Charter.
\item \textsuperscript{356} Wilde 'NGO proposals for an Asia-Pacific Human Rights System' 142.
\end{itemize}
Confucianism. These values depict human rights as restricted when compared to the western ideology of human rights. As a result a western human rights vision cannot be applicable within the Asian context since Asia’s approach to human rights is seen as being dependent on the sensitivity of its societies’ complexities and historical backgrounds. Consequently, any implementation of human rights principles must consider the need to maintain social harmony in conflict management as most Asian countries have different ethnic groups. To Kan Weng, these groups were artificially bonded at a time when their independence was obtained from their colonisers. In other words, the challenge of not having a unified regional human rights system is that:

The lack of such a mechanism is often attributed to the region’s vast size and to the diversity of political, economic, and religious traditions. Yet it also reflects the region’s strong commitment to Westphalian concepts of sovereignty and the principle of non-interference in the internal affairs of neighboring countries.

Despite the assertion that the application of human rights is extremely complex to apply in Asia it must be understood that it is not the only region in the world that has diverse ethnic groups, cultures and religions. Thus, Asian values cannot be used to frustrate the implementation of a regional human rights strategy as well as to determine human rights standards. The Asian Charter has reiterated the endorsement of the UDHR, ICESCR, ICCPR and other international instruments that guarantee rights and freedoms, since:

(i) All rights are universal in nature as every person is entitled to them by virtue of being a human being;
(ii) Even if cultural traditions have an impact on the way the society organises its relationship they nevertheless do not detract from the universalism of rights.
(iv) Rights and freedoms are indivisible and human beings have social, cultural and economic needs and aspirations that cannot be compartmentalised or fragmented;
(v) Civil, political and cultural rights will not be meaningful without availability of economic resources to enjoy them;

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359 Kan Weng ‘Human rights and Asian values’ 151-152.
360 Kan Weng ‘Human rights and Asian values’ 154.
(vi) Equality, the pursuit and acquisition of material wealth is nothing without political freedoms, a chance to develop and express ones personality and cultural engagement.\textsuperscript{362}

Therefore, the Asian emphasis on rights does not exist in a vacuum. It is through the Asian Charter's initiative that Asia as a region began to recognise the responsibility to protect and promote human rights which lie within the international system, regional structures and domestic systems. From this angle, it is pertinent to note that state sovereignty cannot be used as a shield to evade or avoid international norms and international institutions governing human rights.\textsuperscript{363} It is clear that without such a regional system, the Asian Human Rights Charter will continue to remain a paper tiger and individual Asian states will continue to trample on human rights despite the constitutional entrenchment and or selective enforcement of rights.

A regional human rights system is an opportunity aimed at the advancement of the human rights activism. Such a system must be adopted by Asia even though its approach to human rights and its respective values may be different from the other regions in the world. Through the office of the High Commissioner for Human Rights the UN is constantly engaged with the region in an endeavour to intervene, support and strengthen regional efforts in developing a regional human rights infrastructure and mechanisms to carry forward the protection of human rights at a regional level.\textsuperscript{364} These efforts are unlikely to materialise unless all Asian countries are brought on board. Simultaneously the fear that their values could be eroded by the influence of the (western) regional system must be respected. As a result it is likely to be difficult to determine how to enforce SERs in a region that does not have a unified regional structure to promote and protect human rights in general.

\textsuperscript{362} Article 2(2) of the Asian Charter.
\textsuperscript{363} Articles 2(5) and 15(2) (b) of the Asian Charter.
2.3.4.2 Realising the right to adequate housing within the divided Asian region – a challenging perspective

It is a daunting task to invoke the enforcement of any SERs in a region that does not have an established and unified regional human rights system to promote and protect human rights. Asia itself asserts that it is likely to be difficult for it to apply the human rights standards within its diverse values.\(^{365}\) However, this argument cannot be sustained as it is not the only region in the world to have diverse cultures. Moreover, it cannot be seen a justification to avoid establishing a regional human rights structure. To confirm universalism of human rights principles most Asian states have already entrenched the right to adequate housing under their domestic system,\(^{366}\) but such a right seems empty without regional enforcement especially in instances of non-compliance by states.

Certain Asian countries seem to sacrifice SERs in pursuit of economic development. This is so because the focus on economic development and administration is more important than the law; as a result, the imperatives of control override those of economic rationality.\(^{367}\) Therefore, SERs are generally viewed in relation to the distribution of goods, services and opportunities, which must be guaranteed to every person, even when certain notable social goals are being pursued.\(^{368}\)

From the foregoing it can be concluded that recognition and enforcement of SERs to include the right to adequate housing are unlikely to materialise in Asia unless Asia – as


a continent – changes its perception of and unfamiliarity with a human rights regime.\textsuperscript{369} Asia has made a strong argument that, even in the West, the notion of universality and indivisibility of rights has been difficult to sustain, even today. This, for example, is illustrated by the West’s history of oppressing its own people and others, of slavery that has been sanctioned by religion, of child labour, colonial exploitation, imperialism and racism.\textsuperscript{370} Therefore, it can be conclusively said that to begin to invoke the necessity of enforcing a right to adequate housing within the divided Asian region, which is still doubtful about its own approach to human rights, would be a futile exercise – especially since individual states have considerable discretion in deciding on the extent to which they wish to afford protection to these rights.

2.4 Concluding observations
In general it can be said that at international level housing as a human right is entrenched and protected, albeit not universally enforced. Clearly the right to adequate housing can be invoked separately at any international fora and is noted as a right equally independent to have its own remedy. Despite the visibility of the right to adequate housing, the discussions in this chapter have demonstrated how complex it is to deal with violations of the right to adequate housing within a human rights regime that still does not treat adjudication of SERs equally with CPRs. At the same time the international human rights enforcement system is still not strong enough to enforce compliance with states parties imposed obligations in cases of non-compliance.

What is apparent from the regional bodies is that much work still needs to be done to ensure that states are forced or guided to comply with their human rights obligations to separately protect, promote and fulfil SERs. In Africa SERs continue to be marginalised while the adjudication of CPRs has been more visible, thereby providing a minimal opportunity for development of the right to adequate housing jurisprudence. The African Charter is better placed to enforce right to adequate housing cases as it already embodies both CPRs and SERs as equally enforceable. Considering that the

\textsuperscript{369} Yasuaki ‘In quest of intercivilizational human rights: ‘Universal’ vs ‘relative’: Human rights viewed from an Asian perspective’ 59.
\textsuperscript{370} Ghai ‘Human rights and governance: The Asia debate’ 61 71-72.
The jurisprudence of the African Commission does not have much to offer, the right to adequate housing continues to suffer a setback. This is exacerbated by most African states failing to ratify the Protocol on the Statute of the African Court of Justice and Human Rights, thereby delaying the coming into operation of the African Court of Justice and Human Rights. Consequently, the African human rights system lacks much needed teeth in the enforcement of the marginalised SERs. Remedies issued by the African human rights system are ineffective and inappropriate as the right to adequate housing requires the adoption of legislative and housing policies to guide its implementation in addition to compensation and resettlement made.

The Inter-American human rights system can be commended for having embraced the visibility of the right to adequate housing and it is making tremendous progress in ensuring compliance with its decisions. The Inter-American Commission and the Inter-American Court have proven to be effective in enforcing all human rights. This is due to their complementarity within the Inter-American systems. A significant advancement of appropriate remedies have been noted within the Inter-American human rights system.

In Asia there is no regional human rights enforcement system. This is deepening the marginalisation of the right to adequate housing and Asia needs to change its narrow human rights perception and be compliant with a human rights approach to enforce SERs. Consequently the Asian region still has a long way to go in being unified and to speak with a one human rights voice.

The challenge remains for these regional enforcement bodies to independently deal with violations of the right to adequate housing. Their jurisprudence still leaves a lot to be desired and as a result states will continue to ignore the enforcement of the right to adequate housing to adoption of appropriate policies. As such state parties’ are likely to offer compensation and resettlement to victims without appropriate adoption of legislative/policies housing measures envisioned by state parties’ imposed regional human rights obligations. In other words, because regional enforcement bodies seldom deal directly with the right to adequate housing infringements they are reluctant to take
them seriously or deliberately ignore them. Should such bodies establish a firm jurisprudence of the right to adequate housing states will be pressured to afford protection and remedies for any violations.

Nevertheless positive progressive measures have been noted on how the regions deal with the right to adequate housing, albeit at a minimal level. Clearly the Inter-American system seems better prepared than its African and the Asian counterparts to develop the visibility of the right to adequate housing jurisprudence further. Africa and Asia can definitely draw inspiration from the Inter-American system in ensuring that the progressive realisation of the right to adequate housing becomes a reality for many poor and marginalised homeless people.

What this chapter has demonstrated is that regional enforcement systems (courts) have a better chance of fostering compliance with the right to adequate housing than the international human rights system. Regional human rights systems are better placed to police state parties’ than the international human rights system. It is therefore essential that every effort should be made to entrench the regional enforcement systems through ratification of relevant instruments and active interaction with such enforcement systems.

The lack of the right to adequate housing jurisprudence globally and within regional human rights systems is proof that there is still a long way to go in addressing the inadequacies of the existing enforcement measures. It is clear that effective and efficient enforcement mechanisms at international and regional level will ultimately enable domestic systems to be more compliant in enforcing, protecting and fulfilling the required obligations in terms of international, regional and national guarantees.
Chapter 3

3. Canada’s implementation strategies adopted to progressively realise the right to adequate housing

3.1 Introduction

In Canada socio-economic rights (SERs) in general are not fully recognised or enforced as human rights, and as a result are not subject to judicial remedies in cases of non-compliance.\(^1\) The advancement of SERs is achieved mostly through policies, programmes and incentives rather than through legislation. In light of the fact that the Canadian Charter\(^2\) contains no explicit reference to or protection of it,\(^3\) the right to an adequate standard of living, including the right to adequate housing, remains one of the most closely contested SERs in Canada.

Despite the country’s economic status, the homeless, poor and marginalised continue to be vulnerable. Consequently, the objective of this chapter is to analyse the Canadian government’s position and challenges regarding the justiciability of the right to adequate housing as part of SERs. The framework within which the right to adequate housing is dealt with in the Canadian domestic system is critically examined. The country is facing multifaceted challenges that range from among others, government’s non-compliance with set housing policy implementation objectives and how such implementation

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\(^3\) Porter ‘Toward a comprehensive framework for ESC rights practice’ 16.

deepens the vulnerability of the poor and homeless within the domestic system. Moreover, there is inconsistent interpretation, application and enforcement as well as denial, exclusion and reluctance, by the Supreme Court of Canada, to utilise the existing provisions of the Canadian Charter to protect and enforce the right to adequate housing.

Lastly, the chapter looks into the country’s international and regional human rights obligations and compliance record to assess if the imposed obligations could assist the country to change its approach to implementing the right to adequate housing or if these obligations can be regarded as meaningless, unenforceable or deliberately ignored at domestic level.

The chapter intends to provide a critical foundation upon which the right to adequate housing may be approached in Canada, focusing particularly on the proactive role that the judiciary can play in enforcing the right to adequate housing by utilising the Canadian Charter and the country’s internationally imposed obligations. Such an analysis of Canadian jurisprudence offers valuable lessons, strengths and weaknesses from which South Africa can learn in its task of implementing the right to adequate housing.

3.2 The state of housing in Canada and government’s response

3.2.1 Introduction

In 2013 Canada was ranked number eight (8) among the best nations in the world in terms of the UN Human Development Index (HDI). In 1998 the Committee on Economic, Social and Cultural Rights (CESCR) reported that:

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…for the last five years, Canada has been ranked at the top of the UN Development Programme’s Human Development Index (HDI). The HDI indicates that that, on average, Canadians enjoy a singularly high standard of living and that Canada has the capacity to achieve a high level of respect for all Covenant rights.  

In terms of housing and the right to adequate housing, therefore, it is assumed that the country has an easier task and is in a far better position to enforce the right to adequate housing than the two other countries that are the subject of this thesis, namely India and South Africa.

Canada is one of the 54 independent states, including South Africa and India that form the Commonwealth. It consists of 13 political divisions: 10 provinces and 3 territories. As at October 1, 2014 Canada had a population of approximately 35,675,800 (thirty-five million, six hundred and seventy-five thousand and eight hundred). The 1982 Constitution Act - known as the Canadian Charter - contains fundamental rights and freedoms. Its Preamble states that it subscribes to principles that recognise the supremacy of God and the rule of law. The fundamental rights and freedoms are contained in seven separate areas of the Constitution and are seen as an important and

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8 The major difference between a Canadian province and a Canadian territory is that a province is a creation of the Constitution Act (hereafter the Canadian Charter), while a territory is created by federal law that enables the federal government to have more direct control over the territories, while provincial governments have many more competences and rights. Government of Canada Canada, Provinces & Territories: The naming of their capital cities, available at <http://www.nrcan.gc.ca/earth-sciences/geography/place-names/origins-geographical-names/9188> (date accessed 2015-05-09).


10 Northwest Territories, Nunavut and Yukon. See Government of Canada Canada, Provinces & Territories: The naming of their capital cities.


12 Chapter 2 (sections 3-6) deals with fundamental freedoms and democratic rights, mobility rights; legal rights in sections 7-15; equality rights in section 15; official languages of Canada and associated rights in sections 16-22 as well as minority-language educational rights in section 23.
legitimate avenue for challenging the growing inequalities within Canadian society. Fundamental rights and freedoms in the Canadian Charter are all subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Despite Canadians being among the best housed people in the world, there is a significant number (constituting a minority) that dispute this because they continue to live in sordid conditions. A common problem associated with the core need for housing of households in Canada is the affordability issue. In 2007 this was estimated to be 89.2%, resulting in housing affordability in 2013 being classified as seriously unaffordable.

In essence the challenges facing the right to adequate housing in Canada can be categorised as follows:

(a) Affordability and the cost of adequate, suitable housing have been identified as primary causes of the gap between aboriginal and non-aboriginal people in Canada.

(b) The reluctance of the Canadian government to formally recognise housing as an enforceable treaty right and to be interpreted by the judiciary using existing rights under the Canadian Charter.

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14 Section 1 of the Canadian Charter.
(c) Limited judicial interpretation and/or exclusion of Canada’s international obligations and the Canadian Charter to ensure protection and enforcement of the right to adequate housing.

(d) Limited mandate and reluctance of established human rights commissions to enforce SERs within the domestic system.

(e) The lack of enforcement mechanisms against Canada within the Inter-American regional human rights system, due to Canada’s non-ratification of essential SERs instruments.

It is essential to set out the state of the right to adequate housing and challenges of those who are not in a position to provide for themselves but who look to government for assistance. It is particularly the housing conditions of the minorities and the poor and homeless who are unable to afford their own housing without government intervention that is the focus of this chapter.

3.2.2 The housing conditions of poor minorities in Canada

Evolving trends indicate that not all Canadians are able to provide for themselves without assistance from the government. Despite Canada being a developed country\(^20\) its wealth is capable of reducing poverty only if and when government accepts it as a matter of concern. By 2013 about 2.96 million people in Canada were poor, despite poverty rates having been reduced from 11.6 to 8.8% between 1981 and 2011.\(^21\) It is evident that there are an increasing number of poor people in Canada despite government efforts to curb the problem. In 1998 the Human Development Report found that of its population, about 4 million people were in need of housing; this 4 million represents about 14% of Canadian households.\(^22\) Of the 14%, aboriginal households

\(^{19}\) Mission to Canada para 29.
\(^{20}\) Mission to Canada para 33.
constitute the majority, followed by Afro-Canadians, immigrants, persons with disabilities, youth, low-income women and single mothers. The number of single, unattached working-age adults living in poverty has doubled since 1981, from 538,000 to 1,195,000 in 2011. This trend persisted in the provinces and territories. In that regard:

At higher risk of being poor are Aboriginal people, recent immigrants to Canada, people with disabilities, single parents (primarily women) and their children, injured workers, and the roughly one in four to five Canadians toiling in low-paying, often part time and unstable employment.

This group experiences the most severe housing conditions, ranging from widespread overcrowding to grossly inadequate housing supply exacerbated by unemployment. Although efforts have been made to provide them with housing the fact that, despite their unemployment, they are required to pay rent puts their main source of income from social assistance under tremendous strain. It is apparent that the housing conditions of aboriginal people have, for a long time, been ignored by the Canadian government which has laboured under the misconception that, on average, Canadians have no shortage of or difficulties with housing. These housing disparities between

Concluding observations: Canada (2006); Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 105.


Centre for Public Justice Poverty Trends Highlights Canada 2013 4.

See further Mission to Canada para 33.

Canada without poverty A case support-June 4, 2011 1 available at (date accessed 2015-02-03).


Office of the High Commissioner for Human Rights Economic and Social Council Canada’s Fifth Periodic Reports - Concluding observations: 28th session, (CEDAW/C/CAN/5 and Add.1) at its 603rd
aboriginal and other Canadians were highlighted by the CESCR’s Concluding observations\(^\text{32}\) and also came to the fore during the 2009 Universal Periodic Review.\(^\text{33}\) Several countries, nevertheless, noted Canada’s efforts to advance human rights for all.\(^\text{34}\)

The manner in which aboriginal people are dealt with by the domestic system requires an intense interrogation and methods have been sought to resolve their challenges equally and in conformity with international human rights as stated in the UN Declaration on the Rights of Indigenous People.\(^\text{35}\) According to this Declaration, indigenous people have, in addition to other fundamental human rights, the rights to determine and develop priorities and strategies to exercise their right to the development of a distinct identity; to develop, manifest, teach and practise their own cultural traditions, histories, languages, writing systems, literatures and religions; self-determination; to establish and control their educational systems and to improve their economic and social conditions.\(^\text{36}\) In 2013 Canada, in the Report on the Universal Periodic Review, noted its commitment to advance capacity and rights of aborigines through:

…many laws, policies and programs, with a mutually reinforcing focus on: reconciliation, governance and self-government; resolving and implementing land claims; education; economic development; empowerment and protecting the vulnerable; and health and well-being.\(^\text{37}\)

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\(^{32}\) UN CESCR Concluding observations: Canada (1998) para 17.


\(^{36}\) Declaration on the Rights of Indigenous Peoples.

Without necessarily going into detail on how to advance their rights it remains to be seen if government is likely to accelerate its housing policies to ensure that aborigines can report as Canadians who equally enjoy and benefit from the country’s economic status i.e. having best housed citizens in the world. This is relevant in light of the fact that Canada, New Zealand, Australia and the United States voted against adopting the Declaration, on the grounds that it failed to address certain key concerns and also lacked clear guidance for states in several areas such as lands and resources, the concepts of free, prior and informed consent and self-government. These reservations are regarded as a setback to the rights of aborigines, who were urged to use the Canadian Charter and other domestic laws when affirming their fundamental rights despite their prevailing vulnerability before the domestic system.

There have been numerous cases that prove the extent to which aborigines have had to assert their fundamental rights [ownership or title] to their land and fight against the exploitation of their natural resources. The case of Delgamuukw v British Columbia dealt with a claim by aborigines to their title to land, as well as to separate portions of about 58,000 square kilometres in the territory of British Columbia. These separate territories

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had been developed, without consultation with them,\textsuperscript{43} by the Crown for agriculture, mining, forestry and hydroelectric power, infrastructure and the settlement of foreign populations had taken place. La Forest and L'Heureux-Dubé JJ found that:

Legislative objectives of the Crown are subject to accommodation of the aboriginal peoples’ interests. This accommodation must always be in accordance with the honour and good faith of the Crown. One aspect of accommodation of ‘aboriginal title’ entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect is fair compensation.\textsuperscript{44}

In regard to the extent of the aboriginal title, Lamer CJ and Cory, McLachlin and Major JJ held that:

Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be irreconcilable with the nature of the group’s attachment to that land.\textsuperscript{45}

The content of aboriginal title contains an inherent limitation because lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.\textsuperscript{46} However, it appears that aborigines and the Canadian government are engaged in an on-going process of ensuring that the former’s rights will, in this respect, be fully realised.\textsuperscript{47} In an unexpected turn of events in 2010, Canada endorsed the Declaration of the Rights of Indigenous People\textsuperscript{48} in an effort to further reconcile and strengthen its relationship with aborigines in its territories. Canada reiterated its commitment to promote and protect the rights of indigenous people at home and abroad and continue working in partnership with aborigines in creating a better Canada. It reaffirmed its commitment to build on a positive and productive relationship with First Nations, Inuit, and Métis peoples to improve the well-being of Aboriginal

\textsuperscript{43} Calder v Attorney General of British Columbia 318 322.
\textsuperscript{44} Delgamuukw v British Columbia 1021-1022.
\textsuperscript{45} Delgamuukw v British Columbia 1083.
\textsuperscript{46} Delgamuukw v British Columbia 1015.

While the housing conditions of aborigines is still under scrutiny, the lack of adequate housing for other minorities in Canada also continues to grow at an alarming rate. From the above it is clear that Canada seems mindful that while most households are able to satisfy their housing requirements through the housing market, there are some households whose housing needs are not being met in the market place.\footnote{Canada Mortgage and Housing Corporation, \textit{Canadian Housing Observer 2012} (2003) 5-2 (hereafter \textit{Canadian Housing Observer 2012}, available at <http://www.cmhc-schl.gc.ca/odpub/pdf/67708.pdf> (date accessed 2015-02-03).} Proliferation of the poverty trap is prevalent in all Canada’s cities. However, though poverty in general terms seems to have decreased in Canada any improvement recorded would likely to have been greater if there were entrenched income equality among Canadians. As a result income inequality constitutes the main set-back to poverty eradication.\footnote{Sharpe A and Arsenault J F, \textit{Living standards domain of the Canadian index of wellbeing} (2009) vol 4 1-109 99-100.} As one of the strategic components of reducing poverty\footnote{Loewen G, \textit{A Compendium of poverty reduction strategies and frameworks} (2009) 3-37 9, available at <http://tamarackcommunity.ca/downloads/vc/Poverty_Reduction_GL_042209.pdf>, (date accessed 2015-02-03).} Canada adopted a Federal Poverty Reduction Plan\footnote{Hoeppner, \textit{Federal Poverty Reduction Plan: Working in partnership towards reducing poverty in Canada} 52.} that emphasises the provision of housing to the poor. Canada’s approach to reducing poverty is grounded mainly in empowering the poor through the development of skills and enabling them to become self-sufficient through employment, while simultaneously ensuring that the vulnerable receive, among others, adequate housing.\footnote{UN General Assembly, \textit{National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21} Canada, Human Rights Council Working Group on the Universal Periodic Review Sixteenth session Geneva, 22 April–3 May 2013: A/HRC/WG.6/16/CAN/1 para 62, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/108/44/PDF/G1310844.pdf?OpenElement> (date accessed 2015-02-03).} However, Canada’s approach seems to have done little to reduce homelessness. For example in 2003, about 552300 people in Toronto alone were living in

\textit{http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142}
poverty and about 32 000 were using the shelters provided for the homeless. In 2005, Canada’s state party report found that approximately 1.7 million people, or 16% of all households, were in need of housing. In 2006 the issue of homelessness in Canada was noted by the CESCR as having reached a stage of national emergency. The government acknowledged this state of homelessness and it has been argued that it has implicitly allowed poverty to exist within the factual context of Canada’s wealthy society. Hulchanski views homelessness as:

...an extreme expression of social exclusion. All Canadians have the right to adequate housing and to an adequate standard of living – if in this country, they can pay for it. These fundamentals of life are for sale and are readily available in Canada – if you have the money.

As an indication of the growing state of homelessness the urban core housing need in 2009 was 13.5%, up from 12.3% in 2007. As a result of homelessness becoming uncontrollable and with international pressure Canada began to change its housing policy mind-set on how to tackle the core housing needs of homeless Canadians.

### 3.3 Canada’s implementation of its adopted housing policy measures

#### 3.3.1 Introduction

The Canadian government, in changing its approach to the poor and the homeless, realized that it must act positively to ameliorate conditions of poverty and homelessness

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56 City of Toronto *Report Card*; Porter *Expectations of equality* 42.
57 Canada’s Fifth periodic report: 2003 para 53.
61 Hulchanski *No homeland for the poor: Houselessness and Canada’s unhoused population* 1.
62 *Canadian Housing Observer* 2012 5.1.
through its housing policy measures. Since 2005, the Canadian government has committed itself to ensuring that all its citizens have a decent and secure place in which to live and are able to access and contribute to the social and economic life of their communities. The government has recognised its role in sharing the responsibility for successful housing outcomes. It has also acknowledged that addressing housing needs is a daily and long-term challenge that requires a sustained commitment from all stakeholders if real and lasting progress is to be made. Furthermore, the government has recognised ‘the importance of involving and working closely with concerned communities to make sustainable progress in improving peoples’ standard of living, including adequate housing.’ However, this commitment alone is not adequate to best serve the marginalised since they are still vulnerable: they are disempowered in terms of domestic legislation which would enable them to hold their government accountable in cases of non-compliance. Government has realized that the fact that, on average, Canadians are not homeless, have adequate nutrition, attend adequate schools and can raise their children in a dignified manner means nothing at all to those whose human rights are not being respected but are being violated. The housing policy measures that government has introduced to tackle housing in Canada are discussed hereunder.

### 3.3.2 Canada’s adopted housing policy programmes

By putting into practice its commitment, Canada gradually began to commit its resources to housing policy implementation, addressing affordability and core housing need through various programmes. The first is the Affordable Housing Initiative (2001-2011) (AHI). Under this initiative government provided capital contributions through the Canadian

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65 Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 99, 105; Mission to Canada paras 53-59.

66 Canadian Housing Observer 2012 5.2.
Mortgage and Housing Corporation (CMHC) to intensify the supply of affordable housing in partnership with provinces and territories. This was allocated in three phases. The first phase committed an amount of $680 million,\(^67\) the second phase allocation occurred in 2003 with an amount of $320 million, and the third phase allocation took place in 2009 with an amount of $250 million which was extended to 2011.\(^68\) The AHI programme is required to be available at or below the market rent and remain affordable for a minimum of 10 years. Since 2001 about 51,843 housing units were committed or announced.\(^69\)

Secondly, since 2009 Canada’s Economic Action Plan (CEAP) has provided a one-time investment of more than $2 billion over two years to build new and renovate existing social housing. This benefit, among others, single-parent families and senior citizens.\(^70\) An increased commitment was carried forward in accordance with the Economic Action Plan 2013.\(^71\)

With its Social Housing Policy and through the CMHC the federal government invests about $1.7 billion annually in support of an estimated 605,000 low-income households living in existing social housing across Canada.\(^72\) However, the situation is Canada as already espoused in paragraph 3.2.2 above seems to contradict government effort to eradicate poverty and homelessness. Thus the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), although recognising the efforts undertaken by the state party in the provision of social housing, is concerned that such efforts might be inadequate in addressing the needs of women with low incomes, including those and who are single parents.\(^73\)

\(^67\) One Canadian Dollar is equivalent to R9.88 as of 2015-05-09.  
\(^68\) Canadian Housing Observer 2012 5.2-5.3.  
\(^72\) Canadian Housing Observer 2012 5.3.  
\(^73\) Office of the High Commissioner for Human Rights Economic and Social Council Canada’s Fifth Periodic Reports - Concluding observations: 28th session, (CEDAW/C/CAN/5 and Add.1) at its 603rd and 604th meetings, on 23 January 2003 (hereafter Canada’s Fifth periodic report: 2003), para 383,
In terms of its latest framework on Investment in Affordable Housing (2011-2014) (IAH) the federal, provincial and territorial ministers responsible for housing have committed a combined total investment, over the three years, of $1.4 billion towards reducing the number of poor and homeless Canadians in housing need. The IAH commits the Canadian government to:

(a) Increasing the supply of affordable housing across Canada to include construction or conversion, and home ownership or rental, all targeted to households in need.
(b) Improving housing affordability for vulnerable Canadians through rent supplements, shelter allowances to address affordable housing needs, and home ownership assistance, all targeted to households in need.
(c) Improving and/or preserving the quality of affordable housing. Through renovation and rehabilitation of existing affordable housing to improve and preserve the quality of affordable housing for households in need.
(d) Fostering safe independent living via supporting new housing construction, housing modifications and renovations that extend independent living for households in need being seniors and persons with disabilities. Initiatives may also include accommodations for victims of family violence.

For a period of three years bilateral agreements were entered into between the federal provinces and territories in order to implement the IAH framework. This was to take place mainly through provision of funding to improve and preserve the quality of affordable housing and to support vulnerable households in accessing safe and affordable housing.

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74 The Framework boasts a budget of total investment over the three years to be $1.4 billion toward reducing the number of Canadians in housing need. The federal portion of this funding is some $716 million (One Canadian Dollar is equivalent to R9.88 as of 2015-05-09) over three years. Canadian Housing Observer 2012 5.2.


77 Investment in Affordable Housing (2011-2014) Framework Agreement; Canada Mortgage and Housing Corporation Canadian Housing Observer 2012 1.9.
As a further measure to consolidate its housing policy a National Housing Strategy under Bill C 400 underwent its first reading on February 16, 2012 and its second reading in February 2013. Most importantly it calls on the federal government to establish a national housing strategy designed to respect, protect, promote and fulfil the right to adequate housing as guaranteed under international human rights treaties ratified by Canada. However, in Tanudjaja et al. v Ontario and Canada, a motion to challenge the implementation of the strategy was granted by Ontario Superior Court of Justice on 6 September 2013. The applicants filed an appeal at the Court of Appeal, asking that the decision striking their claim be reversed.

While Canada has committed itself to improving the poor’s living conditions through the implementation of various housing programmes, housing conditions for the poor in Canada still have a long way to go, considering the approach government has adopted to realise the right to adequate housing. There is not much the poor can do other than to intensify their lobbying for stronger protection and enforcement of their right to adequate housing in Canada. In this regard it is necessary to examine the political will to implement the right to adequate housing and its impact on protecting and enforcing this right.

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79 Support Bill C-400: A National Housing Strategy.
81 Tanudjaja v Attorney General (Canada) (Application) 2013 ONSC 5410 (CanLII), para 103, 136-137, 147, 151-152, available at <http://canlii.ca/t/g0jbc> (date accessed 2015-05-09).
3.3.3 The political will to realise and enforce the right to adequate housing in Canada

In Canada there has been mixed debate relating to the adoption of a legislative and/or housing policy measure as an appropriate tool to progressively realise the right to adequate housing. Such debates are fuelled when policy measures are exclusively made and implemented by the government without them being subjected to judicial scrutiny. In this regard the judiciary’s reluctance to assess their reasonableness plays a significant role in deepening their marginalisation. Moreover, it is difficult to evaluate the right to adequate housing which is part of SERs when in actual fact the country regards SERs in general as mere policy driven rights. Therefore, it may well be justified to evaluate SERs in general since automatic enforcement of all SERs would also benefit the right to adequate housing.

It must be acknowledged that Canada has taken tremendous steps towards addressing core housing needs and affordability of its poor minorities through implementation of its above-mentioned housing policy measures. Yet, Canada strongly resists judicial involvement in (SERs) policies having budgetary implications. In other words, the implementation of housing policy-driven measures in Canada seems to be hampered by the judiciary’s unwillingness to clarify, protect and safeguard the poor through SERs’ litigation.

Treatment of SERs as politically driven is reflected in several SERs’ cases such as Chaoulli v Quebec (Attorney General). It dealt with delays resulting from waiting lists in Quebec’s public health care system and provincial legislation that prohibited Quebec residents from taking out insurance to obtain private sector health care services already available under Quebec’s public health care plan.

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83 In Schachter v Canada 1992 2 SCR 679 paras 683 709 the Supreme Court of Canada held that ‘the question is not whether courts can make decisions that impact on budgetary policy but rather to what degrees the can appropriately do so’. The court went on to say ‘any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or an expenditure of money.’ See also R v Askov 1990 2 SCR 1199.

84 Porter Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada.


86 Chaoulli v Quebec (Attorney General) para 2.
…the Attorneys General of Canada and Quebec argue that the claims advanced by the appellants are inherently political and, therefore, not properly justiciable by the courts. 87

The question is whether Canada’s political approach to justifying policy-driven SERs as autonomous, from a judicial review point of view, discriminates against its marginalised and vulnerable people. In this regard, the Supreme Court of Canada 88 commented on the inadmissibility of ‘political’ justifications for the infringements of rights’ in *Newfoundland (Treasury Board) v N.A.P.E.* 89 It dealt with gender discrimination that was found to exist in collective agreements that had been in force between the government and the public sector unions, allowing female-dominated work classifications less remuneration than male-dominated classifications for work of equal value. The court found that:

…if an individual’s *Charter* right or freedom is violated by the state, it is no answer to say the violation was driven or is justified for political reasons. Indeed forms of state discrimination that are undertaken for political reasons are among the most odious, as the recent history of parts of the world from South Africa to the Balkans can attest. 90

It remains unclear to what extent those excluded from the benefit of equal protection under the law can fully assert rights which are not explicitly protected in the Canadian Charter. The abovementioned analysis is based on the fact that policy-driven rights do not appear to have been appropriately implemented and those meant to benefit do not have a judicial remedy. Woodward believes that the Canadian Charter is the controlling text and only rights explicitly or implicitly recognised in that text can be considered fundamental, 91 although it can be argued that subsistence benefits (social welfare) are essential to the exercise of fundamental rights. 92 However, without formal recognition of housing as a right under the Canadian Charter or in terms of a separate domestic statute and the reluctance

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87 *Chaoulli v Quebec (Attorney General)* paras 183-185.
89 *Newfoundland (Treasury Board) v N.A.P.E* 2004 3 SCR 381.
90 *Newfoundland (Treasury Board) v N.A.P.E* para 81.
of the judiciary to interpret and apply the Canadian Charter, the poor and homeless people have no enforceable right and there is no governmental accountability for non-compliance.\textsuperscript{93} The country’s lack of a national housing strategy has also been a retrogressive step towards complying with its housing policy prescripts.

### 3.3.4 Summary

It is clear from the housing programmes evaluated that Canada has committed itself and its resources to alleviate the plight of the poor and homeless. The programme reached its final term in 2014 and its evaluation from 2015 onwards will be essential to determine if it has achieved its outcomes, whether or not it experiences and how it deals with some of the implementation challenges. Although such housing policy measures are indeed a step towards realizing, on a progressive basis, the right to adequate housing the absence of both a legislative framework and judicial scrutiny renders such a commitment tantamount to a political commitment only, with no consequences other than public dissatisfaction in cases of non-compliance.

### 3.4 Invoking provisions of the Canadian Charter to safeguard and enforce the right to adequate housing

#### 3.4.1 Introduction

Although it was argued in Chapter 2 that SERs need to be adjudicated independently from the CPRs, the Canadian jurisprudence views the former as being non-justiciable. Hence, the interpretation of CPRs has proven to be one of the possible avenues to be used to enforce the right to adequate housing in Canada. Thus under the Canadian Charter there are two possible provisions that are relevant to safeguard and enforce the right to adequate housing through interpretation by courts. Sections 7 and 15(1) of the Canadian Charter are argued as appropriate to protect and enforce the rights of the poor and homeless in Canada. However, it must be acknowledged that invoking the Canadian Charter on its own seems inadequate particularly when the judiciary is not prone to an indirect interpretation approach.\textsuperscript{94} By contrast the same read-in approach has provided

\textsuperscript{93} Jackman ‘Canadian Charter equality at 20: Reflections of a card-carrying member of the party’ 73, 77; Mission to Canada 91.

\textsuperscript{94} Mmusinyane B ‘Enforcing the right to adequate housing within the Indian Constitution: A lesson for Canada’ \textit{Int. J. Public Law and Policy} (2012) vol 2(2) 162-175 169.
hope to the poor in India because there the judiciary has taken up its role to interpret the existing provisions of the 1949 Constitution\textsuperscript{95} to direct government to properly implement its housing policy.\textsuperscript{96}

\textbf{3.4.2 Interpretation and application of sections 7 and 15(1) to protect and enforce the right to adequate housing: A critical debate}

The interpretation of sections 7 and 15(1) of the Canadian Charter to protect the right to adequate housing has been a subject of critical debate in the Canadian jurisprudence for decades.\textsuperscript{97} Section 7 stipulates that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 15(1) states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Bearing in mind that all SERs are policy driven in Canada, the question to be asked is whether or not such rights can be protected under sections 7 and 15(1). The Canadian Charter as the highest law in Canada\textsuperscript{98} regards everyone as being equal in the eyes of the law, and has entrenched the practical implementation of this equality. This means that no one is perceived as having more or less rights than another. All citizens, regardless of their status (homeless, poor or not), must be treated equally. The justice system should enforce such protection and prevent any further degradation of rights in this regard by affording everyone an adequate standard of living, including health and adequate

\textsuperscript{95}The 1949 Constitution of India, adopted on 26\textsuperscript{th} of November 1949 (Hereafter the 1949 Constitution), as modified up to the 1st December, 2007), available at <http://lawmin.nic.in/coi/coiason29july08.pdf> (date accessed 2015-04-29),

\textsuperscript{96}Mmusinyane ‘Enforcing the right to adequate housing within the Indian Constitution: A lesson for Canada’ 166-168.

\textsuperscript{97}Jackman ‘Canadian Charter equality at 20: Reflections of a card-carrying member of the party’ 77.

\textsuperscript{98}Preamble to the Canadian Charter.
In UN terms the right to adequate housing ‘applies to everyone’ regardless of age, economic status, group or other affiliation or status or such factors. There are a number of cases where courts have had the opportunity to interpret and apply the existing provisions of the Canadian Charter to safeguard certain unprotected rights such as the right to health. It is argued that the same approach should be extended to apply to violations of the right to adequate housing. One example is Chaoulli v Quebec (Attorney General) where the Supreme Court of Canada found that prohibitions on insurance for health care already insured by the state constituted an infringement of the right to life and security. Although this case is not related to the right to adequate housing the approach adopted by the judiciary could be the same approach to be applied to the indirect protection of the right to adequate housing in Canada as will be argued in paragraph 3.4.2 hereunder. Even though the Canadian Charter does not confer a free-standing constitutional right to health care, the prohibition of private health insurance was found to be in contravention of section 7 of the Canadian Charter because it denies those who can afford or who qualify for such insurance, access to adequate alternative health services. The Chaoulli decision was seen as a victory by those who could afford private health care services, which is the majority of Canadians, but the decision has had an adverse impact on those relying on the public health system since it was silent on how the government could improve public health. In this regard, the court held that:

From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here.

The Chaoulli case illustrates that Canadian courts appear to be selective in their interpretation of the Canadian Charter. It also confirms the view in Egan v Canada that

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99 Porter ‘Expectations of equality’ 40.
101 Chaoulli v Quebec (Attorney General) para 45.
102 Porter ‘Toward a comprehensive framework for ESC rights practice’ 15.
103 Chaoulli v Quebec (Attorney General) para 189.
104 Mmusinyane B ‘Enforcing the right to adequate housing within the Indian Constitution: A lesson for Canada’ 164.
certain individuals and groups who are generally more vulnerable are also likely to experience the discriminatory effects of such distinct treatment more severely.\textsuperscript{105} The \textit{Chaoulli} decision, indeed, has widened and deepened the equality gap\textsuperscript{106} between those who can afford certain essentials of life and those who cannot but rely mainly on government for the provision of such social benefits. However, if one considers the interpretation of section 7 of the Canadian Charter as applied in the \textit{Chaoulli} case, it can positively be inferred that courts could apply a similar interpretation approach to order the government to improve poor peoples’ standard of living through adequate housing.

The court’s restrictive interpretation of unblocking only the private health care service, ignoring the serious delays in the public health system, was thus a setback to the improvement of the standard of living of the poor. The court further failed to recognise the violations of the right to health in terms of Canada’s international obligations. This was tantamount to a failure to recognise the homeless as dignified human beings, treating them as if they are of lesser worth.\textsuperscript{107} Arbour J, in her dissenting judgment in \textit{Gosselin}, found that there is no doubt that a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning.\textsuperscript{108} Consequently, any laws that fail to recognise the value of individuals fail also to recognise their inherent worth and as a result fail to respect their dignity and are equal to a denial of humanity.\textsuperscript{109} Essert asserts that:

\begin{quote}
Section 15 claims are premised on the equal dignity of all; thus laws (policies... emphasis added) which violate section 15 are those laws which fail to recognise this equal dignity to the detriment of the claimant, whose dignity has not been respected.\textsuperscript{110}
\end{quote}

\textsuperscript{105} Egan v Canada 1995 (2) SCR 513 para 38.
\textsuperscript{107} Egan v Canada para 39.
\textsuperscript{109} Essert C ‘Dignity and membership, equality and egalitarianism: Economic rights and section 15’ \textit{Canadian Journal of Law and Jurisprudence} 2006 vol 19(2) 407-429 411-412 421-422; Porter ‘Toward a comprehensive framework for ESC rights practice’ 4; Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada.}
\textsuperscript{110} Essert ‘Dignity and membership, equality and egalitarianism: Economic rights and section 15’ 412.
The manner in which benefits are distributed determines to a great extent whether they are consistent with the respect each is equally owed, an approach that seems to benefit the majority at the expense of the poor minorities in Canada. The *Law v Canada (Minister of Employment and Immigration)* decision dealt with a 30-year-old woman without dependent children or disability, who was denied survivor’s benefits under the Canadian Pension Plan (CPP) that gradually reduces the survivor’s pension for able-bodied surviving spouses without dependent children who are between the ages of 35 and 45. In this case the purpose of section 15 was described as:

…to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.

A claim in terms of section 15 could justifiably be applied to violations of the right to adequate housing, on the grounds that the law in question fails to respect the dignity of the claimants as equal human beings. A state has an obligation to recognise and respect dignity as representing the supreme worth of all human beings. A court is required to recognise that the analysis of the dignity interest in equality claims must adopt the perspective of the claimant, and that this analysis must have both subjective and objective components. The adjudication and interpretation of the right must therefore incorporate both the individual circumstances and traits of the claimant and the history of the constituency to which the rights claimant belongs. It is argued that the reasonableness of government’s efforts to progressively realise the right to adequate housing must be assessed in relation to the dignity interests of the group claiming the right and in light of the needs of those whose rights are most at risk. To Porter, ‘the claim to the right to adequate housing, if not viewed through an implicit

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112 *Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497 para 1.
113 *Law v Canada (Minister of Employment and Immigration)* para 51.
114 Essert ‘Dignity and membership, equality and egalitarianism: Economic rights and section 15’ 420.
115 Essert ‘Dignity and membership, equality and egalitarianism: Economic rights and section 15’ 415; Porter *Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada;* The Canadian Charter of Rights and Freedoms: Twenty Years Later’ 3.
116 Porter ‘Expectations of equality’ 34.
118 *Law v Canada (Minister of Employment and Immigration)* paras 3 59.
equality lens, may invoke no similar requirement to frame the legal analysis around the characteristics or the historic struggles of the group.\textsuperscript{119}

Porter also refers to South Africa’s first right to adequate housing (\textit{Grootboom}) case\textsuperscript{120} where the equality claim was advanced on the grounds that the people affected were made up predominantly of black women and their children.\textsuperscript{121} This group had a history of oppression and struggle for security and dignity which constituted a ground for establishing their rights claim. That claim was based on the fact that the group was homeless or had been denied some entitlement that was a component of the right which would be enough to establish a claim of violation of the right to adequate housing despite the history of the group or its place in society.\textsuperscript{122} The approach adopted by the court enabled a reasonableness review that led to the South African courts reading-into the SERs’ framework a consideration of the marginal social and historic position of the affected group. In this way the review approach of reasonable allocation of resources with an implicit equality analysis,\textsuperscript{123} rooted in the historical struggles, ensures that consideration is taken of the historical and social context of the group’s rights and the social movements linked to them within the SERs’ adjudication legal framework.\textsuperscript{124}

In this regard, while the reasonableness concept is not adopted/applied in Canada yet, Canadian courts would consider both positive and negative obligations associated with the right to equality and would determine positive measures in the light of Canada’s available resources. The right to equality is, therefore, seen as a hybrid as it imposes neither positive nor purely negative obligations.\textsuperscript{125} Section 15 not only requires government to refrain from discriminating against protected groups, but may also

\textsuperscript{119} Porter ‘Expectations of equality’ 35. Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada.}
\textsuperscript{120} Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC) (Hereafter \textit{Grootboom}).
\textsuperscript{121} Reaume ‘Discrimination and dignity’ 16-17.
\textsuperscript{122} Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada.}
\textsuperscript{123} Porter ‘Expectations of equality’ 43.
\textsuperscript{124} Porter ‘Toward a comprehensive framework for ESC rights practice’ 20.
\textsuperscript{125} \textit{Eldridge v British Columbia (Attorney General)} 1997 3 SCR 624.
require them to adopt positive measures to ensure equality\textsuperscript{126} or protection from discrimination by others.\textsuperscript{127} Although section 15 is regarded as a civil right it is argued to have a potential to afford remedies to SERs which are not expressed within the domestic legal system as enforceable rights. In other words, there are instances in which section 15 applications would require the availability of resources that are socio-economic in nature, as illustrated by \textit{Eldridge v British Columbia}. The Supreme Court found that failure by the government to provide sign language interpretation services to deaf persons was a violation of section 15(1) and failure to make the necessary resources available could not be said to be reasonably balancing the competing social demands which society should address.\textsuperscript{128} It is thus evident that courts are aware that Canada has committed itself internationally to fulfilling this interpretive approach to giving voice to other SERs. Clearly the Supreme Court of Canada\textsuperscript{129} is fully aware of its ability to adopt the South African test of reviewing the reasonableness\textsuperscript{130} of the adopted housing policy programmes. However, the court seems disinterested in applying the reasonableness concept in extending such a review process to safeguard the right to adequate housing and its reasons for not doing so are not convincing at all.

In general, courts have the power to conduct a constitutional review\textsuperscript{131} of the consistency, with the Canadian Charter, of any government (in)-action and, if necessary, to defer to government in the construction of an appropriate remedy.\textsuperscript{132} Generally, courts regard themselves as competent to hear and adjudicate rights claims in a particular social and historical context that is presented to them, and to review decisions and policy against the rights of particular parties or constituencies before

\textsuperscript{126} \textit{Eldridge v British Columbia (Attorney General)} para 78; Porter ‘Expectations of equality’ 34.
\textsuperscript{127} \textit{Vriend v Alberta} 1998 1 SCR 493.
\textsuperscript{128} \textit{Eldridge v British Columbia (Attorney General)} paras 92-93.
\textsuperscript{130} Mmuseinyane B ‘Enforcing the right to adequate housing within the Indian Constitution: A lesson for Canada’ 170.
\textsuperscript{131} \textit{Vriend v Alberta} paras 54-64; Jackman and Porter ‘Justiciability of social and economic rights’ 6.
\textsuperscript{132} \textit{Vriend v Alberta} paras 54-64; \textit{Eldridge v British Columbia (Attorney General)} paras 677-678. See decisions of O’Brien J and O’Driscoll J in \textit{Masse et al. v Ontario (Ministry of Community and Social Services)} paras 81 134.
them.\textsuperscript{133} However, even if they are competent, in certain cases they regard themselves as having limited scope as the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make.\textsuperscript{134} This assertion is found in La Forest J’s judgement in \textit{Eldridge v British Columbia (Attorney General)} that:

\begin{quote}
...it is also clear that while financial considerations alone may not justify \textit{Charter} infringements … governments must be afforded wide latitude to determine the proper distribution of resources in society. This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups.\textsuperscript{135}
\end{quote}

In this regard an accommodation of disadvantaged groups would entail taking into account their housing needs through proactive housing policies which are amenable to a review by a court in instances of non-compliance with set targets.\textsuperscript{136} Porter argues that there is no need for courts to define what is constitutionally required in every circumstance in order to adjudicate a certain claim.\textsuperscript{137} This analysis is based on the fact that cases brought before courts were clear enough for courts to make findings in those particular circumstances.\textsuperscript{138} In an effort to remind the Canadian judiciary of its obligations in the adjudication of SERs its judges must be encouraged to undergo training in Canada’s international human rights obligations.\textsuperscript{139} Courts and tribunals should recognise their institutional competence in accordance with the role of adjudication and not in terms of determinations of universal entitlement to goods or services.\textsuperscript{140} By virtue of Canada’s being a state party to the ICCPR,\textsuperscript{141} it is obliged by

\begin{itemize}
\item \textsuperscript{133} Porter ‘Toward a comprehensive framework for ESC rights practice’ 10.
\item \textsuperscript{134} Eldridge v British Columbia (Attorney General) para 83.
\item \textsuperscript{135} Eldridge v British Columbia (Attorney General) para 85.
\item \textsuperscript{136} Jackman and Porter ‘Justiciability of social and economic rights in Canada’ 4; Porter ‘Expectations of equality’ 43; Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada}.
\item \textsuperscript{137} Porter ‘Toward a comprehensive framework for ESC rights practice’ 9.
\item \textsuperscript{138} Gosselin v Quebec (Attorney General) paras 332; 346; Irwin Toy Ltd v Quebec (Attorney General) 1003-1004; Winnipeg School Division No. 1 v Craton (1985) 2 SCR 150, para 8; (also available at <http://scc-csc.lexum.com/scc-csc/scc-csc/en/76/1/document.do> (date accessed 2015-02-04). See also Reference Re Public Service Employee Relations Act 349. Masse et al. v Ontario (Ministry of Community and Social Services); Silano v British Columbia.
\item \textsuperscript{139} UN CESCR Concluding observations: Canada (1998) paras 57 59.
\item \textsuperscript{140} Woodward ‘Affirmative constitutional overtones: Do any still sound for the poor?’ 307.
\end{itemize}
Articles 2(1) and (3), and 26 to ensure that effective remedies are available to those whose rights have been violated. SERs are justiciable, intertwined and interwoven as a 'living organism' since they are indivisible and cannot be dissected or distinguished from one another. Therefore, Canadian courts need to enforce SERs in the same way as civil and political rights and in addition to other protocols and conventions to which Canada is a state party. This means that the right to an adequate standard of living, including adequate food, clothing and housing, must be recognised as a right that can be claimed and adjudicated within the existing Canadian Charter rights, as well as through other areas of law. Arguably this can be done by invoking the right to equality in section 15 and the right to life, liberty and security of the

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142 Article 2(1) provides that each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 2(3) states that each state party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted. Of the ICCPR.

143 Article 3 provides that the states parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant of the ICCPR.

144 Article 26 envisages that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status of the ICCPR.

145 In that the obligations to uphold the right to housing include the obligation to provide effective remedies for violations of the right. Such remedies need not always be judicial in nature: Foscarinis M, Paul, Porter B, and Scherer A 'The human right to housing: making the case in U.S. Advocacy' Journal of Poverty Law and Policy (July-August 2004) 97-114 107.


person as in section 7 of the Canadian Charter. Unfortunately, it is an avenue invoked, tested and already rejected on numerous occasions by the Supreme Court of Canada.

In terms of section 24(1) of the Canadian Charter:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

### 3.4.3 The right to adequate housing test cases under the Canadian Charter

The first case to deal with an adequate standard of living, including housing, under the Canadian Charter was *Gosselin v Quebec (Attorney General)*.\(^{150}\) The Supreme Court considered the adequacy of social assistance provided to women under the age of 30, which it was argued, had contributed to people such as Ms Gosselin being homeless. Her claim was based on section 45 of Quebec’s Charter of Human Rights and Freedoms that guarantees that:

> Every person in need has the right, for himself and his family, to measures of financial assistance and to social measures provided by law, susceptible of ensuring such person an acceptable standard of living.\(^ {151}\)

Ms Gosselin argued that section 45 creates the right to an acceptable standard of living and that Quebec’s social assistance scheme breached that right.\(^ {152}\) The Supreme Court of Canada had to determine whether or not such a social assistance programme violated her right to the security of the person in terms of section 7 and her right to freedom from discrimination on the basis of age under section 15 of the Canadian Charter.\(^ {153}\) The Supreme Court of Canada interpreted section 15(1)’s guarantee as providing for the broadest of all guarantees as it applies to and supports all other rights.

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\(^{150}\) *Gosselin v Quebec (Attorney General)* 2002 4 SCR 429.

\(^{151}\) Section 45 of the Quebec Charter of Human Rights and Freedoms. It is the only provincial human rights law prohibiting discrimination on the ground of ‘social condition’ and also includes a form of social and economic rights as found in sections 39 to 48, available at <http://www.learnquebec.ca/en/content/curriculum/bal/cit_com/rights/qcrights.htm> (date accessed 2015-02-04).

\(^{152}\) *Gosselin v Quebec (Attorney General)* para 86.

\(^{153}\) *Gosselin v Quebec (Attorney General)* paras 12-15. On the other hand, it was found in *Silano v British Columbia* 1987 42 DLR. (4th) 407 (B.C.S.C.) that the social assistance regulations which provided $25 per month less to those under 26 were discriminatory. As the distinction based on age was not reasonable or just, the age discrimination could not be saved under section 1 of the Charter.
guaranteed by the Canadian Charter.\textsuperscript{154} With regard to the question whether or not section 45 generates an entitlement, the court found that:

There can be no doubt that section 45 purports to create a right. However, determining the scope and content of that right presents something of a challenge, as s. 45 is ambiguous, admitting of two possible interpretations. According to the first interpretation, by providing a right to ‘measures provided for by law, susceptible of ensuring ... an acceptable standard of living’, s. 45 requires courts to review social assistance measures adopted by the legislature to determine whether or not they succeed in ensuring an acceptable standard of living. This is the approach urged upon us by the appellant.\textsuperscript{155}

A second interpretation reads s. 45 as creating a far more limited right. On this view, s. 45 requires the government to provide social assistance measures, but it places the adequacy of the particular measures adopted beyond the reach of judicial review. The phrase ‘susceptible of ensuring ... an acceptable standard of living’ serves to identify the measures that are the subject matter of the entitlement, i.e. to specify the kind of measures the state is obliged to provide, but it cannot ground a review of their adequacy. In my view, several considerations militate in favour of this second interpretation.\textsuperscript{156}

Consequently, the Supreme Court of Canada held that the lower rate imposed on employable young people under the age of 30 did not discriminate on the basis of age because this ‘incentive’ was designed to help them avoid the trap of welfare dependency.\textsuperscript{157} The Supreme Court of Canada’s decision confirms its reluctance to conduct checks and balances over the legislative or administrative decisions and discard its power of reviewing the prevailing conditions of those who are vulnerable to the same policies. In \textit{Gosselin v Quebec (Attorney General)}, the court seems to have turned a blind eye to its power to conduct a review of Quebec’s social assistance policy in determining whether the policy fell short of its objectives. However, the dissenting judgment has provided a possible interpretation and application of the right to an adequate standard of living within the scope of the right to security of the person.\textsuperscript{158} In her dissenting judgment, Arbour J held a different view regarding the role of the courts in interpreting and reviewing the legislative and administrative role by stating that:

\begin{quote}
…it does not follow, however, that courts are precluded from entertaining a claim such as the present one. While it may be true that courts are ill-equipped to
\end{quote}

\textsuperscript{154} \textit{Gosselin v Quebec (Attorney General)} para 144.
\textsuperscript{155} \textit{Gosselin v Quebec (Attorney General)} para 87.
\textsuperscript{156} \textit{Gosselin v Quebec (Attorney General)} para 88.
\textsuperscript{157} \textit{Gosselin v Quebec (Attorney General)} para 19.
\textsuperscript{158} Section 7 of the Canadian Charter.
decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case ...The role of courts as interpreters of the Charter and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a Charter right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.\textsuperscript{159}

As a result, Arbour J's dissenting judgment gave an indication that such a novel interpretation is justified in these cases:

One should not readily accept that the right to life in section 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the Charter speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the Charter as a whole. After all, the right to life is a prerequisite — a \textit{sine qua non} — for the very possibility of enjoying all the other rights guaranteed by the Charter. To say this is not to set up a hierarchy of Charter rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the Charter as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the Charter had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.\textsuperscript{160}

It is clear that there is a strong possibility for the Supreme Court of Canada to integrate, protect and enforce all SERs under the Canadian Charter. However, the process seems to be hampered by the judiciary's restrictive interpretation of sections 7 and 15 because it shields the Canadian government from equally enforcing all SERs as fundamental human rights.\textsuperscript{161} The Supreme Court of Canada itself has refused to rule out the possible (future) interpretation of section 7 of the Canadian Charter to protect SERs, as found by Dickson C.J. in \textit{Irwin Toy Ltd v Quebec (Attorney General)}:

\textsuperscript{159} \textit{Gosselin v Quebec (Attorney General)} para 332.
\textsuperscript{160} \textit{Gosselin v Quebec (Attorney General)} para 346. See further Porter 'Toward a comprehensive framework for ESC rights practice.'
\textsuperscript{161} Essert 'Dignity and membership, equality and egalitarianism: Economic rights and section 15' 409; Jackman and Porter 'Justiciability of social and economic rights in Canada' 5; Jackman 'Canadian Charter equality at 20: Reflections of a card-carrying member of the party' 76.
The intentional exclusion of property from s. 7, and the substitution therefore of ‘security of the person’... leads to a general inference that economic rights as generally encompassed by the term ‘property’ are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within ‘security of the person’. The Court stated that it would be ‘precipitous’ to limit the scope of s. 7 to rule out ‘such rights’, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.\(^\text{\ref{162}}\)

There is little clarity for the Canadian courts to make up their mind about the justiciability of the right to adequate housing.\(^\text{\ref{163}}\)

The second housing related case is *Victoria (City) v Adams*.\(^\text{\ref{164}}\) It dealt with the prohibition on erecting temporary shelter on public property that is contained in the Parks Regulation Bylaw, the Streets and the Traffic Bylaw which was challenged by a number of homeless people living in the city. They contended that the Bylaw infringed their rights to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, contrary to section 7 of the Canadian Charter. In delivering the judgement, Ross J found that:

> I have found that a significant number of people in the City of Victoria have no choice but to sleep outside in the City’s parks or streets. The City’s Bylaws prohibit those homeless persons from erecting even the most rudimentary form of shelter to protect them from the elements. The prohibition on erecting shelter is in effect at all times, in all public places in the City. I have found further that the effect of the prohibition is to impose upon those homeless persons, who are among the most vulnerable and marginalized of the City’s residents, significant and potentially severe additional health risks. In addition, sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing. I have concluded that the prohibition on taking a temporary abode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people. I have concluded that the prohibition is both arbitrary and overbroad and hence not consistent with the principles of fundamental justice. I finally have concluded further that infringement is not justified pursuant to s. 1 of the Charter.\(^\text{\ref{165}}\)

\(^\text{\ref{162}}\) *Irwin Toy Ltd v Quebec (Attorney General)* 1989 1 SCR 927 paras 1003-1004.

\(^\text{\ref{163}}\) This is particularly so when dissenting judgments often advocate for the justiciability of the right. Even lower courts were found to have enforced SERs: see Arbour J’s judgment in *Gosselin v Quebec (Attorney General)* paras 332 and 346; Dickson C.J in *Irwin Toy Ltd v Quebec (Attorney General)* 1003-1004; Dickson CJ, in his dissenting opinion in *Reference Re Public Service Employee Relations Act* 1987 1 SCR 313 349, 2008 BCSC 1363, available at <http://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc1363/2008bcsc1363.pdf> (date accessed 2015-02-049).

\(^\text{\ref{164}}\) *Victoria (City) v Adams* para 5.
Clearly, this case has demonstrates the paradigm shift at lower courts to interpret the Canadian Charter's existing provisions to safeguard the homeless and poor's right to adequate housing. In *Irwin Toy Ltd v Quebec (Attorney General)* the argument was advanced that vulnerable people will always have to turn to the courts for positive measures to protect rights by governments while more advantaged groups will challenge the government. An important distinction was made by the Supreme Court of Canada between corporate economic rights, which were deliberately excluded from the Canadian Charter and SERs, such as the right to adequate housing\(^{166}\) recognised by international law. Regarding the latter, on which vulnerable groups may rely and which can be read-into the components of the Canadian Charter, such as the right to life, liberty and security of the person in terms of section 7,\(^ {167}\) McLachlin CJ, in *Gosselin*, found that:

> The question therefore is not whether section 7 has been or will ever be recognized as creating positive measures. Rather, the question is whether the present circumstances warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not.\(^ {168}\)

Clearly the Canadian government’s view is that its courts cannot impose certain (positive) obligations\(^ {169}\) on it, especially those that require the allocation of resources. This means that the government views itself to be capable of setting out social assistance policies meant to improve the standard of living of the homeless. At the same time, governments possess the independence to determine or measure the impact of such policies if they have achieved their own objectives or not, without anyone challenging them in cases of unreasonable accommodation. In principle, governmental decisions must not be measured against their own standards of decision-making but rather against the rights of citizens.\(^ {170}\) On the other hand, the Supreme Court of Canada appears to deviate from the government’s view by emphasising that it is aware of its role and possible powers to impose decisions that require positive obligations from the government to allocate (adequate) appropriate resources. La Forest J, in *Eldridge v British Columbia*, found that:

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\(^{166}\) *Irwin Toy Ltd v Quebec (Attorney General)* in discussion of section 7 of the Charter.

\(^{167}\) Jackman and Porter 'Justiciability of social and economic rights in Canada' 5.

\(^{168}\) *Gosselin v Quebec (Attorney General)* paras 82-83.

\(^{169}\) Porter 'Toward a comprehensive framework for ESC rights practice' 9.

\(^{170}\) Porter 'Toward a comprehensive framework for ESC rights practice' 12.
The respondents and their supporting interveners maintain that s. 15(1) does not oblige the governments to implement programs to alleviate disadvantages that exist independently of state action. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits. In my view, this position bespeaks a thin and impoverished vision of s. 15(1) equality rights.\textsuperscript{171}

However, the court’s novel application and interpretation of its powers is yet to be applied to safeguard violations of the right to adequate housing. Thus far it can be argued that it is only the Supreme Court of Canada that has restricted its judicial review powers and consistently excluded the justiciability of the right to adequate housing by refusing to review the existing social assistance and housing policies. Owing to the proven weaknesses of the Canadian Charter and its failure to be widely applied and interpreted to protect the right to adequate housing, the Liberal Housing Task Force recommended, in 1990, that the Canadian Charter be amended to include rights such as adequate housing.\textsuperscript{172} The 25 years of Canadian jurisprudence depict the position of the Supreme Court of Canada being similar to the erection of a wall to fence off the poor (homeless) from meaningful access to the benefits of the judicial process.\textsuperscript{173}

In 2010 the Ontario Supreme Court of Justice, in \textit{Grant v Canada (Attorney General)},\textsuperscript{174} dealt with violations of the right to health and adequate housing. The plaintiff was relocated from one of the Reserve to another and construction of a new house was allocated at the new location. The plaintiff claimed that the relocation resulted in the substandard and toxic housing unsafe for human habitation.\textsuperscript{175} The plaintiff’s initial

\begin{footnotes}
\item \textsuperscript{171} \textit{Eldridge v British Columbia (Attorney General)} paras 72-73.
\item \textsuperscript{173} Woodward ‘Affirmative constitutional overtones: Do any still sound for the poor? 298-299; Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada} 1-2.
\item \textsuperscript{175} \textit{Grant v Canada (Attorney General)} paras 3-5.
\end{footnotes}
reliance on section 7 and 15(1) of the Canadian Charter was rejected and the case was alternatively dealt with on the basis of negligence and breach of fiduciary duty claims.

The 2013 Tanudjaja v Attorney General (Canada) case is the most recent and classic example of the Canadian courts' denial and reluctance to afford right to adequate housing victims an appropriate and effective remedy. The claimant did not challenge a particular legislative provision or government action, but rather government's failure to develop and implement a national housing strategy, which Canada still does not have. It challenged Canada's failure to adopt a national housing strategy that included not only social housing but also income support, rent supplements for those unable to afford housing and support for people with disabilities living in the community. In this case the applicants sought declarations that:

a) … decisions, programs, actions and failures to act by the government of Canada and the government of Ontario have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing.

b) … Canada and Ontario have obligations pursuant to sections 7 and 15 of the Canadian Charter of Rights and Freedoms to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.

c) … the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' rights to life, liberty and security of the person contrary to s. 7 of the Charter. These violations are not in accordance with the principles of fundamental justice and are not demonstrably justifiable under section 1 of the Charter.

d) … the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' right to equality

176 Grant v Canada (Attorney General) para 55 58.
177 Grant v Canada (Attorney General) para 76 86.
180 Mission to Canada para 18.
contrary to s. 15(1) of the Charter. These violations are not demonstrably justifiable under section 1 of the Charter.

They sought an order that Canada and Ontario implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing. These strategies must be developed and implemented in consultation with affected groups and must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms. In addition, an order was sought that the court retain supervisory jurisdiction to address concerns regarding implementation of the order.

On 11 June 2012, the Attorneys General for Canada and Ontario filed a motion to dismiss the Canadian Charter challenge without a hearing into any of the extensive evidence already filed by the applicants. The motion was granted by Ontario Superior Court of Justice on 6 September 2013.\(^\text{182}\) It sought to prevent interveners from referring to documents from UN human rights bodies which describe Canada's obligations to address homelessness as a human rights crisis. In addition Canada made statements to UN bodies that the Canadian Charter ensures that no one will be deprived of access to housing or other necessities. The applicants filed an appeal at the Court of Appeal, asking that the decision striking their claim be reversed.\(^\text{183}\) This case was carefully formulated by litigants, in terms of the Global Strategy,\(^\text{184}\) after realising that the Canadian judiciary had failed to apply and interpret Canada's international obligations and sections 7 and 15 of the Canadian Charter to safeguard the right to adequate housing. From the decision of the Ontario Superior Court it is not surprising that the Canadian judiciary cannot interfere with an executive decision and would be reluctant to review government housing policies in determining if measures taken by government are effective and efficient. This reluctance is demonstrated by Lederer J:


\(^{184}\) The Global Strategy for Shelter.
There is no viable issue raised that could demonstrate a breach of either s. 7 or s. 15(1) of the *Charter*. It is plain and obvious the Application cannot succeed. This is confirmed by the fact that what is being sought is a process initiated and supervised by the court, the implementation of which would cross institutional boundaries and enter into the area reserved for the Legislature. Implicit in the inquiry that would be undertaken is that the value society places on the supply of adequate housing would stand above the many other concerns and values that we expect our government to take into account and plan for. The development and implementation of provincial and national strategies is not, as the applicants would have it, a small, ‘incremental’ decision. It would result in a broad-based policy review involving a wide array of value judgments, the setting of priorities and the development of programs which would have impacts that would reach well beyond housing. The continued involvement of the court is not, as counsel for the David Asper Centre suggested, appropriate and justifiable as the supervision of the implementation of its decision. The continued involvement of the court would draw it, and ‘affected groups’ into the development of policy. If the Application were to continue, it would serve to draw the court across the applicable institutional boundaries and into areas that are the responsibility of the Legislature. This is all confirmed by the requirement that the strategies developed are to include ‘timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms’.  

The Ontario Court of Appeal did not move away from the decision of the Superior Court despite having heard that the social conditions created by the overall approach of the federal and provincial governments violated the four litigants’ and many other poor peoples’ right to adequate housing. Their threatened homelessness and sordid living conditions resulted from their inability to pay their rent and/or being forced to use their fixed income and the social assistance benefit to pay rent, which was almost double the shelter allowance allotted. The four applicants had been on government waiting list for subsidized accessible housing.  

Therefore, the actions and inaction on the part of Canada and Ontario resulted in homelessness and inadequate housing:

The appellants expressly disavow any challenge to any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say ‘in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1). They do not identify any particular law which violates the s. 7 right to life, liberty and security of the person.

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185 Tanudjaja v Attorney General (Canada) (Application) 2013 ONSC 5410 (CanLII) para 147.
The Ontario Court of Appeal further found litigants’ application not justiciable and no sufficient legal component existed to engage the decision-making capacity of the courts. In that regard the Judge held that:

…there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a ‘court-like’ function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.

It is disappointing that the Court of Appeal found that the application raised a question that could not be resolved by the application of law, but which instead engaged the accountability of the legislature. Furthermore, the Court believed that no reference was made to any law applicable – if such law (SERs within section 7 and 15 (1) of the Canadian Charter) was invoked would the court have ordered otherwise? The Court of Appeal held that it was beyond the institutional capacity of the courts to supervise the adequacy of housing policies as one of the remedies sought. The court’s narrow interpretation and applicability of international human rights law resulted in a lack of clarity on how Canada’s obligations in terms of international treaties may assist in determining how section 7 and section 15 of the Canadian Charter are, or could be, interpreted. This case signified a transformative challenge facing the Canadian judiciary to adapt its interpretive approach to accommodate adjudication of the right to adequate housing. The case also provided an opportunity for the Canadian judiciary to redeem itself as the only institution with review powers to assess the inaction or action of the executive and legislature [government] in so far it relates to the increasing homelessness and sordid living conditions of many poor Canadian. Clearly the minority

192 Tanudjaja v Attorney General (Canada) (Application) 2013 ONSC 5410 (CanLII) paras 149-150.
continues to be subjected to undue hardships by its own government and the Canadian Charter is being used to whip any claim brought by victims of this right. It is disappointing to see the courts, even the recent the right to adequate housing case - *Tanudjaja* - prohibiting adjudication of the country’s inaction/action in its approach to housing as being not specific to any law and/or policy and thereby not justified under section 7 and 15 of the Canadian Charter.

*Irma Sparks v Dartmouth/Halifax County Regional Housing Authority, The Attorney General of Nova Scotia*\(^{193}\) is a classic example of how an historical analysis of a ‘social condition’ can be interpreted within the existing provisions of the Canadian Charter to safeguard those vulnerable from becoming homeless. The case dealt with sections 10(8)(d) and 25(2) of the Residential Tenancies Act, R.S.N.S., 1989, Chapter 401, which draw a distinction between public housing tenants and private sector tenants in terms of termination of lease notices. Public housing tenants are treated differently from private sector residential tenants since the terms of a lease with a housing authority can override the provisions of the Act, and a public housing tenant in possession for five years or more by reason of section 10(8)(d) does not have ‘security of tenure’. A private sector tenant with five years possession, subject to certain exceptions (which are not relevant to this factual situation), can only be given a notice to quit if a judge is satisfied that the tenant is in default of his/her obligations under the Act, the Regulations or the lease (section 10(8)(e)). The appellant was a single black mother with two children, was on social assistance and had been a public housing tenant for over ten years. In accordance with the terms of her lease she was given one month’s notice by the respondent to quit her residential premises. Hallett JA managed to infuse poverty as a ‘social condition’ upon which low income earners are likely to experience hardships and used such a historical perspective of poverty as a stepping stone to afford the victim protection within section 15(1) of the Canadian Charter. Hallett JA held that: \(^{194}\)

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\(^{194}\) *Irma Sparks v Dartmouth/Halifax County Regional Housing Authority, The Attorney General of Nova Scotia* under ‘First Issue’.
Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principal criteria of eligibility for public housing are to have a low income and have a need for better housing. Poverty is, in addition, a condition more frequently experienced by members of the three groups identified by the appellant. The evidence before us supports this.

Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in Andrews. To find otherwise would strain the interpretation of ‘personal characteristic’ unduly.

Therefore ‘public housing tenants group as a whole are historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1). As a result, they are a group analogous to those persons or groups specifically referred to by the characteristics set out in s. 15(1) of the Canadian Charter being characteristics that are most commonly the subject of discrimination.’ The manner in which Irma Sparks was dealt with is the same approach advocated for the Supreme Court of Canada for years now to view and interpret the existing provisions of the Canadian Charter to protect those facing homelessness, poverty and living within sordid living conditions. For example, it was held that section 15(1) of the Canadian Charter requires all individuals to have equal benefit of the law without discrimination. Public housing tenants have been excluded from certain benefits private sector tenants have as provided to them in the Act. The effect of section 25(2) and section 10(8)(d) of the Act had been to discriminate against public housing tenants who are a disadvantaged group analogous to the historically recognized groups enumerated in section 15(1). As a result, the Nova Scotia Court of Appeal held that ‘the provisions of s. 10(8)(d) and 25(2) of the Act are inconsistent with the public housing tenants right to equal benefit of the law without discrimination since they explicitly deny benefits to a certain group of the population (public housing tenants) while extending them to others’.

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195 Irma Sparks v Dartmouth/Halifax County Regional Housing Authority, The Attorney General of Nova Scotia under ‘First Issue’.
196 Irma Sparks v Dartmouth/Halifax County Regional Housing Authority, The Attorney General of Nova Scotia under ‘Conclusion’.
If all right to adequate housing cases follow this one, review of governmental housing policy measures would be found to be contrary to the objectives of section 7 and section 15(1) of the Canadian Charter. As it stands the Supreme Court of Canada has consistently turned a blind eye to review government action/inaction to afford right to adequate housing victims a remedy in accordance with section 24(1) of the Canadian Charter. Indeed, it is within the courts’ powers to grant remedies they deem appropriate under the circumstances and in particular to assess and ensure that available resources are maximally utilised to facilitate equal enjoyment of SERs by reading-into the existing Canadian Charter’s rights to protect them. The effect of the failure to entrench the right to adequate housing within the Canadian Charter undoubtedly makes it difficult for the homeless to have any redress, before the courts, in cases of violation. In other words, the poor and other constituencies in Canada are struggling to have the protection of the right to adequate housing recognised as a component of rights such as the right to equality and the right to life, liberty and security of the person. The interrelationship between the right to equality and SERs is at the heart of the notion of substantive equality as a legally enforceable right. Therefore, victims of the right to adequate housing in Canada see themselves as being discriminated against on the grounds of their ‘social condition’, which is not one of the listed grounds of discrimination under the Canadian Charter. They are systemically prevented by both the government and the judicial system from fully asserting rights that

197 Section 24(1) of the Canadian Charter.
198 Jackman and Porter ‘Justiciability of social and economic rights in Canada’ 23; Mission to Canada para 29.
201 Porter ‘The right to adequate housing in Canada’ in Leckie S (ed) National perspectives on housing rights 109; Porter ‘Rewriting the Charter at 20 or reading it right: The challenge of poverty and homelessness in Canada’ 20.
203 Section 15(1) of the Canadian Charter.
204 Fredman S ‘The potential of an equal rights paradigm in addressing poverty’ in Liebenberg S and Quinot G (eds) Law and poverty: perspectives from South Africa and beyond 140-141.
are not expressly entrenched under the domestic system as was the case in *Gosselin v Quebec*. This prohibition can be argued to constitute a violation of Article 8 of the UDHR which provides that

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the Constitution or by law.\(^{206}\)

The CESCR has noted the importance of providing judicial remedies to violations of SERs:\(^{207}\)

> The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to Article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights, which obligates states parties’ to, inter alia, ‘develop the possibilities of judicial remedy’. Nevertheless, a state party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not ‘appropriate means’ within the terms of Article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

What is sought at an international level is the availability of domestic remedies for those who consider that their rights have been violated by a states’ inaction.\(^{208}\) Canada, through its implemented housing policy measures and the approach currently followed by its judiciary, can be argued to be acting contrary to the aspirations of the ICESCR and the UDHR.\(^{209}\) Canadian courts need to move away from forgiving governmental policies that impose subordinating, differential treatment on disadvantaged groups and should begin to review these implemented housing policy measures to see if they have any rational basis. They should adopt a test for the justification of subordinating


\(^{209}\) Article 2(1) of the ICESCR and Article 8 of the UDHR.
treatment of disadvantaged groups that demands more from the government. Instead of forgiving such treatment whenever there is a relevant connection between the differential subordinating treatments on [an established] prohibited ground and a state objective, the government should be held to a higher standard.\textsuperscript{210} The Canadian government, therefore, needs to establish not only that it has chosen a rational means to pursue compelling objectives but also that it has no other options that would have had a less burdensome impact on disadvantaged groups.\textsuperscript{211} From decided court cases, it is evident that courts do have the power to conduct a constitutional review of any governmental action’s consistency with the Canadian Charter and, if necessary, to defer government in the construction of an appropriate remedy.\textsuperscript{212}

The interpretation of existing provisions of the Constitution is not only the mandate of the courts but also of other agencies which contribute to the resolution of the right to adequate housing conflicts such as independent national human rights commissions. It must be acknowledged that changing such a position is not going to be an easy task unless the judiciary plays its part in adjudicating the checks and balances of executive powers. The inconsistent interpretation, by the judiciary, on whether or not to interpret the existing provisions of the Canadian Charter to safeguard not only the right to adequate housing has been going back and forth for over a period of 25 years and to date there is still no answer to putting to rest the justiciability of all SERs (right to adequate housing in particular). It is disappointing to see such a progressive judicial institution within the commonwealth system trapped in a failure to make a significant contribution aimed at advancing the rights of the poor and homeless minority in Canada. The resources issue has never been raised as a defence and undoubtedly government has committed every available resource to alleviate poverty. Of concern is the manner in which such resources are left to government to implement without scrutinising the


\textsuperscript{211} Ryder, Faria and Lawrence ‘What’s Law good for? An empirical overview of Charter equality rights decisions’ 123.

\textsuperscript{212} Vriend v Alberta paras 54-64, Eldridge v British Columbia (Attorney General) para 677-678. Although some lower courts still regard SERs as beyond the institutional competence of the courts the court has no jurisdiction ‘to second guess policy/political decisions’. See the decisions of O’Brien J and O’Driscoll J in Masse et al. v Ontario (Ministry of Community and Social Services) paras 81 134.
reasonableness of housing policies implemented. In addition, courts are not always seen as the only organ to deal with right to adequate housing violations. Institutions such as the established national human rights commissions which Canada also have a significant role to play enforcing and monitoring rights such as housing.

3.4.4 Summary

It is clear that Canada has a long way to go before its judiciary can take control of its position of ensuring the justiciability of the right to adequate housing as a human right and enforce it within the scope of the Canadian Charter. Unfortunately it is the same judiciary that holds the key to unlocking the justiciability of the right to adequate housing. By so doing they would be empowered to seize their power to review such an inaction or action of the government relating to housing policy measures undertaken. Canada is not protecting homeless people from arbitrary and discriminatory social welfare policies using age and social status to reduce the poor’s social welfare benefits. Judicial oversight of minority rights is usually seen as enhancing democracy by ensuring that relatively powerless and vulnerable groups are fully protected from violation of their rights. At the same time it remains to be seen whether the Canadian judiciary would even resort to the interpretation and enforce Canada’s international obligations in instances where the provisions of a domestic statute are similar to a ratified international treaty, in particular the right to adequate housing that forms part of SERs. As a result it can be reiterated that Canadian courts have been inconsistent in determining whether or not they can interpret and protect the right to adequate housing forming part of SERs solely by using the Canadian Charter. Courts in Canada need to interpret and apply the rights in the Canadian Charter in a manner that mirrors the interdependence and indivisibility of all human rights and to bring within its scope the

215 Gosselin v Quebec (Attorney General); Irwin Toy Ltd v Quebec (Attorney General) as examples.
216 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review - 2009 para 17; Hulchanski No homeland for the poor: Houselessness and Canada’s unhoused population 6; Tinta MF ‘Justiciability of economic, social and cultural rights in the
critical issues of poverty and homelessness among vulnerable groups. It can be argued that, to date, the judiciary has failed in its duty to conduct an independent review of government inaction or action. If it has done such a review it has selectively executed its mandate. Moreover, as evidenced by the analyses of the abovementioned cases, it deliberately and unabatedly continues to exclude right to adequate housing cases.

3.5 The role of the Canadian Human Rights Act in enforcing and monitoring right to adequate housing

3.5.1 Introduction

The Canadian Human Rights Act\(^{217}\) has, as its purpose

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\ldots\text{that all individuals have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.}\(^{218}\)
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In that light, what must be determined is whether the promotion of equality and protection against discrimination provisions are relevant within the context of an infringement of a right to adequate housing. The inclusion of ‘social condition’ as a prohibited discrimination ground is central in this debate. While the right to adequate housing is merely pursued through a policy driven measure in Canada, marginalisation of the poor is further deepened by the judiciary’s reluctance to view all adopted housing policies. In this instance the role of a national human rights commission cannot be underestimated. Therefore it is essential to determine if the Canadian Human Rights Commission is capacitated as an appropriate institution to monitor and enforce the right to adequate housing violations.

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\(^{218}\) Section 2 of the Canadian Human Rights Act.
3.5.2 An overview of the Canadian Human Rights Act

The main purpose of the Canadian Human Rights Act is to promote equality of opportunity and to protect individuals from discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or conviction for an offence for which a pardon has been granted.\(^{219}\) A practice based on one or more of these prohibited grounds of discrimination or on the effect of a combination of prohibited grounds constitute a discriminatory practice which may be the subject of a complaint.\(^{220}\) The Act provides for a Canadian Human Rights Commission that deals with complaints relating to a discriminatory practice\(^{221}\) and a Canadian Human Rights Tribunal that deals with inquiries.\(^{222}\)

The Canadian Human Rights Act Review Panel was constituted to conduct a comprehensive review of the Canadian Human Rights Act in 2000. The Panel’s scope included review of amongst others:

(a) The grounds listed in the Act;
(b) To ensure that the Act kept current with human rights and equality principles;
(c) The scope and jurisdiction of the Act, and
(d) Whether or not a ‘social condition’ should be added as a prohibited ground of discrimination in the Act.\(^{223}\)

The Panel heard the following:

Poor people face discrimination every day — indignities, lack of respect from the media, business, and all levels of government. A growing proportion of Canadians are living in poverty, and that poverty is deepening. Growing up in poverty has life-long effects on peoples’ lives and their ability to be healthy and participate in their community. Discrimination on the basis of poverty is not simply an attack on the dignity and equal citizenship of people living in poverty. It is itself a major cause of poverty.\(^{224}\)

\(^{219}\) Section 3 of the Canadian Human Rights Act.
\(^{220}\) Section 4 of the Canadian Human Rights Act.
\(^{221}\) Section 40 of the Canadian Human Rights Act.
\(^{222}\) Section 48(1) of the Canadian Human Rights Act.
Discrimination was expressed in Andrews v Law Society of British Columbia, which dealt with section 42 of the Barristers and Solicitors Act of 1979 - prohibiting admission to the Bar of British Columbia by Canadian citizens - and whether such prohibition violates section 15(1) as:

A distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

The Report found that there is a growing disparity between the poor and the affluent in Canada. It indicated that in June 1998 there had been an attempt to add ‘social condition’ as a discrimination ground to the Canadian Human Rights Act until the Senate Bill S-11 Bill was defeated in the House of Commons. Furthermore, the Report found that the current grounds represent the kinds of distinctions that have had a discriminatory effect on individuals in the past and can be expected to continue to have this effect unless steps are taken to prohibit their unjustifiable use. Despite such findings government did not amend the Canadian Human Rights Act thereby deepening, at national level, the marginalised and poor peoples’ hope of benefiting under the ‘social condition’ discrimination. However, at provincial and territorial level ‘social condition’ as a prohibited ground of discrimination had already been interpreted and defined by, for example, the Quebec Human Rights Tribunal in Commission des droits de la personne du Québec v Gauthier (1993), as follows:

The definition of ‘social condition’ contains an objective component. A person’s standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the

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226 Under heading ‘Discrimination’.  
decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred.  

The Report found that it was essential to protect the most destitute in Canadian society against discrimination and that the ground of ‘social condition’ should be defined in the Canadian Human Rights Act in a manner similar to the Québec definition which characterises ‘social condition’ to be relating to social or economic disadvantage.

The Report reiterated that the ground of ‘social condition’ should be designed to protect persons whose situation of poverty is on-going rather than persons who may temporarily find themselves in that condition. In deciding whether an individual or a group is protected by the equality provisions of the Canadian Charter, the Panel set out factors that the courts should consider:

a) Whether the personal characteristic is immutable because it is beyond the control of the individual or cannot be altered except at an unacceptable cost to the individual;

b) Whether those possessing the characteristic lack political power;

c) Whether there are historical patterns of discrimination against individuals with this characteristic;

d) Whether members of the group experience similar social and economic disadvantage;

e) Whether there is a relationship between the personal characteristic shared by members of the group and the grounds listed in the Canadian Charter.

It is evident that the country is divided on the ‘social condition’ issue as some territories and provinces have already incorporated it in their domestic policies while others have not. Such an inclusion on its own is a positive step towards pressuring national government to reform its policies and laws in order to afford those without a voice an entitlement to be used as a shield in claiming their equally enforceable rights within the Canadian society. Therefore, the Report recommended that ‘social condition’ be added

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to the prohibited grounds for discrimination listed in the Act.\textsuperscript{233} However, it is not surprising that the ‘social condition’ recommendation was rejected and considered to be too costly for government to adopt. The reason for the rejection was that the inclusion of the ground of ‘social condition’ might lead to considerable litigation over complex government programmes and an overall reluctance by government to initiate such social programmes. If those laws and programmes are found to be services available to the general public and if the principle of primacy means they are inoperative where they conflict with the Act, the Canadian Human Rights Tribunal\textsuperscript{234} would have the power to nullify legislative and government decisions with very wide policy and budgetary implications.\textsuperscript{235}

Considering that government agencies are at liberty to put forward a bona fide justification in the case of services the Tribunal could be involved in weighing policy choices as the courts are called on to do under the Canadian Charter.\textsuperscript{236} It is not clear how well the bona fide justification is suited to dealing with these concerns since the Tribunal and the courts have not been very consistent in defining the defence they apply in primacy cases.\textsuperscript{237} Systematic discrimination, within the form of ‘social condition’, has thus found its place within the indigent in Canadian society and adequate protection is afforded neither by the Tribunal/Human Rights Commission nor the courts, which seem to be divided on the justiciability of SERs in general.

Despite the possible application and interpretation of the existing section 3(1) of the Canadian Human Rights Act, more and more people are finding themselves homeless and the country seems to have disregarded the Panel’s recommendation to amend the Act. As it stands, the Act has not been amended to incorporate ‘social condition’ as one of the prohibited grounds, despite the escalating rate at which people are being

\textsuperscript{234} Established in terms of section 48.
\textsuperscript{235} Canadian Human Rights Act Review Panel Report 112.
\textsuperscript{236} Canadian Human Rights Act Review Panel Report 112.
\textsuperscript{237} Masse et al. v Ontario (Ministry of Community and Social Services). Gosselin v Quebec (Attorney General); Silano v British Columbia; Eldridge v British Columbia (Attorney General); Victoria (City) v Adam; Mohamed v Metropolitan Toronto (Department of Social Services) 1996 133 DLR (4th) 108 (Ont. Div. Ct.).
excluded from social assistance with no legal claim. Further, the Panel found that the Act makes no explicit reference to human rights, particularly the international human rights treaties that Canada has ratified. The Panel recommended that the Act be applied in instances where it had previously been excluded (human rights related issues) and aboriginal treaties and rights as recognised in terms of the Canadian Charter.

Nine years after the Canadian Human Rights Act Review Panel Report – in 2009 - a number of arguments were advanced in favour for including 'social condition' into the Canadian Human Rights Act as one of the grounds of discrimination as:

...it would advance the purpose and principles of the Canadian Human Rights Commission by extending discrimination protection to one of the most marginalized and vulnerable groups in society. Second, the addition of social condition to the CHRA would build upon the existing infrastructure of the statutory human rights regime and the expertise of the Canadian Human Rights Commission and Tribunal, enabling the resolution of complaints in a more economical way and in a manner that permits a more authentic reflection of the experience of discrimination where multiple grounds are involved. Third, the inclusion of social condition could inform jurisprudential developments in the Charter field, both in the application of equality rights under section 15 of the Charter and in the consideration of broader socio-economic claims, due to the symbiotic relationship between the Charter and human rights codes. Fourth, the addition of social condition would be of practical benefit to those suffering from socio-economic disadvantage, not only because they would have a legal recourse for discrimination where there previously was none, but also because the statutory human rights regime would provide a more accessible venue for those who, by definition, lack resources to fund an expensive court challenge.

As a result of not substantively recognising 'social condition' as a discrimination ground within the Canadian Human Rights Act a barrier exists that hinders poor and homeless people from advancing enforcement of their human right to adequate housing. Clearly, the country is still reluctant and grappling with implementing any of the

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recommendations advanced by the Panel Report to protect those economically disadvantaged.

3.5.3 An overview of the Canadian Human Rights Commission in enforcing and monitoring right to adequate housing

The Canadian Human Rights Commission is established in terms of the Canadian Human Rights Act\(^{242}\) and it applies throughout Canada, but only to federally regulated activities relating to discrimination.\(^{243}\) The Commission as a national institution is an authoritative body in as far formulating national policy likely to guide all the provincial and territorial tribunals on matters such as discrimination. In short, the Canadian Human Rights Commission has the power within federal areas of jurisdiction to:\(^{244}\)

(a) Develop and conduct information programs to foster public understanding of the Canadian Human Rights Act;
(b) Sponsor research programs relating to its duties and functions, liaison with similar bodies or authorities in the provinces in order to foster common policies and practices and to avoid conflicts respecting the handling of complaints in cases of overlapping jurisdiction;
(c) Make such recommendations, suggestions and requests concerning human rights and freedoms as it receives from any source;
(d) Cause to be carried out such studies concerning human rights and freedoms as may be referred to it by the Minister of Justice;
(e) Review any regulations, rules, orders, by-laws and other instruments made pursuant to an Act of Parliament;
(f) Try by persuasion, publicity or any other means that it considers appropriate to discourage and reduce discriminatory practices and include in a report referred to in section 61 comments on any such recommendation, suggestion or request it has made.

The Canadian Human Rights Act entrusts the Canadian Human Rights Commission, in terms of section 26(1), with the task of investigating human rights, which as is known, are rights that define what we are all entitled to — a life of equality, dignity, and respect. However, human rights in this regard are narrowly interpreted to focus exclusively on the discrimination aspect and excluding all SERs from investigation. Therefore, the right

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\(^{243}\) Sections 5 and 39-40 of the Canadian Human Rights Act.

\(^{244}\) Canadian Human Rights Act Article 27.
to adequate housing exclusively and as part of SERs are automatically excluded from the mandate of the Canadian Human Rights Commission.

Although the Canadian Human Rights Commission recently conducted an investigation into the state of housing conditions for aborigines and non-aborigines the findings were not critical of government’s housing implementation but merely provide an overview of their conditions without indicating if government measures taken were adequate or not. The Commission’s role is moot and how it sees itself is as a result of the environment within which it operate and it is unlikely that it would be critical of government housing polices any time soon. Victims of this right still find it difficult to invoke any provision of the Canadian Charter that could be interpreted to safeguard SERs’ violations. As a result the limited mandate of the Canadian Human Rights Commission has increased the struggle for recognition and enforcement of the right to adequate housing in Canada. The main concern is the narrow interpretation of the discrimination clause to accommodate poverty and homelessness as a ‘social condition’ amenable to protection. Consequently, the mandate of the Canadian Human Rights Commission as it stands does not cater for broader human rights enforcement and the poor and homeless regard their economic disadvantage a ‘social condition’ preventing them from being treated on equal footing with majority of Canadians. In fact there is an existing interrelationship between the ground of ‘social condition’ and other grounds listed in the Canadian Human Rights Act such as race, sex and disability as investigated by the Canadian Human Rights Act Review Panel.

The Ontario Human Rights Commission had found that government has an obligation to prevent third parties from infringing SERs and that human rights commissions have a critical role in fulfilling this obligation. However, it can be argued that the formulation

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247 Ontario Human Rights Commission Human Rights Commissions and Economic and Social Rights, available at
of these institutions has been made in such a way that they do not go beyond the policy-driven method of SERs and are precluded from investigating any violation of the right to adequate housing. It is at this juncture that Canada should rather consider adopting a legislative framework that extends the powers of the Canadian Human Rights Commission to deal with enforcement of all SERs. Alternatively Canada should allow the existing provisions of the Canadian Charter to be utilized to enforce right to adequate housing cases. The functioning of the Canadian Human Rights Commission to monitor and enforce the right to adequate housing cases is likely to enhance its role as a domestic robust institution even at international level and to emerge as one of the key significant institutions that give meaningful content to the right to adequate housing. In this regard, the Canadian Human Rights Act Review Panel Report made the following recommendations:

(a) The Canadian Human Rights Commission should have the duty to monitor and report to Parliament and the UN Human Rights Committee on the federal government’s compliance with international human rights treaties, included in its legislation;\(^{248}\)

(b) Provincial and territorial human rights commissions, in consultation with the Commission, may wish to comment on matters within their respective jurisdictions;\(^{249}\)

(c) There is a role to be played by the Commission in monitoring Canada’s compliance with international human rights treaties, either alone or in cooperation with provincial human rights commissions;\(^{250}\)

(d) The Commission’s power to monitor Canada’s compliance with international treaties should be consistent with its existing power to review domestic regulations,\(^{251}\)

(e) The Commission could play a useful role by monitoring and reporting on these rights;\(^{252}\)

\(^{248}\) [http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf> (date accessed 2015-02-04).

\(^{249}\) Canadian Human Rights Act Review Panel Report para 130.


(f) If social and economic rights were added to the Act, it would be necessary to determine whether some or all of them impose duties on either public and private entities or just on governmental entities.\textsuperscript{253}

3.5.4 Summary

Unless and until 'social condition' is included as part of the Canadian Human Rights Act and followed by an interpretive context safeguarding poor and homeless people there will be no change from the status quo but rather an increasing state of poverty and homelessness that existing policies are failing to address. The poor and homeless minority will continue to be marginalised and the role of the Canadian Human Rights Commission in monitoring and enforcing the right to adequate housing will also continue to be moot and rendered redundant particularly when Canada is struggling to develop a uniform interpretation approach concerning its domestic SERs' obligations. It is vital that a critical overview of its international obligations be explored to determine if there is hope for poor and homeless Canadians to obtain an avenue to be invoked in searching for an effective remedy.

3.6 Canada’s [non]-compliance with international obligations

3.6.1 Introduction

Under Canadian law the right to adequate housing and SERs in general are not included as fundamentally recognised rights but are policy driven.\textsuperscript{254} Canada has broadly acknowledged before international forums that the advancement of SERs is achieved mostly through policies, programmes and incentives rather than through legislation.\textsuperscript{255} Nonetheless, Canada, as one of the founding members of the UN,\textsuperscript{256} has an obligation to ensure the protection and enforcement of all human rights including

\textsuperscript{252} Canadian Human Rights Act Review Panel Report Chapter 17 (f), 5.
\textsuperscript{253} Canadian Human Rights Act Review Panel Report Chapter 17 (f), 5.
\textsuperscript{254} Porter ‘Toward a comprehensive framework for ESC rights practice’ 7 22.
housing for its homeless, low income earners and poor people irrespective of whether it has incorporated international human rights treaties. A challenge in Canada is that most ratified human rights treaties have not been incorporated into its domestic legislation despite the ICESCR’s emphasis, in terms of Article 2(1), to adopt domestic legislation to give effect to its provisions.\textsuperscript{257} Nevertheless, treaty obligations, such as those imposed by the ICESCR, do have an impact on the interpretation of domestic legislation, although the extent of that impact varies.\textsuperscript{258}

In view of the above it is interesting to evaluate the extent to which Canada as a developed country has or is going to comply or implement ratified SERs’ treaties dealing in particular with the right to adequate housing within its domestic system. Such an evaluation is essential to determine the level of complementarity between international and domestic systems in addressing the plight of the poor and homeless. Considering that Canada has been a party to most international treaties dealing with SERs for more than three decades it is expected to have a better understanding of their respective requirements and it has had enough time to fully devise and implement the SERs’ instruments obligations domestically.

\textbf{3.6.2 Canada’s [non]-compliance with its ICESCR obligations}

Canada ratified the ICESCR on May 1976\textsuperscript{259} and is considered to have played a significant role internationally in advocating SERs and the ‘right to adequate housing’.\textsuperscript{260} Considering that Canada has been a state party to the ICESCR for over 39 years it is vital to evaluate how Canada has interpreted its role in terms of Article 2(1) and Article 16(1) of the ICESCR. As a point of departure it is essential to first identify what is argued to be a loophole within the ICESCR reporting framework and language adopted. It is argued that from its inception, this reporting framework and language ambiguity has

\textsuperscript{257} Jackman and Porter ‘Justiciability of social and economic rights in Canada’ 8; Article 2(1) of the ICESCR.


\textsuperscript{260} Porter ‘The right to adequate housing in Canada’ 107.
allowed state parties’ to devise what, in their view, is the appropriate way in which to realise the rights under the ICESCR. As a result of such vagueness or ambiguity several countries, including Canada, have adopted approaches different from what the CESCR in fact sought, i.e. a legislative approach.

The ambiguity loophole is the manner in which Article 2(1) and Article 16(1) of the ICESCR\textsuperscript{261} are phrased. While they are very explicit on the obligations of state parties’ to progressively realise all SERs, it could be argued that these two provisions are in conflict with each other since Article 2(1) supports the adoption of a legislative measure while Article 16(1) refers only to the submission of a report covering measures undertaken. Only after it realised that most nations would opt for policies as opposed to legislative measures when reporting under Article 16 of the ICESCR did the CESCR rectify the Article 2(1) vagueness. This was in 1999 - 23 years after Canada ratified the ICESCR. The CESCR issued a directive in the form of General Comment No. 3 which states succinctly that:

The means which should be used in order to satisfy the obligation to take steps are stated in Article 2(1) to be ‘all appropriate means, including particularly the adoption of ‘legislative measures’. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable.\textsuperscript{262}

It is evident from Canada’s submitted reports under the ICESCR that it has adopted a policy approach and not a legislative-measures approach in achieving the observance of rights in the ICESCR and it has submitted its reports in terms of Article 16. However, the clarity required by the CESCR seems to have occurred too late since some states, including Canada, had already developed what they deemed to be the appropriate means to realising SERs within their domestic domain. This is based on the fact that support for the adoption of a policy approach has not come as a surprise since most

\textsuperscript{261} See Chapter 2 above.
states were not in support of the ICESCR despite the fact that the ICCPR and ICESCR were adopted on the same day under the same General Assembly resolution.\footnote{263} The ICESCR’s procedures for reporting on measures taken in Article 16 and the adoption of legislation in Article 2(1) have thus given Canada the leeway to avoid full compliance with its obligations merely through its interpretation of the ICESCR. It can be argued that the interpretive approach followed by Canada has reaffirmed the fact that the legislative method is not the only measure to adopt in achieving progressive realisation of SERs, and that a policy approach may also be in compliance. In other words, all other appropriate means to fully realise rights under the ICESCR may still be in compliance with the obligations of the ICESCR. Clearly, interpretation of the ICESCR’s obligations thus far remains within the hands of each state party. Consequently, the possibility exists that one state party could adopt SERs as a policy measure and still allow its citizens full access and equal enjoyment of these rights despite the absence of a legislative measure. In that case, it could be argued that the CESCR would be bound to accept that such measures adopted are nevertheless fully compliant in achieving the progressive realisation of all the rights under the ICESCR. Therefore, the CESCR’s failure to persuade Canada to change its policy to the legislative approach is illustrated by its on-going pleas over the years in its observations and its recommendations, all of which have all fallen on deaf ears.\footnote{264}

It may be argued that there is nothing wrong with Canada submitting its reports concerning policy measures undertaken in realising SERs, since such an approach is in compliance with other measures/means as prescribed by Article 2(1) of the ICESCR. However, the adopted housing policy measure has failed to protect the poor from being exposed to vulnerability and marginalisation and that failure cannot be said to be in compliance with the ICESCR imposed obligations. The vague language in Article 16 may have resulted in the full realisation of SERs being compromised since it was left to states such as Canada to continue reporting on one measure (policy) and excluding the other (legislative). However, if one considers the approach adopted by Canada, it clearly

\footnote{263} See Chapter 2.2.4 above, Dennis and Stewart ‘Justiciability of economic, social and cultural rights’ 476.
\footnote{264} Hulchanski No homeland for the poor: Houselessness and Canada’s unhoused population 4.
constitutes a setback to the full realisation of SERs, as illustrated by the fact that after 39 years poor Canadians are still struggling to achieve an adequate standard of living, lacking the adjudicative space for claiming SERs as a central component of equality, security and dignity. Domestic legislation of the right to adequate housing is thus an essential step towards ensuring judicial enforcement or review in cases of non-compliance with their set housing policy objectives. If Canada is to adopt legislative measures, such measures will have to be supported by appropriate, well-directed policies and programmes implemented by the executive, whom Canada, with its abundance of resources, has proved it possesses.

### 3.6.3 Canada’s domestic understanding and or interpretation of its ICESCR obligations

There are several notable court decisions that have dealt extensively with the impact of international human rights law obligations on Canada’s domestic law. The Special Rapporteur on adequate housing: Mission to Canada found that:

> Human rights legislation in Canada affirms that equality for disadvantaged groups often requires governments or private actors to adopt positive measures to address the needs of disadvantaged groups. This principle offers important potential for providing effective remedies with respect to the right to adequate housing in Canada. Jurisprudence under human rights legislation in Canada has also broken new ground internationally in its recognition and prohibition of discrimination on the basis of poverty or income level in housing. Discrimination on the basis of poverty has been found to deny women, single mothers, social assistance recipients and other disadvantaged groups access to the most affordable rental housing or to affordable credit for homeownership.

Besides such a strong human rights affirmation, poverty continues to worsen and Canada is doing little to comply with or implement its international obligations. Poverty as a ‘social condition’ to which poor people are exposed is bluntly denied treatment as a discrimination practice. Such a marginalisation is worrisome when courts are privy to human rights knowledge, their indivisibility and interdependence.

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265 Canadian Charter sections 7 and 16; Porter ‘The right to adequate housing in Canada’.
266 Porter ‘Expectations of equality’, 34.
267 Grootboom para 42.
269 The Special Rapporteur on adequate housing: Mission to Canada para 31.
The impact of human rights legislation was dealt with in *Winnipeg School Division No. 1 v Craton*, relating to the compulsory retirement at a fixed date following a person’s sixtieth birthday, in terms of section 50 of the Public Schools Act 1980 and the Collective Bargaining Agreement. At issue before the Supreme Court of Canada was the conflict between the provisions of the Public Schools Act and the Manitoba Human Rights Act of 1974, section 6(1) of which prohibited discrimination in employment on account of age. McIntyre J emphasised that:

> Human rights legislation is public and fundamental law of general application. If there is a conflict between this fundamental law and other specific legislation, unless an exception is created, the human rights legislation must govern.

Therefore, the Public Schools Act and the Collective Bargaining Agreement were void and could not operate to compel a teacher’s retirement. Section 50 of the Public Schools Act 1980 was seen as relating only to teachers and creating a limited exception to section 6(1) of the Human Rights Act. However this argument was found to be without merit since:

> Human rights legislation is of a special nature and declares public policy regarding matters of general concern. It is not constitutional in nature in the sense that it may not be altered, amended, or repealed by the Legislature. It is, however, of such nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.

Perhaps one of the reasons why Canada still delays and or is reluctant to allow justiciability of all SERs is because it fears that its imposed obligations would be burdensome to implement, with courts waiting to scrutinise and enforce the non-compliance thereof. Clearly, the significance of domesticated human rights treaties seems to be one avenue likely to ensure protection and enforcement of SERs through Canadian courts. Undoubtedly, the domestication of ratified human rights treaties is likely to have a positive impact on expressing the justiciability of SERs and on changing judicial perceptions of these rights.

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270 1985 2 SCR 150
271 *Winnipeg School Division No. 1 v Craton* para 8.
272 *Winnipeg School Division No. 1 v Craton* para 7.
273 *Winnipeg School Division No. 1 v Craton* para 8.
Nevertheless, in the absence of domestic legislation, nothing prevents the judicial interpretation of Canada’s obligations in dealing with violations of SERs. In interpreting ICESCR obligations, Canadian courts would probably rule that Canada is failing to comply with these obligations domestically and would possibly grant remedies appropriate under the circumstances. The Supreme Court of Canada has confirmed, in both majority and dissenting judgments, the interpretive value of international instruments, even where they have not been made part of domestic laws, particularly in the areas of interpretation of the Canadian Charter and in the interpretation and application of administrative law. Such a novel interpretation can be found in Reference Re Public Service Employee Relations Act.²⁷⁴ It dealt with whether or not Alberta’s legislation²⁷⁵ violated the guarantee of freedom of association in section 2(d) of the Canadian Charter by prohibiting strikes and imposing compulsory arbitration to resolve impasses in collective bargaining and, if so, whether such violation could be justified under section 1 of the Canadian Charter. However, the substantial and significant reference to Canada’s international obligations was emphasised in the dissenting judgment, where Dickson CJ held that:

Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its border the protection of certain fundamental rights and freedoms which are also contained in the Charter. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in Charter interpretation.²⁷⁶

In short, Dickson CJ found that:

Though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada’s international obligations under human rights conventions.²⁷⁷

²⁷⁴ Reference Re Public Service Employee Relations Act (Alta.) 1987 1 SCR 313.
²⁷⁶ Reference Re Public Service Employee Relations Act (Alta.) para 59.
²⁷⁷ Reference Re Public Service Employee Relations Act (Alta.) para 60.
The necessity for the domestic courts to take cognisance of Canada’s international obligations was also reaffirmed in *Slaight Communications Inc. v Davidson*. The issue was whether a court could order an employer to give a positive reference letter to a former employee or whether such a remedy would infringe the employer’s right to freedom of expression in a way that could not be justified under section 1 of the Canadian Charter. Dickson CJ found, with reference to *Reference Re Public Service Employee Relations Act*, that the Canadian Charter must be interpreted in such a way as to give effect to the presumption that it offers at least as much protection as the rights Canada is bound to ensure under international human rights law. In *Baker v Canada (Ministry of Citizenship and Immigration)* the court considered the effect of Canada’s ratification of the Convention on the Rights of the Child (CRC) in the immigration context. L’Heureux-Dubé J held that while it is true that the provisions of the CRC and other human rights treaties have no direct application in Canadian law, they nevertheless will have considerable interpretive effect. In this regard, L’Heureux-Dubé J found that:

> The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help the values that are central in determining whether this decision was a reasonable exercise of the H[umanitarian] and C[ompassionate] Review] power.

Scott has affirmed that the court in this case embraced a cosmopolitan conception of the rule of law, and that Canadian courts should begin to show fidelity to the international legal order by seeking to harmonise their domestic law with international law as interpretatively as possible. Therefore, the presumption of compliance with international law consequently includes Canada’s legal obligations under

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278 *Slaight Communications Inc. v Davidson* 1989 1 SCR 1038.
279 *Reference Re Public Service Employee Relations* 349.
280 *Slaight Communications Inc. v Davidson* para 1056 H-I.
283 *Baker v Canada* para 71.
284 Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 100 101.
unincorporated treaties, namely those that Canada has ratified but has not made an effort to domesticate into its law.\textsuperscript{285} The Supreme Court of Canada can be commended for adopting this interpretive context, yet to date the court has selectively and consistently failed to extend such a novel interpretation to enforce Canada’s international obligations to maximally utilise its available resources in progressively realising the right to adequate housing. The role of the courts should be to ensure compliance with the country’s international human rights obligations\textsuperscript{286} yet to be extended to the right to adequate housing. The courts’ reluctance to enforce rights such as housing could be argued to be defeating Canada’s purpose of ratifying and implementing an international treaty since it knows it will not respect or comply with its obligations on the assumption that the Canadian Charter reigns supreme.\textsuperscript{287} Consequently, the need to comply is based on the notion that the executive is empowered to enter into international obligations which are valid and enforceable against the state as a whole and not only against the executive branch of the government.\textsuperscript{288} Ross further asserts that:

\begin{quote}
...if the courts themselves are prepared to recognise these obligations as valid and binding upon the state in international law, surely they can also presume that other branches of government will similarly recognise such obligations.
\end{quote}

From the above it is clear that there is a persistent and inconsistent understanding and interpretation of Canada’s international obligations. From such an analysis SERs have been consistently excluded and neglected as being beyond judicial review scope despite express and clear ICESCR provisions to protect them. Moreover, the manner in which Canada has or is interpreting or applying its international obligations as imposed by the ICESCR leaves much to be desired, in particular, the resistance to incorporate the right to adequate housing in accordance with the legislative aspirations of Article 2(1) of the ICESCR. It is evident that, should the courts decide to invoke the interpretive

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{285}] Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 100 101; \textit{Slaight Communications v Davidson} 1056-1057.
\item[\textsuperscript{286}] \textit{Baker v Canada} paras 69-71.
\item[\textsuperscript{288}] Ross ‘Limitations on human rights in international law: Their relevance to the Canadian Charter of Rights and Freedoms’ 194.
\item[\textsuperscript{289}] Ross ‘Limitations on human rights in international law: Their relevance to the Canadian Charter of Rights and Freedoms’ 195.
\end{itemize}
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context of enforcing Canada’s international obligation to fulfil the right to adequate housing, in the absence of domestic legislation, Parliament can pass new laws if it is unhappy with a court decision. However, the binding effect of these international obligations upon the state and the concept of comity of nations means that Canadian courts can and should, on a principled basis, have due regard for conventional international law when interpreting ambiguous domestic law. Preference for SERs to be in the form of domestic legislation is strongly supported by the Maastricht Guidelines, since:

…the direct incorporation or application of international instruments recognizing economic, social, and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

The CESCR reiterates the need to interpret domestic laws in accordance with international obligations through General Comment No. 9:

It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a state's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the state to comply with the Covenant, international law requires the choice of the latter.

General Comment No. 9 lays the foundation for an affirmation of the central importance of rights claiming a more coherent integration of SERs into our understanding of law and the process of adjudication of rights. In addition, it is seen as situating the claiming of rights and the participation of rights holders at the centre of the legal framework by placing the onus on the state to justify any denial of judicial remedies and to

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290 Eid ‘Interaction between international and domestic human rights law: A Canadian perspective.’
291 Ross ‘Limitations on human rights in international law: Their relevance to the Canadian Charter of Rights and Freedoms’ 195.
293 General Comment No. 9 para 15.
demonstrate the availability and effectiveness of alternative administrative remedies.\textsuperscript{294} Canada’s ratification of the ICESCR, therefore, automatically obliges it to treat SERs as enforceable human rights, subject to effective judicial remedies,\textsuperscript{295} and not as mere policy objectives. For example, \textit{Suresh v Canada (Minister of Citizenship and Immigration)} dealt with a detained refugee who applied for an immigrant status and was about to be deported on allegation that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka.\textsuperscript{296} McLachlin CJ reiterated the point that international norms to which Canada has subscribed have played an important role in the interpretation of the Canadian Charter.\textsuperscript{297} However, in contravention of the aspirations of the ICESCR, it is the interpretation of the same Canadian Charter that is being applied to deny victims their right to the progressive realisation of the right to adequate housing, in the process ignoring the same international human rights norms.

As a result, government has in effect been urging its courts to interpret the Canadian Charter in a manner that denies the protection of the marginalised minority’s right to adequate housing against violation. It has done so by weakening the enforcement mechanisms of SERs by failing to domesticate a legislative housing measure to protect them.\textsuperscript{298} This approach is \textit{prima facie} in violation of Article 2(1) of the ICESCR. The domestic system is yet to yield to the impact of the interpretive text of Canada’s international obligations and ensure enforcement of the right to adequate housing, despite the absence of domestic legislation. On the other hand, Canada has consistently submitted its state reports to the CESCR on the progress it has made in

\textsuperscript{295} UN CESCR: Concluding observations: Canada para 21.
\textsuperscript{296} \textit{Suresh v Canada (Minister of Citizenship & Immigration)} 2002 SCC 1 2002 1 SCR 3
\textsuperscript{298} UN CESCR Concluding observations: Canada (2006) para 11(b).
fulfilling all the rights as contained in the ICESCR. However, Canada has vehemently reiterated its reluctance to ratify this Protocol without any further explanation and this is an indication that the realisation of the right to adequate housing will remain a policy-driven approach and totally excluded from the domestic and regional enforcement evaluations.

3.6.4. **Canada’s record of [non]compliance before the UN CESCR**

3.6.4.1 **Introduction**

Over the years, there has been mixed reaction and concerns have been raised by the CESCR about Canada’s failure or [in] consistency to fully implement international human rights treaties within its domestic laws. The CESCR reports are essential in providing guidelines and recommendations to state parties’ in as far as the interpretation and implementation of ICESCR obligations are concerned. As a monitoring body of all SERs the CESCR has been consistent in assessing states’ obligations with a focus on vulnerable and marginalised groups. From 1993 to 2009, the CESCR was very critical of Canada’s state reports on measures undertaken to progressively realise SERs in general. It is the less privileged and voiceless groups in society that are left to feel the effect of this non-compliance with international obligations. An assessment of these reports is crucial to determine whether any progress in the realisation of SERs has been made in Canada, or whether there is still a need for change within the Canadian domestic system to afford recognition and enforcement of SERs. The Addendum hereto attached at the end of 3.8 on page 187 summarises the (non)-compliance position which is discussed below.

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299 In terms of Article 16(1) of the ICESCR the States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.

300 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review - 2009 para 9.

301 Jackman and Porter ‘Justiciability of social and economic rights in Canada’ 10.

302 Porter ‘Toward a comprehensive framework for ESC rights practice’ 16, 17.

303 Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 105; Porter ‘Toward a comprehensive framework for ESC rights practice’ 5, 17.
3.6.4.2 1993 CESCR review of Canada’s compliance with ICESCR

In 1993 Canada submitted its first report to the CESCR that gave the CESCR an indication that the country was utilising its available resources to progressively realise all SERs. The CESCR noted the judiciary’s efforts to apply the Canadian Charter in balancing the rights of all citizens and its recognition of the importance of effective legal remedies against violations of SERs. The CESCR was satisfied with the fact that efforts were being made to strengthen human rights protection by applying the Canadian Charter and applicable human rights statues. Most importantly, sections 7 and 15 of the Canadian Charter were applied in certain instances to cover certain SERs and the Supreme Court of Canada had, on occasion, turned to the ICESCR for guidance on the meaning of provisions of the Canadian Charter. Canada further conceded that its courts were in the early stages of this novel interpretation and application of the ICESCR to domestic cases; in future, it would give full consideration to the rights in the Covenant when interpreting and applying the Canadian Charter. However, the CESCR reported that, despite such practices being prohibited there was still widespread discrimination in housing provision against people with children, people on social assistance, people with low income, and people who were indebted. With Canada’s available resources not being adequately applied to alleviate homelessness, marginalised Canadians are powerless since they do not have any judicial remedies, owing to SERs being policy-driven. Issues of availability of resources as envisaged in Article 2(1) and in General Comment No. 3 of the CESCR are crucial to a state party such as Canada. In terms of General Comment No. 3 paragraph 2 the obligation is to ‘take steps’ and to apply the maximum of available resources:

Such steps must be ‘deliberate, concrete and targeted’ as clearly as possible towards meeting the obligations recognised in the Covenant.


307 UN CESCR Concluding observations: Canada (1993) para 18; Mission to Canada para 50. Mohamed v Metropolitan Toronto (Department of Social Services) found that the social assistance scheme was discriminatory on the basis of age as it did not provide for direct welfare payments or equivalent benefits for persons under 16. However, it was found to be a justifiable limit on the right under section 1 of the Canadian Charter. Mohamed v Metropolitan Toronto (Department of Social Services), 1996 133 DLR (4th) 108 (Ont. Div. Ct.).
Any measures taken by a state party within its available resources will be subjected to a review, preferably in the form of a legal remedy which is a contentious issue yet to be tackled by the Canadian judiciary. It is a generally held perception that the utilisation of available resources to progressively realise SERs poses a challenge to underdeveloped and developing countries but not to affluent countries such as Canada. Thus violations of SERs should be non-existent in affluent countries because of the high standard of living. The escalating state of homelessness and the unavailability of appropriate housing in Canada can therefore, be argued to constitute a violation of the right to adequate housing which cannot be justified within the ambit of the ICESCR. The 1993 CESCER’s Concluding observations raised several concerns, amongst others:

(a) References to or descriptions of SERs as mere ‘policy objectives’ of governments rather than fundamental human rights;

(b) Certain provincial human rights legislation not always being applied in a manner that would provide improved remedies against violations of SERs, particularly those concerning the rights of families with children and the right to an adequate standard of living, including food and housing;

(c) Canada’s failure to provide statistics regarding the control of homelessness within its borders, an aspect which appears to be its main challenge,

(d) The fact that the problem of homelessness and inadequate housing has grown to such an extent that the mayors of Canada’s 10 largest cities have now declared homelessness a national disaster;

(e) Certain court cases ruling that the right to security of the person in the Canadian Charter does not protect Canadians from, among others, infringements of their

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309 Grootboom para 38, 41 and 47; Nolan, Porter and Langford The justiciability of social and economic rights: An updated appraisal.
316 UN CESCER Concluding observations: Canada (1993) para 19.
rights to adequate food, clothing and housing, despite the Supreme Court ruling on the need to interpret these rights under sections 7 and 15 of the Canadian Charter;\(^\text{318}\)

(f) Canada’s difficulty in implementing the ICESCR in its provincial jurisdictions as a result of its complex federal system;\(^\text{319}\)

(g) The fact that there is an escalating rate of gross disparity between aborigines and the majority of Canadians with respect to the enjoyment of Covenant rights, such as adequate housing and other amenities of life;\(^\text{320}\)

(h) The economic marginalisation of aborigines and the dispossession of their land, in contravention of the recommendations of Royal Commission on Aboriginal Peoples and in violation of aboriginal treaty obligations;\(^\text{321}\)

(i) The unavailability of affordable and appropriate housing and the widespread discrimination with respect to housing that creates obstacles for women trying to escape domestic violence.\(^\text{322}\)

In concluding its report on Canada the CESCR recommended that, amongst others:

(a) There should be explicit reference to SERs in the country’s human rights legislation;\(^\text{323}\)

(b) The Canadian judiciary should be provided with training in the obligations imposed on Canada by the ICESCR and their effect on the interpretation and application of Canadian law;\(^\text{324}\)

(c) Courts should continue to adopt a broad and purposive approach to the interpretation of the Canadian Charter and of human rights legislation to provide appropriate remedies for violations of SERs in Canada;\(^\text{325}\)

(d) Canada should inform the CESCR of any developments and measures taken with regard to the issues raised and recommendations made.\(^\text{326}\)

It can be argued that in 1993, the country did not have much knowledge about the steps taken with regard to the CESCR’s set reporting standards. The first report was the

\(^{318}\) UN CESCR Concluding observations: Canada (1993) paras 15, 21, 23.

\(^{319}\) UN CESCR Concluding observations: Canada (1993) para 12.

\(^{320}\) UN CESCR Concluding observations: Canada (1993) para 17.

\(^{321}\) UN CESCR Concluding observations: Canada (1993) para 18.

\(^{322}\) UN CESCR Concluding observations: Canada (1993) para 28.

\(^{323}\) UN CESCR Concluding observations: Canada (1993) para 25.

\(^{324}\) UN CESCR Concluding observations: Canada (1993) para 29.

\(^{325}\) UN CESCR Concluding observations: Canada (1993) para 30.

\(^{326}\) UN CESCR Concluding observations: Canada (1993) para 32.
country’s opportunity to determine a way forward for the progressive realisation of all SERs in Canada.

3.6.4.3 1998 CESCR review of Canada’s report
The 1998 CESCR review noted the improved standard of living enjoyed by all Canadians in terms of the Human Development Index Report.\(^\text{327}\) It noted, too, the fact that the Supreme Court of Canada had found that section 15 of the Canadian Charter imposed positive obligations on governments to allocate resources and implement programmes to address social and economic disadvantage, thus providing effective domestic remedies for disadvantaged groups under section 15 of the Canadian Charter.\(^\text{328}\) The CESCR commended Canada’s step in appointing the Royal Commission on Aboriginal Peoples to investigate a wide range of serious issues affecting aborigines in Canada.\(^\text{329}\) The CESCR welcomed the Canadian Human Rights Commission’s statement on the inadequate protection and enforcement of SERs in Canada and its proposal for the inclusion of those rights in human rights legislation, as recommended by the CESCR in 1993.\(^\text{330}\) However, the CESCR was less impressed by certain issues which were raised in the 1993 report. It found that Canada had taken unprecedented and arguably retrogressive measures, undermining the right to adequate housing.\(^\text{331}\) In its report, Canada argued that SERs, such as the right to adequate housing, are ‘vague and uncertain’ and that assessing the extent to which resources must be allocated to the progressive realisation ‘is not a concept which easily lends itself to adjudication’.\(^\text{332}\) At the same time, Canada contradicted itself by submitting that section 36 of the Canadian Charter\(^\text{333}\) was an appropriate provision to protect and

\(^\text{327}\) UN CESCR Concluding observations: Canada (1998) para 3.
\(^\text{328}\) UN CESCR Concluding observations: Canada (1998) para 4; Eldridge v British Columbia (Attorney General) 1997 3 SCR 624.
\(^\text{329}\) UN CESCR Concluding observations: Canada (1998) para 7.
\(^\text{333}\) Section 36 enshrines in the constitution a value on equal opportunity for the Canadian people, economic development to support that equality, and government services available for public consumption. Subsection 2 goes further in recognising a ‘principle’ that the federal government should ensure equalisation payments.
enforce the SERs\textsuperscript{334} and that this approach was yet to be tested by the courts. On contradictions such as this, Liebenberg asserts that:

\begin{quote}
It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity.\textsuperscript{335}
\end{quote}

Consequently, similar to the 1993 findings, the CESCR found that Canada’s failure to take appropriate measures to prevent and to respond to the escalating rate of homelessness was a violation of the right to adequate housing and also to life.\textsuperscript{336} The CESCR noted that, despite Canada’s boast that on average its citizens enjoyed a singularly high standard of living, this had not yet been achieved, as reflected in the fact that UNDP’s Human Poverty Index ranked Canada tenth on the list of industrialised countries.\textsuperscript{337} The CESCR also noted that it:

\begin{quote}
...is deeply concerned to receive information that provincial courts in Canada have routinely opted for an interpretation which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights.\textsuperscript{338}
\end{quote}

The CESCR has been concerned with the unavailability of SERs remedies within the Canadian domestic law.\textsuperscript{339} Canadian courts are aware of this interpretive presumption that the legislature must have respect for the values and principles contained in international law, both customary and conventional.\textsuperscript{340} As a result, an interpretation reflecting these values and principles should be adhered to.\textsuperscript{341} The Supreme Court of

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\textsuperscript{334} UN High Commissioner for Human Rights (1998) para 127.
\textsuperscript{336} UN CESCR Concluding observations: Canada (1998) paras 24 28 34 46.
\textsuperscript{338} UN CESCR Concluding observations: Canada (1998) para 15; Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 108. Irwin Toy Ltd v Quebec (Attorney General).
\textsuperscript{339} Porter ‘Toward a comprehensive framework for ESC rights practice’ 26-27.
\end{flushright}
Canada has held that even when the protections in these documents have not been enacted into Canadian law they may be taken into account in interpreting and applying Canadian laws and regulations. Another concern expressed by the CESCR was the fact that there seemed to be a reluctance on the part of government to urge its courts to interpret the Canadian Charter in a manner intended to promote and protect the right to an adequate standard of living and other related rights. In this regard, the CESCR reiterated that:

The Committee urges the federal, provincial and territorial governments to adopt positions in litigation which are consistent with their obligations to uphold the rights recognised in the Covenant.\(^{344}\)

The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation to include social and economic rights. Moreover enforcement mechanisms provided in human rights legislations need to be reinforced to ensure that all human rights claims not settled through mediation are promptly determined before a competent human rights tribunal.\(^{345}\)

As Canadian policies seemed to be inadequate in addressing its socio-economic challenges, the CESCR further reiterated that:

The Committee, as in its review of the previous report of Canada, reiterates that economic and social rights should not be downgraded to ‘principles and objectives’ in the on-going discussions between the Federal Government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms.\(^{346}\)

Furthermore, the CESCR urged Canada to refrain from embarking on economic marginalisation and material deprivation of aborigines and failure to accord them or protect their human rights as guaranteed in the ICESCR. However, the CESCR’s concerns and recommendations were not addressed in 1993 and 1998. The situation was very similar when the 2006 report was assessed by the CESCR.

\(^{344}\) UN CESCR Concluding observations: Canada (1998) para 50.
\(^{345}\) UN CESCR Concluding observations: Canada (1998) para 51.
\(^{346}\) UN CESCR Concluding observations: Canada (1998) para 52.
\(^{347}\) UN CESCR Concluding observations: Canada (1998) paras 17 18 43.
3.6.4.4 2006 CESCR findings on Canada’s compliance

In the 2006 review of the obligations imposed on Canada by the ICESCR, the CESCR reiterated its disappointment with Canada’s failure to comply with most of its 1993 and 1998 recommendations.\(^\text{348}\) Canada continues to pursue SERs through policy-driven measures and regards such an approach as an interpretation of its compliance with the ICESCR obligations instead of adopting a legislative housing framework.\(^\text{349}\) The CESCR saw this as a restrictive interpretive approach\(^\text{350}\) under the ICESCR and consequently the CESCR seems, for years now, to have doubted the sincerity of Canada’s endeavours to fulfil the ICESCR obligations. Taking cognisance of the fact that not much had previously been achieved, the CESCR decided to focus its recommendations on ensuring that Canada dealt mainly with matters outstanding from its two previous reports. The CESCR directed Canada to include in its sixth periodic report:

(a) Detailed information on any measures taken and progress made, especially with regard to suggestions and recommendations made by the CESCR in the present Concluding observations;\(^\text{351}\)

(b) A focus primarily on its follow-up of the CESCR’s previous Concluding observations, structured by Articles of the Covenant;\(^\text{352}\)

(c) In addition to information on measures adopted details on the substantive impact of such measures on the realisation of SERs.\(^\text{353}\)

Clearly the subsequent reviews of Canada’s compliance are unlikely to produce positive reports since it has consistently refused to change its housing implementation strategy to comply with the CESCR’s recommendations. In other words, the findings are unlikely to make any significant difference to the manner in which Canada regards SERs.\(^\text{354}\) However, there is another process which is often utilised to monitor the every country’s human rights performance, namely the Universal Periodic Review.


\(^{349}\) UN CESCR Concluding observations: Canada (2006) paras 11(a) and 40.

\(^{350}\) UN CESCR Concluding observations: Canada (2006) paras 14, 15; Chaoulli v Quebec (Attorney General).


\(^{352}\) UN CESCR Concluding observations: Canada (2006) para 69.

\(^{353}\) UN CESCR Concluding observations: Canada (2006) para 70.

3.6.4.5 Canada and the Universal Periodic Review (UPR) reporting

The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN state parties’ once every four years. The UPR was established in accordance with the UN General Assembly Resolution 60/251 that, in its preamble, reaffirmed universality, indivisibility, interrelatedness, interdependence and mutual reinforcement, and the fact that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.

The UPR is a state-driven process, under the auspices of the UN Human Rights Council, which provides the opportunity for each state to declare what actions it has taken to improve the human rights situation in its country and to fulfil its human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for all countries when their human rights situations are assessed. Its task is to promote the full implementation of human rights obligations undertaken by states and to follow up the goals and commitments related to the protection and enforcement of human rights emanating from UN conferences and summits.

Consequently, in 2009, the Council submitted its report of the working group on the Universal Periodic Review 2009 - Canada on Canada’s follow-up report. Reflecting the CESC’s recommendations and concerns, this report raised the need for Canada to consider passing domestic legislation to harmonise the ICESCR and reminded Canada that it had a responsibility to ensure that all its provinces and territories became aware of the country’s obligations and that all rights were (equally) enforceable.

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356 UN General Assembly Resolution-60/251 adopted by the General Assembly. (without reference to a Main Committee (A/60/L.48)). UN General Assembly Sixtieth session Agenda items 46 and 120 (hereafter Resolution-60/251), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf> (date accessed 2015-04-27).
357 UN General Assembly Resolution-60/251 para 1.
358 UN General Assembly Resolution-60/251 para 5 (e).
359 UN General Assembly Resolution-60/251 para 5 (d).
3.6.5 Summary
Canada has been consistent in choosing what recommendations to implement, dating as far back as its second and third periodic reports. Consequently, this left many questions unanswered on whether Canada was interested in ensuring equal enforcement of rights under the Canadian Charter and those to which it committed itself through ratification of the ICESCR. If one considers that Canada is ranked number eight (8) in terms of the HDI, it has the potential, through its available resources, to improve the standard of living of vulnerable people by redirecting its efforts to where they are most needed. By so doing, the country would be in a position to freely avail itself of the measures undertaken for judicial review. Judicial review would in such instances be directed at evaluating and enhancing areas where such measures fall short and at suggesting how these could be improved. To a certain extent it could be argued that the policy-driven measures are attributable to the ambiguous, vague and conflicting language used in Article 16 and Article 2(1) of the ICESCR. The latest Canada 2013 UPR report merely reiterates Canada’s commitment to continue to make significant investments to help improve the housing situation of vulnerable Canadians and single out some of its achievements without necessarily dealing with its non-compliance with international obligations in relation to SERs and or possibly opening its policy measure to judicial oversight. Therefore, Canada appears to be taking advantage of an international system that has no judicial enforcement available for failure to comply with imposed ICESCR obligations and CESCR recommendations. Little has changed in Canada’s approach to fulfil compliance with its ICESCR obligations, to legislate the right to adequate housing so as to protect the vulnerable members of society who have no means of providing for themselves. Perhaps

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362 UN Development Programme Table 1, 2012; Clark ‘Canada falls out of top 10 in UN Human Development Index’; UN Human Development Index Trends 1980-2010-Table 2.
this is one of the reasons why Canada was one of the countries\textsuperscript{364} that opposed the development of the ICESCR’s complaints mechanism to consider violations of the right to adequate housing by signatory states. Therefore, Canada’s consistent failure to implement its ICESCR obligations has weakened and questioned the role that the CESC plays in monitoring states’ compliance and enforcement of SERs. Nothing was done other than to remind Canada of its duty in terms of the ICESCR to implement its recommendations. To date these remain a distant reality.

Despite Canada having played such an influential role at the international human rights level since the 1970s the country is still reluctant to find appropriate ways (domestication, adoption and or implementation of a national housing strategy) of implementing such treaties domestically in conformity with its dualist approach. Scott summarises Canada’s failure as follows:

International human rights law in Canada has lived a life outside the spotlight of both legal scrutiny and political debate, matching the near invisibility and powerlessness of those members of society who would most benefit from having those rights taken seriously by our legal and political orders.\textsuperscript{365}

Against this background, the regional human rights system deserves to be examined in an endeavour to determine of the right to adequate housing victims in Canada are likely to find an appropriate and effective remedy.

3.7 Canada within the Inter-American human regional rights system
In consideration of the fact that Canada is not a state party to the Inter-American Convention,\textsuperscript{366} the San Salvador or the Buenos Aires Protocols but is a party to the ICESCR in terms of the 2009 UPR, it was recommended that Canada ratify the Optional Protocol to the ICESCR.\textsuperscript{367}

\textsuperscript{365} Scott ‘Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight’ 104.
\textsuperscript{366} Recommendations were also made that it ratify the instrument, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review - 2009 para 86.8.
The role of Canada within the Inter-American system cannot be underestimated. The regional human rights system is considered to be the closest form of enforcement better equipped than the international human rights system. But that system appears to be a distant dream for many poor Canadians as Canada has managed to systemically exclude its SERs’ policy from the domestic and even the regional enforcement system. Canada’s increased participation within the system will undoubtedly give the region credibility and authority and possibly persuade states like the United States of America to join the region’s human rights agenda. This is based on Canada’s domestic jurisprudence in areas where the Charter of Organisation of American States was applied, the possible role that it can play within the Inter-American enforcement bodies in as far as knowledge and expertise are concerned. Until then issues of Canadian housing policy programmes will continue to pose major problems since in most instances they oppose the protection and enforcement of human rights.

Considering that Canada is not a party to the American Convention it cannot ratify instruments such as the Protocol of San Salvador. As a result, it cannot be found to be in violation of Article 4(5) of the American Convention since it would be impossible to impose a sanction on such a state based on the interpretation of an international obligation based upon a treaty that such a state has not duly accepted or ratified. In other words, the Inter-American Commission on Human Rights and the American Court on Human Rights have no jurisdiction to adjudicate cases from the Canadian jurisdiction. This is a blow for victims of SERs since they do not have locus standi.

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before the regional system despite the failure of the Canadian domestic system to provide for SERs’ remedies.\textsuperscript{372}

Arguably, failure to make a specific reference to the right to adequate housing will not per se preclude the Inter-American Court\textsuperscript{373} or Inter-American Commission from interpreting the obligations as set out in the American Declaration, the American Convention, the San Salvador Protocol and the ICESCR. Although the OAS was founded in 1948, Canada only ratified the Charter of the Organisation of American States on 20 December 1989.\textsuperscript{374} It can be argued that by joining the OAS and ratifying the Charter, Canada has recognised the binding force of the American Declaration and has accepted the individual petition mechanism of the Inter-American Commission concerning alleged violations of the Declaration.\textsuperscript{375} Thus, an avenue has been provided for the enforcement of SERs before the Inter-American Commission in accordance with the American Convention.\textsuperscript{376} However, the challenge of enforcing SERs within the Inter-American system involves mainly the non-ratification of core SERs’ treaties and the American Convention. For example, the USA and Canada did not ratify, while other states\textsuperscript{377} did ratify, these agreements, but with reservations on certain provisions.\textsuperscript{378} Therefore, the Inter-American human rights system does not engender any optimism within the Canadian society and is not regarded as a possible avenue for adjudicating

\textsuperscript{372} Cornish and Shen *Ten reasons Canada should ratify the American Convention on Human Rights.*

\textsuperscript{373} The Inter-American Court of Human Rights in terms of Article 33(b) of the American Convention.


\textsuperscript{376} Articles 44-51 and 61-69 of the American Convention.


\textsuperscript{378} Canada is not a state party to the American Convention, OAS General Secretariat (Original Instrument and Ratifications), OAS, Treaty Series, N 36 http://www.cidh.oas.org (date accessed 2010-09-16); Buergenthal T ‘The evolving international human rights system’ *American Journal of International Law* (2006) vol 100(4) 783-807 797.
Canada’s SERs’ challenges at this moment. The country has conceded that it is considering various options in improving existing mechanisms and procedures related to the implementation of human rights obligations.

Clearly Canada’s failure to be a state party to these regional human rights instruments has exacerbated the marginalised victims’ hope of finding any remedy. To date, victims of the right to adequate housing are faced with insurmountable challenges to an equal enjoyment of the right to adequate housing and to the ability to hold their government accountable for non-compliance when discrimination occurs. Under such circumstances, judicial (domestic) activism has proved to be the only hope in protecting (housing) rights that are (deliberately) ignored.

3.8 Concluding observations

There seems to be a political will on the part of the Canadian government to commit its resources towards alleviating poverty through providing housing to the poor. However, this chapter has demonstrated that such a political will has resulted in minimal implementation success of the adopted housing policies. Pursuing the right to adequate housing as a policy measure without judicial scrutiny has demonstrated the weaknesses of such an approach because it affords government an unfettered discretion to devise and implement programmes as they please. Leaving government to devise its own implementation approach without scrutiny has entrenched government’s position as the arbiter of the right to adequate housing. Whether or not a housing policy is adopted as a vehicle to realise the right to adequate housing it is essential that the judiciary play an independent judicial review role. This will guard against such policies failing to achieve their set objectives.

379 Interview by Mmusinyane B with Porter B, Toronto, Canada on 2010-07-23.
380 Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review - 2009 paras 14 16.
381 UDHR Article 8; ICCPR Articles 2(1) 2(2) 2(3) and 26.
As a way of redressing the homelessness problem it is essential that judicial scrutiny be exercised over housing policy measures so as to determine the reasonableness of implemented measures and provide guidelines. However, there are contradictory decisions made by the judiciary in as far right to adequate housing is concerned, thereby demonstrating a growing judicial battle to elevate the right to adequate housing to an interpretation of the Canadian Charter. That could be seen as a desire on behalf of the poor to one day be able to use the Canadian Charter to assert their rights. Unfortunately it is a battle that is controlled by the Supreme Court of Canada and until it is positively empowered to review adopted housing policies there is nothing that government seems to be doing help its poor citizens. If the right to adequate housing as a progressive realisation is not subjected to domestic judicial review it is unlikely that Canada will ever be held accountable for its failure to apply its available resources maximally to address the increasing state of homelessness facing poor Canadians. It is the duty of the judiciary to see to it that the justice system is delivered in a manner that is fair and best resolves conflict, ensuring that the government accords treatment that observes the dignity which is the right of all citizens.

When courts have a SERs’ adjudication mandate, they are capable of fulfilling it competently without intruding on the legislative domain.\textsuperscript{383} If Canadian courts decide to interpret and apply sections 7 and 15(1) of the Canadian Charter to incorporate the right to adequate housing as their mandate, they are undoubtedly capable of carrying that function substantially.\textsuperscript{384} Therefore, it has been demonstrated that the constitutional status of SERs in Canada remains, to a large extent, the central most unresolved issue within the Canadian Charter jurisprudence.\textsuperscript{385} From the CESCR findings and Canada’s interpretation of such findings it is clear that domestication or the inclusion of SERs in the Canadian Charter or the interpretation and application of section 7 and 15 of the Canadian Charter would not be regarded as ideal.\textsuperscript{386} This situation is worsened by the

\textsuperscript{383} Nolan, Porter and Langford \textit{The justiciability of social and economic rights: An updated appraisal} 4.
\textsuperscript{384} Porter ‘Toward a comprehensive framework for ESC rights practice’ 28-29.
\textsuperscript{385} Jackman and Porter ‘Justiciability of social and economic rights in Canada’ 1.
\textsuperscript{386} Interview by Mmusinyane B with Porter B, Toronto, Canada on 2010-07-23. See further Porter \textit{Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada}; Mission to Canada para 29.
manner in which the judiciary views the right to adequate housing in Canada i.e. as having budgetary and political implications beyond the court’s role. Therefore, chances of incorporating SERs into the Canadian Charter are unlikely at this point unless it is opened up for a review.\textsuperscript{387} Therefore, a comprehensive evaluation of invoking the existing provisions of the Canadian Charter is required to demonstrate jurisprudentially that the poor and homeless Canadians can have a hope of equally enjoying their the right to adequate housing with dignity under their domestic system. The chapter has also illustrated the difficulty of resorting to the Inter-American human rights regional system due to Canada not being a state party to most core SERs. This prevents the Inter-American Commission and the Inter-American Court from adjudicating cases from the domestic system. This is also worsened by Canada’s consistent reluctance to implement the CESCR recommendations made. All of these challenges are felt mainly by the victims of the right to adequate housing who have no remedy at any level - domestic, regional and the international human rights level.

\textsuperscript{387} Porter Rewriting the Charter at 20 or rewriting it right: The challenge of poverty and homelessness in Canada.
**Addendum: Summary of critical comments of the ESCR on Canada’s reports (1993-2006)**

From 1993 to 2006 and to a certain extent in 2009 the CESCR was very critical of Canada’s state reports on measures undertaken to progressively realise SERs in general. The chart below reflects Canada’s performance as assessed through its state party’s report before the CESCR:

**CANADA’S PERFORMANCE CHART BY CESCR**

<table>
<thead>
<tr>
<th>1993 REPORT</th>
<th>1998 REPORT</th>
<th>2006 REPORT</th>
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<tbody>
<tr>
<td><strong>1. Concerns</strong></td>
<td><strong>1. Concerns</strong></td>
<td><strong>1. Concerns</strong></td>
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<tr>
<td>Corresponds with the 2006 concern p11 (a), 40 &amp; 11, 14-15.</td>
<td></td>
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<tr>
<td>2. Certain provincial human rights legislation not applied in a manner to improve remedies against violations of ESCR, especially housing, p 24.</td>
<td>2. Provincial courts interpreting the Canadian Charter to exclude protection of the right to an adequate standard of living despite the CSC ruling interpreted under s7&amp;15, 15.</td>
<td>2. Unavailability of effective enforcement mechanisms &amp; legal redress when governments fail to implement the ICESCR obligations 11 (b).</td>
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<tr>
<td></td>
<td>Corresponds with 1993 concern p</td>
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</table>
3. No statistics - escalating rate of homelessness, p 19:

3. Escalating rate of gross disparity between aborigines & other Canadians enjoyment of Covenant rights, p 17 - not complying with recommendations of RCAP p18. 

Corresponds with 2006 11 (d) concern

3. Regret that most of its 1993 & 1998 recommendations have not been implemented, p 11.

4. Court cases ruled the right to security of the person not interpreted rights to adequate food, clothing & housing, p 23.

4. Escalating rate of homelessness & inadequate housing & now homelessness declared a national disaster, p 24.

Corresponds with 1998 15 concern


Corresponds with 1998 (3) 18 concern

5. Similar to 1993 .3 above.

5. Unavailability of affordable & appropriate housing & widespread discrimination with respect to housing p 28.

6. Has taken in every respect unprecedented and arguably retrogressive measures undermining the right to adequate housing. 14-15.

5. No effective procedures to follow up on the Committee’s Concluding observations have been developed on federal/provincial/territorial, p 12.

6. The Committee, while welcoming the National Homelessness Initiative and the adoption of numerous measures on housing, received insufficient information to assess the
Counter argument: rights such as the right to adequate housing are ‘vague and uncertain’ and assessing the extent to which resources must be allocated to the progressive realisation ‘is not a concept which easily lends itself to adjudication'.

This means that the government is the only body that determines whether it has achieved its measures & no one else can challenge measures taken.

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<th>2. 1993-Recom</th>
<th>1998-Recom</th>
<th>2006-Recom</th>
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<tr>
<td>(a) Explicit reference: SERs on the country’s human rights legislation, p 25. (b) Judiciary: Training courses on Canada’s obligations under ICESCR &amp; on their effect on the interpretation and application of Canadian law, p 29. (c) Courts to adopt a broad and purposive approach interpretation of the Canadian Charter and of human rights legislation to provide remedies</td>
<td>(a) Adopt positions in litigation consistent with their obligations to uphold the rights in ICESCR, p 50. (b) Protection: human rights legislation to expand to SERs’ enforcement mechanism within those legislations reinforced &amp; SERs settled before a competent Tribunal, p 51. (c) Canada to refrain from economic marginalisation and material deprivation of aborigines &amp; persons &amp; to afford human rights</td>
<td>(a) To address the specific subjects of concern (1993-1998 reports) &amp; to implement the Committee’s suggestions and recommendations, p 34. (b) The federal Government to take concrete steps to ensure that its provinces and territories are made aware of Canada’s legal obligations &amp; domestic enforceability of ICESCR, p 35. (c) Government legislation to be brought in line with Canada’s</td>
</tr>
<tr>
<td>against violations of SERs, p 30.</td>
<td>in terms of ICESCR, p 17, 18, 43.</td>
<td>obligations and such legislations to protect poor people from discrimination on the basis of social/economic status, p 39.</td>
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<tr>
<td>Similar to 1993 2 (c) above.</td>
<td>Similar to (2) (b) above.</td>
<td>Similar to 2 (c) above.</td>
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<td>(d) Appropriate measures to prevent and respond to escalating rate of homelessness violation of the right to adequate housing &amp; life, p 24, 28, 34, 46.</td>
<td>(d) That courts within an appropriate exercise of their judicial review functions take into account SERs where necessary ensure that Canada’s conduct is consistent with its international human rights obligations &amp; also General Comment No. 9, p 36.</td>
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<tr>
<td>(e) Promote interpretation of the Canadian Charter and other domestic law which is consistent with its General Comment No. 9, throughout the federal, provincial and territorial governments, p 41.</td>
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<tr>
<td>(f) Canada should take</td>
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immediate steps, including legislative measures, to create and ensure effective domestic remedies for all Covenant rights in all relevant jurisdictions, p 40.

<table>
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<th>2. 1993-Recom</th>
<th>1998-Recom</th>
<th>2006-Recom</th>
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<tr>
<td>(g) Ensure that civil legal aid be extended to the poor in regard to SERs’ litigation, p 43.</td>
<td>(h) Canada must address homelessness and inadequate housing as a national emergency by reinstating or increasing, where necessary, social housing programmes for those in need, and improving &amp; properly enforcing anti-discrimination legislation in the field of housing, p 62.</td>
<td>(i) Implement national strategy to</td>
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reduce homelessness that includes **measurable goals and timetables**, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards, p 62.
Chapter 4

4. Implementation strategies for the protection and enforcement of the right to adequate shelter/housing in India

4.1 Introduction

India obtained its independence from British rule on 15 August 1947 and became one of the world’s largest democracies,\(^1\) by adopting its Constitution in 1949.\(^2\) Its population has quadrupled over several decades\(^3\) to about 1 210 193 422 (1.22 billion) people. This amounts to approximately 17% of the total world population.\(^4\) It is a country that subscribes to hybrid religious systems,\(^5\) with eighteen official languages\(^6\) and a unique number system.\(^7\) It is governed by means of a federal government system, with about 28 states\(^8\) and seven union territories\(^9\) administered from the city of Delhi.

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5 With a population of Hindus (80% of the population), Muslims (13.4% i.e. 138 million) and a great many followers of other faiths, including Christians (2.3% i.e. 24 million), Sikhs, Jains, Parsis and others. See UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: (Report of the Working Group on the Universal Periodic Review (2012) – India): India, 8 March 2012, A/HRC/WG.6/13/IND/1 1, available at <http://www.unhchr.org/refworld/docid/5007eaed2.html> (date accessed 2015-04-27).
7 Sources refer to the Indian numbering system that is as follows: 1 Lakh is equivalent to 100 000. In this thesis, where a figure refers to the number of houses and people it was converted. In monetary terms Rs 1 Crore is equivalent to 10 million ZAR. The figure was not converted to ZAR.
8 States of India are Andhra Pradesh, Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Goa, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mizoram, Nagaland, Orissa), Punjab, Rajasthan, Sikkim, Tamil
This chapter explores India’s position on the protection of fundamental rights and determines how the right to adequate shelter/housing is perceived and interpreted. Moreover, it evaluates the Indian government’s position regarding its approaches in progressively implementing the right to adequate shelter/housing within its territory. An examination is made of the extent to which numerous shelter/housing policy measures have been implemented to improve the standard of living of the Economically Weaker Sections (EWS) and Lower Income Groups (LIGs). Although the government has made numerous efforts, mainly through the implementation of its shelter/housing policy measures in its ‘Five Year Plans’, it remains questionable whether these policy measures have made any significant impact on improving the lives of the poor. It is also critically important to analyse the roles of the Indian judiciary and the Indian Human Rights Commission in enforcing and monitoring compliance with the right to adequate shelter/housing, as well as the lengths to which the government has gone in implementing the decisions of the courts.

The absence of an Asian regional human rights system has further marginalised the rights of the homeless in instances where the domestic system afforded them inadequate protection. In addition, an evaluation is made of India’s obligation and compliance record in terms of its International Covenant on Economic, Social and Cultural Rights (ICESCR) obligations. Lastly, the chapter seeks to determine if the Indian government should consider adopting enabling housing legislation. Such a move would consolidate the country’s various fragmented shelter/housing policies and provide a uniform directive on how to implement them and pave the way for the judiciary to comprehensively interpret the adopted and existing shelter/housing implementation strategies. Consequently this chapter seeks to demonstrate that solutions to the

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9 Union Territories are Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, National Capital Territory of Delhi, Puducherry, Census India 2011 Report: India Provisional Population Totals Paper 1 of 2011.

progressive realisation of the right to adequate shelter/housing are multifaceted and complex in nature.

4.2 Understanding the 1949 Indian constitutional framework

The 1949 Constitution contains certain enforceable fundamental human rights as well as non-justiciable Directive Principles of State Policy, which are socio-economic responsibilities and governance provisions aimed at the achievement of social justice. The fundamental rights and Directive Principles of State Policy lay down the basic obligations of the state towards its citizens. Part IVA, the fundamental duties, was added in 1976. These are defined as the moral obligations of all citizens to help promote a spirit of patriotism and maintain the unity of India. The manner in which Indians have thus far preserved their cultural traditions is a testament to their allegiance to their constitutional obligations, and they continue to uphold the spirit of patriotism wherever they go.

Article 15 of the 1949 Constitution provides the following list of prohibited grounds of discrimination:

The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

Nothing in this article shall prevent the state from making any special provision for women and children.

and

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11 Part III, Articles 12-35 of the 1949 Constitution.
13 About eight articles of the ICESCR have a meaning that correspond to the Directive Principles in the 1949 Constitution, i.e. article 7(1)(I) of the ICESCR is similar to Article 39(d) of the 1949 Constitution. Others are Article 7(b) and Article 42, Article 10(2) and Article 42, Article 6(1) and Article 41, Article 10(3) and Article 39(f), Article 13(2)(a) and Article 45, Article 7(a) (ii) and Article 43 and Article 11 and Article 47.
14 Unless the context dictates otherwise, it refers to or includes the government and Parliament of India and the government and the legislature of each of the states and all local or other authorities within the territory of India or under the control of the Government of India. See Articles 12 and 36 of the 1949 Constitution.
15 Articles 12 and 36 of the 1949 Constitution.
16 Article 15(1) of the 1949 Constitution.
17 Article 15(3) of the 1949 Constitution.
Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.¹⁸

As an express non-discrimination constitutional protection, Article 15 is an appropriate measure to adopt, particularly where there is a deep-rooted and well-established history of discrimination based on social background or caste. Despite the entrenchment of a social-background discrimination provision in the Constitution, the interpretation and application of the existing fundamental rights in the Constitution are likely to determine the extent of protection even if those affected are seen as equal in their society. The abovementioned assertion is based on the fact that fundamental rights, as enforced by the courts,¹⁹ are normally defined as the basic human rights of all citizens that apply irrespective of race, place of birth, religion, caste, creed or gender. According to Sripati, fundamental rights are empty declarations unless they are upheld through enforcement and protection.²⁰

On the basis of this background it is vital to understand how the 1949 Constitution has been viewed as a catalyst in enforcing the unprotected right to shelter/housing within the Indian context. The 1949 Constitution does not embrace an elaborate system of socio-economic rights (SERs), but instead refers to them as Directive Principles of State Policy that may not be enforced by courts.²¹ According to Davis:

These principles cannot compel a government to implement particular provisions contained within the set of principles, however the record of the Indian courts reveals that they do have an impact upon constitutional jurisprudence as they have laid down guidelines for legislation, set aside legislation which is in conflict with a directive principle and upheld legislations which seeks to further the directive principles even where a literal interpretation of fundamental principles might have aborted the policy.²²

¹⁸ Article 15(4) of the 1949 Constitution.
¹⁹ Part III of the of the 1949 Constitution.
²⁰ Sripati ‘Towards fifty years of constitutionalism and fundamental rights in India: Looking back to see ahead (1950-2000)’ 452.
Although the right to adequate shelter/housing is not expressly provided for under the Directive Principles of State Policy, it is indeed viewed and interpreted as being part of the categories of those rights that are mentioned in Article 39 of the 1949 Constitution. It provides that the state must, in particular, direct its policy towards ensuring the following:

(a) That the citizens, men and women equally, have the right to an adequate means of livelihood;
(b) That the ownership and control of the material resources of the community are so distributed as best to sub serve the common good; and
(c) That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Furthermore, Articles 41–43 of the 1949 Constitution mandate the state to endeavour to secure the right to work, a living wage, social security, maternity relief, and a decent standard of living for all citizens. As a result, the right to adequate shelter/housing can be monitored and (indirectly) enforced by the Indian Supreme Court that has a protective mandate, together with original appellate and advisory jurisdiction, and is the designated protector of this right. Although Indian High Courts have jurisdiction to deal with violations of any fundamental rights no citizen is barred from bypassing the High Court and directly invoking the Indian Supreme Court’s original jurisdiction for the enforcement of his or her fundamental rights. This practice is popularly known as Public Interest Litigation (PIL) and was developed by the Indian Supreme Court during the 1970s and heavily resorted to in enforcing the right to adequate shelter/housing.

4.3 India’s shelter/housing policy measures

4.3.1 Introduction

In an endeavour to fully understand the current Indian government’s shelter/housing policy it is essential to trace its inception and how it has been interpreted, implemented and reviewed by government. From such an examination it is possible to determine whether or not it has managed to make any inroads into improving the lives of those marginalised or if it has deepened their vulnerability.

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23 Article 14(1) of the 1949 Constitution.
24 Article 32(1) and (2) of the 1949 Constitution.
25 Article 32 of the 1949 Constitution.
26 Dealt with in 4.4 hereunder.
4.3.2 Historical perspective of India’s shelter/housing policy

India has the oldest shelter/housing policy that dates back to World War II. Prior to World War II, shelter/housing in India was generally provided by the private sector in various forms, and the state played only a passive role, intervening when possible and necessary. It is quite clear that, despite the success of this system, the country could not keep up with the ever-increasing rate of shelter/housing shortages due to rapid urbanisation after World War II. After India’s independence, it became evident that there was a need for the state to play an active role in shelter/housing provision, despite the right not being an enforceable one. Thus, from as early as 1950, India embarked on the development and implementation of its shelter/housing policies. Its approach was motivated mainly by the lack of adequate shelter/housing and other basic services, which led to an influx of people to its cities. This urbanisation anticipated diminishing resources from the countryside to feed the cities. The government stance at this time was already clear, since the problems of urban areas were regarded as mere welfare problems and sectors of residual investment, instead of issues of national economic importance.

Since shelter/housing is regarded as a state issue, government is responsible for the formulation of policy with regard to programmes and approaches for effective implementation of shelter/housing schemes, particularly for the poor. As part of its first step towards playing an active role within the shelter/housing sector, government resolved to pursue a policy framework implemented through the adoption of Five Year Plans as an appropriate tool to gradually realise the right to adequate shelter/housing for India’s growing population and its cities. These Five Year Plans are reviewed every five years, resulting in the adoption of subsequent Five Year plans in quick succession. It is important to examine these Five Year plans in order to determine the extent to which they have made an impact and, if not, why the Indian government still regards

27 Sivam and Karuppannan ‘Role of state and market in housing delivery for low-income groups in India’
29 Ministry of Information and Broadcasting-Government of India India 2011 - A Reference Annual, Housing, Publication Division 527.
them as appropriate tools to achieve an improved standard of living through
shelter/housing for the EWS and LIGs.

4.3.3 Evaluation of shelter/housing under India’s Five Year Plans

4.3.3.1 Introduction
To date a set of twelve Five Year Plans has been drawn up by the Indian government. These plans are used as a vehicle to implement various government programmes to cover the period from 1951 to 2017. The overall intention of these plans is, amongst others, to address issues of shelter/housing provision, the eradication and improvement of slums as well as homelessness.

4.3.3.2 First Five Year Plan (1951-1956)\(^{30}\)
This plan acknowledged that there was increasing recognition of the close relationship between shelter/housing and the health and well-being of the people, and that most towns in India developed haphazardly. India had a ‘large proportion of sub-standard shelter/housing and slums containing insanitary mud huts of weak construction, poorly ventilated, over-congested and often lacking in essential amenities such as water and light.’\(^{31}\) With a budget of about Rs. 38.5 crores,\(^{32}\) the First Five Year Plan provided mainly for the construction of houses for government employees. Later government realised that shelter/housing for LIGs, which were not necessarily government servants, would have to be undertaken, at least in the bigger cities, to cope with the acute shortage of accommodation.\(^{33}\) In the First Five Year Plan government acknowledged that:

\[
\ldots \text{no city can be considered healthy which tolerates within itself the existence of a highly congested area with only the minimum amenities of life where some of} \]


\(^{32}\) First Five Year Plan (1951-1956) para 25.

the poorest elements of population are huddled together in almost sub-human conditions. It has been observed that slums are a national problem.\textsuperscript{34}

The overall aim of the First Five Year Plan was to achieve the construction of houses with basic minimum standards in both smaller and larger towns.\textsuperscript{35} While government took on the responsibility of providing housing to EWS and LIGs during this period, it viewed its main task as that of establishing government structures needed to implement its shelter/housing programmes and regulation mandate. Consequently, the Ministry of Works and Housing,\textsuperscript{36} National Building Organisation,\textsuperscript{37} Town and Country Planning Organisation\textsuperscript{38} and housing boards were constituted. However, a substantial part of the plan had its main focus on accommodating refugees from Pakistan\textsuperscript{39} and building the new city of Chandigarh.\textsuperscript{40} It was in this plan that a Housing Act was first proposed,

\textsuperscript{34} Report of the Committee on Slum Statistics/Census,\textsuperscript{24.}

\textsuperscript{35} First Five Year Plan (1951-1956) para 20.

\textsuperscript{36} The Ministry of Works and Housing was constituted on 13\textsuperscript{th} May, 1952. It was known as the Ministry of Urban Affairs and Employment. The Ministry had two Departments: Department of Urban Development and the Department of Urban Employment & Poverty Alleviation. The two Departments were merged on 9th April, 1999 and in consequence thereto, the name has been restored to “The Ministry of Urban Development”. This Ministry was bifurcated into two Ministries viz. (i) Ministry of Urban Development and (ii) Ministry of Urban Employment and Poverty Alleviation with effect from 1999-10-16. These two Ministries were again merged into one Ministry on 2000-05-27 and named the Ministry of Urban Development and Poverty Alleviation with two Departments. They are (i) Department of Urban Development and (ii) Department of Urban Employment and Poverty Alleviation. From 2004-05-27, the Ministry has again been bifurcated into two ministries viz: (i) Ministry of Urban Development; and (ii) Ministry of Urban Employment and Poverty Alleviation (now Known as Ministry of Housing and Urban Poverty Alleviation), available at <http://mhupa.gov.in/ministry/index2.htm> (date accessed 2015-04-27).

\textsuperscript{37} Now known as the National Building Organisation, it was constituted in 1954 as an attached office under the control of the then Ministry of Urban Development for technology transfer, experimentation and dissemination of housing statistics, available at <http://nbo.nic.in/Webforms/index.html> (date accessed 2015-04-27).


\textsuperscript{39} During this period (in 1951) Pakistan’s first Prime Minister, Liaqat Ali Khan, was assassinated. Prominent features thereafter culminated in political instability and economic difficulty, which led thousands of Pakistanis to flee the country to neighbouring states, especially India. U.S. Department of State: Diplomacy in action Pakistan (10/06/10), available at <http://www.state.gov/outofdate/bgn/pakistan/189450.htm> (date accessed 2015-04-27).

\textsuperscript{40} The first planned city of India. Subsequent to India’s independence from British rule, which led to Punjab becoming a state, there was no capital city. A political decision was made to construct a modern and accessible capital to be described as Pandit Jawaharlal Nehru’s Dream City of modern India. The city was named Chandigarh. Chandigarh-History, available at <http://www.chandigarhcities.com/atoz/history.htm> (date accessed 2015-04-27).
which is still the subject of debate in India.\textsuperscript{41} Although the EWS and the LIGs were the beneficiaries targeted to benefit from this plan, this did not materialise, because the shelter/housing that had been developed was allocated mainly to the middle and higher income groups. The houses constructed under various schemes for the EWS and LIGs ended up with these groups not being able to afford them, resulting in these houses no longer having any positive impact on improving the poor section of the community.\textsuperscript{42} Therefore, the poor were left in the cold because the shelter/housing scheme meant to be the basis for improving their standard of living had been grabbed by those able to afford them. Clearly, the First Five Year Plan’s failure to address the marginalised poor’s standard of living seems to have influenced the position of subsequent Five Year plans that were adopted.

4.3.3.3 Second Five Year Plan (1956-1961)\textsuperscript{43}

While the First Five Year Plan witnessed the first steps in the national shelter/housing programme that assumed growing importance in future plans, the Second Five Year Plan focused on the poor and expanded the scope of the shelter/housing programme to pursue slum clearance and rehabilitation of shelter/housing.\textsuperscript{44} It also broadened the Industrial Housing Scheme to cover all workers. Although this scheme managed to aid a fraction of slum dwellers, living conditions and the increasing slum problem nevertheless continued, despite the Second Five Year Plan’s vision of making it impossible for new slums to come into existence.\textsuperscript{45} In addition, three new schemes were introduced, namely Rural Housing, Slum Clearance and Sweepers Housing. Town and Country Planning legislation, such as the Model Town and Country Planning legislation of 1960, was enacted in order to develop Master Plans for important towns.\textsuperscript{46} A scheme to provide loans to government for a period of 10 years for the acquisition and

\textsuperscript{41} First Five Year Plan (1951-1956) para 48, See Section 4.5 hereunder.
\textsuperscript{42} Sivam and Karuppannan ‘Role of state and market in housing delivery for low-income groups in India’ 71.
\textsuperscript{44} Second Five Year Plan (1956-1961) para 12-14.
\textsuperscript{45} Second Five Year Plan (1956-1961) para 4-5.
\textsuperscript{46} Second Five Year Plan (1956-1961) para 32(4).
development of land was introduced in 1959, enabling sufficient land to be made available to build houses. With an allotted budget of Rs. 120 crores for shelter/housing provision, the Second Five Year Plan attempted to create an enabling environment for improving the poor’s standard of living. Despite the large budget given to the Delhi Development Authority, it failed to acquire, develop and release land in adequate quantities to meet the planned targets. Furthermore, the Second Five Year Plan’s slum clearance strategy was criticised for not being aligned with the realities of acute shelter/housing shortages and was thus self-defeating, as it appeared to be destroying existing stock. The Second Five Year Plan failed to meet its set objectives due to:

…the lengthy and time-consuming procedures of acquisition of slum areas; the non-availability and high cost of alternative sites near places of work; and the reluctance or unwillingness of slum dwellers to move from the areas selected for clearance seems to have hampered the progress of these scheme.

While the First Five Year Plan failed to address the unintended distribution of constructed houses to the middle classes and the poor’s affordability issue, the Second Five Year Plan is seen as having increased the state’s responsibility to administer shelter/housing regulation. Moreover, the Second Five Year Plan was short-sighted for failing to determine the actual shelter/housing provision challenges to be addressed. It could not even address most of the First Five Year Plan challenges and shortcomings. Due to the lapse of time, there was a need to focus on a Third Five Year Plan.

4.3.3.4 Third Five Year Plan (1961-1966)

The Third Five Year Plan stressed government’s realisation of the need to have a proper coordination of government services to deliver adequate housing:

In the Third Plan it will be essential to link up the programme more closely with different schemes of community development such as provision of water supply, roads, drainage, public health, education etc. It is also necessary that rural housing

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48 Sivam and Karuppannan ‘Role of state and market in housing delivery for low-income groups in India’ 71, 75.
activities should be effectively coordinated with other connected programmes of rural development so as to ensure that the villages selected under the village housing scheme derive the maximum benefit from the limited resources which are available.\textsuperscript{51}

Slum clearance and slum improvement, plantation labour shelter/housing schemes, village shelter/housing and land acquisition and development were introduced during the Third Five Year Plan.\textsuperscript{52} It was as a result of this plan that shelter/housing schemes for communities such as Scheduled Castes, Scheduled Tribes and backward classes in rural areas, handloom weavers, and displaced persons were introduced.\textsuperscript{53} A budget of Rs. 81.3 crores was allocated to implement shelter/housing provision under this plan. Master plans for major cities and the state capitals of Gandhi Nagar and Bhubaneswar were developed.\textsuperscript{54}

The Third Five Year Plan was the first to identify the weaknesses of the previous plans and to devise strategies to provide the government with the necessary resource capabilities to provide shelter/housing to the EWS and LIGs.\textsuperscript{55} However, rapid urbanisation led to uncontrollable shelter/housing demands that had already resulted in cities not being able to cope with shelter/housing provision, forcing government to sort out the disarrays that would have been managed through the proper implementation of the First and Second Five Year Plans. The Third Five Year Plan acknowledged that government had duplicated many institutions whereas fewer or a single institution could better achieve the targets.

As a result of the rapid urbanisation, failure of the Third Five Year Plan and an increasing state of inadequate housing a Fourth Five Year Plan aimed to focus on how to cope with this problem.

\textsuperscript{51} Third Five Year Plan (1961-1966) para 39.
\textsuperscript{52} Third Five Year Plan (1961-1966) paras 5 10 17 34.
\textsuperscript{53} Third Five Year Plan (1961-1966) paras 2 37 39.
\textsuperscript{54} Third Five Year Plan (1961-1966) para 4 5
\textsuperscript{55} Third Five Year Plan (1961-1966) para 3.
From 1968-1969, the Indian government built approximately 407,450 houses under its various shelter/housing schemes. However, cities throughout the country were unable to contain the increasing influx of people, and the need to address or deal with urban migration required government not only to focus its shelter/housing strategy in cities, but also on the development of areas close to where these people came from. Therefore, this plan gave priority to balanced urban growth by emphasising the need to prevent urban migration and for the decongestion or dispersal of the population. The creation of smaller towns for planning the spatial location of economic activity was considered to be ideal for curbing urban migration. As a result, the Housing and Urban Development Finance Corporation was established to fund remunerative shelter/housing and urban development programmes, promising an ambitious and quick turnover. As part of coordinated programmes government set aside budget to implement schemes relating to the provision of minimum level of services, such as water supply, sewerage, drainage, and street pavements in 11 cities with a population of 800,000. This scheme was later extended to 9 more cities. Although Rs. 176.94 crore had already been spent on various schemes around Rs. 188 crores was allocated for urban development, shelter/housing and metropolitan schemes to implement this plan. It is clear from this plan that a proper approach to deal with recurring shelter/housing provision challenges, albeit according to different time frames, required a properly coordinated review of the previous approaches, in order to ensure consistency and clear outcomes in the current plan, as found in the subsequent plan.

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57 Subsidised housing schemes, subsidised housing schemes for industrial workers and economically weaker sections, slum clearance and improvement loan schemes, low income group, middle income group, rental housing schemes for state employees, Third Five Year Plan (1961-1966) para 19(11).
59 Fourth Five Year Plan (1969-1974) paras 19(2) 19(3).
4.3.3.6 Fifth Five Year Plan (1974-1979)\textsuperscript{63}

The main objectives of this plan were to increase production and promote social justice through amongst shelter/housing provision.\textsuperscript{64} In this regard:

The main thrust of the programmes in the Fifth Plan is directed towards ameliorating the conditions of the backward sections of the society. This is sought to be achieved by augmenting the programmes for the construction of housing colonies by state Housing Boards and by taking up on a large scale a programme for the provision of house-sites for landless labourers in rural areas.\textsuperscript{65}

The plan reiterated the policies of the preceding plans to promote smaller towns in new urban centres in order to ease the increasing pressure on urbanisation.\textsuperscript{66} This was complemented by efforts to enlarge civic services in urban areas, with particular emphasis on a comprehensive and regional approach to problems in metropolitan cities.\textsuperscript{67} A task team was set up to develop small and medium towns. The Urban Land (Ceiling and Regulation) Act of 1976 was enacted to prevent the concentration of land holdings in urban areas and to make urban land available for the construction of houses for the middle and low income groups. Similar to the First Five Year Plan and despite the good intentions of this plan, the poor still benefited the least, while the high and middle income groups benefited the most. Nevertheless, government proceeded to roll out the subsequent (sixth) plan that would have an integrative focus on service delivery.

4.3.3.7 Sixth Five Year Plan (1980-1985)\textsuperscript{68}

Upon its review of previous five year plans, this plan found that:

Apart from housing constructed for government employees, the role of the public sector in the provision of housing has been small. Subsidised dwellings have been provided to certain selected economically weaker sections of the community. Between 1950-51 and December 1979, 2.05 lakh houses were constructed for plantation labour and industrial workers. Housing for other low income groups totalled 3.36 lakhs. Construction of housing under various other schemes for somewhat higher income groups totalled about 1.42 lakhs. In the

\textsuperscript{63} The Fifth Five Year Plan (1974-1979) available at \url{http://planningcommission.gov.in/plans/planrel/fiveyr/5th/5vfore.htm} (date accessed 2015-04-27).
\textsuperscript{64} Fifth Five Year Plan (1974-1979) Foreword.
\textsuperscript{65} Fifth Five Year Plan (1974-1979) para 5(166).
\textsuperscript{66} Fifth Five Year Plan (1974-1979) paras 5(164) 5(184) (iii).
\textsuperscript{67} Fifth Five Year Plan (1974-1979) paras 5(164) 5(184) (iii).
rural areas, about 77 lakh sites have been distributed and about 5.6 lakh houses constructed under the Rural House-Site-cum-House Construction Scheme.\textsuperscript{69} The main objective of this plan was to integrate the provision of services with shelter, particularly for the poor, reduce the number of homeless people and improve the overall living conditions.\textsuperscript{70} Its allocated budget of Rs. 1490.87 crores was intended to provide, amongst others, house sites to 6.8 million homeless families in both urban and rural areas\textsuperscript{71} and to assist with the construction of houses to 336 000 families. The Integrated Development of Small and Medium Towns (IDSMT) was launched in towns with a population below 100 000, in order to provide roads, pavements, minor civic works, bus stands, markets, shopping complexes etc.\textsuperscript{72} The Sixth Five Year Plan was clearly an extension of the Fourth Five Year Plan, as most of these developments were already in place and merely required further exploration. Nevertheless, government was still unable to contain the growing social inequalities being experienced, despite its endeavour to address them in the Sixth Five Year Plan. The plan experienced challenges, since government failed to transfer funds in time. A review of the plan indicated the non-utilisation of transferred funds and lack of capacity in implementing schemes, as well as land acquisition delays.\textsuperscript{73} As a result, some of these challenges were carried over to the seventh plan.

4.3.3.8 Seventh Five Year Plan (1985-1990)\textsuperscript{74}
It had become evident that the shelter/housing backlog had increased at an alarming rate, despite government’s effort to address the state of homelessness. In this plan homelessness was estimated to be 24.7 million units (18.8 million in rural areas and 5.9 million in urban areas).\textsuperscript{75} The Seventh Five Year Plan intended to provide sites to about

\textsuperscript{69} Sixth Five Year Plan (1980-1985) para 23(7).
\textsuperscript{70} Sixth Five Year Plan (1980-1985) paras 23(11) (23(12).
\textsuperscript{71} Sixth Five Year Plan (1980-1985) para 23(26).
\textsuperscript{72} Sixth Five Year Plan (1980-1985) paras 23(21), 23(34)(c).
\textsuperscript{75} Seventh Five Year Plan (1985-1990) para 12(2).
720 000 landless families and provide construction assistance.\textsuperscript{76} The Sixth Five Year Plan had envisaged the provision of construction assistance to 3.6 million families and only 1.9 million families could be assisted.\textsuperscript{77} As a result:

The Seventh Plan includes a provision of Rs. 577 crores for this programme. Of this, Rs. 36 crores would be utilised to provide house-sites in respect of those states where there are landless families still to be provided house-sites and Rs. 541 crores would be utilised for the provision of construction assistance to 2.71 million families. Needless to say that if the above targets are to be achieved during the Plan, the state governments will have to adhere to the norms and standards envisaged in the Plan. These have been considerably liberalised compared to the Sixth Plan.\textsuperscript{78}

However, government’s inability to meet its targets constituted a major hurdle.\textsuperscript{79} The plan’s slum improvement scheme had targeted 9 million slum dwellers - however, government experienced problems in determining the exact coverage under the scheme due to the unavailability of figures.\textsuperscript{80} Moreover, since legal difficulties were experienced in acquiring privately owned slums\textsuperscript{81} government saw fit to transfer the main responsibility for shelter/housing construction to the private sector\textsuperscript{82} because it appeared that the private sector had been neglected and/or given a minimal role to play. Therefore, a three-fold role was assigned to the public sector, namely, mobilisation of resources for shelter/housing, provision of subsidised shelter/housing for the poor and acquisition and development of land.\textsuperscript{83} The National Housing Bank was formed to expand the base of shelter/housing finance, the National Buildings Organisation (NBO) was reconstituted and a new organisation called Building Material Technology Promotion Council (BMTPC) was established to promote the commercial production of innovative building materials.\textsuperscript{84} A network of building centres was established during this time, and the \textit{Seventh Five Year Plan} explicitly recognised the problems of the urban

\textsuperscript{76} Sixth Five Year Plan: (1980-1985) - Mid Term Appraisal para 3.27.
\textsuperscript{77} Seventh Five Year Plan (1985-1990) para 12(15).
\textsuperscript{78} Seventh Five Year Plan (1985-1990) para 12(16).
\textsuperscript{80} Sixth Five Year Plan: (1980-1985) - Mid Term Appraisal para 3.29.
\textsuperscript{81} Sixth Five Year Plan: (1980-1985) - Mid Term Appraisal para 3.32.
\textsuperscript{82} Seventh Five Year Plan (1985-1990) para 12(4).
\textsuperscript{83} Seventh Five Year Plan (1985-1990) para 12(4).
\textsuperscript{84} Ministry of Information and Broadcasting-Government of India - \textit{India 2011-A Reference Annual, Housing} 539 542 543.
poor. In this regard and for the first time, an urban poverty alleviation scheme known as Urban Basic Services for the Poor (UBSP) was launched.\textsuperscript{85}

Subsequent to the Global Shelter Strategy, the National Housing Policy was introduced in 1988, with its long-term goal being to eradicate homelessness, improve the shelter/housing conditions of the inadequately housed, and provide a minimum level of basic services and amenities to all.\textsuperscript{86} The role of government was emphasised to be the provider for the poorest and most vulnerable sections of society and to be a facilitator for other income groups and the private sector, through the removal of constraints and increased supply of land and services.\textsuperscript{87} It took government 34 years to realise and acknowledge its failure to fully achieve shelter/housing provision to the growing marginalised population. Moreover, right from the beginning of the process it had neglected to involve the private sector, resulting in an unmanageable shelter/housing backlog. This forced government to give the private sector the main responsibility for shelter/housing construction. The report of the National Commission of Urbanisation raised several concerns relating to the state of shelter/housing in India’s urban areas, namely (i) the reality of the rapid growth of urban migration; (ii) the scale and intensity of urbanisation; (iii) the critical deficiencies in the various items of infrastructure; (iv) the concentration of a vast number of poor and deprived people (v) the acute disparities in access to shelter and basic services; (vi) the deteriorating environmental quality and the impact of poor governance on income and (vii) the productivity of enterprises.\textsuperscript{88} It is clear that while government did implement some good intervention strategies it lost momentum or produced unexpected results during the implementation phase.

4.3.3.9 Eighth Five Year Plan (1992-1997)\textsuperscript{89}


\textsuperscript{87} National Housing Bank \textit{Urban housing: housing under five year plans} para 5.

\textsuperscript{88} National Housing Bank \textit{Urban housing: housing under five year plans} para 5.

The Eighth Five Year Plan reiterated the 1988 National Housing Policy’s objective of reducing homelessness, improving living conditions and ensuring the provision of a minimum level of basic services and amenities to all.\textsuperscript{90} Government repeated its commitment to take care of the needs of the marginalised, at the same time emphasising its role as the facilitator, rather than the provider.\textsuperscript{91} Approximately 16 million new shelter/housing units, in both the urban and the rural areas were set as targets. From the expected 10 million units, 3 million units in the urban areas and about 7 million units in the rural areas were designated for the EWS and the LIGs. The Ministry of Urban Affairs and Employment monitored the EWS progress, while the Ministry of Rural Areas and Employment monitored the progress in the rural areas.\textsuperscript{92} Shelter/housing was not only viewed as a physical dwelling, but now as an encompassing human settlement linked to a number of basic services such as potable water, sanitation, drainage and electricity. Despite all the initiatives, the Eighth Five Year Plan did not report much success - the shelter/housing backlog still remained a significant challenge and the majority of marginalised Indians continued to experience poor living conditions even though targets had been set and money spent to alleviate their deplorable living conditions. The plan noted that:

Housing stock in urban areas was estimated at 54.1 million in 1961. This increased to 18.5 million in 1971 and further to 28.0 million by 1981. In the rural areas, housing stock grew from 65.2 million in 1961 to 74.5 million in 1971 and 88.7 million in 1981. The earlier projections of National Buildings Organisation (NBO) put the 1991 housing stock of rural and urban areas in 1991 at 106.2 million and 42.6 million respectively.\textsuperscript{93}

The contributing factor to the increasing shelter/housing demand was found to be unimproved shelter/housing provision. Between 1991 and 2001, it was found that usable shelter/housing stock was about 168.2 million, with an annual shelter/housing shortage increase of about 40.8 million.\textsuperscript{94} It can therefore be argued that government had lost control of its shelter/housing policy implementation and was only trying to do

\textsuperscript{92} Eighth Five Year Plan (1992-1997) para 14.3.
\textsuperscript{93} Eighth Five Year Plan (1992-1997) para 14.2.1.
\textsuperscript{94} Eighth Five Year Plan (1992-1997) para 14.2.1.
damage control in its subsequent Five Year Plans. This is demonstrated by government’s decision to implement, only for the landless labourers and artisans, the Minimum Needs Programme (MNP) in both urban and rural housing programmes, with an announced budget of Rs. 2424.34 crores.

Under the Eighth Five Year Plan, government only managed to construct about 269 000 units. It is not surprising that the plan’s review highlights government’s lack of a comprehensive monitoring system or even a sample survey at regular intervals to show the new additions to the shelter/housing stock through informal sector or individual efforts. The Eighth Five Year Plan also suffered a setback due to the unavailability of house sites for distribution in certain states, construction assistance lagging behind in the distribution of house sites, and the reassessment of the allotment of house sites in order to verify the inconsistency between the Seventh and Eighth Five Year Plans.

4.3.3.10 Ninth Five Year Plan (1997-2002) Part of this plan’s main objectives was the accelerated development of shelter/housing, particularly for the low income and other disadvantaged groups, as well as the upgrading and renewal of old and dilapidated shelter/housing stock. The National Housing Policy changed government’s role from that of a provider to a creator of an enabling environment. It committed itself to facilitating the construction of 2 million additional shelter/housing units annually, out of which 13 million would be in the rural areas and 7 million in the urban areas. Similar to the Eighth Five Year Plan, this plan envisaged the promotion of integrated development of settlements, as well as the strengthening of the linkages between shelter and income upgradation, in line with India’s commitment to the National Housing Policy and the Habitat II National Plan of Action. However, the plan acknowledged that the provision of adequate shelter/housing could only be achieved over a longer term of 10-15 years, as opposed to a short
term. This was particularly evident when the net shelter/housing shortage between 1997 and 2002 was 18.77 million, of which 8.46 million was for new houses and 10.31 million was for kutcha or unserviceable houses. In view of the Habitat II National Report, which estimated that there were about 7.7 million units were delivered, and 11.2 million units were required under the Ninth Five Year Plan. Therefore, the introduction of the Ninth Five Year Plan had the mammoth task of achieving integrated shelter/housing provision for all, as well as upgrading current shelter/housing provision. In implementing this plan, the major urban concern was identified as being the growing gap between the demand and supply of basic infrastructure services such as shelter/housing.

The total Five Year Plan’s expenditure over the last 46 years of planning had been about Rs.8, 580 crore on urban developments, Rs.10, 430 crore on urban shelter/housing, Rs.15, 100 crore on urban water supply and sanitation, and Rs.19, 300 crore on rural water supply and sanitation. For over four decades a significant amount of resources had been allocated to the improvement of poor peoples’ standard of living, yet the shelter/housing demand increased as if nothing had been done. Upon review it was found that a significant number of hiccups prevented government from meeting its targets. These include the non-availability of land, absence of technical or feasibility studies, shortage of funds, lack of feedback from the programmes, the multiplicity of programmes with varying components directed at the same target group, and the lack of

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102 While in 2001 it was 6.64 million, The Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 292 293.
convergence or proper coordination, sequencing and linkages between them.\textsuperscript{108} Despite the five yearly projected interval planning and adoption of subsequent policies and programmes, factors such as the increasing population, rapid industrialisation, low rates of economic growth and regional development\textsuperscript{109} as well as the increasing number of slums\textsuperscript{110} and homeless people\textsuperscript{111} had a significant impact on government’s efforts to improve peoples’ standard of living through adequate shelter/housing.\textsuperscript{112} Furthermore, the review found that despite the fact that 32% of the urban population lived below the poverty line, government’s shelter/housing programme in urban areas for this target group did not feature in the government’s urban shelter/housing budget.\textsuperscript{113} As a result, the review recommended that a change in the shelter/housing strategy for this group of people could help reduce the proliferation of slums in India’s cities.\textsuperscript{114}

The newly introduced Integrated Urban Poverty Eradication Programme (IUPEP) sought to address the problem of urban poverty with a multi-pronged, long-term strategy that envisaged bringing community-based organisations to the centre of the development process by facilitating direct participation by targeted groups. Furthermore, the type and

\textsuperscript{110} ’Slums were viewed as a direct outcome of the failure of state policy and law to intervene effectively to ensure legal access of the urban poor to land and financial resources which would be necessary to enable them to construct for themselves legal and adequate shelter. Despite stated commitments in official documents to ensure access of housing to the poor, actual investments in this regard have been niggardly and misdirected. This is aggravated by both law as well as administrative and other prejudices which have not only consistently blocked the access of the urban poor to shelter but have actually criminalised them.’ The Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 290.
\textsuperscript{111} Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 288.
\textsuperscript{112} ’The problems of slum dwellers have been engaging the attention of government since the Second Five Year Plan. A slum clearance scheme was introduced in 1956. Gradually it was realised that this strategy would not lead to provision of adequate facilities for the target group since slum dwellers grew at a rapid pace and the cost of rehabilitation by providing additional land and developing it was very high. Such relocations involved substantial hardships to those affected. In 1972, then, the strategy of slum clearance and rehabilitation on new land was abandoned and a Central scheme of Environmental Improvement of Urban Slums (EIUS) was introduced with an objective of improving the living environment of slum dwellers by providing basic civic facilities.’ The Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 290.
\textsuperscript{113} Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 289.
\textsuperscript{114} Ninth Five Year Plan Mid Term Appraisal - Final Document (1997-2002) 289.
location of shelter/housing was found to be inextricably linked to the employment and affordability of the occupant.\textsuperscript{115}

4.3.3.11 Tenth Five Year Plan (2002-2007)\textsuperscript{116}

This plan reiterated the role of the private sector to be extremely limited, and that the failure by the Urban Development Authorities to meet the total shelter/housing needs of the urban population resulted in the proliferation of slums, even in unauthorised colonies.\textsuperscript{117} For example, despite the concerns raised in the Seventh Five Year Plan about the need to consider the private sector as an equal partner in shelter/housing provision, government made little or no effort to actively and directly make this a reality. The plan regarded the speedy availability of land\textsuperscript{118} as a solution to the rapid delivery of shelter/housing construction at more affordable prices, in order to accommodate or make affordable shelter available to the lower income groups.\textsuperscript{119} Despite the establishment of the National Slum Development Programme (NSDP) in 1997 to provide additional central assistance to state governments for slum improvement, its performance was found to be unsatisfactory, mainly because of the delays at state level in releasing the funds to implementing agencies.\textsuperscript{120} Considering the fact that 90\% of the shelter/housing shortage was related to the weaker sections of the population, government intended to adopt a resolution for the immediate implementation of all policies formulated in the past. Among the main objectives of the Tenth Five Year Plan was the reduction of the poverty ratio by at least five percentage points by 2007.\textsuperscript{121}

\textsuperscript{115} Eighth Five Year Plan (1992-1997) 114.


\textsuperscript{117} Tenth Five Year Plan (2002-2007) 617.

\textsuperscript{118} It was found that the availability of land has been hampered by provisions of various legislations and the manner in which such legislations were interpreted and implemented, which resulted in the creation of challenges for legitimate transactions in land which was urgently required for the expansion of the housing stock, The Tenth Five Year Plan (2002-2007) 621 623.

\textsuperscript{119} Tenth Five Year Plan (2002-2007) 621 623.

\textsuperscript{120} Tenth Five Year Plan (2002-2007) 632.

At the beginning of the Tenth Five Year Plan, the shelter/housing shortage was estimated to be 8.89 million units, while the total number of houses required under this plan was estimated to be 22.44 million\textsuperscript{122} - a significant increase from the Ninth Five Year Plan. Whilst the adoption of the Two Million Housing Scheme did provide about 3.5 million houses for the urban poor, the implementation of the plan’s objectives was not without problems.\textsuperscript{123} The Tenth Five Year Plan boasted an expenditure budget of Rs 29719 crore, allocated to the Ministry of Urban Development and Poverty Alleviation for its strategy implementation.\textsuperscript{124} The national urban shelter/housing shortage was estimated, at the end of India’s Tenth Five Year Plan, to be 24.7 million. Consequently the plan could not have done much, considering the initial assessment of 22.44 million in shelter/housing stock backlog at the beginning of the plan. The plan envisaged that, between 1997/1998 and 2001/2002 about 4.5 million shelter/houses would have been constructed against the requirement of around 11 million new and upgraded houses.\textsuperscript{125} Furthermore, it was found that shelter/housing cooperatives with a target of 100 000 houses per year in terms of the Two Million Housing Scheme for the EWS/LIGs were able to construct a total of 292 000 units during the 1998-2001 period.\textsuperscript{126} While the Tenth Five Year Plan seems to have focused more on what was delivered and reviewed the shortcomings it seems to have lost focus in terms of working towards reducing housing demand, hence the backlog of 24.7 million which had accumulated. Clearly, the government’s shelter/housing policies in terms of the Five Year Plans have been clouded with controversy, where large resources were allocated but minimal outcomes were achieved. The Tenth Five Year Plan implementation challenges included: (a) inadequate funding or under-utilisation of central funds, (b) diversion of funds released for specific programmes, (c) weak and ineffective monitoring at the central level, (d) lack of proper implementation of programmes due to a failure to understand the programmes, (e) unsuitable objectives and modalities of the programmes. These challenges resulted in inaction that affected the poor’s standard of living, as well as a

\textsuperscript{122} Tenth Five Year Plan (2002-2007) 622.
\textsuperscript{123} Tenth Five Year Plan (2002-2007) 622.
\textsuperscript{124} Tenth Five Year Plan (2002-2007) 632.
\textsuperscript{125} Tenth Five Year Plan (2002-2007) 632.
\textsuperscript{126} Tenth Five Year Plan (2002-2007) 622.
lack of proper beneficiary consultation or involvement during the implementation of programmes.\textsuperscript{127}

The plan also acknowledged that despite India being a welfare or pro-poor state, the problem of the urban shelterless and pavement dwellers had not been given much attention, as evidenced from lack of progress with regard to the Night Shelter Scheme.\textsuperscript{128} Therefore, the plan regarded the establishment of night shelters for shelterless women and children as its focal area.\textsuperscript{129} In addition, despite several decades of programmes for the environmental improvement and upgradation of slums, recent trends indicate no change in the basic level or improvement in the features of slum settlements.\textsuperscript{130} In this regard, the plan stated:

\begin{quote}
...there is cause to wonder whether ‘Cities without Slums’ is a slogan about an objective, which, however desirable, is believed to be unreachable, or whether it is a serious planning and urban development concern. Certainly the degree of effort to upgrade slums to a more habitable level does not indicate a serious effort in this direction.\textsuperscript{131}
\end{quote}

Despite the economic growth witnessed under the Ninth and Tenth Five Year Plans, a high level of poverty as well as acute food insecurity and shortages persisted in the country, which disproportionately affected the population living in the poorer states and rural areas.\textsuperscript{132} On the positive side and in order to accommodate those who could not as yet afford to own their own houses, government undertook to promote the rental market through the private sector, public sector, cooperatives and individuals.\textsuperscript{133} Considering the failure of government programmes over the years to eradicate poverty,

\begin{footnotes}
\item[\textsuperscript{127}] Tenth Five Year Plan (2002-2007) 627.
\item[\textsuperscript{128}] Tenth Five Year Plan (2002-2007) 621.
\item[\textsuperscript{129}] Tenth Five Year Plan (2002-2007) 632.
\item[\textsuperscript{130}] Various central government schemes – National Slum Development Programme (NSDP), Swarna Jayanti Shahri Rozgar Yojana (SJSRY), VAMBAY, Night Shelters, Two Million Housing Scheme, Accelerated Urban Water Supply Programme (AUWSP), Low-Cost Sanitation — provide for a wide range of services to the urban poor, including slum-dwellers; Tenth Five Year Plan (2002-2007) 628-629.
\item[\textsuperscript{131}] Tenth Five Year Plan (2002-2007) 628-629.
\item[\textsuperscript{133}] Tenth Five Year Plan (2002-2007) 621.
\end{footnotes}
the thinking under this plan seems to have come a bit late and appears to be theoretical in nature. This is evidenced by an increase in the number of people becoming more vulnerable to poverty and living in slums, as well as because the lack of proper implementation and coordination of shelter/housing policies had worsened the harsh realities facing the poor Indian society.

4.3.3.12 Eleventh Five Year Plan (2007-2012)\textsuperscript{134}

During the Eleventh Five Year Plan period the demand for shelter/housing stock was estimated to be 26.53 million, of which 99% related to the EWS and LIGs.\textsuperscript{135} By then the country had a shortage of about 24.71 million\textsuperscript{136} units in urban areas and 7 million in rural areas. Since there were far too many people still lacking access to basic needs in terms of nutritional standards, access to education and health services, food security, as well as other public services such as water supply and sewerage.\textsuperscript{137} Therefore one of the objectives of the Eleventh Five Year Plan was to reduce poverty, thereby accelerating the pace of growth while also making it more inclusive.\textsuperscript{138} The plan’s central vision was captured in the Universal Periodic Review 2012 - India Report, as being to trigger a development process that would ensure broad-based improvement in the quality of peoples’ lives in an inclusive manner.\textsuperscript{139} 27 targets were identified at the national level and divided into six main categories namely: (i) Income and Poverty; (ii)
Education; (iii) Health; (iv) Women and Children; (v) Infrastructure; and (vi) Environment.\textsuperscript{140} The term ‘social security’ was found to be an inclusive concept that also covered shelter/housing, safe drinking water, sanitation, health, and educational and cultural facilities for society in general.\textsuperscript{141}

Although the Eleventh Five Year Plan was an ambitious one fraught with implementation hiccups. These included inadequate financing due to the low unit cost\textsuperscript{142} that resulted in incomplete construction of houses. Some of the houses delivered were of a poor quality, considering the fact that the construction was left entirely to beneficiaries without building expertise or information.\textsuperscript{143} Other problems included inadequate control and monitoring of the planning, supervision and allocation of funds to Scheduled Castes and Scheduled Tribes/disadvantaged sectors\textsuperscript{144} and irregularities in relation to the methods used for selecting beneficiaries. Since there was no database or regular social audits\textsuperscript{145} tensions arose because those who were vocal quickly reached the top of the list, to the detriment of others.\textsuperscript{146}

The main positive outcome of the Eleventh Five Year Plan was the adoption of a shelter/housing waiting list method.\textsuperscript{147} This plan undertook to allocate a 75% weight to shelter/housing shortage and 25% to poverty ratios, which also included 25% being allocated to the SC/ST segment of the population and devoted attention to meeting the

\textsuperscript{142} Previously the unit assistance of Rs 25000 per dwelling in the plain areas and Rs 27500 in the tribal and hilly areas is not adequate and beneficiaries have to contribute at least by way of their own labour for completion of the house. The Eleventh Five Year Plan-(2007-2012): Rapid Poverty Reduction, chapter 4 95, 96. The Union Budget for 2010–11 has raised the unit cost under IAY to Rs 45,000 in plain areas and Rs 48,500 in hilly areas, The Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal, chapter 12: Rural Development, 267, available at <http://planningcommission.nic.in/plans/mta/11th_mta/chapterwise/chap12_rural.pdf> (date accessed 2015-04-27).
\textsuperscript{143} Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal 266.
\textsuperscript{144} Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal, Social Justice 184.
\textsuperscript{145} Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal 268.
\textsuperscript{146} Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal 267.
\textsuperscript{147} Eleventh Five Year Plan-(2007-2012) Rapid Poverty Reduction, chapter 4 95.
basic social needs of the EWS/LIG.\textsuperscript{148} It is clear that, while trying to reinvent the social welfare wheel of existing programmes, the plan experienced systematic problems.

4.3.3.13 Twelfth Five Year Plan (2012-2017)\textsuperscript{149}

The aim of the Twelfth Five Year Plan is to improve national infrastructural projects and avoid all types of bottlenecks,\textsuperscript{150} as well as to increase social expenditure on government programmes, but this time focusing on improved implementation.\textsuperscript{151} The plan seems to be ambitious, as it intends to change a 61 year legacy of implementation bottlenecks, duplication of functions, and expenditure on resources without reducing or eliminating the increasing shelter/housing demand and number of slums. While the plan aims to renew the Indian economy\textsuperscript{152} and use the funds from government to improve education, sanitation and health,\textsuperscript{153} it also needs to devote a lot of time and resources to eliminating a six-decade shelter/housing backlog. In addition, the plan aims to ensure that poor peoples' standard of living is improved through an inclusive approach going beyond poverty reduction and encompassing all groups and states, in order to achieve its desired outcomes.\textsuperscript{154} Of particular relevance to this plan is the fact that it intends to reduce consumption poverty by 10\%, which is directly related to achieving an adequate standard of living. In this regard the plan acknowledges that:

\begin{quote}
Affordable, decent housing is woefully inadequate in all Indian cities, leading to the formation of slums, health and living conditions in which are aggravated by poor water and sanitation services. Clearly this plan appears to have witnessed challenges as experienced by the erstwhile plans that had too many interrupting bureaucratic bottlenecks resulting on them failing to achieve their set targets.\textsuperscript{155}
\end{quote}


\textsuperscript{150} Twelfth Five Year Plan (2012–2017) 80, 200 334.

\textsuperscript{151} Twelfth Five Year Plan (2012–2017) 1.

\textsuperscript{152} Twelfth Five Year Plan (2012–2017) 3.

\textsuperscript{153} Twelfth Five Year Plan (2012–2017) 5 6 7 10.

\textsuperscript{154} Twelfth Five Year Plan (2012–2017) 35.
The budget allocated to state programmes is divided in accordance with individual states and union territories.\textsuperscript{156} Clearly, this plan appears to be mindful of all the challenges experienced by the previous plans and has now devised a strategy to remedy or avoid falling into the same implementation traps. Despite the theoretical successes of these plans, there have been an increasing number of slums and an ongoing decline in peoples’ standard of living. This raises questions as to whether or not Five Year Plans do have an impact on improving the social welfare of poor people in general and to what extent the successes of the Five Year Plans can be determined by those who benefitted from them.

\textbf{4.3.4 India’s additional shelter/housing policy measures}

By 2011 India was reported to have a shelter/housing shortage of over 24.7 million\textsuperscript{157} and the total national rural shelter/housing shortage for the period covered by the Twelfth Five Year Plan (2012-2017) was estimated at 43.67 million, of which 90\% was for those ‘below the poverty line.’\textsuperscript{158} Clearly, government is unable to coordinate and implement its shelter/housing policy effectively, as the shelter/housing backlog continues to increase unabated. According to the National Sample Survey Organisation’s report of 2012, it was estimated that 33,510 slums existed in urban India.\textsuperscript{159} The 2008-2009 report stated the number to be about 49 000 slums in urban India,\textsuperscript{160} while the 2002 report estimated 52 000 slums to be located in urban areas\textsuperscript{161} with about 8 million urban households living...

\textsuperscript{156} As fully specified in Annexure 3A. For a full breakdown of how much housing was provided, see, Annexure 3.3: Social Services-Table: 3.3A-3i, under The Twelfth Five Year Plan (2012–2017).

\textsuperscript{157} Ministry of Information and Broadcasting \textit{India 2011- A Reference Annual, Housing} 532.

\textsuperscript{158} This was attributed to the lack of adequate investment in rural housing, livelihoods and development, along with large-scale displacement, a severe agrarian crisis, and growing landlessness and homelessness, which all resulted in the majority of the rural poor living under grossly inadequate conditions. \textit{Human Rights in India-Status Report} 2012 9.


\textsuperscript{161} Sivam and Karuppannan ‘Role of state and market in housing delivery for low-income groups in India’ 69-70.
in these slums.\textsuperscript{162} These figures represent as much as 14% of the total urban households in India.\textsuperscript{163} Furthermore, about 65% of the slums were built on public land owned mostly by local bodies and the government.\textsuperscript{164} Approximately 30% to 50% of India’s population has little or no access to adequate shelter/housing or basic amenities. This means that they are living in conditions of extreme deprivation.\textsuperscript{165} By 2002, the population in these slums was said to be increasing at a high rate,\textsuperscript{166} particularly in large cities, where such developments comprised 18-50% of the shelter/housing stock.\textsuperscript{167} It is clear that despite the prevailing conditions there seems to be a sharp decrease in the period between 2002 and 2012. Clearly government has the positive obligation of ensuring an improved standard of living through the eradication of slums and it seems to be doing something positive in as far as slums are concerned. However, individual improvement of every citizen’s standard of living seems to be still a challenge. In order to achieve this it must take appropriate action to address the situation. Additional shelter/housing policies have been adopted and implemented to complement the mentioned Five Year Plans such as the Jawaharlal Nehru National Urban Renewal Mission (JNNURM)’s and related shelter/housing schemes or programmes.

4.3.4.1 Jawaharlal Nehru National Urban Renewal Mission (JNNURM)

JNNURM is one of several housing schemes launched and intended to meet the poor’s shelter/housing demands. It was launched by the Prime Minister in 2005 and ran parallel to the Tenth Five Year Plan, as implemented by the Ministry of Housing and Urban Poverty Alleviation.\textsuperscript{168} JNNURM was the largest single initiative ever launched in India to broadly tackle issues of urban infrastructure and basic services to the urban

\textsuperscript{165} Kothari, Karmali and Chaudhry The human right to adequate housing and land 46 49.
\textsuperscript{167} Sivam and Karuppannan ‘Role of state and market in housing delivery for low-income groups in India’ 70.
\textsuperscript{168} Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 527.
poor, and lasted for a fixed period of seven years, i.e. from 2005-2012. Its tenure was extended for two years, until March 31 2014. By 2012, a total of 1.58 million dwelling units were approved for construction. Of these 533 000 dwelling units have been completed and 369 000 are in progress. The total budget approved under JNNURM was Rs 231 billion, while Rs. 124 billion was released to states for the implementation of the JNNURM project.

However, the JNNURM was reported to have had extremely limited space and resources for the poor, and had a continued focus on large-scale infrastructure development. Furthermore, houses that were built under the JNNURM for the EWS were generally on the periphery of urban areas, very far from essential places such as businesses, schools and hospitals, and as a result they failed to meet the criteria of ‘adequate shelter/housing.’ JNNURM has a number of sub-missions and sub-components. Those programmes related to shelter/housing are discussed below.

(a) Basic Services to the Urban Poor

Basic Services to the Urban Poor’s main aim was to provide shelter, basic services and other amenities to the urban poor only in selected 65 cities. It was implemented on a demand-driven basis, requiring state governments to prepare and submit their City Development Plans and a Detailed Project Report, as well as to commit, through the Memorandum of Agreement, to undertake urban reforms. Among the projects approved under the Basic Services to the Urban Poor were the integrated development of slums, projects involving the development, improvement and maintenance of basic services to the urban poor, slum improvement and rehabilitation projects, the provision

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169 Ministry of Information and Broadcasting *India 2011 - A Reference Annual, Housing* 538.
171 Ministry of Information and Broadcasting *India 2011 - A Reference Annual, Housing* 538.
172 *Human Rights in India - Status Report 2012* 6
175 Ministry of Information and Broadcasting *India 2011 - A Reference Annual, Housing* 528.
of affordable houses for slum dwellers, urban poor and EWS/LIG categories, environmental improvement of slums, and solid waste management.\textsuperscript{176} Since the implementation of the Basic Services to the Urban Poor in 2010, about Rs. 531 212 has been released to 465 projects in 65 cities for the construction of 10 226 89 dwelling units.\textsuperscript{177} However, the programme has had unintended negative consequences, particularly for the urban poor. Moreover its limited scope would seem to have defeated the country’s objective of improving the poor’s standard of living. This occurs when poor people live in one of the 497 cities that are outside of the selected 65 cities.\textsuperscript{178} The fact that comprehensive plans and reports are required from the city in order for funding to be awarded funding means that certain cities, even those among the selected 65, may well not receive funding because their development plans do not meet the set requirements. The restrictive number set by the programme is likely to create inconsistencies in terms of how the country deals with the projects undertaken in terms of it.

Clearly, the Basic Services to the Urban Poor further hampers the improvement of the poor’s standard of living by placing more emphasis on how each city has drafted and submitted its plans. As a result, the right of the poor to development and an improved standard of living has been curtailed, due to the fact that their city either failed to apply or did not submit a comprehensive plan, resulting in that city not being awarded the necessary funds. The government’s strategy, through the Basic Services to the Urban Poor strategy of divide-and-rule in situations where millions of its citizens are homeless and living in slums, seems to have defeated its constitutional objectives by differentiating between homeless people on the basis of the cities in which they live. Therefore, the proliferation of policies intended to improve or provide more or similar basic needs, but which have restrictive conditions, appears to be the main approach used by the Indian government in most of its shelter/housing schemes.

(b) Integrated Housing and Slum Development Programme (IHSDP)

\textsuperscript{176} Ministry of Information and Broadcasting \textit{India 2011 - A Reference Annual, Housing} 528.

\textsuperscript{177} Ministry of Information and Broadcasting \textit{India 2011 - A Reference Annual, Housing} 528.

\textsuperscript{178} Census India 2011 Report: \textit{India Provisional Population Totals} Paper 1 of 2011.
For all those cities not covered by the Basic Services to the Urban Poor, the IHDSP made provision for them and included the Valmiki Ambedkar Awas Yojana [VAMBAY] and the 1997 National Slum Development Programme. The IHDSP’s main objective is the development of slums by providing a healthy and enabling environment through adequate shelter and basic infrastructure facilities to the slum dwellers of the identified urban areas. The IHDSP aims not only to provide shelter, but also to upgrade and construct new houses, provide a range of sanitation services, sites and services or houses at affordable costs for EWS and LIG categories, slum improvement and rehabilitation projects. Since the inception of this project in 2010, Rs. 3529.27 crore was released for 946 projects for the construction of 502 935 dwelling units in 807 cities and towns.

As a result of the Basic Services to the Urban Poor and IHDSP projects, about 1421 projects costing around Rs. 6088 62 crore, comprising a share of Rs. 19910 58 crore, were approved for the construction and upgrading of 1 525 million dwellings units in 870 cities. By 2010, 55 cities had undertaken the implementation of pro-poor reforms, with about 20-25% of developed land in all shelter/housing projects being designated for EWS and LIGs categories. It is clear that numerous projects that have been launched all have the same objectives, namely to provide shelter/housing for the EWS and LIGs, improve slums and achieve related infrastructure development through funding received from the state.

4.3.4.2 The Scheme of Affordable Housing in Partnership

180 Housing and Urban Development Corporation Limited ‘Detailed project report integrated housing and slum development programme - Thoubal’ 8-9.
181 Housing and Urban Development Corporation Limited ‘Detailed project report integrated housing and slum development programme - Thoubal’ 8-9.
182 Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 528-529.
183 Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 528-529.
184 Ministry of Information and Broadcasting India 2011-A Reference Annual, Housing 530.
Under this scheme, government aims to implement the strategy envisaged in the National Urban Housing and Habitat Policy of 2007, namely to promote various types of public-private partnerships.\(^{185}\) It applies primarily to the 65 cities covered in terms of the Basic Services to the Urban Poor programme.\(^{186}\) Similar to the Basic Services to the Urban Poor and IHSD government allocated an amount of Rs. 5 000 crore for the construction of one million houses for EWS and LIG categories.\(^{187}\) However, in addition to the Basic Services to the Urban Poor and IHSDP, the scheme intends to forge a partnership between government, various agencies, para-statals, urban local bodies and developers, in order to achieve affordable shelter/housing for all. Under the scheme, about Rs 1 288 82 crore was approved for the states of Uttar Pradesh (10 projects) and Chhattisgarh (6 projects). The performance of this scheme does not differ significantly from any of the government schemes in operation.\(^{188}\)

4.3.4.3 Slum Free City Planning Scheme

The main objective of this scheme is to provide:

(a) Financial support to state governments to undertake preparatory slum surveys, as well as for the slum Management Information System (MIS), Geographical Information System (GIS) Mapping of Slums;
(b) Development of the GIS-enabled Slum Information System, preparation of Slum Free City and State plans;
(c) Development of a legal framework to provide property rights to the poor’
(d) Addressing issues of master planning, including the revision of laws related to town planning; and
(e) Urban development, municipal administration and slums undertaking community mobilisation.\(^{189}\)

The budget allocation for all of this was Rs.120 core, with a sum of Rs.60 crore being released during the period 2009-2010. Furthermore, the National Slum Free City campaign was launched and workshops and capacity building programmes were held in preparation for the Slum Free City Planning Scheme.\(^{190}\) Based on its objectives this

\(^{186}\) The Scheme of Affordable Housing in Partnership.
\(^{187}\) The Scheme of Affordable Housing in Partnership.
\(^{188}\) Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 530.
\(^{189}\) Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 530.
\(^{190}\) Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 530.
scheme is appealing. However, despite some achievements by the scheme, the state of India’s increasing shelter/housing demand stock and challenges related to lack of adequate implementation and monitoring processes continues to haunt every shelter/housing programme conceived.

4.3.4.4 Rajiv Awas Yojana (RAY)\textsuperscript{191}

Similarly to the Slum Free City Planning Scheme RAY was launched in June 2011 as an ambitious plan, seeking to promote a slum-free India by encouraging states and union territories to address slum problems in a definitive manner through the adoption of a multi-pronged ‘whole-city’ approach focusing on the following:

a) Bringing existing slums within the formal system and enabling them to get the same level of access to basic amenities as the rest of the town;

b) Redressing the failures of the formal system that led to the creation of slums; and

c) Tackling the shortage of urban land and housing, thereby keeping shelter out of the reach of the urban poor and forcing them to resort to extra-legal solutions in a bid to retain their sources of livelihood and employment.\textsuperscript{192}

RAY also intends to give property rights to the urban poor. Furthermore, in terms of RAY, master plans must make provision for EWS/LIG categories by treating them as distinct segments for the purposes of land use and urban planning.\textsuperscript{193} The scheme provides financial assistance to states willing to assign property rights to slum dwellers and to provide basic amenities on an equal basis to the rest of the town. The scheme intends to cover around 250 cities by 2017, and government has already released funds to about 157 cities for preparatory activities.\textsuperscript{194} In terms of RAY two phases were adopted i.e. the preparatory phase which ended in 2013 and the implementation phase for the period of 2013-2022 under the Slum Free City Plan of Action.

\textsuperscript{191} It is a scheme of Government of India for the benefit of poor in urban areas and aims to provide them with Shelters or Housing free of cost. The Scheme aims to make India Slum-free by 2022.
\textsuperscript{193} Guidelines for Slum-free City Planning.
4.3.4.5 The Slum Free City Plan of Action

The SFCPoA is a city level action plan prioritizing the upgrading of existing slums and planning for provision of houses for the urban poor for the next 10-15 years. The plan is divided into two parts namely Part I ‘The Curative Strategy’ that includes slum improvement or redevelopment of all existing slums and Part II ‘Prevention of Future Slums’, that includes estimating and delineating the development of affordable shelter/housing for the urban poor and the revision of existing urban policies to enable shelter/housing for urban poor. However, the SFCPoA is limited to cities covered by RAY, and require stakeholder buy-in through education workshops. An important aspect emphasized in SFCPoA as part of RAY is the review of achievements and challenges of past programmes and what must be done. While the goals and aspirations are convincing enough the approach followed by India in implementing the set shelter/housing programmes has proven too complex and difficult. It is imperative that India must tackle the bureaucratic bottlenecks associated with slum eradication and development in India.

4.3.4.6 Interest Subsidy Scheme for Housing the Urban Poor (ISHUP)

This Scheme was approved in 2008 to supplement the efforts of the government through JNNURM to address the shelter/housing shortage. The purpose of this scheme is to enhance affordability, together with leveraging funds from the market for lower segments of the population. Under the scheme, a subsidy of 5% per annum is given for loans of Rs. 100 000 taken out during the Eleventh Five Year Plan, with a loan repayment of 15-20 years. It was expected that through the Interest Subsidy Scheme for Housing the Urban Poor, an additional shelter/housing stock of 310 000 houses for

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196 Guidelines for Preparation of Slum Free City Plan of Action 2013 – 2022 4-16.
198 Guidelines for Preparation of Slum Free City Plan of Action 2013 – 2022 1.
202 Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 533.
the EWS and LIG categories would be created during the period of the Eleventh Five Year Plan, out of which 213 000 dwelling units were targeted for EWS and 0.97% for LIG categories. In this regard, households with an income of Rs 5000 were classified as EWS and those with a monthly income between Rs 5000 and Rs. 10 000 were LIGs. Under the Interest Subsidy Scheme for Housing the Urban Poor, preference was to be given to Scheduled Castes, Scheduled Tribes, minorities and persons with disabilities, as well as women. Upon review of the scheme, it was found that there were about 629 121 beneficiaries. During the 2010-2011 financial year, Rs.200 crore was allocated for the scheme and was expected to benefit about 120 000 beneficiaries. In May 2010, Rs.56 lakh was released as a subsidy, which benefited 762 people in the state of Andhra Pradesh.

4.3.4.7 The Indira Awaas Yojana (IAY)
The IAY is a flagship scheme within the Ministry of Rural Development that aims to provide mainly shelter/housing to the poor, who must have a plot in the rural areas. It was introduced in 1985-1986 with the aim of providing free shelter/housing to families in rural areas and Scheduled Castes/Scheduled Tribes households and freed bonded labourers. The scheme made specific provision for at least 60% of IAY expenditure to be allocated to the construction of houses for social caste families. From its inception until January 2012 about 27.3 million houses have been constructed at an expenditure of Rs. 795 billion. However, delivery under the scheme produced mixed results, as some states achieved 100% delivery compliance, while others failed to achieve their set

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203 Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 533.
204 Ministry of Information and Broadcasting India 2011 - A Reference Annual, Housing 534.
206 In 1993-94, the scheme was extended to cover non-SC/ST families, subject to the condition that the benefits to these groups would not be more than 40% of the total allocation, The Tenth Five Year Plan (2002-2007): Mid Term Appraisal (2002-2007) chapter 7 244-245.
targets. It is clear that there are many inconsistencies within government institutions responsible for implementing the shelter/housing mandate, particularly when no uniform approach is prescribed for implementing various shelter/housing programmes. Although government provides substantial funding for these programmes - for example, the RAY budget for 2010-2011 was Rs 1270 crore - the Indian Human Rights Commission found that the scheme does not provide sufficient funds to build a house, and there is some evidence that those who receive the money end up being in debt.

4.3.5 Summary
Since their inception India’s Five Year Plans have generated mixed results. These include achieving a considerable margin of success as well as failing to adequately address the shelter/housing backlog, slum eradication and homelessness. A question that can be posed is whether government is willing to accept that its policy, adopted through the Five Year Plans, is failing in its implementation to contain the backlog and improve the poor’s standard of living. For example, most of the shelter/housing programmes and schemes established during the Five Year Plans, despite being aimed at improving the poor peoples’ standard of living, do not seem to have made any major shift towards achieving their overall aim, i.e. reducing migration and improving poor peoples’ standard of living. Contributing factors include the fact that several shelter/housing programmes and schemes, although they provide shelter/housing assistance to the same categories of people and exist in parallel, produce contradictory statistics, outcomes and challenges. Utilising these statistics demonstrates that the

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208 Accountability Initiative. *Budget Briefs- IAY 5.*
209 Ministry of Information and Broadcasting. *India 2011 - A Reference Annual, Housing 530-31.*
211 For example, schemes such as the Two Million Housing scheme and the new scheme of providing housing, with central assistance, to the slum population (Valmiki Ambedkar Awas Yojana or VAMBAY) should be used to provide immediate benefits to the most disadvantaged urban segments. The Tenth Five Year Plan (2002-2007) 624. Bharat Nirman programme which focuses on the provision of key elements of rural infrastructure such as irrigation, rural electrification, rural roads, rural drinking water supply and sanitation, housing for the poor, and rural connectivity via community IT service centres, Eleventh Five Year Plan (2007–2012), Inclusive Growth: vol ix x, available at <http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v3/11th_vol3.pdf> (date accessed 2015-04-29). The conference of Chief Ministers, 1996 recommended the Basic Minimum Services (BMS)
lives of many Indians continues to deteriorate and to be further exacerbated by the regular forced evictions and slum demolitions throughout the country that are carried out in the name of ‘development’. It is evident that every Five Year Plan adopted has its own dynamic implementation challenges and raises new systemic issues, which is argued to have derailed government on its path to generally improve peoples’ standards of living in accordance with the Five Year Plan policy objectives. In addition, the Five Year Plans policy seems to be uncoordinated, as a number of them have at times continued to deal with matters previously raised or dealt with. Moreover, the amount of resources already allocated under these plans, schemes and programmes clearly does not seem to have made much of a contribution to the improvement of the poor’s standard of living in compliance with the Directive Principles of State Policy and fundamental rights, as contained in the 1949 Constitution. The five year period to implement these plans is probably too short to adequately tackle some of the recurring

Programme. One of the seven BMS requiring attention was ‘Provision of Public Housing Assistance to all shelterless poor families’ The Eleventh Five Year Plan-(2007-2012): Rapid Poverty Reduction, chapter 4, 94. There was also the National Urban Renewal Mission (NURM), whose objective was to accelerate the supply of land, shelter and infrastructure, taking into account the requirements of economic development, with particular reference to balanced regional development, poverty alleviation and rapid economic development. The 1998-1999 Two Million Housing Programme was a special action plan intended to further the national agenda for governance and the 1998 NH and HP policy. It intended to facilitate the construction of adequate housing facilities, in particular for economically weaker and low income sections of the population, as well as to cater for the needs of SC/ST and other vulnerable groups. In terms of this programme, the government aimed at constructing about 2 million houses, of which about 0.7 million houses were to be built in urban areas and the remaining 1.3 million in rural areas. Furthermore, a comprehensive action plan for rural housing aimed at the construction of 2.5 million houses in rural areas, as well as the upgrading of unserviceable katcha houses. Even though the government could argue to have delivered a certain number of houses, it cannot be regarded to have utilised its available resources to fully achieve, on a progressive basis, the realisation of the right to adequate shelter/housing, Combined Second, Third, Fourth and Fifth Periodic Report: India 2007 para 421-422.

For example, Kannagi Nagar, Okkiyum Thoraipakkam, located outside Chennai, is Asia’s largest resettlement site, to which 15,000 evicted families from 68 slums have already been relocated: Human Rights in India-Status Report 2012 8.


For example, the First Five-Year Plan failed to cater for the poor; the second Five-Year Plan had a lack of adequate foresight with regard to the implementation of goals that were set, resulting in unnecessary delays; the third Five-Year Plan had too many institutional frameworks with duplication and dispersed functions; the Fourth Five-Year Plan had the challenge of rapid urbanisation; the sixth Five-Year Plan dealt with the integration of services, in particular to the poor; in the seventh five-year plan government recognised its role as the provider of housing to poor people; the eight Five-Year Plan faced the issue of the increasing unemployment rate, etc.

For examples, see the fourth and sixth Five Year Plans.
issues. It is clear that the Five Year Plans legacy failed at the implementation level, as measures adopted every term did not appear to have been adequately applied, monitored and comprehensively reviewed. The failure of government’s implementation is also confirmed by the CESCR:

> While housing is under the responsibility of the state government, the oversight exercised by the federal government is insufficient to ensure effective implementation of the existing strategies and policies to ensure the right to housing for all.\(^{216}\)

Arguably, to abandon the Five Year Plans despite the fact that it was government’s approach to reinvent what could be called a Five Year wheel for over 61 years, would appear to be an embarrassment likely to upset government’s comfortable way of delivering on its mandate. Although it is clear that the government has the financial resources, the approach adopted in utilising the said budget has had mixed results, as government often experiences difficulties in managing all these programmes in such a way that it can come up with a decisive action plan. The various implemented shelter/housing programmes have proven to be uncoordinated,\(^{217}\) contradictory and fragmented, leading to differing reviews and realisations. This makes it a mammoth task to determine the extent or impact of its efforts in providing adequate shelter/housing to the EWS and LIGs.

The issue of uncoordinated programmes was raised by the CESCR in its review of India’s report, creating the necessity for the country to adopt enabling shelter/housing legislation to consolidate and provide a legislative framework from which all of the various schemes would begin to be coordinated and properly reviewed and monitored. Therefore, these shelter/housing programmes could have been better managed, planned and fragmented if, firstly, they had been placed under one government institution responsible for overseeing the shelter/housing mandate, as opposed to being divided among two existing government agencies i.e. Ministry for Rural and Urban Development, with subsequent divisions between the rural and urban. Secondly, this could have been achieved through the integration of all these shelter/housing


\(^{217}\) Twelfth Five Year Plan (2012–2017) 34.
programmes and schemes into one, with subsequent sub-units having clear descriptive functions and roles. Without access to adequate rehabilitation and feasible alternative shelter/housing options, many are forced to become homeless and live on the streets.\footnote{Though the government introduced the \textit{Right to Fair Compensation, Resettlement and Rehabilitation and Transparency in Land Acquisition Bill} in 2012, to enable the state to acquire private property for public use following the payment of compensation to the owner, it has been found to have several shortcomings, such as not intending to minimise evictions; failing to have a rights-based definition of ‘public purpose’ and not including the adequate human rights safeguards for rehabilitation, as well as its weaknesses with regard to urban eviction and displacement issues, \textit{Human Rights in India-Status Report 2012}.}

A significant part of India’s shelter/housing policies has been the subject of litigation mainly under the popular public Interest litigation framework.

### 4.4 Public Interest Litigation and SERs’ adjudication in India

PIL started during the 1970s when it became clear that the elected government was weakening, resulting in widespread violations of the most fundamental human rights, especially the rights to life and liberty. PIL played a significant role in the manner in which the Indian judiciary perceived its function in the application of the Constitution.\footnote{Galanter M and Krishnan JK ‘Bread for the poor: Access to justice and the rights of the needy in India’ \textit{Hastings Law Journal} (2004) vol 55 789-834 795 796.}

During this period, the judiciary saw fit, as the protector and enforcer of the rule of law,\footnote{Meer ‘Litigating fundamental rights: Rights and social action litigation in India: A lesson for South Africa’ 360; Upendra B ‘Taking suffering seriously: Social action litigation in the Supreme Court of India’ \textit{Third World Legal Studies} (1985) vol 4 (6) 107-132 114-115.} to initiate the PIL movement. It is an entirely judge-led and judge-dominated movement\footnote{Upendra ‘Taking suffering seriously: Social action litigation in the Supreme Court of India’ 111 119; Meer ‘Litigating fundamental rights: Rights and social action litigation in India: A lesson for South Africa’ 361; Raja AV and Xavier FR \textit{Economic efficiency of Public Interest Litigation (PIL): Lessons from India} Paper presented at the first annual conference of the Asian Law and Economics Association, held at Kyung Hee University, Seoul, June 24-25 2005, 1-22 9-10, available at <http://mpra.ub.uni-muenchen.de/3870/1/MPRA_paper_3870.pdf>; (date accessed 2015-04-27), Khilnani S ‘The Constitution and individual rights: A comment on Dr Abhishek Singhvi’s India’s Constitution and individual rights: Diverse perspectives’ \textit{George Washington International Law Review} (2009-2010) vol 41 361-366, 363; Galanter and Krishnan ‘Bread for the poor: Access to justice and the rights of the needy in India’ 795; Sripati ‘Human rights in India - fifty years after independence’ 118.} endeavouring to adjudicate on fundamental rights violations and enforcing these rights. However, the Indian Supreme Court clarified the objective of PIL through the demarcation of the role of the courts in \textit{Sheela Barse v Union of India} that:

In Public Interest Litigation, unlike traditional dispute resolution mechanisms, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudications the party structure is merely bi-polar and the controversy pertains to the determination of the legal consequences of past
events and the remedy is essentially linked to and limited by the logic of the array of the parties, in a public interest action the proceedings cut across and transcend these traditional forms and inhibitions.\footnote{222 Sheela Barse v. Union of India 1988 4 SCC 234 234 or 1988 AIR (SC) 2211 2214.}

Essentially PIL is invoked in instances where the interest of the public at large is involved, and the Indian Supreme Court can be approached by any person,\footnote{223 The doctrine of \textit{locus standi} was extended to include any persons acting in the public interest of either a group or an individual. Sripati ‘Human rights in India - fifty years after independence’ 119-120. Bhagwati J, in \textit{SP Gupta v President of India} AIR 1982 SCC 149, held that: where a legal wrong or legal injury is caused to a person or determinate class of persons by reason of violation of any Constitutional or legal right, ... and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction or order.} either by filing, as a Writ Petition,\footnote{224 Bhagwati J, in \textit{SP Gupta v President of India}, held that: where the weaker section of the community are concerned ... who are living in poverty and destitution ... who are helpless victims of an exploitative society and who do not have easy access to justice, ... this court will not insist on a regular Writ petition to be filed by the public spirited individual espousing their cause and seeking relief from them. This court will readily respond even to a letter addressed by such individual acting pro bono publico \textit{SP Gupta v President of India} as 189.} telegram,\footnote{225 Bandhua Mukti Morcha v Union of India 1984 3 SCC 161.} newspaper article\footnote{226 Mukesh Advani v State of Madhya Pradesh AIR 1985 SC 1368.} or postcard.\footnote{227 Sunil Batra v Delhi Administration A.I.R. 1986 SC 180.} This highlights the public’s role in invoking the court’s jurisdiction.\footnote{228 Article 132, 133 of the 1949 Constitution, Awasthi A and Verma A ‘Explanatory note on Supreme Court jurisdiction’ Hidayatullah National Law University, Raipur, (Undated) (C.G) 5 7 10-14.} In other words, the court’s complex procedural systems are relatively relaxed and the Indian Supreme Court’s doors are open to people and issues never raised before.\footnote{229 PIL is regarded as a distinctive, extraordinary jurisdiction, and no other court in the world exercises this jurisdiction, particularly in terms of its endeavour to address, among others, resource-driven and demanding SERs' violations, which the Indian government seems reluctant to fully entrench, protect and enforce. In other words, PIL is characterised by bold, creative and imaginative rights litigation based on the interpretation and enforcement of fundamental rights as contained in the Constitution.\footnote{230 Sripati ‘Human rights in India - fifty years after independence’ 120-121.} This represents a sanctuary for

\footnote{231 According to Tushnet ‘Non-justiciable rights need not be legally irrelevant. It seems clear, for example, that they can be used to interpret ambiguous statutes and even to support interpretation that, absent}
the poor and underprivileged. Consequently, it is meant to shield the 'public interest' and is considered to be an economically efficient choice of redress when there is no incentive for private litigation or an inability of class action to counter harm as a result of high transaction costs, lack of substantive laws on regulation of the harm, and pervasive regulatory failures.

Raja and Xavier praise the PIL process which is exemplified in the role played by innovative judges, who have managed to safeguard the interests of the public at large and interpreted the law to overcome the inadequacy of the formal court system and private litigation in terms of solving conflicts at group level. Clearly, cases that the Indian Supreme Court has dealt with through the years are a demonstration of the judiciary's commitment to bringing justice close to the constitutional-aspirations reality. In *Keshavananda Bharati v State of Kerala*, Dwivedi CJ emphasised the significance of the Constitution to the poor:

> The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed as that they can understand and appreciate it. The more they understand it the more they love it and the more they prize it.

And further the court is not chosen by the people and is not responsible to them in the sense in which the House of the People is. However, it will win for itself a permanent place in the hearts of the people and augment its moral authority if it can shift the focus of judicial review from the numerical concept of minority

from the Directive Principles or similar non-justiciable rights, would not be the natural ones according to accepted standards of statutory interpretation. In addition, non-justiciable rights can be invoked to explain why the courts refuse to recognise other rights, where the recognition of those rights would impair the government’s ability to implement - at its discretion - the non-justiciable rights'. Tushnet M ‘Social welfare rights and the forms of judicial review’ *Texas Law Review* (2003-2004) vol 82 1895-1920 1898.

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234 Raja and Xavier *Economic efficiency of public interest litigation (PIL): Lessons from India* 3-6.


Clearly, PIL enables the Constitution to be used as a tool to enforce the rights to life, livelihood, human dignity, equality and freedom and has, therefore, indirectly brought life to SERs’ adjudication that has kept the courts busy to date. The Indian judicial review process has exposed the conflict of authorities between judicial, legislative and executive and thus seen as playing a central drama to the Indian constitutionalism which is becoming a more critical in nature. Thus, PIL is an appropriate vehicle for poor people to enforce their SERs. Nevertheless government’s compliance track record with regard to the court’s PIL judgments remains questionable.

4.5 The judiciary’s indirect interpretation of the 1949 Constitution to enforce the right to adequate shelter/housing

4.5.1 Introduction

Indian jurisprudence provides a unique and inspiring analysis of the indirect justiciability of the right to adequate shelter/housing. This section traces the origin of housing jurisprudence in India and critiques how the judiciary is safeguarding the right to adequate shelter/housing jurisprudence.

4.5.2 Justiciability of the right to adequate shelter/housing

Even though Directive Principles of State Policy are not enforceable by courts, they are nevertheless seen as aids in interpreting the Constitution, and they also provide the basis, scope and extent of the content of a fundamental right:

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239 Khilnani ‘The Constitution and individual rights: A comment on Dr. Abhishek Singhvi’s India’s Constitution and individual rights: diverse perspectives’ 366.
240 Discussed hereunder paragraph 4.5 and 4.7.
241 The Courts have been trying to strike a fair balance in instances where there is a clash of superiority between the fundamental rights and DPSP. For example, as early as 1951, the court in State of Madras v Champakam Dorairajan held that the directive principles have to conform to and run subsidiary to the chapter on fundamental rights. However, years later, in 1973, in Kesavananda Bharati v State of Kerala (dealing with the basic structure and framework of the 1949 Constitution), Mathew J found that in developing a social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles. In addition, what is fundamental in the governance of the country cannot be less significant than what is significant in the life of an individual. See State of Madras v Champakam Dorairajan 1951 SCR 525, It is on this premise that one can argue that the
Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgment, curtailment and even abrogation of these rights in circumstances not visualised by the Constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims in Part IV.\(^{242}\)

It is on this basis that most SERs in India are compatible with the Directive Principles of State Policy,\(^{243}\) as contained in the 1949 Constitution.\(^{244}\) Their protection has been witnessed by the way in which the Indian Supreme Court’s interprets these rights in accordance with the existing fundamental rights, and this has given much hope to the victims of SERs.\(^{245}\) For example, rights to education,\(^{246}\) health, work,\(^{247}\) and a healthy environment\(^{248}\) have been interpreted as constituting an integral part of the fundamental right to life under Article 21 of the 1949 Constitution.\(^{249}\) This makes Article 21 the most frequently used provision for protecting both civil and political rights (CPRs) and SERs in India,\(^{250}\) where the state’s obligation towards its citizens has been interpreted by referring

\(^{242}\) Kesavananda Bharati v State of Kerala.

\(^{243}\) Article 21 of the 1949 Constitution.

\(^{244}\) The 1949 Constitution. Chameli Singh v State of Uttar Pradesh AIR 1996 SC 1051.

\(^{245}\) In C.E.SC Ltd. Subhash Chandra Bose 1992 1, SCC 441.

\(^{246}\) Mohini Jain v State of Karnataka A.I.R. 1992 SC 1858, in that no citizen can lead a life of dignity inherent to Article 21 unless he or she is educated, and the State discharges its Constitutional right to provide education to its citizens through private educational institutions, 1863-1864 1870-1871.


\(^{248}\) Francis Coralie Mullin v The Administrator, Union of India 1998 9 SCC 591 para 6. Francis Coralie Mullin v The Administrator, Union of Territory of Delhi AIR, In Virendra Gaur v State of Haryana A.I.R. 1995 SC 577: The Court held that Article 21 protects the right to life as a fundamental right. The enjoyment of life and its attainment, including the right to live with human dignity, encompasses the protection and preservation of the environment, ecological balance, freedom from pollution of the air and water sanitation, without which life cannot be enjoyed. Any actions that would cause environmental ecological, air or water pollution, etc. should be regarded as amounting to a violation of Article 21.

\(^{249}\) Francis Coralie Mullin v The Administrator, Union Territory of Delhi 1981 2 SCR 516.

to the Directive Principles of State Policy.\textsuperscript{251} The interpretation approach adopted by the Indian Supreme Court\textsuperscript{252} is commendable and has been seen as being useful in providing guiding principles for the structuring of laws by the government.\textsuperscript{253}

There is a duty upon courts to apply these rights in establishing the national laws of India, and due to the binding effect of the Constitution, the court is also empowered to employ the Directive Principles of State Policy to interpret the Constitution and statutes of India.\textsuperscript{254} It is obvious that the right to adequate shelter/housing finds its protection and foundation in Article 39(a), as it constitutes an integral part of the adequate means of livelihood, which is aptly captured in the Hindu phrase \textit{Roti Kaprda Makan}, which means ‘all human beings require three basic items for survival - food, clothing and shelter.’ This phrase is also captured by Article 11(1) of the ICESCR, which provides for an obligation upon state parties’ to ensure that everyone has an adequate standard of living for himself and his family, including adequate food, clothing and housing, as well as to the continuous improvement of his or her living conditions. From the foregoing it can be deduced that the right to adequate shelter/housing indirectly finds meaning as an integral part of the fundamental rights, and is capable of being invoked and enforced by the courts in India. In view of the interpretive context adopted by the Indian Supreme Court, it is now relevant to look at the manner in which it has specifically interpreted and enforced the right to adequate shelter/housing, and to evaluate the extent and impact of such court’s decision on improving the poor’s standard of living.

\textsuperscript{251} In \textit{M.C.Mehta v Union of India} para 6, the court found that it need hardly be added that the duty cast on the State under Article 47 and 48-A, in particular of Part IV of the Constitution, is to be interpreted as conferring a corresponding right on the citizens and, therefore, the right under Article 21 must at least be interpreted to include the same within its ambit. At this point in time, the effect of the quality of the environment on the lives of the inhabitants is much too obvious to require any emphasis or elaboration.

\textsuperscript{252} Birchfield and Corsi ‘Between Starvation and Globalization: Realizing the Right to Food in India’ 713-715.

\textsuperscript{253} In terms of Article 37, Part IV of the 1949 Constitution, states the following: The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

\textsuperscript{254} Sripati ‘Human rights in India - fifty years after independence’ 126.
4.5.3 Judicial protection and enforcement of the right to adequate shelter/housing

The jurisprudence of the Indian Supreme Court has only emphasised the indirect inclusiveness of the right to adequate shelter/housing in Article 21. As stated above, the Indian Supreme Court has been very receptive to the poor since the 1980s. This is evidenced by the fact that it enabled this right to have a meaning within the Indian law through the judicial interpretation\(^{255}\) of Article 21,\(^{256}\) mainly as a result of the PIL process.\(^{257}\) The Indian Supreme Court managed to employ its creative and interpretive analogy to continually enforce all SERs within the existing fundamental rights.\(^{258}\)

A classic example of the PIL invoking, for the first time, the right to adequate shelter/housing in India, is the famous case of *Olga Tellis v Bombay Municipal Corporation*.\(^{259}\) This case is seen to have given a new socio-economic dimension to Article 21, by holding that the right to life included the right to livelihood in cases where people occupied public land for informal trading and residential purposes. In this case, petitioners contended that since they would be deprived of their livelihood if they were evicted from their slum and pavement dwellings, their evictions would be tantamount to deprivation of their lives, and this would be unconstitutional. However, the court rejected this argument by holding that:

No one has the right to make use of a public property for a private purpose without requisite authorization and therefore, it is erroneous to contend that pavement dwellers have the right to encroach on the pavements by constructing dwellings thereon. If a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his use of the pavement would become unauthorised.\(^{260}\)

\(^{255}\) Sripati, ‘Human rights in India – fifty years after independence’ 126.
\(^{256}\) Though the court seems to have relaxed this interpretation, the court initially applied a restrictive interpretation to this article. *A.K Gopalan v State of Madras* A.I.R. 1950 SC 27.
\(^{257}\) Other rights having a direct bearing on the right to adequate shelter/housing are: Article 14-Equality before the law, Article 15 (1)-Non-discrimination on grounds of religion, race, caste, sex, place of birth, Article 15 (3)-Special provisions in favour of women and children based on the principle of protective discrimination, Article 16-Equality of opportunity in matters relating to employment or appointment to any office under the State, Article 19(1) (d)-Freedom to move freely throughout the territory of India, (Article 19 (1) (e)-Freedom to reside and settle in any part of the territory of India, and Article 19 (1) (g)-Right of all citizens to practice any profession, or to carry on any occupation, trade or business of the 1949 Constitution.
\(^{259}\) *Olga Tellis v Bombay Municipal Corporation* 1985 3 SCC 545.
\(^{260}\) *Olga Tellis v Bombay Municipal Corporation* 524.
Importantly, the court found that the state could not be compelled, by way of affirmative action, to provide a means of subsistence to all its citizens and that it could not deprive a person of his or her means of livelihood. To do so, except by a law that was right, just and fair, was tantamount to depriving him or her of his or her life. The court nevertheless halted all evictions of pavement dwellers and the demolition of their huts for a period of four years following the filing of the writ petition. Furthermore, the court directed the municipal authorities to provide alternative sites or accommodation to the slum and pavement dwellers within a reasonable distance from their original sites. Of particular importance was the fact that the court took the opportunity to strongly urge municipal authorities to implement a proposed shelter/housing scheme for the poor. Although this case is praised for being a landmark judgment in terms of safeguarding the right of homeless people to adequate shelter/housing in India, the judgment does not critically and fully engage any of the government’s adopted shelter/housing policy measures to determine their extent, implementation and reasonableness and government’s efforts to provide shelter/housing to its EWS and LIGs. As a result, it can be argued that the court limited its review scope, which seems to have, in turn, hampered even the subsequent assessment of all shelter/housing-related cases in India. In other words, the implementation review of government’s shelter/housing policies have not been adequately explored by courts to determine if these policies fell short of improving peoples’ standard of living through shelter/housing.

Through Article 21 the court has managed to make shelter/housing remedies in cases where the government failed to fulfil its positive [constitutional] obligations towards the improvement of the standard of living for its poor citizens. For example, the right to life was given an appropriate, comprehensive and inclusive meaning in Francis Coralie Mullin v The Administrator, Union Territory of Delhi, where the court held:

The right to life includes the right to live with human dignity and all that goes with it, namely, the basic necessaries of life such as adequate nutrition, clothing and

262 Olga Tellis v Bombay Municipal Corporation 195.
263 Olga Tellis v Bombay Municipal Corporation 204.
264 Olga Tellis v Bombay Municipal Corporation 204.
265 Olga Tellis v Bombay Municipal Corporation 204.
266 As stated in 4.3 above
shelter and faculties for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activated as constitute the bare minimum expression of the human self.\textsuperscript{267}

While a broader interpretive definition and extension of Article 21 was found in the case of\textit{Shanti Star Builders v Narayan K. Totame},\textsuperscript{268} where the court held that the right to life included the right to food and a reasonable means of accommodation, the decision in\textit{Chameli Singh v State of Uttar Pradesh} case, reiterated that the main objective of the right to adequate shelter/housing was to include other amenities. In this regard reference was made to the UNGA Resolution [35/76], which stated that:

Shelter for a human being is not a mere protection of life and limb. It is a home where he has opportunities to grow physically, mentally, intellectually and spiritually. It therefore includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads, etc.\textsuperscript{269}

It is clear that in order to be able to fully access the right to adequate shelter/housing, a person must be able not only to receive partial amenities associated with it, but should have access to all the basic amenities, as espoused in the case of\textit{Chameli Singh}. Despite the rich jurisprudential court decisions made since the\textit{Olga Tellis} judgment, the prevalence of multiple deprivations,\textsuperscript{270} as found within Indian society today is a painful reminder of what the 1949 Constitution theoretically stands to achieve and the living conditions of the EWS and LIG. The coordinated provision of adequate shelter/housing is likely to minimise or restrict poor peoples’ despair, and even limit the rapid increase in the number of slum establishments in undesignated areas. For example, Dharavi, in Mumbai, is one of the biggest slum settlements in the world today,\textsuperscript{271} and for the Indian Supreme Court to have not seized the opportunity to assess the adequacy of adopted shelter/housing policy measures, in the midst of the country’s state of homelessness,

\textsuperscript{267}Francis Coralie Mullin v The Administrator, Union Territory of Delhi 529 B-F.
\textsuperscript{268}Shantistar Builders v Narayan Khimalal Totame.
\textsuperscript{269}Chameli Singh v State of Uttar Pradesh para 8.
\textsuperscript{270}The Twelfth Five Year Plan (2012–2017): Faster, more inclusive and sustainable growth 80 200 334.
remains questionable. It is clear that in order to prevent illegal or unauthorised occupation of public or private land, the responsibility lies with the government to adopt progressive measures aimed at fulfilling the homeless peoples’ right to adequate shelter/housing. Ultimately this will prevent them from experiencing frustration and hopelessness, resulting in them setting up home in different places throughout the country. The *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* case signifies the responsibility of government towards poor people, in accordance with the 1949 Constitution, and emphasises the need for people to believe that their government is committed to providing them with shelter/housing:

Due to want of facilities and opportunities, the right to residence and settlement is an illusion to the rural and urban poor. Article 38, 39 and 46 mandate the state, as its economic policy, to provide socio-economic justice to minimise inequalities in income and in opportunities and status. It positively charges the State to distribute its largesse to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful so as to make life worth living with dignity of person and equality of status and to constantly improve excellence. Though no person has the right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the State has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads and to make the right to life meaningful.  

Therefore, in accordance with these cases government is reminded to take its constitutional obligations seriously and realise the impact that its resources could have if appropriately utilised to alleviate the plight of many poor Indians, who have no other choice but to live under intolerable conditions, in violation of their right to life.

In the recent 2012 case of *Peoples’ Union for Civil Liberties Petitioner(s) v Union of India and ORS*, which focused on the necessity to provide emergency night shelters, the Indian Supreme Court was very receptive to the urgent needs of the poor residing on pavements during cold winters, while government seemed to be taking its time to deliver adequate shelter/housing to them. The court, in this case exposed the levels of

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272 *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan.*

homelessness in about 10 states, cities and territories, and ordered government to provide temporary shelter within three weeks from the date of the court’s judgment, in order to protect and preserve the lives of the people in accordance with the constitutional philosophy enshrined in Article 21. It also ordered that permanent night shelters be built to accommodate these people within a month, on the basis that:

Nothing is more important for the State than to preserve and protect the lives of the most vulnerable, weak, poor and helpless people. The homeless people are constantly exposed to the risk of life while living on the pavements and the streets and the threat to life is particularly imminent in the severe and biting cold winter, especially in the northern India.

The court also directed the state to discharge its core obligation to comply with Article 21 of the 1949 Constitution by providing night shelters to the vulnerable and homeless people. This case is pertinent as it reveals the state of homelessness in India and how the government deals with the provision of temporary and permanent shelter/housing to its poor. It is clear that the manner in which a country addresses the needs of those in need of emergency shelter/housing determines its obligations and intentions with regard to the provision of permanent shelter/housing.

However, in the Peoples’ Union for Civil Liberties Petitioner(s) v Union of India and ORS case, the court gives little weight to the necessity to adequately examine the reasonableness of adopted shelter/housing policies as an endeavour to improve the poor’s standard of living. Therefore, it can be argued that the Indian Supreme Court approach is losing touch with common realities faced by millions of homeless people, and it seems to be discrediting the poor peoples’ frustration and helplessness as a justification, in most cases, for illegally occupying public land. Indeed, it is the court’s approach of being viewed as not ratifying, adopting, encouraging, promoting or protecting the illegal occupation of land, but also highlighting government’s failure on its policies to provide adequate shelter/housing to its EWS and LIGs. The Indian Supreme Court is reluctant to engage in an historical analysis of existing shelter/housing policies,

274 States of Jammu and Kashmir, Himachal, Pradesh, Uttarakhand, Punjab and Haryana, Rajasthan, Uttar Pradesh and Bihar, People’s Union for Civil Liberties Petitioner(s) v Union of India & ORS 14.
275 People’s Union for Civil Liberties Petitioner(s) v Union of India & ORS 14.
276 People’s Union for Civil Liberties Petitioner(s) v Union of India & ORS 14.
in order to identify their failures/shortfalls to reduce homelessness, housing backlogs and increasing slums and illegal occupation of public land. In *Municipal Corporation of Delhi v Gurnam Kaur*, the court held that:

The Municipal Corporation of Delhi had no legal obligation to provide pavement squatters with alternative shops for rehabilitation as squatters had no enforceable legal right. In *Sadan Singh v. NDMC* 1989 4 SCC 155 Court also reiterated that the question whether there can at all be a fundamental right of a citizen to occupy a particular place on the pavement where he can squat and engage in trade must be answered in the negative.²⁷⁷

The illegal occupation of public land in *Olga Tellis* case, was resurrected in the case of *Almitra Patel v Union of India*,²⁷⁸ which dealt with the illegal occupation of public land by slum dwellers. In this case, the court found that since the land belonged to the government, it was the responsibility of government to decide how it wanted to use that land, irrespective of the poor having occupied it, and they would be evicted in order to cater for government’s objective of establishing rather garbage dumps. The Court held that:

…it is the duty of all concerned to see that landfill sites are provided in the interests of public health. Providing of landfill sites is not a commercial venture, which is being undertaken by the MCD. It is as much the duty of the MCD as that of other authorities enumerated above to see that sufficient sites for landfills to meet the requirement of Delhi for next twenty years are provided. Not providing the same because the MCD is unable to pay an exorbitant amount is understandable. Landfill site has to be provided and it is wholly immaterial which governmental agency or the local authority has to pay the price for it.²⁷⁹

Therefore, it was pointed out that 'Keeping Delhi clean is a governmental function,' and the government was allowed to get its land back from the illegal occupiers, which meant that the slum dwellers were forced to vacate it. The court regarded the slum dwellers as having no rights against the government and ignored their plight, despite them having waited in vain for adequate shelter/housing. This is a domain in which one would expect the court to use its judicial review powers²⁸⁰ on two conflicting rights and to determine the reasons why there is no concerted, integrated effort within government

²⁷⁸ 2000 2 SCC 679.
²⁷⁹ *Almitra Patel v Union of India* 571-572.
²⁸⁰ The Supreme Court is empowered by the Constitution to conduct a judicial review, in particular for any transgression of fundamental rights, *Kesavananda Bharati v State of Kerala* para 1947.
shelter/housing policies to deliver adequate shelter/housing to slum dwellers, thereby minimising illegal occupation of public land. Thus, the failure by the Indian Supreme Court to take the opportunity presented by this illegal occupation case to critically evaluate the reasonableness of government’s shelter/housing policies is argued as neglecting its role as the ‘protector and enforcer of the rule of law’. Instead it exposed slum dwellers to even harsher living conditions without a remedy, since:

The establishment of creating slums, it seems, appears to be a good business and is well organised. The number of slums has multiplied in the last few years in geometrical proportion. Large areas of public land, in this way, are usurped for private use, i.e. free of cost. Rewarding an encroacher on public land with free alternate site is like giving a reward to a pickpocket.

The cases mentioned above constitute an unequivocal reminder to the Indian government that the right to adequate shelter/housing, though part of the Directive Principles of State Policy, must be seen as a right that is capable of being invoked and enforced as a fundamental right under the Constitution. However, it can be argued that the judiciary, although it played a pivotal role in enforcing the right to adequate shelter/housing in general, has failed to clearly evaluate the failure of adopted shelter/housing policies. It is therefore not surprising that despite 65 years of India’s independence, the majority of Indians’ standard of living seems to be worse than ever before, and the 1949 Constitution’s objective of creating a better life for the country’s citizens is merely an illusion. As a result, not only decisions made by the Indian Supreme Court of India decades ago but also recent judgments giving this right meaningful recognition, all appear to be only good on paper.

Many citizens are left vulnerable and marginalised, and the court has only provided them with a half remedy, which is tantamount to none, since the poor are still homeless

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282 Almitra Patel v Union of India 570-571.
and have even been evicted from the land on which they managed to erect a structure that they called home. The eviction of the poor from public land without the court examining government’s shelter/housing policy measures is a blow to what the court has developed as outstanding shelter/housing jurisprudence. Dwivendi CJ emphasised the need to focus on the marginalised that:

It is really the poor, starved and mindless millions who need the court’s protection for securing to themselves the enjoyment of human rights.  

In further emphasising the need to safeguard the weaker section of society through the development of the law, Chandrachud J held that:

But these landmarks in the development of the law cannot be permitted to be transformed into weapons for defeating the hopes and aspirations of our teeming millions, half-clad, half starved, and half educated. These hopes and aspirations representing the will of the people can only become articulate through the voice of their elected representatives. If they fail the people, the nation must face death and destruction. Then, neither the court nor the Constitution will save the country.  

While the Supreme Court of India has issued several orders related to the provision of adequate shelter/housing, few, if any, have been partially complied with. The poor’s standard of living continues to deteriorate, thereby deepening their vulnerability and often leading to illegal occupation of public land.  

In 2009/2010 the Indian Supreme Court intervened and through a series of orders directed all state governments to set up permanent community shelters and allied services for the urban homeless. However, the level of compliance on government’s part appeared to be non-committal and the Homeless Night Shelter Report 2011 found that:

Despite a ‘people progressive’ and strong stand taken by the Honourable Supreme Court and one which will go down in annals of jurisprudence, nationally
and internationally, as one of the most progressive stands for the poorest and most excluded peoples, Governments have continued to drag their feet, filibuster and treat this matter in an unaccountable and casual manner, at a huge cost and humiliation to one of the most deprived sections of the society in independent India.\(^{289}\)

It is clear that in order to improve the poor’s standard of living, a concerted effort is required from the government and the judiciary, where the former allows the latter to guide it in instances where its policies fall short of fulfilling their objectives. An actual evaluation/review of adopted shelter/housing policies would afford the judiciary an opportunity to assist/guide government in understanding how to implement and review such adopted policies. Clearly, failure by government to comply with court orders goes against its constitutional obligations and the promise that it made to fulfil the rights contained in it.

**4.5.4 Summary**

The EWS and LIG’s right to adequate shelter/housing is clearly under siege for reasons such as the failure by the court to go beyond issuing eviction/restraining orders to ensure a proper reasonable assessment review of adopted shelter/housing policies is conducted. The Indian Supreme Court has restricted itself from reassessing the reasonableness of government existing shelter/housing policies. It also failed to conduct a comprehensive examination of the history of homelessness in India and endeavour to find reasons why it is still a problem despite the existence of adopted shelter/housing policies. Possibly government, in this instance, would have to reconsider the adequacy of its policies if it were directed by the courts, in addition to its developmental goals as stated in the case of *Almitra Patel v Union of India* above, of providing information regarding what it is doing to ensure that the homeless also enjoy an improved standard of living. Perhaps the Indian Supreme Court needs some form of enforcement assistance that would help it to ensure or keep government on its toes in as far compliance with the right to adequate shelter/housing orders are concerned.

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\(^{289}\) The ‘The national report on homelessness for Supreme Court of India: Review of compliance of state governments with Supreme Court orders up to Dec 31, 2011’ 13.
4.6 The feasibility of India’s shelter/housing legislative framework

4.6.1 Introduction

The necessity for a country to adopt a legislative framework and a shelter/housing policy framework in addition to its Constitution cannot be underestimated, since a legislative framework sets out an enforceable process through which the improvement of peoples’ standard of living by providing adequate shelter/housing is to take place, within a well-defined roles and responsibilities on national, provincial and local levels. Arguments have been advanced for India to adopt a shelter/housing legislative framework to drive the appropriate coordination and implementation of India’s shelter/housing provision mandate. This had been proposed as far back as the First Five Year Plan era.

4.6.2 India’s adoption of a comprehensive shelter/housing legislative framework

In the absence of shelter/housing legislation, the right to adequate shelter/housing in India is only recognised and enforced through Article 21 of its 1949 Constitution. It is now being enforced through various policy schemes and programmes that are yet to be reviewed by the courts. Although there are other SERs for which India has adopted a legislative framework, the country still lacks a shelter/housing legislative framework. Therefore, India has achieved a selective and contradictory compliance with SERs in general, whereby certain SERs have been formally adopted and enforced in terms of separate legislation, in addition to their indirect enforcement within Article 21 of the Constitution. The selective and contradictory enforcement of SERs is witnessed, for example, through the adoption of the Right of Children to Free and Compulsory Education Act\textsuperscript{290} and the Food Safety and Standards Act,\textsuperscript{291} which is an essential step towards bringing stability to food security in India.

The enactment of the Food Safety and Standards Act occurred as a result of the country’s food stocks having increased to more than 65 million tonnes, with its food subsidy being almost Rs. 30 000 crores. However, despite this increased food stock,

\textsuperscript{290} 35 of 2009, to be amended.
\textsuperscript{291} 34 of 2006.
hunger and malnutrition have continued to lead to unnecessary deaths.\textsuperscript{292} It is clear that although poverty alleviation has been on the government’s agenda for over 58 years the government is still facing more or less the same problems that it experienced years ago.\textsuperscript{293} On that basis, non-governmental organisations began to lobby and eventually pressurised government to provide food to indigent citizens. When the government delayed, they brought a case against it, utilising Article 21 of the Constitution to enforce the right to food, as entrenched in the ICESCR.\textsuperscript{294} The right of human beings to food\textsuperscript{295} was emphasised in 2001 through Article 21,\textsuperscript{296} when the Indian Supreme Court had to deal with the responsibility of the central and state government in the case of the \textit{Peoples’ Union for Civil Liberties Petitioner(s) v Union of India and ORS}. The Indian Supreme Court directed the state to introduce cooked mid-day meals in primary schools. The country has numerous governmental programmes or ‘schemes’ intended to provide food to all children in the age group of 0-6 years, as well as pregnant women, lactating mothers and adolescent girls. However, due to their improper implementation\textsuperscript{297} these schemes faced enormous challenges. Moreover, some states failed to report back to the court on how they are implementing the schemes\textsuperscript{298} and

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\bibitem{Swaminathan} Swaminathan M ‘Excluding the needy: The public provisioning of food in India’ \textit{Social Scientist} (2002) vol 30(3-4) 34-58 34-36.
\bibitem{Cohen} Cohen MJ and Brown MA ‘Access to justice and the right to adequate food: Implementing Millennium Development Goal One’ \textit{Sustainable Development Law & Policy} (2005) vol 6 54-81 55; Birchfield and Corsi ‘Between starvation and globalization: Realizing the right to food in India’ 693.
\bibitem{Cheriyan} Cherian Enforcing the right to food in India: \textit{Bottlenecks in delivering the expected outcome} 4.
\bibitem{Cheriyan2} Cherian Enforcing the right to food in India: \textit{Bottlenecks in delivering the expected outcome} 1 7 9.
\bibitem{Such} Such as (1) Annapurna Scheme-providing 10 kgs of food grains per month for free to indigent senior citizens living alone. (2) Antyodaya Anna Yojana-meant for the poorest of the poor, to be identified through special ration cards, and who would be entitled to receive 35 kg of grain a month at highly subsidised prices (Rs. 2 a kg for wheat and Rs.3 kg for rice). 3. Wage Employment Programmes-these programmes assisted mainly rural people through employment creation, and some of its programmes were hailed as a success. (4) Targeted Public Distribution System- aimed at improving food security at the household level, (5) Mid-day Meals- for children in government and government-assisted schools to receive a free, hot midday meal for at least 200 days per year, (6) Integrated Child Development Services, (7) National Family Benefit Scheme, (8) National Maternity Benefit Scheme and National Old

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others have excluded certain groups (adolescent girls) or failed to report on how they have spent their budgets, thereby resulting in the food benefits not reaching those who these schemes are supposed to benefit. This case represents a significant step in the realisation of SERs in terms of how government policies need to be applied in alleviating poverty and possibly also the need to adopt a separate shelter/housing legislative framework. It is on this premise that the right to adequate shelter/housing could find its basis through separate shelter/housing legislation, in the same way as the Food Safety and Standards Act, since the Indian Supreme Court has already made a number of the right to adequate shelter/housing decisions. Therefore, India’s reliance on domestic law to identify, adjudicate and implement a constitutional right to food reflects a more general confidence in its own sovereignty and position vis-a-vis international human rights bodies when it comes to espousing and upholding human rights. What is needed is the need to re-introduce the discussion and review of the draft Housing Act raised during 1961 as a way of comprehensively tackling the multifaceted shelter/housing challenges.

4.6.3 Summary

From the above, it is indeed clear that the country seems to be selective and contradictory in giving legislative effect to all the SERs forming part of the Directive Principles of State Policy, and as contained in the ICESCR. The inconsistent application of SERs is evidenced by the Right of Children to Free and Compulsory Education Act, and the Food Safety and Standards Act, whereas there is no legislation on shelter/housing despite it being regarded as a national disaster. In order for this to be fully monitored and evaluated, it requires the enactment of its own separate shelter/housing legislative framework. It is never too late to do so, despite 60 years of

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299 Swaminathan ‘Excluding the needy: the public provisioning of food in India’ 40 43-47; Cheriyan Enforcing the right to food in India: Bottlenecks in delivering the expected outcome 9.
300 Birchfield and Corsi ‘Between starvation and globalization: realizing the right to food in India’ 704.
301 SERs are equally enforceable and supply content to fundamental rights, although they cannot stand on their own. B.Krishna v Union of India 1990 3 SCC 65, the enforcement of a prohibition policy basing his claim entirely on Article 47 was rejected by the court. This is an example in which the directive principle concerning equal pay for equal work (Article 39 (d) was consistently applied and interpreted in the context of discrimination under Article 14, in order to achieve recognition and enforceability. Randhir Singh v Union of India 1982 1 SCC 618. Preamble and Article of the ICESCR.
attempts to formally enact the shelter/housing law in India. Due to the absence of a separate shelter/housing law in India, it is clear that courts found it prudent to use the existing provisions of the 1949 Constitution to ensure that this right is meaningfully enforced. However, in the absence of such a shelter/housing law, courts have been innovative to a certain extent, by protecting and enforcing violations of the right to adequate shelter/housing using existing provisions of the Constitution. In this regard, an institution such as the Indian National Human Rights Commission is likely to enhance the visibility, monitoring and enforcement of the right to adequate shelter/housing. In terms of monitoring government’s compliance with the Indian Supreme Court judgment, the Indian Human Rights Commission can play an important.

4.7 The role of the Indian National Human Rights Commission and the right to adequate shelter/housing

4.7.1 Introduction

This section critically evaluates the significant role that the Indian National Human Rights Commission plays within the country’s human rights framework. Although its role is highly praised there are weaknesses. Some possible recommendations on how the Commission could be strengthened particularly on SERs are provided.

4.7.2 The Indian National Human Rights Commission’s role in the right to adequate shelter/housing jurisprudence

The Indian National Human Rights Commission has been set up in 20 states, and its role and importance, domestically speaking, cannot be over-emphasised. It has been argued elsewhere that a watch-dog institution such as this one could be given teeth if supported by an enabling legislative framework and/or through the Constitution. Although the right to shelter and adequate shelter/housing is a human right, the Commission is prevented, through the Protection of Human Rights Act, to take on the

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303 In terms of section 3 of the Protection of Human Rights Act, 1993 as amended by the Protection of Human Rights Act 43 of 2006, as amended.
right to adequate shelter/housing cases. Consequently the right only looks good on paper. Generally speaking, the Commission’s position in relation to the SERs is explained by the kinds of cases it has taken on thus far, none of which are related to SERs. Therefore, the Commission is unable to investigate and monitor the reasonableness of government’s policy measures to ensure the progressive realisation of the right to adequate shelter/housing. Moreover, it has been found that the Commission has not received adequate financial and other resources to enable it to effectively perform its functions. Consequently, this is contrary to ensuring the independence of the Commission, which would enable it to effectively and efficiently do its work.

The Protection of Human Rights Act had envisaged the establishment of Human Rights Courts. However, this has not been implemented in most parts of the country. In this regard, the CESCR reiterated that in order to fully empower the Commission and the Human Rights Courts they must be permitted by the government of India to deal also with violations of SERs. Moreover, in accordance with the enabling Act, adequate funding must be provided to establish Human Rights Courts in all states and union territories of India. From the foregoing, it is evident that the Indian Human Rights Commission’s role in upholding SERs needs to be revisited. As a minimum it must be fully empowered to perform full-scale investigation and monitoring of all fundamental rights. The necessity to ensure that the Commission is fully capacitated is based on the fact that numerous ad hoc Commissions have been established through the years to assist the Indian Supreme Court in monitoring its orders. It is argued that the Commission is the effective, efficient, appropriate, experienced and more equipped

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legislated institution to assist the court with its monitoring and reporting requests unlike these ad hoc commissions.

This is based on the fact that as a legislated body its recommendations are likely to be enforced and complied with. Its role is complementary to that of the judiciary, since the Indian Supreme Court has referred a number of important matters to it for monitoring. Based on its prior exposure to monitoring the Indian Supreme Court judgments there should be no challenges in enabling it to perform the abovementioned tasks by amending the Protection of Human Rights Act accordingly to extend its powers to investigation, enforcement and monitoring of the right to adequate shelter/housing. It is clear that an institution of this magnitude could function effectively and efficiently if its powers were extended to the promotion and enforcement of all SERs, and even to playing an incremental role in assisting the state and the court with, amongst others:

(a) Collecting, collating and analysing state and central government data regarding the right to food and shelter/housing;
(b) Engaging government on how to address the needs of the poor or challenges it is experiencing in implementing its poverty alleviation programmes and campaigns; and
(c) Implementing and monitoring of related court orders.  

4.7.3 Summary

Not much can be said about the Commission as it has essentially been rendered redundant in as far as SERs are concerned. The independence of the Commission could be achieved and strengthened by amending the Protection of Human Rights Act

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311 Similar to the South African Human Rights Commission’s functions, where the Constitutional Court has indeed requested it to monitor government’s actions through progress reports that ultimately assisted it to make appropriate orders, see Chapter 5 para 5.6.
by empowering it to incorporate all rights, particularly SERs, thereby providing victims with alternative ways of enforcing their rights. At the same time, the Indian Human Rights Commission is likely to assist the government to comply with its obligations before even being exposed to courts, international and or regional forums. It is acknowledged that in every democracy, the national enforcement systems may not always be in a position to provide what, in the eyes of the victims, may be a suitable and effective remedy to their challenges. In this regard, it must be possible for them to challenge the national remedy before a regional enforcement system.

4.8 Is there a regional remedy before the Asian human rights system?

4.8.1 Introduction
A regional enforcement mechanism is key to seeking an appropriate and adequate remedy beyond the national enforcement system, as practiced throughout the world, except in Asia. The Asian region within which India is situated is still grappling with establishing its own uniform regional human rights system. Such a system would in all likelihood afford victims and/or Asian state parties’ possible redress beyond national borders. Without reiterating the issues\(^\text{312}\) this section merely attempts to justify some alternatives upon which regional enforcement could be beneficial to a country such as India. Simultaneously it justifies why it is essential for India to play a proactive role in ensuring that regional human rights system is established.

4.8.2 India within the non-existing Asian human rights system: A dual benefit synopsis
A regional human rights system plays an important role in safeguarding the fundamental rights of a country’s citizens, where state parties’ have failed to redress, ignored or offered inadequate redress through their domestic judicial systems. Due to a number of differences amongst Asian states, there is as yet no regional agreement in place for protecting, promoting and enforcing human rights in Asia. The existing regional enforcement systems in Africa, Europe and America have, to a certain extent, brought hope to individual complainants who could not get redress or viewed the national remedies as insufficient for protecting, promoting or enforcing their fundamental rights.

\(^{312}\) Covered in chapter 2.
Constitutional litigation is considered to be one of the possible approaches for protecting the vulnerable and providing them with a voice with regard to their prevailing standard of living. However, it needs to be accepted that constitutional litigation cannot always deliver what favours both parties or provide what is deemed to be adequate relief sought by one of the parties. In fact, it is healthy for the independence of the judiciary to be put under the spotlight, not by government intervention strategies but through regional enforcement review mechanisms.

The Indian Supreme Court, in Almitra Patel v Union of India was heavily criticised for the manner in which it dealt with a case viewed as highlighting systematic violations of the right to life, including the right to adequate shelter/housing. The court was seen to have adopted what is called an anti-poor judgement, thereby revealing a complete shift in priorities, violating the principles of natural justice, and consequently deepening the poor peoples’ vulnerability. The court seems to have affirmed and strengthened the upper class’s assertion of derogatory statements against slum dwellers, based on the manner in which it dealt with cases involving slum dwellers. The criticism regarding the court’s anti-poor judgments, as well as government’s failure to address the shelter/housing needs of the poor, was noted by the Indian Human Rights Commission in 2006, when it stated that the court seemed to have reversed its rich jurisprudence, which had been developed over two decades. Therefore the Almitra Patel v Union of India decision seems to have thwarted the indirect application of the existing provisions of the 1949 Constitution to give the poor a voice in two respects.

The first is to safeguard their right to shelter/housing through Article 21 and the second is to refute Article 39 that seeks to ensure that the operation of the economic system

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315 Kothari, Karmali and Chaudhry The human right to adequate housing and land 43.
316 Kothari, Karmali and Chaudhry The human right to adequate housing and land 43.
317 Kothari, Karmali and Chaudhry The human right to adequate housing and land 44.
does not result in the concentration of wealth and means of production to the common detriment. Consequently the case is just an example of how the regional enforcement system could exercise oversight on the national judiciary in determining the appropriateness and adequacy of the Indian Supreme Court remedies in enforcing the poor’s right to shelter/housing. At the same the regional enforcement system could assist in determining if the Indian Supreme Court’s reluctance to engage government’s shelter/housing policies is appropriate or not. Until such time it is clear that the poor’s voice lies with the Indian Supreme Court, as the last court in India to take on their battle for protection and they must be prepared to be bound by whatever decision it imposes. However, their hopes are pinned on a positive Indian Supreme Court which may not necessarily materialise as was evidenced by Almitra Patel v Union of India case.

4.8.3 Summary
Undoubtedly there is still a long way to go before the Asian regional system can be formalised and unfortunately until then every country’s courts are effectively the final arbiter in all fundamental disputes. This is the case irrespective of whether or not the victims are unhappy with the highest court decision on the matter concerned. The ineffectiveness of domestic remedies can be challenged to a certain extent by victims approaching the international human rights enforcement system that has already been argued in chapter 2 to be merely providing limited and ineffective remedies.

4.9 India’s compliance with its international obligations
4.9.1 Introduction
Considering that India has been a state party to the ICESCR and other international human rights instruments, this section evaluates the country’s compliance with its international obligations. It draws conclusions based on the analysis of whether internationally imposed obligations have any significant meaning/impact on India particularly improving the poor standard of living through adequate shelter/housing.

4.9.2 India’s ICESCR compliance trends

Regardless of whether or not the right to adequate shelter/housing is directly or expressly referred to as a fundamental right under the 1949 Constitution, Indian courts are nevertheless required to enforce the country’s international treaties, as ratified and binding upon them. These include the International Covenant on Economic, Social and Cultural Rights,\(^{319}\) the Convention on the Elimination of all Forms of Discrimination against Women,\(^{320}\) the Convention on the Rights of the Child,\(^{321}\) and the International Convention on the Elimination of All Forms of Racial Discrimination.\(^{322}\) India has been a state party to the ICESCR since 1979, which means that it has over 34 years of membership experience.\(^{323}\) As a result, it could be presumed that it has a good understanding of the objectives of the ICESCR and its implications within its territory. India subscribes to a dualist system\(^ {324}\) whereby any international treaty has no binding effect on it, unless it has been implemented by way of domestic legislation.\(^ {325}\) The country’s pace in terms of utilising the legislative effect of domesticating the ICESCR is disappointing, considering the time it took to adopt the SERs-related Acts, such as the Right of Children to Free and Compulsory Education Act and the Food Safety and Standards Act. Many provisions of the 1949 Constitution are similar to those contained in the ICESR, although this does not mean they are already legislated. An example is

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\(^{319}\) Articles 246 and 253 read with Entry 14 of List I of the Seventh Schedule of the 1949 Constitution.


\(^{324}\) Articles 246 and 253 read with Entry 14 of List I of the Seventh Schedule of the 1949 Constitution.

Article 43, which corresponds with Articles 11 and 15 of the ICESCR. Article 43 states that:

The state shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.

As a state party, India is required, in terms of Article 2(1) of the ICESCR, to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, to progressively achieve the full realisation of the rights recognised in the present Covenant by all appropriate means, including the adoption of legislative measures.\(^{326}\) This means that mere ratification of the ICESCR is not sufficient, as each country is required to legislate every right under its national system so as to give it meaningful protection and enforcement.\(^{327}\) India is in violation of the Article 2(1) of the ICESCR as it has not legislated the right to adequate shelter/housing. India’s reporting and obligation compliance with the ICESCR leaves a lot to be desired, despite the country’s promise to utilise its Constitution as an enforcement vehicle for realising all fundamental rights. In this regard, its 1992 report to the Indian Human Rights Commission regarding compliance with the ICCPR stated that:

India firmly believes that in the matter of implementation of the provisions of the Covenant, what is of paramount importance is the country’s overall performance and its resolve to translate into reality the enjoyment of right by its people, to be viewed from the Constitution and the laws as well as the effectiveness of the machinery it provides for enforcement of the rights.\(^{328}\)

The Indian approach of utilising only the 1949 Constitution has proven not to be an ideal, appropriate or suitable approach, as government has failed on numerous occasions to comply with the Indian Supreme Court orders regarding the

\(^{326}\) The ICESCR.
\(^{327}\) See Chapter 2 above.
implementation of SERs.\textsuperscript{329} It is no surprise that up to this point India has failed to domesticate the ICESCR in accordance with separate legislation, nor has it ensured, despite an expression of willingness to comply, to produce a positive obligation when one looks at the state of shelter/housing and the increasing number of poor people demanding an improved standard of living, despite issued court orders. India’s latest 2009 and 2006 CESCR reports were silent on right to adequate shelter/housing measure undertaken.\textsuperscript{330} It can be deduced from India’s 2008 report to the CESCR that the country failed to report for more than 15 years on measures that it had adopted and implemented, as well as the progress made in terms of achieving the observance of all SERs.\textsuperscript{331} Clearly, India’s failure to submit its reports for such a long time demonstrates that the country still has a long way to go in complying with, at least, the reporting procedure under the ICESCR.\textsuperscript{332}

Even in the submitted report, the CESCR found that insufficient information had been provided by India.\textsuperscript{333} This amounts to a demonstration of India not taking its international obligations seriously and thus disregarding the assistance likely to be given by the CESCR in ensuring that the marginalised poor peoples’ lives improved. The CESCR also found that insufficient information had been provided by the state regarding the extent and causes of homelessness in the country. At the same time, despite several statutes having been enacted to give effect to certain rights under the ICESCR, India still seems to be unwilling to fully enforce SERs through legislative enactment.\textsuperscript{334} Although it has passed some legislation, the process has been selective and contradictory, which also appears to be a major concern for the CESCR. The CESCR’s observations further concluded that there is a lack of coordinated policy framework between federal and state levels, and this has a negative effect on the full

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\textsuperscript{329} The national report on homelessness for Supreme Court of India: Review of compliance of state governments with Supreme Court orders-up to Dec 31, 2011’ 4.

\textsuperscript{330} See UN CESCR Combined Second, Third, Fourth and Fifth Periodic Report: India (2007) and Concluding observations of the CESCR: India, 2008).

\textsuperscript{331} Article 16 (1) of the ICESCR.

\textsuperscript{332} CESCR Concluding Observations: India (2008) para 2.

\textsuperscript{333} CESCR Concluding Observations: India (2008) para 30.

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implementation of the ICESCR. The CESCR recommended that India should seriously consider the utilisation of its available resources to progressively realise all the rights under the ICESCR and, more importantly, that government must take cognisance of the legislative and administrative policy and decision-making processes in its operations.

Moreover, in ensuring appropriate implementation of the ICESCR, government should take a careful look at federal and state systems, in order to ensure the appropriate implementation of its polices under the ICESCR. More importantly, the CESCR urged India to address the acute shortage of affordable housing by adopting a national housing strategy and a plan of action for adequate housing, as well as by building or providing low-cost rental housing units, especially for the disadvantaged and low income groups, including those living in slums. It is indeed true that, despite the government’s failure to execute its international obligations, courts have reminded government that failure to enact the ICESCR through domestic legislation does not prevent it from applying it directly. It is imperative that government must take its obligations seriously. In the Appareal Export Promotion Council v A.K Chopra case, the court found that:

Courts are under an obligation to give due regard to the international conventions and norms for construing domestic laws more so when there is inconsistency between them and there is a void in domestic law.

340 Jolly George Varghese v Bank of Cochin A.I.R. 1980 SC 470 court has referred to customary international law or other international human rights norms, as contained in treaties and declarations, and this must be seen as an acute awareness of the Indian judiciary regarding the country’s international role and obligations, and its underlying approach to take international human rights law seriously in its dealings. Maneka Gandhi v Union of India A.I.R. 1978 SC 597
341 A.I.R. 1999, SC 625 634.
This statement indicates that the country should, on a domestic level, be held liable for having failed to comply with its international obligations or to use its international obligations to remedy its domestic violations. In examining the record of India’s compliance with the ICESCR, it is not surprising that India did not ratify the Optional Protocol to the ICESCR.\(^{342}\) It is through this Protocol that the CESCR would have had an opportunity to assess individual complaints submitted by the poor regarding their right to adequate shelter/housing violations by India and come up with recommended steps enabling the government to remedy such.\(^{343}\) The Optional Protocol complaints resolution mechanism could have been a further alternative enforcement mechanism in the absence of the regional one to give content and meaning to violations of the poor’s right to adequate shelter/housing despite the existence of so many shelter/housing schemes/programmes in place in India. The country’s failure to fully comply with its ICESCR obligations could be seen as a slap in the faces of the poor, who are left vulnerable and without an effective remedy.

4.10 Concluding observations

This chapter demonstrated the conflicting nature and challenges of implementing the right to adequate shelter/housing in India. No directly enforceable right exists in the 1949 Constitution and reliance is placed on Directive Principles of State Policy as interpreted by courts. It remains to be determined whether or not the indirect application of the existing provisions of the 1949 Constitution would continue to be the appropriate method for giving this notable right meaningful recognition, despite it having been interpreted in that manner for years.

There is an urgent need for India to revisit its shelter/housing policies and the extent to which it has implemented them. One could begin to wonder whether or not such an extensive policy effort undertaken by the government since 1951 is still effective to address the needs of the poor. This would shed light on achievements and any


\(^{343}\) See Chapter 2 above.
improvements in poor peoples’ standard of living, as well as how government tackles its challenges. In addition, government needs to determine how it can achieve its objectives and how such policy measures can be strengthened, for example by enacting separate shelter/housing legislation that is likely to ensure that a coordinated framework is adopted to improve peoples’ standard of living.

The existence of Five Year Plans and additional programmes, although assisting the country in implementing its national plan, has proven to be unsuccessful in terms of maintaining or improving peoples’ standards of living. Indeed, it has been proven, based on the Five Year Plans, that the subsequent establishment of various schemes within them entailed the undesirable accumulation of unproductive costs in relation to their administration and establishment, rendering them difficult to manage. The Indian Supreme Court does not seem to have done much to comprehensively review any of these Five Year Plans in terms of how they contributed to improving the poor’s standard of living. To date there is no reported case that extensively evaluated the reasonableness of any of the 12 Five Year Plans.

The inconsistent establishment and operation of state housing institutions does also not appear to aid government in addressing the state of homelessness and proliferation of slums in India. On the contrary, poor peoples’ standard of living seems worse under such shelter/housing schemes. Some of the policies adopted by the Indian government elaborated on government’s extent of reviewing its policies in an endeavour to improving the marginalised peoples’ standard of living, but little has been recorded as

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344 HUDCO assistance is not available to those states which are unable or unwilling to stand guarantee for these loans. A solution has to be found so that the urban poor in these states do not find themselves at a disadvantage in comparison with other states, where there is greater willingness to use HUDCO loans. The Tenth Five Year Plan (2002-2007 624. The Eleventh Five Year Plan-(2007-2012): Rapid Poverty Reduction, chapter 4 97-98.

345 The 1988 National Housing Policy: India has, since 1988, adopted and implemented a national housing policy in accordance with the Global Shelter Strategy, which was informed by the need to eradicate homelessness, improve housing conditions of the inadequately housed and provide a minimum level of basic services and amenities to all. Besides the ambitious objectives of the said policy during that time, little seems to have been achieved, particularly in terms of the implementation arm thereof - see the 1988 National Housing Policy.

The 1998 National Housing and Habitat Policy, among others, intended to:

(a) To create an enabling and supportive environment through the provision of fiscal concessions, as well as carrying out legal and regulatory reforms.
progress in this regard. Clearly, it can be argued that India seems to have been very progressive in terms of developing such shelter/housing policies, while often falling short of practically implementing its objectives in order to achieve the set outcomes. Therefore, there are major implementation challenges relating to the utilisation of available resources, their review, monitoring and evaluation standards. Clearly, what still appears to be a challenge in India, based on the current state of shelter/housing, is the implementation hiccups found in many policies and overlapping institutions that have been established since independence to carry out the shelter/housing provision mandate, all of which recorded minimal success.

It can be argued that the government has done everything in its power to dispossess victims of shelter/housing rights of every available means to realise their rights. This is clear from the following:

(a) Its reluctance to adopt a separate statute giving effect to the right, and its failure to enforce the court’s judgments, except when it was favourable to it. What is also required is the political will of the state to enforce court orders. Clearly, the agenda of the state can be shaped to a great extent by a creative and activist judiciary, since the separation of powers means that the state must be constantly reminded of its obligations and duties. Although the full realisation of SERs is a subject of much controversy and a long-term process, keeping this on the agenda is far more effective than not at all.

(b) Its failure to empower or strengthen the Indian Human Rights Commission through the amendment of the Protection of Human Rights Act in order to provide an effective redress to victims of SERs’ violations.

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(c) The government seems to be taking advantage of the non-existence of a regional human rights system for improving the poor’s standard of living, thereby further disempowering the victims and reducing their hope for justice.

(d) At the international level, it is important to reiterate that India ratified the ICESCR decades ago. Yet, it is clear that India does not take its international obligations seriously, and is unwilling to provide adequate information to the CESCR so that the Committee could make meaningful and concrete recommendations for improving India’s domestic compliance with the ICESCR. At the same time failure to comply with the ICESCR obligations denotes the weaknesses of the international enforcement systems, beyond issued concluding observations, to monitor and enforce SERs’ at domestic level.

The Indian Supreme Court, in attempting to assist, has appeared helpless to alleviate the critical barriers that poor people are experiencing in an endeavour to find redress for the un-entrenched right to shelter/housing. The poor can now only hope for political willingness or discretion, as well as mercy or a miracle from their own government, in order to obtain an adequate standard of living through the provision of shelter/housing. The realisation of the right to adequate shelter/housing in India is therefore a distant and a complex dream, considering the number of shelter/housing-related challenges mentioned and how government and the Indian Supreme Court are dealing with them, yet the state of homelessness, slums and poverty persist.
Chapter 5

5. A review of the government’s implementation strategy for the progressive realisation of the right of access to adequate housing in South Africa

5.1 Introduction

In pursuance of its 1996 Constitution,¹ South Africa adopted a three-tier housing approach comprising a constitutional, legislative and a policy framework to ensure the effective implementation of the right of access to adequate housing. ‘Access’ within the South African context means to ‘provide individuals with the newly established ability to gain access to a particular right.’² The objectives of this chapter are to critically evaluate South Africa’s housing delivery mandate from a constitutional, legislative and policy framework perspective. Such an evaluation is intended to determine whether or not this three-tier approach contributes to the progressive realisation of the right of access to adequate housing in South Africa. Furthermore, an examination is made of the approach taken by the judiciary and the South African Human Rights Commission in interpreting and enforcing the right of access to adequate housing. Essentially the chapter will determine whether or not, 20 years after democracy, the South African housing implementation strategy has had any impact on improving the lives of the poor, through adequate housing, reducing housing backlogs and eradicating slums and informal settlements. Lastly, South Africa’s position in terms of its international and regional human rights obligations will be assessed.

5.2 Historical background to housing: Apartheid housing chaos

Today, in 2015, the South African government is faced with its promise – made 20 years ago - to achieve an improved standard of living\(^3\) for the poor through the elimination of informal settlements.\(^4\) The government is also chasing the 2015 review period for the Millennium Development Goals with a commitment to eradicate slums by 2020.\(^5\) With such important targets having been set, the fact that the country still reflects the persistent spatial exclusion of low-income families from the main socio-economic facilities of cities and regions cannot be ignored. Strategic locations close to employment, opportunities and services are still inaccessible to many people, due to high land costs, limited availability of space, limits to planning and financial instruments and lack of infrastructure in appropriate places.\(^6\) As a result, the realities regarding the provision of housing to the poor seem to contradict government’s objective of integrating people through spatial inclusion with a gradually improved standard of living from 1994 onwards.

The country has a rapidly increasing population of over 54 million and this rapid increase in population should be seen as one of the major challenges affecting the housing delivery in South Africa. A majority of around 43, 33 million (almost 80%) blacks are still predominantly poor, homeless and unemployed.\(^7\) In 1994 the new democratic dispensation inherited an extremely fragmented, complex and racially-based housing

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\(^4\) Bua News South Africa: half a million houses needed to eliminate informal settlements by 2014 19 October 206.1-2.


provision market from the previous government. For example, it was estimated that, at the advent of democracy, there was only one formal brick house for every 43 blacks, compared to one for every 3.5 whites, which means that between 7.5 and 10 million people lived in informal housing such as shanties and squatter camps. As a result, the realities regarding the provision of housing to the poor seem to contradict government’s objective of integrating people through spatial inclusion with a gradually improved standard of living from 1994 onwards. It can no longer be said that South Africa is an infant democracy, since it is now over 20 years into its democratic dispensation.

Undoubtedly, the reality of apartheid played a major role in the socio-economic and cultural arena of many black people, because limited or no housing was provided to them. Back then, blacks constituted 70% of the South African population, but were allowed to own only 13% of the land, and the majority of them were concentrated in ten homelands, or Bantustans. These had been established by the apartheid government whose main aim was to remove all black people from the so-called white South Africa. Four homelands were declared to be what became to be known as independent states, while the remaining six had only limited self-government. The whole concept of homelands failed, as only about 55% of blacks residing in them while the rest remained in South Africa living on the outskirts of its cities in townships, shanty towns and slums. The Slums Act was used as a legal mechanism to evict people from cities on the grounds of health and safety concerns. Blacks had an untenable stay, since they were frequently subjected to harassment, evictions and violence by the apartheid security forces. During the apartheid era the provision of alternative housing only

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13 53 of 1934.
applied to affected poor whites, whereas the majority of those who were in need of housing were blacks or other races.\textsuperscript{16} Many areas were declared to be white-only towns, through the Group Areas Acts\textsuperscript{17} which was introduced to separate Blacks along the lines of exaggerated ethnic differences.\textsuperscript{18} For instance, in accordance with the Bantu Homelands Citizenship Act,\textsuperscript{19} all black South Africans were declared to be citizens of one of the homelands, and this made it easy for them to be evicted from their urban homes.\textsuperscript{20} Furthermore, the Prevention of Illegal Squatting Act (PISA) allowed landowners to demolish structures on their land and evict people without court orders.\textsuperscript{21}

Figures indicate that by 1989 South Africa had reduced its interventions and interference in the so-called welfare functions, such as housing. In this regard, the government of the day stated that:

\begin{quote}
No matter how rich a country may be, and regardless of its political system and methods of distribution, part of its people will be at the lower end of the purchasing power scale.\textsuperscript{22}
\end{quote}

Slums were particularly vulnerable because by 1991 South Africa had over 7 million people in its cities.\textsuperscript{23} The majority of them were blacks living in informal housing. The White, Asian and Coloured population\textsuperscript{24} were surviving and providing shelter for themselves.\textsuperscript{25} In this regard, the apartheid strategy is summarised by Laloo as follows:

\begin{quote}
The transient nature of African urban existence made them aliens in their own country. Apartheid’s bulldozers uprooted long established, vibrant and closely knit communities, sweeping up in their paths the vital sense of place, communalism and shared memories that underpinned the community. Relocation of uprooted communities in hideously monotonous barren, government
\end{quote}


\textsuperscript{17} 41 of 1950 and 36 of 1966.

\textsuperscript{18} COHRE \textit{Any room for the poor? Forced evictions in Johannesburg} 14.

\textsuperscript{19} 26 of 1970.

\textsuperscript{20} COHRE \textit{Any room for the poor? Forced evictions in Johannesburg} 16.

\textsuperscript{21} 52 of 1951.

\textsuperscript{22} Spier A \textit{Beating the housing crisis: Strategic options for the next two decades} (1989) 33.


\textsuperscript{24} Spier \textit{Beating the housing crisis: Strategic options for the next two decades} 27.

\textsuperscript{25} Spier \textit{Beating the housing crisis: Strategic options for the next two decades} 27; Urban Foundation \textit{Policies for a New Urban Future: Urban Debate-2010}. 5.
constructed townships increased their isolation and alienation from place-an alienation exacerbated in many cases through change in tenure status from owner to renter-with a faceless government bureaucracy as landlord.26

The apartheid housing policy undoubtedly intended to prevent Blacks from benefiting from any government-led housing. Therefore, it is reasonable to say that due to the influence of the apartheid regime, which only had the interests of one racial group in mind, the present housing chaos is intrinsically linked to how blacks were treated during that time.27 South Africa was already a segregated country, and apartheid merely deepened and enforced segregation, making it far-reaching and harmful to blacks.28

In 1994 the state of the nation’s housing chaos came, for the first time, under the spotlight and revealed that many South Africans, in particular those who did not have security of tenure, still occupied rudimentary, undeveloped forms of shelter, stayed in overcrowded areas and lived in unsuitable conditions and buildings.29 It is plain that the new government inherited a situation where the state of housing highlighted the harsh realities experienced by millions of poor disadvantaged and dispossessed South Africans still living in the large and proliferating informal settlements scattered across the country.30

At the same time the significant impact of the rapid population growth has on the increasing housing backlog and on government housing delivery implementation plans must be understood to be playing a major role on provisions of basic services such as adequate housing.

5.2.1 Impact of increasing population on government resources

It is vital to examine South Africa’s complex housing history and how the population growth seems to be influencing the country’s housing delivery challenges. It has been

found as far that 1995 that slow provision of housing is likely to be challenged by rapid population growth. In terms of the White Paper on Housing:

South Africa has a rapidly increasing and urbanising society but population growth will result in a numerically stable rural population. Coupled to this is a large existing and increasing housing backlog, due to very low rates of formal housing provision.\footnote{White Paper on Housing para 3.1.1}

As a result the White Paper on Housing further cautioned that:

Given the projected rate of population growth, an average of 200,000 new households will be formed annually between 1995 and 2000. The phenomena of extended households and circulatory migration further add to the complexity of dealing with the housing issue.\footnote{White Paper on Housing para 3.1.1(b).}

The 1996 first democratic South African census since 1970\footnote{Christopher A. J. ‘Urban segregation in post-apartheid South Africa’ Urban Studies (2001) vol 38(3) 449–466 451.} found the population to be at 40.5 million.\footnote{Population Census 1996 National Population Census-final results announced available at <https://apps.statssa.gov.za/census01/Census96/HTML/default.htm> (date accessed 2015-09-07).} In 2001 the second census found the South African population to be at 44.8 million\footnote{Statistics South Africa Census 2001 available at <http://www.statssa.gov.za/?page_id=3892> (date accessed 2015-09-07).} and on the 2007 third census the population was found to be at 48.5 million. This meant an average annual growth rate of 1.5%.\footnote{Statistics South Africa Community Survey 2007-The RDP Commitment: What South Africans say 6 available at <http://www.statssa.gov.za/publications/CS2007RDP/CS2007RDP.pdf> (date accessed 2015-09-07).} In 2011 the South African population was found to be 51.7 million\footnote{Statistics South Africa Population-Census 2011 available at <http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Total_population_poster.pdf> (date accessed 2015-09-07).} and at present South Africa is estimated to have a population of about 54 million.\footnote{Statistics South Africa Mid-year population estimates 2014 (2014-07-31).} The said statistics demonstrate the spiralling and complex housing demand challenge South Africa is facing and need to devise a plan likely to maintain population growth with low cost housing.

It cannot be denied that the dismantling of apartheid and slow or lack of economic growth in South Africa also resulted in the migration pattern of poverty stricken-stricken people from rural areas into urban areas informal settlements for better employment

\footnote{31 White Paper on Housing para 3.1.1}
\footnote{32 White Paper on Housing para 3.1.1(b).}
\footnote{38 Statistics South Africa Mid-year population estimates 2014 (2014-07-31).}
opportunities, access to the land market, accommodation and social networks in urban area. For example from 1991 to 1996 it was found that the African urban population increased by about 27% and that has persisted even today where people migrate to areas having active economic activities (Gauteng in particular) throughout South Africa. It is evident that although the democratic dispensation is hailed by many and although it appears to have fostered faster (African) integration, there has been a slow rate of integration and small numbers of people have benefitted from the transfer of political and not economic power. Therefore:

Increasing urban populations will increase demand for residential property across the continent. In the short term this demand will be primarily for low-cost housing through direct or indirect investment spearheaded by the public sector.

As a result it cannot be denied that 21 years later the ‘demand for affordable housing continues to outstrip supply for low- and middle-income families’ in South Africa despite government having implemented various housing intervention strategies to eradicate the housing backlog. Government cannot achieve any significant impact on its housing provision mandate unless it also takes into account ‘population growth, household formation and size, urbanisation, movement between rural and urban areas, movement between outlying areas and city centres, and life stage.’ Clearly in South Africa this appears to have been the government’s main focus through its adopted and innovative approach to housing. It is discussed below.

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39 Christopher. ‘Urban segregation in post-apartheid South Africa’ 458.
41 Christopher ‘Urban segregation in post-apartheid South Africa’ 459.
42 For example Metropolitan Gauteng (comprising Johannesburg, Tshwane and Ekurhuleni) dominated nationally, accounting for 36.4% of the net increase in South Africa’s population between 1996 and 2011, and 41.9% of the net increase in employed personsHMarrison and Todes ‘Spatial transformations in a “loosening state”: South Africa in a comparative perspective’ 151, 153.
43 Christopher ‘Urban segregation in post-apartheid South Africa’ 463.
45 PricewaterhouseCoopers ‘Real Estate-Building the future of Africa’ 55.
The democratic government’s main focus is to dismantle the apartheid settlement policies that are associated with housing backlogs, housing provision and the ever-increasing housing demands.

5.3 Constitutional housing provision in South Africa

5.3.1 Introduction

South Africa’s democratic transition aimed to unify the divided country through the adoption of the 1996 Constitution with the aim, among others, of redressing the past inequalities that were so ingrained in our society.\textsuperscript{47} Constitutional entrenchment of fundamental rights is regarded as an essential step towards safeguarding them. The right of access to adequate housing is contained in section 26 of the 1996 Constitution. Considering the fact that millions of South Africans had been removed from their land, rendered homeless and were living in sordid conditions, the entrenchment of housing as a fundamental right was key in redressing the inequalities of the past. Several housing measures have been introduced as a step towards fulfilling section 26 obligations thereby giving effect to the meaning of the section in practical terms.

5.3.2 The constitutional entrenchment of the right to adequate housing in South Africa

South Africa became a democracy in May 1994 guided by the interim Constitution of 1993.\textsuperscript{48} Interestingly, it contained no housing clause. It was left to the 1996 Constitution to address the issue of a right of access to adequate housing. The 1996 Constitution is the supreme law of the land, and all law or conduct that are inconsistent with it will be declared invalid to the extent of their inconsistency.\textsuperscript{49} It established a framework for the development and enforcement of all laws and policies and is praised for being among a


\textsuperscript{49} Section 2 of the 1996 Constitution.
few in the world to entrench justiciable socio-economic rights (SERs) alongside civil and political rights (CPRs), albeit subjecting them to a progressive realisation. Liebenberg therefore views it to be a ‘transformative’ Constitution, as it:

undoes the injustices of colonial and apartheid rule in the political, social, economic and cultural realms, and intends to build a new and better society, founded on democratic values, social justice and fundamental human rights.

The justiciability of SERs is a settled matter in South Africa and it is now left to courts to conduct their reviews on a case by case analysis.

The right of access to adequate housing is entrenched in section 26, but reference to “shelter” is found in section 28(1)(c) of the 1996 Constitution. Section 26(1) outlines

Right to education (section 29), right of access to social security and health care (section 27), etc. See Minister of Health & Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC) (hereafter TAC); Soobramoney v Minister of Health, Kwa-Zulu-Natal 1997(12) BCLR 1696 (CC) (hereafter Soobramoney); Government of the Republic of South Africa & Others v Grootboom and Others 2000(11) BCLR 1169 (CC) (hereafter Grootboom); Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1169 (CC) (Certification).

Transformation has been described as not a temporary phenomenon that ends when we all have equal access to resources and basic services and when lawyers and judges embrace a culture of justification. Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected, and in which change is unpredictable, although the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is the perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals, but because it envisions a society that will always be defined by transformation. Langa P ‘Transformative Constitutionalism’ Stellenbosch Law Review (2006) vol 17(3) 351-360 354.

It provides that every child has the right to basic nutrition, shelter, basic health care services and social services.

the general scope of the right, section 26(2) spells out the positive obligations imposed upon the state, while section 26(3) sets out aspects of the negative right by prohibiting arbitrary evictions.\textsuperscript{55} In this regard, section 26 of the 1996 Constitution provides that:

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

Section 26 is seen as the engine of housing law in South Africa, and requires government, in order to ensure all South Africans enjoy an equitable standard of living, to adopt housing policies and enact legislation\textsuperscript{56} aimed at redressing the apartheid legacy of homelessness. The Constitutional Court\textsuperscript{57} has reiterated that section 26 does not establish an entitlement to immediate implementation, free of charge, but rather an entitlement to have ‘access’ to adequate housing, which the state must progressively realise through reasonable legislative and other measures.\textsuperscript{58} There are three key elements that identify the extent of the state’s obligation in relation to SERs namely the obligation to ‘take reasonable legislative and other measures’; ‘to achieve the progressive realisation’ of the right; and ‘within available resources.’\textsuperscript{59} Although section

\textsuperscript{57} Is the highest court in the land in all constitutional matters, see section 166(1) (a), 167(3), (4) and 172 of the 1996 Constitution.
\textsuperscript{58} Grootboom para 35, see also Jaftha v Schoeman and Others Van Rooyen v Stoltz and Others where it was held that “[w]hat does not admit of any doubt is that the right of access to housing does not encompass an entitlement to the ownership of housing; an entitlement to a particular form of housing; or an entitlement to the occupation of a specific residential unit.: para 13. The Constitutional Court in Nokotyana v Ekurhuleni Metropolitan Municipality 2010 (4) BCLR 312 (CC) paras 47-9, declined to decide whether the right of access to adequate housing in section 26 also encompasses entitlements to sanitation or lighting. The Court rather resorted to the National Housing Code chapters 12 and 13 in directing the applicants’ claim to be provided with sanitation and lighting.
26(1) cannot be easily defined, cognisance must be taken of a number of factors, depending on the situation, household conditions and individuals, and according to their needs and priorities. It is a right that is interrelated with other socio-economic goods and amenities.\(^{60}\) It is therefore interpreted to be more than merely a roof over one’s head, to include the right to live somewhere in peace, security and dignity.\(^{61}\) According to Smit’s matrix of adequacy assessment, the right incorporates adequacy of location; adequacy of shelter; affordability (in terms of upfront and on-going costs); adequacy of services (water, sanitation, energy supply, etc.); adequacy of space; physical security; security of tenure; future prospects of housing in terms of the Reconstruction and Development Plan (RDP) housing; and accessibility or availability.\(^{62}\) In a country that is rife with over 35% unemployment,\(^{63}\) poverty and lingering socio-economic and geographical inequality, adequate housing may serve as a trajectory out of poverty, even if it is a gradual process or only applies to the relatively young members of a household.\(^{64}\)

While SERs are regarded as programmatic rights, due to their achievement over time, their fulfilment relies heavily on the country’s available resources.\(^{65}\) At this stage this seems to be the biggest impediment to the realisation of South Africa’s housing provision obligations. An examination of South Africa’s legislation and housing policy will assist in determining how far the country has progressed in terms of complying with section 26 obligations.

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\(^{60}\) Such as access to available and suitable land, credit, sanitation, water, electricity, livelihoods, transport, clinics and hospitals, schools, universities and other recreational amenities such as libraries, sports fields and parks. It is also about access to credit, affordability, economic growth, social development, environment, Mthembu-Mahanyele, S ‘Housing delivery in the new millennium’ Paper presented by the National Minister of Housing at the Institute for Housing in Southern Africa Conference: Developing Housing Environments for the New Millennium, Nelspruit 17-20 October 1999 4.

\(^{61}\) Grootboom paras 2 23 83.


5.3.3 Legislative and executive competence in respect of housing

In South Africa there are three spheres of government, namely the national, provincial and local spheres.\(^{66}\) The 1996 Constitution sets out the legislative authority of all three spheres of government.\(^{67}\) National legislative authority is vested in Parliament and confers on the National Assembly the power to amend the Constitution\(^ {68}\) and to pass legislation on any matter, including a matter within a functional area listed in Schedule 4, entitled ‘Functional areas of concurrent national and provincial legislative competence.’ The legislative competence of the provincial sphere is vested in the provincial legislatures.\(^ {69}\) A provincial legislature has concurrent legislative competence with Parliament over matters listed in Schedule 4, and it may make laws reasonably necessary for or incidental to the effective exercise of any matter listed in Schedule 4.\(^ {70}\) Housing is listed in Schedule 4 giving the legislatures in the national and provincial spheres of government legislative powers.

The executive competence of the national sphere of government is vested in the President.\(^ {71}\) National executive authority is exercised by preparing, initiating and implementing national legislation, developing and implementing policy as well as coordinating the functions of state departments and administrations.\(^ {72}\) The executive authority of a province vests in the Premier who must act together with the other Members of the Executive Council.\(^ {73}\) Provincial executive power is exercised by preparing, initiating and implementing provincial legislation in the province, implementing national legislation within the functional areas listed in Schedules 4 and 5 and legislation outside those functional areas that has been assigned to the province,

\(^{66}\) Section 40(1) of the 1996 Constitution.  
\(^{67}\) Section 43 of the 1996 Constitution.  
\(^{68}\) Section 44(1)(a)(i) of the 1996 Constitution.  
\(^{69}\) Section 43(b) of the 1996 Constitution.  
\(^{70}\) Section 104(4) of the 1996 Constitution.  
\(^{71}\) Section 85(1) of the 1996 Constitution.  
\(^{72}\) Section 85(2) of the 1996 Constitution.  
\(^{73}\) Section 125(1)-(2) of the 1996 Constitution.
developing and implementing provincial policy, and performing any other function assigned to the provincial executive.\textsuperscript{74}

In instances where there is a conflict between national and provincial legislation relating to housing as part of matters falling under Schedule 4, such a conflict must be dealt with in accordance with section 146(2)-(6) of the Constitution. In brief national legislation prevails over provincial legislation if the national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually; the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards; frameworks or national policies.\textsuperscript{75} National legislation also prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that is prejudicial to the economic, health or security interests of another province or the country as a whole or impedes the implementation of national economic policy.\textsuperscript{76} Should these provisions not apply provincial legislation prevails over national legislation.\textsuperscript{77}

Although the 1996 Constitution does not specify housing as a local government function, the latter has now been empowered to implement policy, do settlement planning and ensure the delivery of housing. Both the Housing Act\textsuperscript{78} and the Municipal Systems Act\textsuperscript{79} contain provisions in this regard. Every municipality must take all

\textsuperscript{74} Section 125(2) of the 1996 Constitution.
\textsuperscript{75} Section 146(2) of the 1996 Constitution.
\textsuperscript{76} Section 146(3) of the 1996 Constitution.
\textsuperscript{77} Section 146(5) of the 1996 Constitution.
\textsuperscript{78} Section 9(1) of the Housing Act 107 of 1997 sets out local government’s duties. As part of the municipality’s process of integrated development planning, it must take all reasonable and necessary steps to see that services are provided, housing delivery goals are set, land is identified and designated for housing development; a public environment is created and maintained conducive to housing development which is financially and socially viable; conflicts are resolved that arise in the housing development process; appropriate housing development is initiated, planned, coordinated, facilitated, promoted and enabled in its jurisdiction; bulk engineering services and revenue generation services are provided, in so far as such services are not provided by specialist utility suppliers and land use development is planned and managed.
\textsuperscript{79} The adoption of the Municipal Systems Act 32 of 2000 enabled municipalities to have full control over the financial administration and development of housing in their jurisdiction. However, this has to be
reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the constitutional housing right is realised. Municipalities should do this by actively pursuing the development of housing, addressing issues of land, services and infrastructure provision, and by creating an enabling environment for housing development in their area of jurisdiction.\textsuperscript{80} It is clear that municipalities are at the forefront of housing delivery and any municipality may apply in writing to the MEC\textsuperscript{81} to be ‘accredited’ for the purposes of administering one or more national housing programmes.\textsuperscript{82}

In 2002, metropolitan municipalities were first given the housing function, but this process is yet to be rolled out to all municipalities. At 1 July 2013, the Department of Human Settlements was in the process of assigning the housing function to 6 metropolitan municipalities (excluding Buffalo and Mangaung) as a means to enable them to take on the various aspects of human settlement delivery.\textsuperscript{83} However, to date, those that already had this housing function have faced unprecedented challenges in terms of major financial and fiscal implications, including capital grant allocations, operational funding, transfer of immoveable and moveable assets, transfer of staff and projects, and contractual obligations.\textsuperscript{84} Therefore, the task of ensuring access to adequate housing on a progressive basis by the local government has significantly increased its capacity\textsuperscript{85} and placed its revenue development under a lot of pressure,

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\textsuperscript{80} National Housing Code, Part 1, Chapter 2, section 2.3 of the Municipal Systems Act.
\textsuperscript{81} Member of the Executive Committee.
\textsuperscript{82} Section 10 of the Housing Act.
\textsuperscript{84} SALGA \textit{Support to municipalities on accreditation and assignment of housing function} 2.
which has resulted in many municipalities being pushed to the brink of insolvency.\textsuperscript{86} In the wake of the recent impending blanket assignment or accreditation of the six metropolitan municipalities and the said challenges already experienced by those bearing the accreditation status, there are some municipalities, except for themetros and higher-capacity local authorities, which do not currently have a dedicated housing department.\textsuperscript{87} Therefore, implementing the necessary activities to deliver housing means that, for the most part, these activities are parcelled out to existing departments of engineering, planning, and/or community service, as well as housing practitioners. This is due to the fact that provincial governments do not want to give up the housing function, as it provides them with political control over the delivery process, as well as direct access to substantial housing budgets and resources from national government.\textsuperscript{88}

Therefore, by law, all spheres of government are authorised accordingly to execute a housing function, and their roles and responsibilities are spelt out for them.\textsuperscript{89} However,

\textsuperscript{86} Pottie ‘Local government and housing in South Africa: Managing demand and enabling markets’ 607.
\textsuperscript{89} It was held in 	extit{Grootboom} case that:

\begin{quote}
What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The last of these may, as it does in this case, comprise two tiers. The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. 	extit{Grootboom} case para 39.
\end{quote}

Also that:

\begin{quote}
Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state’s section 26 obligations. In particular, the
\end{quote}
although this function is transferred, in terms of legislation, to the local level, national government is the implementing agent of section 26 obligations and needs to coordinate its obligations and ensure compliance with its duty of improving the lives of the poor from 1994 onwards. Yacoob J held that:

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.\(^90\)

Nevertheless, it remains to be seen if the implementation of the legislative framework in South Africa has any significant impact on housing delivery.

### 5.3.4 South Africa’s housing legislation

In compliance with section 26(2) of the 1996 Constitution several statutes have been adopted giving effect to the provisions of section 26(2) and section 26(3). These diverse laws were adopted and reviewed to apply and protect everyone depending on their economic status and affordability thereby ensuring that everyone benefit from section 26(2) mandate. These laws set out in detail to accomplish the core objectives of section 26(2) and put specific measures in place to ensure everyone fully enjoys the right of access to adequate housing. As a result they are effectively making a specific contribution and play a role in the enforcement of numerous rights ranging from providing precise guidelines and setting out different roles and responsibilities for various organs of state, security of tenure, consumer rights, non-discrimination, setting eviction standards and processes, integrated and uniform housing provision regulating both private persons and public institutions on an equitable basis. The undermentioned national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met. \(^{90}\) *Grootboom* case para 40.

\(^{90}\) *Grootboom* para 93.
laws are essential in considering the different ways in which government currently aims to give meaningful content to section 26(1) of the 1996 Constitution.

5.3.4.1 The Housing Act
The Housing Act\textsuperscript{91} is the first and overarching housing law of South Africa, with the main purpose of setting nationally applicable housing development principles to guide a sustainable housing process, as well as outlining the housing functions of each sphere of government. The Housing Act sets out specific roles and responsibilities of the three spheres of government. In this regard, national government must establish and facilitate a sustainable national housing development process by formulating a housing policy and general implementation strategies, assisting provinces with administrative capacities, providing support to all spheres of government, and ensuring adequate consultation with all stakeholders.\textsuperscript{92} Provincial government, acting within the framework of the national housing policy, must create an enabling environment by doing everything in its power to promote and facilitate the provision of adequate housing in its province, including allocating housing subsidies to municipalities.\textsuperscript{93}

According to the Housing Act, the Department of Human Settlements\textsuperscript{94} must, after consultation with provinces and municipalities, establish and facilitate a sustainable national housing development process by:

a) Setting broad national housing delivery goals;
b) Promoting consultation with all stakeholders in the housing delivery chain, including civil society and the private sector;
c) Determining national policy, including national norms and standards, in respect of housing and human settlements
d) Development;
e) Monitoring performance of provinces and municipalities against housing budgetary and delivery goals; and
f) Building the capacity of provinces and municipalities.

\textsuperscript{91} 107 of 1997.
\textsuperscript{92} Section 3(2) and 4 of Part 2 and sections 5 and 6 of the Housing Act.
\textsuperscript{93} Section 7 of the Housing Act.
\textsuperscript{94} Determines finances, promotes, communicates and monitors the implementation of housing and sanitation programmes in South Africa, Department of Human Settlements Overview <http://www.dhs.gov.za/content/overview> (date accessed 2015-05-15).
In particular national, provincial and local spheres of government must give priority to the needs of the poor in respect of housing development. All three spheres of government must promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions. Lastly, all three spheres of government must promote higher density in respect of housing development to ensure the economical utilisation of land and services. The case of Lingwood and Schon v The Unlawful Occupiers of Erf 9, Highlands stressed that municipalities must take meaningful steps to ensure that people in desperate need have, at the very least, temporary shelter in the case where they are evicted.

5.3.4.2 Rental Housing Act
This Act defines the role of government in as far as the rental housing market is concerned and sets out mechanisms to promote the provision of rental housing property in South Africa. Essentially the Rental Housing Act regulates the relationship between landlords and tenants in respect of all types of rental housing. The Act applies to any house, hostel room, hut, shack, flat, apartment, room, outbuilding, garage or similar structure which is leased, as well as any storeroom, outbuilding, and garage or demarcated parking space which is leased as part of the lease. It recognises that not everyone may be in need of permanent housing particularly in industrialised urban areas and thus certain persons may only require adequate rental housing to stay and ultimately go back to where s/he has his/her own house. The impact of the Act is clear from Maphongo v Aengus Lifestyle Properties where the role of tribunals in the determination of what constitutes an unfair practice was highlighted.

5.3.4.3 Housing Consumer Protection Measures Act

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95 Section 2(1)(a) of the Housing Act.
96 Section 2(1)(e)(iii) of the Housing Act.
97 Section 2(1)(e)(vii) of the Housing Act.
98 2008 (3) BCLR 325 (W)
100 50 of 1999.
101 2012 (3) SA 531 (CC). See also Pienaar Land reform 796-797.
The main objective of the Housing Consumers Protection Measures Act\textsuperscript{102} is to protect housing consumers against any defects relating to the construction of a house by a registered home builder. The Act created a National Home Builders Registration Council (NHBRC) to serve the interests of housing consumers by protecting them against any defects in new homes and to cover housing consumers in respect of failure of home builders to fulfil their obligations. It provides access to adequate housing by protecting new home owners from obtaining houses of poor quality by ensuring that builders are registered with the Council.

5.3.4.4 National Building Regulations and Building Standards Act
This Act\textsuperscript{103} was promulgated to represent the interests of housing consumers by providing warranty protection against defects in new homes and, to provide protection to housing consumers in respect of the failure of home builders to comply with their obligations. However section 12(6) of the Act was challenged as being inconsistent with section 26(3) of the 1996 Constitution. Section 12(6) provides any person who continues to occupy despite the ‘order’ is liable on conviction to a maximum fine of R100 for each day of unlawful occupation while section 26(3) of the Constitution prohibits eviction of people from their home absent a court order that must be made after taking into account all the relevant circumstances.\textsuperscript{104}

5.3.4.5 Social Housing Act
Social housing is defined as a rental or co-operative housing option for low to medium income households at a level of scale and built form which requires institutionalised management and which is provided by social housing institutions or other delivery

\textsuperscript{102} 95 of 1998.
\textsuperscript{103} 103 of 1977.
\textsuperscript{104} The Constitutional Court held that ‘the provisions of section 26(3) would be virtually nugatory and would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order.’ However it was found to be neither just nor equitable to set the provisions of section 12(6) of the Act aside. It is appropriate to encourage people to leave unsafe or unhealthy buildings in compliance with the court order for their eviction. Therefore A reading-in order that provides for a criminal sanction only after a court order for eviction has already been made would in my view be appropriate to save the section. Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others 2008 (5) BCLR 475 (CC) para 49-50.
agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in the Social Housing Act.\textsuperscript{105} Therefore the purpose of the Act is, amongst others, essentially to promote a sustainable housing environment and set out the roles and responsibilities of national, provincial and local government relating to social housing, as well as facilitating the smooth operation of approved social housing projects by other delivery agencies with the benefit of public money. A Social Housing Regulatory Authority has an obligation to invest in social housing and provide support to social housing institutions.

5.3.4.6 Housing Development Agency Act

The Act\textsuperscript{106} regulates the powers and functions of the Housing Development Agency. The Agency’s objects are to identify, acquire, hold, develop and release state, communal and privately owned land for residential and community purposes and for the creation of sustainable human settlements; project manage housing development services for the purposes of the creation of sustainable human settlements; ensure and monitor that there is centrally coordinated planning and budgeting of all infrastructure required for housing development; and monitor the provision of all infrastructure required for housing development.\textsuperscript{107} Most importantly, the Act supports the right of access to adequate housing by fast-tracking the acquisition of land and housing development services.\textsuperscript{108}

5.3.4.7 Spatial Planning and Land Use Management Act

This Act\textsuperscript{109} intends to set to lay down a comprehensive consistent and uniform national approach for spatial development planning and land use management practices and policies in South Africa taking into account past spatial and regulatory imbalances. It repeals\textsuperscript{110} (1) the Less Formal Township Establishment Act\textsuperscript{111} that regulated shortened

\textsuperscript{105} Section 1 of the Social Housing Act 16 of 2008.
\textsuperscript{106} 23 of 2008.
\textsuperscript{107} Section 4.
\textsuperscript{108} Pienaar \textit{Land Reform} 337.
\textsuperscript{110} Section 59 of the Spatial Planning and Land Use Management Act.
\textsuperscript{111} 113 of 1991.
procedures for the designation, provision and development of land and the establishment less formal townships and (2) the Development Facilitation Act 67 of 1994 (DFA) that aimed to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land, to lay down general principles governing land development throughout the Republic and to provide for nationally uniform procedures for the subdivision and development of land in urban and rural areas so as to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses. The DFA aims were never fully realised, partially because it was applied as parallel legislation to the town planning legislation.

The Act’s Preamble refers to section 26 of the Constitution, reiterating that this includes an equitable spatial pattern and sustainable human settlements. An important aspect of the Act is that all spatial plans and decisions on spatial planning must be made in the context of a set of development principles. The principle of spatial justice incorporates inclusivity, improved access to land, access to secure tenure and the incremental upgrading of informal areas.\(^{112}\)

5.3.4.8 Home Loan and Mortgage Disclosure Act
The promulgation of this Act\(^ {113}\) intended to address the unfair discrimination in the provision of home loans within the banking sector’s lending practices by ensuring and promoting fair lending practises by the banking sector.

5.3.4.9 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
This Act,\(^ {114}\) promulgated in terms of section 26(3) of the Constitution, contains procedures for ‘just and equitable’ evictions of unlawful occupiers. Numerous cases have been adjudicated on this constitutional provision and the legislation promulgated in terms of it, but the case that remains pivotal in assessing the relationship between access to housing and evictions remains the *Grootboom* case. It was instrumental in

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\(^{112}\) Section 7(a).
\(^{113}\) 63 of 2000.
\(^{114}\) 19 of 1998.
developing housing policy, listing criteria regarding the development of policy. In light of section 26 of the Constitution the criteria state that policy and legislation must be reasonably implemented, be flexible and balanced, not exclude a significant section of the population and contain clear and efficient assignment of functions with regard to the three spheres of government.\textsuperscript{115}

5.3.4.10 Extension of Security of Tenure Act
The Act came about as a result of many South Africans not having any secure tenure of their homes and the land they use and thus being rendered vulnerable to evictions. The Act therefore sets out the conditions on and circumstances under which the right of persons to reside and rights of residence on land may be terminated and to be evicted. Pienaar has described tenure security as being an end in itself or a means to an end.\textsuperscript{116} It relates to numerous rights in the Bill of Rights and with regard to access to housing is relevant where a person can apply for a housing subsidy in terms of the Housing Act.

5.3.4.11 Provincial legislation
Considering that all provincial legislatures have concurrent legislative competence to adopt provincial laws, several housing related Acts were promulgated and used by provinces to regulate their housing implementation. They include the Gauteng Housing Act 6 of 1998, Western Cape Housing Development Act 7 of 1999, Free State Provincial Housing Act 7 of 1999 and the Limpopo Housing Act 2 of 2006.

5.3.5 South Africa’s housing policy

In 1994, public housing functions were scattered among 17 national and provincial authorities, without any coherent national policy, resulting in an unparalleled and inequitable implementation of housing activities. This was as a result of the apartheid division of land and the allocation of functions. For example, the TBVC states and self-governing territories had no interest in or focus on the growing housing needs of their

\textsuperscript{115} Pienaar \textit{Land reform} 577 referring to the \textit{Grootboom} case para 41.
\textsuperscript{116} Pienaar \textit{Land reform} 416.
inhabitants, while in the apartheid territories there was an extravagant allocation of housing subsidies to the white minority, to the deliberate exclusion of the homeless and dispossessed black majority. In other words, the black poor were left without any support from government to assist in constructing the most basic shelter, despite most of their built houses having been destroyed by the apartheid authorities. As a result, in order to address the housing shortage and lack of affordability, the 1994 political transition and government instituted a number of co-ordinated landmark housing policies and statutes aimed at eradicating the housing chaos left by the apartheid era, which resulted in a comprehensive housing policy being developed during the 1994 transition.\textsuperscript{117} It is against this historical background that an evaluation of South Africa’s current housing policy measures must be looked at and understood.

In a nutshell, South Africa adopted a single, comprehensive housing policy strategy which sets out responsibilities of all role players in housing, and where its role is viewed as facilitating the establishment of a conducive environment for the provision of access to adequate housing without any discrimination.\textsuperscript{118} The adopted policy approach led to South Africa having one of the most liberal low-income housing policies, whereby low-income housing units are subsidised for the benefit of low-income people.\textsuperscript{119} However, such policies have been subjected to criticism since their inception, despite their review being seen as an on-going process.

5.3.5.1 National Housing Forum: 1992-1994

The National Housing Forum (NHF) was an established multi-party, non-governmental negotiating forum, which aimed at formulating an agreement for a non-racial housing policy. It purported to represent a wide range of interests. The anti-apartheid forces, represented by the ANC, led the mass democratic movement, which was argued to have negotiated from a position of relative weakness. Moreover, it was fraught with controversy. For example, the adopted housing policy is viewed as having failed from the onset due to the shift from core objectives to short-term solutions, as opposed to sustainable ones likely to make a significant change to housing inequalities. According to Laloo:

...because the policy negotiations took place against the backdrop of the run-up to the democratic elections, the tension between long- and short-term objectives was exploited by the apartheid state and the business sector to shift focus away from long-term goals that would have addressed the legacy of apartheid more effectively. The need to address the effects of spatial segregation, for instance, was overlooked.

In other words, the apartheid state and business interests managed to manipulate the process to produce a policy that had a narrow focus on short-term issues (such as the allocation of funds for capital subsidies), while diverting attention away from long-term issues that would have addressed the broader aspects of the legacy of apartheid. Moreover, the initial formulation of the South African housing policy failed to engage its intended beneficiaries (the public), as it was abandoned and thus left the involved stakeholders armed with a mere assumption rather than concrete evidence of the country’s housing challenges at grassroots level. Therefore, the initial housing policy formulation was not people-driven. The process enabled the apartheid government and business interests to effect only nominal changes to the old apartheid housing order.

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120 Comprising the ANC, the labour movement COSATU and the civic movement. Ballard, Habib, Valodia and Zuern ‘Globalization, marginalization and contemporary social movements in South Africa’ 621.
121 Tissington A review of housing policy and development in South Africa since 1994 32-33.
Lalloo therefore concluded that the policy that emerged from the NHF process overlooked the need to use the housing policy as a means to address the spatial inequalities of the apartheid city, particularly the need to improve access to the socio-economic opportunities there. The transition rush to the democratic gate is arguably one of the most compromising steps that the poor has endured since 1994, as a result of the manner in which the NHF consultations and conclusions were handled. Post-1994, government nevertheless intensified its efforts to deliver the promised adequate housing to the poor, through the adoption of a subsequent housing agreement, the Botshabelo Accord.

5.3.5.2 Botshabelo Accord and White Paper on Housing: 1994

Adopted in October 1994, the Botshabelo Accord bound every member of society to play an active role in addressing, on a progressive basis, the plight of millions left un-housed by the apartheid legacy. It was seen to represent stakeholders’ popular expression of intent, while the substance and full policy text appeared in the White Paper on Housing. However, not much has been mentioned with regard to the Botshabelo Accord since then.

5.3.5.3 The Reconstruction and Development Programme: 1994

In tackling the country’s socio-economic inequalities, the new government introduced the Reconstruction and Development Programme (RDP), which was seen as the most comprehensive, ambitious socio-economic policy framework, established in an endeavour to mobilise people and the country’s resources towards the total eradication

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127 Lalloo ‘Arenas of contested citizenship: Housing policy in South Africa’ 42.
of the apartheid legacy, through its six basic principles.\textsuperscript{131} The RDP was the initiator of some important developments with regard to the provision of housing in South Africa. However, the RDP policy was ambitious and complicated to execute, as it was based on a vision as opposed to the design and development of institutional arrangements for delivery.\textsuperscript{132} Although some people were reported to have benefitted from the RDP programme, the policy implementation seems to have experienced hiccups that necessitated government revising its ambitious RDP strategy.\textsuperscript{133} In consolidating its focus on housing, government adopted the White Paper on Housing.\textsuperscript{134}

5.3.5.4 White Paper on Housing: 1994
Towards the end of 1994, the White Paper on Housing was adopted in order to tackle one of the most urgent questions facing the new South Africa, namely the provision of housing.\textsuperscript{135} The national housing vision states:

Government strives for the establishment of viable, socially and economically integrated communities, situated in areas of allowing convenient access to opportunities as well as health, educational and social amenities, within which all South Africa’s people will have access on a progressive basis to:

- A permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements; and
- Potable water, adequate sanitary facilities including waste disposal and domestic electricity supply.\textsuperscript{136}

The White Paper on Housing outlined the eight strategies aimed at achieving housing for all.\textsuperscript{137} It highlighted significant challenges faced by the government that it intended to

\begin{itemize}
  \item An integrated and sustainable programme, a people-driven process, peace and security for all, nation-building, link reconstruction and development and democratisation of South Africa RDP para 1.3.
  \item Mackay ‘Policy review housing policy in South Africa: The challenge of delivery’ 387.
  \item Corder CK ‘The reconstruction and development programme: Success or failure?’ Social Indicators Research (1997) vol 41(1/3) 183-203 195-197 200-201.
  \item Growth, Employment and Redistribution (GEAR), although introduced as a result of government’s declining economic growth to address the country’s macroeconomic challenges, was criticised for failing to have properly consulted stakeholders. See The African Peer Review Mechanism: South Africa country review report (04 Feb 2013) 225-226, available at <http://aprm-au.org/sites/default/files/CRR%20South%20Africa.pdf> (date accessed 2015-05-05).
  \item White Paper on Housing para 4.2
  \item Stabilising the housing environment; Supporting the housing process; Mobilising housing credit; Mobilising savings; Subsidisation to alleviate affordability constraints; Institutional arrangements;
\end{itemize}

\textsuperscript{131} An integrated and sustainable programme, a people-driven process, peace and security for all, nation-building, link reconstruction and development and democratisation of South Africa RDP para 1.3.
\textsuperscript{132} Mackay ‘Policy review housing policy in South Africa: The challenge of delivery’ 387.
\textsuperscript{133} Corder CK ‘The reconstruction and development programme: Success or failure?’ Social Indicators Research (1997) vol 41(1/3) 183-203 195-197 200-201.
\textsuperscript{134} Growth, Employment and Redistribution (GEAR), although introduced as a result of government’s declining economic growth to address the country’s macroeconomic challenges, was criticised for failing to have properly consulted stakeholders. See The African Peer Review Mechanism: South Africa country review report (04 Feb 2013) 225-226, available at <http://aprm-au.org/sites/default/files/CRR%20South%20Africa.pdf> (date accessed 2015-05-05).
\textsuperscript{136} White Paper on Housing para 4.2
\textsuperscript{137} Stabilising the housing environment; Supporting the housing process; Mobilising housing credit; Mobilising savings; Subsidisation to alleviate affordability constraints; Institutional arrangements;
address,\textsuperscript{138} - which most of them unfortunately are still prevalent today - namely the housing backlog, desperation and homelessness, and impatience. Through the policy, government was required to undertake an in-depth analysis of the country’s housing problems and devise strategies appropriate and responsive to peoples’ socio-economic needs. According to the White Paper, by 1994 there were about 1.06 million people living in mostly free-standing informal squatter settlements and on the periphery of cities and towns, as well as in the backyards of formal houses.\textsuperscript{139} It can be argued that despite the government’s (through the White Paper on Housing) ambitious plan to achieve a target of one million housing units for the first five years, it failed to deliver its target and was heavily criticised.\textsuperscript{140} This criticism and failure was seen to have led to the adoption of the Comprehensive Plan for the Development of Sustainable Human Settlements in 2004.

5.3.5.5 Comprehensive Plan for the Development of Sustainable Human Settlements

Although government continued to deliver low-cost housing, it realised that its existing housing policies were not adequately addressing the plight of the poor, and it implemented housing policy review programmes from 1994 to 2004,\textsuperscript{141} resulting in the adoption of the Breaking New Ground (BNG) policy.\textsuperscript{142} The BNG is a broad policy framework for the medium to longer term, which paves the way for significant policy and strategy shifts within the public housing provision sector. According to the BNG policy, government and its key stakeholders committed themselves to improving every slum in

\begin{footnotesize}
\textsuperscript{138} White Paper on Housing Preamble.
\textsuperscript{139} White Paper on Housing para 3.1.4.
\end{footnotesize}
the country,\textsuperscript{143} in the country; house the homeless; broaden the range of housing finance; ensure minimum standards for housing provision; and ensure the attainment of Millennium Development Goal (MDG) 7.\textsuperscript{144} The BNG policy is aimed at creating integrated communities instead of just housing areas,\textsuperscript{145} and is regarded as government’s symbolic commitment towards promoting the MDG’s agenda,\textsuperscript{146} as it acknowledges the role that housing plays in the alleviation of poverty,\textsuperscript{147} which manifests itself in different ways.\textsuperscript{148} It is the BNG policy’s ambition that by improving housing delivery, there will be a reduction in the number of slums/squatter camps and the concentration of poverty.\textsuperscript{149} The BNG policy is the basis for setting 2014 as a target date for slum eradication. In 2015, with the current state of housing in South Africa, this remains only an abstract dream for many people, who are still facing inequalities and the challenges experienced by government in terms of housing implementation. Despite its efforts to ensure an appropriate representation to analyse the new South Africa’s housing policy, it has been criticised for not providing any concrete solutions to the


\textsuperscript{144} The Millennium Development Goals (MDGs) are eight international development goals that were established in 2000 following the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration By 2020 to have achieved a significant improvement in the lives of at least 100 million slum dwellers. UN General Assembly United Nations Millennium Declaration 55/2 Resolution adopted by the General Assembly (without reference to a main committee (A/55/L.2) at the fifty-fifth session, A/RES/55 18 September 2000 <http://www.un.org/millennium/declaration/ares552e.pdf> (date accessed 2015-05-09).


\textsuperscript{147} BNG para 3.

\textsuperscript{148} BNG para 2.

\textsuperscript{149} BNG para 2.
country’s on-going rural housing provision challenges. It remains questionable whether or not the aspirations of the BNG policy have been realised or likely to be realised beyond 2014 with so many implementation challenges that government is struggling to address. Despite its introduction and objective of using housing as a wealth creation and empowerment tool, and enabling beneficiaries to move to secondary markets, the poor remain vulnerable to poverty and are unable to use housing as an opportunity to obtain financing.

5.3.5.6 The Housing Subsidy Scheme: 1995

Before dealing with the Housing Code, it is vital to understand the history of the Housing Subsidy Scheme, which was introduced back in 1995 to fast-track housing delivery and to provide housing opportunities through different housing programmes. Though it was previously selectively used by the apartheid regime, it is the most important component used by the post-apartheid housing policy, in providing a range of capital subsidies to enable low-income families to gain access to adequate housing. Therefore, the Housing Subsidy Scheme did away with discrimination in terms of subsidy accessibility on the basis of the type of land rights, and extended housing subsidies to people with no secure land tenure rights. This is based on the fact that in the past, the eligibility criterion for the housing subsidy was based on a person who had acquired fixed residential property for the first time. This means that those who acquired ownership of residential properties with their own resources, without any assistance from the Housing Subsidy Scheme (even though they met all the other qualifying criteria of the scheme), were disqualified from applying for a housing subsidy. As a result, they were only able to construct a basic informal structure that did not fully meet the minimum health and safety requirements, and the National Norms

152 Landman and Napier Waiting for a house or building your own? Reconsidering state provision, aided and unaided self-help in South Africa’ 299.
and Standards in respect of the Permanent Residential Structures.\textsuperscript{157} It is on this premise that government amended the Housing Subsidy Scheme to enable all those who qualify to apply for subsidies, provided that they used the subsidy for building or completing a house, in compliance with the said National Norms and Standards. This process led to the revision of the 2000 National Housing Code, which resulted in the 2009 National Housing Code, which, in turn incorporates the Housing Subsidy Scheme.

5.3.5.7 National Housing Code: 2000/2009
The National Housing Code was constituted in terms of section 4 of the Housing Act and binds all levels of government. It sets out policy directives and administrative guidelines for the implementation and application of the national housing development policy.\textsuperscript{158} It is also seen as an adopted tool or approach to address the plight of millions who are left homeless or live in intolerable conditions due to the legacy of apartheid.\textsuperscript{159} While government does not prescribe any housing policy at provincial level, it affords provinces, due to their diverse needs, an opportunity to initiate and adopt an applicable housing policy measure deemed suitable for its demographic population. Therefore, it is possible, through a flexible approach, for a provincial authority to have different housing schemes/programmes in place depending on the needs of its people. However, these different housing schemes/programmes must be guided by the National Housing Code programmes, some of which will be dealt with below, both from national and provincial perspectives. With reference to the National Housing Code, there are two types of housing subsidies, namely individual and institutional housing subsidies.

(a) Individual housing subsidy
The individual subsidy is aimed at providing access to state assistance where qualifying households wish to acquire an existing house or a vacant residential serviced stand linked to a house construction contract, through an approved mortgage loan.\textsuperscript{160} It affords beneficiaries an opportunity to choose from the available housing options that

\textsuperscript{157} The Department of Housing 1995 Annual Report 10-13.
\textsuperscript{158} The National Housing Code: The Policy Context: part 2.
\textsuperscript{159} The National Housing Code: The Policy Context: part 2.
are suitable for their financial needs. This subsidy, despite aimed at ensuring that beneficiaries unlock their potential and perhaps move from the primary to the secondary housing market, has its own challenges, and government seems to be struggling to report on its success and/or how it is fulfilling section 26 obligations. By 01 April 2014 the subsidy amount increased to R110 947 00 depending on areas and a maximum of R164 000 in rural areas as a result of variances related to extra-difficult terrain, access to construction material, etc. The consolidation subsidy, on the other hand, aims to assist beneficiaries who already have land/stands to acquire funds to build or upgrade a house on the site, for those earning up to R3500 per month, as prescribed as of 2010. It is important to note although that the minimum/maximum earning capacity is fixed, the subsidy amounts are not, and they increase on an annual basis (in April of each year).

(b) Institutional housing subsidy

Institutional subsidies are made available to organisations or co-operatives in order for them to acquire and/or develop residential property, mainly for rented accommodation

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161 Applicants can apply for either of the following subsidy categories, (1) Credit Linked Subsidies: In cases where the applicant can afford mortgage loan finance, the applicant may apply for a subsidy that is linked to credit from a financial institution; and (2) Non-Credit Linked Subsidies: In cases where the applicant cannot afford mortgage loan finance, the applicant may apply for a subsidy to acquire an existing house entirely out of the subsidy and may supplement this with other funds that may be available to him or her. The National Housing Code: Financial Interventions - Individual Subsidies 14.

162 Human Settlement Policy and Budget Speech 2015/16 Policy and Budget Speech, delivered by MEC for Human Settlements-Ms Helen SAULS-August at the Eastern Cape Provincial Legislature, 19 March 2015, available at <http://www.gov.za/sites/www.gov.za/files/gcis_documents/EC%20Human%20Settlement%20policy_speech_%20Speech_16_point%5B1%5D.pdf> (date accessed 2015-09-06). In 2011, households with an income of R1 500 per month or less were eligible for a subsidy of R84 000, while households with an income of between R1 501 and R 3500 per month were eligible for a subsidy of R81 521. When a household income is more than R1 500 and less than R3 500, it qualifies for a housing subsidy of R81 521.00. If it can be proven that the beneficiary is disabled or health stricken, as long as the household income is less than R3 500, s/he qualify for a housing subsidy of R84 000, plus a set amount to pay for the cost of any extras that the house may need, for example a ramp for wheelchair access. Department of Human Settlements MT Mguli Enhancements to the National norms and standards for the construction of stand-alone residential dwellings and engineering services and adjustment of the housing subsidy quantum available at <http://green-cape.co.za/assets/Uploads/WC.pdf> (date accessed 2015-05-05).

163 The National Housing Code: Financial Interventions - Individual Subsidies 41.
for people from lower income groups, by using their own capital. It is essential to note that the occupation of this accommodation does not in any way prevent the household concerned from applying for their own subsidy later on.\textsuperscript{166} Examples of some of the prominent subsidies approved and implemented are:

(c) The Peoples’ Housing Process: 1998
The Peoples’ Housing Process (PHP) was launched in May 1998, and is an official self-help housing mechanism that allows groups of people/communities to work together to pool their resources and contribute their labour, in order to build their respective homes through savings, additional loans or labour.\textsuperscript{167} Government reiterated that support organisations, in full consultation with the affected community, should establish self-help groups (similar to housing co-operatives) known as housing support centres, which would then be responsible for the daily project management of PHP.\textsuperscript{168} Houses are built according to a variety of housing types and sizes, from semi-detached to detached brick and these are a form of government-supported community-based construction of top structures. As practised during the apartheid era, they were known as self-help schemes.\textsuperscript{169} Despite support from international organisations and NGOs, self-help housing has been criticised for failing to adequately deliver on its promises.\textsuperscript{170} For example, by 2002 - four years later - only about 1% of state-provided houses had been delivered using the PHP process.\textsuperscript{171} The PHP intended to produce 10 000 units in the 2012/13 financial year, but only managed to produce 6 801 units. The reasons for this underperformance are that most of the projects were not finalised as planned in the said

\textsuperscript{167} The National Housing Code: Enhanced Peoples’ Housing Process - Part 3 vol 4 9 13 15 and 29.
\textsuperscript{168} Ntema LJ \textit{Self-help housing in South Africa: Paradigms, policy and practice}, Thesis submitted in accordance with the requirements for the Philosophiae Doctor degree in the Faculty of The Economic and Management Sciences-University of the Free State: May (2011) (Unpublished).
\textsuperscript{169} Landman and Napier ‘Waiting for a house or building your own? Reconsidering state provision, aided and unaidered self-help in South Africa’ 300.
financial year.\textsuperscript{172} Moreover, there was a persistent lack of necessary capacity and skills to implement PHP programmes at both local and provincial levels. The implementation of PHP programmes could further be thwarted by government’s failure to strike a balance between the time taken to mobilise communities to write project proposals and the time taken to capacitate communities and their support organisations.\textsuperscript{173} There is a complicated and lengthy screening process for applicants\textsuperscript{174} and the approval of subsidies is inefficient. This has resulted in the process being more complex and much slower than anticipated. Furthermore, municipal authorities are already faced with immense capacity problems, which force them to appoint well-established building contractors instead of emerging local contractors to work with beneficiaries for construction. Even so, historically, the much-favoured contractor-driven public housing delivery is being criticised for, amongst others, poor workmanship and uncompleted projects.\textsuperscript{175}

It can be concluded that, while the PHP as a mode of housing delivery tends to have clear, specific objectives, two fundamental issues are central to the programme’s inability to deliver housing on a large scale: lack of capacity and skills at the administrative and project levels, and limited resources.\textsuperscript{176} Whereas in other provinces the PHP seems to have been inefficient, in Gauteng, the PHP has benefited people living in informal settlements. Through the Mayibuye programme, informal settlements were formalised to confer freehold ownership upon residents. In instances where it was


\textsuperscript{173} Ntema Self-help housing in South Africa: Paradigms, policy and practice 72.


\textsuperscript{175} ‘State fails to trim sanitation, housing and land reform backlogs’ City Press (18 February 2007) 1; ‘State fears protests over lack of delivery: minister warns that elections could face even worse disruptions in 2009’ Sunday Times (28 January 2007) 3.

\textsuperscript{176} Ntema Self-help housing in South Africa: Paradigms, policy and practice 74.
not possible to formalise informal settlements, residents were relocated to vacant land as part of the programme.\textsuperscript{177}

(d) The Emergency Housing Policy Framework

The Emergency Housing Policy Framework (EHP Framework) can be found in Part 3 of the National Housing Code\textsuperscript{178} and was incorporated as a result of the \textit{Grootboom} judgment.\textsuperscript{179} The EHP is the most utilised housing policy scheme in South Africa. It aims to provide temporary relief through grants\textsuperscript{180} to assist groups of people in urban and rural areas\textsuperscript{181} who are deemed to have urgent housing problems, owing to circumstances beyond their control.\textsuperscript{182} However, the challenge with this policy is that it entrusts municipalities entirely with the mammoth task of ensuring that proper plans are drawn up, submitted to and approved by the provincial departments.\textsuperscript{183} This means that if municipalities do not see a particular issue as constituting an immediate threat to its inhabitants’ lives, health and safety, or that there is a likelihood or threat of them being evicted, such people are helpless to alert and/or force the municipality to come to their rescue, since the municipality would not have planned for them.\textsuperscript{184} Therefore, every municipality should draw up an EHP Framework, which should form part of every Integrated Development Plan (IDP) that requires an adequate consultative process to determine local needs. The same approach could be adopted for the poor, to enable them to bring to their local authorities’ attention their intolerable conditions, as it also


\textsuperscript{179} Government of the Republic of South Africa and Others v Grootboom and Others 2000(11) BCLR 1169 (CC) (hereafter Grootboom).

\textsuperscript{180} The National Housing Code: Emergency Housing Programme 13.

\textsuperscript{181} The National Housing Code: Emergency Housing Programme 9.

\textsuperscript{182} Such as disasters, evictions or threatened evictions, demolitions or imminent displacement or immediate threats to life, health and safety, The National Housing Code: Emergency Housing Programme 9 14 15 31-33 59-61 73 93.

\textsuperscript{183} The National Housing Code: Emergency Housing Programme 9.

seems to be a challenge for local authorities to heed the community’s call, resulting in a municipal witch-hunt of local needs.

Another problem is the fact that municipalities do not submit detailed or appropriate budgets. This is clear from Blue Moonlight Properties, where, besides the finding that the City of Johannesburg improperly misunderstood Chapter 12, it also did not to provide a budget for emergencies to assist those likely to be evicted by private owners. However, despite the implementation of the Emergency Housing Policy Framework after Grootboom, there are still challenges related to the fact that municipalities are required to initiate and plan their activities, taking into account the needs of their victims within their jurisdiction. Most often, the poor remain vulnerable to evictions, natural disasters and sordid living conditions. They could all have benefitted from the EHP Framework if the municipalities had executed their obligations accordingly. Undoubtedly, this programme sees organs of state as the only authorities capable to determine the needs of their inhabitants, despite the prevalence of capacity in the form of specialised non-governmental organisations working within these communities, which could alert and/or offer technical assistance, particularly to incapacitated municipalities, to anticipate problems and properly plan in accordance with the Emergency Housing Policy.

(e) Upgrading Support Programme (NUSP): 2008

The National Upgrading Support Programme (NUSP) was established in 2008 to assist provinces and municipalities in their efforts to upgrade informal settlements. The NUSP

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186 City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) (hereafter Blue Moonlight Properties) para 84.
187 Blue Moonlight Properties paras 69 71 74.
delivery pillars include water and sanitation, security of tenure and community empowerment.\textsuperscript{189} In addition certain grants such as the Integrated Housing and Human Settlement Development Grant were made available to implement the National Housing Programmes and the formalisation of informal settlements by 2014 which has passed, and their subsequent eradication by 2020 which appears to be unlikely.\textsuperscript{190} In terms of the guidelines for informal settlements report there is a need to adopt a radically different approach to addressing the informal settlement challenge in South Africa. Such an approach incorporates:

- participative and broad-based response led in most instances by the provision of basic services to informal settlements (in-situ) along with basic, functional tenure. Whilst the provision of low-income housing forms part of the overall informal settlement response, it will typically only constitute a small part of the overall delivery given the slow timeframes, high costs and a range of other challenges associated with it. It is accepted that formalisation and subsidized housing provision will often not be achievable in the short term and will either be deferred or, in the case of marginal land, may not be achievable at all.\textsuperscript{191}

Thus the new proposed approach encompasses amongst others:

- a) \textit{Working with and not against informality} (and accepting that, given our constrained economic future, it is likely to persist in the future);
- b) \textit{Ensuring that there is a rapid response at scale} (i.e. ensuring some level of change and improvement occurs in all informal settlements within a short period of time with no informal settlements left on a developmental ‘back-burner’);
- c) \textit{Multi-pronged and flexible} (consisting of a range of different responses which are responsive to and appropriate for local conditions);
- d) \textit{Giving priority to the upgrading and improvement of informal settlements in-situ} with relocations being only undertaken as a last resort;
- e) \textit{Ensuring meaningful community participation, engagement and local ownership};
- f) \textit{Giving priority to the provision of basic services and functional tenure} as the first line of response and ensuring that this is expedited (except in rare cases where relocations are necessary and justified);
- g) \textit{Maximising the use of scarce land};
- h) \textit{Integrating and including informal settlements} into the planning of cities and towns;
- i) \textit{Understanding informal settlements in their spatial and socioeconomic context};
- j) Ensuring that \textit{livelihoods and economic opportunities} are afforded priority (protected or supported);
- k) \textit{Improving access to key social facilities} (e.g. education and health care);

\textsuperscript{190} Department of Housing Annual Report 2005-2006 19-20.
(l) Improving public transport; and
(m) Accepting that collective functional tenure (through settlement-level recognition) is the minimum form of tenure and that conventional tenure (title deeds) are in most instances incompatible with rapid basic services delivery (since they require that land first be acquired, formally planned and subdivided; which is typically a multi-year process).\footnote{The Housing Development Agency Informal settlements: Rapid assessment and categorisation guidelines 6.}

Therefore the National Upgrading Support Programme has been established to give impetus and support to the new approach, which also finds support in the National Development Plan (NDP).\footnote{Discussed below.} The NDP, amongst others, affords priority to public realm investment. It has been reported that the new approach is already being implemented in various ways by several cities (e.g. eThekwini, Cape Town and Johannesburg), certain provinces (e.g. KwaZulu-Natal).\footnote{The Housing Development Agency Informal settlements: Rapid assessment and categorisation guidelines 6.}

(f) Other institutional housing subsidies/programmes

A rural housing subsidy is made available to people who do not have formal tenure rights to the land on which they live, and this subsidy may be used for building houses, providing services, or a combination of the two.\footnote{The National Housing Code: Rural Interventions: Communal Land Rights vol 5 7 11-12, available at <http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/5_Rural_Interventions/2%20Vol%205%20Communal%20Land%20Rights.pdf> (date accessed 2015-05-05).}

The Community Residential Units Programme makes funds available for the redevelopment of government-owned housing stock (e.g. hostels, council flat buildings) for low-cost rental to beneficiaries earning below R3500 per month, who are not able to be accommodated in the formal private rental and social housing markets.\footnote{The National Housing Code: Social and Rental Interventions - Community Residential Units 9.} Its aim is to develop public rental housing assets.\footnote{The National Housing Code: Social and Rental Interventions - Community Residential Units 12.} Such assets\footnote{Previously the housing subsidy programme aimed at providing shelter for poor people and by 2000 government introduced the concept of seeing housing as an asset, South African Cities Network Housing subsidy assets: Exploring the performance of government subsidised housing in South Africa-Overall analysis (2011) 10 18 53 66-67 74, available at <http://sacities.net/images/stories/2012/pdfs/overall-analysis_final.pdf> (date accessed 2015-05-05).} include old workers’ hostels.
that are either government-owned (by provinces or municipalities) or that have both a
color=blue!50!red!50!white!50]public and private ownership component; public housing stock that forms part of the
‘Enhanced Extended Discount Benefit Scheme’, but which cannot be transferred to
individual ownership and has to be managed as rental accommodation by the public
owner; publicly owned rental stock developed after 1994; and existing dysfunctional,
abandoned and/or distressed buildings in inner cities or township areas that have been
taken over by a municipality and funded through housing funds. However, the
Community Residential Units subsidy has experienced a lot of resistance from all
stakeholders involved.

5.3.5.8 National Norms and Standards for sustainable housing development
All residential developments that will be undertaken in terms of the National Housing
Programme must comply with the recently adopted norms and standards. They must
be in line with the National Builders Regulation and the house building prescripts of the
National Home Builders Registration Council (NHBRC). These norms and standards
apply to the construction of stand-alone houses and houses constructed through the
National Housing Programmes must comply with them. They protect housing subsidy
beneficiaries from exploitation by developers who have delivered unacceptably small
and poorly constructed houses. Therefore houses to be constructed must have a gross
floor area of at least 40 square metres. In addition each house must be designed on the
basis of:

(i) Two bedrooms;
(ii) A separate bathroom with a toilet, a shower and hand basin;

\[199\] The National Housing Code: Social and Rental Interventions - Community Residential Units 12.
\[200\] As will be discussed under the provincial housing delivery measures adopted at 5.3.6.
\[201\] National Norms and Standards for the construction of stand-alone residential dwellings financed
through National Housing Programmes: Technical Guidelines 21 available at
\[202\] Department of Human Settlements The National Housing Code: Simplified guide to the National
\[203\] Department of Human Settlements: Programmes and subsidies, available at
(iii) A combined living area and kitchen with wash basin;
(iv) A ready board electrical installation if electricity is available in the project area.

The norms and standards are applied to municipal services subsidising, among others, water, sanitation, roads, storm water and street lighting in exceptional circumstances and must be strictly adhered to.204 Despite the prescribed National Norms and Standards requirements, challenges continue to surface with regard to the quality of the houses that are delivered,205 thus demonstrating a lack of appropriate monitoring and evaluation on the part of government.

In as far as temporary residential accommodation is concerned the Joe Slovo judgment laid down what it considered to be applicable norms and standards for temporary accommodation to be provided to those facing evictions, namely:

The temporary residential accommodation unit must:
10.1 be at least 24m2 in extent;
10.2 be serviced with tarred roads;
10.3 be individually numbered for purposes of identification;
10.4 have walls constructed with a substance called Nutec;
10.5 have a galvanised iron roof;
10.6 be supplied with electricity through a pre-paid electricity meter;
10.7 be situated within reasonable proximity of a communal ablution facility;
10.8 make reasonable provision (which may be communal) for toilet facilities with water-borne sewerage; and
10.9 make reasonable provision (which may be communal) for fresh water.206

5.3.5.9 National Development Plan: Vision for 2030
The National Development Plan: Vision for 2030 is the most comprehensive plan to have been prepared by government since 1994. Its main objectives include a need to

206 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2009 (9) BCLR 847 (CC) (Hereafter Joe Slovo case) para 10.
address the geographical and urban inefficiencies created during the apartheid era.\textsuperscript{207} Chapter 8, entitled ‘Transforming human settlement and the national space economy’ lists as a key point, that the state will review its policies to better realise constitutional housing rights, ensure that the delivery of housing is to be used to restructure towns and cities and strengthen the livelihood prospects of households.\textsuperscript{208} The NDP provides no detail, but indicates that a revised approach to human settlement is required:

\begin{quote}
...in which the state properly fulfils its obligation to providing high-quality public infrastructure and environments, while also supporting and facilitating low-income households in acquiring adequate shelter. How this will be realized requires detailed technical work, led by the Department of Human Settlements, but there is an urgency to the matter as the current trajectory of housing provision must be changed if the overall objectives of human settlement transformation are to be achieved. In part the solution may come from a more innovative application of the instruments available by provincial and local governments, but there is a need for new instruments that will incentivise and complement investment by households, such as housing vouchers that are not spatially tied as well as a need to reorient funding towards public infrastructure and public environments.\textsuperscript{209}
\end{quote}

While the NDP recognises all the problems and pitfalls its vision is lacking in any detail and it remains to be seen how this ambitious plan will be implemented in redressing not only the apartheid legacy, but also the systemic implementation challenges experienced by the government on its various housing policies since 1994.

Although these are not all the housing subsidies programmes\textsuperscript{210} implemented by government at national level, those mentioned provide an indication of various initiatives taken by government as a way of fulfilling its obligations in terms of section 26 of the

\textsuperscript{208} National Development Plan 259.
\textsuperscript{209} National Development Plan 272.
\textsuperscript{210} Others include the Social Housing Policy, which aims to contribute to the national priority of restructuring South African society in order to address structural, economic, social and spatial dysfunctionalities, thereby contributing to government’s vision of an economically empowered, non-racial, and integrated society living in sustainable human settlements. Secondly, to improve and contribute to the overall functioning of the housing sector and in particular the rental sub-component thereof, especially insofar as social housing is able to contribute to widening the range of housing options available to the poor. The National Housing Code: Social and Rental Interventions - Social Housing Policy-Part 3 11, available at <http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/6_Social_Rental_Interventions/3%20Vol%206%20Social%20Housing%20Policy.pdf> (date accessed 2015-05-05).
1996 Constitution. In addition to these measures taken at national level, provincial
governments are at liberty to devise further housing measures, taking into account their
diverse needs, in order to also fulfil their obligations. Therefore, while at national level,
the focus is mainly on policy formulation and facilitation, it is provincial departments that
must practically implement the adopted policies.

5.3.6 Housing delivery measures adopted and implemented at provincial level
An evaluation of provincial housing measures implemented will highlight the wide
discretion afforded to provinces when devising suitable housing policy measures to be
implemented, taking into account national policy guidelines. From this evaluation, one
will be able to determine if this wide latitude or discretion contributes to the progressive
realisation of the right to adequate housing, or if it merely deepens the vulnerability of
the poor in their attempt to achieve an improved standard of living.

The evaluation will be based mainly on government’s reports as submitted to the South
African Human Rights Commission to measure compliance with section 26 obligations.
It is evident from the provincial reports that there are various contradictory housing
policy programmes being adopted, leading to sporadic implementation. Some are
appropriately formulated but not conducive to the enjoyment and/or progressive
realisation of the right to adequate housing, others are still lacking a directed response
to the requirements of section 26 and others lack comprehensive housing policy
coverage, which results in the neglect or insufficient satisfaction of their needs. In other
words, unparalleled policy adoption and implementation approaches that are not
contributing much to the progressive realisation of the right to adequate housing are
what characterises provincial governments. These discrepancies are evident from the
manner in which provincial reports are prepared, which highlights the uncoordinated
efforts of provinces.

Gauteng leads the way with the introduction of several housing policy measures.
Included are the Home Truth Commission, Special Needs Policy, Mayibuye Upgrading
Programme, High Density and Transitional Housing Programmes. The Home Truth
Commission’s main purpose was to investigate alleged acts of corruption committed by officials during the period from 16th June 1976 to 27th April 1994. The Special Needs Policy was developed in order to promote sustainable and integrated housing delivery. It aimed at addressing the specific needs and housing requirements of special categories of beneficiaries, namely women, persons infected with and/or affected by HIV/AIDS, persons with disabilities, the aged and youth, with two housing projects specifically intended to address the needs of persons with disabilities under the institutional subsidy.\textsuperscript{211} The Gauteng provincial authority has stated that although its policy framework cuts across all the programmes within its department, its main focus is on housing people infected with and affected by the AIDS epidemic, as well as women.\textsuperscript{212} The Mayibuye Upgrading Programme was initiated as a result of Gauteng’s recognition of the realities of urban landlessness and insecurity of tenure the right of access to adequate housing. It seeks to release land and upgrade the tenure rights of citizens living in informal settlements.\textsuperscript{213} The High-Density Programme provides affordable housing, usually in the form of a multi-storey building in the inner cities, through the upgrading of existing buildings.\textsuperscript{214}

Throughout South Africa there are a number of policies addressing important issues that are applicable to more than one province. These policies relate to housing measures for different groups such as HIV/Aids, people with disabilities, the elderly, and residents in rural areas, hostel occupiers and occupiers of rental housing.

As a result of the failure of the national department to devise a policy to cater for people affected by HIV/AIDS, the South African Human Rights Commission, as far back as 2000, found it regrettable that neither the national department nor the respective provincial housing departments had developed policy guidelines to provide housing to persons living with and affected by HIV/AIDS. Although Gauteng has developed a policy to provide housing to persons living with and affected by HIV/AIDS, it is not clear exactly

what the policy entails.\textsuperscript{215} While some provinces have introduced a policy dealing with HIV-affected people and AIDS orphans, others view this policy as unnecessary, since they follow an integrated approach to housing delivery, while yet others are still undertaking research or do not have any specific housing policy measures in place.\textsuperscript{216}

Gauteng, the North West and Northern Cape provinces have adopted a special dispensation policy that caters for disabled persons who qualify for additional allowances or subsidy amounts, in order to provide for their specific needs.\textsuperscript{217} The Eastern Cape reported that people with disabilities were integrated into the community and were therefore catered for within a regular housing project, without any special focus.\textsuperscript{218} Statistics SA found that nationally, about 53\% of households headed by disabled persons live in housing units made of brick structures - nearly the same as the percentage of households headed by non-disabled persons (56\%).\textsuperscript{219} Furthermore, a significant proportion (37\%) of households headed by disabled persons live in traditional dwellings.\textsuperscript{220} This indeed confirms, from a statistical point of view, that disabled persons are a priority for government housing programmes.

With regard to older persons, Gauteng implemented a policy whereby 5\% of its budget allocation for various projects was earmarked for the elderly. As a result it put measures in place to ensure that various stakeholders complied with the policy.\textsuperscript{221} The Free State is running a housing programme that is suitable for the needs of the aged, in conjunction with the provincial Department of Social Development. North West and KwaZulu-Natal stated that the qualifying criteria for relocation subsidies in terms of the Relocation Subsidy Programme were implemented with the main objective of assisting defaulting borrowers to gain access to alternative housing. Under this programme older

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persons were allowed to occupy and own their existing homes, thereby ensuring that older persons were not subjected to undue hardship.

With regard to vulnerable and marginalised groups, Free State and KwaZulu-Natal adopted a comprehensive approach whereby all their provincial housing policies were said to be open to all South African citizens, without any distinction based on gender, race, age or ethnic group. However, emphasis was placed on the beneficiaries having dependants, being married or cohabiting. Clearly, this policy implementation approach seems to discriminate against those who may not have dependents or are not married or cohabiting, or by treating those who are vulnerable and marginalised in the same way as everyone else. Their reports indicated that their policies do not cover child-headed households and girl children, since they do not qualify for a subsidy because they are not majors, and cannot therefore sign contracts. Western Cape and Mpumalanga did not have any specific measures in place aimed at providing special assistance to the above-mentioned groups. Limpopo implemented this subsidy measure, but failed to provide information on the number of beneficiaries for the period under review.

The Rural Housing Subsidy was constituted as a special housing programme established mainly to cater for the special demands of rural areas, where there are minimum survey requirements and the extensive use of long-term lease agreements, as opposed to freehold titles. Provinces such as Mpumalanga, Northern Cape, Limpopo and the North West stated that this relaxation in terms of tenure and survey requirements enables beneficiaries, for the first time, to get access to housing subsidies in their rural area, subject, however, to the prescribed national minimum income capacity. The KwaZulu-Natal Department of Housing reported that most of the rural land is predominantly tribal land belonging either to Ingonyama Trust or the Department of Rural and Land Affairs. As a result, it experienced difficulties in transferring this land to individuals, and the province developed its own Rural Housing Guidelines, which enables the granting of long-term leases to beneficiaries and regards this as constituting

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sufficient security of tenure to satisfy the requirements of the housing subsidy for rural households. Other provinces did not report or provide information on how they address housing for beneficiaries on tribal lands, over which the latter do not have ownership.

The national Department of Human Settlements issued a directive that each province must set aside funding for housing people who are rendered homeless as a result of natural disasters, in accordance with the Disaster Intervention Programme. This programme seeks to ensure that provincial housing departments are able to respond swiftly whenever there is an emergency within their province. However, it appeared that the functions of this programme were taken over by the Housing Disaster Relief Grant, which aimed at providing emergency relief to support the reconstruction of houses and related infrastructure damages, as awarded to KwaZulu-Natal.

The Hostel Redevelopment Programme, which forms part of the CRU programme, is aimed at creating humane living conditions in public sector hostels by converting them from single-sex accommodation into rental (family) units. Despite hostels being found in almost every province, the redevelopment of some of them into family units, as per the programme objective, seems to be far-fetched, due to a number of hiccups from the government and beneficiaries’ side, as well as political battles. That resulted in shoddy reports or no reporting being made to the South African Human Rights Commission. However, the challenges facing this programme do not appear to be different from other government subsidies, insofar as the manner in which housing

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225 The programme was implemented in the Zaalplaaas project, whereby approximately 200 constructed houses were delivered to families affected by floods in the rural areas. South African Human Rights Commission 4th ESR Report 2000-2002 29.
229 During the 2001/2002 financial year, 1 284 units were converted into family units in the Free State. However, no figures were provided in the case of Limpopo, South African Human Rights Commission 4th ESR Report 2000-2002 30.
policy measures was or is being implemented and government understanding of its section 26 obligations.230

Only the Gauteng, Northern Cape and North West provincial departments provided some information on the Rental Housing Sector Policy. The only information that was submitted reflected the policy aim of developing key strategic interventions that will contribute towards the rental housing sector, but failed to indicate how this will be done and how law and order will be restored in the sector.231

The South African Human Rights Commission found that the majority of people, who were illegally evicted from their homes, resulted in them experiencing difficulties in accessing housing subsidies under the Housing Subsidy Scheme. The Commission recommended that victims of unlawful removal from their homes be provided with alternative accommodation by the province, resulting in a policy being developed to facilitate access to subsidies for these people.232

While each province is required to adopt the Consolidated Subsidy Programme, implement it and report on how the programme fulfils the measures set out in section 26, there seems to be on-going inconsistency in reporting and a lack of understanding by provinces of their obligations when submitting their required reports to the South African Human Rights Commission. These inconsistencies are fully dealt with in the discussion on the role of the South African Human Rights Commission below.233

It is clear that in the absence of an appropriate monitoring tool by the national department, every measure adopted is unlikely to contribute to the government’s overall objective of achieving decent quality housing. Instead, the current provincial government reporting patterns only seem confuse and ultimately contribute to the increasing number of households living in informal settlements, as well as the high

231 South African Human Rights Commission 52.
population figures.\textsuperscript{234} It is from these policies as a whole that government draws its statistics, on an annual basis, in order to determine if and how the adopted housing policy measures, improve the poor’s standard of living through housing provision. The subsequent years’ reporting resulted mainly in government structures submitting reports on progress made in terms of most of these programmes, as well as newly developed ones, while others were still being reviewed. However, government reports to the South African Human Rights Commission highlighted the inability of government to report decisively on its section 26 obligations. In terms of the South African Human Rights Commission’s 3rd ESR, it was reported that:

> It is appreciated that the Department of Housing does not deal with implementation of the measures and that is the responsibility of the provincial departments. The monitoring of the realisation of the right of access to adequate housing cannot be measured by the statistics from certain Provinces. In order to make a sound analysis of all provincial departments there is a need to provide information so that a countrywide comparison of the progressive realisation of the right could be made. The national department should therefore take initiatives to capture data that gives a national picture. Provincial departments could help by feeding the necessary data to the national Department.\textsuperscript{235}

### 5.3.7 Summary

Government adopted an income-based capital subsidy scheme as the basis of its approach to low-cost housing in South Africa, thereby making its housing policy grow in complexity,\textsuperscript{236} as shown by the different routes taken by provinces in interpreting and applying their diverse understanding of fulfilling section 26 obligations. It remains to be seen, however, whether or not government will address its systemic housing policy implementation challenges. A study conducted by the Centre on the Right of Access to Adequate Housing and Evictions (COHRE) in 2005 found that South African housing law and policy\textsuperscript{237} is largely compliant with the ICESCR and the 1996 Constitution. It established that where there are policy and programmatic gaps that inhibit compliance with the ICESCR requirements, the government has taken steps to address the situation.\textsuperscript{238} The Special Rapporteur on Housing also acknowledged that South Africa

\textsuperscript{236} Pottie ‘Local government and housing in South Africa: Managing demand and enabling markets’ 607.
\textsuperscript{238} COHRE Any room for the poor? forced evictions in Johannesburg, South Africa 15 17.
adopted progressive housing legislation and policy aimed at fulfilling section 26 obligations. However, with regard to the implementation of these housing statutes and policy, he noted some challenges, such as the fact that while people wait for long periods for the provision of adequate housing, they are not able to access and enjoy these rights.\textsuperscript{239} He noted that significant gaps exist for a variety of categories, namely:\textsuperscript{240}

- (a) People who qualify for a subsidised house and are waiting in the queue for one.
- (b) People who earn too much for a government subsidy, but too little to secure a commercial bond, and thus end up living in backyards or informal settlements.
- (c) People who can afford rentals but cannot rent because there is not enough rental stock at affordable prices.
- (d) Backyard dwellers.
- (e) People in rural areas.
- (f) The fact that there is still homelessness and landlessness, which results in linkages between lack of access to land, evictions,\textsuperscript{241} rural and urban poverty, and the realisation of the right to adequate housing.\textsuperscript{242}

It is on this premise that the Special Rapporteur observed:

> That the realization of the right to adequate housing in South Africa is compromised by the Government’s fragmented approach to the implementation of housing law and policy.\textsuperscript{243}

5.4 The state of housing delivery in South Africa: 21 years later

5.4.1 Introduction

It is already two decades since the new democratic dispensation committed itself, through a constitutional framework to improve the poor’s standard of living through the provision of access to adequate housing. Therefore the time has come for the country to conduct a critical evaluation of its adopted housing delivery mechanisms, in order to determine if it is still relevant as an appropriate tool to improve the lives of those in need


\textsuperscript{240} Special Rapporteur on adequate housing: Mission to South Africa paras 28 29 40 50 52 75 91 105.

\textsuperscript{241} Thus, the result of evictions and/or relocations during slum eradication is that the poor are pushed further out into the periphery of the city, with less access to economic opportunities and higher transport costs, South African Human Rights Commission 7th ESR Report 2006-2009 157, Goebel ‘Sustainable urban development? Low-cost housing challenges in South Africa’ 298. South African Human Rights Commission 4th ESR Report 2000-2002 56.

\textsuperscript{242} Special Rapporteur on adequate housing: Mission to South Africa para 29.

\textsuperscript{243} Special Rapporteur on adequate housing: Mission to South Africa para 36.
of access to adequate housing. Consequently, it is important to analyse the trend in housing delivery in South Africa, highlight what has been achieved, signify shortcomings and propose measures to be adopted to assist the country to comply with its section 26 obligations.

5.4.2 21 years of housing delivery: South Africa’s time for reflection

South Africa’s human settlement implementation approach is based mainly on the provision of social services and infrastructure to the poor and formally disadvantaged communities throughout the country. Based on South Africa’s legislative and policy approach, an examination of what the country has done in terms of implementing its housing framework is essential.

Initially, housing and service delivery were driven by the private sector as a way of overcoming, for example, local government’s forthcoming transformation.244 From 1994 onwards, government took an active role in service delivery, focusing specifically on providing low-cost housing to the poor.245 By 1994, it was estimated that there was a housing backlog of about 1.5 million units,246 and, due to the high rate of population growth and low rate of housing provision, it was estimated that the housing backlog was increasing at a rate of around 178 000 units per annum.247 In 2008 a housing backlog of some 2.1 million units was reported248 and by 2013, it was found to still be around 2.1 or 2.5 million.249 This presupposes that the housing backlog remained stagnant for about five years, or that government agencies failed to record and/or keep up with the appropriate housing backlog or demand. Taking the average annual increase of about

244 Tomlinson ‘Managing the risk in housing delivery: Local government in South Africa’ 420.
245 Goebel ‘Sustainable urban development? Low-cost housing challenges in South Africa’ 297.
246 White Paper on Housing para 3.2.1.
247 White Paper on Housing para 3.2.1.
178 000 into account, then 21 years later, would it not be correct to state that the housing backlog could be around 3 382 000?

With such statistics, it is essential to determine what government has done to turn the housing backlog around. By the end of 2014, it was reported that the government had delivered over 3 million housing units through its various housing policies and programmes, providing shelter to over 13 million poor, unemployed and homeless people. Considering that over 13 million people or households benefitted from government’s various housing programmes, it is indeed a milestone that must be noted and praised. However, this seems difficult to swallow, especially when one looks at the current housing backlog, and it is justifiable to ask whether or not government has properly assessed the housing delivery outcomes in terms of how many people require adequate housing, the extent of the housing backlog on an annual basis as well as how many houses have been delivered. This is a difficult question to answer positively if reliance by government on its statistics is anything to go by.

If reliance on statistics is anything to go by, then it could be argued that government’s 3 million milestone is still a failure, since the backlog has increased. There can be no doubt that the housing backlog is more than the stagnant 2.5 million that is on record. This means that there is a persistent increase in the number of households that is eligible for the housing subsidy annually, taking into account the failure by government to meet most of its annual housing delivery targets. This is illustrated by the following key targets:

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251 There is confusion regarding government’s reporting on their delivery outcomes, whereby at times in the Department of Human Settlements Annual Reports, government reports to have delivered a certain number of houses to individuals, while at the same time summarising their delivery outcomes using households. Therefore, it is difficult to determine whether or not the said figure is also correct, but will be used interchangeably.

(a) In 1994, government aimed to build about 1 million houses in five years (1994-1999), which means about 200 000 houses per year, and increase such number to 270 000.\textsuperscript{253} If one merely uses the 200 000 per annum set target by 2006, government managed to deliver only about 2 081 694 houses, thereby demonstrating a failure by government to achieve its target 13 years later.\textsuperscript{254}

(b) Besides its inability to reach its housing delivery target, in 2008, the South African government increased its housing provision from 270 000 to 500 000.\textsuperscript{255}

(c) Despite the 300 000 planned annual increase in 2012, the department only reported to have managed to deliver 21 119 houses.\textsuperscript{256}

From the above, it is evident that there is a challenge within government agencies to utilise reliable statistics in trying to measure their housing delivery progress. This is worsened by the fact that almost every agency is using its own statistics, and none of them are complementing one another.

With regard to squatter settlements, backyard shacks and slums the situation is much the same. In 1994, 1.5 million households\textsuperscript{257} or 7.4 million people were forced to live in squatter settlements, backyard shacks or over-crowded conditions in existing formal housing in urban areas, with no formal tenure rights with regard to their accommodation.\textsuperscript{258} The 1994 \textit{White Paper on Housing} found that:

\begin{quote}
Approximately 13.5\% of all households +-(1,06 million) live in squatter housing nationwide, mostly in free-standing squatter settlements on the periphery of cities and towns and in the back yards of formal houses.\textsuperscript{259}
\end{quote}

Despite the 2014 target of eradicating slums, it is estimated that there are about 2 754 informal settlements in 70 municipalities in South Africa.\textsuperscript{260} However, in terms of the

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\textsuperscript{253} The RDP para 1.4.2. Financial and Fiscal Commission \textit{Exploring Alternative Finance and Policy Options for Effective and Sustainable Delivery of Housing in South Africa} 14.

\textsuperscript{254} Department of Housing \textit{Annual Report 2005-2006} 24.

\textsuperscript{255} Financial and Fiscal Commission \textit{Exploring Alternative Finance and Policy Options for Effective and Sustainable Delivery of Housing in South Africa} 15.


\textsuperscript{257} \textit{Department of Housing 1995 Annual Report’} 21 25 32.

\textsuperscript{258} White Paper on Housing para 3.2.2.

\textsuperscript{259} White Paper on Housing para 3.1.3(d).

2011 Census Report, the percentage of households living in traditional dwellings almost halved, while the percentage of households living in informal dwellings decreased from 16.2% in 1996 to 13.6%. In addition, it was found that there are about 1.2 million to 2.4 million South African households who live in informal settlements, and considering their ‘illegality’ and situation on ‘private land they are seen to be posing specific challenges for service delivery, and its sustainability.’ In other words, over 10% of South Africa’s people live in urban informal settlements. This equates to more than 1.2 million households and an informal settlement population of over 4.4 million. This increase took place despite government’s massive spending on housing delivery. 21 years later, the 1996 Constitution’s objective of redressing past inequalities continues to be characterised by spatial inequalities comprising many different housing types, including high-density residential houses, shack in informal settlements on both publicly and privately owned land, ‘RDP’ houses in urban townships, backyard shacks adjacent to formal housing, and rural housing. The state of the country’s housing challenges in 2015 is proof that government failed to meet its 2014 target of eradicating slums as demonstrated by the escalation of millions of poor people who are still demanding and waiting for housing since 1994. On the other hand despite section 26(3) of the Constitution, thousands of poor and marginalised communities have been evicted. These evictions targeting the poor and vulnerable communities often

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262 With Gauteng on its own having over 300 informal settlements, which accounts for over 33% of all households in informal settlements in South Africa, The Housing Development Agency South Africa: Informal settlements status’ research report, Research Report 23.


265 E.g. inner city flats, private rental housing and social housing.

266 Tissington A review of housing policy and development in South Africa since 1994 28.


have severe and traumatic results, leaving people with damaged or destroyed properties and broken families, with no access to essential facilities and services.\textsuperscript{269} Such evictions take place for a variety of reasons, such as, but not limited to inner-city regeneration projects,\textsuperscript{270} health and safety conditions\textsuperscript{271} in buildings,\textsuperscript{272} and alleged illegal occupation.\textsuperscript{273} They continue to take place, despite the existence of democratically created laws setting out procedural steps to be followed in evicting the occupants.\textsuperscript{274}

Notwithstanding the 1996 Constitution having been hailed as one of the most progressive ones in the world, 21 years later, the poor do not seem to share the same sentiments as intellectuals, who are praising South African leaders for coming up with such a progressive Constitution. It is clear that government’s efforts, despite the positive progress noted, is thwarted by the spiralling number of people still trapped in poverty and experiencing an unequal standard of living.\textsuperscript{275} One of the main challenges that seems to have an impact on the country not appropriately implementing its housing policies could be a classification made by the former President Thabo Mbeki called, ‘a country that is characterised by ‘two parallel economies’, the first and the second economy’.\textsuperscript{276} In this regard, the first economy is modern, produces the bulk of our

\begin{thebibliography}{99}
\footnotesize
\item Du Plessis ‘The growing problem of forced evictions and the crucial importance of community-based, locally appropriate alternatives’ 124-125.
\item Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC) (hereafter Schubart Park).
\item For example, those located in the Msunduzi River flood plain, much of which is “shack farming”, are also exposed to high levels of risk to natural disasters such as flooding, which indeed occurred in the city on Christmas day in 1995, with approximately 160 lives lost and over 500 families who lost their homes—all of these people were settled in flood risk areas. These conditions pose short- and long-term health and environmental risks, and ultimately costs to the city, province and nation. Goebel ‘Sustainable urban development? Low-cost housing challenges in South Africa’ 295.
\item Blue Moonlight Properties.
\item President of the Republic of South Africa and Other v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amicus Curiae) 2005 (5) SA 3 (CC) (hereafter Modderklip), Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC) (hereafter Port Elizabeth Municipality v Various Occupiers), City of Cape Town v Rudolph and Others.
\item Du Plessis ‘The growing problem of forced evictions and the crucial importance of community-based, locally appropriate alternatives’ 126.
\item Ballard, Habib, Valodia and Zuern ‘Globalization, marginalization and contemporary social movements in South Africa’ 621.
\item A developing trend is prevalent in most cities of having ‘a tale of two cities within one city’, thereby cautioning that policymakers, governments, development practitioners and funding agencies should no longer see the city as one homogenous entity. Accordingly slums are not only a manifestation of poor
\end{thebibliography}
country's wealth and is integrated within the global economy. On the other hand, the second economy (or the marginalized economy) is characterised by underdevelopment, contributes little to the Gross Domestic Product, contains a large percentage of our population who are unemployed and 'unemployable', incorporates the poorest of our rural and urban poor, is structurally disconnected from the first and global economy and is incapable of self-generated growth and development. These two economies and the persistent poverty, inequality and unemployment seem to pose a challenge to those meant to benefit from constitutional democracy. According to Chenwi:

The extent of poverty in the country is evidenced by, among other things, shacks, homelessness, unemployment and lack of access to basic services. HIV/AIDS, food and housing insecurity are still major problems. A majority of the population continue to be deprived of access to basic services and their participation in decision-making processes of government and service delivery projects is limited.

In 2007 an attempt to address the housing backlog was made by the then Minister of Human Settlements who estimated that about R102 billion was required over 3 years to clear the housing backlog, and stated that this amount would double to R253 billion in 2016 (this is nearly 20 times the entire current annual housing budget). However, nine years later, the country is still dancing to the same tune of tackling an increasing
backlog, despite having some resources to alleviate the said backlog. In this regard, the Financial and Fiscal Commission has questioned the sustainability of the country’s adopted housing delivery model amid protracted implementation challenges, considering the fact that the budget allocated has increased significantly over the years, but has not resulted in increased housing delivery. 281 It is on this premise that in Grootboom, the court stated that:

But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. 282

Even though government can be commended for having delivered 3.3 million houses to the poor, some of them still lack what Smit calls an adequacy assessment, since:

...all the major land/housing options currently available to poor households have serious inadequacies. Although poor households are, for example, able to access relatively good locations and affordable accommodation in informal settlements or adequate shelter/services and secure tenure in RDP housing settlements, they are seldom able to adequately satisfy all their minimum requirements simultaneously. 283

While the standard of living of some of the poor seems to have improved, there is an ever-increasing number whose standard of living has deteriorated. As a result, government has been criticised for its tendency to rely more on statistics when it comes to its housing delivery progress than to ensure adequacy, accessibility and fulfilment of housing delivery to the poor. In other words, even though the 1996 Constitution is seen as the guiding framework for policy and legislation, the state is often more mindful of political targets in respect of housing delivery than the constitutional obligation to

282 Grootboom para 45.
provide adequate housing. According to South African Human Rights Commission 7th ESR Report:

This is particularly apt in respect of the right to provide adequate housing in which the chasing of targets resulted in the erection of houses that were of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure or services.

It is clear that every housing delivery measure reported by government through statistics is an inaccurate reflection of its efforts to comply with its constitutional mandate. As a result of this inaccurate recording of government delivery progress/targets it is argued that the government does not have a proper planning relating to its housing delivery and targets. However, a statistical analysis spanning 21 years does not seem to be government’s only challenge in relation to the housing delivery mandate.

**5.4.3 Housing delivery implementation challenges facing South Africa**

Due to the lack of an effective housing delivery implementation system, service delivery protests have been one of the most effective ways of drawing authorities’ attention in South Africa. In this regard, it was found that a total of 606 protests were recorded in South Africa between February 2007 and May 2011, of which 20% were related to the delivery of housing. South Africa’s housing delivery has experienced systemic implementation challenges that are still in the process of being addressed. In terms of government’s 10 years review, the 2005/06-2011/12 National Treasury Report on Provincial Budget and Expenditure found that the country is facing insurmountable implementation challenges to its housing delivery mandate. These include amongst others:

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287 National Development Plan 242 244-245.
288 National Treasury ‘Chapter 6: Human Settlements’ in Provincial budgets and expenditure review, 2005/06-2011/12 (2009) 103-104 available at...
(a) Under spending by provinces due to poor capacity and project management, leading to them returning unspent monies to the National Treasury, as well as inadequate budget allocations.

(b) Poor coordination between spheres of and arms of government in the housing delivery process, leading to delays in project initiation, approval, implementation and completion, as well as money not being released timeously to municipalities.

(c) Increase in construction costs which is now affecting the planned housing projects, by reducing the value of the subsidy to below that required to complete a project;

(d) Inappropriate subsidy mechanisms that initially failed to adjust to changes in housing needs and market conditions;

(e) Unavailability of suitably located land for human settlements; quality of housing contractors and adherence to specifications; urbanisation, migration and immigrant impacts; and complexity of the process with regard to turnover.

(f) Widespread calls from local governments for an elective transfer of skills, in order for local government to participate in national housing programmes; weaknesses and staff shortages at municipalities; and failure of municipalities to submit business plans;

(g) Despite the approval of certain housing projects, houses have not been constructed;

(h) Corruption, political intervention and nepotism.

However, while most of the mentioned implementation challenges were created/made by the government there are some challenges that government seems to have no control over. These include rapid population growth and its influence on shrinking government resources and capability particularly to eradicate the backlog. According to Lekganyane-Maleka a higher rate of population growth has a significant negative effect on the housing sector. See paragraph 5.2.1 discussion above.
impact and demand for social infrastructure and public expenditure being absorbed in the provision of facilities for larger population, putting pressure on food, space and other resources.

Some of these implementation challenges were identified as far back as 1995, yet 20 years later, they are still on the list and seem to continue unabated, leaving

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299 Lekganyane-Maleka The consequence of high population growth in developing countries: A case study of South Africa 8, 16

300 The inadequate budget allocation for housing programmes, especially because of the housing backlog and the number of households that are currently living in abject conditions. Banks and other financial institutions are unwilling to provide finance to low-income housing consumers because of the risk factors. The Northern Cape also encountered problems due to financial constraints, and it was noted that it is crucial for the government to realise that a reasonable housing programme capable of facilitating the realisation of the right to adequate housing involves, amongst others, the allocation of appropriate funding for implementation, as effective implementation requires adequate budgetary support by the national government. The lack of capacity at all levels of government influences the optimum and efficient utilisation of the funds. Other problems include the failure to secure suitably located land, delays in tender adjudication, municipalities failing to submit business plans, delays in approving projects, weaknesses and staff shortages at municipal level, incompetence, corruption, political intervention and nepotism, slow delivery associated with the PHP and delays at the Deeds Office, and under-performance by developers and conveyancers. Section 118 of the Local Government Municipal Systems Act of 2000 requires that all outstanding payments due to municipalities must be paid before clearance certificates are issued for property to be transferred or registered in the name of beneficiary. Furthermore, in some instances the requirements of the National Environmental Management Act have resulted in delays in the implementation of housing projects until a proper assessment is done. Other problems are out of season rainfall and lack of capacity of newly established local authorities to undertake approvals and provide other services. A further problem that was experienced in the implementation of the measures adopted to realise the right to housing is the inadequate budget allocation, South African Human Rights Commission 4th ESR Report 2000-2002 38, 53, Tomlinson ‘Managing the risk in housing delivery: Local government in South Africa’ 420.

301 The perceived uncertainty that existed within the government relating to the policy. There was an imbalance between responsibility, accountability and authority in respect of housing at provincial and local government, Department of Housing 1995 Annual Report (1995) 18. In addition, inadequate administrative, technical and managerial capacity existed at provincial and local government level, and this can be seen in the difficulty of government reports to the South African Human Rights Commission and the National Treasury 2011/12 Report, The Department of Housing Annual Report (1996) 17.

302 For example, from 2000-2004, the Gauteng and North West Departments of Housing experienced difficulties in the implementation of policies, programmes and projects due to lack of appropriate capacity at municipal level. KwaZulu-Natal also had a problem with municipalities lacking capacity to undertake housing developments. It is irrelevant whether the failure to implement occurred at a local level due to lack of capacity or for any other reason, since the formulation of a reasonable programme is the first stage in meeting the State’s obligation. Tomlinson found that out of a total of 283 local authorities, approximately 50 have a dedicated housing department. Capacity therefore ranges from well-staffed departments in the metropolitan areas to poorly capacitated secondary cities. Rural small towns often have one lone housing official, making it impossible for them to deliver on their mandate. South African Human Rights Commission 4th ESR Report 2000-2002 54-55 Tomlinson ‘Managing the risk in housing delivery: Local government in South Africa’ 420.
many people vulnerable and still waiting for government to assist them with their housing needs. Other challenges include housing projects being located in peripheral areas, and their respective residential environments lacking the elements necessary for an improved standard of living.\textsuperscript{303} This does not bode well for economic integration and the maintenance of fragile livelihoods. In this regard, it was stated that:

\begin{quote}
Housing provision has often been of poor quality, delivered on the urban edge, and in dormitory type neighbourhoods without adequate infrastructure, services, and with limited or difficult access to economic, educational and recreational opportunities and facilities.\textsuperscript{304}
\end{quote}

Therefore, there is an urgent need for government to re-strategize and intensify its housing implementation approach by tackling these challenges and devising practical and sustainable solutions. Essentially what is needed is a comprehensive review of government’s 20 year housing delivery mandate assessing government’s housing delivery milestones and recurring weaknesses. Such a review will undoubtedly provide a useful opportunity for all relevant actors to reinforce their positive aspects and address shortcomings.\textsuperscript{305} These challenges manifested themselves even after the BNG, rendering it to be policy existing on paper, since provincial and local authorities have not adopted its aspirations. The housing delivery implementation has also been severely affected by the failure of all three spheres of government to adequately understand how to evaluate housing (and land redistribution) programmes, in order to meet the needs of the poor.\textsuperscript{306} Moreover, despite the BNG policy vision of housing as an asset which provides wealth creation and empowerment opportunities, Charlton argues that the poor have great difficulty in accessing formal credit from financial institutions and being able to afford other forms of credit, resulting in many relying on personal or group savings.\textsuperscript{307}

The South African Human Rights Commission also found that most often, when government does initiate housing development projects, they are generally implemented

\begin{flushleft}
\textsuperscript{305} South African Human Rights Commission \textit{4th ESR Report 2000-2002} 52-53; Special Rapporteur on adequate housing: Mission to South Africa para 37.  \\
\textsuperscript{306} Special Rapporteur on adequate housing: Mission to South Africa para 39.  \\
\end{flushleft}
with limited or non-existent consultation with and participation by affected communities.\textsuperscript{308} As far back as the 4\textsuperscript{th} ESR Report, it was proposed that there should be a national regulatory framework to encourage public consultations, debates and round tables at all levels of government with community-based organisations and all stakeholders of the housing programmes and projects within communities, in order to ensure transparency and involvement of housing beneficiaries from the onset.\textsuperscript{309} However, such a recommendation does not seem to have been concretised, as shown seven years later by the South African Human Rights Commission 7\textsuperscript{th} ESR Report that:

> The lack of meaningful participation and citizen engagement results in frustration and mistrust and it can be argued that it is a contributing factor to the protests that have been erupting in communities over the last few years. For example, the participation of housing beneficiaries and stakeholders in determining the scope of housing provision has been inadequate and mostly instructive on the part of the state. This is indicative of a top down approach in which beneficiaries and those affected by evictions and relocation are only engaged in pseudo participation.\textsuperscript{310}

The finding of the 7\textsuperscript{th} ESR report was a clear demonstration of government’s failure to meaningfully engage concerned beneficiaries as:

> It is unclear whether state officials understand the obligation of and rationale for community consultation and participation and how to effectively engage in these processes. Where consultation does occur it is often purely procedural and not intended to genuinely engage substantive issues around development.\textsuperscript{311}

However to date the state is still deepening the marginalisation of vulnerable groups through inadequate access, coverage or services, without engaging them accordingly in meeting their housing needs. Despite such an extensive housing policy framework, more and more people remain vulnerable to intolerable living conditions. It can be

\textsuperscript{308} For example, two years before the SER report, the Special Rapporteur found, after visiting a number of housing projects in South Africa, that some new housing developments were hastily constructed, poorly planned and designed, without consulting local authorities and residents who are beneficiaries of those housing projects. Special Rapporteur on adequate housing: Mission to South Africa para 38. Tissington A review of housing policy and development in South Africa since 1994 11-12; South African Human Rights Commission 4\textsuperscript{th} ESR Report 2000-2002 55.


\textsuperscript{310} South African Human Rights Commission 7\textsuperscript{th} ESR Report 2006-2009 19 139 160.

\textsuperscript{311} Tissington A review of housing policy and development in South Africa since 1994 12.
argued that the state cannot deliver housing at the scale required at a sustainable rate or within the means of lower-income households.\textsuperscript{312}

These housing implementation challenges\textsuperscript{313} continue alongside the massive spending on housing delivery, as well as within the context of an increasing housing backlog, which has grown significantly since 1994, and continues to increase due in part to rapid urbanisation, migration to cities and towns, lack of opportunities in rural areas, unemployment, and more households falling into the subsidy income band\textsuperscript{314} and less having access to housing finance. It is obvious that the availability of resource allocation for housing development is not leading to the quicker approval of subsidies for poor and low-income households or the delivery of adequate housing units. Therefore, the legacy of apartheid and how the new government has implemented its housing policies made the realisation of this right in South Africa not only urgent, but also complex.\textsuperscript{315} The eradication of this legacy cannot be treated as an event, but rather as a process\textsuperscript{316} in which there should be commitment from the government to gradually fulfil its housing delivery mandate through the eradication of housing backlog. The 20 year review of the housing budget for the 2013/14 financial year found it to be R28.1 billion, representing


\textsuperscript{313} Implementation challenges seems to be far from over considering the response often received from government in responding to housing delivery matters. For example Minister of Human Settlements Ms Sisulu stated during her speech at the 6\textsuperscript{th} Planning Africa Conference that ‘Anybody below the age of 40 will need to understand that they are not our priority unless they are special needs or are heads of child-headed households,’ News24 \textit{Sisulu Housing announcement insult to poor-EFF} available at <http://www.news24.com/SouthAfrica/News/Sisulu-housing-announcement-insult-to-poor-EFF-20141024> (date accessed 2015-05-05). Such statements defeat the objectives of the 1996 of establishing a democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. Unfortunately the South African housing policy does not put an age on those eligible for housing and the Constitution prohibits discrimination based on age and until such time as an amendment is made on discrimination based on age on both the 1996 Constitution and the National Housing Code the status quo shall remain.

\textsuperscript{314} Ballard, Habib, Valodia and Zue 'Globalization, marginalization and contemporary social movements in South Africa' 618 625.


\textsuperscript{316} The South African Housing Policy: Operationalizing the right to adequate housing- Thematic Committee: 6 - 8 June 2001 2.
an increase of R2.9 billion and with the budget allocation being expected to grow to R32.7 billion during the 2015/16 period. It was stated that:

Even if government combined housing and infrastructure subsidies, and provided land for free, there would still be a budgetary shortfall. The Financial and Fiscal Commission was of the view that annual housing unit targets were unrealistic, given the consistent shortfalls in meeting those targets. The demand for housing in South Africa remained high, and was estimated at 2.1 million housing units. Financial and Fiscal Commission noted that there was a need to look at other housing delivery options and their fiscal implications.\(^{317}\)

Clearly the sustainability of South Africa’s current housing model leaves a lot to be desired and is questionable, considering its tendency to burden state resources beyond their means. This Financial and Fiscal Commission finding should be considered a warning and a wake-up call for government to urgently conduct a thorough housing implementation review process and consider the Financial and Fiscal Commission’s alternative approach towards improving the poor’s standard of living. In other words it is time for government to reflect on the sustainability of its housing delivery mandate, particularly in terms of how it has addressed or failed to address some of the recurring systemic housing implementation challenges, as well as the increasing housing demand not being reduced by its delivery capacity. It should also determine if it is likely to achieve the objectives of the National Development Plan and the department’s sustainable and integrated human settlements objective: Vision 2030.\(^{318}\)

Moreover, government is to be blamed for the notion of entitlements, whereby it created the inactive citizenry dependency syndrome,\(^{319}\) which resulted in citizens no longer seeking or taking the initiative to find solutions to their problems and to look for possible partnerships to improve their neighbourhood or livelihoods.\(^{320}\) Besides all these implementation hiccups, the South African government, though optimistic about its


\(^{318}\) National Development Plan 233-234.

\(^{319}\) National Development Plan 242-244. It was found that National Development Programmes should not be limited to the three spheres of government, but broadened to include all stakeholders in society. This requires full participation of these segments in the formulation and implementation of the socio-economic development strategies and programmes at all levels. The African Peer Review Mechanism: South Africa country review report (04 Feb 2013) 235-236.

\(^{320}\) National Development Plan 242-243.
target, has clearly failed to phase out slums and informal settlements by 2014.\textsuperscript{321} It can rightly be argued that although the country has put in place the mentioned housing policies and legislation giving effect to section 26 constitutional obligations, there is little to celebrate 21 years later considering there are more people living in deplorable living conditions than they were during the apartheid era. Moreover the country is still experiencing similar implementation challenges that were identified as far as 1996 as stated in paragraph 5.4.3 above.

\textbf{5.4.4 Summary}

It is evident that there is recurring and inconsistent housing policy and programme implementation in South Africa particularly at provincial and local level resulting in government as a whole being unable to appropriately measure its implementation progress positively.\textsuperscript{322} The status quo reflects national government’s inability to understand and administer housing policy implementation coherently, without housing delivery chaos affecting the marginalised. For example, the South African Human Rights Commission reported in its 4\textsuperscript{th} ESR Report that in relation to the Programme for Emergency Housing, only a few municipalities were able to provide adequate and satisfactory reports in as far as housing provision is concerned, let alone understanding their mandate in this regard.\textsuperscript{323} Consequently, 21 years later and seven years since the publication of the Special Rapporteur’s report on South Africa the government is still grappling with the implementation of its various housing policies.\textsuperscript{324} The proliferation in housing demand proves government’s inability to fully appreciate and properly implement its relevant housing policies in reducing the housing backlog thereby improving the poor peoples’ standard of living. As a result, the systemic implementation


\textsuperscript{322} Mackay ‘Policy review housing policy in South Africa: The challenge of delivery’ 397.

\textsuperscript{323} South African Human Rights Commission 4\textsuperscript{th} ESR Report 2000-2002 51.

\textsuperscript{324} For example, six years before the Special Rapporteur visit to SA in 2007, the Department of Human Settlements found amongst its challenges the need to adequately tackle government’s under-spending patterns, the legal issues resulting in delays in project implementation; capacity constraints of municipalities; improving inter-governmental co-operation between all spheres of government; and improving co-ordination between national government departments, South African Human Rights Commission 4\textsuperscript{th} ESR Report 2000-2002 39.
challenges facing government seem to denote government’s failure with regard to the practical fulfilment of the right of access to adequate housing. It is clear that the continued lack of adequate housing and basic services (water, sanitation, electricity, etc.), growing unemployment and a largely unresponsive state, particularly at the local level, have resulted in an increasing number of so-called ‘service delivery protests’ in townships and informal settlements across South Africa. It is rightfully so that the review of housing policies will continue to be lobbied for even in years to come. The South African judiciary is seen to have significantly contributed to the SERs’ enforcement directly in an endeavour to give the practical meaning of the justiciable right as entrenched in the 1996 Constitution.

5.5 The role of the judiciary in reviewing government’s housing delivery implementation strategy

5.5.1 Introduction

The importance of the judiciary in exercising checks and balances on organs of state is essential in ensuring that those who are marginalised, without a voice, are able to enjoy and contest their fundamental rights as contained in the 1996 Constitution. Therefore, since the adoption of the 1996 Constitution, the South African judiciary has and is still facing daunting challenges in making most of the SERs a reality for millions of citizens. The right of access to adequate housing is one of many such rights being dealt with by various courts, and some are on the court’s doorstep. It is therefore vital that this section looks back in analysing the oversight that the judiciary has over the executive in reviewing the implemented housing delivery strategies, and at the same determining if there is any progress being made by the latter, in enforcing the victims’ rights to adequate housing.

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326 Tissington A review of housing policy and development in South Africa since 1994 11.
327 See chapter 4 dealing with India above.
5.5.2 Critical role of the South African judiciary in enforcing the right of access to adequate housing

The South African judiciary can be said to be robust in pronouncing on the enjoyment, protection and enforcement of rights, particularly SERs,\(^\text{328}\) without any difficulty.\(^\text{329}\) The right of access to adequate housing is one of the most highly contested rights in the jurisprudence of South Africa’s SERs and the jurisprudence of the Constitutional Court speaks for itself in this regard. The cases have dealt essentially with negative infringements of the right of access to adequate housing or with evictions.\(^\text{330}\) This is based on the fact that the power of the courts to exert judicial review over SERs was spelt out earlier by the courts,\(^\text{331}\) departing from a brutal government regime. In South Africa the adjudication of SERs may result in orders having direct budgetary implications. In this regard, the Constitutional Court unanimously held that:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.\(^\text{332}\)

The fact that SERs will almost inevitably give rise to such implications does not seem to be a barrier to their justiciability,\(^\text{333}\) consequently empowering our courts to independently assess SERs' violations and even impose remedies aimed at ensuring their full realisation.\(^\text{334}\) From this judgment the Constitutional Court’s stance and willingness to make budgetary implication remedies cannot be avoided in South Africa especially if warranted to do so.


\(^{329}\) Chapter 8, and section 165(2) of the 1996 Constitution; Certification paras 20 78.

\(^{330}\) Tissington A review of housing policy and development in South Africa since 1994 12.


\(^{332}\) Certification para 77.

\(^{333}\) Certification para 78.

\(^{334}\) Gutto ‘Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa’ 86.
In South Africa, judicial review is based mainly on the complexity of segregated races and deep-rooted inequalities that the apartheid created and then left in the hands of the new government to redress, mainly through socio-economic provision to the dispossessed and misplaced majority. Therefore, the Constitutional Court, as a catalyst of change, is constantly approached to adjudicate on these much-contested SERs and endeavour to translate them into enforceable legal claims. In that regard Liebenberg objectifies adjudication virtues as mainly the ability to:

...develop interpretations of rights that are attuned and responsive to the lived experiences of those affected by a particular social and economic problem.

Gloppen’s view is that courts play a significant role in societal change, both directly and indirectly:

Directly by

(a) Providing a space where the concerns of marginalised groups can be raised as legal claims and providing legal redress in ways that have implications for law, policy and administrative action; and

(b) Protecting existing pro-poor institutional arrangements and reinforcing pro-poor state policies.

Indirectly by

(a) Enabling marginalised groups to effectively fight for social transformation in other arenas through securing their rights of political participation and to information; and

(b) Passively serving as a platform where claims can be articulated. For example, as a central point for mobilisation and publicity that may result in important political effects even in the absence of the judgement.

As a result, it can rightly be said that South African courts are extremely vocal in enforcing SERs, particularly the right of access to adequate housing. Thus far about 17

336 Christmas A ‘Modderklip-evictions and the right of access to adequate housing’ ESR Review (2003) vol 4(3) 4-7 5.
337 Chenwi ‘Socio-economic gains and losses: The South African Constitutional Court and social change’ 431.
cases have been reported.\textsuperscript{341} This means the marginalised seem to have found hope, confidence and trust in the justice system more than on their government as a whole, as the enforcer of their SERs. The Constitutional Court’s SERs’ adjudication process seems to have placed it on the global map and is also used as inspiration. At the same time, the Constitutional Court has been criticised for gradually backtracking on its pro-poor approach in interpreting the implementation and negative impact of government’s socio-economic programmes, with the concomitant budgetary and programmatic implications of such a judgment.\textsuperscript{342} In this regard, the Constitutional Court cautioned, in \textit{TAC}, that while it is empowered to make budgetary implication remedies, it is not able to rearrange state budgets:

\begin{quote}
Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.\textsuperscript{343}
\end{quote}

In \textit{Mazibuko} the Constitutional Court further clarified its role by stating that:

\begin{quote}
Ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability
\end{quote}

\textsuperscript{341} Grootboom, Modderklip, Port Elizabeth Municipality v Various Occupiers, City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (1) SA 78 (SCA); Minister of Public Works and others v Kyalami Ridge Environmental Association and Another 2001 (7) BCLR 652 (CC); Blue Moonlight Properties, Abahlali base Mjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC), City of Cape Town v Ruddolph and Others 2003 (11) BCLR 1236 (C), Jattha v Schoeman and Others Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC); Olivia Road case, Joe Slovo case, Mazibuko & Others v City of Johannesburg & Others 2010 (3) BCLR 239 (CC) (hereafter Mazibuko); Minister of Health and Another NO v New Clicks South Africa and Others 2006 (8) BCLR 872 (CC); Khosa v Minister of Social Development 2004 6 SA 505 (CC); Fischer v Persons Unknown 2014 (3) SA 291 WCC, Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 (2014) (1) AllSA 386 (SCA), Motswagae v Rustenburg Local Municipality 2013 (2) SA 613 (hereafter Motswagae).

\textsuperscript{342} Tissington \textit{A review of housing policy and development in South Africa since 1994} 12.

\textsuperscript{343} TAC para 38.
that they should do so for it is their programmes and promises that are subjected to democratic popular choice.\textsuperscript{344}

While the poor have mostly relied on the judiciary to positively pronounce on their SERs’ claims, they need to be sensitised that the realisation and enjoyment of their SERs cannot be entirely left to the courts to craft and implement. However, they cannot be blamed for turning to courts in the hope of getting positive answers where government has kept them waiting for ages with no sign of delivering on their constitutional promises. Therefore, their reliance on the courts to achieve the progressive realisation of this right is a demonstration of government’s policy implementation failure. Most often, cases brought before court have been as a result of the illegal occupation of both public and private land, where the owner sought an eviction order. This trend is due to the demand for access to adequate housing for the poor, as a result of the inequitable access to land,\textsuperscript{345} which was previously determined by race.\textsuperscript{346}

Even though South Africa has made significant strides in its housing implementation policies,\textsuperscript{347} government’s problem has shifted from creating an enabling policy environment to the practical implementation of those policies.\textsuperscript{348} It is in view of the implementation challenges that our courts found it prudent to exercise their judicial oversight, as found in the landmark housing case of \textit{Grootboom}, where Yacoob J held that:

\textit{I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.}\textsuperscript{349}

\textsuperscript{344} Mazibuko para 60.
\textsuperscript{345} Huchzermeyer M ‘Housing rights in South Africa: Invasions, evictions, the media and the courts in the cases of Grootboom, Alexandra and Bredell’ \textit{Urban Forum} (2003) vol 14(1) 80-107 83.
\textsuperscript{346} Huchzermeyer ‘Housing rights in South Africa: Invasions, evictions, the media and the courts in the cases of Grootboom, Alexandra and Bredell’ 81.
\textsuperscript{347} See the White Paper on Housing: Social Housing Policy.
\textsuperscript{348} Mmusinyane ‘South Africa’s poverty alleviation strategy through housing: Chasing the 2015 Millennium Development Goals’ pragmatic?’ 46-47.
\textsuperscript{349} Grootboom para 94.
As a result, government has been taken to court mainly over the implementation hiccups of its housing policies. It is the *Grootboom* judgement that sparked huge debate in South Africa and abroad with regard to how government complies with SERs’ court orders. Questions need to be asked about the role of the judiciary in reviewing government housing policy, resource allocation and implementation of housing policies, and the extent to which the courts play a role. In such cases the history of the poor, evictions, the marginalised and their current living conditions, as well as their need, in instances of looming evictions, for alternative accommodation, could indeed be essential to the court adjudicating over allegations of infringements of their right to adequate housing and shelter. In dealing with ‘right of access to adequate housing’ cases the Constitutional Court cannot avoid reflecting on the history of apartheid, as it played a major role in the poor’s living conditions. The importance of section 26 and housing history in South Africa was captured in *Jaftha*, that:

Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.

It is difficult for the South African judiciary not to reflect on the housing problems in their social, economic and historical context, and to consider the capacity of institutions

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350 *Port Elizabeth Municipality v Various Occupiers* paras 8-13.
351 Historical emphasis and the need for alternative accommodation play an essential role in any matter dealing with an impending eviction and/or execution of a person’s home. See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* paras 34 and 39, which challenged the constitutionality of the Magistrates’ Court Act 32 of 1944, which permitted the sale in execution of people’s homes in order to satisfy debts. The effect of the sale in execution would be the eviction of people from their homes, without the provision of suitable alternative accommodation. The Constitutional court found this to be an unjustifiable limitation of the Constitutional right to have access to adequate housing. Considering, inter alia, the issue of security of tenure in the light of the historical context, the court’s remedy was to ‘read-in’ words into the Act to ensure that people’s homes can only be sold if a court has ordered so after considering all the relevant circumstances. The judgment in *Port Elizabeth Municipality v Various Occupiers* also referred to the history of homelessness and how it was intrinsically linked to the apartheid policy of urban planning, as emphasised in the *Grootboom, Port Elizabeth Municipality v Various Occupiers* para 36.

352 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* para.29.
responsible for implementing the programmes.\textsuperscript{354} Thus, the Constitutional Court acknowledges the fact that millions of South Africans face a shortage of houses due in part to the apartheid policy of influx control, which sought to limit black peoples’ occupation of urban areas.\textsuperscript{355} Although government is within its own right to give account of its housing delivery success, the statistical analysis conducted in South Africa of its housing delivery, as mentioned above, is out of touch with the reality of the living conditions of millions of citizens. Consequently the Constitutional Court held that such a statistical approach was not satisfactory.\textsuperscript{356} It is evident that government has serious implementation challenges in relation to its housing policies and programmes. Despite this, it still continues to evict people or put people in desperate situations,\textsuperscript{357} and take its time to comply with court orders when found to be in the wrong.

\textbf{5.5.3 Government’s compliance with judicial rulings}

Despite the Constitutional Court having revolutionised the enforceability of SERs and bringing hope to the poor, little can be said about compliance with these rulings on the part of government. The failure by government to comply with such rulings means that they cannot be effectively constrained and this is seen to compromise the contributions

\textsuperscript{354} Grootboom para 42.
\textsuperscript{355} Grootboom para 6.
\textsuperscript{356} The CC held that because the Constitution requires everyone to be treated with equal care and concern, measures, though statistically successful, could be unreasonable and not pass a Constitution al muster if they fail to respond to the needs of the most desperate and vulnerable individuals or groups in society. \textit{Grootboom} paras 43-44. South African Human Rights Commission \textit{3rd ESR Report 1999-2000} 271.
\textsuperscript{357} Such an example is \textit{City of Cape Town v Rudolph and Others}, which deals with the eviction of residents of Valhalla Park, some of whom had been placed on the City of Cape Town’s housing waiting list as far back as ten years ago. They were subsequently forced, due to their over-crowded, intolerable living conditions, to move onto vacant land that was owned by the City, which immediately applied to the High Court for an order of eviction against them. It was also the residents’ counter argument that the City’s housing policies and programmes failed to fulfil its Constitution al and statutory obligations to give effect to their right of access to adequate housing, as guaranteed in section 26. Therefore the City failed to give effect to the \textit{Grootboom} judgment by making short-term provision for people in Valhalla Park who were in a desperate situation. It came as no surprise when the High Court dismissed the City’s application, as the Court found that the City had failed to provide any short-term housing programmes that could meet the housing needs of the Valhalla Park residents, and this constituted an ‘unacceptable disregard for the Constitution al court and therefore for the Constitution itself, \textit{City of Cape Town v Rudolph and Others} para 49B, para 1250I and 1251A-F 1275C-D 1280H-J and 1281A.
that courts are making to politics and policy making. At the same time, government’s failure to comply with these court orders further reduces the dignity of the poor. In *Port Elizabeth Municipality v Various Occupiers*, Sachs J held that:

> It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies, rather than mitigates, their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments, rather than reduces, denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual.

The political will to comply with judicial rulings constitutes, among others, a key aspect of the rule of law. Compliance is often considered to be vital to democracy and the democratic process. It is only compliance with judicial rulings that can have a powerful impact on judicial decision making, judicial independence and judicial power. Despite the Constitutional Court having made some landmark SERs’ rulings that are likely to improve poor peoples’ socio-economic circumstances, government is dragging its feet in complying with most of these orders. The poor continue to live in poverty and socio-economic deprivation while government attempts to devise the appropriate implementation strategy for giving effect to SERs. Despite the fact that South Africa is being praised worldwide for having incorporated SERs into its 1996 Constitution, 21 years later there is still deep-rooted socio-economic deprivation and government is experiencing difficulty in complying with the socio-economic judicial rulings. This cancels out all the praises and reinforces the argument that SERs are difficult to enforce. Only after the court pronounced on the Grootboom community’s right of access to adequate housing violations, stating that its national housing programme lacked an express provision for ‘temporary relief’ to those without shelter, the government, at its

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359 *Port Elizabeth Municipality v Various Occupiers* para 18.
360 Kapiszewski and Taylor ‘Compliance: Conceptualizing, measuring, and explaining adherence to judicial rulings’ 803 806-807.
361 Chenwi ‘Socio-economic gains and losses: The South African Constitutional Court and social change’ 440.
363 Chenwi ‘Socio-economic gains and losses: The South African Constitutional Court and social change’ 440.
own pace, began to implement the order through the provision of accommodation that it had originally offered to the Grootboom community. Three years later, government amended its national housing programme in accordance with the court order to include short-term emergency relief available for people in urgent need (the Emergency Housing Programme). However, according to Wickeri and Mbazira, by 2004 (four years later), it seemed that little had changed for the Grootboom community in particular, or for the broader availability of emergency housing in South Africa.\(^{364}\) Although it is understood that SERs require a progressive realisation and must be within the country’s available resources, the time taken by South Africa to amend its national housing programme to incorporate an ‘emergency housing programme’ cannot be said to have complied with the requirements of progressive realisation and within the country’s available resources which were used as a defence for not achieving the housing mandate. Resources were already provided and what was needed was merely for government to adjust and implement its programme, in order to accommodate those in desperate need of housing. According to Mbazira:

> The failure to implement court orders effectively could, therefore, be described as the ‘weakest link’ in realising socio-economic rights. Successful litigants have remained hopeless and the judiciary helpless in the face of non-compliance with court orders, which has undermined the legitimacy of the courts.\(^{365}\)

Therefore, the time taken by South Africa to review its housing policy undoubtedly complicates the measurement of compliance, since the more time passes between a judicial ruling and public authorities’ response, the more intervening events may affect public authorities’ decision to carry out the activities specified in the ruling. Ms Grootboom died\(^{366}\) without having obtained a house from government, despite her name appearing in the recorded history of shelter/housing rights in South Africa. If, for example, government had suddenly and fully implemented its housing policy in 2010,

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\(^{364}\) Mbazira C *You are the ‘weakest link’ in realising socio-economic rights: goodbye: strategies for effective implementation of court orders in South Africa* (2008) 1-54 21.

\(^{365}\) Mbazira You are the ‘weakest link’ in realising socio-economic rights: goodbye: strategies for effective implementation of court orders in South Africa 2.

\(^{366}\) She passed away in 2008, which was eight years after winning the case against government and was still homeless and penniless as government never complied with the Constitutional Court order. De Vos P ‘Irene Grootboom died, homeless, forgotten, no C-Class Mercedes in sight’ August 11 2008, available at <http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/> (date accessed 2015-04-18).
without an explicit reference to the Court, one would hesitate to interpret this as compliance with the 2000 ruling.\textsuperscript{367} This can be seen as a failure on the part of government when ‘the ability of litigation to effect real social change depends in large part on the government’s willingness to respect and implement the court’s judgments.’\textsuperscript{368} At the same time, it can be argued that governments cannot be blamed, particularly when court orders are seen to be inadequate, inappropriate or not comprehensive enough to remedy the violation of these rights.

The reasons why the \textit{Grootboom} judgment was never implemented was the weak nature of the declaratory order issued by the Constitutional Court,\textsuperscript{369} as well as the failure by the court to provide normative clarity\textsuperscript{370} on the content of the different SERs.\textsuperscript{371} On the other hand \textit{Olivia Road} has been viewed as one of the cases which demonstrate that the state can be compliant after all, due to the comparatively short period of time within which the judgement was enforced.\textsuperscript{372} By striking down section 3 of the State Liability Act, the decision in \textit{Nyathi v MEC Department of Health Gauteng}\textsuperscript{373} has brought the hope of securing compliance by the state with court orders.\textsuperscript{374} Therefore, it can rightly be said that no court order is difficult to implement - it takes

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367 Kapiszewski and Taylor ‘Compliance: Conceptualizing, measuring, and explaining adherence to judicial rulings’ 816.
368 Marcus G and Budlender S \textit{A Strategic evaluation of public interest litigation in South Africa}, (2008) 139.
370 Although it was seen to have been provided in Mazibuko before the High Court and the Supreme Court of Appeal rulings, Stewart is of the view that the courts went too far in their effort to provide normative clarity on this specific right by prescribing a specific quantified amount of water per person per day, instead of using a broader universal standard based on the values in the Constitution. Stewart L ‘Adjudicating socio-economic rights under a transformative Constitution’ \textit{Pennsylvania State International Law Review} (2009-2010) vol 28 487-510 497-503.
372 Mbazira \textit{You are the weakest link in realising socio-economic rights: goodbye—strategies for effective implementation of court orders in South Africa}’ 20.
373 In this regard, the CC held that deliberate non-compliance with court orders by the state detracts from the dignity, accessibility and effectiveness of the courts. The magnitude of this problem has forced the courts to conclude that some state officials have become a law unto themselves, and openly violate people’s rights, while believing that they cannot be held responsible for their actions, 2008 (9) BCLR 865 (CC) (hereafter \textit{Nyathi}).
374 20 of 1957.
political will to fully ensure compliance with it. On a positive note, given the democracy and rule of law that is evident in South Africa, it cannot be deduced that court decisions would be rejected and not complied with. In other words, the government will be seen to comply with, yet take time to fully comply with court orders.\textsuperscript{375} Perhaps, alternative remedies are essential to determining whether or not positive compliance will occur.

\textbf{5.5.4 Shifting adjudication approach: Meaningful engagement remedies}

Possibly due to slow or lack of full compliance with its court orders, and the need to embrace the participatory modes of rights enforcement,\textsuperscript{376} the Constitutional Court saw fit to come up with alternative remedies in order to ensure that government begins to engage those whose lives are most likely to be affected by its decisions.\textsuperscript{377} This involves engaging fully with those who are marginalised and vulnerable to evictions or the demolition of their rudimentary structures.\textsuperscript{378} Subsequent to the \textit{Grootboom} decision and perhaps due to a number of challenges with its orders, the Constitutional Court invoked an alternative remedy.\textsuperscript{379} Therefore, meaningful engagement as a remedy is applied instances where there is an impeding need to evict illegal occupants who are likely to be rendered homeless and government’s obligation to provide them with suitable alternative accommodation.

To Pillay meaningful engagement can be seen as an effective tool in adjudicating SERs as facilitated by courts to provide immediate relief and prompt substantive changes to

\textsuperscript{375} Mbazira, C \textit{Enforcing the economic, social and cultural rights in the South African Constitution as justiciable individual rights: The role of judicial remedies.} PhD Thesis, University of the Western Cape (2007) (Published).

\textsuperscript{376} Liebenberg ‘Participatory approaches to socio-economic rights adjudication: Tentative lessons from South African evictions law’ 327-329.


\textsuperscript{378} \textit{Grootboom}; Port Elizabeth Municipality v Various Occupiers; Modderklip; Olivia Road; Joe Slovo para 117. Abahlali base Mjondolo; Pheko and Others v Ekurhuleni Metropolitan Municipality (hereafter Pheko case) 2012 (2) SA 598 (CC; Blue Moonlight Properties; and Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another [2012] ZACC 9, Schubart Park para 49.

government policy over time. In *Schubart Park*, the Constitutional Court endorsed the meeting of the parties’ minds, in order to accommodate different rights and interests, and to show that the exercise of these often competing rights and interests can best be resolved by engagement between the parties. The Constitutional Court held that the fact that the City was left with the authority to determine when, for how long and ultimately whether the applicants might return to Schubart Park constituted a countenance that the City has the ultimate authority to evict and unilaterally address their housing needs. It thus found the High Court order to be an inadequate basis for a proper order of engagement between the parties. Therefore, the residents were entitled to occupation of their homes as soon as was reasonably possible, and the City was required to meaningfully engage them in ensuring that their re-occupation was achieved.

In *Joe Slovo*, however, the Constitutional Court required the respondent to engage with the affected communities, but also held that although relocation would entail immense hardship, there are instances whereby the Constitutional Court and those involved would have no choice but to face the fact that hardship can only be mitigated, but never avoided. It may well be necessary to undergo traumatic experiences in order to live a better life later. In this regard, the human price to be paid for this relocation and reconstruction is immeasurable. It is interesting to note that although the Constitutional Court was heavily criticised, this case highlighted the need to determine if government’s engagement with the people would perhaps be a better implementation...

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380 Pillay ‘Towards effective social and economic rights adjudication: The role of meaningful engagement’ 753-754.
381 *Schubart Park* paras 44 46.
382 See for example *Blue Moonlight Properties* paras 34-41 and *Grootboom* para 23.
383 *Schubart Park* para 50.
384 *Schubart Park* para 50.
385 *Schubart Park* para 53 (4-5).
386 Dealt with the relocation of about 4 386 households from a large information settlement known as Joe Slovo settlement area in terms of the Western Cape High Court order. The area was earmarked for development of low cost housing in accordance with the BNG Policy, *Joe Slovo* 25, 26, 27-28.
387 *Joe Slovo* 493A-C.
388 *Joe Slovo* 493A-C.
strategy, yielding positive compliance with its section 26(2) mandate. Although the eviction of the residents was achieved, it offered alternative accommodation and did not leave them out in the cold. Therefore, in terms of the *Joe Slovo* judgment, it is evident that the state is required by section 26 to make alternative accommodation available in instances where it intends to evict people. Furthermore, the Constitutional Court reiterated the need for the state to be humane in its approach and talk to the people before the evictions, in order to hear their concerns and resolve them before the actual eviction itself. This is likely to ensure that people realise that government cares for their needs and is doing what it can to improve their poor living conditions.

*Olivia Road* concerned the city’s High Court application to evict over 400 people occupying two buildings as part of the city’s Inner City Regeneration Strategy, since they were seen as dangerous and unhygienic, and therefore unfit for human habitation. The city argued that the eviction order would promote public health and safety, and also reverse the inner-city decay, in line with its said Regeneration Strategy. The application was dismissed by the High Court, and the city was directed to provide

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389 Pillay ‘Towards effective social and economic rights adjudication: The role of meaningful engagement’ 744-745.
390 The CC ordered the respondents to ensure that 70% of the new homes to be built at Joe Slovo were allocated to current Joe Slovo residents or former residents who had moved to Delft previously, in order to make way for the N2 Gateway Project. The remaining 30 per cent were to be allocated to people living in backyard shacks in the neighbouring township of Langa, *Joe Slovo* paras 5, 7, 187, 248 and 307. Furthermore, ‘What must be emphasised is that the government has a wider range of needs to meet. As we held in Grootboom, ‘housing must be made more accessible not only to a larger number of people but to a wider range of people’. There are those who can afford to buy houses and there are those who cannot. Income determines what form of housing people can afford. In developing a policy to provide access to adequate housing, the government must endeavour to address all these needs. And the primary obligation to achieve the progressive realisation of the right of access to adequate housing rests on government. It must determine how and when this should be done. This, however, is subject to the requirement of the progressive realisation of the right – it must progressively facilitate accessibility. How and when the obligation must be fulfilled depends on the availability of resources, in particular, the availability of land’ *Joe Slovo* para 250.
391 *Joe Slovo* para 492J.
392 Whereas in *Motswagae*, the CC found that the eviction of people, despite having been offered an alternative, would not be granted in the absence of a court order.
393 *Joe Slovo* para 494E-H.
394 in terms of section 12(4)(b) of the National Building Regulations and Building Standards Act and the Health Act 63 of 1977, where the court found that it is only a crime for people to remain in a building after a court has provided an eviction notice, and not after receiving an eviction notice from the City of Johannesburg. Thus, the part of the National Building Regulations and Building Standards Act that makes it a crime is deemed unconstitutional.
suitable alternative accommodation. This was overturned by the Supreme Court of Appeal, which directed the city to evict the occupants with limited accommodation. The Constitutional Court took a divergent approach in adjudicating this case, as it directed the parties to meaningfully engage with one another in finding a workable solution for both parties under the circumstances. In this regard, Yacoob held that:

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.

The responsibility for engaging those likely to be made vulnerable as a result of their eviction lies with the municipality, as per section 26(2) of the 1996 Constitution, requiring every step taken in providing housing to be reasonable. It is clear that government authorities at times seem to avoid compliance with section 26(3) and applicable legislation in evicting people from unsafe and/or inhabitable land or buildings. Instead, they rely on the intended performance of their section 26(1) and (2) obligations as short-cuts to achieving eviction. The provision of suitable alternative accommodation is mandatory for those who have been evicted if the alternative accommodation that was initially offered was found to be unsuitable possibly due to it being on the periphery of the city, as found in Olivia Road.

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395 Olivia Road para 2.
396 Olivia Road paras 7-8 23.
397 Olivia Road paras 5 11-23.
398 Olivia Road para 16.
399 Olivia Road paras 16-18.
400 NBRBS Act and The PIE Act.
401 Schubart Park paras 20 38; Pheko paras 8-11 13-15 21-22 38 40 43.
402 Motswagae paras 8 12 14-15 16 18.
403 For example in Fischer v Persons Unknown, the City of Cape Town contended that the Prevention of Illegal Eviction Act (PIE) does not apply as it did not destroy people’s homes. On the contrary it was found that: ‘…the fundamental principle of PIE is to afford a right due process to the most marginalised members of society before being evicted from another’s land, it does not serve the purpose of the legislation to measure with ‘intellect callipers’, as it were, how long the occupier has been on the land, or where there are factors indicating a possibility that the act of occupation has not been completed or that the person may perhaps have given up occupation, before affording the right to judicial oversight of the eviction process. If the structure is complete, the invasion of the piece of land in question has taken place, occupation has occurred, and the provisions of PIE are applicable’ paras 24 67 72-73 82 99.
What is also prevalent in government’s attempts to comply with its section 26 obligations is the promulgation of laws intending to legalise evictions, demolition of structures and relocations of those living without secure tenure, without first engaging with the affected communities. For example, the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act and its constitutional validity were challenged in Abahlali base Mjondolo. The aim of the legislation is to eliminate slums, prevent the re-emergence of slums, upgrade and control existing slums and improve the living conditions of communities. However, despite it being a noble piece of legislation that might well be adopted by other provinces, its section 16 was problematic. It made it obligatory for eviction proceedings to be instituted against unlawful occupiers, subject to the MEC issuing a notice to that effect, without discretion being afforded to the municipality or owner to determine if the eviction would be in compliance with the PIE Act, and with such eviction not being seen as a last resort and not engaging those to be evicted beforehand. Therefore, section 16 was found to be unconstitutional, as it contravenes section 26(2) and housing legislation. This case made it clear that while provinces may have the competence to enact provincial legislation aimed at eradicating slums and improving the poor’s standard of living, the purpose of such should be to adopt a pro-poor approach, whereby organs of state are mindful of the poor’s standard of living and direct efforts towards the improvement of the lives of those who live in slums and informal settlements, rather than focusing on the ‘eradication’ of slums.

It is apparent that the state is still failing to adopt a consultative approach towards those likely to be affected by evictions, before rushing to courts for possible eviction orders. While the state is experiencing a housing demand by those on the waiting list and for longer periods, there are those who have not yet lodged their application for low-cost

406 Abahlali base Mjondolo paras 114-122.
408 Abahlali base Mjondolo para 1.
409 Abahlali base Mjondolo paras 109-116 122.
410 Abahlali base Mjondolo paras 127-128.
411 Abahlali base Mjondolo paras 110 111.
412 Port Elizabeth Municipality v Various Occupiers paras 54 55.
413 For example Ekurhuleni Metropolitan Municipality & Another v Various Occupiers, Eden Park Extension 5 2014 (3) SA 23 (SCA) dealt with an appeal (which was dismissed), relating to the eviction of various occupiers (the Respondents) from a housing development known as Eden Park Extension.
housing, but these people are forced to be considered in terms of *Port Elizabeth Municipality v Various Occupiers*.\(^{414}\) The municipality argued that even though it had a constitutional obligation to provide adequate housing, which it was doing, and offered alternative land to illegal occupiers of private land, it would effectively be ‘queue-jumping’ if it asked the illegal occupiers to vacate it, and they subsequently demanded to be provided with alternative accommodation. This would lead to chaotic disruptions of its planned housing programme and afford illegal occupiers preferential treatment.\(^{415}\) The Supreme Court of Appeal held a contrary view to the high court\(^{416}\) that:

The occupiers were not seeking preferential treatment in the sense that they were asking for housing to be made available to them in preference to people in the housing queue. They were merely requesting land to be identified where they could put up their shacks and where they would have some sense of security of tenure.\(^{417}\)

It is on this premise that the Constitutional Court reiterated the intrinsic connectedness of the right of access to land and housing without arbitrary eviction, as recognised by the 1996 Constitution and being based on the right to land, which affords a person a greater chance of obtaining a secure home.\(^{418}\) The Constitutional Court found that the

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\(^{414}\) In regard to the waiting list challenge it was found that the integrity of the waiting list and the allocation process had been compromised, accordingly, so the high court stated ‘the possibility, indeed the probability [existed], that there had been arbitrariness to the process which renders it unacceptable’; further that the directive acknowledged that ‘various problems [had] plagued] the Waiting List at a provincial and municipal level’ and that the allocation of housing subsidies to beneficiaries ‘[had] not been totally aligned to the Waiting List and as a consequence a significant number of beneficiaries [who had] applied in 1996 and 1997 [had] not yet received any subsidy assistance’. The main issue was that the municipality withdrew the waiting list and suspended the allocation process ‘due to the problems it was experiencing with the waiting list’ paras 4 10 16-17.

\(^{415}\) The occupiers had been living on the land for periods ranging from two to eight years, and the majority seem to have settled on the disputed land after being evicted from previously occupied land. However, they did not seem to be disputing their eviction, save for being provided with suitable alternative land to which they could relocate. Even though the municipality offered alternative land, the occupiers had rejected their proposal to move to the identified land on the basis of the area being known to be crime-ridden, unsavoury and overcrowded, while the other was rejected due to its urban periphery and therefore lack of security of tenure, thus making them susceptible to further eviction. They seem to have occupied a property already zoned for residential purposes and the erection of their dwellings was not done in accordance with the required municipal consent. *Port Elizabeth Municipality v Various Occupiers* paras 1-2 54.

\(^{416}\) The High Court confirmed the illegal occupation of land and that it was in the public interest that they should be evicted, vacate the land, and that the Sherriff should be ordered to demolish any structure found on the said land, and even ordered the occupants to pay the costs of the proceedings, *Port Elizabeth Municipality v Various Occupiers* para 4.

\(^{417}\) *Port Elizabeth Municipality v Various Occupiers* para 5.

\(^{418}\) *Port Elizabeth Municipality v Various Occupiers* para 19 20.
availability of alternative accommodation caused the municipality to face the challenge of finding something suitable for the unlawful occupiers, without prejudicing the claims of lawful occupiers and those in line for formal housing. Therefore, it is vital that the actual situation of the persons concerned be taken into account, and it will not be sufficient to merely have a theoretical housing programme, with little practical implementation thereof. The Constitutional Court reiterated the need for parties to meet each other half way, narrowing the areas of dispute between them and facilitating mutual give-and-take. The Constitutional Court also held that the municipality had not engaged with the occupiers in order to identify their housing needs. Therefore, the court directed the state to take reasonable steps to get an agreed upon, mediated solution and to provide suitable alternative accommodation, particularly for vulnerable groups such as the elderly, children, disabled persons and female-headed households. Ultimately, the Constitutional Court found that the residents were entitled to occupy the land until alternative land was made available to them by the state or provincial or local authority. It is evident that, in this case, that the municipality made little or no effort to consult those affected by the lack of adequate housing and the effect of their eviction. Therefore, the Constitutional Court, in dismissing the municipality’s application, held that it is clear that it took no action against the occupiers, who constituted a small, manageable group of people, for eight years and then hastily applied for their eviction, without taking any steps to address the occupiers’ problems. In addition, the land occupied was not even needed by the owners or the municipality, nor was there any evidence or plans from the owners and/or the municipality to suggest that they intended to put the land into productive use. It is worrisome that the Constitutional Court seemed to be attaching weight to the owner’s intention to be in need of the land or put it to productive use. Sachs J, having found mediation not to yield any positive results in deciding the matter, said that:

419 *Port Elizabeth Municipality v Various Occupiers* para 29.
420 *Port Elizabeth Municipality v Various Occupiers* para 29.
421 *Port Elizabeth Municipality v Various Occupiers* paras 45 56 and 61.
422 *Port Elizabeth Municipality v Various Occupiers* paras 30 and 61.
423 *Port Elizabeth Municipality v Various Occupiers* para 68.
424 *Port Elizabeth Municipality v Various Occupiers* para 57.
425 *Port Elizabeth Municipality v Various Occupiers* paras 45 56 and 61.
426 *Port Elizabeth Municipality v Various Occupiers* para 59-60.
Municipalities have a duty systematically to improve access to housing for all within their area. They must do so on the understandings that there are complex socio-economic problems that lie at the heart of the unlawful occupation of land in the urban areas of our country. They must attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those within their jurisdiction with respect. Where the need to evict people arises, some attempts to resolve the problem before seeking a court order will ordinarily be required.\textsuperscript{427}

On the other hand, in \textit{Modderklip},\textsuperscript{428} a similar argument of queue-jumping was advanced as being likely to interrupt the existing housing programme,\textsuperscript{429} but this was rejected outright by the Supreme Court of Appeal and the Constitutional Court, since the concern was not justified by the facts of the case.\textsuperscript{430} The Constitutional Court held that the state holds the key to the solution of Modderklip’s problem, since its obligations go much further, to include taking reasonable steps in ensuring that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, leading to the undermining of the rule of law.\textsuperscript{431} It is the state’s duty to progressively ensure the realisation of the right to have access to adequate housing and land by the homeless.\textsuperscript{432}

\textsuperscript{427} \textit{Port Elizabeth Municipality v Various Occupiers} para 56.

\textsuperscript{428} It concerns the failure by the state to ensure the eviction of illegal occupants from a private land and to be provided with alternative accommodation in instances where the state helps the private owner to execute the eviction order. The said eviction order affected about 40 000 residential units, which due to the overcrowded conditions in Daveyton township, moved on to occupy a strip of land between Modderklip farm and Daveyton, which was estimated to be 50 hectares, and was owned by Modderklip. From 2000 onwards, the number of occupants on the farmland kept on increasing, resulting in the settlement even having streets and erven, most of which were fenced. \textit{Modderklip} 790C-D 792B-D.


\textsuperscript{430} \textit{Modderklip} 801D-801A-C.

\textsuperscript{431} \textit{Modderklip} 802H 803B-C.

\textsuperscript{432} The court, in clarifying what adequate housing is, held that ‘Section 26(3) acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that established itself on a site that has become its familiar habitat.’ \textit{Modderklip} para 17. Although it is difficult to define the recent case of \textit{Fischer v Persons Unknown} gives a compelling guidelines locating the concept of a home within section 26(3) of the 1996 Constitution on a dispute that dealt with destruction by the City of Cape Town’s Anti-Land Invasion Unit (ALIU) on the ground that structures demolished did not constitute a home. The court held that the interpretation of the concept home should be wider rather than restrictive taking into cognisance poor people who were able to collect together enough money to buy basic building materials to erect the basic structures in which they wish to live peacefully, would undoubtedly call those structures ‘homes’. Further that ‘the short duration of time of those structures in which people were found to be present at the time the ALIU
and this obligation requires ‘careful planning’, ‘fair procedures’ and ‘orderly and predictable processes as to be undertaken by the state’.\textsuperscript{433} In consideration of the fact that the state does not have sufficient land at its disposal to fulfil its section 26(2) obligations, and where such an opportunity arises for the state to acquire the much needed land, the Constitutional Court found that it would be prudent for the state to act swiftly and even consider expropriating the land, to which the owner indicated a willingness to sell the land to the state. This saved Modderklip from having to continue to bear the burden of providing the occupiers with accommodation.\textsuperscript{434}

\textit{Olivia Road} demonstrates the implementation challenges faced by organs of state in striking a balance between lack of access to adequate accommodation for the poor and the extent to which organs of state can determine certain spaces to be inhabitable, evict and provide suitable alternative accommodation for those currently living there. The implementation challenge in relation to the right of access to adequate housing is further aggravated by certain authorities’ lack of understanding of their constitutional role, as found in \textit{Blue Moonlight Properties}. The City of Johannesburg contended that although it is entitled and duty-bound to provide alternative accommodation and to fund such, this is limited to those who are currently benefitting under its policy, as opposed to those being evicted by private owners within its jurisdiction.\textsuperscript{435} Its failure to plan and budget for emergency needs was also attributed to its misunderstanding of Chapter 12.\textsuperscript{436} The said differentiation policy was highlighted by the Supreme Court of Appeal and the Constitutional Court held that:

\begin{quote}
The policy inflexibly and therefore irrationally excluded from temporary emergency accommodation those who are evicted by private landowners. This differentiation violated section 9(1) of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The differentiation bore no rational connection to the City’s legitimate purpose of providing temporary accommodation to those who are vulnerable and most in need. Further, the City’s inflexible approach undermined the Occupiers’ right to dignity, a founding value and right entrenched in section 10 of the
\end{quote}

\textsuperscript{433} \textit{Modderklip} 804D-F.
\textsuperscript{434} \textit{Modderklip} 804H-I 808A-F.
\textsuperscript{435} \textit{Olivia Road} paras 64 70 76 79 80.
\textsuperscript{436} \textit{Olivia Road} paras 69 71 74.
Constitution. The Supreme Court of Appeal declared the policy unconstitutional to the extent that it excluded the Occupiers from consideration for temporary emergency housing.\textsuperscript{437}

From these cases, it is clear that through the years, a significant amount of resource capacity has been diverted to the improvement of the lives of those who are homeless. However, government continues to experience more or less similar implementation difficulties despite still trying to make improved living conditions a reality 21 years later. In characterising government's implementation strategy, \textit{Grootboom} found that:

\begin{quote}
Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing program. Recognition of such needs in the nationwide housing program requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.\textsuperscript{438}
\end{quote}

On the other hand, although 21 years cannot be seen as an adequate time for government to reverse the legacy of apartheid, it is sufficient to ensure that government devise an implementation pattern and even put measures in place to tackle challenges experienced. The Constitutional Court was heavily criticised for some of its judgements, such as \textit{Olivia Road}, where the Court was seen to have failed to pronounce on potentially transformative issues, including whether or not the right of access to adequate housing requires a consideration of location in the provision of alternative accommodation, and whether or not the municipality’s inner city housing plans’ failure to make provision for the poor was unconstitutional.\textsuperscript{439} The Court was further seen to have ‘failed to tackle the policies and practices at the core of the vulnerability of poor people living in locations earmarked for commercial developments’ and ‘to establish critical rights-based safeguards for extremely vulnerable groupings.’\textsuperscript{440} Even though the Constitutional Court may be criticised for its approach, it has indeed determined with

\textsuperscript{437} \textit{Olivia Road} para 84.  
\textsuperscript{438} \textit{Grootboom} para 68.  
\textsuperscript{440} Dugard ‘Courts and the poor in South Africa: A critique of systematic failure to advance transformative justice’ 237–238.
certainty the reasonableness standard to which government housing policies must subscribe. In that the Court adopted an inclusive approach of bringing together two parties on one table in a reconciliatory manner to have an amicable solution to the dispute.

5.5.5 The reasonableness of South Africa's adopted housing policies

Despite millions of houses having been delivered, government will fall short of its section 26(2) mandate if the current measures are not seen to be reasonable enough\(^\text{441}\) to dissuade those in need from taking illegal occupation of land, due to the failure of the state to assist them to live in a dignified manner.\(^\text{442}\) The Constitutional Court set down a reasonable standard principle in determining if the adopted housing policy measures achieve the objective of providing adequate housing to the marginalised members of society.\(^\text{443}\) The measures adopted by government must be reasonable,\(^\text{444}\) taking into account the need for government’s responsibilities and functions to be coherently and comprehensively addressed. In this way, it can determine if the programme adopted was haphazard or not, and therefore the extent to which it represented a systematic response to a pressing social need.\(^\text{445}\)

In analysing what constitutes a reasonable housing measure, Yacoob J stated:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of

\(^{441}\) It was held that 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: *Grootboom* para 95.

\(^{442}\) In assessing the housing delivery measures, the CC came to the conclusion that although the overall housing programme implemented by the state since 1994 had resulted in a significant number of homes being built, it failed to provide any form of temporary relief to those in desperate need, those with no roof over their heads, or those living in crisis conditions: *Grootboom* para 53.

\(^{443}\) McLean ‘Constitutional deference, courts and socio-economic rights in South Africa’ 143.


\(^{445}\) *Grootboom* para 54.
these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.\footnote{Grootboom para 41.}

Furthermore:

In order for measures to be reasonable, they must aim at the effective and expeditious progressive realisation of the right in question, within the states’ available resources for implementation. The measures must be comprehensive, coherent, inclusive, balanced, flexible, transparent, be properly conceived and properly implemented, and make short-, medium- and long-term provision for those in desperate need or in crisis situations. The measures must further clearly set out the responsibilities of the different spheres of government and ensure that financial and human resources are available for their implementation.\footnote{Grootboom paras 39-40 46.}

It is evident from the implementation challenges referred to earlier that government’s adopted housing policy measures fall short of meeting the reasonableness standard set by the Grootboom judgement, as seen through the eyes of millions still living in sordid conditions. Although the Constitutional Court’s approach has been heavily criticised,\footnote{Liebenberg S ‘Needs, rights and transformation: Adjudicating social rights in South Africa’ Stellenbosch Law Review, (2006) vol 17(1) 5-36 10.} the Grootboom decision created a platform for public debates about the extent to which the court could ensure the justiciability of rights such as housing. Therefore, the Constitutional Court, to some extent managed to develop a reasonableness yardstick for SERs’ adjudication, which Chenwi endorses by stating that:

It gives wide latitude to the political branches of government to make the appropriate policy choices to meet their socio-economic rights obligations, with the court’s role being to determine whether they fall within the bounds of ‘reasonableness’; thus addressing separation of power concerns.\footnote{Chenwi ‘Socio-economic gains and losses: The South African Constitutional Court and social change’ 439. See also Grootboom paras 43-44 82-83.}

In as much as the reasonableness yardstick would go hand in hand with the minimum core obligation, the Constitutional Court rejected it in Grootboom.\footnote{Grootboom para 33.} In terms of the minimum core obligation:

Social and economic rights must be realised without delay attempts to take account of the fact that certain interests are of greater relative importance and require a higher degree of protection than other interests. Such an interpretation avoids the creation of two self-standing rights, whilst retaining the important idea
of progressive realisation and making reference to the purpose behind the protection of socio-economic rights.\textsuperscript{451}

However, the Constitutional Court has not ruled out the possibility of future cases where it would be able to consider the content of a minimum core obligation, in order to determine whether or not the measures taken by the state are reasonable.\textsuperscript{452} It has been reiterated that:

Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.\textsuperscript{453}

As a result, the South African approach has enabled the judiciary to focus on determining the extent of implementation efforts undertaken by government in its existing housing policies. In so doing, government housing measures will be continuously questioned and tested to determine if they do reflect on the reasonableness of such implementation strategies, particularly in responding to the needs of vulnerable people. Government must realise that the socio-economic needs of the marginalised vary, and that it must have appropriate plans in place to cater for even those requiring urgent accommodation,\textsuperscript{454} not forgetting those who are demanding permanent housing. In that regard the South African judiciary views the justiciability of rights such as access to adequate housing as constituting an integral part of being human, and believes that human beings must be afforded their basic needs, thereby committing society to providing all the basic necessities of life,\textsuperscript{455} based on human dignity, equality and freedom.\textsuperscript{456} The criticism of


\textsuperscript{452} Grootboom para 33.

\textsuperscript{453} Grootboom para 42.

\textsuperscript{454} Grootboom para 44.

\textsuperscript{455} These include access to land, water, sanitation, electricity, livelihoods, transport, clinics and hospitals, schools, universities and other cultural and recreational amenities such as libraries, public spaces, swimming pools, sports fields and churches, Tissington \textit{A review of housing policy and development in South Africa since 1994}. 

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the Constitutional Court could be significantly reduced if the court acknowledged that it may be experiencing difficulty in developing a reasonable mechanisms standard that is likely to ensure that government understands and perhaps follows its rulings, and that they are easily enforceable. The Constitutional Court could appoint fact-finding missions and/or call upon expert evidence in order to reformulate its interpretation of socio-economic rights to include grammatical, contextual, teleological, historical and comparative interpretation methods. It remains to be seen if the Constitutional Court is likely to adopt that route, as it considers itself as the final arbiter of all constitutional matters or if the court considers itself to possess the requisite skill and expertise to efficiently and exclusively with all constitutional matters.

**5.5.6 Summary**
The South African judicial analysis of the enforceability and implementation of the right to adequate housing has been widely received globally, although at the expense of the poor. It has therefore made an immense contribution to the relevant jurisprudence, but has resulted in very few societal changes and has had a limited impact on the challenges, as is evident in the increasing housing backlog, housing demand and informal settlements 21 years later. Despite such a rich South African jurisprudence those meant to benefit from it continue to suffer inequality, degradation and sordid living conditions. Government could therefore be seen not to be in touch with the realities of those in need of assistance, particularly when the judiciary enforces the rights enshrined in the Constitution, and governments fail to implement court orders. While judicial measures are seen as one of the most effective and necessary remedies, in a democratic environment, these do not admittedly come cheap and require, at times, such remedies not only to be accessible, but also to be affordable, timely and effective. In this regard, the General Comment No. 9 noted that:

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456 *Grootboom* para 42.
457 Pienterse *Coming to terms with judicial enforcement of socio-economic rights* 395-96. Stewart *Adjudicating socio-economic rights under a transformative Constitution* 509.
The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a state party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate.\textsuperscript{459}

Although litigation is seen as an important strategy to bring about social change, especially with regard to inequalities and access to services by the poor,\textsuperscript{460} often resulting in policy formulation or reformulation, political mobilisation and the legal enforcement of standards, it has also failed to achieve socio-economic transformation as rapidly as expected.\textsuperscript{461} Therefore, there is a need, in addition to litigation, to explore what role the South African Human Rights Commission as an established administrative body within the Constitution can play in enforcing the realisation of the right of access to adequate housing.

5.6 The role and impact of the South African Human Rights Commission on the implementation of the right of access to adequate housing

5.6.1 Introduction

South Africa has established within its 1996 Constitution a National Human Rights Commission, which is tasked with exercising a monitoring role in relation to all organs of state with regard to the measures they have adopted to enforce section 26 rights. The Commission has executed this effectively and efficiently although there are some few concerns on the manner on which it carries its mandate.


\textsuperscript{460} Chenwi ‘Socio-economic gains and losses: The South African Constitutional Court and social change’ 430.

\textsuperscript{461} Mbazira You are the ‘weakest link’ in realising socio-economic rights: goodbye—strategies for effective implementation of court orders in South Africa 6.
5.6.2 The role of the South African Human Rights Commission in evaluating South Africa’s progressive realisation of the right to adequate housing

The South African Human Rights Commission Act\(^\text{462}\) establishes the South African Human Rights Commission in accordance with section 184 of the 1996 Constitution and as one of the Chapter 9 independent institutions supporting constitutional democracy. The Commission has full powers\(^\text{463}\) to investigate, without any exceptions or limitations, all SERs’ complaints, as contained in the Bill of Rights, while at the same time being able to initiate its own investigations where necessary.\(^\text{464}\) This process is seen as the core component or characteristic of its independence.\(^\text{465}\) As part of its distinctive features, its mandate is, among others, to monitor and assess the extent to which government departments have progressively realised all SERs.\(^\text{466}\) It does so by requiring, for example, the Department of Human Settlements, its provincial departments and local governments to provide it, on an annual basis, with information on the measures that have been taken in realising the right of access to adequate housing, including land.\(^\text{467}\) Therefore, the role played by the Commission as one of the enforcement bodies is an appropriate alternative method of ensuring access to effective remedies by victims of SERs. In this regard, the Commission’s mandate was succinctly summarised in its 4\(^\text{th}\) ESR Report as being to:

...assess whether legislative, policy and programmatic measures adopted by organs of state are reasonable, that the programmes and projects are comprehensive and cater for vulnerable groups and ensure that the responsibilities of the three spheres of government have been clearly spelt out.\(^\text{468}\)

\(^\text{462}\) 54 of 1994.

\(^\text{463}\) In terms of the South African Human Rights Commission Act 40 of 2013 the Commission will be in a position to recommend to Parliament or any other legislature the adoption of new legislation which will promote respect for human rights and a culture of human rights. See section 13 (1) (b) (iii) (vi) and (vii) and (2) (a)) of the South African Human Rights Commission Act.


\(^\text{467}\) In addition to health care, food, water, sanitation, social security, education, land and the environment.’ Section 184(3) of the Constitution; Horsten ‘The role played by the South African Human Rights Commission’s economic and social rights reports in good governance in South Africa’ 181 181.

The critical role played by the Commission in the area of SERs cannot be overemphasised, as it has the most robust and demanding task with no limits. This is because it has successfully resolved complaints relating to access to adequate housing, has held public enquiries related to housing matters and has made comments on housing-related Bills. The Commission is also capacitated to provide advice, expertise and input to various institutions such as academic institutions, other regulatory bodies and the legal profession, as well as acting as *amicus curiae*. In dealing with complaints, Tables A and B below summarise the number of complaints received by the Commission each year and identify those related to the right to adequate housing. This demonstrates the ability of the Commission to separately investigate these contested rights and to take steps to secure appropriate redress where human rights have been violated, even by means of litigation.

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469 The Commission has additional powers and functions prescribed by specific legislative obligations in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The Commission has to:

a) Promote awareness of the statutes;

b) Report to Parliament in relation to these statutes; and

c) Develop recommendations on persisting challenges related to these statutes and any necessary reform.


475 Furthermore, the South African Human Rights Commission achieved success with all the cases it has directly lodged with the Equality Courts, 17 matters were litigated in the Equality Magistrate’s and High Courts South African Human Rights Commission 12th Annual Report 2007-2008 9th Annual Report
### Table A - South African Human Rights Commission received cases

<table>
<thead>
<tr>
<th>Complaints</th>
<th>95-96</th>
<th>96-97</th>
<th>97-98</th>
<th>98-99</th>
<th>00-01</th>
<th>01-02</th>
<th>03-04</th>
<th>04-05</th>
</tr>
</thead>
<tbody>
<tr>
<td>Received</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1322</td>
<td>6265</td>
<td>3001</td>
<td>9464</td>
<td>12194</td>
</tr>
<tr>
<td>Housing-related complaints</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>Not specified</td>
<td>-</td>
<td>30</td>
<td>Not specified</td>
<td>82</td>
</tr>
</tbody>
</table>

### Table B - South African Human Rights Commission received cases

<table>
<thead>
<tr>
<th>Complaints</th>
<th>05-06</th>
<th>06-07</th>
<th>07/08</th>
<th>08-09</th>
<th>09-10</th>
<th>10-11</th>
<th>11-12</th>
</tr>
</thead>
<tbody>
<tr>
<td>Received</td>
<td>8943</td>
<td>12514</td>
<td>9</td>
<td>254</td>
<td>8556</td>
<td>9326</td>
<td>5626</td>
</tr>
</tbody>
</table>

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Rejections and referrals constitute 2 183 of the written complaints received during this reporting period, South African Human Rights Commission 10th Annual Report 2005-2006 Chapter 5 27.


<table>
<thead>
<tr>
<th>Housing-related complaints</th>
<th>192</th>
<th>173.492</th>
<th>193.493</th>
<th>Not specified</th>
<th>Not specified</th>
<th>5494</th>
<th>Not specified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total no. of complaints 1995-2013</td>
<td></td>
<td>93762</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housing-related complaints 1995-2013</td>
<td></td>
<td>675</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total percentage of housing complaints</td>
<td></td>
<td>0.72%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Even though housing cases were not highlighted in some of the years, those reports did note that the right of access to adequate housing violations were also part of the Commission’s focus for those years of reporting. The significant increase in complaints received by the Commission over the years could be attributed to the growing public awareness of its role and confidence in its mandate.495 In light of the statistics above, it is evident that the Commission plays an incremental role in SERs’ alternate dispute resolution. This means that the Commission is resolving some complex right of access to adequate housing cases, thereby unburdening the courts. Quicker resolution of SERs’ disputes is a measurable output, compared to the time that a court would take to issue a judgement on one matter in a year. Therefore, this perhaps suggests that the Commission is an appropriate or alternative institution to mediate on these highly contested rights through its adopted and well-praised mediation method, as opposed to what has been perceived as an adversarial system used before the courts.496 The Commission has established fully operational regional offices in all 9 provinces, and in

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488 827 were rejected and 1 079 were referred to other agencies or institutions, the total number of finalised complaints (those that are not subjected to litigation or public hearings) is 1 663. Of the finalised complaints, 457 were resolved and 1 206 were closed. South African Human Rights Commission 13th Annual Report 2008-2009, 20 available at <http://www.sahrc.org.za/home/21/files/Annual%20Reports/13th%20Annual_report2008_2009.pdf> (date accessed 2015-05-05).


compliance with its Human Rights Act, thereby making its offices accessible to the marginalised for channelling their complaints.\(^{497}\) Furthermore the Commission is successful because of its ability to train and contribute significantly to the legal profession, independently and confidently, during the course of its mandate.\(^{498}\) Upon reviewing submitted reports, the Commission has the power to issue recommendations, which were succinctly described in its Fourth ESR Report:

Recommendations are, instead aimed at assisting the government to remedy the loopholes identified in the measures that have been adopted in the execution of its obligations in terms section 26 of the Constitution.\(^{499}\)

It is therefore vital to determine how the Commission utilises its powers in holding organs of state accountable for their SERs' obligations.

### 5.6.3 Evaluation and monitoring of SERs by the South African Human Rights Commission

Although the Commission has, through the years, experienced some budget cuts, it nevertheless enjoys considerable budget allocations\(^{500}\) and continues, due to its constitutional autonomy, to exclusively evaluate and monitor SERs through subsequently adopted strategies. These strategies include questionnaires (commonly known as ‘protocols’),\(^{501}\) research, fieldwork, and more recently, consultation with affected communities and civil society in guiding organs of states to submit their annual reports. The protocols have regularly been revised to include (i) policy measures, (ii)

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497 The National Office, including provincial offices, are managed by Provincial Managers, who are admitted attorneys and who qualify as principals accredited by the various relevant law societies, with a law clinic status, and which also enable it to register candidate attorneys. The said initiative is being implemented on an on-going basis, in collaboration and strategic partnership with various private law firms, organisations and the Legal Aid Board, in order to further train its candidate attorneys. South African Human Rights Commission 16th Annual Report 2011-2012 29 30.


legislative measures, (iii) budgetary measures, (iv) outcomes, (v) National Action Plans, (vi) monitoring systems, as well as additional information on the realisation of SERs that has not been included in the above sections. The Commission’s monitoring system was established in 1997, thereby giving it teeth to subpoena any organ of state for failing to submit its annual report. In this regard, the Commission produces, on an annual basis, an in-depth ESR Report, against which all SERs’ measures are evaluated and monitored, in order to measure their progressive realisation. Thus far, the Commission has issued seven ESR Reports, which will be briefly analysed below, paying specific attention to the manner in which the right of access to adequate housing was reviewed, and as observed by the Commission.

Despite the effectiveness of its monitoring tool, the Commission has been criticised for the manner in which it maintains strict control of government’s dissemination of its own prepared reports under section 183(4), before such reports are evaluated by the Commission. In this regard, the Commission has acknowledged, for example, in its 4th ESR Report, that a lack of adequate resources has had an impact on its effectiveness and the quality of its ESR Report monitoring process. Horsten argued that there are equally resourceful NGOs that can competently perform the evaluation exercise in instances where the Commission is unable to fully carry out its mandate.

Therefore, NGOs, as resourceful as they are, should be allowed to contribute to government’s annual compliance reporting and to do so openly, without being manipulated by the Commission that claims to be the exclusive first-hand recipient of

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504 In terms of section 9(c) of the South African Human Rights Commission Act, the Commission reserves the right to serve subpoenas against any person to come and provide information that may have been required of him/her, as provided for in section 184(3) of the Constitution. While section 18 (a) provides for failure or the refusal of anyone to furnish the Commission with information constitute an offence, and legal action (criminal proceedings) can be taken against the party concerned.
505 Horsten ‘The role played by the South African Human Rights Commission's economic and social rights reports in good governance in South Africa’ 182-183.
such state reports. Consequently, the Commission invited written submissions from civil society, academia and any other relevant interested parties during the period from April 2006 to March 2009, as a means of opening up a wide debate about government’s annual reporting obligation to the Commission. The main reason was to assist it in assessing government’s progressive realisation of SERs, in line with the Millennium Development Goals, since it was found that, due to implementation difficulties, it was not likely to meet the MDG deadline in as far as adequate housing is concerned. However, that practice was short-lived and the Commission has gone back to its exclusive evaluation of government progress reports. In demonstrating the effectiveness of the Commission’s monitoring system, it is essential to highlight, with reference to the right of access to adequate housing, the impact that this institution plays.

This report acknowledged the deplorable living conditions in which the majority of the African population, both in urban and rural areas, found themselves as a result of the apartheid legacy. The Commission found that there is a need to mitigate existing economic and societal imbalances of these conditions, as they pose a major challenge to the meaningful realisation of SERs. The first report submitted by then National Department of Housing focused mainly on government repealing discriminatory laws of the past and adopting legislation that gives effect to the constitutional aspirations and the strategy adopted by government in implementing the right of access to adequate housing. Government’s focus was directed at ensuring that those vulnerable and with special needs were at the forefront of government housing policies. However, the Commission’s report found that government provided insufficient details regarding specific measures adopted in terms of the legislation. For example, the government report made

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508 Horsten ‘The role played by the South African Human Rights Commission’s economic and social rights reports in good governance in South Africa’ 183-185.
513 Such as poor people, people with disabilities, people in female-headed households, children and the youth, the elderly people, farm workers, and residents in rural households: South African Human Rights Commission ESR Report: Baseline Information 32.
vague statements and inconclusive submissions, thus leaving gaps with regard to the adequacy of government efforts to ensure full access to adequate housing for all. On the other hand, provincial departments were found to understand their role in implementing the right of access to adequate housing, but their reports were inadequate, since they merely indicated their commitment and obligation to facilitate access to adequate housing, without necessarily stating how they are practically implementing the right.\textsuperscript{514} At the local level, for example, the Greater Johannesburg Metropolitan Municipality highlighted the municipality’s lack of understanding of its role in the facilitation of access to adequate housing.\textsuperscript{515} The Commission’s monitoring role demonstrated a constructive and regular engagement of government reports, in order to remind them to account for their constitutional obligation by reporting on practical steps they have followed to fulfil the said obligation.

In other words, state authorities provided the Commission with annual reports on how they actualised the said constitutional obligation in ensuring the right of access to adequate housing in the new South Africa.\textsuperscript{516} It can be said that from the first report, government had already shown little understanding of how to implement section 26 as a whole, since it theoretically listed and described adopted legislation and policies, but failed to explain how they contributed to the realisation of section 26 obligations. However, government could be forgiven at this time, as it was its first ever housing implementation evaluation since 1994 that was conducted. One would therefore hope that its subsequent ESR reports would show an improvement in its overall implementation of the housing strategy.


\textsuperscript{514} South African Human Rights Commission the \textit{ESR Report: Baseline Information} 31.
\textsuperscript{515} South African Human Rights Commission the \textit{ESR Report: Baseline Information} 36-37.
The second review focused mainly on which implementation efforts or strategies that were undertaken by government departments, and how these were undertaken in order to fully realise all SERs listed within the 1996 Constitution.\textsuperscript{517} Due to the challenges that the Commission experienced during the first report and the fact that most government departments failed to submit their annual report, the Commission began to subpoena defaulting departments, calling upon them to appear before it to provide reasons for failing to comply with their reporting obligations.\textsuperscript{518} The subpoenas accordingly managed to ensure the timely submission of government department reports to the Commission.\textsuperscript{519} This is another demonstration of the efficiency and effectiveness of the Commission with regard to the monitoring and enforcement of the implementation of the right of access to adequate housing. However, mere reporting was found to be insufficient, since an analysis of these departmental reports revealed numerous implementation challenges, such as the failure to report on certain sections of the protocol.\textsuperscript{520} In addition, the department’s report on policy adoption measures was inadequate, since it failed to indicate how the implemented policy promoted the right of access to housing, and while some policy developments were mentioned, their objectives were not stated, whereas with others, nothing\textsuperscript{521} was provided or the information was scanty.\textsuperscript{522} In addition, the department seems to have reported on certain groups or categories of vulnerable people and the minimum amount of qualifications, but without providing details on how it arrived at these figures.\textsuperscript{523} Therefore, the Commission held that the department’s response failed to indicate if the measures implemented contributed positively towards the progressive realisation of the right of access to adequate housing, as the accomplishments were not listed.\textsuperscript{524} For example, the provincial departments only reported on two policy measures, without

\textsuperscript{519} For example, with the exception of the EC housing department, all provincial departments complied with their reporting procedure: South African Human Rights Commission \emph{2nd ESR Report 1998-1999} 9.
indicating the impact that these policy measures had on addressing the needs of the vulnerable and previously disadvantaged groups.\textsuperscript{525} As a result, the Commission could not provide a rational analysis of the effectiveness and reasonableness of the policy measures adopted by both the national and provincial governments.\textsuperscript{526} In addressing this shortcoming, the Commission reiterated that:

\begin{quote}
Reasonableness and effectiveness of the legislative measures can only be determined by the implementation of these measures. It is therefore recommended that the reports should account for what has been done to make those measures work.\textsuperscript{527}
\end{quote}

Under the Second ESR Report, government was already found to be significantly lacking in terms of reporting on its housing delivery, considering the insufficient information that was provided on its section 184(3) mandate, despite the norms and standards that were issued on 30 November 1998, which were not used to monitor the progressive realisation of this right.\textsuperscript{528} Appropriate data recording was seen as essential to determine or help to monitor the realisation of the right of access to housing, which the department was advised to follow.\textsuperscript{529} The third ESR report was a retrogressive step on government compliance with section 26(2).


Of main concern during this period was the fact that government as a whole was found to still experience difficulty in understanding and reporting on the compliance of its implemented housing.\textsuperscript{530} This report highlighted an emerging challenge relating to the provision of infrastructure to meet the need for ‘adequate housing’ in South Africa, as well as inconsistent reporting of the same facts by government departments.\textsuperscript{531} The report concluded that the implementation measures undertaken by the government as a whole remained inadequate to address the key issues that need to be resolved, in order to

\begin{footnotes}
\footnote{South African Human Rights Commission \textit{2\textsuperscript{nd} ESR Report 1998-1999} 174.}
\footnote{South African Human Rights Commission \textit{2\textsuperscript{nd} ESR Report 1998-1999} 173-174.}
\footnote{South African Human Rights Commission \textit{2\textsuperscript{nd} ESR Report 1998-1999} 178.}
\footnote{South African Human Rights Commission \textit{2\textsuperscript{nd} ESR Report 1998-1999} 179.}
\footnote{South African Human Rights Commission \textit{3\textsuperscript{rd} ESR Report 1999-2000} 256.}
\footnote{South African Human Rights Commission \textit{3\textsuperscript{rd} ESR Report 1999-2000} 276 278.}
\end{footnotes}
realise the right of access to adequate housing.\textsuperscript{532} From this report it was clear that government was losing focus on its implementation as more and more information was found to be insufficient and lacking on technical substance.

This report came at a time when the \textit{Grootboom} judgement was fresh from the Constitutional Court,\textsuperscript{533} and the report therefore focused more on providing an analytical view relating to the implementation of the right, basing its emphasis on \textit{Grootboom}.\textsuperscript{534} With regard to government reporting, similar to the First and Second Reports, the Commission still found that government had not obtained a good understanding of its obligations and how to report on its implemented measures.\textsuperscript{535} The same applied to incomplete, contradictory and repetitious measures, and government was cautioned that housing was not merely about numbers and targets, but also involved the quality of the living environment.\textsuperscript{536} Significant barriers to the implementation of this right included the following: access to land, delays in transferring it, security of tenure, housing developments in peripheral areas, lack of capacity, inadequate budget allocation, adequate housing for peripheral areas, community involvement, maladministration and corruption, and land invasions, which appeared to be the government’s main challenges.\textsuperscript{537} The Commission requested the department to familiarise itself with what information was required to report on. In so doing, the department should be mindful of fully detailing information pertinent to the measures that it adopted, rather than providing only a statistical list and names of policies and legislations that were adopted.\textsuperscript{538} Furthermore, the measures adopted by the state must be geared towards the progressive realisation of the right of access to adequate housing, and improving access to land is therefore inherent to the concept of ‘progressive realization.’\textsuperscript{539} The need to engage beneficiaries and all stakeholders through public participation is

essential to government’s achievement of progressive realisation. Unless such concerns are addressed, the Commission concluded that the steps adopted by the government cannot be said to be reasonable, as they cannot pass a constitutional muster.

This report can be compared to the previous one, as it dealt with access to adequate housing in a very scantly manner, focusing mainly on the right to a healthy environment. It is clear from this report that government focused on rental housing, social housing and emergency housing as the key policy priorities for this period. As a result, housing was not given much attention, as required by the Commission protocol and evaluation by the Commission of submitted information in terms of measuring the state’s compliance with its section 26 obligations.

(vi) Sixth ESR Report: 2003-2006
According to this report, the state faces enormous challenges in discharging its mandate of providing adequate housing to all citizens of South Africa, considering the fact that the state had by then managed to build a total of 2.4 million houses. On the contrary the backlog was estimated to be 2.2 million houses and one wonders why the backlog remained stagnant even in 2013, as mentioned above. However, the

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546 Speech by LN Sisulu Minister of Housing at the occasion of the budget vote 2007/8.
547 Speech by LN Sisulu Minister of Housing at the occasion of the budget vote 2007/8.
Commission noted some positive measures\textsuperscript{548} which were seen as moving towards the reasonable and progressive realisation of the right of access to adequate housing, although a number of concerns were noted. In this regard, there was an increasing eviction trend for those residing in dilapidated buildings, and looming evictions that affected farm dwellers.\textsuperscript{549} Furthermore, the Commission managed to recommend a policy response to the process of urbanisation as a means to address illegal land invasions, and the possible development of economic activity in rural areas.\textsuperscript{550}


As a departure from all its previous reports,\textsuperscript{551} the Commission invited government departments to make presentations (written and oral) in the presence of other external institutions or civil society and individuals, in order to afford them an opportunity to directly engage government on their reports. Despite the success of such an initiative, it produced minimal responses from some of those government departments that did presentations, since they failed to respond to any of the written questions posed.\textsuperscript{552} However, this process was only aimed at assessing government’s progress and the extent of the Millennium Development Goals achievement within the national indicators and national policy and legislative frameworks, in order to measure the progressive realisation of SERs.\textsuperscript{553} In the report, the Commission openly criticised government for moving away from a human rights-based approach, as it was increasingly adopting the discourse and practice of negative measures, and seeking legislative changes in order to speed up delivery that militates against the principles of a rights-based approach.

\textsuperscript{548} Waiving of the transfer duties for all property transactions below R500 000.
\textsuperscript{550} Other key recommendations were the need to capacitate government departments with skilful personnel and expertise, in order to effectively deliver its mandate, as well as public participation that adds value to government activities, South African Human Rights Commission 6th ESR Report 2003-2006 28.
This is evidenced in the lack of application of in-situ upgrading in favour of slum eradication via evictions, which marginalises the poor and vulnerable even further. The Kwa-Zulu Natal Slums Act is a case in point.\textsuperscript{554} The Commission reiterated its concern about the lack of coordination of government services and functions to achieve the progressive realisation of the right of access to adequate housing, as well as the need to proactively engage with housing beneficiaries, which is critical for improving the understanding and relationship between government and the people.\textsuperscript{555} The Commission demonstrated its independence further by criticising the Constitutional Court with regard to the manner in which it adjudicated the \textit{Joe Slovo} case:

The \textit{Joe Slovo} judgment of the CCT which required the Western Cape government to have meaningful consultations with the residents on their impending evictions is proof of the failure of the state to do this. Even this judgment of the Constitutional Court does not go far enough to promote meaningful engagement on the substance of the housing provision, as it merely compels the state to engage around the logistics of the relocation.\textsuperscript{556}

Whilst it is clear that the environment within which the Commission operates seems to be sound and healthy, there is minimal or slow compliance by government in implementing its recommendations. At the same time, there is a concerted effort on the part of the national department to capacitate the provincial housing departments by providing them with the opportunity to use the platform to escalate specific policy implementation and delivery challenges, and to get almost immediate responses from the national department. This report again found that government had spent its effort and time on listing policies and legislation, rather than justifying or providing adequate information on how these measures contributed to the progressive realisation of the right to adequate housing. Therefore, according to the Commission, government reports demonstrate a stern and consistent lack of understanding of their obligations:\textsuperscript{557}

The state possesses a limited understanding and appreciation of what it means to adopt a rights-based approach to socio-economic development and how to fulfil its constitutional obligations in terms of the Bill of Rights. In fact, one can cogently argue that many of the gains that have been made in the arena of economic and

social rights in South Africa have not come about through efforts on the part of the state but rather as the result of litigation.\textsuperscript{558}

It is clear that the state is most often caught off guard and forced to attend to some of the pressing social demands as a result of protests and violence by frustrated citizens. Prior to this, there seems to have been a comfortable position by the state to be on-course with its housing delivery mandate.

It is evident that even after 20 years, government does not seem to give much consideration to recommendations made by the enforcement systems (the Commission), as it still fails to justify how its adopted housing policies contribute towards an improved standard of living for the poor. Government merely provides a list and status on its housing delivery mandate without engaging how the adopted policies contributed to the progressive realisation of the right to adequate housing. In executing its role and functions, the Commission is also, like its counterparts, able to hold public hearings on any SERs that it finds prudent to do so.

\textbf{5.6.4 Public hearings by the South African Human Rights Commission}

In South Africa, public hearings have become the a norm within the Commission’s execution of its mandate, whereby it engages with all interested stakeholders\textsuperscript{559} in making their views heard, either in an oral or written format. Such hearings have the advantage of offering unique insights for critical inquiry as a deliberative, dialogic and democratic practice.\textsuperscript{560} At the same time public hearings create opportunities for dialogue between stakeholders, as well as allowing public accountability, as envisaged by the 1996 Constitution.\textsuperscript{561} Public hearings are particularly relevant when government is seen to be merely adopting a desktop collection of statistical measures in compiling its ESR reports for submission to the Commission, and this includes how government is perceived as collecting its service delivery data.\textsuperscript{562} An example of this is the public

\textsuperscript{558} South African Human Rights Commission 7\textsuperscript{th} ESR Report 2006-2009 18.
\textsuperscript{559} All government departments and ministries, as well as civil society organisations, academic institutions and the general public.
\textsuperscript{560} South African Human Rights Commission 7\textsuperscript{th} ESR Report 2006-2009 5.
\textsuperscript{562} South African Human Rights Commission 7\textsuperscript{th} ESR Report 2006-2009 19 139 160.
hearings into housing, evictions and repossessions. In recognition and realisation of the fact that an institution of this magnitude has an incremental role to play on an international forum, the Commission even established its own International Treaty Body Monitoring System, which keeps track of South Africa’s international position, its role and involvement, as well as the ratification of treaties and status of country reports. This system appeared to have surpassed the expectations of external role players, while at the same keeping government on its toes in terms of its international treaty obligations. Lastly, the Commission continues to act as a resource for numerous emerging and established national human rights commissions and the international community.

5.6.5 Summary
Despite the success achieved in terms of fulfilling its role, The Commission faced some challenges. For example, it seems to have relied heavily on reports submitted by government and only evaluated the information provided by government in these reports without verifying their accuracy. This is the role that civil society could play, by comparing and contrasting government measures before they are reported to the South African Human Rights Commission. These must be re-examined in order to enhance its monitoring role, which enables civil society to interrogate government reports in advance. Until such time, the country will continue to go back and forth, despite the roles played by courts and the Commission in reminding government how to implement its housing policies. In this regard, poor planning and fragmented policies in respect of design and implementation are seen as root causes of many of the challenges in housing service delivery. The poor definition of indicators is another problem raised in housing, and terms that mean different things seem to be used interchangeably. For example, the figures for housing opportunities (which include serviced sites) and the

figures for houses (which include a top structure) are often both counted when referring to the numbers of houses built.\textsuperscript{567}

The Commission has only been able to assess, on an annual basis, government reports, without any radical changes, and it has entrenched government’s desktop reports, without even focusing on compliance with their imposed previous recommendations. It is disappointing that after the Commission’s assessment of the seven ESR reports, it still appears to make similar systemic recommendations regarding what is expected of government. Government is preparing and submitting its annual reports to the Commission merely to comply with its reporting obligations in accordance with section 183(4) of the 1996 Constitution. The Commission, after 19 years of examining government’s reporting mechanisms, should aim to exercise its monitoring and evaluation more robustly, without repeating the same recommendations, but rather by asking every government department to report on what measures it has taken in order to ensure the implementation of recommendations made in the previous Commission’s report. It is essential, once the domestic matters have been attended to, that the international system should be assessed.

5.7 South Africa’s position within the international and regional enforcement systems

5.7.1 Introduction

In terms of South African law any international treaty that is ratified or acceded to must be enacted into its domestic law while a self-executing provision of the treaty. If approved by parliament it becomes law unless it is contrary to the Constitution or an Act of Parliament.\textsuperscript{568} Generally, South Africa’s performance review of its international and regional obligations can be viewed to be a mixture of compliance and non-compliance, particularly with regard to the submission of reports to treaty bodies.\textsuperscript{569}

\textsuperscript{568} Section 231 (4) of the 1996 Constitution.
\textsuperscript{569} See chapter 2 for a general background to the international system.
5.7.2 *South Africa within the international human rights system*

South Africa re-joined the international community in 1994 and began to undertake a rigorous process of re-aligning its laws and policies in accordance with the international human rights standards. Unfortunately compliance with the international human rights standards could not be adequately examined in this study since South Africa has only recently ratified the ICESCR,\(^{570}\) thereby bringing its SERs in line with the international human rights standard. It also opens its borders for scrutiny by the CESCR on every SER’s provision. In accordance with a statement issued by the Commission:

> The ratification will enhance the ability of the government to play a meaningful role as one of the key advocates for social, economic and cultural rights in the international arena. And it will further enable the Country to keep pace with those countries that have ratified the Covenant and thus accelerate and improve the respect and observance of socio economic rights in South Africa. It is for this reason therefore that as the Commission we urge Government to expedite the domestication of the Covenant so as to ensure that those provisions that are in the Covenant and not in our Constitution, or any other legislation, become applicable in South Africa.\(^{571}\)

The ICESCR’s entry into force in South Africa occurred on 12 April 2015 in accordance with Article 27(2) of the ICESCR. According to the Commission ratification of the ICESCR would confirm South Africa’s commitment at an international level to upholding SERs,\(^{572}\) at the same time strengthening the domestic protection of SERs. It has been acknowledged that the country is still grappling with understanding its implementation and constitutional obligation roles of ensuring the progressive realisation of all SERs and how to comply with court remedies related to SERs.\(^{573}\) It is at this juncture that the CESCR is likely to play an essential role in redefining and elaborating South Africa’s role in the proper implementation approach to all SERs. Since South Africa is now a state party to the ICESCR, it is likely to benefit more under these monitoring bodies’ expertise in giving meaningful content to entrenched SERs. On the other hand, the country must be commended for having made such tremendous progress in implementing the right of access to adequate housing without the involvement of the

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\(^{573}\) ICESCR Campaign Advocacy Progress Report Prepared for the June - December 2010 Period.
CESCR’s expertise or observation. It is clear that South Africa’s position within the international community is now under close international scrutiny.

Undoubtedly, therefore, South Africa is likely to gain an insightful input and direction on how better to ensure the progressive realisation of all SERs within its boundaries. The ICESCR ratification enables the country to consider adopting the Optional Protocol to the ICESCR, thereby enabling the CESCR to entertain complaints from South Africa. Most importantly the country played an active role in drafting the Optional Protocol to the ICESCR and its adoption. The same CESCR could also draw on expertise from South Africa thereby opening opportunities for local experts to gain and contribute their knowledge at international level. Considering that South Africa has a questionable performance when reporting to international bodies it remains to be seen if the SERs’ reporting requirement in terms of Article 16(1) will be adhered to. It is obvious that the country has already created a bad record at international level on submitting periodic reports on measures adopted giving effect to the right in question.

However, an evaluation of the country’s compliance record with other international human rights obligations could be used as a benchmark to determine the country’s commitment to fully implement and interpret the ICESCR’s obligations within its domestic law. It should be remembered that South Africa ratified the ICCPR in 1998 and its reports have been due since March 2000.574 In the 15 years since South Africa became a state party to the ICCPR it is yet to submit its outstanding initial, second and third periodic reports for consideration by the Human Rights Committee.575 Questions can therefore be asked if the ratification of the ICESCR by South Africa will add any value to the entrenched SERs.

5.7.3 South Africa within the regional human rights system

Since South Africa is one of the members of the African Charter it is vital to indicate what its position is within the regional system. South Africa acceded to the African Charter on 9 July 1996. However, a proviso *(note verbale)* is that South Africa’s adherence to the African Charter should be accompanied by a declaration that contains the country’s view that consultation should take place between state parties’ on a number of issues such as ‘possible measures to strengthen the enforcement mechanisms of the African Charter’; ‘criteria for the restriction of rights and freedoms recognised and guaranteed in the Charter’ and bringing the Charter in line with the UN’s resolutions ‘regarding the characterisation of Zionism.’ 576 The African Charter is not incorporated into South African law but it is applied in accordance with section 233 of the Constitution which states that:

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

South Africa has only submitted two periodic reports for observation to the African Commission on Human and Peoples’ Rights, namely the 1996-1998 report and the first periodic report of 1999-2001. The first report merely focused on what the country was doing or intended to do to address the rampant inequalities, in complying with the African Charter and the challenges that it faced. 577 It is disappointing to find South Africa failing to comply with its regional reporting obligations 578 although it had prepared its first periodic report, South Africa only submitted it four years later, 579 which meant that a lot of the information was out-dated. However, similar to the reports submitted to the

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578 As per Article 62 of the African Charter though the report was noted not to have been shared with the civil societies beforehand.

South African Human Rights Commission, the report did not indicate how these measures had contributed towards improving the rights of its people.\textsuperscript{580} In addition, it the South African government was urged to actively engage civil society with regard to its programmes, in order to fulfil its obligation to ensure the rights contained in the African Charter.\textsuperscript{581}

From these reports, it can be deduced that the country still has a long way to go in terms of understanding its constitutional, regional as well as international obligations, as South Africa struggles to explain how measures it adopted are contributing towards the progressive realisation of the right in question. Its challenges are exacerbated by the failure to comply with its Article 62 reporting obligations, which could result in the country improving its compliance with the African Charter. More or less similar findings were made by the African Peer Review Mechanisms Report, namely that the country failed to elaborate on the extent of domesticating regional treaties and what steps the country had taken to comply with its regional obligations.\textsuperscript{582}

5.8 Concluding observations

The South African government must be commended for having made significant progress since 1994 in improving the lives of the poor through access to adequate housing. However, it is disappointing that today there is still more people demanding government intervention than there were in 1994. It can therefore be conclusively said that the country has failed to comprehensively tailor its housing policy, to eradicate informal settlement, the housing backlog and to improve the lives of those who are poor and vulnerable.\textsuperscript{583} Housing policies and statutes have been adopted, available resources have been committed and millions of houses have been delivered, yet the


\textsuperscript{582} This is beside the country being the first ever to accede to the APRM in 2003, The African Peer Review Mechanism: South Africa country review report-04 Feb 2013 229 231 233-234.

government is still grappling with understanding its constitutional obligations and how to implement most of its adopted policies in order to meet the reasonableness standard of progressive realisation.\textsuperscript{584}

It is clear that what the 1996 Constitution aspired to achieve and the realities that the vulnerable unemployed, homeless and low-income earners are experiencing are two different worlds. The housing implementation challenges facing South Africa have proven that a guarantee of these SERs in terms of a Constitution and separate legislation and policy does not translate them into their automatic enjoyment.\textsuperscript{585}

Consequently, due to the increasing population growth and systemic implementation challenges it is time for South Africa to comprehensively review the sustainability of its housing delivery mandate, since it has failed to eradicate the increasing housing backlog and identify alternative housing provision models that can be studied and adopted, in order to enhance the inequalities inherited from apartheid. Clearly the political power obtained in 1994 has done little to reverse and improve the adequate housing of many homeless and poor and it has yielded little economic transformation to those in need adequate housing. Even though South Africa has achieved some housing delivery success in terms of the progressive realisation of adequate housing through legislative and policy means, this has not prevented the proliferation of informal settlements and the eradication of housing backlogs with an ever-increasing population. None of its five year housing delivery target have been achieved and the number of poor people with a need for access to adequate housing is continually increasing.

The Commission can be commended for having thus far executed its mandate by ensuring that all responsible government departments and agencies submit, even if late, their annual reports, in order for it to conduct its evaluation of the measures that have been adopted. The Commission need to revisit its monitoring role in order to enhance its role in fostering progressive realisation of the right of access to adequate housing. It

\textsuperscript{584} Chenwi ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ 107; South African Human Rights Commission 7th ESR Report 2006-2009 vi.

must also open its doors to interested non-governmental organisations, in order to work with them in evaluating and monitoring government’s progress towards implementing SERs.

Above all, it must be acknowledged that failure to comply with court orders is a government disease, and this is also prevalent with regard to the recommendations made by the Commission. In this regard, the South African Human Rights Commission emphasised that cooperation of government departments was the key factor for the successful execution of its monitoring task. The country’s lack of regional and international treaty compliance and reporting create a bad image of its progress, openness to accepting criticism and building a better country for its inhabitants through international scrutiny, which would be essential in a democracy such as that of South Africa.

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Chapter 6

6. Conclusions

6.1 Introduction

The aim of this study was to determine whether the approaches adopted to implement the right to adequate housing in South Africa are appropriate to improve the standard of living of the poor, unemployed and homeless as well as to eliminate housing backlogs. Against the background of their positions in international and regional law relating to the right of access to adequate housing, a comparative examination of how the right of access to adequate housing is implemented in South Africa, Canada and India was made. The primary objective was to determine the extent to which South Africa can draw inspiration from both Canada and India, or whether these countries can perhaps draw lessons from South Africa.

India has played a central role in implementing the progressive realisation of the right to adequate housing since the 1960s. Canada started to address the issue in the 1960s, but the situation steadily changed during the 1980s when the conservative government was elected and it only began playing an active role again from 2001.\(^1\) In South Africa the democratic government only started to address the issue after 1994.

It is clear that, despite the adopted housing implementation strategies, there are still many failures.\(^2\) In all three countries too many households and too many poor and

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2 Gilbert A ‘Helping the poor through housing subsidies: Lessons from Chile, Colombia and South Africa’ Habitat International (2004) vol 28(1) 13-40 14. See the Indian Chapter 5 in paragraph 4.3 where the country’s sporadic implementation of its Five Year Plans is a demonstration of a systemic failure to tackle recurring shelter/housing rights implementation hiccups when adopting subsequent plans for a period of 60 years. In Canada see paragraph 3.3 and 3.4 where despite massive budgetary injection into housing implementation measures such policies have done little to eradicate homelessness, improve the poor’s standard of living. Moreover the non-justiciability of the right to adequate housing has been exacerbated by the unwillingness of the judiciary to utilise the existing provisions of the Canadian Charter (section 7 and 15) to enforce the right to adequate housing.
homeless people are still in desperate need of adequate shelter/housing. The research findings from the three countries show that a significant amount of resources have been allocated to housing delivery yet there is a continued high demand for housing and huge housing backlogs. It is evident that all three countries are faced with a situation that is tantamount to an uncontrollable housing demand and backlog which are only being contained instead of actually being eradicated. This predicament is said to have arisen in light of the fact that during the 1990s, governments were generally advised to limit their involvement in productive activities and to cut much of their regulatory intervention. Employment, it was argued, would grow more quickly if the government would stop meddling. Along with education, health, infrastructure provision and transport, housing became an eminently suitable candidate for private sector initiatives, albeit at times in the form of public-private partnerships. Consequently, the question that arises is whether the role of states should be limited to being mere facilitators of housing, as opposed to being the main providers of housing. Although Canada may have moved from being a social welfare state to a self-sufficient and active society through the creation of employment opportunities, such an implementation strategy failed to bear much fruit. South Africa followed a self-help approach but the programme experienced significant implementation challenges, which ultimately questions whether or not the self-help approach works and if government is indeed addressing its related challenges. Walker posits that:

The move towards pairing a social investment state with an active civil society to achieve housing goals might be able to work effectively in the future, but adequate state financial resources and stewardship over a coherent national vision based on equity and redistribution among citizens will be necessary.

In order to involve the private sector legislative reforms would have to be undertaken, and the private sector is unlikely to gracefully accept this. The private sector’s lack of

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3 Walker ‘Aboriginal self-determination and social housing in urban Canada: A story of convergence and divergence’ 199.
4 Gilbert ‘Helping the poor through housing subsidies: Lessons from Chile, Colombia and South Africa’ 14.
5 Walker ‘Aboriginal self-determination and social housing in urban Canada: A story of convergence and divergence’ 200.
housing accountability is premised on the weaker forms of accountability for the normative commitment of the Bill of Rights. However, Liebenberg does not rule out the possibility of private actors being held accountable for safeguarding socio-economic rights (SERs):

A purposive approach to the interpretation of socio-economic rights would require the adoption of regulatory legislative as well as judicially developed common law rules to ensure that equitable and effective access to socio-economic rights is not impeded by the conduct of these [private entities].

The role of the private sector in housing provision for the poor is, therefore, yet to be explored in South Africa, thoroughly examined in Canada while India appears to have made significant progress in this regard. It must be acknowledged that it is undeniably very costly and burdensome to run a social welfare state where free housing is provided to the poor. It is not a question of merely providing houses and maintaining the increasing number, as housing demand and supply are heavily influenced by several factors, such as the necessity to improve the existing stock, migration, population growth resulting in slums increase, etc. Since the role of the private sector is minimal in as far as improving the living conditions of the poor is concerned, states will unfortunately continue to be the main provider and facilitator of basic necessities, particularly to the poorest of the poor.

A number of key comparative findings have emerged from this study. These include the existence of a constitutional right to adequate housing, the extent to which the adoption of housing legislative and/or policy measures can play a role, what the position of the judiciary is in interpreting and enforcing the right to adequate housing, whether or not there is political will on the part of government to address right to adequate housing

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8 Liebenberg ‘Socio-economic rights beyond the public-private law divide’ 71.
challenges and if national human rights commissions can make a contribution towards the implementation, enforcement and monitoring the right to adequate housing. The final set of findings relates to how and where international and regional human rights obligations are a factor in promoting and enforcing the right to adequate housing. These conclusions were drawn from four chapters that, briefly, dealt with the following issues:

Chapter 2 dealt with the relevant international and regional human rights instruments and shows the extent and visibility of the right to adequate housing that must be separately invoked and enforced under international and regional human rights law. The international human rights system has clearly set the scene for the equal recognition and enforcement of the right to adequate housing. However, despite such a strong visibility of the right at international level not much can be said about the enforcement mechanisms set, particularly when state parties’ fail to comply with their imposed obligations and the international human rights enforcement system (Committee on Economic, Social and Cultural Rights)\(^\text{10}\) lacks the teeth to enforce state parties’ non-compliance. Consequently, the international human rights system relies merely on political/diplomatic strength to enforce its own recommendations and these rarely work.\(^\text{11}\) On the other hand, effective regional human rights systems seem to be a viable hope for this enforceability lacuna. In general it can be said that the regional human rights system is, due to the strong judicial enforcement mechanism that is in operation, more meaningful in terms of rights enforcement than the international system,

Chapter 3 provided a critical analysis of the right to adequate housing in Canada from its policy perspective and it evaluated how this approach impacts on the poor minority’s standard of living. It examined Canada’s compliance with its imposed international obligations and the Canadian judiciary’s reluctance to consider the country’s international obligations and to interpret the existing provisions in Articles 7 and 15(1) of


\(^{11}\) This is based on the fact that from 1993 the CESCR has been recommending that Canada comply with its obligations in the same way as India, yet there seems to be little respect and compliance with their obligations.
the Canadian Charter\textsuperscript{12} to equally enforce the realisation of the poor’s right to an adequate standard of living. The issue of incorporating ‘social condition’ as part of the non-discrimination clause\textsuperscript{13} in the Canadian Human Rights Act\textsuperscript{14} is significant since such an amendment could ensure that a historical housing analysis is undertaken by enforcement agencies in evaluating why people are vulnerable to the poverty trap, becoming homeless and are unable to afford adequate housing. By so doing meaningful content could be given to the interpretation and implementation of the right to adequate housing. The Canadian National Human Rights Commission’s role is part and parcel of investigating, monitoring and enforcing all SERs. Lastly, the spotlight fell on the Canadian judiciary as key in unlocking the justiciability of the right to adequate housing in Canada, considering that all other possible avenues (a constitutional read-in approach, international human rights obligation approach, the policy approach) have not been successful.

Chapter 4 sought to analyse the Indian housing policy jurisprudence, particularly in terms of how the judiciary manages to give meaningful content to the right to adequate shelter/housing, which is considered to be part of Directive Principles of State Policy. In this regard the Indian jurisprudence has revolutionised this policy-driven right by utilising the existing provisions of the 1949 Constitution, thereby requiring the Indian government to comply with its constitutional and international obligations. Furthermore, the chapter reviewed the 61 year period of implementing the right to adequate shelter/housing in India, under its five year plans and identified systemic implementation hiccups that have hindered the progressive realisation of the right. The role of the judiciary in India is also central in enforcing the un-entrenched right, but it must go beyond using the existing provisions of the 1949 Constitution and evaluate the reasonableness of the adopted housing policies to elicit proper responses from government on its housing implementation policy strategy. The chapter looked at the powers of Indian Human


\textsuperscript{13} Canadian Human Rights Act Review Panel Report 6-12.

Rights Commission to conduct investigations without any restrictions and to monitor all SERs. Where India’s compliance with its international human rights obligations is lacking and is dampening its human rights image, its role within the Asian region is an influential one in terms of advocating for the establishment of the long-awaited Asian regional human rights system. The Indian domestic system has a resounding human rights jurisprudence that is likely to make a significant contribution at the regional level.

Chapter 5 assessed how South Africa has transcended the apartheid created housing chaos and implemented its three-tier right to adequate housing implementation strategy (constitutional, legislative and policy) in its first 21 years of democracy. A progressive Constitution that contains a right of access to adequate housing, supported by a comprehensive set of policy and legislative measures and a judiciary that gives substantive meaning to the constitutional right to adequate housing provide all the necessary elements for the proper implementation and enforcement of the right. However, while South Africa must be praised for having adopted this inspirational three-tier strategy, it must seriously tackle the recurring adequate housing implementation challenges that thwart any progress the country has made. The chapter examined the role that the South African Human Rights Commission plays in addressing these challenges. South Africa’s recent ratification of the ICESCR demonstrates that the country is taking its international obligations seriously though mere ratification does not mean automatic compliance with imposed international human rights obligations.

From Canada and India’s perspectives, the study found South Africa to have a better (constitutional and legislative) housing delivery model that can provide some inspiration to these two countries. However, its failure to address recurring implementation challenges has rendered such an implementation strategy moot, thereby making it difficult to justify why its adopted three-tier implementation strategy is better than the Canada and India to improve the poor’s standard of living, eradicate slums and housing backlogs.

6.2 Constitutional adoption protecting the right to adequate housing: A way forward?

From the three countries analysed, and despite the adoption of various housing implementation approaches, it is evident that there is no adequate and properly adopted housing implementation formula that seems to improve the poor’s standard of living, eradicate slums and housing backlogs. A Constitution should be the starting point for anyone contesting a violation of the right to adequate housing and this is based purely on the supremacy of the Constitution. In other words a Constitution plays a central role as it commits to transform a society into one where human dignity, freedom and equality lie at the heart of a constitutional order. The entrenchment of the right to adequate housing under a Constitution is seen as the most appropriate way to charter enforcement of this much contested right. It must be acknowledged that even though constitutional entrenchment is ideal it does not lead to the automatic enjoyment/enforcement of the right by the enforcement agencies. South Africa has fared better in this respect than Canada and India.

A challenge ensues if the Constitution does not expressly protect the right to adequate housing as a fundamental right, thereby making claimants' remedies complex and even impractical. In this regard the Indian judiciary managed to adopt a read-in approach whereby existing provisions of its 1949 Constitution were used to enforce the right to adequate housing. By resorting to the Constitution it was made easier for government to accept such orders as they were viewed as a constitutional mandate to comply with. Therefore, the vulnerability of the right to adequate housing is heavily influenced by the manner in which national courts view and regard enforceability of the said right, as well as by the court’s enforcement of the right based on its capabilities and on the limitations of

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17 This is seen by the manner in which the right was protected and enforced in South Africa and how the Constitution was used as a shield to the un-entrenched right in India.
18 Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) para 8.
judicial procedure. An example is Canada where, to date, there has been a persistent failure to invoke or allow a constitutional interpretation to apply to the right to adequate housing so as to protect those who lack adequate housing, equal dignity, equal opportunity, privacy, personal autonomy and self-determination. In this regard the three countries have invoked three diverse interpretive approaches to the same right based on their own socio-economic and political context.

6.2.1 South Africa’s 1996 Constitution

South Africa’s direct and express entrenchment of the right to adequate housing under its Constitution, as one of the few in the world, certainly ensures justiciability and brings relief to a majority of those who were victimised during the apartheid era. Unlike Canada and India, South Africa’s three-tier approach emanates from the 1996 Constitution. To that end section 26 is the foundation of the right to adequate housing in South Africa as it lays down that legislative and policy measures must guide government on how to implement the right. The number of decided court cases signifies the visibility and the significance of this right and government has been taken to task on its failure to comply with its section 26 obligations. This is commendable and should definitely provide a guiding framework for Canada and India. Despite the fact that the South African position is complex, as evidenced by the immense challenges that the country has had to deal with in the past 20 years, it needs to be congratulated for having adopted a stringent constitutional approach. Therefore, from the three countries evaluated, the South African position is ideal and healthy for its open contestation of the justiciability of the right to adequate housing. Such an approach enables the adopted housing implementation measures to be fully monitored and regularly scrutinised.

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20 Sections 7 and 15(1) of the Canadian Charter.
23 Discussed in chapter 5.
Despite the fact that South Africa has the constitutional model to realise the right to adequate housing it continues to be clouded with implementation controversy. Living conditions, housing backlogs and homelessness continue to worsen, leading to sporadic inequalities. South Africa’s failure to tackle the systematic implementation challenges 21 years after democracy casts a shadow over any positive impact made, since the number of people demanding access to housing has increased from the number recorded during the apartheid era. This on its own can be seen as praising the apartheid system as a better form of governance than the democratic South Africa where the right to adequate housing is entrenched. From this analysis the study evinced that there is no guarantee that the constitutional model is the most appropriate method to fully and adequately implement the right to adequate housing. However, it must be emphasised that South Africa’s failure to deal with implementation challenges does not overshadow the constitutional entrenchment of the right. The country’s adopted constitutional model is ideal for the poor to be equally entitled to contest violations of their constitutional right to adequate housing before the courts, and for the latter to be able to independently review any right to adequate housing policy measures adopted.

It is evident that what the 1996 Constitution aspired to achieve and the realities that the unemployed, homeless and low income earners are experiencing signify two different worlds. In other words the 1996 Constitution remains a distant dream to many poor, homeless and unemployed citizens that have applied and waited for government housing schemes to assist. This is based on the fact that:

Homeless people are in many ways entirely dependent upon authorities for their own basic needs and ability to survive.\(^\text{24}\)

The South African housing implementation strategy has been heavily criticised for not having adequately fulfilled the promise to the poor of a roof over their heads, and for not having solved South Africa’s apartheid housing chaos. However, the South African housing delivery model has, nevertheless been praised (on its first five years) for having afforded homes to over 3 million poor households. In this regard:

\(^{24}\text{Williams JC 'The politics of homelessness: Shelter now and political protest' Political Research Quarterly (2005) vol 58(3) 497-509 }\)
If there are problems with the homes provided, people are at least living somewhere legally. No other country has ever been able to do so much over the first 5 years of its programme. And, given the widespread disappointment with the achievements of the first ANC government, some consider housing to be one of the few success stories.\(^{25}\)

### 6.2.2 The Canadian Charter

As confirmed by the judiciary and as spearheaded by the government, the Canadian Charter’s ability to protect the poor, unemployed and homeless Canadians has been a great disappointment.\(^{26}\) Its interpretation of the non-discrimination clause continues to exclude ‘social condition’ as a protected condition.\(^ {27}\) In other words, Canada has failed to entrench ‘social background’ as a form of discrimination. Since this would protect its vulnerable people as part of its non-discrimination clause,\(^ {28}\) the poor in Canada are disadvantaged by this exclusion. Despite adopted housing policies their lives continue to deteriorate, due mainly to the non-justiciability of the right to adequate housing. Therefore Nolan, Porter and Langford are of the view that:

> The justiciability debate must also be informed by an appreciation of the role of rights-claiming and rights adjudication in our understanding of the contextual meaning of human rights. Most people who have participated in human rights hearings at the domestic or regional level will have experienced a kind of pivotal moment in the adjudication of a human rights claim when, through the ‘voice’ of the rights claimant, the subjective struggle for dignity and security breaks through the legal argument to bring home the real issues of human dignity that are at stake in a claim.\(^ {29}\)

Clearly not much that is positive can be said about the Canadian Charter as it has been used to denigrate a contested standard of living. It has been selectively applied to deny the right of the poor, unemployed and homeless Canadians to equally contest their

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\(^{25}\) Gilbert ‘Helping the poor through housing subsidies: Lessons from Chile, Colombia and South Africa’ 19.

\(^{26}\) The Canadian Charter is discussed in chapter 3.4.

\(^{27}\) See further chapter 3.5.

\(^{28}\) Article 15(1) of the Canadian Charter. See further chapter 3. In this regard, several implementation measures in India have been adopted to give effect to the advancement of its backward classes or citizens. For example, about 50 to 27% of seats at higher learning institutions are reserved for this group, and there are a number of other opportunities. Weisskopf TE ‘Impact of reservation on admissions to higher education in India’ Economic and Political Weekly (2004) vol 39(39) 4339-4349 4341; Sundaram K ‘On backwardness and fair access to higher education: Results from NSS 55th Round Surveys 1999-2000’ Economic and Political Weekly (2006) vol 41(50) 5173-5182 5166.

constitutional right to life and dignity. This is so despite the Charter being seen as the only hope for these victims, considering that Canada is not active within the Inter-American human rights system and does not comply at all with its ICESCR obligations. Hence, the interpretation of the existing provisions of the Canadian Charter and the amendment of the Canadian Human Rights Act, 1985 to include ‘social condition’ as discrimination are sought.

6.2.3 The 1949 Indian Constitution

The 1949 Constitution\textsuperscript{30} has been the beacon of hope for poor Indians to enforce their un-entrenched right to adequate housing and the judiciary must be commended for this bold step and hailed for having restored dignity to those seen as having nothing over their heads. The judiciary’s interpretation of the existing provisions of the 1949 Constitution has demonstrated the power the judiciary possesses to extend protection to vulnerable peoples’ claims, which in an ordinary setting would be difficult to directly contest. However, such an indirect approach harbours risks, as it can easily be swept away by a subjective bench as is the case in Canada. Although this has not yet happened, it cannot be ruled out in the near future. Despite the novel interpretation by the judiciary, the lives of millions of Indians continue to deteriorate and to be further exacerbated by regular forced evictions and slum demolitions throughout the country,\textsuperscript{31} which are carried out in the name of ‘development’, such as urban ‘renewal’ schemes.\textsuperscript{32} This means that the indirect protection of the right to adequate housing by the judiciary means nothing to the poor if they still find themselves in the same deteriorating conditions despite having won their claims against government.

6.3 Housing legislation and policy

6.3.1 Housing backlog challenges: General

\textsuperscript{30} Discussed in chapter 4.2.
\textsuperscript{31} For example, Kannagi Nagar, Okkiyum Thoraipakkam, located outside Chennai, is Asia’s largest resettlement site, to which 15,000 evicted families from 68 slums have already been relocated, \textit{Human Rights in India-Status Report 2012}; prepared for India’s second Universal Periodic review at the UN, 8, available at \textless http://wghr.org/wp-content/uploads/2013/07/Human-Rights-in-India-Status-Report-2012.pdf\textgreater (date accessed 2015-04-18).
It is evident from the analysis of the three countries that they all experience severe housing shortages, backlogs, increasing slums and homelessness that significantly affect their poor populations. In Canada these constitute minorities, while in India and South Africa they are in the majority. All three countries have adopted housing legislation and/or policies. Nevertheless, governments in each of the three countries seem to be unable to coordinate and implement their shelter/housing instruments effectively and the more they try, the more the housing demand increases. From the evaluation of the three countries it is clear that each country adopted what it views as the most appropriate way to realise the right to adequate housing. However, what is essential is to determine the outcome of each county’s approach - has it managed to eradicate the homelessness, improve the poor’s’ standard of living. This must be done according to (1) whether legislative and/or other measures have been adopted, (2) that progressively realise the right and (3) do so within available resources.

6.3.2 Housing legislative and other measures

Considering that South Africa opted for legislative measures it remains questionable whether the adopted and implemented housing legislation and policy measures are reasonable and practical to achieve the progressive realisation of the right in accordance with section 26(2) of the 1996 Constitution. South Africa is the only country to have undertaken a legislative approach to implement the right to adequate housing. The analysis of ‘reasonable legislative and other measures’ adopted was evaluated extensively in the Grootboom case33 and such an analysis is considered insightful in how Canada and India could deal with the implementation of the right to adequate housing.

The positive obligation requires the state to devise a comprehensive and workable plan to meet its imposed obligations.34 A coordinated housing programme must engage with, set out clearly and allocate responsibilities and tasks to the different spheres of government. In this regard the Housing Act 107 of 1997 extensively demarcates this

33 Government of the Republic of South Africa and Others v Grootboom 2001 (1) BCLR 1169 (CC) (hereafter Grootboom).
34 Grootboom para 38.
coordination where every sphere of government is tasked with a particular responsibility of implementing the housing programme. In this way, provincial governments are given autonomy to enact housing legislation to deal with their diverse socio-economic demographics.\textsuperscript{35} However the Financial and Fiscal Commission cautioned the South African cities that due to the increasing migration of rural people and population they must have:

Better understanding of what constitutes housing demand, where housing can best be situated and how households' tenure choices and locations change over time will make it easier to plan for future housing needs, improve delivery and provide relevant housing stock in relevant locations. Failure to understand housing demand has led in some cases to inappropriate government interventions and poorly planned settlements.\textsuperscript{36}

This approach eliminates duplication and ensures a coherent as well as an effective utilisation of resources with national government as the custodian of all housing programmes. In this regard South Africa fares well in its housing legislative progress when compared with Canada and India as it has adopted an elaborate housing legislative framework that steers its coordinated housing delivery.\textsuperscript{37} Nevertheless, the mere adoption of housing legislation was found to be insufficient to warrant compliance with section 26 obligations. Rather, a reasonable and coordinated comprehensive housing programme that is practically implemented will be considered compliant.\textsuperscript{38}

It can rightly be said that the South African government has only managed to comply with the legislative adoption aspect as it continues to experience systemic implementation challenges of its adopted housing measures. The housing legislative measures can easily be measured against the constitutional prescripts of addressing the housing problems within the social, economic and historic context. Moreover, the capacity of the institutions responsible for implementing the housing programme can be

\textsuperscript{35} Section 7 of the of the Housing Act.
\textsuperscript{37} See Chapter 5.3.3 above.
\textsuperscript{38} Grootboom para 42.
examined.\textsuperscript{39} Consequently, it has been decided that a housing programme that excludes a significant segment of society cannot be said to be reasonable.\textsuperscript{40} It is evident from the analysis of Canada and India that in addition to not having a legislative framework, their policies cannot be found to be reasonable. For example the poor in Canada are vulnerable to homelessness and do not have a remedy in law. In South Africa and India a majority of the population remains poor and continues to live in sordid living conditions, despite government’s efforts to implement shelter/housing programmes.

Using the South African reasonableness standard, the Canadian and Indian governments’ adopted shelter/housing policies will probably not be found to be balanced and flexible enough to accommodate the poor’s housing needs.\textsuperscript{41} India still has a huge and ever increasing backlog of housing units, with the attendant problem of homelessness.\textsuperscript{42} Mahadeva suggests that current Indian housing challenges can be attributed mainly to the pre-reform period:

\begin{quote}
\ldots which spread over forty years (1950-51 to 1991) of development planning, was known for (a) lack of public understanding of the housing problem; (b) absence of an organized market for the supply of finance; (c) lack of integrated approach in the development of housing and basic amenities; and (d) disparities in the development between rural and urban areas. It may not be an exaggeration to say that most of the housing problems that the country is facing today are attributed to these reasons.\textsuperscript{43}
\end{quote}

It is disappointing that after 61 years, India still finds it difficult to adopt a legislative framework that will align and implement its diverse housing policies.\textsuperscript{44} This could contribute towards improving its citizens’ standard of living. Over and above the provision of shelter/housing in the form of a policy initiative in India, and despite the

\textsuperscript{39} Grootboom para 43.
\textsuperscript{40} Grootboom para 43.
\textsuperscript{44} Tiwari P ‘Housing and development objectives in India’ Habitat International (2001) vol 25 229-253 232-233.
proposed Housing Act in the first FYP,[^45] which has been kept under wraps for over 61 years, there are positive pockets of excellence in India, where a number of SERs such as the Right of Children to Free and Compulsory Education Act[^46], and the Food Safety and Standards Act,[^47] have been adopted in addition to policies. It is on the premise of this positive step that the development of a separate shelter/housing legislative framework is argued for in this study.

On the other hand, the Canadian government is reluctant to adopt a legislative right to adequate housing initiative[^48] and continues to pursue the right to adequate housing as a policy-driven measure. From the point of view of the poor it is disconcerting to see how the right to adequate housing has been worsened by the Canadian courts that consistently distance themselves from reviewing this housing policy measure.

While Canada and India have demonstrated that they are making progress towards the full realisation of the right to adequate housing by adopting various housing policies, they nevertheless have thus far failed to reduce the increasing[^49] housing demand. This is despite domestic attempts having been made to utilise the international human rights law and constitutional interpretation to give effect to the enforcement of the right to adequate housing. They have failed to realise the right to adequate housing in their housing policy implementation framework and it is an onerous task to effectively implement such housing policies. This is because they do not derive their strategy from comprehensive housing legislation that would enable the judiciary, similar to the South African Constitutional Court, to assess the extent or reasonableness of any subsequent housing policy measures that are adopted. Even though it was emphasised in the Canadian and Indian chapters of this study that these countries need to adopt separate housing legislative measures to ensure the progressive realisation of the right to

[^46]: 35 of 2009, to be amended.
[^47]: 34 of 2006.
[^48]: See chapter 3.
adequate housing, they should be doing more than merely enacting legislation to comply with their associated obligations.

6.3.3 Progressive realisation of the right to adequate housing

Considering that South Africa, Canada and India are state parties’ to the ICESCR, they are duty bound, irrespective of their national laws, to promote the ‘progressive realisation’ of the right to adequate housing by all appropriate means. Therefore, efforts undertaken by countries may differ depending on their socio-economic statuses and approaches adopted. In this regard the progressive realisation principle is seen as imposing more burdens on developed nations when measuring compliance:

Inherent in this idea of ‘progressive realization’, therefore, is the principle that countries with greater economic resources – and thus an increased capacity to devote more resources to food, education, health, and water & sanitation – have a correspondingly greater duty to ensure equitable and widespread enjoyment of ESR guarantees. Within a human rights framework states are the relevant duty-bearers; assessing ESR fulfilment means incorporating state capacity for fulfilment into the measurement of how well a country is doing in meeting its ESR obligations under international law.

This means that Canada, due to its economic status, will be held at a stricter compliance standard when compared to India and South Africa. It is evident from the study that Canada has failed to progressively realise the right to adequate housing as it merely treats the right as a policy-driven right that is not justiciable and its judiciary continues to be reluctant to extend protection to the right. Therefore, it is disappointing that, despite Canada’s strong economic status and power to improve its poor minority’s standard of living, it fails to use its resources to progressively realise the right. Despite numerous domestic efforts to progressively realise the right, the outcome of the

52 Chenwi L ‘Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ De Jure (2013) vol 46(3) 742-769 744.
evaluation of South Africa, Canada and India reveals regressive steps as more and more people’s standard of living remains vulnerable and intolerable in violation of article 2(1) of the ICESCR. Clearly the progressive realisation of the right to adequate housing is under a significant strain in South Africa, Canada and India as minimum essentials of the right are often not offered. Chenwi however warns that:

**Progressive realisation thus goes beyond achieving the minimum essential levels of a right; and beyond ensuring access to goods and services to improvements in access over time.**

Consequently, Canada’s current housing policy directive can be regarded as having taken a retrogressive step despite the fact that it has been a state party to the ICESCR since 1976 and has had ample time to devise a strategy likely to improve the standard of living of the poor. India, on the other hand, can also be said to have done little since 1979 to progressively realise the right to adequate housing considering its 61 years of its failing shelter/housing policies. In India, in terms of the 2010 Report of the Committee on Slum Statistics/Census:

**Given the relentless growth of urban population and the difficult economic environment for the poor, the housing problem will further worsen unless concerted efforts are taken to ameliorate the living conditions of the vast majority of vulnerable sections of society, i.e. the slum dweller/urban poor.**

Indeed, the Human Rights in India Status Report of 2012 found further that it is those who cannot afford a space in a slum who continue to remain homeless, being forced to live on pavements and railway platforms, under flyovers, and in other precarious conditions, with little effort being made to implement government housing programmes and policies. Tiwari and Parikh state that despite the state’s commitment to provide a liveable house of reasonable standards to all its citizens, this has been largely a

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52 Chenwi L 'Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' De Jure (2013) vol 46(3) 742-769 744.


dream. As a possible option for resolving India’s housing challenges, Mahadeva suggests that:

Given the challenges that emerged in the housing sector, the next phase of reforms needs to address four important concerns: (a) reengineering of housing policy; (b) reorganization of financial markets; (c) evolving an integrated approach; and (d) containing development disparities.

It is evident that experienced state parties’ to the ICESCR have done little to comply with their imposed Article 2(1) obligations and that the newest state party South Africa seems to be on the right path in understanding and complying with its imposed obligations. When one measures 21 years of South Africa’s democracy and over six decades of Canada and India’s exposure to the international community, only praises can be recorded that South Africa has managed, without the guidance of the ICESCR, to lay a progressive realisation foundation which will now be beneficial as a state party to the ICESCR. However, it has been found to be common for state parties’ not to comply fully with their imposed obligations irrespective of their economic status. In this regard there is a need for Canada and India to reflect on their membership of the ICESCR and how such a membership could impact on improving their poor citizen’s standard of living. South Africa, on the other hand, need not follow in these countries footsteps but needs to work hand in hand with the CESCR to improve its current legislative and policy measures to progressively realise the right to adequate housing within its available resources.

6.3.4 Utilisation of states available resources to realise the right to adequate housing

Article 2(1) of the ICESCR refers to the undertaking by state parties’ to take steps to the maximum of their available resources to achieve the progressive realisation of the

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55 Tiwari and Parikh ‘Housing paradoxes in India: Is there a solution’ 59.
56 Mahadeva ‘Reforms in housing sector in India: Impact on housing development and housing amenities’ 431-432.
58 Robertson cautions against having a definitive list of types of resources which the state must have. However five are listed that are considered most important resource to achieve ICESCR rights, and these resources are considered in measuring government compliance to include amongst other (a) financial resources, (b) human resources, (c) natural resource, (d) technology, and (e) information. see
right to adequate housing. However, there is no measuring tool for state compliance but it is left to state parties to devise such steps (in the form of actions), resources and compliance thereof. ‘Steps’ represent specific actions and ‘resources’ represent that upon which the satisfaction of the right is dependent. In this regard the law providing for the delivery of adequate housing to the poor is considered a step and the allocation of land and a budget to build houses are resources. Therefore, Robertson reiterates that there is no need for confusion in measuring state compliance between steps to be taken and resources to be allocated. As a result ‘simply taking steps may be meaningless without an accompanying resource being provided’. In this regard South Africa, Canada and India have all taken diverse steps in complying with providing housing to the poor and allocating resources to fulfil this right. For example, South Africa’s step is the constitutional and legislative adoption with regard to the right to adequate housing and allocating its available and diverse resources to achieve the housing step. Though the South African housing step is commendable it has been clouded with implementation hiccups. Similarly, India can be regarded as having taken a step through its Five Year Plans to provide the poor with shelter/housing and it has also allocated its available resources to its housing step. Although Canada can be regarded as having taken a step in adopting a housing policy in terms of Article 2(1) of the ICESCR and has allocated resources to achieve the housing step it is difficult to accept

Robertson RE ‘Measuring state compliance with the obligation to devote the ‘maximum available resources’ to realizing economic, social, and cultural rights’ Human Rights Quarterly (1994) vol 16(4) 693-714 704-713.

Robertson is of the view that ‘using a figure to measure ICESCR compliance is not possible, since the latter looks at expenditures in the context of all societal resources available. To measure only ICESCR expenditures as a percentage of government expenditures would be to fall into the obviously inequitable situation where two states with equal needs and societal resources devote the same percentage of government expenditures to realizing ICESCR rights, but one state has lower government expenditures in absolute terms.’ See Robertson ‘Measuring state compliance with the obligation to devote the ‘maximum available resources’ to realizing economic, social, and cultural rights’ 710.

Robertson ‘Measuring state compliance with the obligation to devote the ‘maximum available resources’ to realizing economic, social, and cultural rights’ 695.

Robertson ‘Measuring state compliance with the obligation to devote the ‘maximum available resources’ to realizing economic, social, and cultural rights’ 695.

South Africa a constitutional, legislative and a policy step, India and Canada to have undertaken a housing policy step to provide housing.
that its measure is fully in compliance with what Article 2(1) read with what Article 11(1) intends to achieve.\textsuperscript{63}

Essentially, utilising Robertson’s analysis, it cannot be concluded that the steps and resources undertaken by the three countries fully comply with the obligations imposed by Article 2(1) and Article 11(1) of the ICESCR. This is primarily based on the fact that to date Canada, despite its policy step and allocated resources, nevertheless has an increasing state of homelessness and does not protect violations of the right to adequate housing even though the poor constitute a minority. In India and South Africa, despite their housing policies and allocated resources to protect the right to adequate housing, the majority of their poor people continue to live in deplorable living conditions and this number has increased exponentially since 1961 in India and since 1994 in South Africa.

Therefore, due to the housing legislative and policy implementation hiccups as mentioned in chapter 3, 4 and 5 above, these three countries cannot yet be said to have used their maximum available resources adequately\textsuperscript{64} to progressively realise the right to adequate housing. The implementation of the right to adequate housing must be understood as a process to be achieved over time and to which every available resource should be allocated, in order to achieve the minimum content of the right. In that regard:

\begin{quote}
The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.\textsuperscript{65}
\end{quote}

While the three countries have demonstrated their commitment to improve the standard of living of the poor through various housing steps undertaken and the allocation of their

\textsuperscript{63} The recognition of the right to housing as a human right and the claimant's opportunity to claim for its violation and to have access to an effective remedy in accordance with Article 25(1) of the Universal Declaration of Human Rights.

\textsuperscript{64} Brennan M ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ Queensland University of Technology Law and Justice Journal (2009) vol 1 64-84 75-76.

\textsuperscript{65} UN CESC R General Comment No. 3 para 11.
available resources little seems to have improved though the years. In this regard, the study found that it is not so much a question of taking housing steps and allocating resources but on how the housing steps undertaken and resources allocated have been maximally applied to ameliorate the poor’s standard of living. The contention in this study is that every nation is capable of claiming to have undertaken a housing step and allocating its available resources but how its steps were taken and resources used remains a significant challenge to these three countries.

Despite the fact that Canada and India have vast democratic and international human rights systems experience and fundamental rights application, as well as their interpretation, they could draw an insightful lesson from South Africa’s housing step approach. The level of progress with regard to the manner in which it implemented the right to adequate housing is commendable, even though this has been coupled with some irregularities. Similar to India, in South Africa, even though it has had some success in terms of the progressive realisation of these rights through legislative and policy measures, the proliferation of informal settlements and the increasing number of poor people in need of access to adequate housing has not been prevented. Unlike India, where the emphasis seems to be only on providing shelter/housing, South Africa has entrenched ‘adequacy’ as part of housing.66 In Canada, the government seems to be reluctant to indulge on the adequacy/safety standard and continues to ignore dealing with violations of the right to adequate housing.67

6.4 The role of the judiciary in enforcing/reviewing the right to adequate housing policies

The manner in which the right to adequate housing has been interpreted by the three courts - the Supreme Court of Canada, the Indian Supreme Court and the South African Constitutional Court - differs with considerable contradictions. These courts’ diverse

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interpretation approaches are influenced by a number of factors such as the country’s preferences on whether to constitutionalise the right to adequate housing, and/or legislate on housing and/or whether to merely adopt housing as a policy driven right. This is despite the right to adequate housing being a universal fundamental right.\(^{68}\) Although the roles of the judiciaries in general can be seen as being universal in nature they are more likely to approach the same issue differently, mainly due to the diverse socio-economic and political contexts of their own countries. However, Neuman is of the view that in instances where one state’s national interpretation of a right weakens, or limits its coverage in ways that is indefensible under contemporary normative understandings of the right in international community –‘International human rights law plays its important role of critiquing positive national law in the name of universal values.’\(^{69}\)

Contrary to Neuman’s viewpoint, the interpretation of the right to adequate housing in South Africa, Canada and India has produced complex findings on the same fundamental human right. South Africa and India can be said to be in line with the universalism of the right while Canada has failed to recognise the same universalism principle. It must be remembered that the international human rights law position requires equal protection and enforcement of the right to adequate housing by all state parties’ to everyone\(^{70}\) and affords everyone an effective remedy by the competent national tribunals in cases of violation granted by the constitution or by law.\(^{71}\) It is essential to keep in mind that the ‘role of the courts is to question the decisions of the legislator and executive’\(^{72}\) and even direct the government to a construction of an appropriate remedy within a constitutional framework.

### 6.4.1 The South African judiciary

\(^{68}\) Article 25(1) of the Universal Declaration of Human Rights.

\(^{69}\) Neuman ‘Human rights and constitutional rights: Harmony and dissonance’1879.


\(^{71}\) Article 8 of the Universal Declaration of Human Rights.

\(^{72}\) Brennan ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ 74.
While South Africa has adopted a three-tier approach to implement the right to adequate housing, namely the constitutional, legislative and policy approach, Canada and India have adopted a policy approach with a human rights framework. Unlike Canada and India, which do not seem to dwell much on the historical aspects of the marginalised,\(^73\) the study shows that the Constitutional Court, in dealing with ‘right of access to adequate housing’ cases,\(^74\) cannot avoid reflecting on the history of apartheid, as it played a major role in the poor’s living conditions today. The historical background of South African society therefore constitutes an integral part of the Constitutional Court’s jurisprudential assessment. For example, in every eviction case the court deals with the illegal occupants’ circumstances\(^75\) and government’s housing policies aimed at improving the situation of these people are considered.\(^76\) Porter believes that South African jurisprudence,\(^77\) with regard to the justiciability\(^78\) of the right to adequate housing, as well as that of the Indian courts, could be helpful to Canada, despite such rights not being entrenched under the Canadian Charter.\(^79\) Clearly, it is difficult for the South African judiciary not to reflect on the housing problems in their social, economic and historical context,\(^80\) and to consider the capacity of institutions responsible for implementing the programmes.\(^81\) The study found the South African courts to be more

receptive to review the right to adequate housing cases using the apartheid historical housing chaos when compared to their Canadian and the Indian counterparts.

The Constitutional Court has done an extensive analysis of government’s housing policy from the country’s first and landmark right to adequate housing case (*Grootboom*), in as far as the reasonableness of the policy is concerned. As a result, it can rightly be said that South African courts are extremely vocal in comparison to the Canadian and Indian courts in enforcing SERs, particularly the right of access to adequate housing. More than its counterparts, the Supreme Court of Canada and the Indian Supreme Court, the Constitutional Court have, to some extent, managed to develop a reasonableness yardstick for SERs’ adjudication, a measure endorsed by Chenwi. Reasonableness supports a dynamic concept of law, where law is responsive to the changing circumstances and socio-political contexts. This reasonableness concept would be relevant to Canada, considering the fact that there seems to be a wide gap between the housing policy measure adopted and what comprises an appropriate remedy to improve the marginalised people’s standard of living. According to Quinot and Liebenberg:

> The evolution of reasonableness as a standard of review has been one of the most significant developments in both socio-economic rights and administrative justice jurisprudence in South Africa under the Constitution of the Republic of South Africa 1996.

It is evident from the implementation challenges that 21 years after the dawn of democracy, the government’s housing policy measures still fall short of meeting the reasonableness standard set by the *Grootboom* judgement and millions continue to live in sordid conditions. Despite the court having set a reasonableness standard principle

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82 Chenwi ‘Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions’ 108.
86 See chapter 5.4.3.
that is yet to be implemented by government, the Constitutional Court’s reasonableness standard principle could be adopted by the Canadian and Indian courts. Its acceptance would be insightful in determining if their adopted housing policy measures achieve the set objectives of providing adequate housing to the poor, unemployed and homeless. In contrast, the Canadian and Indian courts have limited their right to adequate housing scrutiny in the absence of comprehensive separate right to adequate housing legislation. As a result, the South African approach has enabled the judiciary to focus on determining the extent of implementation efforts undertaken by government. This differs from the Canadian and Indian approach of devising and still questioning whether or not there is a need to even assess the reasonableness of government’s adopted housing policies. In so doing, government housing measures will continuously need to be reviewed to determine if they do reflect their implementation objectives, particularly in responding to the needs of vulnerable people. Government must realise that the socio-economic needs of the marginalised vary, and that it must have appropriate plans in place to cater for even those requiring urgent accommodation, without forgetting those who are demanding permanent housing. The cases of Grootboom, People’s Union for Civil Liberties Petitioner(s) v Union of India & ORS, Grant v Canada (Attorney General) and Tanudjaja v. Attorney General (Canada) are examples of cases requiring judicial intervention through evaluation of adopted housing policies and programmes on a short and long term basis.

The Constitutional Court has been criticised on how it responded to the minimum core obligation evaluation. However it’s evaluation of the country meeting the minimum

88 Grootboom para 44.
92 Chenwi ‘Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ 744; Lehmann K ‘In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core’ American University International Law Review (2006) vol 22(1) 163-197 165 166 197; Mbazira C
core obligations has now been resurrected by South Africa’s ratification of the
ICESCR.\textsuperscript{93} Therefore, the Constitutional Court, in its future cases will be forced and will
be in a position to consider the content of a minimum core obligation, in determining
whether or not measures taken by the state are reasonable.\textsuperscript{94} This is a sphere within
which the Supreme Court of Canada and the Indian Supreme Court could have
provided clarity and guidance.\textsuperscript{95} Unfortunately both courts have failed to review the
extent of compliance with the ICESCR (minimum core obligation) at domestic level. If
these courts undertake the minimum core obligation review their comparative principles
could be brought back to South Africa in order to instil certainty, as it is evident, through
the Constitutional Court’s jurisprudence, that it may not have had all the answers or
appropriate remedies sought or from which to draw inspiration. Lessons in this regard
could be mutual.

Lastly, the criticism of the Constitutional Court could be significantly reduced if the court
acknowledged that it may be experiencing difficulty in developing a reasonable
mechanisms standard that is likely to ensure that government understands and perhaps
follows its rulings, and that they are easily enforceable. Moreover, in the same way as
the Indian Supreme Court, the Constitutional Court could appoint fact-finding missions
and/or call upon expert evidence in order to reformulate its interpretation of socio-
economic rights to include grammatical, contextual, teleological, historical and
comparative interpretation methods.\textsuperscript{96} However, calling upon the Constitutional Court to
consider fact-finding missions and experts, as witnessed under the Indian Chapter,
failed to assist the Indian Supreme Court to produce and implement comprehensive,
well-accepted SERs’ judicial rulings.

\footnotesize{\textsuperscript{93} Office of the High Commission for Human Rights ICESCR Status of ratification available at
<http://indicators.ohchr.org/> (date accessed 2015-02-02).}
\footnotesize{\textsuperscript{94} Grootboom para 33.}
\footnotesize{\textsuperscript{95} Young KG ‘The minimum core of economic and social rights: A concept in search of content’ The Yale
\footnotesize{\textsuperscript{96} Pieterse M ‘Coming to terms with judicial enforcement of socio-economic rights’ South African Journal
6.4.2 The Canadian judiciary

The study indicates that the Canadian judiciary has subjectively succeeded in suppressing the justiciability of the right to adequate housing and afforded government ammunition to continue deepening the vulnerability of poor, unemployed and homeless Canadians. The Canadian judiciary has contradicted itself in the adjudication of SERs as it did manage to safeguard the right to health\(^\text{97}\) through section 7 of the Canadian Charter despite it not being a justiciable right nor protected through separate legislation. At the same time the Supreme Court of Canada has consistently dismissed the justiciability of the right to adequate housing as it failed to indirectly resort to the Canadian Charter similar to the approach adopted in the Chaoulli v Quebec (Attorney General) case. In addition, the court relied heavily on the need to ensure separation of powers in ensuring that any judicial decision taken should not have any financial implications that would impede on government’s discretion on how to properly distribute its resources to the society.\(^\text{98}\) The rejection of adjudication occurred despite some claims based on enacted human rights legislation\(^\text{99}\) on the Gosselin v Quebec (Attorney General) case.\(^\text{100}\) In other words the Supreme Court of Canada, despite having indirectly utilised indirect provisions of the Canadian Charter to safeguard rights such as health continues to turn a blind eye to utilising the same approach to the right to housing cases. Clearly, irrespective of how unreasonable the adopted housing policy measure could be, it is evident from Canada’s viewpoint that it will not be entertained at all by the judiciary. Unlike the South African and Indian approaches, the Canadian approach does not appear to consider the history and/or any status of its poor citizens at all, since courts regard themselves as being incapable of reviewing\(^\text{101}\) SERs’ policies - they still

\(^{97}\) Chaoulli v Quebec (Attorney General) 2005 CCC 35.

\(^{98}\) Eldridge v British Columbia (Attorney General) 1997 3 SCR 624 para 85. This is despite the Supreme Court of Canada to have rejected the same wide government discretion in the same case at para 72-73.

\(^{99}\) Such as Section 45 of the Quebec Charter of Human Rights and Freedoms. It is the only provincial human rights law prohibiting discrimination on the ground of ‘social condition’ and also includes a form of social and economic rights as found in sections 39 to 48, available at <http://www.learnquebec.ca/en/content/curriculum/bal/cit_com/rights/qcrights.htm> (date accessed 2015-02-04).

\(^{100}\) 2002 4 SCR 429.

\(^{101}\) Tushnet defines judicial review as the creation of a separate institution, removed from the direct influence of politics and staffed by independent judges charged with the job of ensuring that the
shy away from SERs’ justiciability. Consequently, Wilson and Dugard capture the role of the court in this era to develop the ability of ‘listening more closely to what poor people litigants say in their papers about how the social context of poverty affects their access to socio-economic goods.’

Therefore, the Supreme Court of Canada is urged to interpret poverty as a ‘social condition’ that intrinsically prevents poor people from equally and with dignity being protected against violation of the right to adequate housing. Furthermore, it is recommended that the Supreme Court of Canada must begin to holistically interpret the right to dignity in section 7 and equality in section 15(1) of the Canadian Charter as appropriate constitutional provisions to be invoked to enforce the fundamental human right to adequate housing and even assess the reasonableness of Canada’s troubled housing policies. It is imperative that the Canadian judiciary should urgently adopt an innovative interpretation approach, as already explored by its Indian counterpart, in interpreting the Canadian Charter, in order to protect and enforce the right to adequate housing. This is based on the notion that courts are capable of exercising the duty of adjudicating substantive claims, as is done in South Africa. In this regard the South African jurisprudence could be helpful to Canada in making a concrete statement about the visibility and justiciability of the right to adequate housing and review powers. Furthermore, the Canadian legal fraternity needs to improve its knowledge of human rights and to be more receptive to a human rights approach in order to understand appropriate strategies to use when dealing with all SERs, as this is not only a constitutional imperative. At the same time it can never be said that the Canadian judiciary is not privy to the training, knowledge and resources to actually hear the right

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102 See chapter 3.
to adequate housing violation cases and competency but concerns exist on their subjective unwillingness to hold their government accountable.

On the other hand, and in order to achieve a greater impact, strategic intervention at all levels is needed, as courts cannot be seen as the only implementing agents. It is disappointing to see the Canadian judiciary being dragged into rubber stamping and refusing to review the Canadian government’s unreasonable housing policy measures. By turning a blind eye to the state of housing in Canada the judiciary can be said to be contributing to government’s view that the judiciary cannot adjudicate on this fundamental human right. In other words the Canadian courts have turned a blind eye to the historically disadvantaged communities:

Despite the above examples of judicial recognition of the socio-economic dimensions of discrimination against specific historically disadvantaged communities and groups, courts have been reluctant to recognize discrimination, when the claim is broadly linked to incidents of poverty, such as homelessness.

In this regard a historical analysis of why homeless people in Canada occupy vacant and/or public land is something that the judiciary seems reluctant to engage with in assessing the implementation failures of adopted housing policies. Such an approach has rendered the right to adequate housing merely a theoretical right and a distant dream, in comparison with the proliferation of homelessness that the domestic systems are failing to contain.

The study also found the Canadian judiciary to be selective in reviewing its powers and deliberately neglecting to undertake a proper interpretation of the existing provisions of the Canadian Charter to ensure the justiciability of the right to adequate housing. From the manner in which judicial independence is exercised in Canada it is evident that it is guaranteed to be protected and nourished by reducing the potential pressures it is likely

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105 Brennan ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ 74.
108 See chapters 3 and 4.
to face instead of maximising them. Clearly their independence is guaranteed for not dealing with SERs’ litigation. In this regard the South African Constitutional Court’s jurisprudence and its willingness to make budgetary implication remedies are insightful to Canada and it is urged to avoid making decisions similar to Eldridge v British Columbia decision. Therefore, the Canadian approach to the fundamental human right to adequate housing can be argued to be:

A related technique for reducing the tension between constitutional courts and elected governments under strong-form judicial review focuses not on safe cases or cautious judgments on the merits, but on the remedial measures that judge’s order for constitutional violations.

As a result the Canadian judiciary could learn a lot from India and South Africa about the extent of the judicial review process in SERs’ litigation and how to interpret the existing provisions of the Canadian Charter to protect the right to adequate housing.

Although Canada’s housing policy objectives could be considered ideal, the judiciary’s hesitancy to assess the reasonableness of the adopted housing policy measures to question why Canada is not committed to comply with its constitutional and international human rights standards but also the independence of the judiciary must be questioned. With these findings it is unlikely that Canada’s housing jurisprudence will become an inspiration for developing countries such as India and South Africa in terms of how to interpret and enforce the right to adequate housing.

At the same time the judiciary, particularly the Supreme Court of Canada, should without any hesitation begin to assess/review the reasonableness of the adopted housing policy measures and how they were implemented. The country’s non-

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110 Brennan ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ 76.
111 Where the court viewed itself as having a limited scope because the role of the legislature demands deference from the courts to those types of policy decisions that the legislature is best placed to make. Nevertheless, it directed the government to provide resources in ensuring a reasonable balance between competing social demands in society, without prescribing exactly how much the government must spend. See Eldridge v British Columbia (Attorney General) 1997 3 SCR 624 paras 92–93.
112 Gardbaum ‘Are strong constitutional courts always a good thing for new democracies?’ 309-310.
compliance with the CESCR Concluding observations could be improved through a judicial evaluation of its legislative housing mandate and international obligations.

6.4.3 The Indian judiciary
The research has shown how the judiciary has robustly, yet indirectly, engaged the existing constitutional provisions safeguarding the policy-driven right to adequate housing. The indirect approach of using the existing constitutional provisions to enforce the right to adequate housing is commended and, to a certain extent, seems to have a positive effect on the contestation of this much-neglected right. However, in the Olga Tellis v Bombay Municipal Corporation\textsuperscript{113} case, which was the first shelter/right to adequate housing case in India, one would have expected that a comprehensive reasonableness standard review would have been laid from which all government shelter/housing policies would be scrutinised in order to improve people’s standard of living. Therefore, the Indian Supreme Court’s approach of not fully engaging the poor’s historical circumstances and scrutinising the adopted housing policies is, to a certain extent, similar to that adopted by the Canadian judiciary.\textsuperscript{114} However, the Indian approach does seem to be more progressive than the Canadian. South Africa’s first right to adequate housing case - the Grootboom case - is constantly being referred to in shaping the implementation strategies of government’s subsequent housing policies.\textsuperscript{115} The Constitutional Court’s interpretive approach could be an inspiration to the Indian Supreme Court as it has, to date, failed to critically explore the extent or failure of India’s shelter/housing policy implementation measures in meeting the needs of the poor.

From the research it is clear that the jurisprudence of the Indian Supreme Court has little or no real impact on people’s improved standard of living through shelter/housing provision. However, in adjudicating illegal occupation cases\textsuperscript{116} the Indian Supreme Court seems to differ from South African housing jurisprudence that engages fully with the history and impact of the apartheid legacy on the country’s present implementation

\textsuperscript{113} Olga Tellis v. Bombay Municipal Corporation 1985 3 SCC 545.
\textsuperscript{114} See chapter 3.
\textsuperscript{115} Grootboom paras 41, 44, 46, 64, 83, 92.
\textsuperscript{116} People's Union for Civil Liberties Petitioner(s) v Union of India & ORS.
challenges related to shelter/housing provision. In India the judiciary has been applying remedies that have budgetary implications, although it is yet to adequately assess the reasonableness of adopted policies which could have budgetary implications. Thus, the reasonableness of the implemented housing policy measures, the poor’s historical context and the judicial review process to embody the right to adequate housing are the guiding principles upon which the Indian Supreme Court and the Supreme Court of Canada should develop their jurisprudence - some of the lessons that could be drawn from South Africa.

6.5 Political will to enforce the right to adequate housing/non-compliance record

The reluctance of the state to comply fully and on time with court orders seems to be one of South Africa and India’s challenges in ensuring the progressive realisation of the respective right to adequate housing. Therefore:

The neglect of critical issues, some of which have been raised for over ten years, and the lack of enforcement of court orders, result in people feeling neglected and unheard, often culminating in “service delivery” protests or acts of xenophobic violence.117

Shepard has pointed out that:

Socio-economic inequality and poverty constitute critical human rights challenges in an increasingly globalized world. Not only do they result in material inequities that affect everyday life; they also undermine psychological and social wellbeing.118

Therefore, it is essential that governments must be seen to have the will to improve their poor peoples’ standard of living by also complying with imposed court orders. The study found that irrespective of the adopted housing implementation approaches of these three countries none managed to fully comply with its imposed court orders. It is evident from chapter 3 that the Canadian government has been consistent in evading its constitutional responsibility by quickly raising the inapplicability of the Canadian Charter to all violations of the right to adequate housing cases. This is despite having resorted

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118 Sheppard ‘Bread and roses’: Economic justice and constitutional rights’ 228.
to the Canadian Charter in protecting and enforcing the right to health in the *Chaoulli v Quebec (Attorney General)* case as an infringement of the right to life and security. That on its own signifies the selectiveness, subjective approach, unwillingness of Canadian government and its knowledge of its court’s capability to recognise and ultimately enforce remedies related to the right to adequate housing. Thus it can be rightly be asserted that there is possibly no willingness on the part of the Canadian government to voluntarily and/or through court orders enforce any the right to adequate housing claims or orders.

On the other hand the Indian position seems similar to the South African situation regarding the commitment to realise the right to adequate housing but it fails on properly implementing court orders. With regard to South Africa, government has indicated a commitment to comply with its own constitutional obligations. However, it has failed to fully execute court orders. Furthermore, chapter 5 shows how various levels of government consistently expose the lack of understanding of imposed constitutional obligations as they have been unable to submit fully on appropriate measures adopted to realise the right to adequate housing.

Chapters 4 and 5 do not reveal an outright refusal by India and South Africa to comply with court orders but rather a systemic delay on implementing court orders. The Indian government’s position in this instance could, to a certain extent, be similar to that of South Africa, considering the fact that Ms Grootboom died without having obtained a house from government, despite her name appearing in the recorded history of shelter/right to adequate housing in South Africa. In the *Grootboom* case the court declared that the state’s housing policy was unconstitutional without prescribing criteria on how the state should comply. Some Constitutional Court decisions have been

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119 *Chaoulli v Quebec (Attorney General)* para 45.
120 See chapter 4.
121 She passed away in 2008, which was eight years after winning the case against government and was still homeless and penniless as government never complied with the Constitutional Court order. De ‘Irene Grootboom died, homeless, forgotten, no C-Class Mercedes in sight’ August 11 2008, available at <http://constitutionallyspeaking.co.za/irene-grootboom-died-homeless-forgotten-no-c-class-mercedes-in-sight/> (date accessed 2015-04-18).
122 *Grootboom* case para at paras 67, 93–99.
heavily criticised for not providing meaningful remedies to those it intends to help. For example, the *Blue Moonlight*\textsuperscript{123} decision was more theoretical in nature and constituted a weaknesses of the court in its reluctance to exercise oversight and to ensure that meaningful engagement is undertaken. Therefore to Dugard this:

> can be understood as part of the Court’s historical reluctance to maintain a supervisory role, the fact that residents were left with such problematic choices of accommodation can be traced to the Court’s refusal to provide any substantive content to the right to housing. Certainly the Court’s washing of its hands following the initial *Blue Moonlight* order has provided the space for the City to offer inhumane accommodation and/or fail to uphold orders to provide alternative accommodation.\textsuperscript{124}

In addition, the Constitutional Court has been criticised for avoiding ‘substantive development of SERs in the application of its own procedures or by relying on the remedies seen as expanding procedures that protect the poor.’\textsuperscript{125} For example, the meaningful engagement order in the *Olivia Road* case, though it was not provided for as one of its remedies, it was imposed as one.\textsuperscript{126} The same can be said for *Joe Slovo*.\textsuperscript{127} Bilchitz provides numerous approaches that the Constitutional Court can adopt to give meaningful remedies to victims of SERs violations. He proposes that while adjudicating SERs courts should make direct references to the legislative provisions and executive policies and endeavour to give effect to the legislation and policies.\textsuperscript{128} This is based on the supremacy of the Constitution where judges have the power to interpret the Constitution and make remedies that cannot be seen as invalid.\textsuperscript{129} Since the legislative and executive actions need to be evaluated in light of the constitutional standards the court is required to seriously evaluate them. He states that:

\begin{flushleft}
\textsuperscript{123} City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) (Hereafter the *Blue Moonlight* case).
\textsuperscript{126} Ray ‘Evictions, aspirations and avoidance’ 185.
\textsuperscript{127} *Joe Slovo* case para 7.
\textsuperscript{128} Bilchitz, D ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ *CCR* (2014) vol 5 297-308 301.
\textsuperscript{129} Bilchitz, ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ 301.
\end{flushleft}
the Court must not avoid making clear in such cases the respects in which the legislation reflects the standards demanded by the Constitution and which cannot therefore, for instance, be the subject of legislative amendment.\(^\text{130}\)

Lastly:

Constitutional supremacy itself requires the articulation of constitutional standards against which the exercise of legislative and executive power can be measured. The development of these standards is precisely the role of courts where they are granted the powers of judicial review.\(^\text{131}\)

Therefore the Constitutional Court did emphasise its respect for the separation of powers in the *Mazibuko* case\(^\text{132}\) and Bilchitz also reiterates that:

Courts must be conceptualised in a manner that can give concrete effect to these constitutional provisions. When courts perform this role, they therefore actively achieve what they are required to do in terms of the division of powers within these modern constitutions. That does not mean, however, that the court must not actively engage other branches in the important task of optimally realising these rights. Those branches, however, exercise their power to realise these rights within the substantive framework set by the courts.\(^\text{133}\)

As a result the court’s adopted avoidance approach seems to have exacerbated government’s lack of compliance with court orders. This has left open the possibilities of what would have happened if the court had rather imposed mere supervisory orders. Unfortunately, it is uncertain how the poor’s standard of living would have been had these countries fully complied with imposed court orders. Thus, the study exposes a disturbing view of a constitutional dichotomy of what the court sees as proper implementation/interpretation of the right to adequate housing and what government views as an adequate implementation approach. The study also brings to light that, despite various shelter/housing policies to be implemented and the court making remedies in housing cases, little or nothing is visible on improving the lives of those meant to benefit from these court orders.

It can be concluded that although courts (the Indian Supreme Court and the Constitutional Court) do try to execute their role they seem to be helpless, as nothing

\(^{130}\) Bilchitz, ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ 302.

\(^{131}\) Bilchitz ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ 302.

\(^{132}\) *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC) para 60.

\(^{133}\) Bilchitz ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ 302.
further can be done to ensure that government complies with its orders. It is yet to be determined if, despite these countries’ flourishing democracies, they will one day fully comply with judicial rulings related to SERs. On a positive note, given the democracy and rule of law that is evident in India, South Africa and Canada, it cannot be deduced that court decisions will be rejected and not complied with.

6.6 Coordination of government services to fully implement the right to adequate housing

Coordination of government services to fully implement the right to adequate housing requires a concerted effort from all stakeholders to achieve a common goal i.e. improving the poor’s standard of living through delivery of houses and reduction of housing backlogs. Implementation requires a coordinated strategy from agents. As is stated in the *Grootboom* case:

> Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need to receive it immediately. Such planning too will require proper co-operation between the different spheres of government.\(^{134}\)

It is clear that within the South African government structure there is only one government department that oversees the housing delivery mandate, while other government departments merely provide support through certain housing-related services, such as water, energy, land etc.\(^{135}\) In this regard, it has been possible for South Africa to coordinate government’s housing delivery progress since 1994. However, such progress should not be viewed as a success on its own, since on-going challenges have been noted to persist.\(^{136}\) Nevertheless, the coordination of housing delivery services under the Department of Human Settlements has proven, in South Africa, to at least inform and enhance government’s concerted approach to housing

\(^{134}\) *Grootboom* case para 68.

\(^{135}\) See chapter 5.3.

provision, as reporting is sourced from one government institution. India differs, and information is sourced from more than two departments.\textsuperscript{137} Therefore, the Indian government needs to restructure its departments in order to ensure that only one government department oversees the shelter/housing delivery mandate and has one aligned and comprehensive shelter/housing policy initiative.\textsuperscript{138}

Coordination within government is seen as a good basis for effective policy implementation as it often takes place between various government agencies at all levels of government from national to local government, simultaneously guarding against contradictions and overlapping.\textsuperscript{139} The South African Public Service Commission 2010 report found that ‘overall coordination and integration poses critical challenges to the Public Service and it requires mature institutional capacity to drive it.’\textsuperscript{140}

This is despite the fact that government has, over the years put in place clear planning frameworks aimed at promoting better coordination and effective service delivery.\textsuperscript{141} Perhaps this is the reason why India has found it so difficult, since 1951, to accurately report on how many shelters and houses have been delivered to the poor considering that several departments have adopted various housing policies that ran parallel to other existing housing policies. The South African housing implementation model makes it a lot easier to be reviewed, in comparison with the complex Indian model. As far as Canada is concerned,\textsuperscript{142} not much can be said, as the evaluation of its housing policy is merely pursued from the federal government level, with provinces and territories drawing their implementation strategy mainly from the federal state. Coordination in

\begin{footnotesize}
\textsuperscript{137} Department of Urban Development and Department of Urban Employment & Poverty Alleviation. See also chapter 4.3.
\textsuperscript{138} Human Rights in India - Status Report 2012 6.
\textsuperscript{141} Public Service Commission (2010) 18.
\textsuperscript{142} See chapter 3.3.
\end{footnotesize}
Canada will only be relevant once justiciability is resolved as it will require an identified government department to be principally responsible for the housing mandate thereby providing a coordinated framework for all provinces and territories. It is evident from this study that not all spheres of government work together to determine how to improve inadequate living conditions and eradicate homelessness. The study has indicated that one of the prevailing trends that have led to a failure in the implementation of the right to adequate housing is the haphazard approach taken by these three countries to deal with the right to adequate housing. Thus a systematic approach is required to implement the right to adequate housing and desist from merely setting out policies and allocating resources with no proper and adequate plan to coordinate their concerted effort to reduce homelessness and improve the standard of living of the poor.

6.7 Monitoring pro/regress by the national human rights commissions

The role of national human rights commissions in monitoring and enforcing the right to adequate housing cannot be underestimated. Although they have been established through legislative means in Canada, India and South Africa it is the powers that they possess that make them either a meaningful or a meaningless institution.

6.7.1 The South African Human Rights Commission

The role of the South African Human Rights Commission, despite being relatively new, is far more interesting than its Canadian and Indian counterparts. What is clear is the uniqueness and strength of the Commission in enforcing the right to adequate housing. The Commission is the only one that can separately investigate and monitor the right to adequate housing, unlike the Canadian and Indian human rights commissions that still have a long way to go before they can be equated with the South African Human Rights Commission. Although the South African Human Rights

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143 See chapter 5.6.
144 See chapters 3.5.3 and 4.7 respectively.
Commission is viewed as being the exemplary one when compared with those in Canada and India, there are weaknesses such as the manner in which it executes some of its key functions. Thus the Commission needs to open its doors to interested, resourced and capable non-governmental organisations and to work together in evaluating and monitoring government’s progress towards implementing SERs. By so doing its role will be more valuable and insightful in holding government accountable on substantive grounds.

The South African Human Rights Commission must re-evaluate the manner in which government departments compile and report on their obligations. In this regard, the protocol should be amended to highlight government’s latest progress on its previous recommendations made so that government does not have to report every year on what it did 21 years ago. This is based on the fact that the current protocol format results in government assuming that every year it requires fresh independent reports, whereas government is now 21 years into its implementation of SERs’ policies. Instead what is recommended is that more effort should be put into reviewing the current and new housing legislation and policies as well as related amendments adopted, and most importantly how these latest measures contribute towards the progressive realisation of the right to adequate housing in accordance with section 26. The latter - how government links its steps and resources to comply with section 26 obligations - continues to be the most challenging aspect. In addition, it should be the focus of the protocols to channel government’s responses to pressing socio-economic demands and how government, in a particular financial year, has attempted to implement and interpret its existing housing policies and programmes. If such proposals can be implemented, the Commission could be more effective in its approach, thereby finding a meaningful solution to the most pressing SERs entrenched in South Africa. Unfortunately, the Commission cannot learn anything from its Canadian and Indian counterparts, despite their longer period of existence. It is evident that the two commissions could benefit immensely from the South African Human Rights Commission’s work in terms of how they could reflect on the need to safeguard and monitor the right to adequate housing. However, in order to do so they require a substantial review of their respective powers
and functions, something that can only be endorsed by the political leaders of their respective governments.

6.7.2 The Canadian Human Rights Commission
Chapter 4 paints a worrying state of affairs in Canada in as far as the role of the Commission within the SERs’ discourse is concerned. The Commission’s position is worsened by the country’s position on the justiciability of all SERs. It is perhaps only when courts become more receptive to the justiciability that the Commission could begin to play an immense role. The chapter suggests that Canada revisits the Canadian Human Rights Act Review Panel Report recommendations of supporting a social condition to be added as a discrimination factor. It is at this juncture that the Commission’s rather redundant position could be revived to play a proper investigative and monitoring role of the right to adequate housing, thereby unburdening the Canadian courts.

6.7.3 The Indian National Human Rights Commission
Similar to the Canadian situation, the chapter on India reveals the limited powers of the Indian Human Rights Commission to investigate certain human rights cases. In the same way as what is suggested for Canada, the chapter advises that India strengthen the Commission’s powers by amending the Protection of Human Rights Act to include enforcement and monitoring of all SERs. It is evident that the Canadian and the Indian Human Rights Commissions could draw a significant inspiration from the South African Human Rights Commission on how SERs are investigated and enforced. Unfortunately their founding statutes would have to be amended, a task that, when looking at these two governments’ views of the matter at hand, seems insurmountable.

6.8 States parties’ compliance with their international human rights obligations
The enforceability of the right to adequate housing in complying with ICESCR obligations is an intricate matter. Moreover, there are inherent weaknesses in the

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147 See chapter 4.7.
148 Section 12 of the Protection of Human Rights Act 43 of 2006, as amended.
149 See chapter 2.2.
international human rights system to enforce compliance with the ICESCR. In this regard the CESCR plays a limited role. The level of international compliance with the ICESCR is enhanced only when government legislates the right to adequate housing and/or when the judiciary is free to review the justiciability of all SERs. What the research reveals is that South Africa, India and Canada have not ratified the Optional Protocol to the ICESCR.\footnote{UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117 available at <http://www.refworld.org/docid/49c226dd0.html> (date accessed 2015-04-19).} As a result it is patently clear to victims of the right to adequate housing infringements that these countries do not intend anytime soon, to change their behaviour of non-compliance. It is an international norm that a country should endeavour to align its domestic laws with international obligations in order to meet its international obligations.\footnote{Art 27 Vienna Convention on the Law of Treaties 1969 states that ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. This rule is without prejudice to Art 46, Treaty Series, vol 1155 331, para 229.}

For India and Canada, non-compliance with their imposed ICESCR obligations has, since 1979, been the norm. As the oldest ICESCR members they are still struggling to understand and interpret their international obligations and the CESCR’s concluding observations reports reiterate persistent non-compliance patterns. What is evident from this study is that Canada and India’s international images have been tarnished by their non-compliance records with the CESCR/ICESCR imposed international obligations, thereby thwarting their intentions to look good in the eyes of the international community and as law-abiding states.\footnote{Warioba JS ‘Monitoring compliance with and enforcement of binding decisions of International Courts’ Max Planck Yearbook of United Nations Law (2001) vol 5 41-52 51.} Therefore, the two countries’ lack of international treaty compliance and reporting creates a bad image of their progress, openness to accepting criticism and building a better country for their inhabitants through international scrutiny.

Pursuing the right to adequate housing as a policy measure clearly only results in Canada and India failing to comply for the most part with the ICESCR’s imposed obligations of adopting a legislative measure in accordance with article 2(1) of the ICESCR. Even though the Indian judiciary manages to indirectly safeguard the right to
adequate housing using the constitutional provisions, the country’s non-compliance with its article 2(1) ICESCR obligations remains unjustified. While Canada and India have already complied with the other measure (housing policy) requirement within article 2(1) of the ICESCR, they fall short of complying with the progressive realisation principle and within their available resources. This failure to adopt a legislative measure and, to a great extent, the manner in which it is dealt with from the executive to the judicial arms, continue to further deepen poverty and marginalise the poor, particularly in Canada, and to a certain extent in India.

In this regard South Africa’s compliance with its obligations will come under scrutiny as a result of its recent ratification of the ICESCR. However, South Africa should not be in any doubt of not complying with the ICESCR requirements, as it already appears to be on the right path and will merely be looking forward to the guidance of the CESCR. In addition and, once again, unlike India and Canada, South Africa should be commended for having, without being a state party to ICESCR’s expertise or concluding observations, to have made such tremendous progress in implementing the right to adequate housing. Now that it has ratified the ICESCR South Africa could become a leading example in terms of the protection of the right to adequate housing, although the sustainability of providing housing to the poor is already being questioned by the Financial and Fiscal Commission 2013 report.

6.9 States parties’ compliance with their regional human rights obligations

Canada’s performance at the regional level is disappointing, considering that it did not ratify most pertinent regional human rights instrument, namely the American Convention. This is seen as a calculated reluctance and failure to ratify as it means

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153 To have constitutionally entrenched the right to housing under section 26 of the 1996 Constitution, and went on to legislate the right to housing in terms of the Housing Act and further adoption of a comprehensive housing policy.

154 See chapter 3.7.

that Canada cannot be brought before the Inter-American Court of Human Rights.\footnote{The Inter-American Court of Human Rights, which is an autonomous judicial institution of the Organization of American States established in 1979, and whose objective is the application and interpretation of the American Convention on Human Rights and other treaties concerning this same matter. Inter-American Court on Human Rights available at <http://www.corteidh.or.cr/index.php/en> (date accessed 2015-04-19).} By ratifying the American Convention, Canada’s domestic approach to SERs could be challenged before the Inter-American Court, thereby affording its citizens an opportunity to contest the reasonableness of measures implemented to realise the right to adequate housing.\footnote{Cornish M and Shen V Ten reasons Canada should ratify the American Convention on Human Rights available at <http://www.cba.org/CBA/Sections_International/pdf/tenreasonsforACHRratification.pdf> (date accessed 2015-02-03).} By ratifying the American Convention, Canada would further be enabled to ratify the amended Protocol of San Salvador in the area of SERs.\footnote{Additional protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ‘Protocol of San Salvador, adopted 17 November 1988, at San Salvador, OAS, Treaty series No, 69 available at <http://www.oas.org/juridico/english/treaties/a-52.html> (date accessed 2015-04-19).} In other words, Canada’s SERs’ adjudication is essentially excluded from the Inter-American human rights enforcement system. The Inter-American court has proven to be an effective enforcement system capable of enforcing the un-entrenched right to adequate housing against state parties’ at domestic level. Moreover, by playing an active role in the regional human rights system, Canada’s increased participation within the Inter-American system would undoubtedly give the region credibility and authority, and possibly advance its domestic interpretation, understanding and application of all SERs. The possible role that Canada could play within the Inter-American Commission and Inter-American Court in as far as knowledge and expertise are concerned is of huge significance.\footnote{Cornish and Shen Ten Reasons Canada should ratify the American Convention on Human Rights.} Clearly, as a demonstration of the progressive steps being made towards realise all SERs, Canada could initially ratify such SERs’ instruments, while expressing some reservations about certain provisions and deciding how to comply with all provisions. Canada’s reluctance to participate fully in the Inter-American human rights system can be seen as a step backwards in terms of the full realisation of the right to adequate housing as adjudicative rights. Consequently, it is the poor who are paying a high price for such a failure and are now left out in the cold, without any hope of getting an effective and efficient remedy.

\footnote{Cornish M and Shen V Ten reasons Canada should ratify the American Convention on Human Rights available at <http://www.cba.org/CBA/Sections_International/pdf/tenreasonsforACHRratification.pdf> (date accessed 2015-02-03).}
There are inherent weaknesses in the African human rights system. The failures range from the challenges faced by its enforcement mechanisms, an absence in making concrete concluding observations on facts presented to the African Commission and the continued resistance to establishing a powerful regional judicial mechanism. The research shows the vulnerability of all SERs’ claims and hunger of the African region to have a stronger and effective enforcement system in the form of the operating African Court on Human and Peoples Rights and even the awaiting African Court of Justice and Human Rights. As a result of this enforcement gap African people do not have a remedial regime as intricately developed as that of the Inter-American system, motivating national justice systems to act — and to learn and care about regional rights law. It is indeed still a (near) dream that the African human rights system will have a court similar to the Inter-American court playing a key role in monitoring its orders within its state parties' domestic systems. It is a role that is performed in collaboration with the domestic courts, and it would have been ideal for the African Court on Human and Peoples Rights to have tested how its relationship would have been with domestic courts on this matter before the African Court of Justice and Human Rights comes into operation in order to address right to adequate housing violations taking place. In this regard, the American system is a beacon of hope for victims of the right to adequate housing who may have been denied an effective remedy by the domestic legal system. However, there is already a dark cloud over this court, as most African states have a tendency to be reluctant to comply even with their own domestic court judgments. Even so, the African human rights system has waited a long time for the judicial body, and it is appropriate that the efficacy of the court be tested once it comes into force.

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160 See chapter 5.7.3.
162 Mbodenyi *International human rights and their enforcement in Africa* 427.
The challenge is even more complex within Asia as the region still grapples with the conflict between its Asian values and its understanding and application of human rights, which are seen to be a Western influence. The culture of human rights in India seems to have prepared it to be willing to be an active member of the region’s human rights system and to play an active role in the development and composition (expert knowledge) of an institutional framework, as articulated in the Asian Human Rights Charter. In establishing a unified regional human rights system, the Asian region, besides holding firm to its unique values, firstly needs to embrace the concept of the universality of human rights that

Recognises the vulnerability of every human being to disabling and degrading suffering and the capacity of each to contribute to the continuing maintenance, negotiation and reconstruction of local and national cultures, and thereby to the common global good.\textsuperscript{165}

Freeman considers the possibility of universal human rights being in conflict with the requirements of local cultures. However, such conflicts are prevalent within cultural, moral and political systems, whether they aspire to be universal or are narrowly particularistic.\textsuperscript{166} Therefore, despite the accusations levelled by the West against Asian states, the universality of human rights cannot be seen to be in serious dispute, considering the fact that many Asian countries, such as India, explicitly already affirm the universality of human rights.\textsuperscript{167} Consequently, it is not justified for such values to be used as an excuse for the region not to come together and embrace its values within a unified regional human rights system.

6.10 Final concluding remarks
This study has contradicted Erasmus’s assertion that the socio-economic demands of people in developed economies are better addressed than developing ones,\textsuperscript{168} considering the fact that Canada’s housing position is deepening the vulnerability of its

\begin{itemize}
  \item\textsuperscript{165} Freeman M ‘Universal rights and particular cultures’ in Jacobsen M and Bruun O (eds) \textit{Human rights and Asian values: Contesting national identities and cultural representations in Asia} (2000) 53.
  \item\textsuperscript{166} Freeman ‘Universal rights and particular cultures’ 53.
\end{itemize}
poor people, despite its well-developed economic status. While Canada is economically better placed than South Africa and India, the country is facing multifaceted SERs’ implementation challenges more or less similar to South Africa and India.

The conclusions reached are evidence that no matter what housing implementation strategy has been adopted there is an ever-increasing demand for housing and none of the approaches adopted have managed to adequately eradicate housing backlogs and/or improve the standard of living of the poor in South Africa, Canada and India. The lack of a comprehensive national shelter/housing policy strategy as well as a coordinated government strategy is possible contributing factors. A policy could address the needs of disadvantaged and marginalised individuals and groups, including those living in slums and reportedly growing in number, by providing them with low-cost housing units. It is worrisome that housing steps and resources have been allocated and utilised on chasing housing backlogs, as opposed to addressing prevalent housing demands, yet such backlogs continue to increase or even spiral out of control in all the three countries. Clearly, it seems as if the provision of housing to the poor by all three governments is not making an impact where it is meant to. This is based on the fact that the number of those still demanding housing continues to grow, and exceeds the number to whom the government has already delivered housing. While there is a political commitment to improve the poor’s standard of living through housing steps and resources allocated to housing, there is a lack of a concerted effort on the part of governments to take proactive measures to implement their housing policies, review their policies, deal with systemic challenges and comply with court orders. As a result a systematic approach by these three countries is required. In order to improve the poor’s standard of living all levels of government, regardless of which implementation approach they have adopted, have to work together. The extent of the role that courts can play in ensuring the meaningful enjoyment of the right to adequate housing is central. However, the approach of the court must be a human rights approach. What is

clear, though, is that courts should remain a catalyst of hope for those who are vulnerable and marginalised, because it is the same institution that holds the key to the enforcement of the right to adequate housing if not directly entrenched. As a result, how courts interpret fundamental rights lead to either the enjoyment or the deprivation of such rights.

This research set out to consider whether South Africa can draw any inspiration from Canada and/or India in implementing the right to adequate housing. What the research found is, in fact, the opposite where Canada and India can draw significant lessons from South Africa’s adequate housing implementation approach. South Africa has clearly gone to great lengths to ensure the justiciability of the right to adequate housing. What old democracies have clearly failed to achieve is what a young democracy such as South Africa has managed to achieve in only 21 years and it continues to be a leading inspiration in the field of the right to adequate housing jurisprudence worldwide.

Nevertheless one can ask what possible alternatives exist to assist these three governments’ struggles to eradicate housing backlogs, homelessness and/or improve the poor’s standard of living. It is a question that cannot be answered with a single approach but a diverse one. First, it would be ideal if these three countries could, at the outset, review their current housing delivery models, pay particular attention to the systemic challenges and devise plans to tackle the identified bottlenecks. Having the political will to address the challenges head-on is an essential starting point. This includes respecting the decisions of the courts, taking seriously the role of oversight and reporting institutions and having regard to international obligations.
Bibliography

Table of cases

African Commission on Human and Peoples’ Rights

Centre for Minority Rights Development and Others v Kenya (2009) AHRLR 75 (ACHPR 2009)

Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Sudan Human Rights Organisation and Another v Sudan (2009) AHRLR 153 (ACHPR 2009)


Canada

Baker v Canada (Ministry of Citizenship and Immigration) 1999 2 SCR. 817
Calder v Attorney General of British Columbia 1973 1 SCR 313
Chaoulli v Quebec (Attorney General) 2005 CCC 35
Delgamuukw v British Columbia 1997 3 SCR 1010
Egan v Canada 1995 (2) SCR 513
Eldridge v British Columbia (Attorney General) 1997 3 SCR 624
Gosselin v Quebec (Attorney General) (2002) 4 SCR 429
Grant v Canada (Attorney General) (2010), 77 OR (3d) 481 (ONSC)
Irwin Toy Ltd v Quebec (Attorney General) 1989 1 SCR 927
Law v Canada (Minister of Employment and Immigration) 1999 1 SCR
Mohamed v Metropolitan Toronto (Department of Social Services) 1996 133 DLR.
Newfoundland (Treasury Board) v N.A.P.E 2004) 3 SCR 381
Nova Scotia Court of Appeal SCA No. 02681, 1993
R v Askov 1990 2 SCR 1199
Schachter v Canada 1992 2 SCR 679
Silano v British Columbia 1987 42 DLR
Slaight Communications Inc. v Davidson 1989 1 SCR 1038
Tanudjaja et al. v Attorneys General of Ontario and Canada, C57714, 04/10/13
Tanudjaja et al. v Ontario and Canada Court File No. CV-10-403688
Tanudjaja v Attorney General (Canada) (Application) 2013 ONSC 5410 (CanLII)
Victoria (City) v Adams 2008 BCSC 1363

India
Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan 1997 11 SCC 121
Ahmedabad Municipality Corporation v Nawab Khan Gulab Khan & ORS [1996] INSC 1300
B.Krishna v Union of India 1990 3 SCC 65
Bandhua Mukti Morcha v Union of India 1984 3 SCC 161
C.E.S.C. Ltd. v Subhash Chandra Bose 1992 1 SCC 441
Chameli Singh v State of Uttar Pradesh AIR 1996 SC 1051
Francis Coralie Mullin v The Administrator, Union Territory of Delhi 1981 2 SCR 516
Gauri Shankar v Union of India 1994 6 SCC 349,
Gramophone Company of India Ltd. v Birendra Bahadur Pandey AIR 1984 SC 667
Jolly George Varghese v Bank of Cochin A.I.R. 1980 SC 470
M.C.Mehta v Union of India 1998 9 SCC 591
M/s Shantistar Builders v Narayan Khimalal Totame (1990) 1 SCC 520
Madras v Champakam Dorairajan 1951 SCR 525
Maneka Gandhi v Union of India A.I.R. 1978 SC 597

Mohini Jain v State of Karnataka A.I.R. 1992 SC 1858

Mukesh Advani v State of Madhya Pradesh AIR 1985 SC 1368

Municipal Corporation of Delhi v Gurnam Kaur 1989 1 SCC 101

Narendra Kumur Chandla v State of Haryana 1994 4 SCC 460 461

Olga Tellis v Bombay Municipal Corporation 1985 3 SCC 545

Peoples’ Union for Civil Liberties Petitioner(s) v Union of India & ORS Supreme Court of India Case 2012

Randhir Singh v Union of India 1982 1 SCC 618


Sheela Barse v Union of India 1988 4 SCC 234 234 or 1988 AIR (SC)

State of Punjab v M.S. Chawla 1996 Supp. 10 SCR 279

Sunil Batra v Delhi Administration A.I.R. 1986 SC 180


Unnikrishnan J.P. v State of Andhra Pradesh 1993 1 SCC 645


Vishaka v State of Rajasthan 1997 6 SCC 241

Inter-American Commission on Human Rights

Carlos Martinez Riguero Nicaragua, Resolution No 2/87, Case No 7788, Nicaragua, March 27 1987

Communidad Yanomami v Brazil Resolution No 12/85, Case No. 7615 Brazil, March 5 1986

Corumbiara v Brazil Report No 32/04, Case No 11.556, March 11 2004

Edward Darmburg v Suriname Resolution No 19/89, Case 10.117, September 27 1989
Humberto Rubin et al. v Paraguay Resolution No 14/87, Case No 9642, March 28 1987, OEA/Ser.L/V/II.71, Doc. 9 rev.1, 22 September 1987

James Terry Roach and Jay Pinkerton v United States, Resolution No 3/87, Case No 9647 September 22 1987

Leon Thebaud v Haiti Resolution No 41/83, Case No 3405 September 26 1983

Octave Cayard, v Haiti Resolution No 15/83, Case No 2976, June 30 1983


U.S. Military Action in Panama, Report No 31/93, Case 10.573, United States, October 14 1993

Inter-American Court on Human Rights

Aloeboetoe et al v Suriname, Judgment of September 10, 1993, (Reparations and Costs)


Juvenile Reeducation Institute v Paraguay, Judgment of September 2 2004, (Preliminary Objections, Merits, Reparations and Costs)

Loayza-Tamayo v Peru, Judgment of June 3, 1999, (Interpretation of the Judgment of Reparations and Costs)

Mayagna (Sumo) Awas Tingni Community v Nicaragua, Judgment of August 31, 2001, (Ser. C) No. 79 (2001)

Moiwana Community v Suriname, Judgment of February 8, 2006 (Interpretation of the Judgment of Merits, Reparations, and Costs)

Moiwana Community v Suriname, Judgment of June 15, 2005, (Preliminary Objections, Merits, Reparations and Costs)


Yakye Axa Indigenous Community v Paraguay, Judgment of June 17 2005, (Merits, Reparations and Costs)
South Africa

Abahlali base Mjondolo Movement of South Africa and Another v Premier of the Province of KwaZulu–Natal and Others 2010 (2) BCLR 99 (CC)

City of Cape Town v Rudolph and Others 2003 (11) BCLR 1236 (C)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC)

City of Johannesburg v Rand Properties (Pty) Ltd and Others 2007 (1) SA 78 (SCA)

Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 2014 (1) All SA 386 (SCA)

Ex-parte Chairperson of the Constitutional Assembly In re: Certification Application of the Constitution of the Republic of SA 1996 (4) SA 744 (CC)

Fischer v Persons Unknown 2014 (3) SA 291 (WCC)

Government of the Republic of South Africa and Others v Grootboom 2001 (1) BCLR 1169 (CC)

Jaftha v Schoeman and Others Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

Khosa v Minister of Social Development 2004 (6) SA 505 (CC)

Lingwood and Schon v The Unlawful Occupiers of Erf 9, Highlands 2008 (3) BCLR 325 (W)

Maphongo v Aengus Lifestyle Properties 2012 (3) SA 531 (CC)

Mazibuko & Others v City of Johannesburg and Others 2010 (3) BCLR 239 (CC)

Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others 2006 (8) BCLR 872 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC)

Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another 2001 (7) BCLR 652 (CC)

Motswagae v Rustenburg Local Municipality 2013 (2) SA 613 (CC)

Nokotyana v Ekurhuleni Metropolitan Municipality 2010 (4) BCLR 312 (CC)
Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others 2008 (5) BCLR 475 (CC)
Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another [2012] ZACC 9

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 CC

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

President of the Republic of South Africa and Other v Modderklip Boerdery (Pty) Ltd (Agri SA & Others, Amicus Curiae) 2005 (5) SA 3 (CC)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2009 (9) BCLR 847 (CC)

Schubart Park Residents’ Association and Others v City of Tshwane Metropolitan Municipality and Another 2013 (1) SA 323 (CC)

Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC)
Constitutions

Burkina Faso Constitution 1991

Canada: Constitution Act of 1867 (also known as the Canadian Charter of Rights and Freedoms)

Constitution of Ghana 1992

Constitution of India 1949

Constitution of the Democratic Republic of Congo 2005


Constitution of the Kingdom of Cambodia 1993

Constitution of the Republic of Korea 1987

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa 1996

Constitution of the State of Bahrain 2002
### Table of Legislation

**Canada**

- Ontarians with Disabilities Act 2001
- Residential Tenancies Act R.S.N.S, 1989

**India**

- Food Safety and Standards Act 2006
- Protection of Human Rights Act 1993
- Protection of Human Rights Act 2006
- Right of Children to Free and Compulsory Education Act 2009

**South Africa - national**

- Development Facilitation Act 67 of 1994
- Extension of Security of Tenure Act 62 of 1997
- Home Loan and Mortgage Disclosure Act 63 of 2000
- Housing Act 107 of 1997
- Housing Consumers Protection Act 95 of 1998
- Housing Development Agency Act 23 of 2008
- Interim Protection of Informal Land Rights Act 31 of 1996
- Land Reform (Labour Tenants) Act 3 of 1996
- Less Formal Township Establishment Act 113 of 1991
- National Building Regulations and Building Standards Act 103 of 1977
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
Rental Housing Act 50 of 1999

Social Housing Act 16 of 2008

South African Human Rights Commission Act 40 of 2013

Spatial Planning and Land Use Management Act 6 of 2013

**South Africa – provincial**

Gauteng Housing Act 6 of 1998

Free State Provincial Housing Act 7 of 1999

Limpopo Housing Act 2 of 2006

Western Cape Housing Development Act 7 of 1999
Table of policies

Canada


Investment in Affordable Housing 2011-2014 Annual Public Reporting on Outcomes 2012-2013  
http://nwthc.gov.nt.ca/_live/documents/content/Investment%20in%20Affordable%20Housing%202012-2013%20Report%20Final.pdf

Investment in Affordable Housing 2011-2014 Framework Agreement  


Northwest Territories - Investment in Affordable Housing 2011-2014 Annual Public Reporting on Outcomes 2012-2013,  
http://nwthc.gov.nt.ca/_live/documents/content/Investment%20in%20Affordable%20Housing%202012-2013%20Report%20Final.pdf

Ontario Agreement for Investment in Affordable Housing 2011 – 2014 Agreement made as of April 1, 2011  

India

Five year plans in India: Policies and programmes for urban development Indian economy 2013  

Ministry of Housing and Urban Poverty Alleviation

Housing and Urban Policy in India  
http://mhupa.gov.in/policies/index2.htm


Ministry of Housing and Urban Poverty Alleviation Guidelines for Preparation of Slum Free City Plan of Action 2013 – 2022  
http://mhupa.gov.in/ray/RAYGuidelinesSFCP.pdf

Report of the Committee on Slum Statistics/Census National Building Organization 2010  
The Scheme of Affordable Housing in Partnership
http://mhupa.gov.in/w_new/AffordableHousing.pdf

Planning Commission

First Five Year Plan (1951-1956), Housing Chapter 35
http://planningcommission.gov.in/plans/planrel/fiveyr/index2.html

Second Five Year Plan (1956-1961), Housing, chapter 26

Third Five Year Plan (1961-1966) Housing and Urban and Rural Planning, Chapter 33
http://planningcommission.gov.in/plans/planrel/fiveyr/3rd/3planch33.html


Fifth Five Year Plan (1974-1979)
http://planningcommission.gov.in/plans/planrel/fiveyr/5th/5vfore.htm

Sixth Five Year Plan (1980-1985) Housing, Urban Development and Water Supply, chapter 23
http://planningcommission.gov.in/plans/planrel/fiveyr/6th/6planch23.html

Sixth Five Year Plan: (1980-1985) - Mid Term Appraisal
http://planningcommission.nic.in/reports/publications/mta_6fyp.pdf

http://planningcommission.nic.in/reports/publications/mta_7fyp.pdf

http://planningcommission.nic.in/plans/planrel/fiveyr/index1.html

http://planningcommission.nic.in/plans/planrel/fiveyr/index1.html

http://planningcommission.nic.in/plans/planrel/fiveyr/index9.html

http://planningcommission.nic.in/plans/mta/mta-9702/mta-ch11.pdf

Tenth Five Year Plan (2002-2007), vol II: Sectoral Policies and Programmes, chapter 6.1
http://planningcommission.nic.in/plans/planrel/fiveyr/10th/vol_2/10th_vol2.pdf
http://planningcommission.nic.in/plans/planrel/fiveyr/10th/default.htm


Eleventh Five Year Plan (2007-2012), Inclusive Growth vol I

Eleventh Five Year Plan (2007-2012) Mid-Term Appraisal, chapter 12: Rural Development
http://planningcommission.nic.in/plans/mta/11th_mta/chapterwise/chap12_rural.pdf

Eleventh Five Year Plan - (2007-2012): Rapid Poverty Reduction,

Eleventh Five Year Plan 2007-2013, Vol. II: Social Sector
http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v2/11th_vol2.pdf

http://planningcommission.nic.in/plans/planrel/12thplan/pdf/vol_1.pdf

Guidelines for Interest Subsidy Scheme for Housing the Urban Poor: February 2009

Inclusive Growth: vol I

Provision of Basic Services to Urban Poor ULB Level Reform
http://www.indiaurbanportal.in/reforms/local/BasicService_UrbanPoor.pdf

Rajiv Awas Yojana: Guidelines for Slum-free City Planning

South Africa

A New Housing Policy and Strategy for South Africa 1994

Breaking New Ground: Comprehensive Plan for Housing Delivery

438
Human Settlement Policy and Budget Speech 2015/16 Policy and Budget Speech, delivered by MEC for Human Settlements-Ms Helen SAULS-August at the Eastern Cape Provincial Legislature, 19 March 2015


National Norms and Standards for the construction of stand-alone residential dwellings financed through National Housing Programmes: Technical Guidelines 21


The National Housing Code: Emergency Housing Programme-part 3 vol 4


The National Housing Code: Financial Interventions - Individual Subsidies, 13 vol 3


The National Housing Code: Incremental Interventions; vol 4


The National Housing Code: Rural Interventions: Communal Land Rights vol 5


The National Housing Code: Social and Rental Interventions - Institutional Subsidies


The National Housing Code: Social and Rental Interventions - Social Housing Policy - Part 3


439


Books and chapters in books


Church J, Schulze C and Strydom H *Human rights from a comparative international law perspective* (2007)


Ethridge ME (ed) *The political research experience: Readings and analysis* (2002)


Hohmann J *The right to housing: Law, concepts, possibilities* (2013)


Krause C and Rosas A (eds) *Economic, social and cultural rights* (2001) 2ed


Mbazira C *You are the ‘weakest link’ in realising socio-economic rights: goodbye-strategies for effective implementation of court orders in South Africa* (2008)

Mbondenyi MK *International human rights and their enforcement in Africa* (2011)

McLean K *Constitutional deference, courts and socio-economic rights in South Africa* (2009)


Spier A *Beating the housing crisis: Strategic options for the next two decades* (1989)

Tushnet M *Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law* (2008)

**Theses**


Journal articles


Barnes BR and Milovanovic M ‘Class, resistance, and the psychologization of development in South Africa’ Theory & Psychology (2015) 1-17


Bilchitz, D ‘Avoidance remains avoidance: Is it desirable in socio-economic rights cases?’ CCR (2014) vol 5 297-308


Birchfield L and Corsi J ‘Between starvation and globalization: Realizing the right to food in India’ Michigan Journal of International Law (2009-2010) vol 31 691-764


Brennan M ‘To adjudicate and enforce socio-economic rights: South Africa proves that domestic courts are a viable option’ *Queensland University of Technology Law and Justice Journal* (2009) vol 1 64-84


Chenwi L ‘Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance’ *De Jure* (2013) vol 46(3) 742-769


Christmas A ‘Modderkilp-evictions and the right of access to adequate housing’ *ESR Review* (2003) vol 4(3) 4-7


Corder CK ‘The reconstruction and development programme: success or failure?’ Social Indicators Research (1997) vol 41(1/3) 183-203

Cross C and Seager JR ‘Towards identifying the causes of South Africa’s streets homelessness: Some policy recommendations’ Development Southern Africa (2010) vol 27(1) 54-81


De Los Compos AF Access to Court (IACHR)-From Locus Standi to Jus Standi European Public Law Series (2008) vol XCIV 15-24


Dennis JD and Stewart DP ‘Justiciability of economic, social and cultural rights: Should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?’ The American Journal of International Law (2004) vol 98(3) 462-515

Dugard, J ‘Beyond Blue Moonlight: The implications of judicial avoidance in relation to the provision of alternative housing’ CCR (2014) vol 5 265-296
Du Plessis J ‘The growing problem of forced evictions and the crucial importance of community-based, locally appropriate alternatives’ *Environment and Urbanization* (2005) vol 17 123-134


Felner E ‘Closing the ‘escape hatch’: A toolkit to monitor the progressive realization of economic, social, and cultural rights’ *Journal of Human Rights Practice* (2009) vol 1(3) 402-435


Gilbert A ‘Helping the poor through housing subsidies: lessons from Chile, Colombia and South Africa’ *Habitat International* (2004) vol 28(1) 13-40


Joireman SF ‘Colonization and the rule of law: comparing the effectiveness of common law and civil law countries’ Constitutional Political Economy (2004) vol 15 315–338


448
Kenna P ‘Can housing rights be applied to modern housing systems?’ International Journal of Law in the Built Environment (2010) vol 2(2) 103-117


King P ‘Housing as a freedom right’ Housing Studies (2003) vol 18(5) 661-672


Leckie S ‘Housing as a human right’ Environment and Urbanisation (1989) vol 19(2) 90-108


Moore E and Skaburskis A ‘Canada’s increasing housing affordability burdens’ *Housing Studies* (2004) vol 19(3) 395-414


Mmusinyane B ‘South Africa’s poverty alleviation strategy through housing: Chasing the 2015 Millennium Development Goals’ pragmatic?’ (2014) *Int. J. Private Law* vol 7(1) 40-52


Neff EC ‘From equal protection to the right to health: Social and economic rights, public law litigation, and how an old framework informs a new generation of advocacy’ *Columbia Journal of Law and Social Problems* (2009) vol 43 151-181


Pienaar JM ‘The housing crisis in South Africa: will the plethora of policies and legislation have a positive impact?’ *South African Public Law* (2002) vol 17(1) 336-370


Swaminathan M ‘Excluding the needy: The public provisioning of food in India’ Social Scientist (2002) vol 30(3-4) 34-58


Tiwari P ‘Housing and development objectives in India’ Habitat International (2001) vol 25 229-253


Warioba JS ‘Monitoring compliance with and enforcement of binding decisions of international courts’ Max Planck Yearbook of United Nations Law (2001) vol 5 41-52


Williams JC ‘The politics of homelessness: Shelter now and political protest’ Political Research Quarterly (2005) vol 58(3) 497-509


Internet sources
African Human Rights System Instruments and Documents


African Commission on Human and Peoples Rights
About us http://www.achpr.org/about/


Presentation of the third activity report of the African Commission by the Chairman Umosurike U to the 26th session of heads of state and government of the Organisation of African Unity, 9-11 July 1990

Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Twenty-third ordinary sessions of the Assembly, held in Malabo, Equatorial Guinea, 27 June 2014
http://www.au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20%20EN_0.pdf


Protocol on the Statute of the African Court of Justice and Human Rights, Adopted by the eleventh ordinary session of the Assembly, held in Sharm El-Sheikh, Egypt, 1st July 2008

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples’ Rights,


Resolution 252: Resolution on the renewal of the mandate of the working group on economic, social and cultural rights in Africa, available at
http://www.achpr.org/sessions/54th/resolutions/262/

Rules of Procedure of the African Commission on Human and Peoples’ Rights

The African Court on Human and Peoples Rights has dealt with about 24 cases none of which are related to SEs claims. See African Court on Human and Peoples Rights ‘Finalised cases and decisions’

Working Group on Economic, Social and Cultural Rights
http://www.achpr.org/mechanisms/escr/
African Union
http://www.au.int/en/about/constitutive_act
List of Countries which have Signed, Ratified/Acceded to the African Charter on Human and People’s Rights’-as of 21/01/13

The African Court on Human and Peoples’ Rights
http://www.au.int/en/organs/cj

Asian human rights system documents

Asian Human Rights Charter - A Peoples-Charter’ Declared in Kwangju, South Korea on 17 May 1998, on Occasion of the 50th Anniversary of the Universal Declaration of Human Rights (Asian Charter)
http://www.refworld.org/pdfid/452678304.pdf

http://www.humanrights.asia/about


Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration), 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991
http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Ffaculty.washington.edu%2Fswhiting%2Fpols469%2FBangkok_Declaration.doc&ei=tjVNVeaGNqeS7Abg84DQDg&usg=AFQjCNF0fcCNUMvd7m9BSSoC_idV4zX1MQ&sig2=gGv-wv_XZeGlqlqS7UyLWJq&bvm=bv.92885102,d.ZGU


UN Office of the High Commissioner Towards the establishment of an ASEAN Human Rights System http://bangkok.ohchr.org/programme/asean/

European Human Rights instruments

European Convention on Human Rights
http://www.echr.coe.int/Documents/Convention ENG.pdf


Inter-American Human Rights systems instruments


Inter-American Court History http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh


Inter-American Court of Human Rights ‘Other treaties’ subject to the consultative jurisdiction of the court (art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982 to the Government of Peru http://www1.umn.edu/humanrts/iachr/b_11_4a.htm
http://www1.umn.edu/humanrts/oasinstr/oaslist.htm


United Nations Human Rights Instruments and documents

Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995 (Beijing Declaration) http://www.refworld.org/docid/3dde04324.html


UN Treaty Collection Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, entry into force 05 May 2013 in accordance with article
Committee on Economic, Social and Cultural Rights (CESCR)
Concluding observations: Canada, 10 June 1993, E/C.12/1993/5
http://www.unhchr.org/refworld/docid/3ae6ae638.html

Concluding observations: Canada 10 December 1998, E/C.12/1/Add.31
http://www.unhchr.org/refworld/docid/3f6cb5d37.html


Concluding observations, India, 8 August 2008, E/C.12/IND/CO/5 http://www.refworld.org/docid/48b8dbdac42.html


Chapter Four: Becoming a party to the Convention and the Optional Protocol http://www.un.org/disabilities/default.asp?id=231

General Comment No. 2 http://www.refworld.org/docid/47a7079f0.html


General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24
http://www.refworld.org/docid/47a7079d6.html

http://www.refworld.org/docid/4538838c22.html

http://www.refworld.org/docid/4538838d0.html

Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992, Agenda 21
http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

Declaration on Cities and Other Human Settlements in the New Millennium (Millennium Declaration) of 9 June 2001 as adopted by the General Assembly Resolution ARES25.2.
http://www.google.co.za/url?q=sa-t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CCMQFjAB&url=http%3A%2F%2Funhabitat.org%2F%2Fwpdmact%3Dprocess%26did%3DNDNEuaG90bGlua%3D%3D&ei=J6hVVY7OEQo07gaesoOoAQ&usg=AFQjCN-G-3rQD6JvYaIP5tCvBuFukR1cOog&sig2=Srp_eDq4o6phPs46BwTpA

Declaration on the Right of Disabled Persons, Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975
http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightsOfDisabledPersons.aspx

Declaration on the Rights of Indigenous Peoples


‘Table of pending cases before the Committee on Economic, Social and Cultural Rights,’ considered under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-CESCR),http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx

Development Programme

Table 1: Human Development Index and its components: 2012

461
Table 1: Human Development Index and its components: 2013

Economic and Social Council


462
Report of 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, Leilani Farha A/HRC/28/62, 22 December

Fact Sheet No. 16 (Rev.1) May 1996, No. 16 (Rev.1)
http://www.refworld.org/docid/4794773cd.html

ESCR-Net Resource page on the Optional Protocol to the ICESCR http://www.escr-net.org/docs/i/431553


General Assembly
Conference on Human Settlements 16 December 1976, A/RES/31/109, (Vancouver Declaration)


463
Declaration on the Right to Development: resolution / adopted by the General Assembly, 4 December 1986, A/RES/41/128
http://www.refworld.org/docid/3b00f22544.html

Declaration on the Rights of Disabled Persons 9 December 1975, A/RES/3447 (XXX) http://www.refworld.org/docid/3b00f1c18.html

Global Strategy for Shelter to the Year 2000 A/RES/43/18183rd plenary meeting, 20 December 1988
http://www.unhabitat.org/downloads/docs/1393_76192_other1.htm


Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Right to adequate housing, Note by the Secretary-General, Sixty-fifth session, Item 69 (b) of the provisional agenda, Distr.: General, 9 August 2010 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/108/44/PDF/G1310844.pdf?OpenElement

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms Right to adequate housing, Note by the Secretary-General, Sixty-sixth session, Item 69 (b) of the provisional agenda, Distr.: General, 5 August 2011 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/446/01/PDF/N1144601.pdf?OpenElement

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, The right to adequate housing, Note by the Secretary-General, Sixty-seventh session, Item 70 (b) of the provisional agenda, Distr.: General, 10 August 2012

464
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, Right to adequate housing, Note by the Secretary-General, Sixty-eighth session, Item 69 (b) of the provisional agenda, Distr.: General, 7 August 2013 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/421/84/PDF/N1342184.pdf?OpenElement

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development 25 sessions, Agenda item 3, 26 March 2014 http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.18/Rev.1

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’ The right to adequate housing, Note by the Secretary-General, Sixty-ninth session, Item 69(b) of the provisional agenda, Distr.: General 7 August 2014 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/498/19/PDF/N1449819.pdf?OpenElement

Report of 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 Miloon Kothari A/HRC/10/7/Add.3 2009, Addendum Mission to Canada (9 to 22 October 2007) http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.7.A dd.3.pdf


Sixtieth session Agenda items 46 and 120 http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.RES.60.251_En.pdf

Universal Declaration of Human Rights, 10 December 1948, 217 A (III), http://www.refworld.org/docid/3ae6b3712c.html


Housing Rights Programme Indigenous peoples’ right to adequate housing: A global overview (Report no 7) (2005), 1-213


Human Rights Committee
Addendum to the Third Periodic Reports of States Parties Due in 1992, India, 17 June 1996, CCPR/C/76/Add.6
http://www.unhcr.org/refworld/docid/3ae6b02f3.html

CCPR General Comment No. 6: Article 6 (Right to Life) 30 April 1982
http://www.refworld.org/docid/45388400a.html

Human Rights Council
Adequate housing as a component of the right to an adequate standard of living: Resolution 6/27, Adopted without a vote 33rd meeting 14 December 2007,

National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: [Universal Periodic Review 2012-India]: India, 8 March 2012, A/HRC/WG.6/13/IND/1 1
http://www.unhcr.org/refworld/docid/5007eaed2.html

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Report of 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, Raquel Rolnik, Twenty-second session, Agenda item 3, Distr.: General, 24 December 2012 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G12/189/79/PDF/G1218979.pdf?OpenElement

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development Report of 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, Raquel Rolnik, Tenth session, Agenda item 3, A/HRC/10/7, 4 February 2009 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/106/32/PDF/G0910632.pdf?OpenElement

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms. Note by the Secretary-General, Sixty-fourth session, Item 71 (b) of the provisional agenda, Distr.: General 6 August 2009 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/446/64/PDF/N0944664.pdf?OpenElement

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of 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, Raquel Rolnik, Thirteenth session, Agenda item 3, Distr: General, 18 December 2009 http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/176/13/PDF/G0917613.pdf?OpenElement

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of 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, Raquel Rolnik, Nineteenth session, Agenda item 3, Distr.: General, 26 December 2011 http://www.ohchr.org/Documents/Issues/Housing/A-HRC-19-53_en.pdf

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of 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, Raquel Rolnik, Sixteenth session, Agenda item 3, Distr.: General, 20 December 2010 http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-42.pdf


Report of 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, Raquel Rolnik, Nineteenth session, Agenda item 3, A/HRC/19/53-26 December 2011

Report of 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, Miloon Kothari: addendum: mission to South Africa, 29 February 2008, A/HRC/7/16/Add.3
http://www.refworld.org/docid/47d55d3f2.html


Universal Periodic Review Working Group on the Universal Periodic Review, Canada-Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 08 June 2009, eleventh session A/HRC/11/17/Add.1

http://www.refworld.org/docid/52271e254.html

Human Rights in the Administration of Justice: A manual on Human Rights for Judges, Prosecutors and Lawyers-The role of the courts in protecting economic, social and cultural rights

http://www.refworld.org/docid/48abd5730.html

International Convention on the Elimination of Discrimination Against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with Article 27(1)
http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf

International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49,
http://www.refworld.org/docid/3ae6b3aa0.html
International Covenant on Economic, Social and Cultural Rights

International Covenant on Economic, Social and Cultural Rights Ratification status 03-02-2015

International Labour Organisation Recommendation No. 115 on Workers Housing Adoption: Geneva, 45th ILC session (28 Jun 1961)

Millennium Declaration 55/2 Resolution adopted by the General Assembly (without reference to a main committee (A/55/L.2) at the fifty-fifth session, A/RES/55 18 September 2000

Millennium Development Goals and urban sustainability: 30 years of shaping the Habitat Agenda
https://sustainabledevelopment.un.org/content/documents/11292101_alt.pdf

Office of the High Commission for Human Rights
The role of courts in protecting economic, social and cultural rights
ICESCR Status of ratification http://indicators.ohchr.org/


http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx

Economic and Social Council Canada’s Fifth Periodic Reports - Concluding observations: 28th session, (CEDAW/C/CAN/5 and Add.1) at its 603rd and 604th meetings, on 23 January 2003
http://www2.ohchr.org/english/bodies/cedaw/docs/co/CanadaCO28.pdf


Manual on human rights monitoring: Chapter 20 - Monitoring economic, social and cultural rights

469
Question of the realisation in all countries of the Economic, Social and Cultural Rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Resolution 2000/9, Adopted without a vote 52nd meeting, 17 April 2000, 

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Ratification status 

Optional Protocol to the International Covenant on Civil and Political Rights Ratification status

Universal Periodic Review

Habitat The right to adequate housing, Fact Sheet No. 21 (Rev 1), May 2014, Human Rights Programme for Asia-Pacific (2008-2009) – Regional Human Rights Context

Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People Special procedures and regional human rights systems: Areas for strengthening cooperation

470
World Summit on Social Development, Copenhagen Denmark, 6-12 March 1995, A/CONF.166/9 (Copenhagen Declaration)
General Internet sources

Arbour L Beyond self-congratulations: the Charter in an international perspective (12 April 2007)  

Aboriginal Affairs and Northern Development Canada Canada Endorses the UN Declaration on the Rights of Indigenous Peoples Ref: 2-3429, Ottawa, Ontario, November 12, 2010  
https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958

African Peer Review Mechanism: South Africa country review report (04 Feb 2013)  

Alexander LT Occupying the Constitutional Right to Housing (February 17, 2015)  
Univ. of Wisconsin Legal Studies Research Paper No. 1288  


Apartheid Shanty Towns in Cape Town  
http://www.capetown.at/heritage/history/apart_influx_shanty_art.htm

Apte PM Dharavi: India's Model Slum (September 29, 2008)  
http://www.planetizen.com/node/35269

Bhatt MR The case of Ahmedabad, India  

http://iay.nic.in/netiay/IAY%20revised%20guidelines%20july%202013.pdf

Canada  
Foreign Affairs, Trade and Development Canada - Canada and the UN San Francisco Conference, April 25 to June 26, 1945  
http://www.international.gc.ca/genev/mission/Canada-UN Nu.aspx

Foreign Affairs, Trade and Development Canada Canada's Statement of Support on the UN Declaration on the Rights of Indigenous Peoples (November 12, 2010)  
http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142


Canadian Superior Court Judges Association *Structure of the courts*

Central Intelligence Agency *The world fact book: legal system*

Centre for Public Justice *Poverty trends highlights Canada (2013)*


Chandigarh-History
http://www.chandigarhcity.com/atoz/history.htm

Charlton S *An Overview of the housing policy and debates, particularly in relation to women (or vulnerable groupings)* (2004) Research report Centre for the Study of Violence and Reconciliation

City of Toronto *Toronto Report Card on Housing and Homelessness 2003*

Clark C ‘Canada falls out of top 10 in UN human development index’ *The Globe and Mail* (14 March 2013)

COHRE *Any room for the poor? Forced evictions in Johannesburg (2005)*
http://docs.escr-net.org/usr_doc/COHRE_Johannesburg_FFM_high_res.pdf

COHRE Legal Resources for Housing Rights: International and National Standards: (June 2000)
http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/undocs/COHRE_Sources4LegalResourcesForHousingRights.pdf

Come C ‘No apologies: structural racism, “white mobs” and the pushing of indigenous peoples in Canada to the edge of social, political and cultural extinction’ Speech to the Canadian Bar Association Ontario, Toronto, October 2001
http://ellisctaylor.homestead.com/firstnation.html

Common track 5: Asian values, China and human rights: the rise of Asian values

Commonwealth Secretariat Member States
http://www.thecommonwealth.org/Internal/191086/142227/members/

Community Law Centre and Centre for Disability Law and Policy *Special needs housing policy framework in South Africa workshop report* Cape Town, 28 June 2012
Cornish M and Shen V *Ten reasons Canada should ratify the American Convention on Human Rights*  

Côté A *NAWL calls on Mr Harper to respect International Law on Social and Economic Rights* (28 June 2006)  

Craven P *‘South Africa: The most unequal society in the world’* Paper presented to the SARA Conference (29 October 2010)  

CSIR *‘CSIR provides support in guiding housing and human settlement investment’*  
*Science Scope* September 2010  


De Vos P *‘Irene Grootboom died, homeless, forgotten, no C-Class Mercedes in sight’* (August 11 2008)  

DesBaillets D *‘The human right to housing and the Canadian Charter: A case comment on Tanudjaja v Canada (Attorney General)’*  

Dev SM *Right to food in India* Centre for Economic and Social Studies, Working Paper No. 50 (2003) 1-72  
[http://cess.ac.in/cesshome/wp%5Cwp_50.pdf](http://cess.ac.in/cesshome/wp%5Cwp_50.pdf)

Dhlamini BW *‘Hostels must be integrated into inclusive housing policy’* (08 Jun 2012)  

Dlakude D *Debate on budget vote on Human Settlements* (9 May 2012)  
http://icclr.law.ubc.ca/sites/icclr.law.ubc.ca/files/publications/pdfs/E-Eid.PDF

ESCR-Net The principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples’ Rights’ (Implementing ESCR guidelines in Africa) Part II
http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=1599552

ESCR-Net The Government of South Africa ratifies the ICESCR
http://www.escr-net.org/node/365752

Failure by the state to comply with numerous Supreme Court Judgements/orders regarding the provision of night shelters [Homeless Night Shelter Report 2011-11-12] FAO ‘Jurisprudence on the right to food - justiciability: Cases on Switzerland, India and South Africa’ The Right to Food Guidelines: Information Papers and Case Studies

Financial and Fiscal Commission ‘Chapter 4 Understanding housing demand in South Africa’- Technical report: Submission for the Division of Revenue 2015/16’ (30 May 2014)
http://www.ffc.co.za/index.php/2-uncategorised/71-technical-reports-chapters

Fraser-Kruck H Canada’s failure to support the UN Declaration on the Rights of Indigenous Peoples: an intersectional analysis of the repercussions as seen through the inter-woven lenses of women’s rights, environmental rights, and poverty alleviation (15 January 2009)

http://digitalcommons.uconn.edu/cgi/viewcontent.cgi?article=1361&context=econ_wpapers

Gazzard N ‘Millions of Canadians lack decent, affordable housing’
http://www.thestar.com/comment/article/326319

Görgens T and van Donk M Exploring the potential for ‘networked spaces’ to foster communities of practice during the participatory upgrading of informal settlements, paper submitted for the National Department of Human Settlements Seminar: ‘From beneficiaries to citizens: meaningful communication with, and participation of, the poor in human settlement development’ Held on the 17th November 2011, Emperors Palace, Johannesburg
http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fisandla.org.za%2Fdownload%2Fassets%2Fnetworked_spaces_isandla_institute_paper_final-0.pdf&ei=wn1YVbOxDbWTsQTI24GoAw&usg=AFQjCNHjRifGCOQhQznE8XGyCpRevb9rVwg&sig2=DLmqvLXP1qWwX0pF6xIonQ&bvm=bv.93564037,d.ZGU

476


Hershkoff H *Public Interest Litigation: Selected Issues and Examples* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf


India


Indian National Human Rights Commission Human Rights Cases: Selected case summaries [http://nhrc.nic.in/]


Knight R Housing in South Africa (July 2001) [http://richardknight.homestead.com/files/sisahousing.htm]
Kota-Fredericks Z Speech delivered by the deputy Minister of Human at the Southern African Housing Foundation International Conference on 17 September 2012 in Cape Town, Cape Sun Hotel

Kota-Fredericks Z Statement delivered by Republic of South Africa’s Deputy Minister of Human Settlements,' at the 6th World Urban Forum Special Session on South-South Co-operation-Naples, Italy: 04 September 2012


Languages in India
http://adaniel.tripod.com/languagelist.htm

Levenson Z ‘We are humans and not dogs’ Berkeley Journal of Sociology (2014) vol 58
http://berkeleyjournal.org/2014/10/we-are-humans-and-not-dogs/?src=longreads

Loewen GA Compendium of poverty reduction strategies and frameworks, Tamarack – An Institute for Community Engagement-Waterloo, Ontario (2009)
http://tamarackcommunity.ca/downloads/vc/Poverty_Reduction_GL_042209.pdf


Mbeki T Address to the National Council of Provinces 11 November 2003

Misselhorn M A new response to informal settlements

Morka F The African Commission on Human and Peoples Rights and ESC Rights in Circle of Rights - Economic, Social & Cultural Rights Activism: A training resource
https://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm

Munthanbhorn V Regional protection of human rights in Asia


National Housing Bank *Urban housing: Housing under five year plans* [http://www.nhb.org.in/Urban_Housing/5year_plan.php](http://www.nhb.org.in/Urban_Housing/5year_plan.php)


Ontario Human Rights Commission *Human Rights Commissions and Economic and Social Rights* [http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf](http://www.ohrc.on.ca/sites/default/files/attachments/Human_rights_commissions_and_economic_and_social_rights.pdf)


Porter B *The right to be heard: What’s at stake* presentation at the High Level Experts’ Seminar on Economic, Social and Cultural Rights, Nantes, France, (September 2005)

480


Quebec’s Charter of Human Rights and Freedoms, the Québécois Charter of Human Rights and Freedoms http://www.learnquebec.ca/en/content/curriculum/bal/cit_com/rights/qcrights.html


Sager M Walking a tightrope: Environmental sustainability and South African social housing institutions (2014)


Sisulu LN Minister of Housing at the occasion of the Budget Vote 2007/8 for the Department of Housing: 8 June 2007 – National Assembly – Cape Town

Sisulu Housing announcement insult to poor-EFF


Social Watch - Poverty Eradication and Gender Justice Believe it or not: more poor people http://www.socialwatch.org/node/10648

Sosibo K ‘Crumbling hostels refuse to go away’ Mail and Guardian (24 May 2012)
http://mg.co.za/article/2012-05-24-crumbling-hostels-refuse-to-go-away

South Africa
Department of Housing Annual Report 2005-2006

Department of Human Settlements Address by Minister Tokyo Sexwale at the Govan Mbeki Human Settlements Awards Gallagher Estate, Midrand (31 May 2012)

Department of Human Settlements Address by L N Sisulu Minister of Human Settlements at the Human Settlement Indaba- 16 October 2014, Sandton Convention Centre

Department of Human Settlements Annual Report 2010-2011

Department of Human Settlements Annual Report 2011-2012

482
Department of Human Settlements Annual Report 2012/2013

Department of Human Settlements Budget Speech by Minister Tokyo Sexwale National Assembly (22 May 2013)

Department of Human Settlements Budget Vote Speech by Deputy Minister Z Kota-Fredericks (MP) (22nd May 2013)

Department of Human Settlements M T Mguli Enhancements to the National norms and standards for the construction of stand-alone residential dwellings and engineering services and adjustment of the housing subsidy quantum
http://green-cape.co.za/assets/Uploads/WC.pdf

Department of Human Settlements Overview
http://www.dhs.gov.za/content/overview

Department of Justice and Constitutional Development African Charter on Human and Peoples Rights


Government Communication and Information System ‘Housing’ 380


Parliamentary Monitoring Group Department of Human Settlements strategic plan & budget: Financial & Fiscal Commission & Community Law Centre
https://pmg.org.za/committee-meeting/14194/


South African Cities Network
Housing subsidy assets: Exploring the performance of government subsidised housing in South Africa - Overall analysis (2011)


South African Human Rights Commission
2nd Economic and social rights report 1998 – 1999

3rd Economic and social rights report 1999-2000

4th Annual economic and social rights report 2000-2002


4th Economic and social rights report 2000-2002
5th Annual report 2000-2001

5th Economic and social rights report 2002-2003

5th Economic and social rights report series 2002-2003 Financial Year-2004

6th Annual report 2001-2002 Complaints Handling
http://www.sahrc.org.za/home/21/files/Reports/Annual%20Reports/6th_a_report_chap_1_2.PDF

6th Economic and social rights report 2003-2006

7th Economic and social rights report: Millennium Development Goals and the progressive realisation of economic and social rights in South Africa

8th Annual report 2003-2004

9th Annual report 2004-2005 Section 2: Programme Performance

10th Annual report 2005-2006 Chapter 5

11th Annual report 2006-2007

12th Annual report 2007-2008
http://www.sahrc.org.za/home/21/files/Reports/Annual%20Reports/12th%20Annual%20R-07_08%20r.pdf

13th Annual report 2008-2009

14th Annual report 2009-2010
15th Annual report 2010-2011

16th Annual report 2011/12

Annual international report: 2011

Economic and Social Rights Report: Baseline information-1997-1998, vol 1

Economic and social rights report - Government Responses to Protocols 1997-1998 vol III

Economic and Social Rights Report Protocols 1997-1998 vol II

Report on the public hearing on housing, evictions and repossessions (2008)

South African Local Government Association Support to Municipalities on Accreditation and Assignment of Housing Function Circular 15/2013 (13 June 2013)


486
Quarterly Labour Force Survey Quarter 1 (2014)

Mid-year population estimates 2014 (31 July 2014)

Census 2011 Statistical release – P0301.4

Support Bill C-400: A National Housing Strategy

Supreme Court Commissioners The national report on homelessness for Supreme Court of India: Review of compliance of state governments with Supreme Court orders-up to Dec 31, 2011 Tenth Report of the Commissioners of the Supreme Court Permanent Shelters for Urban Homeless Populations: WR 196/2001

The Housing Development Agency Informal settlements: Rapid assessment and categorisation guidelines (2014)
http://www.thehda.co.za/information/research/category/research

The National Home Builders Registration Council Affordable housing strategies around the world: South African approach (undated)

Tissington K, Munshi N, Mirugi-Mukundi G and Durojage E Jumping the queue’, waiting lists and other myths: perceptions and practice around housing demand and allocation in South Africa

United States Department of State Diplomacy in action ‘Pakistan (10/06/10)’
http://www.state.gov/outofdate/bgn/pakistan/189450.htm

Urban LandMark and SHF. Small-scale private rental: A strategy for increasing supply in South Africa (January 2010)

Wright-Smith K  *The decision to comply: examining patterns of compliance with the Inter-American Human Rights bodies*  
[https://www.academia.edu/243361/The_Decision_to_Comply_Examining_Patterns_of_Compliance_with_the_Inter-American_Human_Rights_Bodies](https://www.academia.edu/243361/The_Decision_to_Comply_Examining_Patterns_of_Compliance_with_the_Inter-American_Human_Rights_Bodies)

Ziblim A and Sumeghy G  *The dynamics of informal settlements upgrading in South Africa: Legislative and policy context, problems, tensions and contradictions* Final research report (2013)  