

**A COMPARATIVE ANALYSIS OF THE RIGHT TO ADEQUATE HOUSING  
IN THE ZIMBABWEAN DECLARATION OF RIGHTS AND SOUTH  
AFRICAN BILL OF RIGHTS**

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## Dedication

This work is dedicated to God, my family, and friends, especially my mother Mrs P Fungura who have always been my pillars of strength, and helped me gain control of my life spiritually and physically as I walk in the paths that have been set by God. I will forever be grateful for everyone that I met through this journey and will treat them with utmost respect as they helped with some answers to life.

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## Abstract

The right to adequate housing is of fundamental importance, closely linked to the accessing, enjoyment of other economic, social and cultural rights. This consists of the individual's right to dignified standard of living for themselves, their family and continuous improvement of living conditions. This right, like any other human right, it is universal, inalienable, indivisible and interdependent. It is interlinked to the right to life, human dignity and the right to be protected against deprivation of property is threatened where people are forced out of their homes using unwarranted force. In this work the writer used both quantitative and qualitative analysis and being a comparative analysis of the right to adequate housing through South African Constitution Bill of Rights which guarantees every person not to be evicted arbitrary as compared to Zimbabwean Constitution where there is a gap which gives no express provision for the right to adequate housing.

## **Key Terms**

Adequate - enough and sufficient for a specific need or requirement.

Arbitrary - random choice.

Availability - the quality of being able to be used or obtained.

Condition - is a particular state of being or existence of a situation with respect to the circumstances.

Constitution – sets out how all the elements of government are organised and how power is carved up among different political units.

Dignity – the state or quality of being worthy of honour or respect.

Fundamental – of central importance and or forming a necessary base or core.

Housing - the construction and assigned usage of houses or buildings individually or collectively for the purpose of shelter (living space).

Human - pertaining to, characteristic of or having the nature of people.

Right - a moral or legal entitlement to have or to do something.

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## CHAPTER 1: INTRODUCTION

### 1.1. Background

All over the world, the right to adequate housing is of fundamental importance and closely linked to the accessing and enjoyment of all other economic, social and cultural rights. The right of human beings to adequate housing consists of the individual's right to a dignified standard of living for, both themselves and their family, including the continuous improvement of living conditions.<sup>1</sup> This right, like any other human right, is universal, inalienable, indivisible and interdependent.<sup>2</sup> The right is interlinked to a number of other rights.<sup>3</sup> For example, the right to life, human dignity as well as the right to be protected against deprivation of property is threatened where people are forced out of their homes using unwarranted force. Similarly, children whose homes are destroyed in pursuit of a court order or arbitrary law permitting forced removal are put in a position to miss school. Therefore, such a forcible removal from property morphs into an infringement of their right to a basic education.

Further, where people are forced to live in shelter that is not suitable for human habitation and, due to the urgent housing crisis- are forced to live in over-crowded places, their right to health may in the same way be adversely implicated. Also, the rights to privacy and, or social security can be infringed in the same manner if people are deprived of their right to adequate housing. This is so because a home provides an individual a secure place to live, ensuring privacy and protection against harassment.<sup>4</sup> Without an adequate shelter, there is high risk of violence, rape, and physical and mental abuse<sup>5</sup> amongst the vulnerable members of the society such as women and children. Therefore, it cannot be naysaid that most of these fundamental human rights cannot be meaningfully enjoyed where the right to adequate housing has not been meaningfully respected, protected and fulfilled.<sup>6</sup>

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<sup>1</sup> Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations General Assembly in December 1966.

<sup>2</sup> Ibid; T Kondo, 'Socio-economic rights in Zimbabwe: Trends and emerging jurisprudence' (2017) 17 *African Human Rights Law Journal* 163, 167; C Tshoose, 'A closer look at the right to have access to adequate housing for inhabitants of informal settlements post Grootboom, (2015) Public Law 97: <https://www.researchgate.net/publication/313220446> accessed 30 September 2021.

<sup>3</sup> L Chenwi, 'The right to adequate housing in the African regional human rights system: Convergence or divergence between the African Commission and South African approaches' (2013) 17 *LDD* 342, 342-343.

<sup>4</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *Women and the Right to Adequate Housing*, 2012, HR/PUB/11/02, available at: <https://www.refworld.org/docid/5289e87b4.html> [accessed 3 September 2021]

<sup>5</sup> Ibid.

<sup>6</sup> The right to adequate housing is part of second-generation rights which are also referred to as socio-economic and cultural rights. This right, according to A Nolan, 'Litigating Housing Rights: Experiences and Issues' (2006) 28 *DULJ* 145, 148-149 <https://ssrn.com/abstract=1434880> accessed 3 September 2021, imposes both negative and positive obligations to the state and non-state actors. The obligations are to respect, protect and fulfil the right.



From the aforementioned, it then becomes clear that the right to adequate housing ought to be guaranteed and be accompanied by certain freedoms, *inter alia* the protection against arbitrary evictions and invasion of privacy.<sup>7</sup> Where the right to housing is guaranteed, it is further concretised by security of tenure.<sup>8</sup> Further, once the right to housing is guaranteed, there will be equal and non-discriminatory access to adequate housing and people will successfully apply for restitution where their property has been unlawfully taken away from them.

The starting point in any discussion of the right to adequate housing is the supreme laws of any country- the Constitution. In Zimbabwe and South Africa, the analysis of the right to adequate housing centres around the discussion of the Constitutions of these two countries. Through the Zimbabwean and South African Constitutions,<sup>9</sup> major legislative measures were adopted by the States to recognise the fundamental socio-economic right to adequate housing. Section 26 of the Constitution of South Africa guarantees the right to adequate housing in a clear and unambiguous manner and provides for additional protection by prohibiting forced evictions and demolition of houses without an order of the court.<sup>10</sup> The Constitution of South Africa states:

- (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.<sup>11</sup>

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<sup>7</sup> T Kondo, 'Constitutionalising Socio-Economic Rights in SADC: An Impact Assessment on Judicial Enforcement in South Africa, Zimbabwe, Botswana, Lesotho and Zambia' (2020) (34) Spec Juris 35.

<sup>8</sup> United Nations Human Rights Office of the High Commissioner: Security of tenure, cornerstone of the right to adequate housing, <https://www.ohchr.org> > accessed 3 September 2021.

<sup>9</sup> Constitution of Zimbabwe (Amendment No. 20) Act 2013 and Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution of Zimbabwe/Zimbabwean Constitution and Constitution of South Africa respectively).

<sup>10</sup> Constitution of South Africa.

<sup>11</sup> Section 26.

More importantly, the right to adequate housing is considered a fundamental right of every child in South Africa.<sup>12</sup> Thus, in the case of *The Government of South Africa & Others v Grootboom & Others*<sup>13</sup> it was held that

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. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing.<sup>14</sup>

It is clear that the obligation imposed upon the State by the Constitution is not an absolute or unqualified one. The extent of the State's obligation as defined in the Constitution of South Africa is based on three key elements that are considered separately namely: the obligation to 'take reasonable legislative and other measures', 'to achieve the progressive realisation' of the right; and 'within available resources.'<sup>15</sup> This means that the State must be seen to be committed to the realisation of the provision of the right to adequate housing. As noted by some scholars, the South African government, 'remains committed to addressing the housing crisis and aims to eliminate the housing backlog by 2030 through building two hundred thousand housing units per year.'<sup>16</sup>

Unlike the South African Bill of Rights, the Declaration of Rights in the Constitution of Zimbabwe does not explicitly provide for the right to adequate housing but rather guarantees every person the right not to be arbitrarily evicted from his or her home without a court order.<sup>17</sup> Hence in Zimbabwe the right still remains an implied right and not an express right.<sup>18</sup> Even though the Zimbabwean Constitution does not expressly guarantee the right to adequate

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<sup>12</sup> Section 28(1)(c) of the Constitution of South Africa which provides that; 'every child has the right to basic nutrition, shelter, basic health care services and social services.' It must be noted that unlike the right to adequate housing in terms of section 26 of the Constitution, the children's right to shelter in terms of section 28(1)(c) is not qualified by access, progressive realization or available resources – L Chenwi, 'Implementation of Housing Rights in South Africa: Approaches and Strategies' (2015) 24 JL&SP 68, 73 <https://digitalcommons.osgoode.yorku.ca/jlsp/vol24/iss1/4> accessed 1 September 2021.

<sup>13</sup> *The Government of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) 29.

<sup>14</sup> *Grootboom* case (n 13) para 36.

<sup>15</sup> Section 26 (2) of the Constitution of South Africa.

<sup>16</sup> Chenwi, (n 12) 69.

<sup>17</sup> Section 74 of the Constitution of Zimbabwe.

<sup>18</sup> A Mavedzenge, 'Rights inference: Understanding the meaning of Section 46 of the Constitution of Zimbabwe beyond Gubbay CJ's dictum' (2019) 2(1) UZLJ 93 <http://hdl.handle.net/10646/3894> accessed 1 September 2021; *Zimbabwe Homeless Peoples Federation & Others v Minister of Local Government & National Housing & Others* SC 78-21

housing it can be argued that the protection against arbitrary eviction by the Constitution is *prima facie* evidence that Zimbabwe is committed in protecting the right to housing.<sup>19</sup>

The right to adequate housing is also internationally recognised. This right is recognised in the Universal Declaration of Human Rights<sup>20</sup> and in the International Covenant on Economic, Social and Cultural Rights<sup>21</sup> as part of the right to an adequate standard of living.<sup>22</sup> In terms of the ICESCR, the right to adequate housing is recognised, or referred to as, the right to adequate housing, or some elements of it such as the protection of one's home and privacy.<sup>23</sup> Further, the international instrument went a step further in guaranteeing the housing rights of specific vulnerable groups such as migrant workers, disabled persons, the elderly, women and children.<sup>24</sup>

Article 2 (1) of the ICESCR, obliges the State parties to take legislative and other steps to the 'maximum of its available resources', with a view to achieve 'progressively' the full realisation of the rights recognised in the Covenant, including the right to housing.<sup>25</sup> This clearly shows that, just like any other socio-economic right, the right to adequate housing is not an absolute right.<sup>26</sup> The right must be realised subject to the availability of resources.<sup>27</sup> However, this does not mean that the resource scarcity can relieve States of certain minimum obligations in respect of their implementation of economic, social and cultural rights.<sup>28</sup> Since the Republic of Zimbabwe and Republic of South Africa are member States to the UDHR and the ICESCR, it follows therefore that as State parties, they are bound to ensure that they respect the human rights enshrined therein and honour the duty to take legislative and other measures to promote and fulfil these rights at the national level,<sup>29</sup> including the right to adequate housing.

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<sup>19</sup> Section 74 of the Zimbabwean Constitution

<sup>20</sup> Article 25 (1) of the Universal Declaration of Human Rights (UDHR). Adopted by United Nations General Assembly Resolution 217A (III) of 10 December 1948.

<sup>21</sup> Article 11 (1) of the ICESCR.

<sup>22</sup> Article 11 (1) of the ICESCR

<sup>23</sup> Article 2 (1) of the ICESCR

<sup>24</sup> Article 2 (1) of the ICESCR

<sup>25</sup> Article 2 (1) of the ICESCR. Chenwi, (n 12) 78

<sup>26</sup> 1998 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights notes on Guideline No. 10.

<sup>27</sup> *Zimbabwe Homeless Peoples Federation & Others* case (n 18) 34.

<sup>28</sup> 1998 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights notes on Guideline No. 10: Chenwi, (n 12) 78.

<sup>29</sup> The Preamble to the UDHR provides that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedom progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

This research study will examine the extent to which the right to adequate housing is constitutionally guaranteed in the Zimbabwean and South African Constitutions. The study will also interrogate the measures being adopted by these two States in implementing the constitutional and international obligations imposed on them in as far as the realisation of the fundamental human right to adequate housing is concerned. The strengths and weaknesses of each of these two jurisdiction's legal frameworks and practices will be analysed on a comparative basis and recommendations will be made from that analysis.

## 1.2. Problem Statement

Both South Africa's Bill of Rights and Zimbabwe's Declaration of Rights provide the essential foundations for the total and comprehensive advancement and attainment of a human rights culture.<sup>30</sup> However, as academic recording and a prudent assessment of reality reveals, there is a slow implementation of the socio-economic rights, particularly the right to adequate housing.<sup>31</sup> The slow implementation of these rights in Zimbabwe can mainly be attributed to a lack of clarity on the constitutionality of the right.<sup>32</sup>

In Zimbabwe, the right to adequate housing is not expressly provided in the supreme law hence it is only implied. There is a yawning gap in the law in as far as provisions granting and protecting the adequacy of housing. The law merely protects the right against eviction but it remains silent in making the access to adequate housing a constitutional right in Zimbabwe. For this reason, people are still living under deplorable conditions and without constitutional recourse. Lack of express provision recognising the right to adequate housing is also exacerbated by the lack of political will by those in government.<sup>33</sup> In South Africa, although the right to adequate housing is expressly provided in section 26(1) of the Constitution, lack of political will has seen the slow realisation of the right as evidenced by the majority of people

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<sup>30</sup> See sections 73, 75, 76 and 77 of the Zimbabwean Constitution and also see sections 24, 26, 27, and 29 of the South African Constitution.

<sup>31</sup> Mavedzenge, (n 18)

<sup>32</sup> See the case of *Zimbabwe Homeless Peoples Federation & Others* case (n 18) para 41 where the court noted that, 'The right to shelter is not provided for anywhere in the Declaration of Rights. Parliament, in its wisdom, merely made provision for the State and all institutions of government to take reasonable steps and measures, within the limits of the resources available, to actualise access to adequate shelter. That provision is essentially exhortatory but is one that the State and all institutions of government must bear in mind when formulating or implementing laws and policy decisions of government'

<sup>33</sup> E Serfontein, 'Humans: The biggest Barrier to Realising Human Rights – A South Africa Perspective' in: Maigul Nugmanova & Heimo Juhani Juhani Mikkola & Alexander Rozanov & Valentina V. Komleva (ed.) Education, Human Rights and Peace in Sustainable Development, 12.

still living under deplorable conditions.<sup>34</sup> These problems have necessitated this research, to critically analyse whether the provisions of the Constitutions and policies of these countries need to be revised for the full realisation of the right to adequate housing, so as to give teeth to the framework of socio-economic rights.

### **1.3. Research Questions**

The questions required to be addressed in pursuit of assessing the efficacy of the right to adequate housing in Zimbabwe and South Africa are the following:

#### **Main research question**

Whether the right to shelter encapsulated in Section 26 of the Constitution of Zimbabwe adequately governs and protects the right to access to shelter and, by extension, a home?

Whether Zimbabwean citizens and residence have the right to adequate housing and if so, whether they enjoy such right within the Zimbabwean context; if not whether the reason for the failure of the people to equally enjoy such right justifiable in a democratic society?

#### **Sub-research questions**

- 1.3.1. What is the nature and scope of the right to adequate shelter and housing?
- 1.3.2. What does the Zimbabwean legal framework and practice provide for in terms of the right to adequate housing?
- 1.3.3. Does the content of the right to shelter in the Constitution of Zimbabwe encourage the State's compliance in preserving this right, and by extension, the right to housing?
- 1.3.4. With reference to the South African constitutional right to housing parallel, does the Zimbabwean Constitution meet comparable standards?
- 1.3.5. If not, what recommendations can be made for the right to adequate shelter to be substantively realised, implemented and monitored in Zimbabwe?

### **1.4. Research Methodology**

This research study is primarily based on a desktop study method in that it relies principally on literature and on data collected without necessarily participating in the fieldwork.

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<sup>34</sup> Chenwi, (n 12) 68,69; *Grootboom* case (n 13)

Accordingly, this is a qualitative research based on a review of the available literature, from both primary and secondary sources including treaties, international case law, academic books and journals articles dealing with the right to adequate housing. Having done so, the research engages a comparative approach by interrogating on what Zimbabwe and South Africa have done in the promotion and realisation of the right to adequate housing in their respective jurisdictions through making reference to their Constitutions, legislation and practice. Furthermore, the research suggests measures which can be adopted in order to strengthen the independence of the judiciary.

### **1.5 Significance of the Study**

It has been established that the right to adequate housing is a fundamental right afforded to every person and is domestically, regionally and internationally recognised as a cornerstone for the realisation of all other socio-economic rights.<sup>35</sup> Despite such recognition in both Zimbabwe and South Africa, some marginalised sectors of the society such as the homeless, squatters, and occupiers, farm workers, the poor and many other vulnerable social groups are still living under deplorable conditions. This research, therefore, is relevant under these current circumstances where the right is afforded to everyone only on paper whilst in practice some societal groups are barred or unable to exercise such right. This study hopes to contribute to the ever-poignant debate on the right to housing and the role the government ought to play in order to make this a reality debate thereby giving effect to the right to adequate housing and also to advocate for its realisation within these two jurisdictions as one of the fundamental rights which is supposed to be afforded to everyone without discrimination. The research study will help in correcting the right to adequate housing thereby suggesting change that the government must adopt in order to promote, protect and fulfil the right to adequate housing.

### **1.6. Limitations of the Study**

The study has its own shortcomings in its compilation. These limitations include lack of adequate sources of the law to compile the study on the right to adequate housing. These sources include text books and law reports. There are few researches which have been done on the right to adequate housing in Zimbabwe and those sources are kept in the libraries. There is a single library in Harare which offers sources on this subject which was closed due to the Covid-19 pandemic and could only be accessed online. Other libraries are owned by State

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<sup>35</sup> Article 25(1) of the Universal Declaration of Human Rights.

universities and are only accessible to students of those universities. The researcher cannot access text books and law reports in those libraries because she does not possess college identity card for the institutions. The study will therefore be limited to the provisions of the Constitutions of the two countries<sup>36</sup> and journal articles as far as the right to housing is concerned. Therefore, the scarcity of material in Zimbabwe is the main limitation even though, some material can be accessed on other university libraries like UNISA online.

### **1.7. Literature Review**

To understand the concept of adequate housing and provide a clear analysis of how it is constitutionally provided under the Zimbabwean and South African frameworks, it is imperative to define its meaning first. There is long and rich literature on the right to adequate housing both in South Africa. Scholars/academics have discussed the right to adequate housing in South Africa as provided for in the constitution. Further, courts have interpreted the provisions of the constitutions which relates to housing. Thus, this research study will seek to add to the discussion of the analysis of the right to adequate housing in Zimbabwe and South Africa.

The right to adequate housing, has been defined by the African Commission, as referring to ‘the right of every person to gain and sustain a safe and secure home and community in which to live in peace and dignity’, which ‘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.’<sup>37</sup> Further, the ICESCR General Comment No. 4, shed light on the meaning of the term adequate housing. Paragraph 7 of the General Comment No.4 states that the right should not be interpreted in a restrictive manner.<sup>38</sup> It is further stated that the right to adequate housing should not be equated to right to shelter.<sup>39</sup> It goes beyond the provision of a roof over one’s head. The

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<sup>36</sup> Section 26 of the South African Constitution, which provides for the right to adequate housing and section 74 of the Zimbabwean Constitution, which although does not expressly provide for the right to adequate housing, deals with freedom from arbitrary eviction.

<sup>37</sup> Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights (African Commission Principles and Guidelines), adopted in 2010 and formally launched in 2011; at para 78. Available at <http://www.escr-net.org/docs/i/1599552> (accessed 22 December 2013); Chenwi, (n 3) 345.

<sup>38</sup> General Comment No. 4 of the ICESCR

<sup>39</sup> The Human Rights to Adequate Housing: Special Rapporteur on the Rights to Adequate Housing; OHCHR <https://www.ohchr.org › special-procedures> › Accessed 12 July 2022.

Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated:

Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a cost.<sup>40</sup>

From the definition of the right to adequate housing, it is therefore clear that one of the most important elements of this right is that there must be legal security of tenure. Where there is security of tenure, people are guaranteed of ownership of their homes, as such they are not arbitrarily evicted from their homes. The right to adequate housing also encompasses the availability of services, facilities and infrastructure.<sup>41</sup> Affordability, habitability, accessibility and location are some of the factors that are considered in deciding whether or not the right to adequate housing has been complied with.<sup>42</sup> These elements are important in guaranteeing the right to adequate housing, thus, when analysing whether the right to adequate housing is constitutionally guaranteed in the Zimbabwean and South African Constitutions, this research will consider whether the constitutional provisions cover these elements.

Zimbabwe and South Africa are constitutional democracies, as such everything that is done in these countries has to be consistent with the provisions of the Constitution.<sup>43</sup> Preambles to both the Zimbabwean and South African Constitutions commit to establish societies based on democratic values, social justice and the fundamental human rights that lay foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law.<sup>44</sup> The South African Constitution contains a Bill of Rights in its Chapter 2 where the right to adequate housing is provided for in section 26. In this regard, it is clear that the right to adequate housing is expressly provided for.

In contrast, the Zimbabwean Constitution does not expressly provide for the right to adequate housing. However, this right can be implied from the provisions of section 74 of the Constitution which provides that, ‘no person may be evicted from their home, or have their

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<sup>40</sup> United Nations “The Global Strategy for Shelter to the Year 2000” <http://www.nuigalway.ie/media/housinglawrightsandpolicy/files/undocs/UN-Global-Strategy-for-Shelter-to-the-Year-2000-.pdf> Accessed 16 January 2021.

<sup>41</sup> The Right to Adequate Housing: Fact Sheet No. 21/Rev.1, OHCHR: <https://www.ohchr.org> › FS21\_rev\_1 Accessed 16 January 2022.

<sup>42</sup> *ibid*

<sup>43</sup> G Devenish, ‘*The South African Constitution*’ LexisNexis Butterworths Durban 2005.

<sup>44</sup> Preamble to the Constitution of South Africa and Preamble to the Constitution of Zimbabwe.



home demolished, without an order of court made after considering all the relevant circumstances.’ Some of the relevant circumstances that have been considered by the courts before ordering eviction include whether or not the persons being evicted have alternative accommodation that is decent. It is in this regard that the right to adequate housing is implied. Thus, the research will interrogate the provision of the Constitution with the view to determine whether the right to adequate housing is justiciable in Zimbabwe as the case in South Africa.

Apart from the provisions of the supreme law, the right to adequate housing has also been discussed by the courts. In the case of *Government of South Africa v Grootboom*<sup>45</sup> the court dealt with the South African government’s obligation to provide housing. The case involved the eviction of people from the land they had informally settled on. The Constitutional Court unanimously held that the Constitution obliges the South African government to act positively in order to improve the conditions of living for the general populace.<sup>46</sup> Similarly, in the Zimbabwean case of *Makani and others v Epworth Local Board and others*<sup>47</sup> it was held that people should not be evicted where there are no indications that alternative accommodation has been secured for them.<sup>48</sup> These cases are important since they recognise the right to adequate housing. However, it can be noted that the court’s interpretation of the right fell short of mandating the government take additional action to meet the housing needs of its citizens.<sup>49</sup>

Another notable case dealing with the right to housing is *Residents of Joe Slovo Community v Thubelisha Home*<sup>50</sup> concerned an application for the eviction of approximately 20 000 residents of *Joe Slovo* informal settlements in the Western Cape South Africa. The application was brought by government agencies responsible for housing on the basis that the eviction was required for the purpose of developing affordable houses for poor people. The Constitutional Court ruled that the State was obliged in terms of section 26 of the Constitution to provide temporary shelter for people who have been evicted or who faced imminent eviction as the absolute priority must be the principle of upholding human dignity. The researcher uses this case to illustrate that the rights in the Bill of Rights are interwoven. In this case the right to human dignity found application in matters to do with housing. The researcher also uses the

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<sup>45</sup> *Grootboom* case (n. 13).

<sup>46</sup> *Grootboom* case (n. 13) para 93.

<sup>47</sup> HH-550-14.

<sup>48</sup> HH-550-14

<sup>49</sup> CA. Wertman, ‘There’s No Place Like Home: Access to Housing for All South Africans’ (2015) 40 Brook. J. Int’l L 719

<sup>50</sup> ZACC 16 2009; 2009 (9) BCLR 847.

case to demonstrate that the South African government has gone an extra mile in realising socio-economic rights compared to the Zimbabwean government.

Another important case dealing with the right to adequate housing in South Africa is *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*<sup>51</sup> in which the City of Johannesburg applied to the High Court for eviction of more than 400 occupiers of buildings in the inner city on the ground that the buildings were unsafe for human habitation. The High Court refused to evict the occupiers but directed the City of Johannesburg to make mends its housing programme. The Supreme Court overturned the decision and allowed the evictions on the condition that alternative accommodation would have been found for the occupiers. The Constitutional Court emphasized on the need to engage meaningfully with occupiers before conducting evictions. It was held that while the rights of the vulnerable groups must be upheld, the same should not make unattainable and unreasonable demands. These cases are important to this research because they interpreted the right to adequate housing in South Africa. Further, the cases discussed the obligations imposed on the government to promote, protect and fulfil the right to adequate housing. However, this research will go further to provide a critical analysis of the interpretation adopted by the courts in these cases.

Regarding academics who have researched on the right to adequate housing, this paper will start with Chenwi<sup>52</sup> whose research paper considered the right to adequate housing in the African regional human rights system, with specific emphasis on its enforcement by the African Commission on Human and Peoples' Rights. In the paper, the author discussed the recognition, meaning and content; State obligations; and the interactions of the right to adequate housing with other rights in terms of the principle of interdependency of rights.<sup>53</sup> Further, the paper discussed the South African jurisprudence with the view to highlight congruencies and divergences between the African system and the South African system. The work of Chinwe is important in this research because it discussed some of the aspects covered under the South African jurisprudence relating to the right to adequate housing. However, the research did not discuss in depth the constitutional provisions relating to the right to adequate housing in South Africa. Further, the research did not discuss the right to adequate housing under the

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<sup>51</sup> ZACC 1 2008; SA 208 (5) BCLR 475

<sup>52</sup> Chinwe (n 3)

<sup>53</sup> Ibid

Zimbabwean context. Thus, this research will seek to add to that research and analysis the Zimbabwean and South African constitutional provisions on the right to adequate housing.

Wertman<sup>54</sup> also discussed access to housing for all South Africans in his paper. In the research, Wertman critically discussed the extent to which South Africa has come in realising its progressive right of access to housing and how far it still has to go. In discussing the extent to which the right to adequate housing has been realised, the author had occasion to analyse the Constitutional Court case of *Government of the Republic of South Africa v Grootboom*,<sup>55</sup> and found that the court ‘has failed to enforce the Constitution’s promise of access to adequate housing for all South Africans; therefore, the legislative and executive branches of South Africa’s government must amend the law to shift from the unsustainable practice of delivering completed units of housing toward delivering infrastructure and public services that will support the private development of affordable housing.’<sup>56</sup>

Wolf also added to the discussion in his paper when he analysed the right to adequate housing in South Africa.<sup>57</sup> In the research, the author reviewed international instruments and South African housing laws and concluded that the right of access to adequate housing should be expanded to include access to the civil and political right to participate. In his paper, the author argued that participation by stakeholders in decision-making processes is the most effective way to realise the right to housing.<sup>58</sup> The two researches are important in this research since they discussed the right to adequate housing in South Africa. However, this research will go further to do a comparative analysis between the South African constitutional provision which guarantee the right to adequate housing and the Zimbabwean constitutional provision. This researcher will seek to rely on these researches to highlight the need for the Zimbabwean government to adopt the South African approach in relation to realising the right to adequate housing.

Another important paper worth noting which is relevant to the topic under study is that of Kondo which discussed the socio-economic rights in Zimbabwe and how they have been

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<sup>54</sup> Wertman, (n 49)

<sup>55</sup> *Grootboom* case (n 13)

<sup>56</sup> Wertman (n 49) 731, 732

<sup>57</sup> R Wolf, ‘Participation in the Right of Access to Adequate Housing’ (2006) 14 *Tulsa J. Comp. & Int’l L.* 269.

<sup>58</sup> Wolf (n 57) 271.

interpreted by the courts.<sup>59</sup> Although Kondo did not specifically discuss the right to adequate housing in Zimbabwe, his research is important in that it deals with the development of jurisprudence on socio-economic rights in Zimbabwe. Kondo's research illustrates the approach of the courts in interpreting socio-economic rights where the courts in one case noted that the State as well as non-State actors have to refrain from negatively interfering with constitutionally-protected and enforceable socio-economic rights whilst in another case noted that there is a positive obligation on the State, which may involve the allocation of resources, to ensure that socio-economic rights are realised. Since the right to adequate housing is one such socio-economic right, the pronouncement of the courts in the cases discussed by Kondo is therefore important to this research in that this research will analyse whether the constitutional provisions of Zimbabwe adequately provide for measures and policies that prohibit State and non-State actors from negatively interfering with the right to adequate housing. Further, the research will analyse whether positive obligation imposed on the State to ensure the realisation of the right to adequate housing is being promoted.

Despite the constitutional provisions guaranteeing the right to adequate housing, constitutional cases interpreting the same and academic scholarly reviews discussing the right to adequate housing, it cannot be gainsaid that there is much that still needs to be done in order to realise this right. This is because although the government has been trying to provide people with shelter, it has not realised the provision of the right to adequate housing. In Zimbabwe, the right to adequate housing is only indirectly provided for in section 74 of the Constitution.

### **1.8. Overview of the Structure and Chapters of the Dissertation**

Chapter one introduces the study, concisely states the problem to be investigated by this research and gives the background and significance of the study. It will highlight the problem statement that gave birth to the analysis in this paper. Guiding questions to inform the analysis will be given and the methodology of how the study is going to be conducted which is mainly desk research and also proffer reasons for the chosen comparison. Lastly, the paper will justify the importance of this study and give a short summary of the major points to be analysed in this paper on every chapter.

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<sup>59</sup> Kondo (n 2)

Chapter two discusses conceptual and historical framework on the right to adequate housing. This, the research will do by discussing the international and regional instruments which provides for the right to adequate housing. In discussing these instruments, the chapter will further discuss the nature and scope of the right to adequate housing and details out the right holders and duty bearers of the right.

Chapter three critically analyses the Zimbabwean legal framework with regards to the right to adequate housing and practice in its realisation looking at the contemporary context. This chapter will clearly show if the available legal framework concerning the right to adequate housing comprehensively and will also into the available literature and practices.

Chapter four compares and contrasts the realisation of the right to adequate housing in Zimbabwe with the South African perspective. This chapter will give clear picture on the realisation of the right to adequate housing in South Africa. Best practices to inform the progressive realisation of the right will emerge from the comparisons and discussions to be conducted in this chapter.

Chapter five provides some conclusions to this research and lastly provides recommendations to how the right to adequate housing in Zimbabwe could be progressively realised. This chapter closes the discussion by giving the author's opinion with regard to the right. These recommendations will be mainly directed towards the government of Zimbabwe. Also, another set of recommendations will be presented for researchers who intend to pursue additional research going beyond the scope of this thesis.

## CHAPTER 2: THE NATURE AND SCOPE OF THE RIGHT TO ADEQUATE HOUSING – INTERNATIONAL PERSPECTIVE

### 2.1. Introduction

It cannot be disputed that some of the measures of a quality life that every human being desire to include safe, secure, affordable and appropriate housing.<sup>60</sup> Housing is therefore essentially a human need and an important requirement for the fulfilment of human life.<sup>61</sup> This entails that the concept of adequate housing is an important component of human rights. The concept of the right of every human being to an adequate standard of living has long been recognised in many international, regional and national instruments.<sup>62</sup> The most important international instruments which recognise the right to adequate housing include the Universal Declaration of Human Rights of 1948 (UDHR) and the International Convention on Economic, Social and Cultural Rights of 1966 (ICESCR). Regionally the African Charter on Human and Peoples' Rights of 1981 is an important instrument which recognise, though impliedly, the right to adequate housing. However, despite the provisions of these instruments, much work remains<sup>63</sup> since the right to adequate housing has not been fully realised in the lives of many human beings in most States including in Zimbabwe.<sup>64</sup>

The aforementioned instruments are vital pillars in so far, the right to adequate housing is concerned since they provide much of the framework for the discourse on international human rights. Further these instruments are now many decades old, which demonstrate the long history of a conceptual right to housing.<sup>65</sup> Thus, when discussing the nature and scope of the right to adequate housing, it is imperative to consider what these instruments provides first. An analysis of the Zimbabwean and South African legal framework will then be made after first discussing the nature and scope of the right to adequate housing as provided for under the international and regional instrument. This chapter will discuss the conceptual and historical framework on the right to adequate housing. The chapter will discuss the international and regional statutes

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<sup>60</sup> P. Khosla, 'Women and Housing: Towards inclusive Cities' (2014) United Nations Human Settlements Programme

<sup>61</sup> H. Onaria, 'Guaranteeing the right to adequate housing and shelter in Uganda: The case study of women and people with disability' (2007) Human Rights and Peace Centre 1.

<sup>62</sup> Monitoring housing rights. Developing a set of indicators to monitor the full and progressive realisation of the human right to adequate housing (2003) United Nations Housing Rights Programme Working Paper No. 1

<sup>63</sup> Monitoring housing rights (n 62)

<sup>64</sup> Khosla (n.60)

<sup>65</sup> T Byrne & D.P. Culhane, 'The Right to Housing: An Effective Means for Addressing Homelessness?' (2011) UP JL&SC Vol 14, 379, 380-381.

governing the right to adequate housing and will further discuss the nature and scope of the right to adequate housing and details out the right holders and duty bearers of the right.

## **2.2. International Instruments Recognising the Right to Adequate Housing**

The right to adequate housing for all people has been acknowledged in several United Nations conventions including the UDHR and the ICESCR. These instruments are important since they have been enacted and adopted many years ago. Constitutions of most States acknowledges the binding nature of these instruments.<sup>66</sup>

### *2.2.1. Universal Declaration of Human Rights*

The first international instrument which according to some scholars explicitly recognises the right to adequate housing is the UDHR of 1948.<sup>67</sup> The UDHR recognises that all human beings are entitled to basic human rights which include both civil and political rights as well as economic, social and cultural rights.<sup>68</sup> The instrument also contains an authoritative interpretation of the ‘human rights and fundamental freedoms’ which according to some scholars, do constitute an obligation, binding upon the Members of the United Nations,<sup>69</sup> stemming from the U.N. Charter, and therefore enforceable by the U.N. Security Council.<sup>70</sup> The UDHR is mostly taken into regard when interpreting other international instruments and many of its provisions are considered to form part of international customary law. Thus, the instrument is important when interpreting the right to adequate housing, although it is not binding upon States.

The most important provision of the UDHR in regard to the right to adequate housing is article 25(1) which provides that,

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services...

The other provision of the UDHR which recognises the right to adequate is article 17 which provides that, ‘

(1) Everyone has the right to own property alone as well as in association with others.

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<sup>66</sup> See section 327 of the Zimbabwean Constitution and section 231 of the South African Constitution.

<sup>67</sup> B. Terminski, ‘The right to adequate housing in International human rights law: Polish transformation experiences’ (2011) 22 (2) RLDH 220, 223.

<sup>68</sup> Article 2 of the UDHR

<sup>69</sup> H. Lauterpacht, ‘International law and human rights, in international human rights in context: law politics morals’, 147, 151

<sup>70</sup> E Schwelb, ‘An Instance of Enforcing the Universal Declaration of Human Rights: Action by the Security Council’ (1973), 22 INT’L & COMP L.Q. 161; S Romero, ‘Mass Forced Evictions and the Human Right to Adequate Housing in Zimbabwe’, (2007) 5 Nw. J. Int’l Hum. Rts. 275, 282.

(2) No one shall be arbitrarily deprived of his property. \_’

Considering the above provisions, it is clear that the UDHR recognises the right of every human being to own property individually or in association. This right should not be taken in isolation, but rather should be read in conjunction with other rights provided in the instrument. It is however important to note that because the UDHR is not binding on States, it leaves a room for its abuse by States since its provisions cannot be challenged under any human rights bodies.<sup>71</sup> The import of this is that the application of the instrument will largely depend on the goodwill of States.<sup>72</sup> Thus, the full realisation of the right to adequate housing cannot be guaranteed in terms of the UDHR. However, the instrument should be considered an important step in the realisation of the right to housing since it gave birth to the binding international and regional instruments which will be discussed below.

### 2.2.2. *The International Convention on Economic, Social and Cultural Rights*

The ICESCR is one of the most ratified treaties and of legal binding international instrument to recognise the right to adequate housing.<sup>73</sup> This instrument codified the right to adequate housing in the UDHR under article 11(1) which provides that:

The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself [or herself] and for his [or her] 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 realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The above provision means that the right to adequate housing is a component of the right to an adequate standard of living. Article 11(1) has been carefully defined and interpreted by the Committee on Economic, Social and Cultural Rights (the Committee) which is mandated to monitor the fulfilment of the obligations set by the Covenant. This Committee has elaborated several general comments on the right to housing.<sup>74</sup> The general comments expounded by the Committee formulate the guidelines for the protections and progressive realisation of the rights. These General Comments provides the most comprehensive international statement of law on

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<sup>71</sup> D.N Kinuthia, ‘A critical evaluation of the right ton housing in Kenya’ (2018) 31.

<sup>72</sup> Kinuthia, (n. 71) 31.

<sup>73</sup> There are 171 state parties to this Convention.

<sup>74</sup> Kashakashvili *et al*, ‘The right to adequate housing: The analysis of basic challenges (2018) Human Rights Education & Monitoring Centre, 19; see also the Committee on Economic, Social and Cultural Rights, General Comments, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23



the right to adequate housing to date.<sup>75</sup> Thus, any discussion on the nature and scope of the right to adequate housing in this research will be made to these General Comments.

What is important to note from the two international instruments discussed above is that while the UDHR places no binding obligations on nations, the ICESCR requires States that have ratified it to take appropriate steps to ensure the realization of a right to housing.<sup>76</sup> This means that once a State ratifies the ICESCR, that State will not only be considered to have accepted the principle of a right to housing, but will be considered also to have accepted a binding obligation to uphold and promote this right.<sup>77</sup> Thus, member States of the ICECSR are required to respect, protect, and fulfil the rights to housing of their citizens. To do so, States are therefore obliged to refrain from engaging in activities such as forced evictions and also, they must ensure that third parties do not impede access to adequate housing.<sup>78</sup>

### *2.2.3. Other International Instruments*

Besides the above discussed international instruments, the right to adequate housing is also recognised under several other international conventions which include the International Covenant on Civil and Political Rights of 1966 (ICCPR),<sup>79</sup> the Convention on the Rights of the Child of 1989 (CRC),<sup>80</sup> the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (ICERD),<sup>81</sup> the International Convention on the Rights of People with Disabilities of 2006 (ICRPD),<sup>82</sup> and the Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW),<sup>83</sup> among other international conventions. These instruments clearly place an obligation on member States to respect, protect and fulfil the right to adequate housing. Members States are mandated to adopt measures which guarantee citizens to gain and sustain a safe and secure home and community in which to live in peace and dignity.

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<sup>75</sup> Romero (n. 70) 285.

<sup>76</sup> Article 11(1) above

<sup>77</sup> Byrne & Culhane (n. 65) 380.

<sup>78</sup> Byrne & Culhane (n. 65) 382.

<sup>79</sup> Article 17(1) of the ICCPR which guarantee protection to privacy and homes for the enjoyment and fulfilment of the right to housing.

<sup>80</sup> Article 16(1) of the CRC which guarantee the right children's right to home and privacy.

<sup>81</sup> Article 5(e)(iii) of the ICERD which mandates states to eradicate and ban discrimination in the enjoyment of the right to housing.

<sup>82</sup> Article 28 of the ICRPD

<sup>83</sup> Article 14(2) of CEDAW

### 2.3. Regional Instruments Recognising the Right to Adequate Housing

The African Charter stands as a regional human rights instrument among others that recognise the right to adequate housing. The African Charter was adopted by the Organization of African Unity (OAU) in 1986 and ratified by Zimbabwe that same year.<sup>84</sup> This regional instrument provides for both civil and political rights and economic, social and cultural rights which according to scholars shows its unique features in the sense that it recognises both categories of rights on the same footing and the provides for the same enforcement mechanism for both categories of rights.<sup>85</sup> Although the right to shelter and housing are not explicit in the African Charter, the combined effect 28 of Articles 14, 16 and 18(1) create the right,<sup>86</sup>

As interpreted by the African Commission particularly in the case of *The Center for Economic and Social Rights (CESR) v. Nigeria*,<sup>87</sup> ‘the right to housing or shelter forms a part of the rights to property, health, and protection of the family, read together, because property, health and family life are all adversely affected when housing is destroyed’. It should be noted that the right to adequate housing, in the context of the African Charter, includes a right to protection against forced evictions. Thus, in the above *CESR* case, the African Commission held that ‘the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions.’<sup>88</sup> The right to protection from forced evictions is thus a derivative of the right to housing, which is itself a derivative of other rights.

It is therefore clear from the above that the right to adequate housing is explicitly provided in the regional instruments the same as it is under the international instruments. From these instruments, it becomes necessary to analyse the nature and scope of the right before discussing the right to adequate housing in Zimbabwe.

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<sup>84</sup> Romero (n.70) 288.

<sup>85</sup> Chenwi, (n 3) 342-343.

<sup>86</sup> Wolf, (n 57) 274.

<sup>87</sup> *The Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, 15th Annual Activity Report of the ACHPR (2002); 10 IHRR 282 (2003) at para 60 wherein the Commission noted that,

‘Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.

<sup>88</sup> *The Center for Economic and Social Rights (CESR) v. Nigeria (2005)* 1 African Journal of Legal Studies 129 at 140.

## 2.4. Nature and Scope of the Right to Adequate Housing

The nature and scope of the right to adequate housing should be understood in conjunction with the concept of adequacy. The concept of adequacy is particularly important in relation to the right to housing because it underscores factors which must be taken into account in determining whether particular forms of shelter must be considered to constitute 'adequate housing'.<sup>89</sup> Thus, the definition of the right to adequate housing should encompass several aspects. According to some scholars, the right to adequate housing can be defined as the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.<sup>90</sup> This therefore means the right to adequate housing include other rights such as right to security, privacy, space, lighting, ventilation and satisfactory location.<sup>91</sup>

As noted from the international and regional instruments discussed above, the right to adequate housing should not be interpreted narrowly. It must not be equated to the right to have a roof over one's head, but rather to mean the right of people to live somewhere where security, peace and dignity is guaranteed.<sup>92</sup> This means that the right to adequate housing implies a certain standard of housing that includes facilities, like energy and sanitation, is affordable and culturally adequate.<sup>93</sup> The other important aspect relating to the right to adequate housing is that it must apply to every person. Since the right is like any other rights, the right applies to every person by virtue of being a human being. This means that the human rights principles of equality and non-discrimination are fundamental components of the right to housing.<sup>94</sup>

Further, it is worth noting from the definition of the right to adequate housing that the right contains freedoms and entitlements. Freedoms captured by the right to adequate housing include, protection against forced evictions and the arbitrary destruction and demolition of one's home; the right to be free from arbitrary interference with one's home, privacy and family; and the right to choose one's residence, to determine where to live and to freedom of movement.<sup>95</sup> This shows how broad the right to adequate housing is. As to the entitlements that is contained in the right to adequate housing, the following are common cause, security of

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<sup>89</sup> CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), Office of the High Commissioner for Human Rights, 4.

<sup>90</sup> M Kothari *et al*, 'The human right to adequate housing and land' (2016) National Human Rights Commission 9; Kinuthia (n. 71) 1.

<sup>91</sup> Kinuthia (n. 71) 1.

<sup>92</sup> L Leijten & K de Bel, 'Facing financialization in the housing sector: A human right to adequate housing for all' (2020) 68(2) NQHR 94, 97.

<sup>93</sup> CESCR, General Comment No. 4: The Right to Adequate Housing (article 11(1) of the Covenant) (E/1992/23, 13 December 1991) para 8.

<sup>94</sup> Leijten & de Bel (n. 92) 98.

<sup>95</sup> CESCR General Comment No. 4 (n. 89) 6.

tenure; housing, land and property restitution; equal and non-discriminatory access to adequate housing; participation in housing-related decision-making at the national and community levels.<sup>96</sup> The freedoms and entitlements are discussed below:

#### *2.4.1. Legal Security of Tenure*

One of the most important aspect of the right to adequate housing is the legal security of tenure. Security of tenure has been loosely defined by some scholars as ‘the legal arrangements which offer tenants indefinite tenure to their housing, subject to the proven breaches of their lease agreement that provide ground for termination action by the landlord’.<sup>97</sup> From this definition, it can be noted that legal security of tenure describes an agreement, governed by a legal framework or legislative regime protecting individuals or groups regarding use of land or residential property generally to such an extent that those with security of tenure are protected against arbitrary forced eviction or expropriation of property.<sup>98</sup>

Further, legal security of tenure means individuals or groups should not be subjected to arbitrary or unlawful interference with their right to housing. Thus, the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.<sup>99</sup> Tenure takes a variety of forms, including rental accommodation (whether public or private), cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property.<sup>100</sup> Notwithstanding all these types of tenure, international law provides that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.<sup>101</sup> Thus, in terms of the ICESCR, States are obliged to take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.<sup>102</sup> The aspect of security of tenure means that the practice of forced evictions which amounts to the violation of the human right to adequate

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<sup>96</sup> These are contained in CESCR General Comment No. 4.

<sup>97</sup> S Fitzpatrick & H Pawson, ‘Security of Tenure in Social Housing: An International Review’ (2011) p.1

<sup>98</sup> Monitoring Housing Rights (n. 62) 12

<sup>99</sup> CESCR General Comment No. 4: (n. 89) 6.

<sup>100</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23

<sup>101</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23

<sup>102</sup> Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23

housing,<sup>103</sup> must be avoided and State must ensure its citizens are protected from those practices. They should do so by adopting laws and policies which guarantee security of tenure.

It must however be noted that not all housing laws and policies are considered to be adequate. In order for housing laws and policies to be considered adequate, they must have a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats to the occupants. In other words, an individual or group, such as a family, can only be said to have security of tenure when they are protected from involuntary removal from their land or residence, except in exceptional circumstances, and only by means of a known and agreed legal procedure.<sup>104</sup> Thus, the Commission on Human Rights, in its resolution 1993/77 declared that ‘the practice of forced evictions constitutes a gross violation of human rights, in particular, the right to adequate housing.’ This shows how connected the right to adequate housing is to other rights since lack of security of tenure, and lack of stability and control in the housing arena can have a negative outcome for health and well-beings in individuals.<sup>105</sup> It is thus clear from the above that for any shelter or house to be considered as constituting adequate housing, there must be security of tenure.

#### *2.4.2. Availability of Services, Materials, Facilities and Infrastructure*

In order for a particular shelter to conform to the standard of adequate housing, certain facilities essential for health, security, comfort and nutrition must be present.<sup>106</sup> Because the right to adequate housing is closely connected to other rights like right to privacy and the right to life, it cannot be gainsaid that for a particular shelter to imitate to the standard of adequate housing, it must contain facilities that are essential for health, security, comfort among others. This entails that the beneficiaries of the right to adequate housing must have sustainable access to natural and common resources like safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.<sup>107</sup> Without these facilities, it cannot be said that the right to adequate housing is realised in a given country. Thus, when analysing the right to adequate housing, regard must be made to these facilities. If a shelter lacks these facilities, such shelter cannot be

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<sup>103</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 7

<sup>104</sup> Monitoring Housing Rights (n. 62) 12

<sup>105</sup> Fitzpatrick & Pawson (n. 97) 3

<sup>106</sup> Committee on Economic, Social and Cultural Rights, General Comment No.4.

<sup>107</sup> See *European Roma Rights Centre (ERRC) v Portugal*, Complaint no. 61/2010, Decision on Merits, ECSR (30 June 2011) wherein the European Committee stated that, ‘the concept of an adequate housing means housing which is safe, in terms of sanitation and health care’ (para 31) and then at para 36 that, ‘the right to adequate housing includes having access to fresh water, which should be placed at a reasonable distance’.

considered as constituting adequate housing since according to some scholars the, ‘health and welfare of a person is severely impacted through inadequate access to basic sanitation and resources’<sup>108</sup>

The above is supported by the decision of the European Committee of Social Rights in the complaint filed by the European Roma Rights Centre against Italy.<sup>109</sup> In this case the European Roma Rights Centre (ERRC) claims that the housing situation of Roma in Italy contravene the provisions of Article 31 of the European Social Charter and Revised Charter (RESC). In precise the ERRC alleges that Roma is denied an effective right to housing because of the shortage of and inadequate living conditions in camping sites, the forced evictions Roma are often subject to, and the fact that Roma have no access to accommodation other than camping sites. In finding in favour of the ERRC, the Committee noted that the insufficiency and inadequacy of camping sites, lack of permanent dwellings and forced evictions constitute a violation of the provisions of European Social Charter and Revised Charter. The findings of the Committee clearly define the substantive concept of the right to adequate housing.

#### *2.4.3. Affordability*

Another aspect of adequate housing is the issue of affordability. Housing affordability is one of the key issues in housing policies because it plays an important role in the concept of the right to adequate housing. If housing is not affordable many people will be left homeless thus their right to life will be threatened as well. Thus, some have argued that, ‘there are similar concerns that growing numbers of people cannot find an affordable place to live that meets their needs and that this is pushing more people into poor quality, overcrowded and insecure housing and homelessness’.<sup>110</sup> For housing or shelter to be considered adequate in terms of this factor, personal or household financial costs associated with housing should therefore be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised.<sup>111</sup>

In terms of the General Comment, it is therefore the duty of state parties to take steps to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. Further, states parties should establish housing subsidies for those unable to obtain affordable

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<sup>108</sup> M. Temple, ‘Housing, homelessness and human rights: Advocating a rights-based response to a systemic problem’ (202) European Master’s Programme in Human Rights and Democratisation, p.15.

<sup>109</sup> *European Roma Rights Centre (ERRC) v Italy*, Complaint No. 27/2004.

<sup>110</sup> The Right to adequate housing: Are we focusing on what matters? A discussion paper commissioned by the association of local authority chief housing officers (2011) 31-32.

<sup>111</sup> CESCR General Comment No. 4: (n. 89).

housing, as well as forms and levels of housing finance which adequately reflect housing needs.<sup>112</sup> This is also cemented by the European Social Charter and Revised Charter (RESC) which provides in Article 31 that obliges State parties to take measures designed ‘to make the price of housing accessible to those without adequate resources.’ This provision was interpreted in the case of *FEANTSA v Slovenia*,<sup>113</sup> wherein it was determined that, ‘the State has obligations not only to ensure that the average cost of housing corresponds to average income, but that the affordability ratio of the poorest applicants for housing is compatible with their level of income.’<sup>114</sup>

#### 2.4.4. Habitability

The other aspect of adequate housing as provided for under General Comment is the issue of habitability. This aspect implies that for a shelter or house to be considered to be in compliance with the concept of adequate housing, it must provide the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.<sup>115</sup> The physical safety of occupants must be guaranteed by the shelter for it to be considered an adequate housing. This is so considering that housing provides physical protection from the weather, offers personal security, and satisfies psychological demands for individual space and privacy. Housing establishes integral social functions by providing a gathering space for families and communities. Thus, the Committee encourages states parties to comprehensively apply the Health Principles of Housing prepared by World Health Organisation (WHO) which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; that is, inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates.<sup>116</sup>

#### 2.4.5. Accessibility

The law is clear that for the right to adequate housing to be considered be released, it must be accessible to those entitled to it. In other words, the right to housing must be accessible to all groups of people both advantaged and disadvantaged. This in turn means that the housing law and policy of any state must take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of

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<sup>112</sup> CESCR General Comment No. 4: (n. 89)

<sup>113</sup> *FEANTSA v Slovenia* [2008] European Committee of Social Rights, 53.

<sup>114</sup> Temple (n.108) p.19.

<sup>115</sup> CESCR General Comment No. 4: (n. 89)

<sup>116</sup> CESCR General Comment No. 4: (n. 89)

the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.<sup>117</sup>

#### *2.4.6. Location*

The other aspect which affects the right to adequate housing is location. It is not in dispute that where the shelter is located in areas where there is no access to important features discussed above like health-care services, schools' other facilities, it cannot be considered to be adequate housing. In this regard, adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities.<sup>118</sup> Similarly, for a shelter to be considered adequate, it must not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.<sup>119</sup>

#### *2.4.7. Cultural Adequacy*

According to the General Comment, for any shelter or housing to conform to the standard of adequate housing, it must also take into the cultural identity and diversity of citizens. Thus, the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.<sup>120</sup> Further, activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.<sup>121</sup>

### **2.5. Right Holders and Duty Bearers of the Right to Adequate Housing**

What can be noted from the nature and scope of the right to adequate housing as discussed above is that this right confers upon the State certain obligations whilst it provides to the citizens certain rights or entitlements. The obligations imposed on the State are both negative and positive. Since the right is part of fundamental human rights, it calls for the state to respect, protect and fulfil it hence the failure to do amount to violation of the right. The obligation to respect means the right to adequate housing impose a negative obligation on the State not to interfere directly or indirectly with the individual's enjoyment of the right by for example

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<sup>117</sup> CESCR General Comment No. 4: (n. 89)

<sup>118</sup> CESCR General Comment No. 4: (n. 89).

<sup>119</sup> CESCR General Comment No. 4: (n. 89)

<sup>120</sup> CESCR General Comment No. 4: (n. 89)

<sup>121</sup> C. Golay & M. Ozden, 'The right to housing. A fundamental human affirmed by the United Nations and recognised in regional treaties and numerous national constitutions' 40.



carrying out forced evictions.<sup>122</sup> This obligation also means that the State must respect an individual's own efforts to realise such right.<sup>123</sup>

As to the obligation to promote, the right imposes a positive obligation on the State since it calls upon the State to take measures that prevent third parties from interfering with the enjoyment of such rights.<sup>124</sup> This means that the State must ensure that other people or bodies do not violate this right<sup>125</sup> and this includes implementing measures to prevent, investigate and punish third parties that violate such rights, for example through regulation and remedies.<sup>126</sup> Finally, the obligation to fulfil requires States to take steps to facilitate individuals and communities in enjoying the right and, when an individual or group is unable to realise the right themselves, to provide that specific right.<sup>127</sup> The obligation to fulfil is subject to progressive realisation. It nevertheless requires taking legislative, administrative, budgetary, judicial and others steps toward the full realisation of rights. This obligation includes duties to increase access to resources and the means of attaining these rights through immediate measures.<sup>128</sup> States must give priority to meeting the core minimum obligations for each right. In the same vein this obligation calls for the State to eliminate and refrain from adopting any laws, policies or practices that may have a direct or indirect discriminatory impact on individuals' ability to realise their rights.<sup>129</sup>

Another important aspect to note concerning the right to adequate housing is that the right is regarded as part of vertical rights meaning they are enforceable against the State.<sup>130</sup> This basically means that the State is expected to provide the services and facilities needed to give effect to the right. This means that for the State, regardless of the state of development of any country, there are certain steps which must be taken immediately. State parties are obliged to take several measures to ensure that the right is fully implemented within the jurisdiction. These

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<sup>122</sup> Leijten and de Bel (n. 92) 99.

<sup>123</sup> Leijten and de Bel (n. 92) 99.

<sup>124</sup> Nolan (n. 6) 4

<sup>125</sup> Economic, Social and Cultural Rights in Zimbabwe: Options for Constitutional Protections. Executive Summary.

<sup>126</sup> Leijten and de Bel (n. 92) 99.

<sup>127</sup> Paraphrased from CESCR General Comment 13 on the Right to Education at para. 47. For more on what these different obligations entail, see the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997, published in (1998) 20 *Human Rights Quarterly* 691.

<sup>128</sup> Economic, Social and Cultural Rights in Zimbabwe: Options for Constitutional Protections. Executive Summary, 10

<sup>129</sup> Economic, Social and Cultural Rights in Zimbabwe: Options for Constitutional Protections. Executive Summary, p.10.

<sup>130</sup> D.M Engel, 'Vertical and Horizontal Perspectives on Rights Consciousness,' (2012) 19 *Indiana Journal of Global Legal Studies*, 423.

measures include giving due priority to those social groups living in unfavourable conditions by giving them particular consideration. Thus, the government housing policies must not be aimed to the already advantaged social groups at the expense of the others.<sup>131</sup> States have an obligation to provide for housing in the form of, for example, social housing or low-rental units for low-income households.

What is interesting on the right to adequate housing is the fact that the principle of progressive realisation acknowledges that as economic, social and cultural rights cannot be fully achieved all at once or over a short period of time, every State must pursue a process of continuous improvement. This is understood to entail regularly reviewing and updating laws, policies, programmes, codes of practice and non-statutory guidance, as well as budget decisions and resource allocations, to enhance the ability of people to realise their rights and improve their lives.<sup>132</sup> Rather than a legal right whose violation can be rectified via the judicial system, in most cases, the right to housing is perhaps better described as a mechanism for programmatic rights, that compel States to engage in some broader, more abstract form of action to address homelessness.<sup>133</sup>

## **2.6 Conclusion**

From the above, it is clear that the right to adequate housing is vital for one to exercise other human rights. Without the housing or shelter, other basic human rights cannot be achieved, for example the right to privacy, health, dignity and others cannot be enjoyed without the right to adequate housing. This shows the interdependence of the rights. As alluded to already, the right to adequate housing not only forms part of the right to adequate living but is intertwined with other civil, political, economic, social and cultural rights. In human rights language this means that all human rights are indivisible, interdependent and interrelated, such that implementation of one right impact on other rights.<sup>134</sup> This right has been provided for under various international and regional convention which shows aspects contained in the right to adequate housing. These aspects are important for a particular shelter to be considered adequate. This means that nature and scope of the right to adequate housing shows that the right must not be interpreted narrowly. The next chapter will therefore analyse the right to adequate housing in Zimbabwe.

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<sup>131</sup> CESCR General Comment No. 4: (n. 89)

<sup>132</sup> The Right to adequate housing (n. 108) 12

<sup>133</sup> Byrne & Culhane (n. 65) 382.

<sup>134</sup> The Right to adequate housing (n. 122) 10

## CHAPTER 3: ZIMBABWE LEGAL FRAMEWORK ON THE RIGHT TO ADEQUATE HOUSING

### 3.1. Introduction

Housing or shelter in Zimbabwe is an important aspect that need special attention and must be addressed meticulously and explicitly in the statutes. This is particularly so if regard is made to the fact that Zimbabwe is experiencing an acute national housing crisis, stemming from the failure by the State to make adequate provision of access to housing amid a growing urban population.<sup>135</sup> There is a need for an enforceable right to adequate housing for everyone in Zimbabwe. As already discussed under chapter 2, the right to adequate housing encompasses various necessities such as adequate privacy, adequate space, adequate security, adequate lighting and ventilation among other necessities.<sup>136</sup> The right to adequate housing is therefore important because it is related to other human rights like right to privacy, health, dignity and other fundamental huma rights. For example, if the right to adequate housing is not guaranteed and people are arbitrary forced out of their homes, the right to life, human dignity as well as the right to be protected against deprivation of property will be equally threatened.

Because of the importance of the right to adequate housing, the government of Zimbabwe must endeavour to respect obligations imposed upon it to promote, protect and fulfil the enjoyment of the right to adequate housing by every person in Zimbabwe. There are several legislative framework and policies that deal with the right to adequate housing. In Zimbabwe, the most important legislative framework when analysing the right to adequate housing is the Constitution of Zimbabwe. This legislative framework must be considered in light of the various international instruments discussed under chapter 2 which explicitly recognise the right to adequate. This is particularly so if regard is made the provisions of the Constitution which mandates the courts, tribunal, forum or body to take into account international law and conventions to which Zimbabwe is party when interpreting the provisions of the bill of rights.<sup>137</sup>

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<sup>135</sup> J A. Mavedzenge, 'The right to life as an alternative avenue for the enforcement of the right of access to adequate housing in Zimbabwe' (2020) 31(2) Stellenbosch Law Review 344; 344.

<sup>136</sup> Chapter 2 p.30

<sup>137</sup> Section 46 (1)(c) of the Constitution of Zimbabwe as read together with section 327 (6) which provides that, When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

It is also vital to note that although the Constitution is the most important legislative framework when discussing the right to adequate housing in Zimbabwe, there are other legislative frameworks and policies which were adopted before the promulgation of the Constitution which dealt with the issue of housing. Thus, the purpose of this chapter is to interrogate the pre- and post-independence legislative frameworks and policies which provided for the right to housing. The chapter will then discuss the provisions of the Constitution of Zimbabwe to ascertain the extent to which the right to adequate housing is provided. The chapter will further analyse the nature and content of the right to adequate housing and conclude by discussing the decisions of the courts which interpreted the provisions guaranteeing the right to adequate housing in Zimbabwe.

### **3.2. Pre-Independence Legislative Policy**

Due to colonial rule, there was always inadequate supply of housing, which was mainly caused by the colonial housing policies and practices. Before independence, there was a deliberate strategy of discouraging blacks from permanently settling in the urban areas. During the early colonial period, urban areas were considered to be the preserve of the whites. In that regard only the African male working class were allowed to settle in urban areas with women and children restricted to rural areas. Those who were allowed to settle in urban areas (males) were accommodated in hostels accommodation which were built as single sex accommodation. These hostels later accommodated large number of people when family of hostel inhabitants came to the cities and moved into the hostels already occupied by more than one male occupier.

Some scholars thus noted that because of this a family of eleven, two adults and their nine children occupy, in reality squat, with no formal rights of occupation, in a downstairs communal toilet in what used to be a single sex, single room occupant, hostel.<sup>138</sup> Even though, such facility can be considered as a shelter, such a shelter cannot be considered as adequate housing because it cannot offer the entitlements like habitability and availability of services, materials, facilities and infrastructure which entitlements are important for a house to be considered adequate housing. Thus, the sentiments expressed by other scholar that during colonial rule there was always insufficient supply of housing through a deliberate policy of

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<sup>138</sup> J. E. Stewart, R. K. Katsande & O Chisango, 'Shelter, a Home a House or Housing? 2014. Available at IDRC Digital Library <https://idl-bnc-idrc.dspacedirect.org/handle> Accessed 3 January 2022.

discouraging blacks from settling in urban areas which fuelled overcrowding and inferior conditions for the poor,<sup>139</sup> are unassailable.

It cannot therefore be disputed that housing laws that existed before independence were meant to govern urban centres in keeping with the intention to retain and expand the predominance of white interests.<sup>140</sup> Colonial policies on black housing clearly denied blacks permanent urban residence to the extent that during that period only limited housing ownership schemes were established. This then support the assertion that the right to adequate housing was not even recognised during pre-colonial rule. It is on this basis that some scholars concluded that housing delivery has been an issue in Zimbabwe's urban areas since the 1950s.<sup>141</sup>

It is however important to note that although blacks were prohibited from settling in urban areas thus being deprived of their rights to adequate housing, during colonial rule, certain legislative frameworks were enacted to address housing issue. According to some scholars, the settlement of blacks in the urban areas was first brought under control by the Native Locations Ordinance (No 4 of 1906) which stipulated that Africans who lived in the location must be employed in the area.<sup>142</sup> Also, the State attempted further to regulate the lives of African men and women living in the city. To this end, pass laws were more strictly enforced, and marriage was promoted among the African working classes by subsidizing rents for married housing with the rents paid by employers to house single men living in hostels.<sup>143</sup> It was on this basis that the issue of rental accommodation for married persons of various designs introduced.

Another Act which slightly improved the rights of black people to housing is the Land Apportionment Act of 1930 which was re-enacted in 1941 to include a provision for local authorities to house the black population and remove the requirement that they must be employed in the area. Under this Act, provision was made for government to provide urban rental housing for Africans working in parastatals. Although there was no adequate provision for the right to housing, the Land Apportionment Act allowed few black people to enjoy the right to housing. Further, due increased pressure to recognise the right to housing of Africans blacks, from the 1960s, limited home ownership schemes were established for blacks on long

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<sup>139</sup> J Mutembedzi, 'Housing land allocation in Kadoma: Implication for low-cost housing provision' (2012) (unpublished MSocSci dissertation). University of Zimbabwe, 16

<sup>140</sup> J Mutembedzi, (n 139) 14

<sup>141</sup> C. Rakodi and N.D Mutizwa-Mangiza, 'Housing Policy, Production and Consumption in Harare: A Review Part II' (1990) Zambezia

<sup>142</sup> Mutembedzi (n.139) 15.

<sup>143</sup> T. Scarnecchia, 'Access to Housing in Urban and Rural Zimbabwe: Historical Observations on the Nuclear Family' (1996) Shelter, Women, and Development: First and Third World Perspective, 295; 296.

leases. Apart from that the government also upgraded informal settlements and some building societies started to be involved for low-income housing finance for site and service schemes. Further, housing Services Board and the African Building Fund were established. These, although not clearly guaranteed the right to black Africans to an adequate housing, slightly improved such a right.

What cannot be denied is that the urban policies that were put in place during the colonial era in Zimbabwe were sensibly constructed to advance the goals of the colonial rulers which main goal was for capital accumulation through the use of cheap labour of African black males who were accommodated at hostels. Thus, research on urban development in Zimbabwe has shown that housing policies in the colonial era created inefficient and inequitable cities, segmented living areas according to race and class and a big gap between rural and urban in terms of infrastructure development.<sup>144</sup> This has resulted in the revision of most colonial urban policies by the post-independence government as a way of addressing the apparent disparities that were caused by the colonial policies. Although housing is essential for all human beings, prior to independence, the colonial regime paid lip-service to this self-evident principle. The provision of decent, affordable and durable housing to all income groups in urban areas became central to Zimbabwe's post-independence policy with homeownership becoming the major form of tenure.

### **3.3. Post-Independence Legislative Policy**

When Zimbabwe attained independence in 1980, the government of Zimbabwe embarked on a national development programme aimed at achieving economic independence in the various sectors society. The drive has been on the equal distribution of resources and provision of decent and affordable housing and security of tenure in urban areas. The government however was alive to the fact that the mission of improving human settlements cannot be achieved by the public sector alone, thus it pursued a policy which encourages the participation of the private sector, employers, individuals, community-based organisations in the provision of shelter.<sup>145</sup>

It was on this basis that the housing policies and legislative framework that was adopted after independence acted as a redistributive mechanism for restoring colonial inequalities. Thus, for Scarnecchia, the policy adopted by the government after 1980 of homeownership was meant

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<sup>144</sup> Government of Zimbabwe (2012). National Housing Policy, Government Printers, Harare.

<sup>145</sup> L. Mutendeke and N. Sigauke, 'Low Income Housing Finance -Post Independence Experiences, Prospects and Policy Implications for Zimbabwe' (2007) ENHR International Conference: 'Sustainable Urban Areas' 2.

to empower the previously marginalised indigenous. Further, the homeownership policy was meant to provide security of tenure to people who had stayed in urban settlements, formerly called 'African Townships' as well as to those who were acquiring stands and houses in independent Zimbabwe.<sup>146</sup> This part will therefore discuss some of the legislative framework and policies that were promulgated and adopted after independence to address the housing issue in Zimbabwe.

### *3.3.1. The Town and Regional and Country Planning Act [Chapter 29:12]*

The first Act to be considered in this research which was promulgated after independence and which addressed the housing issue is the Town and Regional and Country Planning Act of 1976. As can be noted from its preamble, this Act guides spatial planning of regions, districts and local areas, focus on conserving and improving the physical environment, promoting health, safety, convenience and general welfare as well as efficiency and economy in the development process.<sup>147</sup> Although the Act was amended several times and revised in 1996, the Act is important in issues relating to housing or shelter because it deals with planning, subdivision and consolidation of pieces of land. This means that if houses are built in compliance to the provision of this Act, the standards of the houses will meet the standards for adequate housing required under international convention. If houses are built contrary to the provisions of this Act, the government can implement some of its policies to demolish it like the 2005 Operation Restore Order or Murambatsvina which resulted in several houses being demolished in Harare. The importance of the Act in relation to housing issues cannot be gainsaid. The Act encourages government, citizens and other stakeholders to abide by certain building standards which meet the standards required under international conventions discussed under chapter 2.

### *3.3.2. The Urban Councils Act [Chapter 29:15]*

From its preamble, the Urban Councils Act was promulgated to,

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<sup>146</sup> C. Rakodi and P. Withers, 'Site and Services Home Ownership for the Poor. Issues for Evaluation and the Zimbabwean Experience. (1995) 19(3) Habitat International 371.

<sup>147</sup> The preamble to this Act provides as follows;

AN ACT to provide for the planning of regions, districts and local areas with the object of conserving and improving the physical environment and in particular promoting health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications; to authorize the making of regional plans, master plans and local plans, whether urban or rural; to provide for the protection of urban and rural amenities and the preservation of buildings and trees and generally to regulate the appearance of the townscape and landscape; to provide for the acquisition of land; to provide for the control over development, including use, of land and buildings; to regulate the subdivision and the consolidation of pieces of land; and to provide for matters incidental to or connected with the foregoing.

provide for the establishment of municipalities and towns and the administration of municipalities and towns by local boards, municipal and town councils; to provide for the conferring of town and city status on growth points, municipalities and towns; to provide for the declaration of local government areas and the administration of local government areas by local boards; to confer functions and powers and impose duties upon municipal and town councils and local boards; to provide for the establishment of the Local Government Board and to provide for the functions thereof; and to provide for matters connected with or incidental to the foregoing.

Important provisions of this Act which relates to housing are the provisions which covers issues of estate development, housing provision and development. Further, the Urban Councils Act provides how councils can raise finance and spend it in the context of urban development and how they relate with the Minister. The powers to raise and apply finance/revenue in keeping with Council-defined plans and budgets define the framework within which councils provide services, like housing, street lighting, sanitation, education, and health.<sup>148</sup> It is under this Act that both the central government and local authorities can maintain the existing urban infrastructure. However, as evidence shows, central government and local authorities are unable to provide new or adequately maintain existing urban infrastructure because of the prevailing economic situation which has adversely affected the revenue streams. This then leaves citizens with shelters which do not meet the minimum standards enshrined under international law for adequate housing.

According to some scholars, the other reason beside limited financial resources, that has affected the provisions of housing as required by the Urban Councils Act is the shortage of staff and equipment.<sup>149</sup> The shortage of staff and equipment had affected the delivery capacity which then result in the decline of quality of existing neighbourhoods and sluggish provision of new housing stock. An example is the decline of quality of most of the flats in Harare in particular the flats in Mbare. It is further important to note that the Urban Councils Act and all its amendment do not provide for the right to adequate housing. It only provides for the establishment of municipalities and towns and the administration of municipalities and towns. This means that this Act still leaves a gap on the legislative framework which provides for the right to adequate housing in Zimbabwe.

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<sup>148</sup> Mutembedzi (n.139) 19.

<sup>149</sup> Mutembedzi (n.139) 19.



### *3.3.3. Land Acquisition Act [Chapter 20:10]*

The other Act which has a great impact on housing issues in Zimbabwe after independence is the Land Acquisition Act. The Land Acquisition Act deals with the acquisition of rural land for either redistribution, social and economic infrastructure development or for incorporation into urban areas for urban uses. This means that under this Act, once rural land is incorporated into the urban boundaries, the administration of that land falls under central and local government, private landowners and civil society groupings and the provisions of the Urban Councils Act applies. What cannot be denied is that a lot of previously marginalised people benefitted from the Land Acquisition Act. However, just like the other legislative frameworks that were enacted before, this Act failed to provide for the right to adequate housing.

### *3.3.4. Housing and Building Act [Chapter 22:07]*

The other Act which deals with housing issues and which must be considered in this research is the Housing and Building Act. This Act establishes the Housing and Guarantees Fund and the National Housing Fund which benefits civil servants and non-civil servants. This Act is important in issues relating to housing because the fund established under it guarantees loans for civil servants and non-civil servants in Zimbabwe which are meant for purchasing or constructing houses. Further, local authorities can also benefit from these loans since they can also apply for funds to establish trunk services. Mutembedzi noted that ‘in recent years the National Housing fund has been used to construct dwellings, other buildings and essential services,<sup>150</sup> support construction related ‘experiments’ in the area of affordable housing and construction material.’ This clearly enhances the right to adequate housing since a lot of people benefit from this Act.

From the above legislative framework and the available evidence, it is worth noting that the supply of housing and the related settlement services still lags demand. Evidence shows that there are a quite number of people on the waiting list to be allocated stands by the government. The other issue which shows that there is still housing challenge in Zimbabwe despite the discussed legislative framework is the inadequate maintenance of the existing housing units, general settlement amenities and offsite public utilities. Local authorities’ ability to maintain existing services is weak for a number of reasons. In its multi-faceted form, the human settlement challenge in Zimbabwe has resulted in often undesirable sociological transformations in terms of family life and culture. For instance, some parents share rooms

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<sup>150</sup> Mutembedzi (n. 149) 24

with their children or are forced to stay apart, different couples share single rooms and children stay or sleep out at night which raises family stability and morality issues.<sup>151</sup> The settlement challenges have also contributed to a loss of quality of urban life. Disease outbreaks like Cholera, Tuberculosis and other health conditions have been linked to overcrowding, poor waste management as well as inadequate water and sanitation conditions.

The above shows that there is high demand of housing in Zimbabwe. According to the national housing policy of 2012, most Zimbabweans lack access to decent and secure housing...studies have shown that some high-density suburbs are shared by as many as 22 people instead of the recommended 6. The issue of access and the lack of access to decent accommodation is a global housing 'crisis' issue facing countries in developing and developed countries across the world.<sup>152</sup>

### *3.3.5. The Constitution of Zimbabwe*

It is trite that the Constitution is the supreme law of the land and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.<sup>153</sup> The Constitution of Zimbabwe guarantees a wide range of fundamental rights ranging from civil-political rights to socio-economic rights. These rights are set out in Chapter four-the Declaration of Rights. However, despite the Constitution of Zimbabwe providing a range of fundamental rights, the same Constitution is silent on a number of other important fundamental rights which include the right to access to adequate housing, the right to development and the right to the protection of family.<sup>154</sup> The Constitution does not expressly provide for the right to adequate housing to every person in Zimbabwe, hence the right remains implied from the provisions of the Constitution.

There is no provision under the Constitution of Zimbabwe, particularly under the Declaration of Rights section, which explicitly recognise the right to adequate housing for every person. However, this does not mean that there is no provision in the Constitution of Zimbabwe which deals with the freedoms and entitlements of the right to adequate housing. As discussed earlier, the right to adequate housing has various necessities and freedoms which include freedom from arbitral eviction from one's place of residence. In this regard, when discussing the right to

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<sup>151</sup> D Auret, 'Urban Housing: A national crisis?' (1995) Mambo Press: Gweru

<sup>152</sup> Government of Zimbabwe (2012). National Housing Policy, Government Printers, Harare.

<sup>153</sup> Section 2 of the Constitution of Zimbabwe.

<sup>154</sup> Mavedzenge, (n. 18)

adequate housing in Zimbabwe, the starting point is section 74 of the Constitution which deals with the issue of freedom from arbitrary eviction. This provision provides that;

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.

Since the issue of arbitrary eviction is considered as one of the freedoms under the right to adequate housing, it can therefore be argued that the Constitution of Zimbabwe recognise the right to adequate housing. As will be further highlighted from the decisions of the courts, the Constitution of Zimbabwe guarantees every person a right not to be arbitrary evicted from their homes. This means that the law prohibits eviction of any person without the court order. And in deciding whether it is proper for any person to be evicted, the courts are obliged to consider relevant circumstances first. Some of the relevant circumstances that have been considered by the courts before ordering eviction include whether or not the persons being evicted have alternative accommodation that is decent. This shows that this provision recognises certain aspects of the right to adequate housing. The question that then follows however is whether the government of Zimbabwe and other stakeholders comply with this when carrying out evictions. As will be further highlighted below, the government of Zimbabwe carried some evictions which were clearly in defiance of section 74 of the Constitution.

From the reading of section 74 of the Constitution of Zimbabwe and other international conventions which provides for the right to adequate housing, which Zimbabwe is party to, it can be argued that the government of Zimbabwe is still obliged to respect, protect and fulfil this important fundamental right. In relation to the issue of respecting one of the freedoms under the right to adequate housing (freedom from arbitrary eviction), the government of Zimbabwe, its organs and agents are obliged to desist from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the rights of the individual to housing.<sup>155</sup> This further means that the government of Zimbabwe has the responsibility to respect housing rights of its citizens and therefore must refrain from rendering people homeless by carrying out forced and arbitrary evictions of persons from their homes like the “Operation Murambatsvina’ that took place in 2005.<sup>156</sup>

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<sup>155</sup> Housing Rights in Zimbabwe: Human Rights Monthly Number 37, July 2005. Available at [http://hrforumzim.org > uploads > 2010/06 > HR1](http://hrforumzim.org/uploads/2010/06/HR1). Accessed 31 December 2021.

<sup>156</sup> See for example E Benyera & C Nyere, ‘An Exploration of the Impact of Zimbabwe’s 2005 Operation Murambatsvina on Women and Children’ 2015 Vol 13(1) Gender & Behaviour.

As to the obligation to protect the right to housing, section 74 of the Constitution of Zimbabwe obliges the government and its agents to stop the violation of any individual's right to housing by any other individual or non-State actor. This means that the government of Zimbabwe should take or put measures to protect its people from abuse by landlords, property developers, land - owners or any other third party capable of abusing these rights.<sup>157</sup> Although the government of Zimbabwe cannot be expected to build a free house for every Zimbabwean due the prevailing dire economic situation in Zimbabwe, the Government of Zimbabwe is still obliged to fulfil its duty to provide housing by undertaking measures necessary for guaranteeing for each person under its jurisdiction opportunities to access the entitlements of housing rights which cannot be obtained or secured through exclusively personal efforts.<sup>158</sup> The government is expected to take measure within its limited resources to fully realise the right to adequate housing.

The other important provision of the Constitution of Zimbabwe which deals with the issue of adequate housing is section 28. This provision provides that;

The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.

It is apparent from the above provision that the State and all other governmental institutions and agencies are obliged to avail access to adequate shelter subject to the limits of the resources available to them. The qualification on the obligation to avail access to adequate shelter is significant but does not absolve the State of its administrative obligation to take reasonable legislative and other measures to enable the populace as a whole to have access to adequate shelter. Some scholars have argued that the wording of section 28, arguably, imposes a clear obligation on the government of Zimbabwe to take measures to ensure that every Zimbabwean has access to adequate shelter.<sup>159</sup> The above interpretation is supported by the fact that despite section 28 only appearing in the national objectives chapter, there is no limitation contained in section 28 of the Constitution that national objectives are for guidance alone, thus the provision can be used as a benchmark politically and economically to determine state compliance or

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<sup>157</sup> Housing Rights in Zimbabwe (n. 134)

<sup>158</sup> Housing Rights in Zimbabwe (n. 134)

<sup>159</sup> Stewart, Katsande & Chisango, (n. 138)

effort to meet the needs of the most needy and marginalized in relation to the provision of shelter.<sup>160</sup>

Despite the above remarks by the mentioned scholars, it cannot be denied that there is a problem when one tries to enforce the right to adequate housing using section 28 of the Constitution. The problem stems from the fact that reference to adequate shelter fell under the section that spells out national objectives to guide the State. Reasonably, one cannot seek to enforce a right in terms of section 28 which does not offer substantive justiciable rights.<sup>161</sup> However, in this author's view, the matter does not end there. The national objectives can still be invoked as an aid in the holistic interpretation of section 74 in ascertaining the constitutionality of any evictions and demolitions that can take place in Zimbabwe. As has been noted by other scholars, the objectives under Chapter 2 of the Constitution of Zimbabwe are important for interpreting the constitution and other laws, although they are not justiciable.<sup>162</sup>

Since the right to adequate housing in Zimbabwe is implied, another provision which can be used in Zimbabwe in support of the right to adequate shelter is section 51 which deals with the right human dignity. It has been argued that the right to dignity necessarily incorporates the right to shelter because without the right to shelter and to food, the promise of dignity in the declaration of rights would be meaningless.<sup>163</sup>

In terms of the Constitution of Zimbabwe the right to shelter for children is clearly provided for in section 81 (1) (f), which also define a child as "every boy or girl under the age of eighteen". This means that the constitution is framed narrowly with the regard to the right to shelter since adults cannot rely on this right to claim access to shelter as a right.<sup>164</sup> What cannot be disputed therefore is that even if Zimbabwe had been party to international treaties that included the right to shelter or housing, such a right is not a fundamental right under the Constitution. It is the Constitution, the supreme law of this country itself, which has deliberately left out the right to adequate housing from the list of fundamental rights delineated under Chapter 4 of the constitution.<sup>165</sup> Hence, the right to adequate housing is only implied, as

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<sup>160</sup> Stewart, Katsande & Chisango, (n. 138)

<sup>161</sup> See *Zimbabwe Homeless Peoples Federation & Others* case (n.18).

<sup>162</sup> C Rickard, 'No Justiciable Rights to Shelter in Zimbabwe – Supreme Court' 23 July 2021. Available at <https://africanlii.org> › article › 20210722 › Accessed 3 January 2022.

<sup>163</sup> Rickard, (n. 162).

<sup>164</sup> J. Mavedzenge and D.J. Coltart, 'A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights,' 2014 Zimbabwe Rule of Law Journal, 105.

<sup>165</sup> Rickard, (n. 162).

will be highlighted below, one cannot therefore successfully approach the courts seeking to enforce the fundamental right to adequate housing in Zimbabwe.

### **3.4. The Content of the Right to Adequate Housing in Zimbabwe**

From the above discussion of the Zimbabwean legal framework regarding the right to adequate housing, it is apparent that the Constitution of Zimbabwe provides one important freedom of the right to adequate housing, that is the right from arbitrary or unlawful eviction and demolition of the shelter or home. Thus, in terms of the Zimbabwean legal framework, for any home demolition to comply with section 74 there should be a court order sanctioning the demolition of the house which court order should be made after the court has considered all relevant circumstances. This provision mandates that substantive requirements should be met through a court order sanctioning the demolition<sup>166</sup> before a person's home is demolished. This was confirmed by the court in case of *Mavis Marange v Chitungwiza Municipality and Glory to Glory Housing Co-operative*.<sup>167</sup> What this means is that Zimbabwe's legal framework addresses one aspect of the right to adequate housing, that is the issue of arbitrary eviction. However, in order for the right to adequate housing to be fully realised, the legal framework must address all the freedoms and entitlements discussed under chapter 2 above. A lot still needs to be done under the Zimbabwean legal framework for the right to adequate housing to be fully realised.

Be that as it may, the nature of the content of the right to adequate housing in Zimbabwe was elaborated by the Supreme Court in the case of *Zuze v Trustees of Mlambo & Anor*,<sup>168</sup> where the court aptly expounded the essential elements of the freedom from arbitrary eviction and demolition under section 74 as follows;

The essential elements of the protection afforded by s 74 are twofold. The first is that no person may be evicted from his home or have his home demolished 'without an order of court'. This is a basic procedural requirement to ensure that the law is followed in conformity with due process. This was underscored in the City of Harare case (supra), at paras. 12 & 15, as a prerequisite to the lawful demolition of the respondents' homes. .... .

The second element relates to the possible arbitrariness of an eviction and necessitates that the court seized with the matter must consider 'all the relevant circumstances' before it grants an order of eviction or demolition. With respect to the South African equivalent of our's 74, i.e. s 26, the provision has been

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<sup>166</sup> Mavedzenge and Coltart, (n.164) 101.

<sup>167</sup> Case No 106/2014- This is a judgment handed down by the Chitungwiza Magistrates Court

<sup>168</sup> SC 69-19

construed to confer not only a procedural right but also a substantive benefit to include the issue of whether or not the prospective evictee has access to alternative housing.<sup>169</sup>

Thus, in Zimbabwe for a party to evict and demolish another person home, he or she need to approach the courts where the courts are mandated to consider all relevant circumstances before granting an order for eviction. Considering this, one can safely conclude that some of the home demolitions that took place in Zimbabwe were not in conformity with the law as they were done in contravention of the procedure and formalities prescribed by section 74 of the Constitution of Zimbabwe. Thus, one scholar noted that, ‘a case for the compulsorily displaced lies in the argument that none of these procedural requirements have been complied with, and the policy initiative to clean up Zimbabwe’s cities does not outweigh the right to security from compulsory evictions when there was no infrastructure in place to accommodate the displaced’.<sup>170</sup> Further, the forced evictions and threatened eviction contravene the norms and obligations of Zimbabwe to respect, protect and fulfil them.

Another important point to note when analysing the content of the right to adequate housing in Zimbabwe is the meaning of the word ‘home’. It is not in dispute that the word ‘home’ as used in section 74 of the Constitution of Zimbabwe must be broadly construed to embraces both permanent and temporary places of abode as well as shacks and informal dwellings. It has also been conceptually defined to mean a shelter against the elements providing some of the comforts of life with some degree of permanence. Considering this, it is clear therefore that section 74 of the Constitution of Zimbabwe protects all forms of shelter, whether permanent or temporary, formal or informal. Thus, the so called ‘illegal’ structures demolished or targeted for demolition fall within the purview of ‘homes’ as envisaged by section 74 of the Constitution and are therefore protected from arbitrary demolition. It is further submitted that in terms of section 74 it is immaterial whether or not the dwelling being used for residential purposes is legal or whether its construction was and is sanctioned by the local authorities.

Having said the above, it is still not in dispute that some of the homes in some urban areas of Zimbabwe fall short of the definition of adequate housing. Since the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000<sup>171</sup> defined adequate shelter as comprising of adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic

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<sup>169</sup> *Zuze v Trustees of Mlambo & Anor* SC 69-19 at pages 14-15

<sup>170</sup> Romero (n. 70)

<sup>171</sup> Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 (n. 40)

facilities - all at a cost, some of the homes in Zimbabwe do not meet the standard of adequate housing. For example, in Mbare a family of eleven, two adults and their nine children occupy, in reality squat, with no formal rights of occupation, in a downstairs communal toilet in what used to be a single sex, single room occupant, hostel. For health reasons these toilets were closed, toilets are still functional on upper floors, but they overflow into the downstairs toilet. It is shelter and it is a home, and as a home that falls under the protection of s74 of the 2013 Constitution but it is far from adequate shelter.<sup>172</sup>

### **3.5. Practice and Lessons from Decisions of the Courts**

As is observed in several jurisdictions, the courts play a pivotal role in ensuring the eradication of social inequalities and actualising socio-economic rights, thereby promoting and advancing the attainment of social justice.<sup>173</sup> Thus, it is important in this research to analyse the decisions of the courts in relation to their interpretation of the right to adequate housing as provided for in the Constitution of Zimbabwe. What cannot be disputed is that the courts, government agencies and everyone seized with constitutional interpretation, must interpret the Constitution in a manner that promotes the realisation of the stated goal or vision.<sup>174</sup> Thus, when interpreting the right to adequate housing in terms of the Constitution, the courts must be guided by the section 28 of the Constitution as discussed above.

Further, it must be noted that Zimbabwe ratified the several International Conventions dealing with the right to adequate housing. Consequently, by dint of section 46(1)(c) of the Constitution of Zimbabwe, it is mandatory upon our courts to take them into account in interpreting the Declaration of Rights entrenched in Chapter 4 of the Constitution. This is further reinforced by section 327(6) of the Constitution which dictates the adoption of any reasonable interpretation of domestic legislation that is consistent with any treaty or convention which is binding on Zimbabwe, in preference to any alternative interpretation that is inconsistent with that treaty or convention.

Considering this, it can therefore be argued that despite the fact that there is no explicit provision providing for the right to adequate housing for everyone under the Zimbabwean Declaration of Rights, the courts have the discretion by virtue of section 46 (1) (e) of the

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<sup>172</sup> Stewart, Katsande & Chisango, (n.138) 9.

<sup>173</sup> See *People's Union for Democratic Rights & Ors v Union of India & Ors* 1983 (1) SCR 456; *Soobramoney v Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

<sup>174</sup> J Mavedzenge, 'Learning from others: An insight into the experiences in the enforcement of ESC rights in comparative foreign and international law jurisdictions' (2015) Vol 3(1) University of Zimbabwe Student Law Journal, 94.



Constitution to broadly interpret the other expressly provided rights and constitutional values such as the right to human dignity and equality to include certain constituent aspects of missing rights such as the right to shelter.<sup>175</sup> In any case, the Constitution mandates the courts to widely interpret these fundamental rights,<sup>176</sup> thus the courts must give a broad meaning to the provisions of section 74 of the Constitution. The following cases illustrate the approach of the Zimbabwean courts when dealing with the right to adequate housing particularly the freedom from arbitrary eviction as provided for in section 74 of the Constitution.

In the case of *Makani and Others v Epworth Local Board and others*<sup>177</sup> the High Court of Zimbabwe noted that people should not be evicted where there are no indications that alternative accommodation has been secured for them.<sup>178</sup> Although the court did not base its decision on the right to adequate housing, this judgment is important since it recognises the need for an alternative accommodation before eviction took place.

Further, the High Court of Zimbabwe made it clear that summary evictions are a violation of occupiers' rights, regardless of the manner in which they had come into occupation of the 'home' from which they are evicted. Thus, in *Dusabe and Another v Harare City and Others*<sup>179</sup> Justice Chigumba made it abundantly clear that in terms of section 74 of the Constitution a court order must be obtained to enable demolition to take place:

Under no circumstances are government departments at liberty to unilaterally and arbitrarily demolish any structures in the absence of a court order authorizing them to do so, whether the structures were built without approval of building plans, or layout plans or without complying with any other legal requirements. Even if the structures are an eyesore, they cannot be razed to the ground (sic) at the drop of a hat or on a whim.<sup>180</sup>

A similar decision with similar reprimands to those who tore down the structures was given by Justice Mangota in *Together As One Housing Coop v City of Harare and Nyatsime Beneficiaries Trust*<sup>181</sup> in this case regularization of building plans and subsequent buildings had not taken place so summary evictions demolitions were in hand. City of Harare, sought to rely on a subsidiary law from 1979 which permitted precisely the action it had undertaken. However, this law was in direct conflict with section 74 of the Constitution of Zimbabwe and

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<sup>175</sup> Mavedzenge, (n.164) 84.

<sup>176</sup> See section 46 (1) (a) of the Constitution of Zimbabwe.

<sup>177</sup> HH-550-14.

<sup>178</sup> HH-550-14

<sup>179</sup> HH 116-16

<sup>180</sup> HH 116-16 at page 2 of the cyclostyled judgment.

<sup>181</sup> HH 101-16

thus void to the extent of that conflict. In finding in favour of the Applicants, the court noted that, ‘the Respondent must approach the court and obtain a court order before they evict, or demolish the structures of, persons who are on what they say is their land.’<sup>182</sup>

Although the courts’ approach in relation to the interpretation of section 74 of the Constitution is clear, the same courts have refused to enforce the right to adequate housing in terms of section 74 of the Constitution. The courts have noted that section 74 of the Constitution does not provide for the right to shelter in Zimbabwe. Thus, in *Zimbabwe Homeless Peoples Federation & Others v Minister of Local Government & National Housing & Others*<sup>183</sup> the court noted that,

The right to shelter is not provided for anywhere in the Declaration of Rights. Parliament, in its wisdom, merely made provision for the State and all institutions of government to take reasonable steps and measures, within the limits of the resources available, to actualise access to adequate shelter. That provision is essentially exhortatory but is one that the State and all institutions of government must bear in mind when formulating or implementing laws and policy decisions of government.

The above case shows that the right to adequate housing is not justiciable and as such one cannot use the Constitution to claim the right to adequate housing. This however does not mean if there is arbitrary eviction, one cannot approach the court for a relief.

### **3.6. Conclusion**

Unlike the Bill of Rights of South Africa, the Declaration of Rights in the Constitution of Zimbabwe does not explicitly provide for the right to adequate housing but rather guarantees every person the right not to be arbitrarily evicted from his or her home without a court order.<sup>184</sup> Hence in Zimbabwe the right still remains an implied right and not an express right. The Constitution must protect the right to adequate housing, including the freedoms and entitlement of the right which include legal security of tenure and the prohibition of forced evictions; the affirmative right of inhabitants to adequate, affordable, and accessible housing in a location that is proximate to goods and services; and the requirement that housing be culturally appropriate. However, even though the Zimbabwean Constitution does not expressly guarantee the right to adequate housing, it can be argued that the protection against arbitrary eviction by

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<sup>182</sup> HH 101-16 at page 5 of the cyclostyled judgment.

<sup>183</sup> SC 78-21

<sup>184</sup> Section 74 Constitution of Zimbabwe.

the Constitution is *prima facie* evidence that Zimbabwe is committed in protecting the right to housing, though a lot needs to be done in order for the right to be fully realised.

## **CHAPTER 4: SOUTH AFRICAN PERSPECTIVE OF THE RIGHT TO ADEQUATE HOUSING**

### **4.1. Introduction**

Having discussed the right to adequate to housing in Zimbabwe, it is imperative to do a comparative analysis with the South African perspective of the right to adequate housing. This research chooses South Africa because both countries are former British colonies thus their policies and laws have been influenced by their former colonial master. This chapter will therefore look into the South African legislative framework on the right to adequate housing. The research will discuss the laws and policies regulating housing during colonial era and then discuss the laws and policies enacted after independence. This is will be done to ascertain the extent to which apartheid laws and policies affected the right to adequate housing. Further, this chapter will discuss the interpretation adopted by the South African courts in dealing with the right to adequate housing. In doing this, this chapter will do a comparative analysis with a view to ascertain whether the Zimbabwean standard of the right to adequate housing should be amended in order to meet the minimum standards recognised by international law.

### **4.2 South Africa Pre-1994**

Just like the Zimbabwean situation, colonial rule in South Africa adversely affected the socio-economic and cultural lives of many black Africans. As has been noted by various scholars, 'the apartheid legacy significantly and detrimentally influenced the socio-economic and cultural lives of many black people.'<sup>185</sup> The impact of colonial rule on socio-economic and cultural lives of many people is still being felt today.<sup>186</sup> It has been noted that during colonial rule, the colonial government provided either limited or no housing to black people.<sup>187</sup> In order to limit the right to black majority to the right to adequate housing, the colonial government promulgated various draconian laws.<sup>188</sup> These laws helped the colonial government to evict the

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<sup>185</sup> C Cross, JR Seager, J Erasmus, C Ward and M O'Donovan 'Skeletons at the feast: A review of street homelessness in South Africa and other world regions' (2010) 27(1) *Development Southern Africa* 5; 13-14; GT Thomas 'Why the homeless rebel: Housing struggles in post-apartheid South Africa' (2010) 42(2) *African Historical Review* (2010) 27; 32.

<sup>186</sup> KW Mah and PL Rivers 'Negotiating difference in post-apartheid housing design' (2013) 11(3) *African Identities* 290; 291-293.

<sup>187</sup> R Del Mistro and DA Hensher 'Upgrading informal settlements in South Africa: Policy, rhetoric and what residents really value' (2009) 24(3) *Housing Studies* 333; 334.

<sup>188</sup> Examples of laws passed during the colonial era in South Africa which limited the right to adequate housing include; The Prevention of Illegal Squatting Act 51 of 1952 which was then repealed after independence by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 2008, the Slums Act 53 of 34, the Natives Land Act of 1963, the Physical Planning Act 88 of 1967 and the Health Act 63 of 1977.

majority of black African from their land and move them to highly populated areas and they did that without considering the subsequent hardships that these people would suffer.<sup>189</sup>

The most common law passed during the colonial era in South Africa is the Natives Land Act of 1913. The Act according to Muller had the effect that black ownership of fixed property would be limited to the areas designated for their use.<sup>190</sup> It was because of this Act that residential accommodation needs for black people in urban areas was neglected since it did not recognise black people as permanent residents of areas allocated to white people under the Act.<sup>191</sup> Because of the Native Act, the common type of accommodation for black people were hostel accommodation and backyard rooms which were regarded as adequate houses for those black people who were labourers in the urban areas.

The Native Act and its effect had resulted in most black people forced to live in urban squatter camps and informal settlements. Thus, for some scholars the limited accommodation or housing for black people in the urban areas led to an increase of urban squatter camps and informal settlements.<sup>192</sup> The houses in squatter camps and informal settlements were undignifying and therefore cannot be considered adequate housing because they lacked the essential elements of an adequate housing for example, they have inadequate living space inside and outside. Further, the living and housing conditions of the informal settlements and squatter camps were very poor and posed health risks to the people dwelling in those houses.<sup>193</sup>

Another law that was promulgated during the colonial era which adversely affected the right to adequate housing was the Slums Act of No. 54 of 1934. This Act was passed with the aim of implementing residential discrimination in the name of public health. The Act gave extensive powers to the Medical Officers of Health to confiscate residential properties deemed to be danger to public health. Most of the residential properties that were expropriated using this Act were those belonging to black people hence some scholars concluded that the Slums

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<sup>189</sup> G Muller, 'The impact of section 26 of the Constitution on the eviction of squatters in South African Law (unpublished LLD Thesis) Stellenbosch University (2011) 11-12.

<sup>190</sup> Muller (n 189).

<sup>191</sup> Muller (n 189).

<sup>192</sup> P Maylam, 'Explaining the apartheid city: 20 years of South African urban historiography' (1995) *Journal of Southern African Studies*, 33.

<sup>193</sup> Maylam (n 192) 34.

Act was nothing more than mechanism to remove black slum communities to create space for white middle class housing schemes and developments.<sup>194</sup>

Considering the above, it can therefore be argued that the current state of housing conditions in South Africa, most particularly the spread of informal settlements throughout the country and the illegal occupation of vacant land and buildings by black people in desperate need of housing or land is a result of these colonial laws. The colonial laws and housing policy indisputably were intended to prevent the majority black people from benefitting from any government-led housing thus limited or thwarting their right to adequate housing. This cement the argument that during apartheid there was no access to the right to adequate housing to the black majority. From this, it is apparent that the colonial laws and housing policies in both South Africa and Zimbabwe were similar in particular with regard to the segregation of the majority black Africans.

#### **4.3. South Africa Post-1994**

South Africa gained independence in 1994 and because of the laws and policies of apartheid, the new government inherited, a huge and complex housing crisis,<sup>195</sup> among other things. The crisis created by the apartheid government required rigorous effort and commitment by the new government to eliminate. Apartheid created an unequal society in relation to housing issues, and the new government had the task of addressing that unequal society in an inclusive manner without discriminating on racial grounds. Thus, to deal with the issue of housing and address homelessness and housing inequalities, the government of South Africa enacted a number of laws and also implemented a number of policy initiatives.<sup>196</sup> Amongst the laws passed to deal with the issue of housing is the 1996 Constitution<sup>197</sup> which is considered as the main framework guiding South Africa's housing mandate. The Constitution as the supreme law of the land and the subsequent decisions of the courts led to the promulgation of other subordinate statutes dealing specifically with the issue of housing. This part will therefore discuss the laws and

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<sup>194</sup> J H Tagg, 'Providing adequate housing in South Africa in the twentieth and twenty first century (2012) (Unpublished Dissertation, University of Pretoria) 19

<sup>195</sup> South African Human Rights Commission, 'The right to a healthy environment 5<sup>th</sup> economic and social rights report series: 2002-2003 Financial Year-2004

<sup>196</sup> B O Mmusinyane 'Comparative implementation strategies for the progressive realisation of the right to adequate housing in South Africa, Canada and India' (2015) (Unpublished PhD Thesis, University of South Africa.

<sup>197</sup> Constitution of South Africa.

policies implemented after South Africa gained independence which specifically deals with the right to adequate housing.

#### **4.4. The South African Constitution**

The starting point to the discussion of the right to adequate housing in South Africa is the 1996 Constitution of South Africa, which expressly guarantees the right to adequate housing and prohibits the practice of forced eviction. The Constitution provides under section 26 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.<sup>198</sup>

Considering the above provision, it is worth noting that the right to adequate housing is explicitly provided for under the South African Bill of Rights, unlike the position in Zimbabwe where the right is only implied from other provisions. Section 26(1) outlines the general scope of the right, while section 26(2) spells out the positive obligations imposed upon the State, and section 26(3) sets out aspects of the negative right by prohibiting arbitrary evictions. This means that in South Africa, everyone has the constitutional right to adequate housing. This right is enforceable since it is part of the bill of rights. As evidenced by a plethora of cases which have been filed, most people have approached the courts in South Africa using this provision.<sup>199</sup> Considering this point alone, one can note the difference between the South African and Zimbabwean positions regarding the content of the right to adequate housing. In South Africa, the right is constitutionally provided and is justified whereas in Zimbabwe, the right can only be implied and one cannot approach the court alleging the infringement of the right to adequate housing.

Further, it is clear from section 26(3) that the freedom from arbitrary eviction is firmly entrenched since the provision provides that no legislation may permit arbitrary eviction. According to the interpretation of the courts, a law is 'arbitrary' when it does not provide

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<sup>198</sup> Section 26 of the Constitution of the Republic of South Africa.

<sup>199</sup> The leading case is the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (4) SA 46 (CC); see also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg vs City of Johannesburg and Others* (2008) SA 208 (5) BCLR 475

sufficient reason for the eviction, or is procedurally unfair.<sup>200</sup> Thus, for one to be evicted, the State or any person must make an application for eviction in which case the courts are mandated to consider whether there are sufficient reasons for eviction. In deciding whether there are sufficient reasons for eviction that courts will have regard to the obligations of the State to respect and protect the right to adequate housing. In this regard the courts can have powers to suspend or stay the eviction to enable those evicted to find another place. The aspect of negative right to prohibit arbitrary evictions is similar in both Zimbabwe and South Africa.

Further, from the provision of section 26, there are three key elements that identify the extent of the State's obligation in relation to the right to adequate housing and these are; the obligation to 'take reasonable legislative and other measures'; 'to achieve the progressive realisation' of the right; and 'within available resources. These three key elements have been interpreted by the court as will be highlighted below. It is however important to note that by enacting statutes that give effect to the right to adequate housing, the State had respected its obligation to protect and promote the right to adequate housing. What need to be seen is whether the State had achieved the progressive realisation of the right to adequate housing.

Just like any other Constitution of a democratic State, the South African Constitution also provides for the justiciability of the rights under the Bill of Rights, including the right to adequate housing. The Constitution explicitly confers legal standing to aggrieved persons and their representatives to approach the courts to enforce their rights.<sup>201</sup> Because of section 26 and section 38 of the Constitution, South African citizens have been given hope and has been evidenced by a number of litigants who approached the courts seeking to enforce their constitutional right to adequate housing.<sup>202</sup> As will be highlighted below, a number of case authorities interpreted the constitutional provision to the right to adequate housing.

Based on the principle of the interdependency of rights, the right to adequate housing is read together with other rights provisions of the constitutions on equality, dignity, life, right to just administrative action, access to land, right to health care, food, water and social security, amongst others. Further, the right to adequate must be read together with section 7(2) of the

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<sup>200</sup> *First National Bank v Commissioner for SARS; first National Bank v Minister of Finance* 2002 (7) BCLR 663 (CC) at 100.

<sup>201</sup> Section 38 of the Constitution of South Africa.

<sup>202</sup> *Mmusinyane* (n 196) 269.



Constitution, which provides that the State has constitutional responsibilities and duties to protect, promote, respect and fulfil the right to access to adequate housing in the Bill of Rights. Thus, if the State fails to protect, promote, respect and fulfil the right to access to adequate housing, the courts of law are empowered in terms of section 165 of the Constitution to direct all persons including other spheres of government such as the executive to make resources available for the implementation of the right to suitable and satisfactory accommodation as provided in section 26 of the Constitution.

Another provision of the Constitution worth noting is section 28(1)(c) which guarantees children's right to shelter. What is distinguishing about the provision's approach is that children's right to shelter is not qualified by access, progressive realization or available resources. Thus, the right is absolute. The three spheres of government, namely, local, national and provincial should therefore assist and support each other with regard to the implementation and enforcement of access to adequate housing as entrenched in the Constitution.<sup>203</sup>

Considering the impact of the apartheid on the socio-economic and cultural lives of many black people particularly the displacement of black people who were removed from their land and therefore rendered homeless or left to live in disreputable conditions, the entrenchment of the right to adequate housing in the Constitution was vital in remedying the inequalities of the past. Because of the entrenchment of the right to adequate housing and other rights and the fact that several legislation were subsequently enacted to give effect to the Constitution, the South African Constitution has been viewed as 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.<sup>204</sup>

#### **4.5. South Africa's Housing Legislation**

Since the Constitution provides in section 26(2) that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to adequate housing, several statutes were passed to give effect to the constitutional

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<sup>203</sup> See Section 41(1) of the Constitution and see section 4 of the Housing Act 107 of 1997 which provides the responsibilities of all spheres of government in providing houses to the people of South Africa.

<sup>204</sup> Mmusinyane (n 196) 277.

provisional. The laws that were implemented and reviewed after independence apply and protect everyone depending on their economic status and affordability thereby ensuring that everyone benefit from section 26(2) mandate and therefore enjoys the right to adequate housing. According to Mmusinyane, 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.<sup>205</sup>

#### *4.5.1. The Housing Act 107 of 1997*

The Housing Act is the first and all-embracing housing law of South Africa, and its main purpose is to set nationally applicable housing development principles to guide a sustainable housing process, as well as outlining the housing functions of each sphere of government. The Act lays down the general principles for housing development and these principles include prioritizing the needs of the poor,<sup>206</sup> consulting with affected parties<sup>207</sup> and regulating affordable and sustainable housing development<sup>208</sup> through the principles of co-operative government. The Housing Act sets out specific roles and responsibilities of the three spheres of government which are the national, provincial and local government. In this regard, in terms of section 3 of the Act, the national government role is to 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.<sup>209</sup> The function of the provincial government is provided for under Part 3 (section 7 of the Act) and is include creating 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.<sup>210</sup>

According to some scholars, the Housing Act placed a duty on the national, provisional and local sphere of government to show preference for the poor people when fulfilling the right to adequate housing and to promote gender equity.<sup>211</sup> The Act facilitates the sustainable housing development process and regulates housing development in terms of section 11 and 12 of the

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<sup>205</sup> Mmusinyane (n 196) 285.

<sup>206</sup> Section 2(1)(a) of the Housing Act.

<sup>207</sup> Section 2(1)(b) of the Housing Act.

<sup>208</sup> Section 2(1)(c) of the Housing Act.

<sup>209</sup> Section 3(2) and 4 of Part 2 and sections 5 and 6 of the Housing Act.

<sup>210</sup> Section 7 of the Housing Act.

<sup>211</sup> Mmusinyane (n 196) 286.

Act. One of the objectives of the Housing Act was to put an end to the housing laws that were enforceable during the apartheid government in relation to the regulation and development of housing.<sup>212</sup>

What is clear from the Housing Act is that it seeks to help those who cannot afford to acquire houses in particular the poor since it mandates the three spheres of government to give priority to the needs of the poor in respect of housing development. This has been noted in the case of *Lingwood and Schon v The Unlawful Occupiers of Erf 9, Highlands*<sup>213</sup> where the court 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.<sup>214</sup>

#### 4.5.2. Rental Housing Act 50 of 1999

Another Act which was promulgated to give effect to the constitutional provision to adequate housing is the Rental Act of 1999. The Preamble to this Act clearly provides the reason why this Act was promulgated. According to this Act ‘there is a need to balance the rights of tenants and landlords and to create mechanisms to protect both tenants and landlords against unfair practices and exploitation,’ and to ‘introduce mechanisms through which conflicts between tenants and landlords can be resolved speedily at minimum cost to the parties. 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.’<sup>215</sup>

Further, the Act regulates the relationship between landlords and tenants in respect of all types of rental housing and provides for the rights of both the landlords and tenants. This Act also serves as a measure to prevent unlawful eviction. This Act further establishes the Rental Housing Tribunal and its functions. The court had occasion to interpret the provisions of the Rental Housing Act in the case of *Maphongo v Aengus Lifestyle Properties*<sup>216</sup> where the role of tribunals in the determination of what constitutes an unfair practice was highlighted. It is therefore clear that South Africa had is making an effort to enhance the right to adequate housing. These laws are a clear intention of the government to promote and protect the right to

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<sup>212</sup> K Mashiane and K.O Odeku, ‘A critical legal perspective on the context and content of the right to access to adequate housing in South Africa’ (2020) 10, Special Issue, 98.

<sup>213</sup> *Lingwood and Schon v The Unlawful Occupiers of Erf 9, Highlands* 2008 (3) BCLR 325 (W)

<sup>214</sup> See further Pienaar JM Land reform (2015) 734-749.

<sup>215</sup> Section 2 of the Act

<sup>216</sup> *Maphongo v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC).

adequate housing. However, the challenge is still there since there are a lot of people who are not enjoying their constitutional right to adequate housing.

#### *4.5.3. Social Housing Act 16 of 2008*

The Social Housing Act was promulgated to establish and promote a sustainable social housing environment, to define the functions of national, provincial and local governments in respect of social housing among as well as facilitating the smooth operation of approved social housing projects by other delivery agencies with the benefit of public money among other aims. The Act defines social housing 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 agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in the Act.<sup>217</sup> Further, this Act established the Social Housing Regulatory Authority<sup>218</sup> which has an obligation to invest in social housing, promote the development and awareness of social housing and provide support to social housing institutions among other roles.<sup>219</sup> This Act clearly shows the government's approach in trying to promote the right to adequate housing in South Africa.

#### *4.5.4. Housing Development Agency Act 23 of 2008*

The Housing Development Agency Act was promulgated as a response to the urgent need for government to address the increasing backlog in respect of housing delivery together with a critical shortage of skills and capacity to provide housing in some provinces and municipalities.<sup>220</sup> This Act establishes the Housing Development Agency and provides for its the powers and functions. 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.<sup>221</sup> All these functions shows that the Act support the right to access to adequate

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<sup>217</sup> Section 1 of the Social Housing Act.

<sup>218</sup> Section 7 of the Social Housing Act

<sup>219</sup> Section 11 of the Social Housing Act.

<sup>220</sup> Preamble to the Housing Development Agency Act.

<sup>221</sup> Section 4 of the Act.

housing. It is worth noting that the Act also supports the right of access to adequate housing by fast-tracking the acquisition of land and housing development services.<sup>222</sup>

#### *4.5.5 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 2008 (PIE Act) was promulgated in terms of section 26(3) of the Constitution to provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws. The Act was aimed at ensuring that evictions take place in a manner that is consistent with the values of the Constitution. This Act contains procedures for ‘just and equitable’ evictions of unlawful occupiers.<sup>223</sup> Because of this Act, a number of cases have come before the courts for adjudication. However, according to some scholars, despite several cases having being adjudicated based on this Act, the case that remains fundamental in evaluating the relationship between access to housing and evictions remains the Grootboom case which was instrumental in developing housing policy, listing criteria regarding the development of policy.<sup>224</sup>

It is important to note that the PIE Act contains two central operative provisions, which are section 4 which governs evictions brought by owners of land,<sup>225</sup> and section 6 which governs evictions brought by organs of state. Both these provisions contain detailed procedure which must be followed before one is evicted and they further require courts before granting an order for eviction to consider whether it would be just and equitable to grant the eviction. Section 4 differentiates between occupiers who have occupied the land for less than or more than six months, but in both cases requires the court to consider all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.<sup>226</sup> Where the occupier has occupied the land for more than six months, the Act also requires the court to consider whether land has been made available or can reasonably be made available by a municipality or other organ of state or other land owner for the relocation of the unlawful occupier.<sup>227</sup>

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<sup>222</sup> Pienaar Land Reform 337.

<sup>223</sup> Section 4 and section 6 of the Act.

<sup>224</sup> Mmusinyane (n 196) 290.

<sup>225</sup> Section 4(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

<sup>226</sup> Section 4(6) and (7) Act.

<sup>227</sup> Section 4(7) of the Act.

It is however important to note that in terms of the PIE Act, the court can only grant an order for eviction if it is satisfied that the unlawful occupier has no valid defence and that the owner has complied with all the requirements of section 4. Further, when granting the order for eviction, the court ought to consider a just and equitable date for the unlawful occupier to vacate. This is to ensure that unlawful occupier is afforded an opportunity to find an alternative accommodation. By enacting the PIE Act, the government of South Africa had taken a positive step in implementing the constitutional provision to the right to adequate housing.

The laws which have been enacted in South Africa to give effect to the constitutional provision to the right to adequate housing clearly shows that the content of the right to adequate housing in South African is different from the content of the right to adequate housing in Zimbabwe. As already highlighted, in South Africa, the right to adequate housing is constitutionally provided which means it is a right which is justified, whereas the right to adequate housing in Zimbabwe is implied since there is no a constitutional provision which makes housing right a justified constitutional right.

Also, the laws promulgated in South Africa to give effect to the constitutional right to adequate housing will go a long way in providing poor people with adequate housing unlike the situation in Zimbabwe where a lot of people who are on waiting list have no recourse or hope on when they will be able to be provided with adequate housing. Further, because the South African Constitution mandates the State to take responsibilities and ensure that the right to adequate housing has been achieved, the other laws which have been promulgated in South Africa have the effect of promoting the right by allowing the maintenance of existing housing structures, as well as facilitating housing development for the poor and marginalised groups. This can be contrasted to the Zimbabwean position where there is inadequate laws which means that the progressive realisation of the right to adequate housing is difficult to be achieved.

#### *4.5.6. Policies*

Apart from the laws discussed above and others not discussed in this research, the government of South Africa implemented various policies and legislative measures with the aim of promoting the right to adequate. Amongst the policies and legislatives measures adopted by the government is the National Housing Policy and Subsidy Programmes Scheme, 2009 which sought to bring about social cohesion, stability and security integrated developments and to

create jobs and economic well-being for communities which did not previously have access to land and business services, formal housing and social and economic amenities.<sup>228</sup> The National Housing Code was implemented in 2000 as a response to the provision of the constitution that everyone has the right access adequate housing. Thus, some scholars have noted that through the putting into practice of the provisions of the National Housing Code, most black people would benefit from the provision of houses by government.<sup>229</sup>

Further, the South African legislature enacted Housing Assistance in Emergency Housing Situations in terms of chapter 12 of the National Housing Code, to deal with situations where people need housing because of the occurrence of events beyond people's control.<sup>230</sup> Other measure adopted by the government to deal with the housing issues is the Upgrading of Informal Settlements Programme which is aimed at bringing about social cohesion, stability and security in integrated developments and to create jobs and economic well-being for communities which did not previously have access to land and business services, formal housing and social and economic amenities.<sup>231</sup>

It is therefore not in dispute that South Africa had formulated various policies to deal with the right to access to adequate housing. However, what remains to be ascertained is the extent to which the government had implemented those policies for the people to fully enjoy the right to adequate housing. According to Mmusinyane, even-though South Africa has made significant strides in its housing implementation policies, the government's problem has shifted from creating an enabling policy environment to the practical implementation of those policies.<sup>232</sup> It is however important to note that the policies formulated in South Africa if implemented will greatly enhance individual's right to adequate housing in South Africa. Unlike the Zimbabwean situation where there no clear policies on the right to adequate housing, in South Africa, the government should only be seen to implement the policies that are already in place. In Zimbabwe, the government must first provide the constitutional right to adequate which is unambiguous and then formulate policies which help in the advancement of the right.

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<sup>228</sup> See Part B (2.1) of the National Housing Policy and Subsidy Programmes Scheme, 2009

<sup>229</sup> Mashiane and Odeku (n. 212) 98.

<sup>230</sup> Mashiane and Odeku (n. 212)

<sup>231</sup> Mashiane and Odeku (n. 212)

<sup>232</sup> Mmusinyane 'South Africa's poverty alleviation strategy through housing: Chasing the 2015 Millennium Development Goals' pragmatic?' 46-47.

#### 4.6. Interpretation of the Right by the Courts

As with any other socio-economic rights enshrined under the Bill of Rights, the effective implementation or realisation of the right to adequate housing is often subject to the qualifications of availability of resources. Thus, in most instances the State will be slow in implementing the measure to promote the right. Thus, it will be the role of the judiciary to help in the interpretation and enforcement of the right. The South African judiciary can be said to be vigorous in pronouncing on the enjoyment, protection and enforcement of rights, particularly socio-economic rights<sup>233</sup> without any difficulty.<sup>234</sup> After the promulgation of the Constitution, the right of access to adequate housing became one of the most highly litigated rights in the jurisprudence of South Africa's socio-economic rights as evidenced by the jurisprudence of the Constitutional Court. Most of the cases that have been brought before the courts dealt essentially with negative infringements of the right of access to adequate housing or with evictions.<sup>235</sup> This is based on the fact that the power of the courts to exert judicial review over socio-economic rights was spelt out earlier by the courts,<sup>236</sup> departing from a brutal government regime.

The most important case which dealt with the constitutional provision on the right to adequate housing is the famous case of *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>237</sup> In this case a group of homeless adults and children, who had nowhere else to go, assembled on a sports field, but could not erect adequate shelters because their building materials had been burned and bulldozed in a previous eviction that was reminiscent of apartheid-era evictions. This group of people brought an emergency action against the government seeking temporary shelter until they could obtain permanent accommodation. The Constitutional Court interpreted the provision of section 26 which mandates the government to take reasonable legislative and other measures to achieve the progressive realisation of the right within available resources. In the case the court used reasonableness as a yardstick to measure policy, legislative and other measures adopted by government in order to achieve the progressive realisation of the right of access to adequate housing. The issue of reasonableness means that the courts can require an explanation from the

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<sup>233</sup> S Gutto 'Beyond justiciability: Challenges of implementing/enforcing socio-economic rights in South Africa' (1998) 4 Buffalo Human Rights Law Review (1998) 97; 98-101.

<sup>234</sup> Chapter 8, and section 165(2) of the Constitution

<sup>235</sup> Tissington A review of housing policy and development in South Africa since 1994 12.

<sup>236</sup> K McLean, 'Constitutional deference, courts and socio-economic rights in South Africa (2009) 144-145.

<sup>237</sup> *Government of the Republic of South Africa and Others v Grootboom* case (n. 13)



State of the measures chosen to fulfil the right pertaining of access to adequate housing. This means that the government cannot just ignore its obligations to promote the realisation of the right and seek to hide behind the fact that it does not have resources. The court will require the government to proffer reasonable explanation of the measures adopted.

This is further supported by the findings of the Constitutional Court in the Grootboom case that section 26 of the Constitution compels the State to devise and implement a coherent, co-ordinated programme to meet housing needs.<sup>238</sup> It was also found that the programme that had been implemented at the time of the application fell short of the obligations imposed upon the state by s 26(2) in that it failed to provide for any form of relief for those desperately in need of access to housing.<sup>239</sup> The State was therefore ordered to comply with its s 26(2) obligations by devising, funding, implementing and supervising measures to those in desperate need of housing.<sup>240</sup> By so doing, the court removed any uncertainty with regard to the status of socio-economic rights in South Africa.<sup>241</sup> It is clear from the decision of the Constitutional Court in the Grootboom case that the interpretation adopted by the court in relation to the right to adequate housing seeks to promote the right.

The other important aspect to note about the role of the South African judiciary in interpreting the right to adequate housing is the fact that the courts cannot avoid reflecting on the history of apartheid, as it played a major role in the poor's living conditions. Thus, the importance of section 26 and housing history in South Africa was captured in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>242</sup>, 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.<sup>243</sup>

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<sup>238</sup> Page 95 of the case.

<sup>239</sup> Page 95 of the case.

<sup>240</sup> Page 96 of the case.

<sup>241</sup> Pillay "Implementation of Grootboom: Implications for the Enforcement of Socio-economic Rights" 2002 LDD 256.

<sup>242</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* para 29.

<sup>243</sup> Para 29

Considering that, it can rightly be said that South African courts are extremely vocal in enforcing socio-economic rights, particularly the right of access to adequate housing.<sup>244</sup> This approach will mean that even the marginalised can have hope, confidence and trust in the justice system more than on their government as a whole, as the enforcer of their right to access to adequate housing. However, it is important to note that even though the poor can rely on the judiciary to positively pronounce on their right to adequate housing, it cannot be denied that the realisation and enjoyment of the right to adequate housing cannot be utterly left to the courts to craft and implement. Thus, the government still has an important role to place in the realisation of the right to adequate housing. After the rulings of the courts, the government should abide by the rulings and have a political will to comply with those judicial rulings.

It is not in dispute that the political will to comply with judicial rulings constitutes, among others, a key aspect of the rule of law. Thus, compliance with judicial rulings is vital to democracy and democratic process. It is only compliance with judicial rulings that can have a powerful impact on judicial decision making, judicial independence and judicial power.<sup>245</sup> If the government fail to comply or abide by the rulings of the courts, the right to adequate housing cannot be realised. This is also the situation in South Africa to some extent where despite the Constitutional Court having made some landmark rulings that have the effect of improving poor peoples' socio-economic circumstances, government is dragging its feet in complying with most of these orders, hence the poor continue to live in poverty and socio-economic deprivation and many people cannot access the right to adequate housing.

#### **4.7. Conclusion**

The South African perspective of the right to adequate housing shows that the government of South Africa has made a significant attempt to promote and improve the right to adequate housing as compared to the Zimbabwean position. Since under the apartheid most black Africans were denied the right to adequate housing because of the apartheid laws and policies, the government of South Africa who inherited houses from the apartheid government passed several laws and implemented various policies and measures aimed at guaranteeing the citizens of South Africa the right to adequate housing. Starting with the 1996 Constitution which

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<sup>244</sup> Mmusinyane (n 195) 334; L. Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 Human Rights Law Review, 105; 108.

<sup>245</sup> Kapiszewski and Taylor 'Compliance: Conceptualizing, measuring, and explaining adherence to judicial rulings' 803 806-807; Mmusinyane (n 196) 339.

explicitly recognised the right to have access to adequate housing as part of the rights under the Bill of Rights, the government of South Africa went on to pass several other legislations to give effect to the constitutional provision. The laws passed and policies implemented clearly sought to promote and improve the right to adequate housing. Further, the South African judiciary has been vocal in its interpretation of the right to adequate housing and the analysis of the enforceability and implementation of the right to adequate housing has been widely received globally. The judiciary has therefore made an immense contribution to the right to adequate housing.

It is however important to note that although the right to adequate housing is explicitly provided in terms of the Constitution of South Africa with several laws having been passed to give effect to the Constitution, and the judiciary being vocal on the interpretation of the right to adequate housing, there is still increasing housing backlog, housing demand and informal settlements in South Africa. This has been attributed to lack of politics by the government. Nonetheless, the South African government ought to be applauded for entrenching the right to adequate housing as a constitutional right which is actionable, unlike the Zimbabwean position where the right cannot be actioned as it does not form part of the rights enshrined under the Bill of Rights. Further, in Zimbabwe there are no legislative frameworks which expressly guarantee individuals the right to adequate housing even on complementary laws and policies. Thus, the following chapter will seek to provide recommendations to promote the right to adequate housing in Zimbabwe.

## **CHAPTER 5: FINDINGS, CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This study analysed the right to adequate housing in Zimbabwe in comparison to the and South African position. It was highlighted that the right to adequate housing is explicitly provided for under several international and regional policy instruments and that the right should be interpreted broadly.<sup>246</sup> Further, the research shows that the right to adequate housing contains several freedoms and entitlements which means that for any particular house or home to be considered adequate house or home, it must include these freedoms and entitlements.<sup>247</sup> A house or home without the freedoms and entitlements such as freedoms from arbitrary evictions, privacy, security of tenure among others is not an adequate interpretation of the right to housing.

The study further showed that the content of the right to adequate housing, as provided under the Zimbabwean and South African legal frameworks, is different. Whereas the right to housing the right to housing is adequately entrenched in the South African Constitution, the same is implied in Zimbabwe, which makes it difficult for the citizens of Zimbabwe to have recourse to the court to actuate the right to housing in Zimbabwe. Having considered the legislative and policy framework in Zimbabwe and South Africa on the right to adequate housing, this part will provide summary findings and recommendations on how the right to adequate housing can be best enhanced in Zimbabwe and South Africa.

### **5.2 Summary of Findings**

There are several findings that were made in this study. It was shown under the research that the right to adequate housing is critical for one to exercise other human rights. This is because the inadequacy of the right to housing means that other basic human rights cannot be enjoyed. A person cannot enjoy the right to education, privacy, dignity and other human rights in the absence of the right to adequate housing. Also, once the right to adequate housing is not guaranteed and people are arbitrary forced out of their homes, it effectively means that the right to life, human dignity as well as the right to be protected against deprivation of property will

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<sup>246</sup> M Oren and R Alterman, *The right to adequate housing around the Globe: Analysis and Evaluations of National Constitutions*, University of University of Alberta Press, 2002. 5; Art 25 of The Universal Declaration of Rights (1948), Art 11 of ICESCR (1966).

<sup>247</sup> United Nations Committee on Economic, Social and Cultural Rights general comments No. 4 (1991) on the right to adequate housing.

be equally threatened. This finding shows the interdependence of the rights, hence the need to interpret the right to adequate housing broadly.

Also, it was made clear in the research that the right to adequate housing contains several freedoms and entitlements and these include protection against forced evictions and the arbitrary destruction and demolition of one's home; the right to be free from arbitrary interference with one's home, privacy and family; and the right to choose one's residence, to determine where to live and to freedom of movement.<sup>248</sup> This, again, shows how broad the right to adequate housing is. The adequacy or otherwise of the right to housing, one must ascertain whether a particular home or house contains these freedoms and entitlements.

The other aspect highlighted under the study is that the right to adequate housing confers certain obligations to the States whilst it also provides certain rights or entitlements to the citizens. As to the obligations imposed to the States, these include both negative and positive obligations. The right therefore calls for the State to respect, protect and fulfil the right. The same right calls for the State to remove and refrain from adopting any laws, policies or practices that may have a direct or indirect discriminatory impact on individuals' ability to realise their rights. The right to adequate housing is part of the framework of socio-economic rights which calls for the State to take measures to ensure the progressive realisation of the right. This also shows that the right is enforceable against the State hence it is regarded as part of vertical rights. Thus, States are therefore obliged, regardless of the state of development, to take certain steps to ensure progressive realisation of the right.

With regards to the Zimbabwean positions, this study finds that - although the right to adequate housing is indispensable for all human beings- during the colonial era, the colonial regime paid lip-service to this important right. The colonial laws and policies on housing were designed in such a way that the black population were deprived of the right to adequate housing. This was further evidenced by the fact that during that period, only limited housing ownership schemes were established.

It was made clear that because of the colonial history of Zimbabwe, when the country gained independence, the government of Zimbabwe tried to address the important aspects which were ignored by the colonial regime and these include the aspect of housing. However, despite the effort to address the issues, the study finds that the housing issues in Zimbabwe still remain.

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<sup>248</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria* (communication No. 155/96); United Nations, Right to Adequate Housing, Fact Sheet No. 21/Rev.1, p 3.

This is worsened by the fact that the Constitution, which is the supreme law of the land, does not expressly provide for the right to adequate housing to every person in Zimbabwe, hence the right remains implied from the other provisions of the Constitution which provide for some of the aspects of the right, for example the right not arbitrary evicted. This means that the content of the right to adequate housing in Zimbabwe only deals with one of the freedoms of the right- the aspect of arbitrary eviction. As already highlighted, the right to adequate housing is broad and must cover all the freedoms and entitlements, this study finds that the right to adequate housing is not sufficiently guaranteed in Zimbabwe.<sup>249</sup>

The above is further supported by the point that one cannot successfully approach the courts to vindicate the right to adequate housing in Zimbabwe since there is no provision under the Declaration of Rights which deals with the right to adequate housing. This study finds that even the courts of Zimbabwe have refused to enforce the right which is not provided under the Bill of Rights. The only way one can successfully approach the court regarding the issue of housing is when one is alleging arbitrary eviction and demolition. This means that, in Zimbabwe, the right to housing means the right not be arbitrary evicted or have one demolish your home without an order of the court. The summative effect of the content of the right to adequate housing in Zimbabwe is that one cannot be evicted or have his or her home demolished without an order of the court. This, however, is not enough since the right to adequate housing as discussed under this study requires the legal framework to address all the freedoms and entitlements of the right. This study thus concluded that much more still needs to be done under the Zimbabwean legal framework for the right to adequate housing to be fully realised.

The study also made findings with regard to the South African position on the right to adequate housing. It was highlighted that, just as in pre-independent Zimbabwe, the colonial housing laws and policies were promulgated with the aim of preventing black people from profiting from any government-led housing which effectively restricted and limited black African's right to adequate housing.<sup>250</sup> Thus, this study finds that the colonial laws and housing policies in both South Africa and Zimbabwe were similar in particular with regard to the segregation of the majority black Africans.

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<sup>249</sup> Section 74 of Constitution of Zimbabwe only guarantees against arbitrary eviction and no guarantee to adequate housing.

<sup>250</sup> JE Stewart, RK Katsande & O Chisango, 'Shelter, a Home a House or Housing?', 2014. This paper was originally presented in 2014, some aspects have been updated to take account of recent litigation in Zimbabwe in 2015 and 2016.

The study then discussed the right to adequate housing as provided for under the South African and other legislative provisions. It was highlighted that, in South Africa, the right to adequate housing is explicitly provided for under the Bill of Rights, unlike the position in Zimbabwe where the right is only implied from other provisions. The net effect of this is that, in South Africa, everyone has the constitutional right to adequate housing, right which is enforceable due to its inclusion in the Bill of Rights. The justiciability and enforceability of the right to housing in South Africa is evinced by numerous cases which have been filed, and decided by the courts.

To further give effect to the constitutional provision to the right to adequate housing, several laws have been enacted in South Africa which shows that the content of the right to adequate housing in South Africa is different from the content of the right to adequate housing in Zimbabwe. Lastly, the study finds that South African courts are extremely vocal in enforcing socio-economic rights, particularly the right of access to adequate housing. Considering this, the major finding highlighted in the study is that in South Africa, the right to adequate housing is constitutionally provided and is justified whereas in Zimbabwe, the right can only be implied and one cannot approach the court alleging the infringement of the right to adequate housing.

### **5.3 Recommendations**

Having made the above findings, this study makes the following recommendations both for Zimbabwe and South Africa.

#### *5.3.1 Recommendations for Zimbabwe*

##### *5.3.1.1 Rethinking of the Legal Framework*

For Zimbabwe to fully realise the right to adequate housing, it is recommended that there is need to review legislative provisions of Zimbabwe which include the constitutional, legislative, and administrative housing law in Zimbabwe. Because the right to housing in Zimbabwe is not justiciable and enforceable, there is need for the government of Zimbabwe to broaden the laws and insert a provision in the Constitution which specifically makes the right to adequate housing a justiciable and enforceable right. It is worth noting that when dealing with socio-economic rights, there is a need for complete clarity with no room for misinterpretation. Thus, this study gives the recommendation to the legislature to amend the Constitution to include a provision which specifically addresses the right to adequate housing.

Once the Constitution is amended to include the right to adequate housing, the study further recommends the need to review other national laws to give effect to the right to adequate

housing. Just like other jurisdictions where Housing Acts are enacted to translate international provisions into realisable rights as prescribed in their Constitution, there is need to review Zimbabwean laws in this regard.

Also, the government of Zimbabwe is implored to develop and implement clear policies on the right to adequate housing, as the case in South Africa. In Zimbabwe, the government must first provide the constitutional right to adequate which is unambiguous and then formulate policies which help in the advancement of the right, particularly policies that would extend the right to housing to the poor. The right to adequate housing should apply to everyone on an equitable basis.

#### *5.3.1.2 Adequate Housing Finance*

It cannot be denied that for any State to effectively address socio-economic rights, particularly to realise the right to adequate housing, there is need to have provisions for adequate housing finance. It is noteworthy that housing crises is attributed to economic realities, that is, poverty and unemployment, economic realities stall housing development. In Zimbabwe, the government of Zimbabwe has done little in terms of addressing housing issues and this is particularly because of economic constraints. The National Housing Fund is empty thus no longer providing funds to borrow from for housing-related development. Also, the national budget that has been set aside for local government is not specific. There is no adequate housing finance in Zimbabwe and this has effectively affected the realisation of the right to housing. Resultantly, the study recommends the need for the government to address the issue of finance, particularly to set aside the budget for housing finance.

#### *5.2.3.3 Political Will To Drive The Housing Agenda*

Positive implementation of rights can only be achieved where there is political will by the responsible authorities. Socio-economic rights require the State to take measures for progressive realisation of the right. Realisation of these rights depends therefore on whether the government or responsible authority is willing to what is required by the law. This can only be achieved where the issues relating to corruption in any country are properly dealt with. The housing situation of Zimbabwe, particularly in Harare, shows how political corruption in housing is a deterring factor in addressing the current culture of impunity that is breeding. It is therefore recommended that the government through the responsible authorities, must ensure that issues of housing must be addressed in a systematic and non-partisan manner. As argued by other scholars, if the nation can do away with elitist ambitions and selfish interests and become



committed to true public interests, the right to housing will be realised. Thus, in Zimbabwe it is recommended that the government must ensure that housing rights are separated from politicking. There must be a separation of housing and party business.

### *5.3.2 Recommendations for South Africa*

Since the right to adequate housing is explicitly provided for under the South African legislation, to achieved the progressive realisation of the right, the government of South Africa must ensure that these laws are implemented. Implementation of the right to adequate housing requires political will from the government to abide by the decisions of the courts as well as device and implement other programs to meet housing needs. As already highlighted in this study, that the political will to comply with judicial rulings constitutes, among others, a key aspect of the rule of law, the government of South Africa must comply or abide by the rulings of the courts, for the right to adequate housing to be fully realised. It is therefore recommended that the State must devise and implement a coherent, co-ordinated programme to meet housing needs.

### **5.4 Conclusion**

As already highlighted above, the right to adequate housing is importance and closely connected to the access and enjoyment of all other economic, social and cultural rights. This right has been extensively recognised in numerous international and regional instruments. Further, the Constitutions of some countries like South Africa recognise the right and to give effect to the constitutional provision, major legislative measures were adopted by the States to recognise the fundamental socio-economic right to adequate housing. However, in Zimbabwe there is no provision which expressly provide for the right to adequate housing but rather the Constitution guarantees every person the right not to be arbitrarily evicted from his or her home without a court order. It therefore follows that, in Zimbabwe, there is a wide gap in the law in as far as provisions granting and protecting the adequacy of housing. Because of the lack of a justiciable and enforceable right to adequate housing, many people still living under deplorable conditions and without constitutional recourse.