A right to the city for South Africa's urban poor

by
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Declaration

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Margot Strauss

Summary

In South Africa, spatial injustice holds profound implications for the democratic transformation of society, the planning and development of inclusive towns and cities, and the realisation of the constitutionally enshrined housing rights of vulnerable and marginalised urban inhabitants. The post-apartheid state has enacted an extensive housing law framework since 1994 aimed at giving substantive effect to the right to have access to adequate housing in section 26 of the Constitution. In practice, however, the implementation of this framework remains distorted and fails to adequately respond to the country's complex housing crisis. A deep disjuncture also characterises current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Addressing these challenges requires a paradigm capable of contextualising housing rights interpretation and litigation, while viewing housing policy analysis and implementation through the normative lens of section 26. This study adopts an interdisciplinary and multifaceted research framework informed by history, social theory, international housing law, and South African legislation, policy, and jurisprudence. The dissertation investigates the value and potential of the right to the city paradigm to develop the substantive content of the housing rights of South Africa's urban poor.

The right to the city represents a normative framework adept to critically analysing current approaches to the interpretation and implementation of housing rights, in both international and South African housing law. Utilising this theoretical paradigm can contribute to a value-based understanding of housing rights, which offers pragmatic solutions to material problems in the areas of housing delivery, urban planning, and local governance. This value-based approach also requires democratic institutions, which include the courts, the legislature, and the executive, to collectively contribute to contextualised and participatory housing solutions in South Africa. If properly understood and implemented, the right to the city paradigm has the potential to advance the substantive realisation of housing rights and to promote spatial and social transformation in a manner that is congruent with the transformative nature of the South Africa Constitution.

Opsomming

In Suid-Afrika, hou ruimtelike ongeregtigheid onpeilbare gevolge in vir die demokratiese transformasie van die samelewing, die beplanning en ontwikkeling van inklusiewe dorpe en stede, en die verwesenliking van die grondwetlik verskanste behuisingsregte van kwesbare en gemarginaliseerde stedelike inwoners. Die post-apartheid staat het sedert 1994 'n uitgebreide behuisingsreg raamwerk uitgevaardig wat daarop gemik is om substantiewe effek te gee aan die reg op toegang to geskikte behuising in artikel 26 van die Grondwet. In praktyk, is die implementering van hierdie raamwerk egter verwronge en slaag dit nie daarin om voldoende op die land se ingewikkelde behuisingskrisis te reageer nie. 'n Breë gaping kenmerk ook huidige benaderings tot die interpretasie en implementering van die behuisingsregte van Suid-Afrika se stedelike armes. Die aanspreek van hierdie uitdagings vereis 'n paradigma wat daartoe in staat is om die interpretasie en litigasie van behuisingsregte te kontekstualiseer, terwyl dit die analise en implimentering van behuisingsbeleid deur die normatiewe lens van artikel 26 beskou. Hierdie studie neem 'n interdissiplinêre en veelsydige navorsingsraamwerk aan wat ingelig word deur geskiedenis, maatskaplike theorie, internasionale behuisingsreg, en Suid-Afrikaanse wetgewing, beleid, en regspraak. Die proefskrif ondersoek die waarde en potensiaal van die reg tot die stad paradigma om die substantiewe inhoud van die behuisingsregte van Suid-Afrika se stedelike armes te ontwikkel.

Die reg tot die stad verteenwoordig 'n normatiewe raamwerk wat bedrewe is om huidige benaderings tot die interpretasie en implimentering van behuisingsregte, in beide internasionale en Suid-Afrikaanse behuisingsreg, krities te analiseer. Die benutting van hierdie teoretiese paradigma kan tot 'n waardegebaseerde begrip van behuisingsregte bydra, wat pragmatiese oplossings vir materiële probleme in die areas van behuisingsvoorsiening, stadsbeplanning, en plaaslike regering kan bied. Hierdie waardegebaseerde benadering vereis ook dat demokratiese instellings, wat die howe, die wetgewer, en die uitvoerende gesag insluit, gesamentlik tot gekontekstualiseerde en deelnemende behuisingsoplossings in Suid-Afrika bydra. Indien dit behoorlik verstaan en geïmplimenteer word, het die reg tot die stad paradigma die potensiaal om die substantiewe verwesenliking van behuisingsregte te bevorder, asook ruimtelike en maatskaplike transformasie, op 'n wyse wat ooreenstem met die transformerende aard van die Suid-Afrikaanse Grondwet.

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ABBREVIATIONS

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
art	article
arts	articles
BCLR	Butterworths Constitutional Law Reports
BEPP	built environment performance plan
BNG	Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements
CALS	Centre for Applied Legal Studies
CC	Constitutional Court
CoCT	City of Cape Town
CoE	Council of Europe
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Centre for Economic and Social Rights
CJ	Chief Justice
CLC	Community Law Centre
COHRE	Centre on Housing Rights and Evictions
CRC	Convention on the Rights of the Child
CRSR	Convention Relating to the Status of Refugees
DAG	Development Action Group
DCJ	Deputy Chief Justice
DoH	Department of Housing
DHS	Department of Human Settlements
EA	Environmental Authorisation
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ed	edition
(ed)	editor
(eds)	editors

EHP	National Programme for Housing Assistance in Emergency Housing Circumstances
ERRC	European Roma Rights Centre
ESC	European Social Charter
FEANTSA	European Federation of National Organisations Working with the Homeless
FIDH	International Federation for Human Rights
GA	General Assembly
GHS	general household survey
IACtHR	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IDA	incremental development area
IDP	integrated development plan
JHB	Johannesburg
KZN	KwaZulu-Natal
MEC	Member of the Executive Council
NDP	National Development Plan
NGO	nongovernmental organisation
NHC	National Housing Code
NPC	National Planning Commission
NU	Ndifuna Ukwazi
OAS	Organization of American States
OAU	Organization of the African Union
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
para	paragraph
paras	paragraphs
PE	Port Elizabeth
Res	resolution
rev	revised

s	section
ss	sections
SA	South Africa
SAHRC	South African Human Rights Commission
SANT	South African National Treasury
SCA	Supreme Court of Appeal
SDF	spatial development framework
SERAC	Social and Economic Rights Action Centre
SERI	Socio-Economic Rights Institute of South Africa
SHF	Social Housing Foundation
StatsSA	Statistics South Africa
TRA	temporary relocation area
trans	translated
UCLG	United Cities and Local Governments
UDHR	Universal Declaration of Human Rights
UISP	Upgrading of Informal Settlements Programme
UOA	Unit Occupation Agreement
UN	United Nations
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UN-Habitat	United Nations Human Settlements Programme
UNTS	United Nations Treaty Series
UWC	University of the Western Cape
WC	Western Cape
WCG	Western Cape Government
WSF	World Social Forum

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Chapter 1

Introduction

1 1 Background

Wolwerivier is a remote incremental development area ('IDA')[1] located near the urban boundary of the City of Cape Town.[2] According to the City's Built Environment Performance Plan ('BEPP'), the aim of this low-cost housing development is to provide permanent settlement opportunities and essential services to vulnerable households.[3] Most of the families and individuals occupying Wolwerivier were relocated from the Skandaalkamp informal settlement near the Vissershok municipal landfill in 2015.[4]

During its initial planning stages, the City of Cape Town identified the Wolwerivier site as a temporary relocation area ('TRA').[5] Funding for the project was acquired through the National Programme for Housing Assistance in Emergency Housing Circumstances ('EHP'), which provides temporary relief to persons experiencing

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[1] In comparison to conventional township establishment practices, the development processes applicable to an incremental development area ('IDA') aim to accelerate the delivery of settlement opportunities for poor inhabitants who cannot fulfil their own housing needs. See City of Cape Town ('CoCT') *City of Cape Town: Built Environment Performance Plan 2015/16* (2015) 85.

[2] Wolwerivier is located approximately 30 kilometres north of Cape Town. The City's integrated development plan ('IDP') lists Wolwerivier as an approved human settlement project that forms part of the broader Built Environment Performance Plan ('BEPP'). See CoCT *Five-Year Integrated Development Plan 2012-2017: 2015/16 Review and Amendments* (2015) 145; and CoCT *City of Cape Town: Built Environment Performance Plan 2015/16* (2015) 86.

[3] CoCT *City of Cape Town: Built Environment Performance Plan 2015/16* (2015) 85.

[4] Established in the 1970s, the Skandaalkamp informal settlement was located approximately 23 kilometres north of Cape Town. Initially, its residents carved out a marginal existence by selling home-brewed beer to labourers living in a nearby hostel. The site later attracted more people due to its proximity to the Vissershok municipal landfill, which facilitated access to food and recyclable waste that could be sold for income. Relocating the occupants of Skandaalkamp was a precondition for the planned extension of the municipal landfill. See Ndifuna Ukwazi ('NU') *Wolwerivier: Social Audit Report* (2015) 12-13; and A Sokanyile "Skandaalkamp removal outcry" *IOL* (2015-07-12) available at <http://www.iol.co.za/news/south-africa/western-cape/skandaalkamp-removal-outcry-1884111> (accessed 2015-07-20).

[5] The Wolwerivier living environment and housing structures resemble those of the Symphony Way temporary relocation area ('TRA'), which is commonly referred to as Blikkiesdorp. Blikkiesdorp is situated approximately 30 kilometres east of Cape Town in Delft.

housing emergencies.[6] However, the City's 2015 BEPP identifies Wolwerivier as a *permanent* IDA.[7] The paradoxical use of emergency housing funding to establish a permanent low-cost settlement for vulnerable inhabitants poses significant spatial, economic, social, and legal challenges, while raising important questions about current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor.[8]

Despite concerns, local authorities assert that Wolwerivier reflects the City's commitment to addressing the housing needs of its most vulnerable residents,[9] while redressing the apartheid spatial and residential imbalances within its jurisdiction.[10] The City is investigating the prospect of expanding the IDA to enable the long-term goal of transferring ownership to beneficiaries who do not take up alternative housing opportunities elsewhere.[11] Planning for an extensive mixed-use residential and commercial development near Wolwerivier is also underway, which will form part of a future urban growth corridor.[12]

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[6] The technical specifications of the Wolwerivier housing units are governed by the universally applicable standards prescribed in the National Programme for Housing Assistance in Emergency Housing Circumstances or the Emergency Housing Programme ('EHP'). The EHP forms part of the revised National Housing Code ('NHC') and its objective is to provide temporary relief to persons experiencing housing emergencies. See Department of Human Settlements ('DHS') *National Housing Code (Part 3, Volume 4) Incremental Interventions: Emergency Housing Programme* (2009) 9, 18. See further chapter 5.

[7] CoCT *City of Cape Town: Built Environment Performance Plan 2015/16* (2015) 85 (own emphasis).

[8] See further chapter 1, section 1 2.

[9] M Gontsana "Will Wolwerivier be a model for development or the next Blikkiesdorp?" *GroundUp* (2015-03-20) available at <http://www.groundup.org.za/article/will-wolwerivier-be-model-development-or-next-blikkiesdorp_2773/> (accessed 2015-03-25).

[10] The imperative to redress existing spatial inequalities in the distribution of housing development and to refrain from creating new imbalances is a formal policy statement contained in the CoCT's spatial development framework ('SDF'). This policy document sets out the long-term vision for the City's desired spatial form and structure and aligns its spatial development goals, strategies, and policies with national and provincial frameworks. See CoCT *Cape Town Spatial Development Framework: Statutory Report* (2012) 8, 70.

[11] M Gontsana "Will Wolwerivier be a model for development or the next Blikkiesdorp?" *GroundUp* (2015-03-20).

[12] CoCT *City of Cape Town Built Environment Performance Plan 2015/2016* (2015) 55-57. For an analysis of the proposed WesCape development, see L Cirolia "(W)Escaping the challenges of the city: A critique of Cape Town's propose satellite town" (2014) 25 *Urban Forum* 295-312.

1 2 Rationale and motivation

Although the situation of the Wolwerivier community is context-specific, the complex issues confronting its inhabitants are symptomatic of a deep disjuncture that characterises current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Kirsty McLean expounds that this disjuncture can be attributed to the fact that engagement with South African housing law generally occurs either in academia or practice.[13] Legal scholarship is inclined to focus on the interpretation of section 26 of the Constitution of the Republic of South Africa, 1996 ('Constitution'),[14] its enabling legislative and policy framework,[15] and the housing rights jurisprudence of the South African Constitutional Court.[16] Conversely, government officials, planners, and housing practitioners prioritise the implementation of housing legislation and policy – often without due regard for its "nuanced legal interpretations".[17]

McLean argues in favour of adopting a multifaceted approach to the study, interpretation, and implementation of South African housing law. This alternative

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[13] K McLean "Introduction" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2008) 55.1-1 at 55.1-1.

[14] S 26 of the Constitution of the Republic of South Africa, 1996 ('1996 Constitution') states:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within 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.

The Constitutional Court's interpretative approach to s 26 of the 1996 Constitution is outlined in section 5 2 of this study. The obligations on the state to give effect to the housing rights of the urban poor in terms of s 26(2) are analysed in section 5 3. The application of s 26(3) in the context of the eviction of vulnerable and marginalised urban inhabitants from their homes is examined in section 5 4 of this study.

[15] For an overview of the primary and secondary legislative and policy framework applicable to s 26 of the 1996 Constitution, see K Tissington *Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 3, 12-24.

[16] The right of access to adequate housing in s 26 of the 1996 Constitution is the most contested, developed, and successfully litigated socio-economic right in South Africa. Of the 23 socio-economic rights decisions handed down by the South African Constitutional Court over the past two decades, at least 15 cases have dealt with the interpretation and implementation of s 26 of the Constitution. All of these cases have involved poor urban inhabitants and have been successful in the sense that the claimants were granted some form of relief. See S Wilson, J Dugard & M Clark "Conflict management in an era of urbanization: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 472.

[17] K McLean "Chapter 55: Housing – Introduction" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2008) 55.1-1 at 55.1-1.

approach contextualises housing rights interpretation and litigation in relation to the real challenges characterising state decision-making processes, housing delivery, and planning practices. Simultaneously, it views housing policy analysis and implementation through the normative lens of section 26 of the 1996 Constitution.[18] Accordingly, this study is motivated by the need to advance a multifaceted, context-sensitive, and normative approach to the study, interpretation, and implementation of South African housing law. This alternative approach is essential in order to address key challenges currently affecting the substantive realisation of the housing rights of South Africa's urban poor.

Since 1994, the post-apartheid state has developed and adopted an extensive and relatively progressive legislative and policy framework aimed at giving substantive effect to the constitutional rights, values, and obligations entrenched in section 26 of the 1996 Constitution. The South African Constitutional Court has also issued a number of landmark housing rights decisions, which contain important legal developments and guidelines aimed at promoting, protecting, and fulfilling the housing rights of South Africa's urban poor. In practice, however, the implementation of this normative and institutional framework remains distorted and largely fails to adequately respond to the country's complex housing crisis and needs.[19]

The South African National Development Plan ('NDP')[20] recognises that the complex spatial form of the country's housing terrain can be partly attributed to the pre-1994 legislative and policy framework, which enabled the political, economic,

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[18] 55.1-1.

[19] A recent general household survey ('GHS') indicates that 55,3% of South African households fully own the dwellings they inhabit. Households that partially own their homes represented 10,6% of the households surveyed, while 21,7% of households rented accommodation. The remaining 12,4% of households relies on a variety of informal housing arrangements, such as informal settlements and backyard dwellings. See Statistics South Africa ('StatsSA') *Statistical Release P0318: General Household Survey* (2014) 34-35. Research suggests, however, that the actual number of households living in informal conditions is substantially higher than indicated by official data. For an explanation of this phenomenon, see K Tissington *Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 8. See further sections 5 3 and 5 4 of this study.

[20] The National Development Plan ('NDP') is a policy document adopted by the state in 2012. It represents a long-term strategy aimed at eliminating poverty and reducing inequality in South Africa by 2030. The NDP envisions achieving this goal through the united efforts of South Africans, developing an inclusive economy, building capabilities, and enhancing the ability of the state and citizens to work together to solve complex problems. See National Planning Commission ('NPC') *National Development Plan: Vision for 2030* (2012) 1.

social, and spatial exclusion of the majority black population.[21] Despite advances made since 1994, the post-apartheid state has largely failed to systematically challenge the spatial legacy of apartheid planning and housing development.[22] The long-term policy goal of achieving spatial redress through the democratic transformation of society, the development of compact cities, the promotion of integrated socio-economic development, land reform, and access to well located housing and decent transport thus remains unrealised.[23]

Spatial planning and access to land are intrinsically linked to the provision of adequate housing and the development of sustainable, integrated human settlements for South Africa's urban poor.[24] The unlocking of well-located land for urban housing development in terms of inclusive spatial planning practices has, however, lagged behind other forms of post-1994 transformation in South Africa.[25] Consequently, both existing and new forms of spatial injustice currently characterise and affect the development of South African towns and cities, which are counted as among the most unequal in the world.[26] Spatial inequality thus continues to hold

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[21] NPC *National Development Plan: Vision for 2030* (2012) 260. See further chapter 2.

[22] Accordingly, millions of poor South Africans still lack access to adequate housing and essential services, including water, sanitation, and electricity. Moreover, in urban areas the phenomenon of inadequately housed households and individuals is increasing. See K Tissington *Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 5.

[23] NPC *National Development Plan: Vision for 2030* (2012) 260. In 1994, the Office of the President published the White Paper on Reconstruction and Development ('RDP White Paper'), which established the Reconstruction and Development Programme ('RDP'). At the time, the RDP White Paper represented the principal policy framework for redressing the legacy of apartheid through the promotion of integrated economic and social development and the democratic transformation of South African society. See Parliament *White Paper on Reconstruction and Development*, General Notice 1954 of 1994, *Government Gazette* 16085, 15 November 1994.

[24] J Pienaar "The housing crisis in South Africa: Will the plethora of policies and legislation have a positive impact?" (2002) 17 *Southern African Public Law* 336 at 337.

[25] A Todes "Housing, integrated urban development and the compact city debate" in P Harrison, M Huchzermeyer & M Mayekiso *Confronting Fragmentation: Housing and Urban Development in a Democratising Society* (2003) 109 at 110. See further chapter 5, section 5 3.

[26] UN-Habitat recently conducted a survey based on income inequality data in 109 countries. The survey indicates that South African cities feature very high Gini coefficients: Johannesburg (0.75); Buffalo City/East London (0.75); Mangaung/Bloemfontein (0.74); Ekurhuleni/East Rand (0.74); Msunduzi/Pietermaritzburg (0.73); Tshwane/Pretoria (0.72); Nelson Mandela Bay/Port Elizabeth (0.72); eThekwini/Durban (0.72); and Cape Town (0.67). See UN-Habitat *World Cities Report 2016 – Urbanization and Development: Emerging Futures* (2016) 206; and UN-Habitat *State of the World's Cities 2010-2011* (2008) 73-74.

profound implications for South Africa's urban poor. Accordingly, this study is motivated by the need to advance a critical spatial approach to the interpretation and implementation of the housing rights of South Africa's urban poor.

In recent years, efforts aimed at addressing the complex relationship between urbanisation and deprivation have resulted in the development of a theoretical and practical framework that establishes a conceptual link between human rights and human habitat.[27] Henri Lefebvre's right to the city has received considerable attention throughout this process.[28] The concept has been advanced as a challenge to capitalism and the disenfranchisement of marginalised urban inhabitants, as it proposes an alternative paradigm that requires the restructuring of social, economic, and political relations that perpetuate inequality and exclusion.[29] The right to the city also informs the search for alternative strategies that involve emerging movements among marginalised urban populations advocating for renewed forms of democratic control.[30] Consequently, while different social movements have claimed it as a reference to a range of demands concerning the social value of urban space and questions of urban citizenship,[31] the right to the city has also been established as a theoretical concept under which a variety of urban struggles can be claimed.[32]

Developing the normative and substantive content of the housing rights of South Africa's urban poor requires a paradigm capable of facilitating a multifaceted, spatially sensitive, and interdisciplinary approach to the interpretation and implementation of section 26 of the Constitution. The right to the city paradigm is

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[27] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 99. See also J Holston & A Appadurai "Introduction: Cities and citizenship" in J Holston (ed) *Cities and Citizenship* (1999) 1-20; J Holston "Spaces of insurgent citizenship" in J Holston (ed) *Cities and Citizenship* (1999) 155-173; E Isin "Introduction: Democracy, citizenship and the city" in E Isin (ed) *Democracy, Citizenship and the Global City* (2000) 1-21; and E Soja *Postmetropolis: Critical Studies of Cities and Regions* (2000).

[28] See further chapter 3 of this study.

[29] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101-102; and J Friedman "The right to the city" (1995) 1 *Society and Nature* 71 at 74.

[30] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101.

[31] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 28.

[32] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 28; and R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

complex and fluid[33] and represents one important strand of Lefebvre's social theory.[34] The right to the city promotes the transformation of urban space and society in a manner that is congruent with the transformative nature of the South African Constitution. Significantly, it represents a paradigm capable of facilitating a multifaceted, spatially sensitive, and interdisciplinary approach to the interpretation and implementation of the housing rights of South Africa's urban poor.

A multifaceted and interdisciplinary to South African housing law can gain valuable insight from the right to the city paradigm, which can guide legal scholars to conceptualise the relationship between law and state power as continually shaped by political struggles over the inhabitance of space. In turn, these insights can add value to critical legal inquiries into the nature, structure, and form of contemporary spatial projects that affect the housing rights of South Africa's urban poor, such as housing delivery, spatial planning, and urban governance. It can also assist in providing insight into the multifaceted nature of urban housing spaces in South Africa, which remain spatially segregated. Moreover, the right to the city framework can assist in achieving the a legal and urban paradigm shift that is required to redress the adverse effects of these political, legal, and economic processes and relations on the development of urban space in South Africa and particularly housing spaces for vulnerable and marginalised urban inhabitants.

The multifaceted spatial approach advanced in this study must be contextualised with reference to the recent shift in South African legal culture.[35] Adopted during a period of political transition,[36] the 1996 Constitution represents the legal foundation for establishing a democratic post-apartheid society.[37] Stated differently, the

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[33] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101.

[34] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 4.

[35] E Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31 at 32.

[36] For a discussion of South Africa's transition from a system of parliamentary sovereignty to a system of constitutional democracy see S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 7-20.

[37] S 2 of the 1996 Constitution recognises that the Constitution is the "supreme law of the Republic" and that "law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled". For a discussion of the processes through which socio-economic rights were included in the 1996 Constitution, see S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 7-20.

Constitution provides a normative and institutional framework within which to redress both past and present causes of marginalisation and injustice by facilitating the democratic, participatory, and egalitarian transformation of society.[38] This process is frequently described as entailing a project of 'transformative constitutionalism'.[39] South Africa's new constitutional dispensation thus involves fundamental changes within the legal system that necessitate a substantive vision of law.[40] Significantly, the Constitution requires that all decisions and actions must be capable of being substantively defended not only in terms of relevant authority, but also in terms of the rights and values enshrined in the Constitution.[41]

The courts are primarily tasked with the responsibility of developing the normative framework and substantive content of the housing rights of South Africa's urban poor.[42] A transformative approach to the adjudication of their housing rights claims can assist in challenging the boundary between law and politics by inviting recourse to social values and realities situated beyond the legal realm.[43] Although adjudication cannot guarantee political or social transformation, it remains a necessary condition for the long-term success of transformative constitutionalism. This is due to the fact

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[38] E Mureinik "A bridge to where? Introducing the interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31 at 32; P Langa "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351 at 353; and S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 25. See further R Teitel "Transitional jurisprudence: The role of law in political transformation" (1997) 106 *Yale Law Journal* 2009 at 2014.

[39] K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 150. See further M Pieterse "What do we mean when we talk about transformative constitutionalism?" (2005) 20 *Southern African Public Law* 155-166; A van der Walt "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina* 1-47; S Liebenberg "Needs, rights and transformation: Adjudicating social rights" (2006) 1 *Stellenbosch Law Review* 5-36; P Langa "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351-360; and S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 24-42.

[40] A Cockrell "Rainbow jurisprudence" (1996) 12 *South African Journal on Human Rights* 1 at 3.

[41] P Langa "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351 at 353.

[42] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 45. The legal community represents an authoritative and dominant source for generating interpretations of the housing rights provisions in the 1996 Constitution. It does not, however, represent the only source capable of developing the normative and substantive content of housing rights. See, for instance, L du Plessis "Legal academics and the open community of constitutional interpreters" (1996) 12 *South African Journal on Human Rights* 214-229.

[43] K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 169.

that it represents an important means of reducing formalism by promoting transparent legal processes and deepening democratic culture. Courts must, however, be vigilant of the features of South African legal culture that constrain the development of a transformative conception of housing rights.[44] Moreover, they must actively promote the development of appropriate and innovative responses to the housing rights claims of vulnerable and marginalised urban inhabitants.[45]

However, since delivering its landmark judgment in *Government of the Republic of South Africa v Grootboom* ('*Grootboom*'),[46] the Constitutional Court has, on several occasions, avoided developing the normative and substantive content of section 26 of the 1996 Constitution.[47] Since housing rights speak directly to the material conditions of the urban poor, the failure of courts to give meaning to these rights becomes even more significant in situations where the state fails to integrate a rights-based approach to development.[48] The absence of judicial guidance regarding the content of housing rights contributes to considerable uncertainty and ambiguity regarding the interpretation and implementation of the housing rights of South Africa's urban poor. It also stifles the potential of housing rights to contribute to the

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[44] For an analysis of these constraints, see S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 43-44; and M Pieterse "Coming to terms with the judicial enforcement of socio-economic rights" (2004) 20 *South African Journal on Human Rights* 383 at 396-399.

[45] Moreover, housing rights are vital to ensure that disadvantaged litigants are guaranteed a judgement that engages seriously with their underlying normative commitments. K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 169; and S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 43, 46.

[46] 2001 1 SA 46 (CC), 2000 11 BCLR (CC).

[47] David Bilchitz has, for instance, accused the Constitutional Court of abrogating its basic duty to interpret the provisions of the Bill of Rights. See D Bilchitz "Is the Constitutional Court wasting away the rights of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) 127 *South African Law Journal* 591 at 597. Examples of these socio-economic rights cases include *Nokotyana v Ekurhuleni Metropolitan Municipality* 2009 ZACC 33, 2010 4 BCLR 312 (CC); *Joseph v City of Johannesburg* 2010 3 BCLR 212 (CC), 2010 4 SA 55 (CC); and *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC); 2010 4 SA 1 (CC). See further section 5 3 of this study.

[48] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 45-46. Conversely, Henk Botha observes that, while reforms to the litigation process can enhance the diversity of participants in litigation processes, the court ultimately has the power to prioritise or privilege certain interpretations over others. See H Botha "Democracy and rights: Constitutional interpretation in a postrealist world" (2003) 63 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 561 at 573.

transformation of the deplorable housing conditions in which many South Africans live.[49] Ultimately, this gives the constitutional values of human dignity, freedom, and equality "a hollow ring".[50] Accordingly, this study is also motivated by the realisation that developing the normative and substantive content of the housing rights of South Africa's urban poor is imperative to addressing spatial injustice and promoting the democratic, participatory, and egalitarian transformation of South African society.

1 3 Research question, aims, hypotheses and methodology

1 3 1 Primary research question

The primary research question of this dissertation is whether the right to the city paradigm can inform the development of the substantive content of the housing rights of South Africa's urban poor, as enshrined in section 26 of the Constitution. There are five ancillary research aims related to its fundamental research question.

1 3 2 Supplementary research aims, hypotheses and methodology

1 3 2 1 The origins of spatial injustice and segregated urban settlement

The aim of the historical analysis in chapter 2 is to contextualise the leading causes of spatial injustice and segregated urban settlement in South Africa during the colonial and apartheid periods. The hypothesis is that a myriad of factors contributed to the legacy of spatial injustice and exclusion that characterises South Africa's contemporary urban areas and segregated settlement patterns.

Developing the substantive content of the housing rights of South Africa's urban poor entails engaging with the material impact of housing deprivation and socio-economic exclusion caused by South Africa's history of segregated urban development in light of the values and interests underlying section 26 of the

[49] While millions of poor South Africans still lack access to adequate housing and essential services, including water, sanitation and electricity, the phenomenon of inadequately housed individuals and households is increasing in urban areas. See K Tissington *Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 5.

[50] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC), 1997 12 BCLR 1696, para 8; and S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 100.

Constitution.[51] This requires construing section 26 in both its textual setting and its historical and social context.[52] A textual interpretation of section 26 must be cognisant of the interrelated and mutually supportive nature of the rights in the Bill of Rights and the constitutional framework as a whole.[53] The housing rights of the urban poor cannot be understood in isolation and must be interpreted in a manner that advances their interconnection with other rights,[54] as well as the fundamental values of human dignity, freedom, and equality.[55]

In the second instance, interpreting section 26 requires understanding and being cognisant of South Africa's particular historical and socio-economic context.[56] In *Soobramoney v Minister of Health (KwaZulu-Natal)*,[57] the Constitutional Court acknowledged that the context of poverty and inequality that characterises contemporary South Africa precedes the adoption of the Constitution.[58] Promoting the egalitarian transformation of society and addressing the deplorable conditions in which many South Africans live thus represent important constitutional objectives.[59]

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[51] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 47, 79-80.

[52] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), paras 21-22.

[53] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 23; S Liebenberg "The interpretation of socio-economic rights" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 33.4-1 at 33.4-1; I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 143-145. See also S Liebenberg & B Goldblatt "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *South African Journal on Human Rights* 335-361.

[54] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), paras 23-24.

[55] S 1(a) of the Constitution of the Republic of South Africa, 1996 ('Constitution') states that South Africa is a sovereign, democratic state founded on the values of human dignity, equality and the advancement of human rights and freedoms. See further S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 97-100.

[56] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 22, 25; and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721; 2002 10 BLCR 1033, para 24. See further chapter 2.

[57] 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC).

[58] Para 8.

[59] *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC), para 8. See further S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 100.

The methodology in this chapter adopts a spatial perspective in its historical analysis of relevant legislation, case law, and academic literature pertaining to segregated urban development and settlement patterns in South Africa. Advancing this critical spatial awareness is essential, as it remains elusive in current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor.[60] The causes of spatial injustice and segregated urban development identified in chapter 2 also establish the context for justifying the suitability of adopting the right to the city paradigm to critically analyse current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor.

1 3 2 2 The value of the right to the city paradigm

Chapter 3 considers whether the right to the city paradigm is suited to critically analysing and reconceptualising current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Developing the substantive content of the housing rights of vulnerable and marginalised urban inhabitants requires a multifaceted approach capable of traversing the current disjuncture characterising the interpretation and implementation of South African housing law. Simultaneously, this approach must be capable of advancing meaningful spatial and social transformation in South African towns and cities. The hypothesis underlying this research aim is that the right to the city represents a philosophically rich and multidimensional paradigm with the potential to promote substantive spatial and social transformation in urban areas in a manner that is congruent with the fundamental values, rights, and transformative ethos of the South African Constitution.

Part one of this chapter considers the theoretical foundations and key constituent elements of the right to the city as developed by the French philosopher and urban sociologist Henri Lefebvre.[61] The analysis in this chapter relies primarily on English translations of Lefebvre's writings and relevant academic literature. In particular, my understanding of the philosophical origins of Lefebvre's right to the city is informed

[60] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 428. See further chapter 5.

[61] See further chapter 3, section 3 2.

by the work of Chris Butler, who recently published a comprehensive critical legal analysis of the relevance of Lefebvre's social theory for the study of the relationship between law, the state, and space.[62] With reference to the South African context, my analysis of the right to the city draws on various aspects of Marie Huchzermeyer's scholarship.[63] I also rely on the work of Thomas Coggin and Marius Pieterse, who argue in favour of adopting the right to the city as a framework informing the analysis and interpretation of certain rights in the South African Bill of Rights,[64] as well as the obligations of local government.[65] Part two of this chapter examines comparative and international instruments aimed at institutionalising key constituent elements of the right to the city.[66]

1 3 2 3 Developing the normative content of housing rights in international law

Chapter 4 applies the right to the city paradigm to an analysis of the leading instruments and interpretive approaches applicable to housing rights under international human rights law. The corresponding hypothesis is that the philosophically rich and multifaceted right to the city paradigm can assist in developing the normative content of housing rights in international law by providing recourse to extra-legal values and sources of understanding. In turn, this process can reveal normative purposes, novel insights, and conceptual linkages that can guide the interpretation and implementation of the housing rights of South Africa's urban poor.

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[62] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012). See also C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313-332; C Butler "Reading the production of suburbia in post-war Australia" (2005) 9 *Law Text Culture* 11-33; and C Butler "Sydney: Aspiration, asylum and the denial of the right to the city" in A Philippopoulos-Mihalopoulos (ed) *Law and the City* (2007) 205-220.

[63] See, for example, M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011); M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64-89; M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004); and M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006).

[64] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257-278.

[65] M Pieterse "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *South African Law Journal* 149-177.

[66] See further chapter 3, section 3 3.

International law is both a valuable normative source and an essential guide for interpreting and implementing housing law in South Africa.[67] The methodology of this chapter focuses predominantly on analysing the definitive international legal expression of the right to housing as recognised in article 11(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[68] In addition, the interpretative statements of international treaty bodies, such as the General Comments of the United Nations Committee on Economic, Social and Cultural Rights ('CESCR') are considered.

South Africa ratified the ICESCR on 12 January 2015.[69] It entered into force on 12 April 2015 in accordance with article 27(2) of the ICESCR.[70] Through its ratification of the ICESCR, South Africa has committed itself to the obligations, goals, and standards of the ICESCR and is bound in international law to act in such a way that it does not infringe on the spirit of the ICESCR.[71] This represents an important step forwards giving the Covenant greater force in South Africa.[72] Where appropriate, the analysis in this chapter will also consider other authoritative international law sources on housing rights, such as the African Charter on Human and Peoples' Rights,[73] as well as the corresponding interpretative statements of the African Commission on Human and Peoples' Rights.

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[67] See further chapter 4, section 4 2.

[68] United Nations General Assembly ('UNGA') International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 16 December 1966, 993 UNTS 3 ('ICESCR').

[69] UNGA *Depository Notification*, C.N.23.2015.TREATIES-IV.3, 12 January 2015.

[70] Art 27(2) of the ICESCR states that:

> For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

[71] D Petherbridge *The Role of International Law in the Interpretation of Socio-Economic Rights in South Africa* (2015) LLD dissertation, Stellenbosch University 79-83. See further D Petherbridge "South Africa's pending ratification of the international Covenant on Economic, Social and Cultural Rights: What are the implications?" <http://blogs.sun.ac.za/seraj/2012/11/06/ south-africas-pending-ratification-of-the-international-covenant-on-economic-social-and-cultural-rights-what-are-the-implications/> (accessed 2015-05-22).

[72] S Liebenberg "The potential of the International Covenant on Economic, Social and Cultural Rights as a tool for poverty reduction in South Africa" (2014) 15 *Economic and Social Rights Review* 3 at 5.

[73] Organization of the African Union ('OAU') African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev5. South Africa ratified the Charter on 9 July 1996.

1 3 2 4 Analysing the housing rights of South Africa's urban poor

The research aim of chapter 5 is to analyse current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor through a right to the city lens. The hypothesis is that the right to the city paradigm can reveal critical and novel insights that can assist in reconceptualising current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. In particular, the right to the city paradigm can assist in evaluating the responsiveness of South African housing, planning, and evictions law to the constitutional imperatives of spatial and social transformation and the need to substantively realise the housing rights of South Africa's urban poor. The analysis in this chapter focuses on the primary legislative and policy frameworks applicable to the housing rights of the urban poor, as well as the jurisprudence of the South African Constitutional Court,[74] at the intersection of housing, planning and evictions law.

1 3 2 5 Evaluating the potential of the right to the city paradigm

Chapter 6 evaluates the potential of the right to the city paradigm to develop the substantive content of the housing rights of South Africa's urban poor. The evaluation is cognisant of South Africa's particular historical and social context, as outlined in chapter 2, and draws on the normative guidance gained in chapter 4. The aim of this concluding chapter is to highlight the most significant insights advanced by the right to the city paradigm and to make recommendations regarding potential future developments that can contribute to advancing the substantive content of the housing rights of South Africa's urban poor. Related research areas that could benefit from further study are also identified.

1 4 Overview of chapters

Chapter 2 provides a historical exposition of the most significant causes of spatial injustice and segregated urban settlement in South Africa. This chapter contextualises the myriad political, legal, economic, and social factors that underlie

[74] The Constitutional Court is the highest court in South Africa and its decisions bind all other courts. See Constitution of the Republic of South Africa Seventeenth Amendment Act, 2012.

the spatially segregated settlement patterns of vulnerable and marginalised inhabitants in contemporary towns and cities. The historical analysis is divided into three parts that correspond to specific periods between 1652 and 1990. Part one examines the colonial roots of spatial control and residential segregation in South Africa's earliest towns (1652-1910). In particular, it considers the impact of colonial administration, public health management, town planning, land dispossession, and industrial development on the spatial settlement patterns and marginalisation of black persons. Part two reviews the post-Union or pre-apartheid period (1910-1948) and investigates the use of the law as an instrument to legitimate and advance the systematic dispossession, spatial segregation, political control, and socio-economic exclusion of the majority black population. The focus is on the role of law in enhancing spatial control and segregation through land dispossession, planning, forced removals, and the implementation of health and safety legislation. The final part of this chapter explores the apartheid state's use of legislation between 1948 and 1990 to consolidate spatial control, entrench segregated housing settlement, and facilitate the spatial restructuring of urban areas.

Chapter 3 considers whether the right to the city paradigm is suited to facilitating a critical analysis of current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. The analysis in this chapter is divided into two main parts. Part one is a theoretical analysis of the philosophical and historical origins of the right to the city. This section of the chapter commences by analysing three philosophical frames that underlie Lefebvre's broader social theory and inform his understanding and development of the right to the city. The first concerns key theoretical concepts and themes associated with Lefebvre's critique of everyday life. The second philosophical theme explores his theory of the production of space, while the third considers Lefebvre's substantive notion of inhabitance. Part two of this section examines key constituent elements of the right to the city. These include Lefebvre's understanding of the appropriation of urban space, the significance of developing substantive forms of participation, and the city as a creative collaborative work. The final section of the theoretical component of this chapter considers debates regarding the potential articulation of a legal conception of the right to the city. Part two of this chapter focuses on the right to the city in practice and examines three of the leading examples of attempts to institutionalise the right to the city. These include the Brazilian Federal City Statute 10.257 of 2001,

the 2005 World Charter on Human Rights in the City, and the Global Charter-Agenda for Human Rights in the City. The chapter concludes by evaluating the potential of the right to the city paradigm to promote spatial and social transformation and its congruency with the fundamental values, rights, and transformative ethos of the South African Constitution.

Chapter 4 establishes whether the right to the city paradigm can inform the development of the normative content of the right to housing under international human rights law. This chapter is divided into three parts. Part one analyses the normative content of the right to housing under international law in order to determine to what extent it facilitates the development of adequate housing environments that can facilitate spatial and social transformation in urban areas. In doing so, it relies on the key points of convergence identified between the right to the city and the right to housing in chapter 3. These include the adequacy or quality of housing spaces needed to facilitate the spatial and social transformation, the role of the state in housing development, and the importance of the participation of urban inhabitants in promoting the social or use value of urban space. Part two of this chapter analyses the normative content of the right to housing under international law in the context of evictions and the spatial displacement of vulnerable and marginalised urban inhabitants. This section also draws on intersecting themes between the right to the city and the right to adequate housing, which include the role of the state and the participation of urban inhabitants in preventing and mitigating the negative effects of evictions and spatial displacement. The analysis of the normative content of the right to housing in international law in both sections of this chapter draws on the most significant international, subject-specific, and regional human rights sources on housing rights. These sources include the most prominent international, subject-specific and regional human rights instruments. Part three of this chapter evaluates the normative content of housing rights in international law with reference to the key philosophical frames and concepts informing the right to the city paradigm. The purpose of the evaluation is twofold. Firstly, it identifies areas of congruence between the norms and values informing the right to the city and the normative content of the right to housing under international law. Secondly, it identifies areas where the right to the city paradigm can assist in developing the normative content of housing rights in international law. In turn, these insights and

developments can inform the interpretation and implementation of the housing rights of South Africa's urban poor, which is the focus of the next chapter of this study.

Chapter 5 utilises the right to the city paradigm to critically analyse current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. The objective is to determine whether the right to the city paradigm can contribute towards the substantive realisation of the housing rights of South Africa's urban poor by informing judicial, legislative and policy approaches to these rights. Such an interpretation must be responsive to the complex needs of the urban poor and redress the deep social, economic and spatial inequalities that characterise South Africa's urban areas. The analysis in this chapter is divided into two sections. The first part of this chapter examines the legislative and policy framework applicable to the development of state-subsidised housing for the urban poor and informal settlements. It applies the right to the city paradigm within the context of housing provision that is supported by relevant legislative and policy frameworks. The second part of this chapter analyses legislative, policy and judicial approaches to the housing rights of the urban poor within the context of evictions from informal settlements and abandoned buildings.

Chapter 6 concludes this dissertation by evaluating the potential of the right to the city paradigm to develop the substantive content of the housing rights of South Africa's urban poor. The chapter makes recommendations regarding potential future developments that can contribute to developing the substantive content of the housing rights of South Africa's urban poor. Related research areas that could benefit from further study are also highlighted.

Chapter 2

A historical exposition of spatial injustice and segregated urban settlement in South Africa

2 1 Introduction

This chapter provides a historical exposition of the most significant causes of spatial injustice and segregated urban settlement in South Africa during colonialism and apartheid. A myriad of political, economic, legal, and social factors underlie the legacy of spatial injustice and exclusion that characterises South Africa's contemporary urban areas and segregated settlement patterns.[1] It is beyond the scope of this chapter to provide an in-depth historical account of all relevant factors. In keeping with the primary focus of this study, which seeks to develop the substantive content of the housing rights of South Africa's urban poor, this chapter contextualises the role of the legal order in advancing spatial injustice and exclusion through segregated urban settlement during colonialism and apartheid.

The historical analysis consists of three main parts that correspond to distinct periods between 1652 and 1990. Part one examines the colonial origins of spatially segregated urban settlement (1652-1910).[2] This section commences with an overview of the spatial organisation and settlement patterns of indigenous populations before the colonial occupation of southern Africa. It moves on to consider how municipal and public health administration, planning, land use management, and industrialisation contributed to segregated urban development in the earliest, major colonial settlements. This section also traces the role of colonial authorities and market influences in facilitating the spatial displacement, dispossession, and socio-economic exclusion of black urban inhabitants. Part two spans the post-Union or pre-apartheid period (1910-1948). This section investigates

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[1] J Pienaar "The housing crisis in South Africa: Will the plethora of policies and legislation have a positive impact?" (2002) 17 *Southern African Public Law* 336 at 337; and National Planning Commission ('NPC') *National Development Plan: Vision for 2030* (2011) 259-276.

[2] In South Africa, colonialism officially commenced in 1652 when the Dutch founded a permanent settlement at the Cape. On 31 May 1910, the amalgamation of four British colonies (the Cape Colony, Natal Colony, Transvaal Colony and Orange River Colony) established the Union of South Africa in terms of the Union of South Africa Act of 1909. This date marks the end of the colonial period and the beginning of the post-Union or pre-apartheid period. See further S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 199; and J van Wyk *Planning Law* 2 ed (2012) 25.

the use of legal mechanisms to legitimate and enable the systematic dispossession, spatial segregation, political control, and socio-economic marginalisation of the majority black population. In particular, it explores the role of the pre-apartheid government in enabling spatial control, segregation, displacement, and dispossession through land use management, planning, and public health administration. Cumulatively, these measures established the foundation for spatially segregated urban development during apartheid (1948-1990).[3] The final part of this chapter concerns the use of legal frameworks by the apartheid state to consolidate spatial control and segregated settlement development in towns and cities. In particular, it provides insight into the extensive legislative framework and political, economic, and social context that contributed to the spatial restructuring of apartheid urban areas and entrenched the spatially unjust settlement patterns that characterise contemporary urban South Africa.

2 2 Colonial origins of spatially segregated urban settlement (1652-1910)

2 2 1 Pre-colonial settlement patterns of indigenous populations

Prior to the colonial occupation of southern Africa, sizable indigenous settlements developed as strategically located agrarian and economic nodes along prominent trading routes.[4] Walls of stone demarcated the spatial organisation and main settlement features of these communities, which included administrative courts and the homesteads of prominent figures.[5] While most residents lived within the

[3] As a political ideology, apartheid is mainly associated with the period of National Party rule between 1948 and 1990, which marks the official dissolution of apartheid. See further S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 308-309.

[4] The location of these settlements facilitated access to agricultural and mineral resources, which stimulated regional trade and significantly increased the political influence and economic power of local inhabitants. Mapungubwe, the first capital of Zimbabwe (1075-1220), developed along a trading route through the Limpopo River valley that extended from Botswana to the Indian Ocean. The capital of Mapungubwe provided the foundation for the establishment of the pre-colonial Kingdom of Zimbabwe (1220-1450). See T Huffman "Southern Africa to the south of the Zambezi" in M Elfasi & I Hrbek (eds) *General History of Africa III: Africa from the Seventh to the Eleventh Century* (2000) 664 at 676-680; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 19.

[5] In addition to built structures, rights of way demarcated the living environment of these pre-colonial settlements. This particular spatial approach to residential development was used extensively in the residential villages of the Tswana chiefdoms and the large capitals of the Zulu Kingdom. See A Mabin

enclosure, prestigious families with political influence occasionally resided outside built-up areas. The pre-colonial spatial settlement patterns of local inhabitants evinced political hierarchies and advanced social structures.[6] At the height of their development, complex political, economic, and social relations characterised these organised and functional living environments.[7]

From the 1650s, a series of significant events severely disrupted the settlement patterns and livelihood strategies of indigenous communities in southern Africa. Prolonged periods of ethnic warfare, major droughts, and famine resulted in large-scale forced migration.[8] With the advent of colonialism, the development of European settlements, the scarcity of arable land and livestock, and the demand for slave labour and trade in valuable resources exacerbated the spatial displacement of local populations.[9] The following section examines the impact of the establishment and control of spatially segregated residential settlements on black persons in the earliest major colonial towns.[10]

2 2 2 Administering spatial control through separate residential 'locations'

Spatial segregation represents a significant dimension in the historical development of urban settlement patterns in South Africa that is deeply rooted in the

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"Dispossession, exploitation and struggle: An historical overview of South African urbanization" in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 13 at 13; and J van Wyk *Planning Law* 2 ed (2012) 26.

[6] These political hierarchies and social structures were evident in the regional distribution of residential complexes and the layout of administrative capitals. See T Huffman "Southern Africa to the south of the Zambezi" in M Elfasi & I Hrbek (eds) *General History of Africa III: Africa from the Seventh to the Eleventh Century* (2000) 664 at 678-679.

[7] C Laburn-Peart "Precolonial towns of southern Africa: Integrating the teaching of planning history and urban morphology" (2002) 21 *Journal of Planning Education and Research* 267 at 269.

[8] E Eldredge "Sources of conflict in southern Africa, c. 1800-30: The '*Mfecane'* reconsidered" (1992) 33 *Journal of African History* 1 at 29-31; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 19-20.

[9] J van Wyk *Planning Law* 2 ed (2012) 28; and J Pienaar *Land Reform* (2014) 54-55.

[10] For an account of the origins and impact of urban residential segregation in the Boer Republics of the Transvaal and Orange Free State during the late nineteenth century, see S Parnell "Sanitation, segregation and the Native (Urban Areas) Act: African exclusion from Johannesburg's Malay Location, 1897-1925" (1991) 17 *Journal of Historical Geography* 271 at 273; and P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 23.

colonial period.[11] With the arrival of the Dutch at the Cape in 1652, they introduced their system of land registration and planning in the earliest colonial settlements.[12] These measures were based on the assumption that the land inhabited by indigenous communities was *res nullius*.[13] Dutch settlers also introduced the discriminatory notion that whites were superior to 'natives'.[14] After the British invaded and conquered the Cape in 1795, they maintained the Roman-Dutch legal system, but introduced their land administration practices.[15] Due to slow development, property values in early towns were low and land use segregation occurred naturally. English authorities accordingly did not recognise any immediate need for land use planning or restrictive measures.[16]

Founded as a British colonial port, the town of Port Elizabeth represents one of the primary sites in South Africa where spatially segregated development occurred along racial lines.[17] The initial spatial design of the colonial outpost catered

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[11] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 22.

[12] These early settlements were established mainly for administrative and agricultural purposes. See J van Wyk *Planning Law* 2 ed (2012) 27.

[13] The Dutch colonial authorities assumed that the land did not belong to anyone at that particular point in time. See P Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's the Law of Property* 5 ed (2006) 32; and J van Wyk *Planning Law* 2 ed (2012) 27.

[14] R Ross *A Concise History of South Africa* 2 ed (2008) 37; and J van Wyk *Planning Law* 2 ed (2012) 28.

[15] In *Alexkor Ltd v Richtersveld Community*, the South African Constitutional Court considered the nature and content of an indigenous community's land rights, before and after the British acquisition of the land in 1847. The case dealt with a claim for restitution of land by the Richtersveld community under the provisions of the Restitution of Land Rights Act 2 of 1994. Central to the claim was the question whether the Richtersveld community was disposed of its land rights after 19 June 1913 as a result of discriminatory laws or practices. The court found that the real nature of the community's title was a right of communal ownership under indigenous law, which included the right to the exclusive occupation and use of the land. The court concluded that there was nothing in the events preceding the annexation of the Richtersveld that suggested that annexation extinguished the community's land rights. See *Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC); 2003 12 BCLR 1301 (CC), paras 32, 45, 62, 68-77. See further chapter 2, section 2 3 1.

[16] J van Wyk *Planning Law* 2 ed (2012) 28.

[17] By the mid-nineteenth century, Port Elizabeth was the town with the second largest population in South Africa after Cape Town. See A Christopher "Port Elizabeth" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 43 at 43; and J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 295. The colonial town of East London represents another prominent site where racially segregated urban development occurred in as early as 1849. However, military

exclusively for white needs.[18] In 1834, missionaries founded a separate residential area or 'location' near the town centre for indigenous communities under their care.[19] Due to an influx of Africans seeking access to livelihood opportunities, the Port Elizabeth municipality decided in 1855 to establish the Native Strangers' Location adjacent to the 1834 location to accommodate black labourers.[20] Africans who were not housed by their employers were required to relocate to this regulated area and build their own housing.[21] The development of the Native Strangers' Location is historically significant, as it provides a prime example of the colonial administration and control of space through segregated residential development.[22] Additionally, due to the participation of colonial police officers, the physical relocation of black tenants to the Native Strangers Location represents one of the first authorised forced removals in a South African urban area.[23]

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considerations largely determined its spatial organisation. See R Fox, E Nel & C Reintges "East London" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 58 at 58; and E Nel "Racial segregation in East London, 1836-1948" (1991) 73 *South African Geographical Journal* 60-68.

[18] A Mabin "Origins of segregatory urban planning in South Africa, c. 1900-1940" (1991) 13 *Planning History* 8 at 9.

[19] The London Missionary Society Outstation was located less than a kilometre from the town centre and separated from it by cemeteries and open land. See A Christopher "Apartheid planning in South Africa: The case of Port Elizabeth" (1987) 153 *Geographical Journal* 195 at 197; and G Baines "The origins of urban segregation: Local government and the residence of Africans in Port Elizabeth, c. 1835-1865" (1990) 22 *South African Historical Journal* 61 at 72.

[20] This settlement was intended exclusively for black labourers, who were considered temporary residents. The landholding system in the location was based on a twenty-one year leasehold period, which could be renewed annually. Although the land was not individually owned, some tenants lived on their plots long enough to attain common law rights or tenure through occupancy. See A Christopher "Port Elizabeth" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 43 at 44; and J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 304.

[21] This included Africans who were squatting on private land or the town commonage. See A Christopher "Apartheid planning in South Africa: The case of Port Elizabeth" (1987) 153 *The Geographical Journal* 195 at 197; and G Baines "The origins of urban segregation: Local government and the residence of Africans in Port Elizabeth, c. 1835-1865" (1990) 22 *South African Historical Journal* 61 at 74-75.

[22] Joyce Kirk argues that, contrary to studies indicating that urban residential segregation originated during the 1880s (when the closed compound housing system developed in Kimberley), it commenced with the establishment of the Native Strangers' Location. See J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 294. See further chapter 2, section 2 2 4.

[23] J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 294.

Despite the proximity of the Native Strangers' Location to employment opportunities, its tenants faced significant challenges. Local authorities prohibited residents, for instance, from improving or adapting their homes. This restriction rendered their structures unsafe and contributed to poor living conditions. It also affected livelihood strategies, as many occupants supplemented their income by renting out rooms or allowing others to erect structures on their plots. As a result, inhabitants frequently built structures or accommodated boarders without obtaining permission from local authorities. The Native Strangers' Location thus provides valuable insight into marginalised urban inhabitants' early attempts to adapt their living environments to meet their particular needs – despite formal restrictions and criminal sanctions imposed by colonial authorities.[24]

By the 1880s, Port Elizabeth's black population resided in different types of accommodation within walking distance to employment opportunities.[25] However, as the town expanded, local authorities established additional residential locations beyond the urban boundary.[26] Although this decision was ostensibly aimed at alleviating overcrowding and poor living conditions in the Native Strangers' Location,[27] in practice it ensured municipal control over newly established residential areas reserved for black urban inhabitants.

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[24] 305.

[25] In addition to the locations, black urban inhabitants resided in rental accommodation and housing provided by employers. See J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 295.

[26] These locations included Dassiekraal (1850), Cooper's Kloof Location (1877) and the Reservoir Location (1883). All of the locations were established on municipal land. However, the regulations applicable to these new locations differed from those pertaining to the Native Strangers' Location. In Cooper's Kloof, for instance, the municipality limited the leasehold period to three years and retained the right to remove tenants at any time, within the terms of the lease agreement. This had a significant impact on residents' economic and social position, as they had the status of short-term tenants and were subject to evictions. Notably, the municipality did not administer Gubbs Location as it developed on privately owned land, which allowed its inhabitants greater freedom to maintain aspects of traditional life. See A Christopher "Port Elizabeth" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 43 at 44; and J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 304-305.

[27] In addition to overcrowding and poor living conditions, there was limited access to essential services in the Native Strangers' Location, such as water standpipes. Although many of these issues also existed in white residential areas, they received greater municipal support. See J Kirk "Race,

As a result of its prime geographical location near Port Elizabeth's town centre, the Native Strangers' Location eventually encroached on the expansion of white commercial and residential areas. During the late-nineteenth century, the value of the land on which the settlement was located increased and the site was earmarked for commercial and industrial development.[28] Moreover, the town's white population increasingly demanded the removal of the location as their new residential areas developed in its proximity.[29]

In 1883, the Port Elizabeth municipality attempted to introduce legislation authorising the removal of the Native Strangers' Location and the relocation of its residents.[30] This approach was modelled on the use of legal instruments in the Cape Colony to achieve similar results. British officials in the Cape enacted the Native Administrative Act 3 of 1876 and the Native Locations, Lands and Commonages Act 40 of 1879 to exercise greater control over Africans residing on public and private land. Significantly, the Native Reserve Locations Act 40 of 1902 granted British authorities the power to establish black residential areas on the outskirts of urban areas.[31]

In Port Elizabeth, the inhabitants of the Native Strangers' Location resisted their relocation, as they realised that it would exacerbate their marginalisation and significantly affect their livelihood strategies and social networks. Residents would, for instance, be deprived of access to existing facilities, such as schools and churches. Moreover, they were aware that their new settlement would be situated at a considerable distance from employment opportunities. Although the Native Strangers' Location Bill was unsuccessful, the municipality's attempt to introduce

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class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 306, 310.

[28] 294, 312-313.

[29] A Christopher "Port Elizabeth" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 43 at 44.

[30] Local authorities in Port Elizabeth introduced the Native Strangers' Location Bill in 1883. See J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 295, 300, 314.

[31] In terms of the Native Reserve Locations Act 40 of 1902, black residents from District Six and other parts of Cape Town were forcibly relocated to the outlying area of Ndabeni. See further chapter 2, section 2 2 3.

legislation to evict and relocate black inhabitants fuelled a broader and prolonged dispute between the town's authorities and black population.[32]

In 1901, health authorities evicted the occupants of the Native Strangers' Location after an outbreak of the bubonic plague and relocated its residents to an outlying area.[33] Stated differently, colonial administrators deliberately decided to relocate Port Elizabeth's black urban inhabitants instead of providing them with access to adequate housing in town. This decision aligned with the municipality's broader strategy of advancing urban residential segregation, while controlling the presence of black labourers in urban areas, without addressing the unsafe and unhealthy living conditions in their housing environments.[34]

Many evictees relocated to Korsten, a mixed-race freehold village where they purchased land.[35] In the following year, the municipality implemented the Native Reserve Locations Act 40 of 1902 to establish New Brighton – the first official urban 'township' or separate residential area for black inhabitants in Port Elizabeth.[36] Joyce Kirk argues that New Brighton provided both a physical example and legal precedent for the development of future racially segregated residential settlements.[37]

As indicated above, public health administration represents another context for examining spatial control, segregated urban development, and housing deprivation during the colonial period. Maynard Swanson argues that colonial authorities' approach to the control of infectious diseases reveals a great deal about two sets of relationships in urban areas. The first encompasses the interaction between

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[32] The members of an emerging black middle class were particularly opposed to the strategy of forced removal and its impact on their status, specifically in relation to their prescriptive land rights in the location. See J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 293-295, 314-317.

[33] See further chapter 2, section 2 2 3.

[34] J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 306.

[35] 319-320.

[36] During this period, two similar statutes were passed in the Natal colony. The Native Locations Act 37 of 1896 enabled the heightened administration of locations, while the Native Reserve Locations Act 2 of 1904 enabled local authorities to establish locations. See J van Wyk *Planning Law* 2 ed (2012) 48.

[37] J Kirk "Race, class, liberalism, and segregation: The 1883 Native Strangers' Location Bill in Port Elizabeth" (1991) 24 *International Journal of African Historical Studies* 293 at 320. See further A Mabin & D Smith "Reconstructing South Africa's cities? The making of urban planning 1900-2000" (1997) 12 *Planning Perspectives* 193 at 199.

inhabitants of different racial groups, while the second concerns urban residents' relations to their physical surroundings.[38] The following section examines the use of public health administration, town planning, and land use management practices to justify and facilitate the forced removal, spatial displacement, and dispossession of black communities.

2 2 3 Facilitating spatial displacement through planning and land use management

At the turn of the century, the spread of infectious diseases throughout urban areas resulted in a powerful societal metaphor, which influenced the establishment of institutions and legal frameworks that heightened racial tension. The 'sanitation syndrome'[39] explains spatial control and segregated residential development in terms of the "moral panic and racial hysteria" of whites who increasingly equated the presence of black people in urban areas with poverty, disease, and crime.[40] As a result, a causal connection developed between the perceived threat to white health and safety and the imperative to achieve spatial and racial segregation through the forced removal of black people from urban areas.[41]

In Cape Town, the eruption of the plague in 1901 resulted in the swift relocation of more than six thousand Africans from the urban centre to temporary accommodation in the outlying area of Ndabeni.[42] The onset of the plague in Port Elizabeth prompted the municipality to demolish the Native Strangers' Location and to establish the

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[38] M Swanson "The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909" (1977) 3 *Journal of African History* 387 at 387; and M Swanson "'The Durban system': Roots of urban apartheid in colonial Natal" (1973) 35 *African Studies* 159 at 160.

[39] Emphasising the metaphorical significance of the syndrome Maynard Swanson explains that urban race relations were "widely conceived and dealt with in the imagery of infection and epidemic disease". See M Swanson "The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909" (1977) 3 *Journal of African History* 387 at 409. See further M Swanson "'The Durban system': Roots of urban apartheid in colonial Natal" (1973) 35 *African Studies* 159 at 160.

[40] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 24.

[41] 24.

[42] M Swanson "The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909" (1977) 3 *Journal of African History* 387 at 392; and P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 24. See further chapter 2, section 2 2 2.

segregated township of New Brighton.[43] Local authorities in Johannesburg also used the outbreak of the plague to justify the removal of Indians from the inner city 'Coolie Location' to the peripheral township of Klipspruit.[44]

In addition to forced removals, the adverse planning ideologies of colonial authorities contributed to the spatial control and segregated settlement patterns of black communities. Municipal officials strictly regulated housing development in the separate black residential locations, while implementing limited or unsuitable town planning practices. In black residential areas, the application of European planning norms misconstrued, for instance, the housing needs of African women. Settlement plans in colonial towns were not spatially sensitive towards the particular domestic and economic responsibilities of African females. White planners also incorrectly assumed that blacks would have nuclear families and keep their places of residence and employment separate. Moreover, local practices failed to accommodate the culturally specific or religious needs of non-European communities living in urban areas. Planning approaches in black residential areas were thus wholly incompatible with the particular employment patterns and domestic, social, and cultural needs of their inhabitants.[45] As a result, housing deprivation, overcrowding, and unsafe and unhealthy living conditions afflicted these areas.[46]

In other regions, formal planning methods were either superimposed on indigenous settlement patterns and land use systems or implemented alongside pre-existing historic urban centres.[47] In contrast, white residential developments were characterised by low-density layouts, public spaces, green belts, and access to

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[43] M Swanson "The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909" (1977) 3 *Journal of African History* 387 at 400; and A Christopher "Apartheid planning in South Africa: The case of Port Elizabeth" (1987) 153 *The Geographical Journal* 195 at 197. See further chapter 2, section 2 2 2.

[44] S Parnell & G Pirie "Johannesburg" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 129 at 130; S Parnell "Sanitation, segregation and the Native (Urban Areas) Act: African exclusion from Johannesburg's Malay Location, 1897-1925" (1991) 17 *Journal of Historical Geography* 271 at 273; and P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 24-25.

[45] J Hardoy & D Satterthwaite *Squatter Citizen: Life in the Urban Third World* (1989) 22-23.

[46] C Rakodi "Colonial urban policy and planning in Northern Rhodesia and its legacy" (1986) 8 *Third World Planning* 193 at 201.

[47] J Hardoy & D Satterthwaite *Squatter Citizen: Life in the Urban Third World* (1989) 20.

superior infrastructure and municipal services.[48] Consequently, planning practices in areas reserved for black inhabitants differed significantly from those applied to white residential areas. In practice, colonial planning approaches thus failed to adequately respond to the diverse housing needs of growing heterogeneous urban populations and exacerbated the spatial, economic, and social exclusion of black inhabitants.

Introducing planning legislation to improve the living conditions of black urban residents proved largely ineffectual. These legal frameworks were based on Western models and designed for economies and societies that were entirely distinct from the actual contexts in which they were implemented.[49] In particular, statutory planning frameworks failed to recognise both the specific transportation needs of indigenous communities and local conceptions of divisions between public and private spaces. In essence, the extensive impact of early planning practices on black settlement patterns and housing needs remains evident in many of the social power imbalances and spatial inequalities inherent in contemporary South African urban areas.[50]

Land use planning and management also entrenched the spatial control and dispossession of Africans in as early as 1858,[51] as applicable legal frameworks provided that land could not be registered in the name of a 'native', 'Bantu' or 'Black'.[52] In particular, the exclusionary nature of land ownership was justified on the

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[48] C Rakodi "Colonial urban policy and planning in Northern Rhodesia and its legacy" (1986) 8 *Third World Planning* 193 at 201.

[49] J Hardoy & D Satterthwaite *Squatter Citizen: Life in the Urban Third World* (1989) 21-22; and A Mabin "Dispossession, exploitation and struggle: An historical overview of South African urbanization" in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 15-17.

[50] J Gugler "Urbanization in Africa south of the Sahara: New identities in conflict" in J Gugler (ed) *The Urban Transformation of the Developing World* (1996) 219 at 221-225; and J Hardoy & D Satterthwaite *Squatter Citizen: Life in the Urban Third World* (1989) 22-23. See further chapter 2, section 2 5.

[51] The *Grondwetten van de Zuid-Afrikaansche Republiek* (Constitutions of the South African Republic) of 1858, 1889 and 1896 all advanced the principle of non-equality, which provided that black persons could not have equal rights with whites. See further J van Wyk *Planning Law* 2 ed (2012) 30.

[52] Colonial authorities used the terms 'native', 'Bantu', and 'Black' interchangeably. The names of statutes referring to Africans were subsequently amended to coincide with the official use of these terms. For example, the Native Land Act 27 of 1913 was amended to the Bantu Land Act 27 of 1913 and later became known as the Black Land Act 27 of 1913. See J van Wyk *Planning Law* 2 ed (2012) 30. See further chapter 2, section 2 3 1.

basis of article 13 of the Pretoria Convention of 1881.[53] Subsequent legislation also provided for a variety of restrictions on the use and occupation of land by non-whites.[54] In the Transvaal, for example, the Precious and Base Metals Act 35 of 1908 restricted the occupation of certain land by Africans.[55] The enactment of the Glen Grey Act of 1894 also brought an end to black communal land rights in the Cape Colony.[56]

In 1905, *Tsewu v Registrar of Deeds*[57] held that article 13 of the Pretoria Convention of 1881 did not have the status of law and that Africans could register land titles in their own names.[58] Between 1905 and June 1913, blacks purchased approximately 399 white farms.[59] However, the enactment of the Black Land Act 27

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[53] Art 13 of the Pretoria Convention of 1881 stated that "[n]atives will be allowed to acquire land, but the grant of transfer of such land will in every case be made to and registered in the name of the Native Location Commission … in trust for such natives". See also *Tongoane v Minister of Agricultural and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 10. See further chapter 2, section 2 3 1.

[54] Art 9 of the *Grondwet van de Zuid-Afrikaansche Republiek* of 1858 provided, for instance, that the "people will not permit any equalisation of Coloured persons with white inhabitants, neither in Church nor State". See further C Lewis "The modern concept of ownership of land" (1985) *Acta Juridica* 241 at 251; and J van Wyk *Planning Law* 2 ed (2012) 30.

[55] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 20-21.

[56] The Glen Grey Act of 1894 regulated African settlement patterns in the Cape Colony through the introduction of labour taxes and the limitation of individual land holdings. The Act resulted in the forced displacement of thousands of Africans from land. It also sought to undermine the chieftain system of traditional African society, as tribal authorities represented an independent political voice that resisted changes imposed by colonial authorities. See T Davenport *South Africa: A Modern History* (1987) 181; and R Bouch "Glen Grey before Cecil Rhodes: How a crisis of local colonial authority led to the Glen Grey Act of 1894" (1993) 27 *Canadian Journal of African Studies* 1-24.

[57] 1905 TS 130 at 135.

[58] In *Tsewu v Registrar of Deeds* 1905 TS 130 at 135 the court cited art 13 of the Pretoria Convention of 1881 and stated that "[l]eave shall be given to natives to obtain ground, but the passing of transfer of such ground shall in every case be made to and registered in the name of the Commission for Kafir Locations … for the benefit of such natives". See further *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 11; and I Loveland *Due Process of Law? Racial Discrimination and the Right to Vote in South Africa 1855-1960* (1999) 76.

[59] S Feinberg "Pre-apartheid African land ownership and the implications for the current restitution debate in South Africa" (1995) 40 *Historia* 48 at 50; and T Davenport & C Saunders *South Africa: A Modern History* 5 ed (2000) 129-156.

of 1913 fundamentally changed this situation, as it restricted the rights of Africans to own or occupy land outside the legally defined rural reserves or homelands.[60]

Towards the end of the nineteenth century, economic and industrial development added a further dimension to spatial control and urban segregation in the colonies.[61] The subsequent section considers the impact of industrialisation and urbanisation on the spatial settlement patterns of black migrant labourers in early mining towns.

2 2 4 Impact of industrialisation and urbanisation on spatial settlement patterns

From the mid-nineteenth century, industrial and economic development, coupled with the mineral revolution, significantly altered settlement patterns in urban areas. An influx of investment and the expansion of economic and mining activities resulted in rapid and unrestrained urbanisation, which had a profound impact on the spatial organisation of urban areas.[62] Industrial, commercial, and residential sites often developed adjacent to one another. The haphazard nature of urban development spurred the need for formal town planning in relation to residential areas, ports, transportation networks, and commercial centres.[63]

Local planning authorities drew inspiration from British land use management practices in their efforts to spatially reconfigure colonial towns.[64] Alan Mabin argues that the spatial settlement patterns that developed during the 1880s in industrial or mining towns, such as Kimberley, represent an important source of urban residential segregation in South Africa. In particular, he advances that the housing compounds and hostels near mines, which accommodated African labourers, represent a rigid form of residential segregation that structured the development of South African

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[60] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 11. See further chapter 2, section 2 3 1.

[61] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 23.

[62] Rapid urbanisation in South Africa was due to a combination of natural increase and large-scale migration to urban areas. See J van Wyk *Planning Law* 2 ed (2012) 21.

[63] A Mabin "Dispossession, exploitation and struggle: An historical overview of South African urbanization" in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 13 at 14; and J van Wyk *Planning Law* 2 ed (2012) 21.

[64] R Faccio "The development of planning controls in Britain and South Africa" (1972) 14 *Planning and Building Developments* 33 at 35; and J van Wyk *Planning Law* 2 ed (2012) 21.

cities.[65] The British Colony of Natal also implemented racially discriminatory housing policies that only permitted black persons to access urban areas as single workers housed in either municipal or private dormitories.[66]

The rise of industrialisation coincided with substantial population migration towards economic opportunities in towns. Aggressive labour recruiting practices for emerging industries attracted people of different races and classes.[67] This process perpetuated existing class differentiation and entrenched racial and spatial inequalities in residential areas. Although whites and blacks were equally susceptible to changing labour trends, their migratory patterns differed vastly.

The combined pressures of land deprivation, forced displacement, and deepening levels of poverty and inequality had a profound impact on Africans. As a result, struggling rural black communities increasingly attempted to access the small urban economy. The settlement patterns of African migrants in urban areas varied according to the period they spent in towns and the participation of their households in the migratory process. For example, entire families often did not migrate to urban areas in order to maintain a home in the rural reserves.[68] Significantly, this trend illustrates that even though market conditions contributed to the control of the spatial settlement patterns of black labourers in urban areas, the white-minority dominated economy relied heavily on rural areas for a consistent supply of migrant labour.[69]

2 2 5 Conclusion

Before the colonial occupation of southern Africa, the strategic location and spatial organisation of indigenous settlements evinced functional living environments characterised by complex political, economic, and social structures. From the 1650s,

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[65] A Mabin "Labour, capital, class struggle and the origins of residential segregation in Kimberley" (1986) 12 *Journal of Historical Geography* 4 at 22. See further G Pirie "Kimberley" in A Lemon (ed) *Homes Apart: South Africa's Segregated Cities* (1991) 120-128.

[66] A Christopher "Apartheid and urban segregation levels in South Africa" (1990) 27 *Urban Studies* 421 at 425.

[67] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 21.

[68] A Mabin "Dispossession, exploitation and struggle: An historical overview of South African urbanization" in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 13 at 14-15.

[69] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 22.

the settlement patterns and livelihood strategies of local communities were severely disrupted by a series of significant events that resulted in large-scale forced migration. The advent of colonialism exacerbated the spatial displacement of black populations and established the template for racially segregated urban development.

Advancing spatial control and segregation through the physical demarcation and administration of separate black residential locations represents a prominent feature of the colonial period. The restrictions applicable to municipal locations resulted in overcrowding and deplorable living conditions, which failed to accommodate tenants' particular housing needs and livelihood strategies. Despite significant challenges, the locations also represented sites for political contestation where Africans undermined colonial authorities' attempts at spatial control through their daily activities.

Colonial authorities used legislation to legitimate and enforce the forced removal of black communities, who were often relocated to remote sites beyond the urban boundary. Municipalities implemented forced removals for various reasons. In addition to limiting and managing their presence in urban areas, Africans were spatially displaced to enable the expansion of white commercial, industrial, and residential developments. This process demonstrates the use of law to prioritise the property interests of the white minority population and the economic value of land occupied by black urban inhabitants over its social or use value.

At the start of the twentieth century, the spread of infectious diseases heightened racial tensions. The causal connection that developed between the perceived threat to white health and safety and the use of legislation to secure spatial control and segregation further contributed to the forced removal of Africans from urban areas. The establishment and management of peripheral housing spaces for black inhabitants thus formed part of a broader strategy aimed at advancing segregated urban development and the economic and social marginalisation of black persons.

In addition to forced removals, colonial planning practices were instrumental in managing the spatial settlement patterns and living conditions of black communities. While foreign land registration and planning practices in the earliest settlements disregarded the indigenous land rights of local communities, colonial town planning later exacerbated their marginalisation and exclusion. The implementation of European planning models contributed to segregated development and failed to accommodate the diverse housing needs of growing heterogeneous urban populations. In particular, local planning approaches to black residential areas were

wholly incompatible with inhabitants' economic, domestic, social, and cultural needs. Additionally, land use planning and management entrenched the spatial control and dispossession of Africans. The application of legal frameworks advanced the exclusionary nature of land ownership by imposing a variety of restrictions on the use and occupation of land by non-whites.

Industrialisation, economic development, and rapid urbanisation also facilitated significant spatial adjustments to urban settlement patterns during colonialism. Local town planning approaches were informed by foreign practices and the spatial forms of early industrial and mining towns represent an important source of urban residential segregation in South Africa. Substantial population migration towards economic opportunities in towns further contributed to class differentiation and racial and spatial inequalities in residential areas. The settlement patterns of African migrants in urban areas varied according to the period they spent in towns and the participation of their households in the migratory process. Significantly, this trend illustrates that even though market conditions contributed to the control of the spatial settlement patterns of black labourers in urban areas, the white-minority dominated economy relied heavily on rural areas for a consistent supply of migrant labour.

Spatial control and segregation thus represent significant dimensions in the historical development of urban settlement patterns in South Africa, which are deeply rooted in the colonial period. The following section analyses the use of legal frameworks to produce the foundations for the spatial control of urban settlement during the post-Union period between 1910 and 1948.

2 3 Establishing the pre-apartheid foundations of spatial control and segregated urban development (1910-1948)

2 3 1 Advancing spatial segregation through land dispossession

The amalgamation of the four British colonies established the Union of South Africa in 1910. Between 1910 and 1948, the government developed legal mechanisms that facilitated spatial control in the areas of land use management, town planning, housing, and public administration. These measures gradually entrenched the spatial segregation and socio-economic exclusion of the majority

black population. Moreover, they established the legal foundation for spatial control and segregated urban development during apartheid.[70]

The Black Land Act 27 of 1913 demarcated and managed the spaces within which Africans could legally settle.[71] By deliberately restricting areas where blacks could lawfully purchase, hire, or occupy land to scheduled reserves in rural areas,[72] the Act excluded Africans from accessing vast portions of land in South Africa.[73] Additionally, the Act reduced the status of black labourers who remained in areas designated for the exclusive use of whites to that of labour tenants or squatters.[74] These restrictions advanced the economic participation of poor urban whites that struggled to compete with skilled and semi-skilled black labourers.[75] In urban areas, the Black Land Act 27 of 1913 controlled the spatial settlement patterns and limited the livelihood opportunities of Africans, who were only accommodated as members of a temporary workforce.

The Development Trust and Land Act 18 of 1936 extended the application of the Black Land Act 27 of 1913 by providing for the acquisition of additional scheduled

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[70] See further chapter 2, section 2 4.

[71] J van Wyk *Planning Law* 2 ed (2012) 43.

[72] Ss 1 and 2 of the Black Land Act 27 of 1913. In terms of s 10 of the Act, a "scheduled native area" was any area in a province or homeland listed in the Schedule to the Act. These scheduled areas were the forerunners for the establishment of the Bantustans or independent homelands during apartheid. See further chapter 2, section 2 4.

[73] S 1(1) of the Black Land Act 27 of 1913 prohibited the sale of land located outside the scheduled areas listed in the Act between Africans and a person "other than a native". S 1(2) of the Act provided that, in exceptional circumstances, the Governor-General could approve the sale of land to blacks in terms of the Black Administration Act 38 of 1927. This land was, however, not registered in the name of the purchaser. Instead, the Minister of Native Affairs held the land in trust and recognised the permanent use and occupation rights of the purchaser in respect of the land. See *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), paras 12-13; and J van Wyk *Planning Law* 2 ed (2012) 43. See further chapter 2, section 2 3 4.

[74] S 6 read with s 2 of Black Land Act 27 of 1913. In order to remain on land outside of the scheduled reserves, while avoiding criminal prosecution in terms of s 5 of the Act, blacks concluded labour tenant contracts with white farmers. The Black Service Contract Act 24 of 1932 regulated labour tenancy in South Africa during the pre-apartheid period. See A van der Walt *Property in the Margins* (2009) 135; and J van Wyk *Planning Law* 2 ed (2012) 43.

[75] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 26. See further S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 473-476.

areas or rural reserves for black settlement.[76] The Development Trust and Land Act 18 of 1936 integrated land identified by the Black Land Act 27 of 1913 into these reserves and formalised the racial segregation of rural areas through the mechanism of the South African Native Trust.[77] Although the land held by the Trust was intended for the "exclusive use and benefit" of Africans, the amount of land that it could acquire was restricted.[78] In particular, section 10(1) of the Development Trust and Land Act 18 of 1936 advanced the control of the spatial settlement patterns of Africans by limiting land allocated for black occupation to 13% of the country's total surface area.[79] In doing so, the Development Trust and Land Act 18 of 1936 secured the remaining 87% of the land for the white minority's unfettered use and occupation. In urban areas, the Act facilitated the spatial exclusion and socio-economic marginalisation of black persons by requiring them to settle in remote townships in the reserves.[80]

During the pre-apartheid period, the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 were thus instrumental in facilitating the spatial segregation and socio-economic marginalisation of Africans. This legislative framework placed extensive restrictions on the use, occupation, and ownership rights of black inhabitants and limited their participation in urban society to meeting

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[76] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), paras 12-15; and J van Wyk *Planning Law* 2 ed (2012) 31.

[77] Ss 4-9 of the Development Trust and Land Act 18 of 1936. In terms of s 6 of the Act, all land that was set aside for the use and occupation of blacks vested in the South African Native Trust. Tribal authorities administrated the land held by the Trust in terms of s 4(3) of the Act. See *Western Cape Provincial Government: In re SVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC), 2001 1 SA 500 (CC), paras 76-77.

[78] S 48(1)(g) of the Development Trust and Land Act 18 of 1936 authorised the South African Native Trust to "grant, sell, lease or otherwise dispose of land" to blacks on certain conditions. Additionally, the provision empowered the Governor-General to issue regulations prescribing the conditions under which blacks could purchase, hire or occupy land held by the Trust. S 48(1)(i) of the Act provided for the allocation of land held by the Trust for residential purposes. See *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 14.

[79] *Western Cape Provincial Government: In re SVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC), 2001 1 SA 500 (CC), para 2. See further R Ross *A Concise History of South Africa* 2 ed (2008) 95-96; and M Robertson "Dividing the land: An introduction to apartheid land law" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 122 at 128-129.

[80] M Robertson "Segregation land law: A socio-legal analysis" in H Corder (ed) *Essays on Law and Social Practice in South Africa* (1988) 45 at 51.

the functional needs of the white economy.[81] Concurrently, the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 advanced the development of the white urban economy by enabling access to inexpensive African labour from within the townships located in the reserves.[82]

The implementation of the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 also gave rise to the development of a separate system of land use management and planning for areas occupied by blacks.[83] Land use management and planning approaches applicable to these regions were subordinate in comparison to the land use planning schemes implemented in sectors designated for white occupation.[84] The following section analyses the government's use of legislative instruments to enhance spatial control and segregation at the intersection of planning and housing.

2 3 2 Enhancing spatial control at the intersection of planning and housing

During the pre-apartheid period, the Black (Urban Areas) Act 21 of 1923[85] enabled the development of separate residential areas for Africans in or near white urban centres.[86] The Act regulated the spatial settlement patterns of black inhabitants by, for instance, authorising local authorities to demarcate, plan, and

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[81] This legislative framework also established the foundation for subsequent legislation that entrenched the dispossession and spatial exclusion of blacks during apartheid. See further chapter 2, section 2 4.

[82] *MEC for KwaZulu-Natal Province, Housing v Msunduzi Municipality* 2003 4 BCLR 405 (N) at 412-413; and J van Wyk Planning Law 2 ed (2012) 31.

[83] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), paras 12-15. The Black Administration Act 38 of 1927 enhanced this particular system of land use management and planning. See further chapter 2, section 2 3 4.

[84] For a discussion of the development of the planning and land use management schemes applicable to areas occupied by whites, see J van Wyk *Planning Law* 2 ed (2012) 31-43.

[85] According to the Long Title of the Black (Urban Areas) Act 21 of 1923, the aim of the Act was to provide for "improved conditions of residence for natives in or near urban areas and the better administration of native affairs". In 1922, the Transvaal Local Government appointed the Stallard Commission to investigate the presence of Africans in urban areas. The Black (Urban Areas) Act 21 of 1923 was enacted based on the Commission's recommendations. See Transvaal Local Government *Commission Report of the Transvaal Local Government Commission* (TP1-1922), para 267.

[86] For a discussion of the establishment of separate black residential locations during the colonial period, see chapter 2, section 2 2 2.

develop separate locations for Africans.[87] As an alternative settlement option, the Act provided for the lease of municipal plots to black tenants.[88] The Black (Urban Areas) Act 21 of 1923 also endorsed hostel accommodation for single African men working in urban areas.[89] A prominent rationale underlying the accommodation of blacks in pre-apartheid urban areas was the need for access to a steady supply of affordable labour to advance the white-dominated economy.[90] Additionally, urban residential segregation enabled local authorities to implement influx control measures and administer stricter pass laws.[91]

Although the housing options provided for by the Black (Urban Areas) Act 21 of 1923 enabled access to employment opportunities, they also enhanced the government's control over the spatial settlement patterns of Africans.[92] In 1925, for instance, the Johannesburg Municipality used the provisions of the Act to evict African tenants from a portion of the Malay Location. Although the Black (Urban Areas) Act 21 of 1923 required that displaced blacks be rehoused, the municipality did not have the financial resources to provide evictees with access to alternative accommodation.[93] Evictions instituted in terms of the Act frequently aggravated the spatial exclusion, housing deprivation, and socio-economic marginalisation of black urban inhabitants.

The Regulations for the Administration and Control of Townships in Black Areas[94] established limited conditions for blacks to lawfully purchase, rent, or occupy land in

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[87] S 1(1)(a) of the Black (Urban Areas) Act 21 of 1923 provided local authorities with the power to "define, set apart and lay out one or more areas of land for the occupation, residence and other reasonable requirements of natives", which were called "locations". See further J van Wyk *Planning Law* 2 ed (2012) 48.

[88] S 1(1)(b) of the Black (Urban Areas) Act 21 of 1923.

[89] S 1(1)(c).

[90] See further chapter 2, section 2 3 4.

[91] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 29.

[92] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.

[93] S Parnell "Sanitation, segregation and the Native (Urban Areas) Act: African exclusion from Johannesburg's Malay Location, 1897-1925" (1991) 17 *Journal of Historical Geography* 271 at 284.

[94] The Regulations for the Administration and Control of Townships in Black Areas, Proclamation R293 in Government Gazette 373 of 16 November 1962, were adopted in terms of ss 6(2) and 25(1) of the Black Administration Act 38 of 1927 and s 21(1) of the Development Trust and Land Act 18 of 1936.

the scheduled areas beyond pre-apartheid towns.[95] The townships governed by the regulations differed from the formal residential locations established in or near urban areas,[96] as they were consigned to the reserves and subject to the provisions of the Development Trust and Land Act 18 of 1936. However, the proximity of these townships to urban areas was significant, as they represented sources of labour for the urban economy.[97] Significantly, Africans who resided in these townships did not enjoy tenure security in the form of ownership rights over their homes.[98]

Increased levels of urbanisation during the 1940s resulted in the proliferation of informal settlements.[99] The Union government responded by enacting the Black (Urban Areas) Consolidation Act 25 of 1945,[100] which enabled the implementation of influx control policies.[101] The provisions of the Act, in conjunction with the Regulations Concerning the Control and Supervision of an Urban Black Residential Area,[102] were used to establish formal black townships in urban areas.[103] In

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[95] During the pre-apartheid period, black land tenure was traditionally divided into rural and urban categories. Jeannie van Wyk explains that this distinction was largely arbitrary and technical. In essence, the term 'rural' applied to land governed by the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936. However, the term 'urban' also applied in areas that, in the ordinary sense of the word, would have been categorised as rural. See J van Wyk *Planning Law* 2 ed (2012) 45.

[96] The formal residential locations established for blacks in or near urban areas were governed by the provisions of the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945.

[97] F Wilson "Historical roots of inequality in South Africa" (2011) 26 *Economic History of Developing Regions* 1 at 6.

[98] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 16.

[99] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 25.

[100] According to the Long Title of the Black (Urban Areas) Consolidation Act 25 of 1945, the aim of the Act was to consolidate the laws that provided for "improved conditions of residence for natives in or near urban areas and the better administration of native affairs". The Abolition of Racially Based Land Measures Act 108 of 1991 repealed the Black (Urban Areas) Consolidation Act 25 of 1945.

[101] In 1946, the state appointed the Native Laws Commission to investigate and recommend potential changes to the system of spatial and racial segregation. The Commission's recommendation in favour of permanently accommodating African settlement in urban areas was rejected. See Native Laws Commission *Native Laws Commission Report on Africans in Urban Areas* (1946).

[102] The Regulations Concerning the Control and Supervision of an Urban Black Residential Area, Government Notice 1036 in Government Gazette 2096 of 14 June 1968, were issued in terms of s 38(3)(a) of the Black (Urban Areas) Consolidation Act 25 of 1945. These regulations had a long-term impact on the spatial settlement patterns of Africans, as they remained in force for many years in

particular, section 2(1) of the Black (Urban Areas) Consolidation Act 25 of 1945 empowered local authorities to demarcate and plan spaces for black occupation. These areas included locations, vacant municipal land or buildings, and hostels.[104] The settlement options provided for in the Act were subject to the approval of the Minister, who had to be satisfied with the planning and layout of the location, the suitability of the land, the condition of buildings, and the provision of essential services.[105] Section 2(1) did not, however, require the Minister to consider the adequacy of the location of housing spaces created in terms of the Black (Urban Areas) Consolidation Act 25 of 1945. The following section examines the use of the Black Administration Act 38 of 1927 by the pre-apartheid government to control the spatial settlement patterns of black urban inhabitants through the practice of forced removals.

2 3 3 Spatial displacement and forced removals

The Black Administration Act 38 of 1927[106] facilitated the large-scale spatial displacement and control of the majority black population. Section 5(1)(b) of the Act was a powerful mechanism for affecting the management and reconfiguration of urban space through the forced removal of black inhabitants.[107] In *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial*

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terms of s 66 of the Black Communities Development Act 4 of 1984. S 72(1) of the Abolition of Racially Based Land Measures Act 108 of 1991 repealed the Black Communities Development Act 4 of 1984.

[103] J van Wyk *Planning Law* 2 ed (2012) 48-49. See further M Robertson "Black land tenure: Disabilities and some rights" in A Rycroft, L Boulle, M Robertson & P Spiller (eds) *Race and the Law in South Africa* (1987) 119-138; and N Olivier "Property rights in urban areas" (1988) 3 *Southern African Public Law* 23 at 26-29.

[104] S 2(1)(a)-(d) of the Black (Urban Areas) Consolidation Act 25 of 1945.

[105] S 2(2).

[106] The Black Administration Act 38 of 1927 provides for the "better control and management of Black affairs".

[107] S 5(1)(b) of the Black Administration Act 38 of 1927 stated:

> The Governor-General may whenever he deems it expedient in the general public interest, order the removal of any tribe or portion therefore or any Native from any place to any other place within the Union upon such conditions as he may determine: Provided that in the case of a tribe objecting to such removal, no such order shall be given unless a resolution approving the removal has been adopted by both Houses of Parliament.

S 1(1) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act 28 of 2005 repealed s 5(1)(b) of the Black Administration Act 38 of 1927.

Government,[108] the Constitutional Court encapsulated the role of the Black Administration Act 38 of 1927 in facilitating spatial displacement:

> The Native Administrative Act 38 of 1927 appointed the Governor-General (later referred to as the State President) as 'supreme chief' of all Africans. It gave him the power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of 'a colossal social experiment and a long term policy'.[109]

The Black Administration Act 38 of 1927 enabled the comprehensive spatial control and relocation of the black population[110] and the administration of land tenure and land use in the scheduled reserves.[111] It also established separate courts with the authority to apply indigenous laws.[112] By appointing the Governor-General as the "supreme chief" of all Africans,[113] the Act granted him extensive legislative, executive, and judicial powers, which included the authority to evict and remove groups and individuals from any place.[114]

The provisions of the Black Administration Act 38 of 1927 enabled the government to both control the presence of blacks in urban areas and achieve the spatial reconfiguration of towns through the forced removal of thousands of blacks to the scheduled reserves.[115] These processes of spatial displacement and socio-economic marginalisation resulted in immense suffering and dispossession.[116] In

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[108] 2000 4 BCLR 347 (CC), 2001 1 SA 500 (CC).

[109] Para 41.

[110] Ss 3-5 of the Black Administration Act 38 of 1927.

[111] Ss 6-8 of the Black Administration Act 38 of 1927. See further *Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC), 2000 4 BCLR 347 (CC), para 41; and J van Wyk *Planning Law* 2 ed (2012) 43-44.

[112] S 11 of the Black Administration Act 38 of 1927. See further *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 23.

[113] S 1 of the Black Administration Act 38 of 1927.

[114] S 5(1)(b).

[115] G Marcus "Section 5 of the Black Administration Act: The case of the Bakwena ba Mogopa" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 13 at 18-20.

[116] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC), 2000 4 BCLR 347 (CC), para 41. See further C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *South*

practice, the land dispossessions and evictions initiated under the Black Administration Act 38 of 1927 officially excluded Africans from urban areas for several years.[117] The Act has accordingly been described as a "cornerstone of racial oppression, division and conflict" in South Africa.[118]

During the pre-apartheid period, the implementation of other forms of town planning further contributed to the spatial segregation, displacement, and control of black persons. The following section examines some of the most prominent spatial consequences of the implementation of public health and safety legislation in urban areas between 1910 and 1948.

2 3 4 Spatial impact of health and safety legislation in urban areas

The outbreak of the bubonic plague in South Africa in 1901 sparked a powerful social metaphor that associated the presence of Africans in urban areas with poverty, disease, and crime.[119] Between 1910 and 1948, whites increasingly associated the spread of infectious diseases with a growing number of multiracial inner city slums and urban black townships.[120] Promoting the public health and safety interests of the white minority accordingly became an integral aspect of the government's broader imperative of advancing the spatial segregation and control of black urban dwellers.[121]

In 1918, for instance, the influenza epidemic focused the attention of health officials on the appalling living conditions in black settlements such as Ndabeni in Cape Town.[122] The minority white population responded by demanding that Ndabeni

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African Journal on Human Rights 361-394; and A van der Walt *Property in the Margins* (2009) 137-138.

[117] *Tongoane v Minister of Agriculture and Land Affairs* 2010 6 SA 214 (CC), 2010 8 BCLR 741 (CC), para 25. See further M Robertson "Land options" (1989) 21 *Columbia Human Rights Law Review* 193 at 195; and N Olivier "Property rights in urban areas" (1988) 3 *Southern African Public Law* 23 at 25.

[118] *Bhe v Magistrate Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC), para 61.

[119] See further chapter 2, section 2 2 3.

[120] S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 483.

[121] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 24-25.

[122] The Ndabeni settlement was established in 1901 to accommodate black persons who were forcibly expelled from Cape Town as a result of the bubonic plague. See further chapter 2, section 2 2 3.

be demolished and its residents relocated to a more distant area.[123] In Johannesburg, the 1918 epidemic also highlighted the unhealthy living conditions in Johannesburg's Malay Location. In order to manage overcrowding and the spread of disease in the area, the Johannesburg municipality established the Western Areas Native Township, where limited housing was made available to Africans. The construction of the township contributed to the gradual spatial segregation of black inhabitants living permanently in Johannesburg.[124]

The evolving causal connection between white public health concerns and the imperative of spatial separation also informed the reports of government commissions.[125] As a result, municipal health officials increasingly focused on the health concerns associated with the spatial settlement patterns of black urban inhabitants.[126] The notion that spatial segregation would solve problems associated with unhealthy living conditions, overcrowding and disease among blacks in urban areas increased support for racial and spatial segregation.[127]

The Public Health Act 36 of 1919 was enacted to regulate overcrowding and the location and density of housing settlements in urban areas.[128] The implementation of the Act illustrates how the use of British planning practices in South Africa

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[123] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 25.

[124] S Parnell "Sanitation, segregation and the Native (Urban Areas) Act: African exclusion from Johannesburg's Malay Location, 1897-1925" (1991) 17 *Journal of Historical Geography* 271 at 274, 282.

[125] For instance, the 1914 Tuberculosis Commission identified and condemned black locations and urban slums as a health menace. See Union Government *Report of the Tuberculosis Commission* 34/14 (1914). See further P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 25.

[126] M Swanson "The sanitation syndrome: Bubonic plague and urban native policy in the Cape Colony, 1900-1909" (1977) 3 *Journal of African History* 387 at 309; and S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 487.

[127] S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 483; P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 24-25; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.

[128] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.

contributed to spatial, racial, and social segregation.[129] The Public Health Act 36 of 1919 facilitated the spatial displacement of blacks by providing for their removal from white urban centres to peripheral sites under the guise of public health care. Once overcrowding was identified as a factor that exacerbated the spread of infectious diseases, municipalities began constructing segregated housing for Africans in remote parts of urban areas. In practice, however, these measures largely failed to address difficulties associated with providing safe and affordable housing for black urban inhabitants, as well as the broader impact of disease on affected communities.[130]

The provisions of the Public Health Act 36 of 1919 were used in conjunction with the Housing Act 35 of 1920 to advance segregation, racialised urban planning, and the eviction and removal of Africans from white urban areas. This legislative framework proved invaluable for achieving segregated residential development in urban areas, as many of the regulations applicable to black urban settlements were incomplete, ineffective or ignored.[131] The intersection between planning, public health administration, and housing thus represented a key area where local authorities could regulate African urbanisation, while managing the spatial development of urban areas along racial lines.

Increased social and racial differentiation in urban areas during the early twentieth century also resulted in planning approaches that encouraged the eradication of urban slums.[132] English law inspired the provisions of the Slums Act 53 of 1934,[133] as well as the development of local planning approaches to slum clearance and

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[129] S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 472.

[130] 483.

[131] S Parnell "Sanitation, segregation and the Natives (Urban Areas) Act: African exclusion from Johannesburg's Malay Location, 1897-1925" (1991) 17 *Journal of Historical Geography* 271 at 273-274.

[132] S Parnell "Creating racial privilege: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 478.

[133] The Long Title of the Slums Act 53 of 1934 states that it aimed to make "better provision for the elimination of slums within the areas of jurisdiction" of certain local authorities. S 1 of the Act defined a "slum" as "any premises or any part of any premises which has been declared a slums under the provisions" of s 4 of the Act.

relocation.[134] Although planning practices in England required local authorities to rebuild housing on the site of slum clearance schemes, [135] South African municipalities frequently relocated black inhabitants to the urban periphery, where land and construction costs were lower.[136]

In Cape Town, for instance, the provisions of the Slums Act 53 of 1934 were used to remove multiracial inner-city slums and to develop housing schemes for coloured persons on the Cape Flats.[137] The Act also contained criteria and procedures for identifying, repairing, evacuating, or demolishing housing spaces demarcated as slums.[138] In conjunction with planning, health, and housing legislation, the provisions of the Slums Act 53 of 1934 were thus instrumental in effecting the large-scale eviction and peripheral relocation of non-whites from urban areas during the pre-apartheid period.

2 3 5 Conclusion

Between 1910 and 1948, the government enacted a legislative framework that enabled it to systematically dispossess and gradually entrench the segregation, displacement, control, and exclusion of the majority black population. The Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 were pivotal to facilitating dispossession by restricting land allocated for African occupation to the rural reserves, which represented important sources of migrant labour. The statutes legitimated the government's control over African settlement patterns and demarcated areas where blacks were forced to reside. The housing spaces, livelihood opportunities, and participation of Africans in urban areas were essentially limited to meeting the functional needs of the white economy.

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[134] S Parnell "Creating racial privileged: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 481.

[135] H Dyos "The slums of Victorian London" (1967) 11 *Victorian Studies* 5-40.

[136] S Parnell "Creating racial privileged: The origins of South African public health and town planning" (1993) 19 *Journal of Southern African Studies* 471 at 481.

[137] P Maylam "Explaining the apartheid city: 20 years of South African urban historiography" (1995) 21 *Journal of Southern African Studies* 19 at 27; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 24.

[138] Ss 4-16 of the Slums Act 53 of 1934. S 4(1) described a slum as a place where a medical officer indicated that a "nuisance" existed, which could be effectively remedied by applying the provisions of the Act.

During the pre-apartheid period, a separate system of land use management applied to areas occupied by blacks, which was subordinate to the planning schemes implemented in whites regions. The Black (Urban Areas) Act 21 of 1923 and the Black Administration Act 38 of 1927 reinforced these dual planning approaches and enhanced spatial segregation in urban areas by facilitating the development of peripheral black locations. Confining Africans to separate and isolated settlements enabled local authorities to administer pass laws and influx control policies, while enhancing the political and socio-economic exclusion of blacks. In practice, the legislative framework, land dispossessions, and evictions initiated under the Black Administration Act 38 of 1927 officially excluded Africans from urban areas for many years and resulted in severe dispossession and suffering.

The control of African settlement patterns and the spatial displacement of black urban inhabitants were also furthered by the use of health and safety legislation. The notion that spatial segregation would solve problems of disease among Africans in urban areas promoted racial tension and influenced the development of health and safety legislation applicable to urban areas. The provisions of the Public Health Act 36 of 1919 and Housing Act 35 of 1920 were used to advance segregated urban development and the forced removal of Africans from white urban areas.

Pre-apartheid statutory measures facilitated the control and assignment of Africans to racially segregated reserves.[139] This began with the creation of legislative assemblies, which turned into self-governing territories and ultimately into independent states. This process was in accordance with a broader plan to exclude black persons from spaces designated for the exclusive use and benefit of whites.[140] The final section of this chapter examines the use of legal frameworks to advance the colonial template and pre-apartheid foundations of spatial control, segregated urban development, and housing deprivation during the apartheid period.

[139] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2000 4 BCLR 347 (CC), 2001 1 SA 500 (CC), para 42.

[140] *Ex Parte Moseneke* 1979 4 SA 884 (T) at 889-890.

2 4 Consolidating spatial segregation during apartheid (1948-1990)

2 4 1 Entrenching spatial control and segregated urban development in law

The election of the National Party in 1948 heightened the spatially unjust and racially discriminatory legislative and policy approaches of the colonial and pre-apartheid governments. The apartheid state developed extensive legal mechanisms to implement racially based spatial segregation in urban areas.[141] Most notably, these included the Population Registration Act 30 of 1950, the Group Areas Act 41 of 1950, the Black Education Act 47 of 1953, the Reservation of Separate Amenities Act 49 of 1953, the Group Areas Act 36 of 1966, the Black Local Authorities Act 102 of 1982, the Community Development Act 3 of 1966, and the Black Communities Development Act 4 of 1984.[142] These statutes contributed to either demarcating or controlling black urban settlement.[143] In essence, the state utilised this legal framework to regulate the use and development of land designated for African occupation and to consolidate apartheid ideological principles applicable to land, planning, and urban settlement.[144] In the area of land use management, for instance, legislative and policy measures were key to eroding the remaining land rights (such as labour tenancy) that black persons had in sectors reserved for whites.[145]

On a regional level, the apartheid legislative framework facilitated the creation of ethnically defined homelands and physical displacement of thousands of Africans, who were prohibited from living in areas other than the rural reserves.[146] The spatial reconfiguration of South Africa's majority black population resulted in concentrated

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[141] S Parnell & A Mabin "Rethinking urban South Africa" (1995) 21 *Journal of South African Studies* 39 at 41.

[142] For an account of the myriad political, legal, social and cultural institutions that further entrenched racial inequality in South Africa during apartheid, see T van Reenen *Land: Its Ownership and Occupation in South Africa* (1962) 323-328; and S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 334-339.

[143] See further chapter 2, section 2 4 2.

[144] R Ross *A Concise History of South Africa* 2 ed (2008) 126; and J van Wyk *Planning Law* 2 ed (2012) 25. See *Abrams v Allie NO* 2004 9 BCLR 914 (SCA) for examples of practices in terms of which these statutes established a framework of race classification.

[145] For a description of the legal and institutional mechanisms that effected the dispossession of black people during apartheid, see the judgment of Moseneke DCJ in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC), 2007 10 BCLR 1027 (CC).

[146] G Budlender "Urban land issues in the 1980s: The view from Weiler's farm" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 66 at 74.

pockets of severe inequality, poverty, and deprivation in the homelands and independent states.[147] These spatial contradictions were magnified when the rapid economic development of the 1960s and 1970s dwindled.[148] This is due to the fact that the movement of African labourers further away from the core of the urban economy contributed, for example, to severe transportation costs that required government subsidisation.[149] Concurrently, the apartheid state prioritised white economic development through a combination of discriminatory labour, market, and educational policies. Jeremy Seekings and Nicoli Nattrass accordingly observe that no other "capitalist state (in either the North or the South)" structured income inequalities as methodically and severely as South Africa during apartheid.[150]

Due to their intersectional nature, racial discrimination deepened class divisions between 1948 and 1990.[151] The material consequences, severe poverty, and structural inequality produced under apartheid remained largely unresolved after the deracialisation of legal and policy frameworks in the late and post-apartheid periods.[152] Solomon Terreblanche aptly summarises this problem by explaining that although South Africa introduced a political-economic system of democratic capitalism, it still represented "a system of democratic *capitalism*, legitimised by the ideology of liberal capitalism".[153] In practice, state and market influences therefore retained their dominance over the development of urban space and settlement patterns. The following section examines the impact of key components of the extensive legislative framework that consolidated spatial control and facilitated the restructuring of apartheid urban areas.

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[147] See generally M Noble & G Wright "Using indicators of multiple deprivation to demonstrate the spatial legacy of apartheid in South Africa" (2012) 112 *Social Indicators Research* 187-201.

[148] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 33.

[149] P Maylam "The rise and decline of urban apartheid in South Africa" (1990) 89 *African Affairs* 57 at 60.

[150] J Seekings & N Nattrass *Class, Race and Inequality in South Africa* (2005) 2.

[151] 4.

[152] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 3.

[153] S Terreblanche *A History of Inequality in South Africa 1652-2002* (2002) 18 (emphasis in original).

2 4 2 Restructuring the spatial form of apartheid urban areas

The Group Areas Act 41 of 1950, which was modelled on the provisions of the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945,[154] was a powerful mechanism for facilitating the spatial restructuring of apartheid urban areas.[155] The Act enabled spatially segregated urban development through establishing land use zones according to different racial groups,[156] while controlling the tenure status, use, and occupation of land within towns and cities. In practice, the Group Areas Act 41 of 1950 prohibited the multiracial use or occupation of urban land.[157] Stated differently, the Act divided urban areas into segregated zones where only members of a particular race could reside and work.[158] In doing so, the Act clearly designated urban spaces for the exclusive ownership or occupation of a particular group.[159] Additionally, the Group Areas Act 41 of 1950 made it possible to institute criminal proceedings against a person from one race who either owned or occupied land in an area designated for the exclusive use of another racial group.[160]

In practice, the implementation of the Group Areas Act 41 of 1950 had significant consequences for land use management, municipal planning, and settlement development in urban areas. Mabin argues that the Act undermined municipal autonomy by centralising or shifting state control over racial segregation to the

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[154] Mabin argues that a number of existing segregatory measures converged in the Group Areas Act 41 of 1950. The implementation of the Act depended on existing municipal planning structures that were put in place by legislation such as the Housing Act 35 of 1920, the Black (Urban Areas) Act 21 of 1923 and the Black (Urban Areas) Consolidation Act 25 of 1945. See A Mabin "Comprehensive segregation: The origins of the Group Areas Act and its planning apparatuses" (1992) 18 *Journal of Southern African Studies* 405 at 406.

[155] A Dodson "The Group Areas Act: Changing patterns of enforcement" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 132 at 137-161.

[156] S 12(1) of the Group Areas Act 41 of 1950 characterised different racial groups as white, black and coloured.

[157] A Dodson "The Group Areas Act: Changing patterns of enforcement" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 132 at 145-147.

[158] L Thompson *A History of South Africa* (1990) 194.

[159] A Christopher *The Atlas of Apartheid* (1994) 105. See further A Christopher "Segregation levels in South African cities, 1911-1985" (1992) 24 *International Journal of African Historical Studies* 561-582.

[160] D Dyzenhaus *Hard Cases in Wicked Legal Systems: South African law in the Perspective of Legal Philosophy* (1991) 71.

national sphere.[161] This process paved the way for long-term racialised approaches to land use planning, hampered the exercise of property rights, and facilitated the development of state housing for poorer segments of the urban population.[162] The Group Areas Act 41 of 1950 also extended compulsory spatial segregation to the coloured population.[163]

Significantly, the implementation of the Act resulted in the large-scale eviction and spatial displacement of thousands of black urban dwellers from well-located multiracial settlements in inner cities during the 1950s.[164] The forced removals instituted in terms of the Group Areas Act 41 of 1950 coincided with the development of massive peripheral townships,[165] which have become a defining feature of South African urban areas due to their location and standardised layouts.[166] The location of these separate black residential areas enhanced the state's control over black urban inhabitants,[167] as they were often surrounded by industrial buffer zones or vacant land.[168]

In addition to the Group Areas Act 41 of 1950, the Prevention of Illegal Squatting Act 52 of 1951 was instrumental in effecting the spatial restructuring of apartheid towns and cities.[169] The Act regulated the unlawful occupation and use of public and

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[161] A Mabin "Comprehensive segregation: The origins of the Group Areas Act and its planning apparatuses" (1992) 18 *Journal of Southern African Studies* 405 at 407.

[162] 407.

[163] A Mabin "Comprehensive segregation: The origins of the Group Areas Act and its planning apparatuses" (1992) 18 *Journal of Southern African Studies* 405 at 407. See further H Trotter "Trauma and memory: The impact of apartheid-era forced removals on coloured identity in Cape Town" in M Adhikari (ed) *Burdened by Race: Coloured Identities in Southern Africa* (2009) 49-78.

[164] A van der Walt *Property in the Margins* (2009) 60.

[165] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 26.

[166] A Mabin "Conflict, continuity and change: Locating 'properly planned native townships in the forties and fifties'" (1993) *South African Planning History* 305 at 308.

[167] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 27.

[168] By the late 1960s, the emphasis on development in South Africa's major urban areas shifted to the construction of towns in the African rural reserves. See further P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 27.

[169] C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) *South African Journal on Human Rights* 361 at 362.

private land,[170] by authorising the Minister of Native Affairs to compel black urban dwellers living on public or private land to relocate to established resettlement camps[171] and by imposing severe criminal sanctions.[172] The Act also had a particularly detrimental impact on local authorities' approaches to informal settlement development.[173]

The Prevention of Illegal Squatting Act 52 of 1951 was amended in 1977.[174] In 1986, a further amendment in terms of the Abolition of Influx Control Act 68 of 1986 provided for an alternative type of informal settlement area for black urbanites that was commonly referred to as a 'designated area'.[175] Stated differently, these legislative amendments introduced a form of controlled squatting in urban areas that was directly linked to influx control policies.[176] In practice, the amendment enabled portions of state-owned land to be allocated for the housing needs of poor segments of the urban population who were incapable of accessing alternative accommodation.[177] Unlike the transit camps developed during apartheid for accommodating evictees,[178] these designated areas provided more permanent access to housing options.[179] In the case of both transit camps and designated

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[170] C O'Regan "The Prevention of Illegal Squatting Act" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 162 at 163.

[171] T Davenport *South Africa: A Modern History* (1987) 373.

[172] Ss 1 and 2 of the Prevention of Illegal Squatting Act 52 of 1951.

[173] S 3 authorised the eviction of illegal occupants and the demolition of any structures erected on unlawfully occupied public or private land. S 4 prohibiting municipalities from exercising authority over informal settlements, while ss 5 and 8 sanctioned the removal of unlawful occupiers. See further chapter 2, section 2 4 3.

[174] The Riekert Commission of Inquiry into Manpower Utilization was established in terms of General Notice 1673 in Government Gazette 5720 of 26 August 1977. The Commission recommended that African labourers be afforded access to urban areas on condition that adequate accommodation was made available for them. See further C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) *South African Journal on Human Rights* 361 at 373.

[175] S 6A(1) of the Abolition of Influx Control Act 68 of 1986 amended the Prevention of Illegal Squatting Act 52 of 1951.

[176] C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) *South African Journal on Human Rights* 361 at 367.

[177] 393.

[178] C Lewis "The Prevention of Illegal Squatting Act: The promotion of homelessness?" (1989) 5 *South African Journal on Human Rights* 233 at 237. S 6(5) of the Prevention of Illegal Squatting Act 52 of 1951 provided a local authority with the power to make regulations for the establishment of transit camps. Local authorities could use land they owned for purposes of establishing transit camps.

[179] See further chapter 5, section 5 3.

areas, ordinary township planning rules and the provisions of the Group Areas Act 36 of 1966 and the Slums Act 76 of 1979 did not apply.[180] In practice, designated areas provided a more flexible tool for accommodating the influx of black persons into urban areas and a potential alternative to instituting forced evictions and relocations.[181]

However, neither the Prevention of Illegal Squatting Act 52 of 1951 nor the Abolition of Influx Control Act 68 of 1986 addressed the need for integrated housing settlement opportunities for black inhabitants who could not access formal housing in urban areas. Instead, the 1988 amendment to the Prevention of Illegal Squatting Act 52 of 1951 introduced further measures to control 'squatters' or persons residing unlawfully in urban areas. In particular, the Prevention of Illegal Squatting Amendment Act 104 of 1988 empowered local authorities and private landowners to demolish housing structures and forcibly remove black dwellers.[182]

The effective implementation of the Prevention of Illegal Squatting Act 52 of 1951 in urban areas was guaranteed by the enactment of a comprehensive framework of equally discriminatory legislation.[183] These statutes included the Black Laws Amendment Act 54 of 1952,[184] the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, and the Black Service Levy Act 64 of 1952. Moreover, the Prevention of Illegal Squatting Act 52 of 1951 was implemented in conjunction with the Slums Act 76 of 1979, the Trespass Act 6 of 1959, the Physical Planning Act 88 of 1967, and the Health Act 63 of 1977 to control issues associated with health, safety and housing in the areas occupied by African urban inhabitants.[185]

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[180] Different versions of the Group Areas Act 41 of 1950 were enacted, including the Group Areas Act 77 of 1957 and the Group Areas Act 1936 of 1966. These statutes consolidated the compulsory principle of developing segregated urban settlements. See further J Pienaar *Land Reform* (2014) 106-107.

[181] C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) *South African Journal on Human Rights* 361 at 393.

[182] 362.

[183] 369.

[184] The Black Laws Amendment Act 54 of 1952 amended the Black (Urban Areas) Consolidation Act 25 of 1945.

[185] The Prevention of Illegal Squatting Act 52 of 1951 was repealed by s 11(1), read with Schedule 1, of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See further chapter 5, section 5 4.

Within this complex legislative framework, the Physical Planning Act 88 of 1967 was vital to facilitating the apartheid spatial segregation of South African urban areas. Throughout the 1950s and 1960s, the state attempted to centralise control over local planning processes associated with the increased urbanisation of black persons.[186] The Physical Planning Act 88 of 1967 authorised the state to control and prescribe local planning practices through the preparation of master guide plans for local areas approved in terms of section 6A(10) of the Act.[187] In 1972, the administration and management of black urban townships shifted from municipalities to centralised, state-controlled Administration Boards. Planning practices implemented in terms of the Physical Planning Act 88 of 1967 comprised ambitious spatial reconfiguration programmes aimed at both the local and regional levels. In practice, these planning approaches were largely ineffectual and contributed to the development of informal settlements on the boundaries of urban areas. This is due to the fact that many black migrants resorted to accessing urban areas and resources by adapting their basic survival strategies and occupying vacant plots of land or open spaces in or near towns and cities.[188]

During late-apartheid, the townships represented powerful sites where black urban inhabitants challenged the political status quo.[189] As a result, the apartheid state became increasingly concerned with how to address the growing presence of black inhabitants in urban areas. The final section of this chapter examines the abolition of influx control measures and the state's attempt at facilitating 'orderly urbanisation' in South African towns and cities towards the end of apartheid.

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[186] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 29.

[187] A Mabin "Comprehensive segregation: The origins of the Group Areas Act and its planning apparatuses" (1992) 18 *Journal of Southern African Studies* 405 at 407.

[188] L Royston "South Africa: The struggle for access to the city in the Witwatersrand region" in A Azuela, E Duhau & E Ortiz (eds) *Evictions and the Right to Housing: Experiences from Canada, Chile, the Dominican Republic, South Africa, and South Korea* (1998) 145 at 146; and D Soni "The apartheid state and black housing struggles" in D Smith (ed) *The Apartheid City and Beyond: Urbanization and Social Change in South Africa* (1992) 39 at 43. See further chapter 2, section 2 4 3.

[189] P Maylam "The rise and decline of urban apartheid in South Africa" (1990) 89 *African Affairs* 57 at 83.

2 4 3 'Orderly urbanisation' and the abolition of urban influx controls

During the 1980s, the apartheid state investigated alternative strategies to address the effects of rapid urbanisation and the migration of black people to towns and cities. In 1985, a report of the Constitutional Affairs Committee called for the abolition of influx control measures in urban areas. In particular, the report proposed that racially defined controls over black settlements be replaced with neutral measures in the form of planning and health and safety legislation.[190] The recommendations of the Constitutional Affairs Committee were incorporated into the White Paper on An Urbanisation Strategy for the Republic of South Africa ('White Paper on Urbanisation').[191] The notion of 'orderly urbanisation' was central to the White Paper on Urbanisation and entailed accommodating the presence of Africans in urban areas through the establishment of a black middle class with secure tenure rights. This new policy approach introduced measures to ensure that urbanisation happened in a planned and controlled manner in parts of towns and cities designated for black settlement – most often at the urban periphery.[192] The policy approach advanced by the White Paper on Urbanisation, therefore, did not address the spatial imbalances in urban residential settlement.

The apartheid government's policy of orderly urbanisation was enforced through various legal measures, as well as more subtle forms of restrictions applicable to urbanising black inhabitants.[193] The strategy also allowed for controlled squatting on demarcated land through the upgrading of invaded land or the orderly development of uninhabited land – primarily through the involvement of the private sector.[194] In practice, however, the strategy caused ambiguity regarding development

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[190] D Hindson "Orderly urbanization and influx control: From territorial apartheid to regional spatial ordering in South Africa" in R Tomlinson & M Addleson (eds) *Regional Restructuring under Apartheid: Urban and Regional Policies in Contemporary South Africa* (1987) 74 at 78.

[191] Constitutional Affairs Committee *White Paper: An Urbanisation Strategy for the Republic of South Africa* (PC3-1985).

[192] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 33.

[193] G Budlender "Urban land issues in the 1980s: The view from Weiler's farm" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 66 at 74; and M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 1.

[194] M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 1.

approaches to informal settlements, which ranged from demolition to upgrading.[195] Marie Huchzermeyer argues that the apartheid state's predominant development approach was to afford selected informal settlements the status of transit camps until a site and service project was ready for implementation and the affected community could be relocated.[196] Localised solutions that prioritised the upgrading of an existing occupied site were only considered in cases where affected black communities vehemently contested their relocation.[197] Additionally, local authorities retained the power to relocate poor urban inhabitants, whose homes had been subjected to eviction or demolition on one informal site, to an approved albeit equally informal location.[198]

The strategy of orderly urbanisation was unsuccessful, as the apartheid state's extensive legal framework could not prevent land invasions or the continued growth of informal settlements on the peripheries of urban areas.[199] As black migrants continued to defy influx control measures in favour of settling in rapidly growing informal settlements, the government enacted the Abolition of Influx Control Act 68 of 1986.[200] During the final years of apartheid, black residential townships represented powerful spaces of political contestation. The township uprisings of 1984, for instance, contributed to the end of attempts to establish viable black local authorities in urban areas. Cumulatively, the political contestation in the townships, international

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[195] P Harrison "The policies and politics of informal settlement in South Africa: A historical perspective" (1992) 22 *Africa Insight* 14 at 18.

[196] M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 1-2.

[197] 1-2.

[198] C Lewis "The Prevention of Illegal Squatting Act: The promotion of homelessness?" (1989) 5 *South African Journal on Human Rights* 233 at 237; and C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) *South African Journal on Human Rights* 361 at 393.

[199] D Hindson "Orderly urbanization and influx control: From territorial apartheid to regional spatial ordering in South Africa" in R Tomlinson & M Addleson (eds) *Regional Restructuring under Apartheid: Urban and Regional Policies in Contemporary South Africa* (1987) 74 at 98; and P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 33.

[200] For a discussion of the Abolition of Influx Control Act 68 of 1986 see J Schoombee & D Davis "Abolishing influx control: Fundamental or cosmetic change?" (1986) 2 *South African Journal on Human Rights* 208-219.

economic sanctions, and a flailing economy contributed to the eventual demise of apartheid.[201]

2 4 4 Conclusion

The apartheid state heightened the spatially unjust and racially discriminatory approaches of the colonial and pre-apartheid governments by developing extensive legal mechanisms to entrench spatial control and segregated urban settlement in South Africa. On a regional level, the apartheid legal framework enabled the establishment of homelands and independent states to which thousands of Africans were spatially displaced. This process of spatial reconfiguration resulted in the concentration of inequality, poverty, and deprivation in areas reserved for black occupation. Racial discrimination represented another dimension that advanced the spatial and social contradictions produced under apartheid, which remain largely unresolved in contemporary South Africa.[202]

A variety of statutes applicable to land and planning demarcated and controlled urban black settlement and entrenched the insecure tenure status and poor location of housing of South Africa's urbanising black population. The Group Areas Act 41 of 1950, the Prevention of Illegal Squatting Act 52 of 1951, and the Physical Planning Act 88 of 1967 were instrumental in facilitating the restructuring of apartheid urban areas. The Group Areas Act 41 of 1950 enabled spatially segregated urban development by establishing racially based land use zones and controlling the tenure status, use, and occupation of land in towns and cities. The Act also had significant consequences for municipal land use management, planning, and settlement development in urban areas, as it centralised state control over racially segregated development. The implementation of the Group Areas Act 41 of 1950 resulted in the spatial displacement of thousands of black inhabitants from multiracial settlements in South African cities during the 1950s. These forced removals coincided with the development of peripheral townships that enhanced state control over urban black settlement.

The Prevention of Illegal Squatting Act 52 of 1951 regulated the unlawful occupation of public and private land by authorising the removal of black urban

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[201] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 33.

[202] See further chapter 1, section 1 2, and chapter 5.

dwellers to established resettlement sites or transit camps. The Act also enabled the allocation of portions of state-owned land for accommodating the housing needs of the urban and urbanising poor. After 1986, the Act facilitated the creation of designated areas. This alternative type of informal settlement area provided access to more permanent housing alternatives for black migrants and represented an alternative approach to managing the growing urban black population. However, the need for spatially integrated urban settlement options remained unaddressed.

The Physical Planning Act 88 of 1967 contributed to spatially segregated development by enabling the apartheid state to centralise the control of municipal planning processes and the management of black urban townships. Ambitious state-driven spatial reconfiguration programmes were, however, largely unsuccessful and contributed to the proliferation of informal settlements on the urban edge. For many black urban inhabitants, vacant plots of land or open spaces and buildings were the only spaces where they could secure a fragile foothold in towns and cities.

The White Paper on Urbanisation set out a strategy to contain the unlawful occupation of land and manage the development of informal settlements. The strategy authorised the state to plan and demarcate spaces where the growing urban black population could be accommodated.[203] Informal settlements became vital housing spaces for the urban poor that existed outside of legal and planning frameworks. Evictions and forced relocations were instrumental in advancing spatial segregation and coincided with racialised land use planning practices.[204] Forced removals and restrictions on migration also led to dense settlements on the periphery of urban areas, where many of South Africa's urban poor still reside today.[205] This has serious consequences for advancing development in areas such as infrastructure, transport, housing, health, and labour in contemporary towns and cities.

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[203] M Sutcliffe, A Todes & N Walker "Managing the cities: An examination of state urbanization policies since 1986" in C Murray & C O'Regan (eds) *No Place to Rest: Forced Removals and the Law in South Africa* (1990) 86 at 91.

[204] C Bundy "Land, law and power: Forced removals in historical context" in C Murray & C O'Regan (eds) *No Place to Rest* (1990) 3 at 6; and A van der Walt *Property in the Margins* (2009) 60-62.

[205] W Smit "Understanding the complexities of informal settlements: Insights from Cape Town" in M Huchzermeyer & A Karam (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 103 at 111-115. See further chapter 5, section 5 3.

2 5 Conclusion

Spatial injustice and urban residential segregation represent significant dimensions in the historical development of the settlement patterns of South Africa's urban poor. This chapter contextualises some of the most significant political, economic, legal, and social factors underlying the legacy of spatial injustice and socio-economic exclusion that characterises the housing crisis and segregated settlement patterns in South Africa's contemporary urban areas. In doing so, it illustrates that the housing needs of South Africa's urban poor are inextricably linked to this complex system of factors.[206] Acknowledging this interrelationship before seeking possible solutions or alternative approaches to meeting the housing needs of vulnerable and marginalised urban inhabitants is essential.[207]

This chapter also draws attention to the dominant role of the state in developing racially segregated spaces and settlement patterns at the national, regional, and local levels in both urban and rural areas through the use of various legal mechanisms. The role of the state, as the primary developer of space at the intersection between land, planning, and housing represents a prominent source of spatial injustice and segregated urban development. As Juanita Pienaar explains, the history of land, planning, housing, and the development of informal settlements in South Africa is firmly embedded in an extensive legal framework informed by a racial bias advanced by the state.[208] Stated differently, the legal system used to develop urban space in the areas of land use management, planning, and housing has historically operated on a spatially and racially exclusive basis.[209] The lack of a comprehensive legal response by the post-apartheid state, aimed at addressing spatial injustice and exclusion in urban areas, has also exacerbated the inability of

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[206] J Pienaar "Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin America and African developments" (2002) 35 *Comparative and International Law Journal of Southern Africa* 1 at 16.

[207] J van Wyk *Planning Law* 2 ed (2012) 592.

[208] J Pienaar "The housing crisis in South Africa: Will the plethora of policies and legislation have a positive impact?" (2002) 17 *Southern African Public Law* 336 at 337.

[209] J Pienaar "Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin America and African developments" (2002) 35 *Comparative and International Law Journal of Southern Africa* 1 at 1.

the urban poor to access integrated and sustainable settlements and livelihood opportunities in urban areas.[210]

These factors assist in establishing the context for investigating the suitability of the right to the city as a paradigm for understanding and reconceptualising the historical and contemporary factors that affect current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor in chapter 3.

[210] J van Wyk *Planning Law* 2 ed (2012) 458.

Chapter 3

The right to the city: Theory and practice

3 1 Introduction

The historical analysis in chapter 2 contextualised the leading causes of spatial injustice and segregated urban settlement in South Africa during the colonial and apartheid periods. Chapter 3 considers whether the right to the city paradigm is suited to critically analysing and reconceptualising current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Developing the substantive content of the housing rights of vulnerable and marginalised urban inhabitants requires a multifaceted approach capable of traversing the current disjuncture characterising the interpretation and implementation of South African housing law. Simultaneously, this approach must be capable of advancing meaningful spatial and social transformation in South African towns and cities.

The analysis in this chapter is divided into two main parts. Part one is a theoretical analysis of the philosophical and historical origins of the right to the city, as developed by Henri Lefebvre. This section of the chapter commences by analysing three philosophical frames that underlie Lefebvre's broader social theory and inform his understanding and development of the right to the city. The first concerns key theoretical concepts and themes associated with Lefebvre's critique of everyday life. The second philosophical theme explores his theory of the production of space, while the third considers Lefebvre's substantive notion of inhabitance. Part two of this section examines key constituent elements of the right to the city. These include Lefebvre's understanding of the appropriation of urban space, the significance of developing substantive forms of participation, and the city as a creative collaborative work. The final section of the theoretical component of this chapter considers debates regarding the potential articulation of a legal conception of the right to the city. Part two of this chapter focuses on the right to the city in practice and examines three of the leading examples of attempts to institutionalise the right to the city. These include the Brazilian Federal City Statute 10.257 of 2001, the 2005 World Charter on Human Rights in the City, and the Global Charter-Agenda for Human Rights in the City. The chapter concludes by evaluating the potential of the right to

the city paradigm to promote spatial and social transformation and its congruency with the fundamental values, rights, and transformative ethos of the South African Constitution.

3 2 The right to the city in theory

3 2 1 Philosophical framework informing the right to the city

3 2 1 1 A humanist Marxist philosophical position

Lefebvre's humanist Marxist philosophical position[1] is informed by the work of George Hegel, Karl Marx and Friedrich Nietzsche.[2] A characteristic feature of Lefebvre's philosophical orientation is his endeavour to consolidate the ideas of Hegel, Marx, and Nietzsche into an emancipatory and dialectic social theory.[3] Drawing on Hegel, Marx, and Nietzsche's "relations with the modern world",[4] Lefebvre identifies synergies in their unique intellectual contributions. In particular, he acknowledges Hegel's concern with the vast influence of the state,[5] Marx's transformative critique of capitalist social relations,[6] and Nietzsche's reliance on art as a "resource for protest" and a "defence of civilization" against the state.[7]

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[1] H Lefebvre [trans J Sturrock] *Dialectic Materialism* (2009) provides an example of Lefebvre's initial approach to Marxist philosophy. This work explores Marx's dialectic method and adopts the theme of alienation as an analytic frame applicable to social life. For an account of Lefebvre's development as a Marxist philosopher, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 13-19. See further chapter 3, section 3 2 1 2.

[2] Stuart Elden argues that Martin Heidegger's influence on Lefebvre is often undervalued. See S Elden "Between Marx and Heidegger: Politics, philosophy and Lefebvre's *The Production of Space*" (2004) 36 *Antipode* 86 at 87; and S Elden *Understanding Henri Lefebvre: Theory and the Possible* (2004) 76-83. See further chapter 3, section 3 2 1 4.

[3] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18-19. For an overview of the key features of Marx's dialectic method, see D Gregory, R Johnston, G Pratt, M Watts & S Whatmore (eds) *The Dictionary of Human Geography* 5 ed (2009) 157-158. See further chapter 3, section 3 2 1 2, section 3 2 1 3, and section 3 2 1 4.

[4] S Elden, E Lebas & E Kofman (eds) *Henri Lefebvre: Key Writings* (2003) 44.

[5] Although Lefebvre was critical of Hegel's ideas, it is widely accepted that Hegel enlivened Lefebvre's humanist approach to Marxist philosophy. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 13-19.

[6] For insight into Marx's impact on Lefebvre's unique philosophical stance, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18-19, 42-43.

[7] S Elden, E Lebas & E Kofman (eds) *Henri Lefebvre: Key Writings* (2003) 42-44. Chris Butler observes that Lefebvre's integration of Nietzsche's work into his evolving social theory is frequently neglected. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City*

Engaging with these prominent intellectual figures influenced Lefebvre's maturation as a humanist Marxist philosopher and the development of key concepts and philosophical themes that permeate his extensive body of work. The 'everyday' represents a defining component of Lefebvre's social theory that connects two prominent philosophical streams.[8] These theoretical threads are the prevalence of human alienation in daily life and the need to contextualise social phenomena within an understanding of society as a continuously transforming 'totality'.[9] The following section examines the influence of Lefebvre's humanist Marxist philosophy on his development of the concept of the everyday as a vital element of both his broader critique of everyday life and his work on the right to the city.

3 2 1 2 Lefebvre's critique of everyday life and contribution to Marxism

3 2 1 2 1 The concept of the 'everyday'

After World War II, Lefebvre began studying daily life in French society under conditions of capitalism and developed the concept of the 'everyday',[10] which he regards as his most significant contribution to Marxist theory.[11] For him, the everyday signifies "real life" or a material existence encompassing social goods such as

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(2012) 1-2, 19. Nietzsche influenced, for instance, Lefebvre's critique of the abstract effects of spatial production under conditions of contemporary capitalism in H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 239-242, 247-249. See further chapter 3, section 3 2 1 3.

[8] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 5, 107.

[9] See further chapter 3, section 3 2 1 2.

[10] Butler explains that the theoretical concept of the everyday is an inexact translation of Lefebvre's use of the French adjective *la quotidienne*, which evokes the notion of repetition in daily life. He argues that Lefebvre's understanding of *la quotidienne* should be differentiated from the French phrase *la vie quotidienne* (daily life), which has a more enduring association with everyday practices or daily routines. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 23-24. The French adjective *la quotidienne* refers to each day (*de chaque jour*); daily expenses or tasks (*les dépenses ou tâches quotidiennes*); an everyday problem (*un problème de la vie quotidienne*); the working day (*le temps de travail quotidienne*); a common expression (*expression courante*); a common use (*d'usage courant*); or a daily occurrence or problem (*occurrence ou problème quotidienne*). See M Corréard, V Grundy, J Ormal-Grenon & N Rollin (eds) *The Oxford-Hachette French Dictionary: French-English, English-French* 4 ed (2007) 696.

[11] H Lefebvre "Toward a leftist cultural politics: Remarks occasioned by the centenary of Marx's death" in C Nelson & L Grossberg (eds) *Marxism and the Interpretation of Culture* (1988) 75 at 78. See further E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 5; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 107.

"sustenance, clothing, furniture, homes, neighbourhoods," and the environment.[12] The concept animates Lefebvre's efforts to reconstruct Marxism, which he identifies as the social theory with the greatest potential to engender a critique of everyday life.[13] Lefebvre extends the scope of Marxist scholarship to the material aspects of alienation, which exist beyond the economic realm.[14] The everyday thus represents a theoretical concept adept to framing a critical analysis of the substantive aspects of alienation inherent in daily life in modern society.[15] Additionally, by incorporating the concept of the everyday into his study of the material aspects of daily life, Lefebvre pioneered the 'urban' as a particular social realm within Marxism.[16] When examining the social features and consequences of urbanisation and economic transformation, [17] he uses the terms 'urban', 'city' and 'society' fluidly and interchangeably. For Lefebvre, the urban is thus a synecdoche for society.[18]

The concept of the everyday connects two prominent philosophical streams in Lefebvre's extensive body of work.[19] The first considers the prevalence of human alienation. The second intellectual theme concerns the need to contextualise social phenomena within an understanding of society as a continuously transforming totality.[20] The next section explores the role of alienation in informing Lefebvre's understanding of the notion of the everyday and his critique of everyday life.

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[12] H Lefebvre [trans S Rabinovitch] *Everyday Life in the Modern World* 2 rev ed (2002) 21.

[13] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 107.

[14] Lefebvre draws attention to this shift in perspective by emphasising that workers have social and political lives beyond their places of work. See H Lefebvre "Toward a leftist cultural politics: Remarks occasioned by the centenary of Marx's death" in C Nelson & L Grossberg (eds) *Marxism and the Interpretation of Culture* (1988) 75 at 78. Butler explains that the concept of the everyday also encouraged Lefebvre to consider alternative avenues for political expression beyond those recognised by orthodox Marxism. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 1-2, 5, 24-25, 107.

[15] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 24-25.

[16] N Smith "Foreword" in H Lefebvre [trans R Bononno] *The Urban Revolution* (2003) vii at x-xi; and M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 69.

[17] H Lefebvre "It is the world that has changed" in N Brenner & S Elden (eds) *State, Space, World: Selected Essays* (2009) 153 at 161.

[18] P Marcuse "Reading the right to the city" (2014) 18 *City* 4 at 5.

[19] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 15, 107.

[20] See further chapter 3, section 3 2 1 2.

3 2 1 2 2 The pervasiveness of alienation in everyday life

In his *Critique of Everyday Life*,[21] Lefebvre develops a framework for examining the social impact of alienation under conditions of contemporary capitalism.[22] He adopts a broad conception of alienation,[23] which advances that its origins lie beyond market influences or the economic realm. In particular, Lefebvre argues that the source of alienation is embedded in the material conditions of daily life.[24] He also posits that any analysis of daily existence in a modern capitalist society must thoroughly engage with the linkages between urbanisation, consumerism, and state power. In essence, Lefebvre's framework demonstrates the prevalence of alienation in social practices and relationships.[25]

The theme of alienation also illuminates Lefebvre's concern with the real contradictions inherent in daily life.[26] By prioritising lived experience over formalism, Lefebvre reworks Marx's dialectic method as an essential component of his

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[21] Lefebvre began developing this sociological framework in H Lefebvre [trans J Moore] *Critique of Everyday Life, Volume I: Introduction* (1991). His extensive critique of everyday life includes two further volumes: H Lefebvre [trans J Moore] *Critique of Everyday Life, Volume II: Foundations for a Sociology of the Everyday* (2002); and H Lefebvre [trans G Elliott] *Critique of Everyday Life, Volume III: From Modernity to Modernism: Towards a Metaphilosophy of Daily Life* (2006). Mark Gottdiener argues that Lefebvre's critique of everyday life represents his most significant work. See M Gottdiener "A Marx of our time: Henri Lefebvre and the production of space" (1993) 11 *Sociological Theory* 129 at 129. Lefebvre's work on 'rhythmanalysis' was published posthumously, but is often cited as the unofficial fourth volume of his critique. See H Lefebvre [trans G Moore & S Elden] *Rhythmanalysis: Space, Time and Everyday Life* (2004).

[22] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 5, 24-25.

[23] Lefebvre differentiates his understanding of alienation from economic exploitation and applies to a variety of social relationships not traditionally considered in Marxist theory. This approach sets him apart from his intellectual counterparts. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 15-16, 26.

[24] H Lefebvre [trans J Moore] *Critique of Everyday Life, Volume I: Introduction* (1991) 33; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 16.

[25] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 24, 107.

[26] Stefan Kipfer explains that Lefebvre's concern with the everyday predominantly manifests as an interest in the "contradictory lived experience" of different inhabitants, which is characterised by the prevalence of consumerism and the deepening of unequal social relations under contemporary colonial market conditions. See S Kipfer "Urbanization, everyday life and the survival of capitalism: Lefebvre, Gramsci and the problematic of hegemony" (2002) 13 *Capitalism, Nature, Socialism* 117 at 119, 127, 132. See also M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 68.

philosophical approach.[27] He accordingly argues that alienation can only be abolished if deeply rooted social contradictions are eliminated.[28] This reasoning lies at the heart of his endeavour to reorient Marxist scholarship to a critique of everyday life.[29]

Alienation represents, however, only one particular aspect of dialectical contradiction in Lefebvre's work.[30] His dialectical approach is characterised by the use of contradictory ideas or opposing arguments to reveal their interrelationship and to contribute to mediating or resolving their inherent tension. A vital feature of Lefebvre's dialectic approach is its potential to engage with the profound social contradictions inherent in modern society in a manner that challenges the way in which they advance exclusion or discrimination.[31] For example, instead of employing terms such as 'formal' and 'informal' to distinguish between the spaces in which urban inhabitants live, Lefebvre develops a conceptual triad that reveals the multidimensional and inclusive nature of space.[32]

Lefebvre's dialectic approach to engaging with the social contradictions inherent in modern society provides valuable insight in the context of this study. For example, the informal housing spaces of the urban poor are often juxtaposed with the formal state-subsidised housing projects developed for vulnerable households.[33] This

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[27] For Lefebvre, the role of the dialectic within Marxist philosophy is to free the real content or substance of life from formalism. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 14.

[28] In particular, Lefebvre cautions that new forms of alienation will continue to emerge if social contradictions are not addressed. See H Lefebvre [trans J Moore] *Critique of Everyday Life, Volume I: Introduction* (1991) 56; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 16.

[29] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 16.

[30] H Lefebvre [trans J Moore] *Critique of Everyday Life, Volume I: Introduction* (1991) 69-70; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 15-16.

[31] H Lefebvre [trans R Bononno] *The Urban Revolution* (2003) 171; and M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 69. See further chapter 3, section 3 2 1 4.

[32] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 10; and M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 69. See further chapter 3, section 3 2 1 3.

[33] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 70-71.

distinction has a detrimental affect on both the interpretation and implementation of the housing rights of the urban poor, as urban informality is often viewed as "extra-legal" or as existing beyond the legally recognised formal boundaries of planned space and society.[34] Lefebvre's dialectic approach to the study of everyday life has the potential to assist in mediating the tension between the different ways in which the South African state currently approaches formal housing development projects in comparison to the upgrading of informal settlements.[35] The subsequent section considers Lefebvre's concern with the need to contextualise social phenomena within an understanding of society as a continuously transforming totality, which represents another prominent philosophical stream that is connected to the concept of the everyday.

3 2 1 2 3 Society as an open and transforming 'totality'

Lefebvre describes society as an open "totality" that is continuously transforming due to the potential of human agency to reimagine and remake the material world.[36] This broad understanding of society contributes to a meaningful dialectical account of the material contradictions inherent in daily life.[37] It also draws attention to the fact that substantive social transformation requires more than, for instance, the implementation of laws.[38]

In *The Survival of Capitalism*, Lefebvre asserts that marginalised inhabitants must participate in a "total project" that expressly advances an alternative approach to everyday life.[39] Stated differently, the participation of alienated residents in all

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[34] T Hansen & M Vaa "Introduction" in T Hansen & M Vaa (eds) *Reconsidering Informality: Perspectives from Urban Africa* (2004) 1 at 4; and M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 70.

[35] See further chapter 5, section 5 3.

[36] H Lefebvre [trans J Sturrock] *Dialectic Materialism* (2009) 108. For a discussion of how Hegel influenced Lefebvre's thoughts on the concept of social totality, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 17-18.

[37] H Lefebvre [trans J Sturrock] *Dialectic Materialism* (2009) 48-50; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18.

[38] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18. See further chapter 3, section 3 2 1 2.

[39] H Lefebvre [trans F Bryant] *The Survival of Capitalism: Reproduction of the Relations of Production* (1976) 34-35. Butler explains that Lefebvre's argument in *The Survival of Capitalism* forms the basis for his interest in political pluralism and his later argument in favour of recognising and asserting a

aspects of urban society represents an essential precondition for addressing material contradictions and achieving real social reform. For Lefebvre, this substantive and participatory approach to transformation represents a significant political consequence of understanding society as a constantly changing entity. The notion of totality thus provides a valuable frame for conceptualising the role of human participation in the substantive transformation of society.[40]

3 2 1 2 4 Synthesising Lefebvre's critique of everyday life

As a defining concept, the everyday informs Lefebvre's critique of daily urban life and connects the philosophical themes of alienation and social totality. In particular, the notion of the everyday demonstrates Lefebvre's appreciation of the value of a material existence that encompasses social goods, such as food, clothing, housing, and the environment.[41] Through his work on the everyday, Lefebvre advances a broad conception of alienation that recognises its concrete and social dimensions. Accordingly, he identifies the substantive conditions of daily life as the source of alienation in modern society and argues that eliminating deeply rooted social contradictions, such as structural inequality, is paramount to overcoming marginalisation.[42]

The everyday also imbues Lefebvre's understanding of society as a constantly evolving entity, which provides insight into the potential of human agency to reimagine or recreate the material environment. He identifies the substantive participation of marginalised inhabitants in all aspects of society as a prerequisite for advancing an alternative approach to everyday life and achieving real social transformation. For Lefebvre, this substantive and participatory approach to change represents a significant political consequence of understanding society as a constantly evolving entity.[43] Within the context of this study, the value of understanding Lefebvre's use of the theoretical concept of the everyday is that it can assist in informing a critical analysis of the material aspects of alienation inherent in

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'right to difference' alongside the right to the city. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18, 133, 152-156. See further chapter 3, section 3 4.

[40] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 18.

[41] See further chapter 3, section 3 2 1 2 1.

[42] See further chapter 3, section 3 2 1 2 2.

[43] See further chapter 3, section 3 2 1 2 3.

modern daily life and it can provide essential insight into the role of human agency or participation in achieving substantive spatial and social transformation.[44]

By incorporating the everyday into his study of the substantive aspects of daily life, Lefebvre also pioneered the urban as a synecdoche for society and a particular social realm within Marxism.[45] This development represents a critical response to orthodox Marxism's failure to engage with the question of the future of urban society.[46] Although the innovative nature of Lefebvre's Marxist humanist philosophical orientation is both celebrated and contested, it makes a positive contribution to this study. Lefebvre's Marxist humanist philosophical orientation and critique of everyday life both contextualise and pervade his thinking and development of right to the city.[47] These insights are particularly evident in Lefebvre's recognition of the importance of lived space,[48] his substantive notion of inhabitance,[49] and his understanding of the city as a creative work.[50]

It is beyond the scope of this study to conduct an in-depth analysis of Lefebvre's humanist Marxist philosophical position and his extensive critique of everyday life. Nevertheless, as illustrated above, it is essential for this study to engage with these aspects of his philosophical orientation as they prefigure Lefebvre's intellectual

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[44] See further chapter 5, section 5 4.

[45] See further chapter 3, section 3 2 1 2.

[46] In 1872, the Marxist scholar Friedrich Engels commented on the utopian nature of speculating about the future of urban society and the development of living environments. A century later, Lefebvre responded to Engels' work by noting that he "speaks of housing but very little of the city". This statement forms part of a broader criticism of the Marxism's failure to reflect on the future of urban society as a subject. See H Lefebvre "No salvation from the centre?" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 205 at 205. See further M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 69.

[47] M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 68. See further chapter 3, section 3 2 2 4.

[48] See further chapter 3, section 3 2 1 3.

[49] See further chapter 3, section 3 2 1 4.

[50] M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 69. See further chapter 3, section 3 2 2 1.

interest in space, social relations, and the nature and development of social space.[51] In turn, these concerns feature centrally in his writings on the right to the city.[52]

From the late 1960s, Lefebvre's work increasingly focused on the role of urbanisation in sustaining the unequal social relations created under modern market conditions.[53] The ensuing section investigates key aspects of his theory of the production of space, which contribute to his understanding and development of the right to the city. Notably, these include Lefebvre's alternative philosophy of space and his multidimensional conception of the nature of space.[54]

3 2 1 3 Theorising the production of space

3 2 1 3 1 Reorienting philosophy and reconceptualising space

Space and spatial relations represent important elements of Lefebvre's broader social theory.[55] His work on the everyday prompted his fascination with the development of social space.[56] In *The Production of Space*, Lefebvre synthesises his extensive engagement with the subject of space and its implications for social analysis.[57] Informing his approach is the hypothesis that dominant perceptions of space and spatial relations are structured by an intellectual bias in the philosophical tradition,[58] which is based on an 'absolute' conception of space.[59] The absolute

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[51] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 317; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 8, 133, 158-159.

[52] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[53] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 5, 107.

[54] See further chapter 2, section 3 2 1 3.

[55] In as early as 1939, Lefebvre began examining the spatial aspects of the dialectic method. Significantly, he recognises that processes of production have both spatial and temporal dimensions. See M Gottdiener "A Marx of our time: Henri Lefebvre and the production of space" (1993) 11 *Sociological Theory* 129 at 130. See further chapter 3, section 3 2 1 2.

[56] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 107.

[57] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) is one of Lefebvre's most significant publications. For a discussion of the complexities and challenges involved in studying this work, as well as its significance for the development of social theory, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 37-38.

[58] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 94; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 38.

[59] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 1-7.

conception of space reflects a limited understanding of space as something that can be measured quantitatively.[60] It equates space with an empty container that precedes or exists separately from the social content or relationships that fill it.[61] In essence, the absolute conception of space reduces space to a mental construct or intellectual idea that is disconnected from its physical manifestation and social substance.[62]

Lefebvre is critical of the impact of this philosophical bias on academic disciplines and the development of social theory. In particular, he rejects the way in which it incorporates or confines social relations to the mental dimension of space and treats space as an epistemological category. He also opposes the tendency of this philosophical approach to divide human existence into mental, physical, and social dimensions. Significantly, Lefebvre argues that any social analysis that promotes the fragmentation of space into mental, physical, and social divisions is based on a poor understanding of the true nature of space.[63]

Understanding the impact of the absolute conception of space is important within the context of this study, as it reveals valuable insights about the relationship between law and space.[64] Chris Butler explains that the law represents a field of social inquiry that advances an absolute conception of space or a poor understanding of the actual nature of space by reinforcing its fragmentation into mental, physical, and social dimensions.[65] Stated differently, by applying abstract categories to space the law perceives space as having predominantly mental and

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[60] Butler explains that the absolute conception of space developed from the Cartesian distinction between *res cogitans* (which signifies the thinking being) and *res extensa* (which signifies the physical world). It perceives space in geometric terms and reduces space to a set of mathematical coordinates that can be measured quantitatively. The Cartesian notion of space was augmented by Immanuel Kant's account of space and time as categories that are theoretically deduced or inferred within the realm of consciousness. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 38. See further chapter 3, section 3 2 1 4 1.

[61] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 319; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 38.

[62] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 3; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 38.

[63] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 3-8; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 38-39.

[64] See further chapter 3, section 3 2 1 3 5.

[65] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 319; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39.

physical dimensions. For example, planning law is frequently used to formally subdivide and assign categories of zoning uses to space. The way in which the state uses planning law to impose restrictions on space and to prioritise certain zoning uses has implications for the social relations that exist and develop in space.[66] Similarly, property rights represent legal constructs that demarcate spaces and regulate the contractual relations applicable to the social dimensions of those spaces. Implementing certain legal frameworks or rights can thus promote an understanding of space as an instrument, a mechanism of control, or a commodity.[67] Significantly, this approach neglects or eliminates the full scope of diverse uses that can be attributed to space.[68]

During apartheid, the South African state employed various legal mechanisms (in addition to planning law and property rights) to formally subdivide and assign different categories of use values to space, often based on grounds of race. For example, in addition to the physical and legal restrictions imposed by the Group Areas Act 41 of 1950, its implementation had severe consequences for the social relations of urban black communities who were forced to abandon their homes and neighbourhoods when they were spatially displaced and excluded from society.[69]

Within the context of this study, understanding how the law contributes to the fragmentation of space through the application of abstract legal categories or constructs reveals significant insights. In particular, it raises the important question whether legal constructs, such as housing rights, have the potential to contribute to an understanding of space that gives effect to its multidimensional nature.[70]

In order to overcome some of the effects of the absolute conception of space, Lefebvre both identifies and differentiates between the physical, mental, and social components of space.[71] In *The Production of Space*, he argues for an understanding of space that moves beyond its artificial separation into three distinct categories,

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[66] For an analysis of the impact of planning on the development of suburban areas in post-war Australia, see C Butler "Reading the production of suburbia in post-war Australia" (2005) 9 *Law Text Culture* 11-33. See further chapter 3, section 3 2 1 3 3 and section 3 2 1 3 6.

[67] See further chapter 3, section 3 2 1 3 6.

[68] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39.

[69] See further chapter 2, section 2 4 2.

[70] See further chapter 3, section 3 2 1 3 5.

[71] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39. See further chapter 3, section 3 2 1 3 3.

while elucidating its interconnected nature.[72] Significantly, his attempt to link the three dimensions of space is informed by his appreciation of the role of human agency in the production of space, as well as the connection between the human body and space. In other words, Lefebvre adopts a broad conception of production that extends beyond actual products or economic processes and relations.[73] In addition to creative acts or forms of artistic expression, and the development of the physical environment of the city, Lefebvre's notion of production also includes the practices, processes, or relations that create and replicate social relations.[74] Accordingly, he recognises the need for a philosophical alternative to the absolute conception of space.[75] The subsequent section examines Lefebvre's development of an alternative spatial philosophy and his unique understanding of the social nature of space.

3 2 1 3 2 Developing a unique understanding of social space

Gottfried Leibniz's understanding of space as a network of relationships between objects and the processes that create them informed Lefebvre's development of an alternative spatial philosophy.[76] Drawing on Leibniz's relational conception of space, Lefebvre argues that the mental, physical, and social dimensions of space are intertwined within an open totality.[77] Stated differently, he views the mental, physical, and social dimensions of space as interconnected and constantly evolving due to the active participation of urban inhabitants in reimagining and recreating space.

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[72] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 11-12; C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 319; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39.

[73] For a discussion of Lefebvre's particular interpretation of the notion of production, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 43-44.

[74] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 43. See further chapter 3, section 3 2 1 3 4.

[75] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39.

[76] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 319; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 40. See further L Loemker (ed) *Gottfried Wilhelm Leibniz: Philosophical Papers and Letters* 2 ed (1989).

[77] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 33-39; C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 319; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 40. See further chapter 3, section 3 2 1 2 3.

In *The Production of Space*, Lefebvre utilises the dialectical method to develop a conceptual triad that supports the idea that space can be perceived, conceived, and lived.[78] Marie Huchzermeyer argues that Lefebvre's dialectical approach to the study of everyday life provides valuable insight into how space is perceived, conceived, and lived as it addresses a general reluctance to analyse the material contradictions inherent in contemporary society.[79] Additionally, Eleonore Kofman and Elizabeth Lebas advance that Lefebvre's dialectical approach to the study of daily life makes it possible for him to move fluidly between the abstract realm of theory and the concrete realm of practice. In turn, this approach contributes to developing or solidifying links between theory and practice.[80] The value of applying Lefebvre's conceptual triad within the context of this study lies in its potential to assist in investigating how spatial processes, practices, and relations entrench alienation and socio-economic exclusion.

Lefebvre's conceptual triad consists of spatial practices (perceived space); representations of space (conceived space); and representational spaces (lived space).[81] In *The Production of Space*, he criticises those who conflate spatial practices (perceived space) and representational spaces (lived space) with representations of space (conceived space).[82] Butler elucidates that the way in which Lefebvre identifies, distinguishes and connects the physical, mental, and lived dimensions of space is pivotal to both his unique understanding of the production and use of space, as well as his response to the absolute conception of space.[83] The following section outlines the different categories of Lefebvre's conceptual triad, which consist of perceived space, conceived space, and lived space.

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[78] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 9-10. See further chapter 3, section 3 2 1 3 3.

[79] M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 70. See further chapter 3, section 3 2 1 2 2.

[80] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 9-10. See further chapter 3, section 3 2 1 2 4.

[81] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 40.

[82] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 38-39.

[83] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 320; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41.

3 2 1 3 3 Perceived, conceived and lived spaces

Perceived space is constituted through spatial practices, which are individual and collective activities and routines that reproduce social life and are capable of being perceived.[84] Essentially, perceived space includes the physical environments that people encounter and inhabit daily.[85] Lefebvre recognises that the spatial practices of everyday life have the potential to promote communication and processes of social exchange between inhabitants.[86] In *The Production of Space*, he identifies the everyday habits of a tenant residing in a state-subsidised housing project as an example of perceived space.[87] In the South African context, an example of the equivalent of a perceived space is the daily practices of a household living in a state-subsidised house.[88]

Representations of space refer to mental constructs about space.[89] Conceived space is produced through institutional or formal structures concerned with the organisation, management, and control of space.[90] Conceived space is characterised by a rational, intellectual, or technical approach to the development of space. This approach reduces space to something that can be quantified and excludes or diminishes the true nature of social space.[91] Lefebvre identifies conceived space as the dominant feature of space in society.[92] Law represents a powerful instrument through which representations of space are codified into mental constructs, such as property rights, or inscribed into physical space, through planning laws.[93] In contemporary South Africa, key role players in the production of

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[84] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 40.

[85] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[86] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 33.

[87] Lefebvre also identifies two modes of transportation, namely highways and air travel, as examples of spatial practices. See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 38.

[88] See further chapter 5, section 5 3.

[89] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[90] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 40.

[91] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 36-39; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41.

[92] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 38-39.

[93] C Butler "Reading the production of suburbia in post-war Australia" (2005) 9 *Law Text Culture* 11 at 15-16, 19-22. See further chapter 3, section 3 2 1 2 4 and section 3 2 1 3 5.

conceived space include municipal authorities and professional planners.[94] The value of understanding how conceived space is produced is that it highlights how the spatial practices of daily life are understood differently, for instance, by state authorities and urban inhabitants respectively.[95] In practice, the process through which conceived space is produced has a real impact on the daily lives of South Africa's urban poor. For instance, the manner in which state authorities develop formal state-subsidised housing frequently adopts a functional approach that prioritises the physical and mental dimensions of housing, while neglecting the social goods and values associated with housing.[96]

Representational spaces are intimately connected to the human body and the social practices of daily life and reflect a person's real experience of space.[97] Lefebvre's conception of lived space is significant, as it represents a complex merger between perceived and conceived space, which illustrates that social relations and lived space are completely intertwined in real life.[98] The human interactions that occur in representational spaces thus differ notably from those that take place in perceived and conceived spaces.[99] Accordingly, lived spaces provide an opportunity for inhabitants to engage in creative practices that can advance different forms of spatial organisation or social struggles.[100] In doing so, lived spaces have the potential to engender practices that can assist in transforming exclusionary spaces.[101] Lived space thus represents a powerful site where inhabitants can contest

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[94] See further chapter 5, section 5 3.

[95] Additional examples include social engineers, scientists, cartographers, and members of academic disciplines with "socially recognised 'expertise'" regarding the management and control of space. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 39-40. See further chapter 3, section 3 2 1 3 6 and chapter 5, section 5 3.

[96] See further chapter 3, section 3 2 1 4, and chapter 5, section 5 3.

[97] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41.

[98] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[99] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 39.

[100] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 39; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41.

[101] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 39.

and resist, for instance, the dominant influence of the state on the production of space.[102]

In *The Production of Space*, Lefebvre identifies the spaces created by excluded urban communities in Latin America as representational spaces. By developing alternative planning practices or forms of social ordering, these communities reconfigure space in *favelas* (informal settlements) in a manner that gives greater effect to the social and use value of those spaces. They also undermine formal or institutionalised approaches to the planning, control, and management of space.[103] Despite their material inadequacies, Lefebvre argues that the social aspects of everyday life are more visible in urban spaces such as *favelas* than in the formal residential areas of cities.[104] Huchzermeyer affirms that Lefebvre particularly admired the spontaneous forms of spatial planning, creative architecture, and housing development in the informal settlements of Latin America.[105]

In contemporary South Africa, informal settlements represent lived spaces where poor urban inhabitants engage in creative practices that advance different forms of spatial organisation.[106] Promoting inclusive, participatory, and context-sensitive approaches to the upgrading of informal settlements have the potential to contribute to the meaningful spatial and social transformation of these living environments.[107] However, informal settlements also represent powerful sites from which poor urban inhabitants contest the dominant influence of the state on the production of space.[108] The ensuing section examines how the physical, mental, and social dimensions of

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[102] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41.

[103] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 373-374; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41. Rob Shields provides an account of Lefebvre's visit and stay in some of Brazil's *favelas* in R Shields *Lefebvre, Love and Struggle: Spatial Dialectics* (1999) 183.

[104] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 373.

[105] M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 75. Lefebvre acknowledges, however, that the social aspects of urban life can only survive in informal settlements in as much as it "fights in self-defence and goes on the attack in the course of class struggle in its modern forms". See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 373-374.

[106] W Smit "Understanding the complexities of informal settlements: Insights from Cape Town" in Huchzermeyer M & Karam A (eds) *Informal Settlements: A Perpetual Challenge?* (2006) 103-125.

[107] See further chapter 5, section 5 3.

[108] See further chapter 5, section 5 4.

Lefebvre's conceptual triad function concurrently[109] and form the foundation of his multidimensional conception of space.

3 2 1 3 4 The multidimensional nature of space

Lefebvre identifies space as a fundamental requirement or precondition for reproducing and transforming social relations.[110] For him, space simultaneously adopts several functions or characteristics that enable social action.[111] Additionally, space is both a product of social relations and the object of consumption.[112] He distinguishes, however, the causal function that social space performs in productive processes from other commodities, due to the fact that space "subsumes things produced, and encompasses their interrelationships".[113]

Lefebvre's unique appreciation of the multidimensional nature of space illustrates its role as a means, force, and product of the unequal social relations generated under conditions of contemporary capitalism. It also demonstrates that space can serve as a political instrument that enables social control. Finally, it recognises the spatial dimensions of social conflict,[114] by acknowledging that space also serves as a site for political struggle and a means for developing social resistance.[115] Significantly, Lefebvre's multidimensional conception of space illustrates that space encompasses more than a geographical location, the planning and development of

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[109] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 320; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41-42.

[110] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 85.

[111] N Brenner "Global, fragmented, hierarchical: Henri Lefebvre's geographies of globalization" (1997) 10 *Public Culture* 135 at 140; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 41-42.

[112] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102. Examples that illustrate how space or the physical environment can be the object of consumption include recreational areas, such as beaches and parks, and physical developments, such as shopping malls and parking lots. See C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 42, 44.

[113] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 73.

[114] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 42-43, 45.

[115] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 349.

the physical environment, a mental construct, or a commodity. Spatial processes thus entail producing and reproducing all aspects of urban life.[116]

Butler argues that Lefebvre's understanding of the multiple functions of space draws inspiration from Leibniz's argument that the human body should occupy space.[117] Lefebvre's relational approach to space assumes a direct relationship between the body and its spatial environment. Accordingly, Lefebvre understands production as the means through which the human body creates or develops space, while reproducing itself within the confines and rules applicable to a particular space.[118] This relational approach to spatial production differs significantly from the absolute conception of space, which disconnects the mental and physical dimensions of space from everyday social relations and the existence of the human body in space.[119]

Lefebvre's multidimensional conception of space has broad significance for this study. In particular, it can assist in advancing a substantive conception of the right to housing by illustrating that housing entails more than a physical structure in a geographical location, a component in the planning and development of the physical environment, or a commodity. Additionally, Lefebvre's understanding of the multidimensional nature of space recognises the value of the direct and reciprocal or interactive relationship between the human body and its spatial environment. These insights are paramount to informing current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor, which frequently prioritise the physical and mental dimensions of housing as a space over its social dimensions and the relationships reproduced within space.[120] The final section on Lefebvre's theory of space considers the role of the state and law in the production of 'abstract' space.

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[116] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 37, 42.

[117] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 169-170; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 42.

[118] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 171; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 42.

[119] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 42.

[120] See further chapter 3, section 3 4, and chapter 5.

3 2 1 3 5 The role of the state and law in producing 'abstract' space

Lefebvre's theory of space argues that spaces created by the state (or market interests) represent abstract spaces, as they facilitate the reproduction of unequal social relations and actively exclude alternative spatial uses.[121] He identifies three characteristics of abstract space. Lefebvre explains that fragmentation is a prevalent feature of the spatial organisation of contemporary society, which manifests through processes that divide space into discrete units that can be privatised and commodified.[122] Coexisting with the fragmented nature of abstract space is a tendency towards the homogenisation of space.[123] The homogenisation of space occurs through the application of, for instance, exchange criteria to space.[124] The effect of prioritising the economic value of space is that it dominates, diminishes, or eliminates the other diverse uses of space and particularly the social value of space.[125] The third characteristic of abstract space relates to the hierarchical ordering of space.[126] Mario Martins explains that the uses of space are arranged in a hierarchical order that is determined by the political, economic, administrative, or technical demands of powerful actors in society. The value, status, or position of a particular space within this hierarchy is determined by its position in the contentious relationship between those who have the power, resources, or information to exert their dominant influence over the production space (such as the state) and those who do not (such as marginalised inhabitants).[127]

The role of the state in developing abstract space is most evident in the way in which it controls and determines the spatial form and hierarchical order of the use

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[121] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 115; and C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 323.

[122] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 89-90; and C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 324.

[123] Lefebvre explains that abstract space is not homogenous, but rather has homogeneity is its goal. See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 287.

[124] M Martins "The theory of social space in the work of Henri Lefebvre" in R Forrest, J Henderson & P Williams (eds) *Urban Political Economy and Social Theory* (1982) 160 at 179.

[125] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 324.

[126] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 319.

[127] M Martins "The theory of social space in the work of Henri Lefebvre" in R Forrest, J Henderson & P Williams (eds) *Urban Political Economy and Social Theory* (1982) 160 at 180. See further chapter 3, section 3 2 1 3 6.

value of space. By actively intervening in the production of space, the state uses space as a political instrument to physically shape space and establish social control and order.[128] The state is also largely responsible for creating the template of abstract space, as it is responsible for spatial planning, providing urban infrastructure, and administering resources.[129] Significantly, the law legitimates the role of the state as the primary producer of space through regulations, prohibitions, and sanctions that enable the state to establish and sustain a hierarchal order of the dominant uses of space.[130]

Lefebvre's theory of space provides valuable insights that can inform a critical legal analysis of the role of the state in the production of abstract space. Chris Butler's application of Lefebvre's spatial theory to an analysis of planning in Australia illustrates, for example, the use of zoning as a legal mechanism to divide space into homogenous land use zones. This process contributes to the hierarchical ordering of the dominant uses of space and elucidates zoning's dual function. In this context, zoning is both a technical tool in the hands of the state (which inscribes certain types of land uses into physical space) and it represents a legal codification of dominant representations or mental constructs applicable to that space.[131] A further key feature of legal scholarship grounded in Lefebvre's philosophical approach is its ability to simultaneously conceptualise law as a mechanism of spatial control and as a site for political contestation. The value of applying Lefebvre's spatial theory within the context of this study is, therefore, that it can be used to analyse and evaluate the structure and form of both past and present state-controlled spatial projects, such as planning, housing development, and urban governance.[132]

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[128] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 324.

[129] See further chapter 3, section 3 4, and chapter 5, section 5 3.

[130] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 324. See further chapter 3, section 3 4.

[131] C Butler "Reading the production of suburbia in post-war Australia" (2005) 9 *Law Text Culture* 11-33.

[132] See for instance N Brenner "Global, fragmented, hierarchical: Henri Lefebvre's geographies of globalization" (1997) 10 *Public Culture* 135 at 148; and N Brenner "Globalisation as reterritorialisation: The re-scaling of urban governance in the European Union" (1999) 36 *Urban Studies* 431 at 439. See further chapter 3, section 3 4.

The complexity of Lefebvre's theory of the production of space has, however, raised questions regarding its value as a viable social theory.[133] For instance, Mariana Valverde is critical of Lefebvre's theory of abstract space and questions whether it can truly contribute to understanding the concrete ways in which the state uses its legal and regulatory powers to govern daily life.[134] Despite these criticisms, the value of Lefebvre's broad and inclusive philosophical account of the production of space lies in the fact that it reveals the inherent complexities of space,[135] in a manner that advances a better understanding of the true nature of space in social fields such as legal analysis.

3 2 1 3 6 Synthesising Lefebvre's theory of space

Within the context of this study, the significance of Lefebvre's theory of space is that it reveals important insights about the relationship between law and space. In particular, his critique of the philosophical bias informing the absolute conception of space illustrates that any field of social inquiry, such as law, which promotes the fragmentation of space into its mental, physical, and social categories is based on a limited understanding of the true nature of space. The law has the potential to fragment space through the application of abstract legal categories in areas such as planning law. This process conceptualises space as having predominantly mental and physical dimensions, which neglects its social dimension. Simultaneously, the law contributes to an understanding of space as a mechanism of control or a commodity, which neglects or eliminates the full scope of diverse uses that can be attributed to space.[136]

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[133] For a discussion of the complexities involved in working with Lefebvre's theory of space, see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 37-38. For examples of some of the issues raised regarding the viability of Lefebvre's theory of space as a social theory, see H Molotoch "The space of Lefebvre" (1993) 22 *Theory and Society* 887 at 893; and T Unwin "A waste of space? Towards a critique of the social production of space" (2000) 25 *Transactions of the Institute of British Geographers* 11-29.

[134] Mariana Valverde is critical of a Marxist, structural account of the politics of space, due to its functionalist and class-based account of the application of legal mechanisms to urban governance. See M Valverde "Taking land use seriously: Toward an ontology of municipal law" (2005) 9 *Law Text Culture* 34 at 55-62.

[135] A Merrifield "Lefebvre, anti-logos and Nietzsche: An alternative reading of *The Production of Space*" (1995) 27 *Antipode* 294 at 299.

[136] See further chapter 3, section 3 2 1 3 1.

In order to overcome the effects of absolute space, Lefebvre argues for an understanding of space that elucidates its interconnected nature. This approach is informed by his appreciation of the role of human agency in the production of space. Lefebvre's theory of space advances a broad conception of production that includes the processes and relations that create and replicate unequal social relations in modern societies. He develops a philosophical alternative to the absolute conception of space, which supports the idea that daily life in urban space can be perceived, conceived and lived. This conceptual triad provides an important analytical frame for scrutinising how legal and spatial processes, practices, and relations entrench exclusion and marginalisation.[137] Lefebvre's dialectal approach to the study of everyday life can also assist in engaging with deeply rooted social contradictions in a manner that moves beyond current exclusionary practices.[138]

The value of Lefebvre's broad conception of the multidimensional nature of space and spatial production has further significance for this study. Lefebvre's spatial theory illustrates that giving substantive effect to the housing rights of the urban poor through, for example, state-subsidised housing development requires more than the construction of a physical structure in a geographical location or a commodity.[139] It also entails more than the planning and development of the physical environment.[140] Significantly, it emphasises the importance of integrated living environments and substantive processes that enable all urban inhabitants to participate in the production of space in a manner that meets their needs.[141]

Lefebvre's theory of the production of space identifies space as a fundamental requirement or precondition for reproducing and changing the social relations that are contained within it. His broad conception of space recognises it as the means, force and product of productive processes. Space also serves as a political instrument that enables social control. Finally, space symbolises a site for political struggle and a means for developing social resistance, which recognises the spatial dimensions of social conflict.

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[137] See further chapter 3, section 3 2 1 3 2 and section 3 2 1 3 3. See also chapter 5, section 5 3 and section 5 4.

[138] See further chapter 5, section 5 3.

[139] See further chapter 4, section 4 2, and chapter 5, section 5 3.

[140] See further chapter 5, section 5 3.

[141] See further chapter 3, section 3 2 1 4.

In particular, Lefebvre argues that representational spaces or lived spaces have the potential to engender practices that can assist in transforming exclusionary spaces and social relations. Lived space thus represents a powerful site where inhabitants can contest and resist the dominance of the state, as well as other factors and influences that dictate the decision-making processes and practices that affect their daily lives. In South Africa, lived spaces such as informal settlements represent important political sites from which vulnerable and marginalised urban inhabitants can contest the power of the state to control space through, for example, either the provision or denial of essential social goods associated with housing and in the context of evictions.[142]

Significantly, Lefebvre's depiction of abstract space gives rise to another potentially valuable area for critical legal investigation – the right to the city. Since abstract space is never dominant in Lefebvre's writings, any field in which the social relations of abstract space are reproduced (whether philosophy, religion, science or law) must be subject to a critical examination of established forms of spatial power.[143] The implication is that all processes or movements that attempt to challenge the dominant spatial order must also undergo this critical spatial examination.[144] Neil Brenner explains that the practical implementation of any transformative political strategy depends on the ability of inhabitants to produce, appropriate, and participate in social space.[145]

Space and spatial relations represent important elements of Lefebvre's broader social theory, which were inspired by his study of daily urban life and contributed to

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[142] See further chapter 5, section 5 3 and section 5 4.

[143] This process leaves open the possibility of future transformations through the generation of new social and spatial orders. See C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 325. Lefebvre likens this process to a trial by space. More specifically, he states that it is "an ordeal which is the modern world's answer to the judgement of God or the classical conception of fate" (sic). See H Lefebvre [tr D Nicholson-Smith] *The Production of Space* (1991) 416. See further J Guidry "Trail by space: The spatial politics of citizenship and social movements in urban Brazil" (2003) 8 *Mobilization* 189-204.

[144] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 325.

[145] N Brenner "Global, fragmented, hierarchical: Henri Lefebvre's geographies of globalization (1997) 10 *Public Culture* 135-152. For Henri Lefebvre, groups or social classes "cannot constitute themselves, or recognise one another as 'subjects' unless they generate (or produce) a space". See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 416-417. See further chapter 3, section 3 2 2.

his critique of French state planning practices and housing development.[146] The final philosophical frame in the theoretical component of this chapter explores Lefebvre's substantive notion of inhabitance. In particular, it investigates his critique of state approaches to planning and housing development,[147] his engagement with the concept of 'dwelling',[148] and the relationship between inhabitance and the key elements of the right to the city.[149]

3 2 1 4 Housing, dwelling and the right to inhabit the city

3 2 1 4 1 Lefebvre's critique of suburban housing developments

A focal point of Lefebvre's critique of everyday life is his appreciation of human habitats and concern with the role of the state in producing housing spaces.[150] Through his critique of post-war state planning in France, Lefebvre focuses his attention on questions of space and its implications for the social analysis of daily life in contemporary societies.[151] In his writing on the city, Lefebvre traces and contextualises a conceptual shift from a substantive approach to the practice of inhabiting space to the creation of human living environments characterised solely by the "logic" or "rationality of habitat".[152] He associates this trend with the growing appeal of suburban housing developments in the outlying areas of cities during the late nineteenth and early twentieth centuries. At the time, a prominent feature of state planning was to prioritise the development of private spaces over the creation of public or collective spaces.[153] Lefebvre also identifies this logical and technical

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[146] For an account of Lefebvre's critique of state planning practices in France, see S Elden, E Lebas & E Kofman (eds) *Henri Lefebvre: Key Writings* (2003) 61-181. See also C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 318; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 5, 37.

[147] See chapter 3, section 3 2 1 4 1.

[148] See chapter 3, section 3 2 1 4 2.

[149] See chapter 3, section 3 2 1 4 3.

[150] H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 147 at 174. See further chapter 3, section 3 2 1 2 and section 3 2 1 3.

[151] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 318.

[152] H Lefebvre "Industrialization and urbanization" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 65 at 76-77, 80-83; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 116-117.

[153] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 117.

approach to planning and housing development in suburban state-funded public housing schemes aimed at addressing severe housing shortages in Europe and North America after the end of World War II.[154] In both instances, he explains that these housing developments disconnect or remove the substantive aspects and social values associated with housing as a space from the "complex totality" of the city and society.[155]

In keeping with his dialectical approach, Lefebvre acknowledges that the process of developing housing at scale facilitates access to an "independent life" or freedom that every individual should enjoy.[156] He cautions, however, that this process is dominated or "appropriated by the state for strategic purposes".[157] Lefebvre is critical of the dormitory or suburban nature of urban residential development and argues that the "overwhelming" impact of producing housing at scale may result in eliminating "faintly outlined rights" such as the right to housing.[158] In *The Production of Space* Lefebvre argues that even though "slums" represent the "lowest possible *threshold of tolerability*", the extensive housing projects that replaced them represent the "lowest possible *threshold of sociability*".[159] For Lefebvre, the quality of daily life

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[154] Lefebvre explains that these housing spaces developed by the state represented "minimal living space, as quantified in terms of modular units and speed of access; likewise minimal facilities and a programmed environment". See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 316. See further C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 117.

[155] Lefebvre asserts that the disconnected nature of these suburban housing developments have a dominating effect on urban inhabitants, which renders them powerless. He also argues that this approach to housing development is not congruent with the socially inclusive process of participation and engagement embodied in the concept of the right to the city. See H Lefebvre "Industrialization and urbanization" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 65 at 76-77. See further chapter 3, section 3 2 1 2 3 and section 3 2 2.

[156] H Lefebvre [trans Rabinovitch S] *Everyday Life in the Modern World* 2 rev ed (2002) 151.

[157] H Lefebvre [trans Rabinovitch S] *Everyday Life in the Modern World* 2 rev ed (2002) 151; and M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 70. See further chapter 3, section 3 2 1 3 5.

[158] H Lefebvre [trans Rabinovitch S] *Everyday Life in the Modern World* 2 rev ed (2002) 151-152; and M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 70. See further chapter 3, section 3 2 1 4 3.

[159] Lefebvre describes these housing developments as spaces in which "survival would be impossible because all social life would have disappeared". See H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 316 (emphasis in original).

in these massive suburban housing developments represents a bare social existence. This is due to the fact that these housing spaces are disconnected from the physical and social fabric of the city and society. Huchzermeyer explains that, due to the developing nature of Lefebvre's work, he originally refers to the need to reconceptualise the freedoms associated with housing as the "*freedom of the city*".[160] Lefebvre later asserts that the "urban experience" and particularly the "struggle for the city (for its preservation and restoration, for the *freedom of the city*) provide the setting and objectives" for asserting the right to the city.[161]

3 2 1 4 2 Martin Heidegger's concept of 'dwelling'

Martin Heidegger's writings on the intimate relationship between the concepts of 'dwelling' and 'being' significantly influenced Lefebvre's engagement with the notion of inhabiting space.[162] Heidegger's poetic concept of dwelling provides the basis for his argument that, throughout the twentieth century, functional or technical requirements dominated the design of human settlements. This rational or technical approach to housing development prevents inhabitants from appreciating the full or creative scope of dwelling.[163] He identifies the source of this problem as the use of technology to develop and structure the world for the benefit of human consumption.[164] Heidegger's understanding of the nature of dwelling can thus be clearly distinguished from the types of housing spaces developed through state

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[160] H Lefebvre [trans Rabinovitch S] *Everyday Life in the Modern World* 2 rev ed (2002) 151 (emphasis in original). See also M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 70.

[161] H Lefebvre [trans Rabinovitch S] *Everyday Life in the Modern World* 2 rev ed (2002) 205 (emphasis in original). See also M Huchzermeyer "Humanism, creativity and rights: Invoking Henri Lefebvre's right to the city in the tension presented by informal settlements in South Africa today" (2014) 85 *Transformation* 64 at 70. See further chapter 3, section 3 2 1 4 3 and section 3 2 2.

[162] According to Heidegger "[d]welling … is the *basic character of Being* in keeping with which mortals exist". For him, the concept of 'dwelling' encapsulates both the earthly and divine elements of human spatial inhabitance. See M Heidegger *Poetry, Language, Thought* (1971) 160 (emphasis in original). For a discussion of the intellectual relationship between Lefebvre and Heidegger, see S Elden *Understanding Henri Lefebvre: Theory and the Possible* (2004) 92; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 121.

[163] M Heidegger *Poetry, Language, Thought* (1971) 228.

[164] M Heidegger Poetry, Language, Thought (1971) 228; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 122.

planning practices and public housing programmes during the nineteenth and twentieth centuries.[165]

Heidegger's intellectual influence on Lefebvre is evident in his own writing on the impact of technology on the development of human habitats. Lefebvre also drew inspiration from Heidegger's work in formulating his own understanding of the practice of inhabitance.[166] Stuart Elden identifies two particular ways in which Heidegger influenced Lefebvre's substantive notion of inhabiting. The first relates to Lefebvre's use of the French verb *habiter* (to dwell). This is a direct translation of the German verb *wohnen* (to dwell) that Heidegger employed. The second suggests that Lefebvre's substantive conception of inhabitance must be understood alongside Heidegger's articulation of the plight of dwelling,[167] which is much broader than the crisis represented by the material problems of the post-war housing shortage.[168]

3 2 1 4 3 The right to inhabit the city

In his seminal essay on the right to the city,[169] Lefebvre argues that it

> manifests itself as a superior form of rights: right to freedom, to individualization in socialization, to habitat and to inhabit. The right to the *oeuvre*, to participation and *appropriation* (clearly distinct from the right to property), are implied in the right to the city.[170]

He grounds the right to the city in the entitlement to physically occupy urban space[171] and argues that the concept "gathers the interests … of the whole society

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[165] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 122.

[166] S Elden, E Lebas & E Kofman (eds) *Henri Lefebvre: Key Writings* (2003) 122-123.

[167] S Elden "Between Marx and Heidegger: Politics, philosophy and Lefebvre's *The Production of Space*" (2004) 36 *Antipode* 86 at 96-97; and S Elden *Understanding Henri Lefebvre: Theory and the Possible* (2004) 190-191.

[168] S Elden "Between Marx and Heidegger: Politics, philosophy and Lefebvre's *The Production of Space*" (2004) 36 *Antipode* 86 at 96-97; and S Elden *Understanding Henri Lefebvre: Theory and the Possible* (2004) 190-191. See further C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 122.

[169] H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 147-159.

[170] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 173-174 (emphasis in original).

[171] H Lefebvre "The specificity of the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 100 at 101-103; and D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18.

and firstly of all those who *inhabit*".[172] By positioning the right to inhabit the city at the heart of his broader transformative political strategy, Lefebvre critiques the way in which dominant approaches to the development of space in modern societies reduce the substantive practice of inhabiting to the physical, technical, or quantitative aspects of housing. He also challenges the way in which state and market influences dominate the development of space and prioritise the economic or exchange value of space over its social or use value.[173] Moreover, Lefebvre regards the right to inhabit the city as an essential precondition for enabling the active and meaningful participation of all citizens in the decisions, processes, and practices associated with the development of physical space and the transformation of society.[174] Don Mitchell accordingly argues that the right to inhabit the city represents both an essential normative component and a political claim implicit in the right to the city.[175]

3 2 1 4 4 Synthesising a substantive approach to inhabiting the city

Within the context of this study, the value of understanding Lefebvre's substantive notion of inhabitance, as encapsulated in the right to inhabit, is that it moves beyond recognising the importance of physically occupying space by requiring more than the provision of adequate housing or essential urban services.[176] In particular, a substantive conception of inhabitance necessitates acknowledging the right of all inhabitants to be present in the space of the city and to participate in urban society.[177] In order to give effect to Lefebvre's broader transformative strategy, the right to inhabit the city thus illustrates the need for alternative approaches to spatial development that enable substantive practices of inhabiting and give effect to the

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[172] H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 147 at 158 (emphasis in original); D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144.

[173] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144.

[174] H Lefebvre "The specificity of the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 100 at 101-103; and D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18.

[175] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18.

[176] C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 326; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144. See further chapter 4, section 4 2, and chapter 5, section 5 3.

[177] See further chapter 3, section 3 2 1 4 3 and section 3 2 2 3.

material and social goods associated with housing.[178] These alternative approaches should be aimed at, for example, reconceptualising current approaches to public housing developments on the urban periphery and informal settlements that fall outside the formal planned boundary of the city.[179] Giving effect to Lefebvre's substantive understanding of the practice of inhabitance also entails developing space in a manner that recognises its multidimensional nature and asserts the social or use value of space against its economic or exchange value. Additionally, the right to inhabit the city is essential to enable the meaningful participation of all inhabitants in the development of urban space and the substantive transformation of society.

Significantly, the above discussion elucidates that struggles over the right to inhabit the city depend on the capacity of inhabitants to manage themselves in two important ways. The first concerns the use and appropriation of urban space by all urban inhabitants.[180] The second relates to developing substantive forms of democratic participation that enable all inhabitants to fully engage in spatial processes and participate in the transformation of society.[181] Both of these aspects of Lefebvre's substantive conception of inhabitance inform his understanding of the right to the city. Accordingly, appropriation and participation represent key components of the right to the city.

The following part of this chapter analyses some of the key constituent components of the right to the city, which include Lefebvre's understanding of the appropriation of urban space,[182] the significance of developing substantive forms of participation,[183] and the city as a creative *oeuvre* (work).[184] These key conceptual elements of Lefebvre's evolving discourse on the right to the city are based on his thorough engagement with the material aspects and lived experience of daily life and

[178] See further chapter 3, section 3 2 1 2 1.

[179] See further chapter 3, section 3 2 4, and chapter 5, section 5 3.

[180] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144. See further chapter 3, section 3 2 1 3 4 and section 3 2 2 2.

[181] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144. See further chapter 3, section 3 2 2 3.

[182] See further chapter 3, section 3 2 2 2.

[183] See further chapter 3, section 3 2 2 3.

[184] See further chapter 3, section 3 2 2 1.

the need to develop urban space in a manner that contributes to the substantive transformation of society.[185]

3 2 2 The right to the city and its key constituent elements

3 2 2 1 Interrelationship between rights and the right to the city

Although Lefebvre's understanding of the notion of the right to the city evolved over the course of many years, he wrote his seminal work on the subject at the intersection of two significant events.[186] Firstly, this particular piece on the right to the city was concluded in Paris in 1967 in honour of the celebration of the centenary of the publication of Marx's highly influential theoretical critique of capitalism.[187] Secondly, Lefebvre's renown writings on the right to the city followed the adoption of the International Covenant on Economic, Social, and Cultural Rights[188] ('ICESCR') by the United Nations General Assembly in 1966.

Drawing inspiration from the ICESCR, Lefebvre identifies the rights to work, education, health, and housing,[189] as "rights which define civilization" and have the potential to transform society and daily life if they are incorporated into social practice.[190] It is evident that the prevailing human rights discourses influenced

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[185] See further chapter 3, section 3 2 1.

[186] H Lefebvre *Le droit à la ville* (1968) is translated and included in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1-181.

[187] K Marx [trans B Fowkes] *Capital, Volume I: A Critique of Political Economy* (1990). The publication of Lefebvre's seminal essay on the right to the city also preceded the civil unrest cause by the student uprisings and workers' protests in France during May of 1968, during which it contributed to the critique of French capitalist society. See further E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (trans & eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 6; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 24.

[188] United Nations General Assembly ('UNGA') International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 16 December 1966, 993 UNTS 3 ('ICESCR'). See further chapter 4, section 4 2.

[189] The ICESCR recognises the right to work (art 6); the right to the enjoyment of just and favourable conditions of work (art 7); the right to education (art 13); the right to adequate housing as a component of the right to an adequate standard of living (art 11); and the right to culture (art 15). See further chapter 4, section 4 2.

[190] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 173-174; and H Lefebvre "Theses on the city, the urban and planning" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 177 at 178-179.

Lefebvre's thinking about the right to the city,[191] as he acknowledges the important role of substantively realising the social rights of vulnerable groups as part of achieving broader processes of spatial and social transformation.[192] In this regard, he expresses his dissatisfaction with the absence of the legal recognition of economic, social, and cultural rights in France during the 1960s:

> In these difficult conditions, at the heart of a society which cannot completely oppose [these rights] and yet obstructs them, rights which define civilization … These rights which are not well recognized, progressively become customary before being inscribed into formalized codes. They would change reality if they entered into social practice: right to work, to training and education, to health, housing, leisure, to life.[193]

Although it is widely accepted in Anglophone literature that the term 'right' in the right to the city does not refer to a judicially enforceable legal claim, Peter Marcuse argues that adjudication represents a valuable platform from which to promote the realisation of the right to the city.[194] He advances that the right to the city can be understood as a conglomerate of legal rights aimed at advancing a broader moral claim, which is grounded in the fundamental principles of justice and ethics.[195] Additionally, Marcuse explains that the objective of the right to the city is to assert a broad moral claim for justice that extends beyond the legal system, by engendering processes of spatial and social transformation that meet the needs of all urban inhabitants.[196]

David Harvey advances a similar position by positing that the right to the city should be understood as encompassing more than an individual claim for access to

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[191] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 19.

[192] H Lefebvre "Theses on the city, the urban and planning" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 177 at 179.

[193] 178-179.

[194] P Marcuse "From critical urban theory to the right to the city" (2009) 13 *City* 185 at 192. See further chapter 3, section 3 4, and chapter 5, section 5 4.

[195] Peter Marcuse argues that the right to the city incorporates various rights or a collection of rights, rather than one individual right. See P Marcuse "From critical urban theory to the right to the city" (2009) 13 *City* 185 at 192-193. See also, M Pieterse "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *South African Law Journal* 149 at 154. See further chapter 3, section 3 4.

[196] See P Marcuse "From critical urban theory to the right to the city" (2009) 13 *City* 185 at 193. See further chapter 3, section 3 4.

urban opportunities or resources.[197] He bases his argument on Lefebvre's statement that giving effect to the right to the city entails promoting a transformed and "renewed *right to urban life*" that is based on an "integrated theory of the city and urban society".[198] Significantly, Harvey's argument illustrates that transforming the daily lives of urban inhabitants depends on exercising collective processes that are intimately linked to the broader transformation of society.[199]

The right to the city recognises the significance of substantively realising the social rights of vulnerable and marginalised urban inhabitants as an essential part of a broader process aimed at spatial and social transformation. The adjudication of legally enforceable rights, such as the right to housing, represents one valuable and potentially powerful avenue through which urban inhabitants can claim their right to the city.[200] However, in order to realise the right to the city a substantive right to housing must be accompanied by collective and inclusive participatory processes aimed at bettering the daily lives of all urban inhabitants and achieving broader social transformation.

As noted earlier, advancing the right to the city depends on the ability of urban inhabitants to manage themselves through the appropriation of urban space and the development of substantive forms of democratic participation.[201] The following section considers Lefebvre's understanding of appropriation as a key component of the right to the city and its significance for promoting the social or use value of urban space.

3 2 2 2 Appropriation and the use or social value of space

As elucidated above, Lefebvre identifies the right to housing, alongside the rights to work, education, health, and life, as rights encapsulated in the right to the city that have the potential to effect real spatial and social transformation.[202] When understood in this manner, the right to the city advances a broad or structural

[197] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 25.

[198] H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 146 at 158 (emphasis in original). See further chapter 3, section 3 2 1 2.

[199] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 25, 33. See also P Marcuse "Reading the right to the city" (2014) 18 *City* 4 at 5. See further chapter 3, section 3 4.

[200] See further chapter 3, section 3 4, and chapter 5.

[201] See further chapter 3, section 3 2 1 4.

[202] See further chapter 3, section 3 2 2 1.

meaning that entails the "full and complete *usage*" of space by all urban inhabitants through their daily activities or practices.[203] As a component of the right to the city, appropriation is concerned with the social or use value of space and the experience of developing space that meets the material and social needs of all inhabitants. Accordingly, Mark Purcell advances that appropriation represents an essential normative element and political claim implicit in the right to the city.[204]

Lefebvre compares appropriation to a process of creative expression. His conception of appropriation is informed by his understanding of the city as a site of encounter where different people or participants engage with one another and contribute collectively to the decisions, processes, or relations that affect their everyday lives.[205] Stated differently, the appropriation component of the right to the city encompasses all the values, knowledge, decisions, and needs that contribute to the development of urban space.[206] Realising the right to the city thus depends, in part, on the active participation of urban actors in appropriating space through developmental approaches that meet the material and social needs of all inhabitants.[207]

Simultaneously, the appropriation component of the right to the city necessitates prioritising the social or use value of urban space over its economic or exchange value.[208] As argued earlier, Lefebvre is critical of processes or relations that develop abstract spaces that are disconnected from the spatial and social fabric of the city, as they fail to advance a substantive notion of inhabitance or give full effect to the values, relations, and material goods associated with the social dimension of space.[209] Accordingly, a fundamental objective of the appropriation component of the

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[203] H Lefebvre "Theses on the city, the urban and planning" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 177 at 179 (emphasis in original).

[204] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101-102.

[205] H Lefebvre [trans D Nicholson-Smith] *The Production of Space* (1991) 165. See further chapter 3, section 3 2 2 4.

[206] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101-102.

[207] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 174. See further chapter 3, section 3 4.

[208] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 179.

[209] See further chapter 3, section 3 2 1 3 and section 3 2 1 4.

right to the city is to re-establish and advance the importance of the social or use value of space over its economic or exchange value.[210]

Lefebvre argues that the right to the city includes the right to "*appropriation* [clearly distinct from the right to property]".[211] He identifies property rights as examples of legal constructs that contribute to promoting the exchange or economic value of space. This is due to their ability to enable individual owners to assert their private rights over a particular space and to regulate the social relations contained within that space. Lefebvre argues that this process excludes or undermines the ability of other urban participants to contribute collectively to decisions that affect the development and use of urban space.[212] When understood within this context, the appropriation component of the right to the city challenges market-driven systems, or neoliberal approaches to urban governance, which prioritise the economic or exchange value of space to the detriment or exclusion of other spatial uses.[213]

Nicholas Blomley contends that the right to housing represents an important means or form of appropriation that Lefebvre clearly distinguishes from the right to property.[214] He explains that this is due to the role of property rights in legitimating the authority or power of the state or private entities to evict and remove vulnerable and marginalised inhabitants from the space of the city.[215] Similarly, Don Mitchell advances that the appropriation component of the right to the city reaffirms the right of all urban inhabitants to access, occupy, or use the space of the city.[216] He argues that, in order to give effect to the right to the city, the right to housing (or the right to physically occupy and inhabit urban space) must be advanced independently and

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[210] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 103; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 145.

[211] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 174 (emphasis in original).

[212] 174.

[213] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 145.

[214] N Blomley "Property" in D Gregory, R Johnston, G Pratt, M Watts & S Whatmore (eds) *The Dictionary of Human Geography* 5 ed (2009) 593 at 593-594.

[215] N Blomley "'Acts', 'deeds', and the violences of property" (2000) 28 *Historical Geography* 86 at 88.

[216] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 18-20. See also M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 103.

asserted against the right to property.[217] This is due to the fact that Lefebvre's substantive notion of inhabitance requires more than the provision of a physical structure or essential services.[218] In particular, it necessitates redeveloping social spaces, structures, and relations in a manner that is responsive to the needs of all urban inhabitants.[219]

Sustaining Lefebvre's substantive conception of inhabitance entails more than recognising the right of urban inhabitants to physically occupy space. In part, it also necessitates developing inhabitants' ability for self-management through the appropriation of urban space.[220] Appropriation requires the creative and active participation of a variety of urban actors in spatial development processes that meet the material and social needs of all urban inhabitants. Simultaneously, it requires prioritising and asserting the social or use value of space over its economic or exchange value. As a component of the right to the city, appropriation is also critical of systems or processes that contribute to the commodification of urban space or an understanding of space as private property, as they sustain the dominance of the economic or exchange value of urban space.[221]

Lefebvre's understanding of spatial appropriation and how it mediates the conflicting interests that arise between housing rights and property rights is particularly significant for this study. In urban areas, vulnerable and marginalised urban inhabitants frequently cannot exercise their right to inhabit the city, as they do not have the resources to gain formal access to property rights. For them, the right to housing represents a vital alternative means to legitimately assert their right to inhabit the city. Recognising and realising a substantive right to housing thus represents an essential step towards securing the right to the city for the urban poor.[222]

However, advancing Lefebvre's substantive notion of inhabitance also requires developing forms of democratic participation that enable all inhabitants to

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[217] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 20.

[218] See further chapter 3, section 3 2 1 4.

[219] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 20. See further chapter 3, section 3 2 1 3.

[220] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144.

[221] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 103.

[222] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 20.

meaningfully engage in spatial processes and participate in the transformation of society.[223] The following section examines participation as a key component of Lefebvre's substantive understanding of inhabitance and the right to the city.

3 2 2 3 Participation and a broad conception of urban citizenship

As a component of the right to the city, the right to participation enjoins all urban actors to actively engage in decisions and processes that affect the control, development, and use of space.[224] These forms of participation must be capable of counteracting the dominating effect of state or market influences on urban space.[225] Additionally, the right to participation necessitates recognising or developing participatory mechanisms that are controlled by urban inhabitants.[226] Stated differently, these forms of participation must advance the autonomy or the ability of urban inhabitants to self-manage and should not be superimposed by state institutions or market systems.[227]

In *The Survival of Capitalism*, Lefebvre argues that self-management is essential to ensure that citizen participation is real or imbued with substantive meaning and capable of adequately addressing social conflict.[228] For him, self-management entails a substantive, political process through which urban inhabitants engage in an autonomous form of organisation or decision-making. Lefebvre's conception of self-management must, therefore, be distinguished from formal models of public participation or dialogic forms of engagement between the state and citizens, which often occur on profoundly unequal terms and lack substantive content.[229]

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[223] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144. See further chapter 3, section 3 2 1 4.

[224] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 174.

[225] M Martins "The theory of social space in the work of Henri Lefebvre" in R Forrest, J Henderson & P Williams (eds) *Urban Political Economic and Social Theory* (1982) 160 at 183; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 145.

[226] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 146.

[227] 146.

[228] H Lefebvre [trans F Bryant] *The Survival of Capitalism: Reproduction of the Relations of Production* (1976) 120.

[229] H Lefebvre [trans F Bryant] *The Survival of Capitalism: Reproduction of the Relations of Production* (1976) 124; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 145-146. See further chapter 3, section 3 4.

Lefebvre advances that self-management has the potential to transform the state institutions, market systems, and unequal social relations that dominate everyday life in cities. This is due to the fact that, as a social practice, self-management is capable of engaging with deeply rooted social divisions. Additionally, it can assist in creating or developing alternative state institutions or market systems with the potential to overcome social divisions and inequalities.[230]

As an essential component of the right to the city, the right to participation aims to advance the interests of the whole of society.[231] Although Lefebvre initially identified the working class as the primary beneficiaries of the right to the city, it is now widely accepted that it can be claimed by anyone who inhabits, appropriates, or participates in creating the lived space of the city.[232] In doing so, the right to participation advances a broad understanding of urban citizenship that can be distinguished from traditional or liberal-democratic conceptions of citizenship, which often equate the right to participate with formal citizenship status.[233] Stated differently, Lefebvre's notion of urban citizenship does not differentiate or subject the right to participate to criteria such as nationality or social status.[234]

Lefebvre's substantive understanding of citizen participation empowers vulnerable and marginalised inhabitants by encouraging them to contribute directly to the development and organisation of urban space through their daily practices of inhabiting the city.[235] The participation component of the right to the city also addresses the issue of vulnerable or oppressed inhabitants who are marginalised due to their inability to participate equally in decisions, processes, and relations that

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[230] H Lefebvre [trans F Bryant] *The Survival of Capitalism: Reproduction of the Relations of Production* (1976) 124.

[231] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas E (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 34. See further chapter 3, section 3 2 2 4.

[232] H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 146 at 158-159; and M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[233] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 103.

[234] E Kofman & E Lebas "Lost in transposition: Time, space and the city" in E Kofman & E Lebas E (eds) *Writings on Cities: Henri Lefebvre* (1996) 1 at 34.

[235] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102. See further chapter 3, section 3 2 2 4 and section 3 4.

shape space and society.[236] Additionally, it challenges processes of engagement in which vulnerable or marginalised urban inhabitants are afforded a purely superficial or limited role.[237] Significantly, all urban inhabitants can claim the right to the city regardless of their political or social status.[238] The right to the city thus represents a powerful mechanism with the potential to transform unequal spatial and power relations by shifting the balance of control away from state or market influences towards urban inhabitants.[239]

The ensuing section examines Lefebvre's understanding of the city as a creative *oeuvre* (work) as a final key component of the right to the city within the context of this study. This conceptual element of Lefebvre's evolving discourse on the right to the city is intimately connected to his engagement with the material aspects and daily lived experience and the need to develop urban space in a manner that contributes to the substantive transformation of society.

3 2 2 4 The city as a creative oeuvre

Lefebvre describes the right to the city as a "superior form of rights" that includes the "right to the *oeuvre*" of the city.[240] For him, the space of the city entails more than the product or result of state policies and market influences.[241] Lefebvre argues that the essence of the city as a creative oeuvre can be found in philosophy, art, and in the practice of inhabiting urban space.[242] Stated differently, the material environment of the city represents the collective body of work of its inhabitants, which is created through their daily practices of inhabiting the city.[243]

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[236] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 18.

[237] See further chapter 3, section 3 4.

[238] P Marcuse "From critical urban theory to the right to the city" (2009) 13 *City* 185 at 190-191. See further chapter 3, section 3 4.

[239] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 102.

[240] H Lefebvre "Perspective or prospective" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 160 at 174 (emphasis in original).

[241] See further chapter 3, section 3 2 1 3.

[242] H Lefebvre "Around the critical point" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 122 at 129; and H Lefebvre "Theses on the city, the urban and planning" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 177 at 180.

[243] H Lefebvre "Levels of reality and analysis" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 111 at 117.

Lefebvre's understanding of the city as a creative entity that is shaped through human agency informs the right to the city's attempt to restore society in its totality.[244] He identifies inclusive practices of inhabiting, which enable all inhabitants to participate in the development and transformation of urban space and society, as an important means of achieving this goal.[245] Significantly, the right to the city thus promotes inclusive and substantive modes of participation as a means of overcoming the spatial divisions, inequalities, and injustices caused by state policies or practices and market interests.[246]

By conceiving of the city as an evolving entity, Lefebvre's right to the city recognises that the lived space of the city is shaped through the fundamentally different actions, relationships, ideas, and competing claims of various urban participants.[247] The collaborative process of creating or developing urban space is thus both constitutive of and dependent on recognising the city as a site for exchange and encountering difference.[248] This understanding of the right to the city aligns with other philosophical models of urban difference. For example, Iris Marion Young's notion of city life advances that exposure to and the celebration of difference is essential to overcoming the inequalities and injustices inherent in modern society.[249]

Understanding that the space of the city represents a creative, collaborative work encourages the celebration of difference and can engender the capacity of urban

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[244] See further chapter 3, section 3 2 1 2.

[245] H Lefebvre "The specificity of the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 100 at 101-103; and D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18. See further chapter 3, section 3 2 1 4 and section 3 2 2 3.

[246] T Coggin & M Pieterse "Rights and the city: An Exploration of the Interaction Between Socio-Economic Rights and the City" (2012) 23 *Urban Forum* 257 at 260. See further chapter 3, section 3 4.

[247] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 260.

[248] D Mitchell *The Right to the City: Social Justice and the Fight for Public Space* (2003) 18; C Butler "Critical legal studies and the politics of space" (2009) 18 *Social and Legal Studies* 313 at 325-326; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 143. See further chapter 3, section 3 2 2 2.

[249] Iris Marion Young developed the concept of city life to formulate an understanding of social relations that affirms group difference. See I Young *Justice and the Politics of Difference* (1991) 227, 235. See further T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 260.

inhabitants to participate in collective political processes.[250] Understanding that the space of the city emerges from processes of encounter, exchange, and engagement also enables and recognises the value of alternative modes of living or different practices of inhabiting space. As a key component of the right to the city, the right to the creative oeuvre of the city can thus assist in promoting a normative and dialectical understanding of the social relations and interactions that take place in space. In doing so, it can also contribute to mediating the relationship between different spatial participants, such as the state and its citizens.[251] This inclusive understanding of the right to the city links it to the essential characteristics of urban space as both a creative oeuvre and a site for gathering, exchange, and encounter.[252] It also highlights the importance of inhabiting space as a means of defining struggles over spatial production.[253]

Part two of this chapter focuses on the right to the city in practice and examines three of the leading examples of attempts to institutionalise the right to the city. These include the Brazilian Federal City Statute 10.257 of 2001, the 2005 World Charter on Human Rights in the City, and the Global Charter-Agenda for Human Rights in the City.

3 3 The right to the city in practice

3 3 1 Introduction

In Anglophone literature, prevailing intellectual debates often caution against a reformist interpretation of Lefebvre's dynamic notion of the right to the city, as it situates the concept within the traditional system of individualised human rights. Chris Butler argues, for instance, that Lefebvre's depiction of the significance of the appropriation of space and his broad notion of citizenship and participation raises the complex question whether the right to the city can be successfully institutionalised within existing state and legal structures.[254] He argues that, while the increased

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[250] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 143-144.

[251] D *Mitchell The Right to the City: Social Justice and the Fight for Public Space* (2003) 17-18.

[252] H Lefebvre "Around the critical point" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 122 at 131; and H Lefebvre "The right to the city" in E Kofman & E Lebas (eds) *Writings on Cities: Henri Lefebvre* (1996) 148 at 158.

[253] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 144.

[254] 146.

attention to and interest in the right to the city is encouraging, the radical implications of Lefebvre's formulation of the concept are often obscured in literature on the subject.[255]

Butler recognises that there are a number of sound reasons for legally safeguarding reforms in urban governance and the extension of democratic participation in decision-making.[256] He cautions, nevertheless, that there are also dangers in institutionalising the implementation of the right to the city. For instance, domestic or international legislative reforms of this nature necessarily require the support of sympathetic governments. Accordingly, Butler posits that in the absence of the necessary state support, the legal codification of the right to the city is likely to be counter-productive to overall aims to challenge existing forms of spatial domination and exclusion.[257] In addition, there is a deep contradiction between the incorporation of urban struggles within state-controlled institutions and the radical contestation of state power envisaged by Lefebvre's version of the right to the city. Therefore, while not rejecting the strategic use of legal mechanisms to further political demands, Butler contends that the right to the city cannot be reduced to a positive, legal right.[258]

There have, however, been numerous recent attempts to institutionalise the constituent elements of the right to the city at the domestic, regional, and international levels.[259] In Latin America, for instance, social mobilisation inspired by the right to the city has contributed to constitutional and legislative reforms and the enactment of justiciable rights aimed at facilitating the transformation of legal frameworks applicable to urban space.[260] The Brazilian Federal Law on Urban

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[255] 146-147.

[256] 148.

[257] 148.

[258] 148.

[259] C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 147. For a comprehensive overview of the various global initiatives aimed at advancing the constituent elements of the right to the city, see GLOOBAL *The Right to the City Around the World*, available at <http://www.gloobal.net/iepala/gloobal/fichas/ficha.php?entidad=Textos&id=11617&opcion=documento#s3> (accessed 31-08-2016).

[260] In Colombia, the right to public space in art 82 of the Constitution of Colombia, 1991, seeks to promote the right to the city by recognising the right of citizens to access and participate in the city's public spaces. See R Berney "Public space versus tableau: The right-to-the-city paradox in neoliberal Bogota, Colombia" in T Samara, S He & G Chen (eds) *Locating the Right to the City in the Global*

Development 10.257 of 2001 is considered one of the leading legal mechanisms giving effect to key aspects of the right to the city at the domestic level.[261] At the international level, a joint initiative of the United Nations Educational, Scientific and Cultural Organisation ('UNESCO') and the United Nations Human Settlements Program ('UN-Habitat') seeks to formalise the right to the city as an element of international human rights law through the promulgation of a World Charter on the Right to the City[262] and a Global Charter-Agenda for Human Rights in the City.[263] The following section examines The Brazilian Federal Law on Urban Development 10.257 of 2001, which is considered one of the leading legal mechanisms giving effect to key aspects of the right to the city at the domestic level.

3 3 2 Brazil's Federal Law on Urban Development

The Federal Law on Urban Development of Brazil 10.257 of 2001 represents the clearest example of an attempt to enact a positive, justiciable right to the city at the domestic level. The economic, social, legal and political context that characterised Brazil's rapid transition to an urbanised nation provided the impetus for the enactment of the Federal Law on Urban Development.[264] Over the course of several decades, the state's failure to plan for accelerated urbanisation resulted in austere economic, social and territorial reorganisation at considerable cost to the Brazilian population.[265] This process entrenched economic and social inequality in Brazilian cities and manifested in escalating informal development and spatial segregation.[266]

South (2013) 152-178; and R Berney "Pedagogical urbanism: Creating citizen space in Bogota Colombia" (2011) 10 *Planning Theory* 16-32.

[261] E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 Social & Legal Studies 199 215; and E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 Urban Forum 299 at 301.

[262] See further chapter 3, section 3 3 3.

[263] See further chapter 3, section 3 3 4.

[264] G Martine & G McGranahan *Brazil's early urban transition: What can it teach urbanizing countries?* (2010) 1.

[265] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 301. See also United Nations Population Fund ('UNFPA') "Study warns of failure to plan for rapid urbanization in developing nations: Research reveals Brazil's lessons for countries in Africa, Asia" (2010-08-06) <http://unfpa.org/public/home/news/pid/6463> (accessed 2010-08-09).

[266] E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199 201 at 202-203.

As a result, urban development in Brazil was dominated by the social production of space through informal processes aimed at promoting access to land and housing.[267]

Synchronously, the dominant legal order affirmed the state's role as sole lawmaker in a conservative political context defined by a limited model of representative democracy and a general lack of access to adequate legal processes, instruments and mechanisms for the enforcement of rights.[268] The established civil law tradition and strong culture of legal positivism also inhibited individual rights protection and progressive rights interpretation by the courts.[269] This hampered attempts to develop an alternative legal order that could respond to the social needs and collective rights associated with land-use development, planning and housing at the local level.[270]

For decades, social and political factors excluded the majority of Brazil's population from participating in urban decision-making processes.[271] The exclusionary nature of Brazil's urbanisation process, the dire housing situation of poor and marginalised urban inhabitants and the segregated legal order eventually motivated the call for wholesale urban and legal reform in Brazil.[272] However, it was social movements and civil society organisations that specifically called for urban and legal reform in Brazil through the recognition of the right to the city.[273]

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[267] Edésio Fernandes explains that although the data is imprecise, it is realistic to suggest that more than 50% of Brazil's urban population gains access to land and housing through informal processes. See E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199 at 203.

[268] 209-210.

[269] Before the 1990s, Brazil's restrictive legal regime enforced unqualified private property rights. Within this context, land and property were seen almost exclusively as commodities and their social or use values were severely limited. See E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199 at 209-210.

[270] E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 Social & Legal Studies 199 at 203; and E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 301-302.

[271] E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199 at 209.

[272] N Saule Júnior & M Rodriguez "Housing rights in Brazil" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 175 at 175.

[273] E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199 at 210.

The right to the city was incorporated into law in Brazil through a constitutional amendment that enabled the enactment the Federal Law on Urban Development. The Constitution of the Federative Republic of Brazil, 1988,[274] was amended to include a novel chapter on urban policy consisting of articles 182 and 183.[275] Articles 182[276] and 183[277] establish general guidelines for urban policy development and reform at both the federal and municipal levels. They also recognise constitutional principles formulated through widespread deliberative, participatory processes in which thousands of social movements, civil society organisations and individuals were involved.[278] These constitutional principles are considered essential to achieving legal reform in cities and promoting the right to the city. They include recognising the social function of property; engaging with land and property

[274] As is the case with the Constitution of the Republic of South Africa, 1996, the Constitution of the Federative Republic of Brazil, 1988 ('1988 Constitution'), represents a legal landmark designating the end of years of authoritarian military rule. The Brazilian Constitution now enshrines justiciable economic and social rights in Chapter II. In recent years, the Brazilian judiciary has issued a number of seminal decisions promoting the positive realisation of these rights. See F Piovesan "Brazil: Impact and challenges of social rights in the courts" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 182 at 182.

[275] Arts 182 and 183 are contained in Chapter II of Title VII of the 1988 Constitution.

[276] Art 182 of the 1988 Constitution states that the implementation of "urban development policy" by local governments is intended to order the "full development of the social functions of cities" and to guarantee the "well-being of their inhabitants". Art 182(1) states that municipal master plans represent the "basic policy instrument of urban development and expansion" and are compulsory for cities of over twenty thousand inhabitants. Art 182(2) states that urban property performs its social function when it "conforms to the fundamental requirements for the city's ordering expressed in the master plan". Art 182(3) provides for "prior and just compensation" for the expropriation of urban property. Art 182(4) holds that municipal governments may, by law, require that the owner of "non-built, under-used or unused urban land provide for adequate use of such land, under penalty, successively", of (i) compulsory subdivision or construction; (ii) building and urban property tax rates that increase over time; or (iii) expropriation with payment in public bonds, from an issue previously approved by the Federal Senate, redeemable in up to ten years, in equal and successive annual instalments, ensuring the real value of the compensation and legal interest.

[277] Art 183 of the 1988 Constitution states that an individual who "possesses as his own an urban area of up to two hundred and fifty square meters, for five years without interruption or opposition, using it as his or as his family's residence", will acquire the title to the property, provided that the individual does not own any other urban or rural property. Art 183(1) holds that the deed of title and concession of use can be granted to either a man or woman, regardless of their marital status, while art 183(2) states that this right cannot be recognised more than once for the same title holder. Art 183(3) states that public lands may not be acquired by *usucaptio*.

[278] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 303.

speculation in urban areas; regularising informal settlements; promoting a social right to housing; as well as advancing local government autonomy and the democratic management of cities.[279]

The Federal Law on Urban Development represents the culmination of a decade-long process of participatory legislative drafting.[280] It regulates articles 182 and 183 of the Brazilian Constitution and elaborates on the constitutional principles associated with promoting the right to the city and achieving urban and legal reform.[281] In doing so, it provides a legislative framework for implementing a number of comprehensive reforms in Brazilian urban areas.[282]

Article 2 of the Federal Law on Urban Development rejects the longstanding civil law tradition in favour of private property rights by elaborating on the constitutional principle that enshrines the social function of urban property.[283] It provides a new legal paradigm for urban land use, which recognises its social dimension and use value and subjects vacant or under-utilised urban land to taxes or even subdivision.[284] The statute also aims to limit the speculative gains of private

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[279] 303.

[280] R Rolnik (ed) *The Statute of the City: New Tools for Assuring the Right to the City in Brazil* (2002) 7.

[281] Art 1 of the Federal Law on Urban Development states that its provisions apply to the "execution of urban policy", which is the subject of arts 182 and 183 of the 1988 Constitution. See further R Rolnik (ed) *The Statute of the City: New Tools for Assuring the Right to the City in Brazil* (2002) 39; and E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 305.

[282] The Law is applicable to urban areas with more than 20 000 people.

[283] Art 2 of the Federal Law on Urban Development recognises that the purpose of urban policy is to "give order to the full development of the social functions of the city and of urban property". It identifies sixteen guidelines through which to achieve this goal, including: public participation and democratic administration in the formulation, execution and monitoring of urban development projects, plans and programs; and the regularisation of land ownership and the development of areas occupied by low income populations through the establishment of special urban and environmental norms, which consider the social and economic situation of the particular population. See further R Rolnik (ed) *The Statute of the City: New Tools for Assuring the Right to the City in Brazil* (2002) 43.

[284] Art 4(3) of the Federal Law on Urban Development lists a number of municipal planning and urban policy tools, which include the "disciplining of sub-divisions, of land and occupation" and "taxes on built property and urban land". Art 39 of the Federal Law on Urban Development states that urban property fulfills its social function when it meets the "basic requirements for establishing order" for a city, as expressed in its municipal master plan, in a manner that respects the rights established in art 2 of the statute and attends to its citizens' needs "concerning quality of life, social justice and the

landholders and developers.[285] The provision thus aims to enhance social control over urban development and affirms the primary social function of urban space, thereby redefining the concept of land ownership in Brazil.[286]

By regulating urban land use and settlement development, the urban policy tools in the Federal Law on Urban Development can be utilised to assist in protecting the housing rights and improving the housing conditions and tenure security of inhabitants of *favelas* or informal settlements.[287] In turn, this can aid in promoting social inclusion and integration as a norm in Brazilian cities.[288] The legal framework also enables municipalities to promote land tenure regularisation programmes in relation to informal settlements established on both public and private land.[289] This assists in democratising the conditions of access to land and housing for poor and marginalised urban inhabitants.[290] In Brazil, the realisation of the social right to

development of economic activities". See further R Rolnik (ed) *The Statute of the City: New Tools for Assuring the Right to the City in Brazil* (2002) 45.

[285] Art 2(6)(e) of the Federal Law on Urban Development states that the "ordering and control of land use" is aimed at avoiding the "speculative retention of urban real estate, which results in its under utilization or non-utilization". See further art 5 of the Federal Law on Urban Development; and R Rolnik *The Statute of the City: New Tools for Assuring the Right to the City in Brazil* (2002) 47.

[286] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 306.

[287] In doing so, the Federal Law on Urban Development can assist in redressing the effects of urbanisation in Brazil, which largely denied the housing rights of poor and marginalised urban inhabitants, as the majority of urban growth occurred in *favelas* (informal settlements). See G Martine & G McGranahan *Brazil's early urban transition: What can it teach urbanizing countries?* (2010) 32; and N Saule Júnior & M Rodriquez "Housing rights in Brazil" in S Leckie (ed) National Perspectives on Housing Rights (2003) 175 at 177.

[288] N Saule Júnior & M Rodriguez "Housing rights in Brazil" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 175 at 179.

[289] 177.

[290] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 306.

housing[291] is thus considered within a comprehensive urban policy and legal framework informed by normative themes underlying the right to the city.[292]

Article 2(4) of the Federal Law on Urban Development reinforces the constitutional principle recognising the power and obligation of municipal governments to control urban development through the formulation of territorial and land use policies in which the individual interests of landowners coexist with the social, cultural and environmental interests of other groups, as well as the city as a whole. In support of this goal, the statute provides municipalities with a range of legal and economic powers, especially within the context of the implementation of their master plans, to regulate urban land and property markets according to the criteria of social inclusion and environmental sustainability.[293] Municipalities therefore have greater powers to intervene in the development of both formal and informal urban land markets, which are serious drivers of social exclusion and spatial segregation in Brazil.[294]

Edésio Fernandes argues that combining traditional and contemporary planning mechanisms provides Brazilian municipalities with a range of possibilities to develop urban space that is economically efficient, politically fair, spatially just and sensitive to an array of socio-economic challenges.[295] By strengthening integrated planning mechanisms, legislation and management capacity at the local level, the Federal Law on Urban Development thus assists in democratising decision-making

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[291] Despite an initial lack of political consensus regarding the recognition of a right to housing, the fundamental social right to housing was approved by Constitutional Amendment 26 of 1985 and is now recognised in art 6 of Chapter 1 in Title II of the 1988 Constitution. Art 6 recognises education; health; nutrition; labour; housing; leisure; security and social security; protection of motherhood and childhood; and assistance to the destitute as constitutionally protected social rights. See further C de Souza *Constitutional Engineering in Brazil: The Politics of Federalism and Decentralisation* (1997) 61.

[292] A Azuela & E Duhau "Overview: The evolution of housing rights and their social context" in A Azuela, E Duhau & E Ortiz *Evictions and the Right to Housing: Experience from Canada, Chile, the Dominican Republic, South Africa, and South Korea* (1998) 233 at 250.

[293] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 305.

[294] 305.

[295] Fernandes explains that traditional planning mechanisms include zoning, subdivision, and building regulations, while the contemporary instruments include: compulsory subdivision, construction and utilisation orders; the progressive extra-fiscal use of local property tax; an expropriation sanction with payment in titles of public debt; surface rights; preference rights for the municipality; and the onerous transfer of building rights. See E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 305-306.

processes and legitimating a socially orientated legal framework applicable to cities.[296] Mechanisms aimed at facilitating the effective participation of citizens and associations in urban planning and management, include public consultations; the creation of local councils; popular initiatives for proposing urban laws; public litigation; as well as the practice of participatory budgeting.[297]

Since the adoption of the Federal Law on Urban Development, the urban and legal order applicable to the production of space in Brazil has undergone a gradual, yet consistent process of reform.[298] The new legal order is based on constitutional provisions and principles applicable to urban policy that recognise the social value of space and aim to overcome social exclusion. Significant institutional changes have also been introduced through the generation of new Municipal Master Plans to complement the national legal order, as well as the installation of a Ministry of Cities and National Council for Cities.[299] Edésio Fernandes cautions, however, that the effective implementation of the Federal Law on Urban Development depends on achieving comprehensive reforms at the local level.[300]

Municipalities are appropriately placed to assist in reversing the exclusionary patterns of urban development in Brazilian cities, particularly through the approval and use of master plans, which are more inclusive and participatory by nature.[301]

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[296] 306.

[297] Brazil has a strong tradition of participatory budgeting processes that foster widespread public participation in the annual budgets of local authorities. The extension of the participatory budgeting model to the governance of urban space is one example of how the Brazilian state has attempted to reform its historically authoritarian, legal and political system. See B de Souza Santos "Participatory budgeting in Porto Alegre: Toward a redistributive democracy" (1998) 26 *Politics & Society* 461-484; C Souza "Participatory budgeting in Brazilian cities: Limits and possibilities in building democratic institutions (2001) 13 *Environment & Urbanization* 159-184; E Fernandes "Constructing the 'right to the city' in Brazil" (2007) 16 *Social and Legal Studies* 199-217; E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299-314; and C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012) 147.

[298] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 300.

[299] Since 2001, more than 1400 Municipal Master Plans have been formulated across Brazil. According to Fernandes, the content and effective enforcement of these plans will assist in realising the new legal and urban order consolidated by the City Statute. See E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 300.

[300] 310.

[301] 310-311.

Notwithstanding, many local governments have failed to adopt the urban policy tools required for intervening directly in the development of urban space. As a result, these municipalities cannot determine obligations for land and property owners[302] and are limited to approving conventional regulatory plans.[303] Moreover, in the few instances where these new legal and planning tools have been incorporated into master plans, municipalities have done so without clearly determining a redistributive context for the application of financial resources. This has contributed towards reinforcing land and property speculation, as well as social and spatial segregation.[304] Many municipal master plans have also failed to give practical effect to their proposals, as they are not supported by adequate spatial plans. Additionally, the technically complex nature of the new municipal master plans fails to account for the limited capacity of local municipalities to implement them. As a result, the new municipal master plans have not necessarily succeeded in promoting social and spatial integration and effective implementation remains a significant challenge faced by all parties committed to urban reform in Brazil.[305]

At an institutional level, the independence of the Ministry of Cities has been questioned and the full realisation of its urban reform agenda depends on a number of factors. These include the manner in which existing political disputes and contradictory interests are accommodated, as well as the promotion of greater inter-ministerial integration and inter-governmental cooperation towards urban questions.[306] The Ministry of Cities also requires consistent institutional support and infrastructure in order to generate the capacity to act, as well as the necessary resources for the promotion of new policies and programmes.[307]

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[302] As a result, economic, social, political and institutional disputes over the control of land development processes have become aggravated since the enactment of the Federal Law on Urban Development. See E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 311.

[303] 311.

[304] 311.

[305] This can be attributed to economic growth and an increase in economic values generated by land and property speculation in Brazil. See E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 310-311.

[306] This includes promoting better internal integration between the secretariats and respective programmes of the Ministry of Cities.

[307] E Fernandes "Implementing the urban reform agenda in Brazil: Possibilities, challenges, and lessons" (2011) 22 *Urban Forum* 299 at 312.

While the enactment of the Federal Law on Urban Development has undeniably advanced urban reform in Brazil, many problems still persist. The statute has been subject to several proposed legislative amendments with the potential to undermine its transformative goals.[308] Therefore, the new laws and institutions in Brazil should not be taken for granted.[309] The Brazilian experience illustrates that urban reform entails a long, open-ended process that requires a combination of legal reform, institutional change and social mobilisation. Moreover, Fernandes asserts that the success of urban-legal developments in Brazil depends on the continued socio-political mobilisation of the urban inhabitants who are most marginalised.[310]

The political quality of the urban reform process in Brazil depends on the capacity of its society to effectively assert its legal right to be present in urban areas and to actively participate in the decision-making processes that produce and reshape urban space. Fernandes argues that, given the highly politicised nature of the urban reform process, the constant renewal of social mobilisation in Brazil represents a vital condition for advancing the transformation of urban livelihoods and space.[311] In other words, constant social mobilisation remains an important means of asserting the right to the city in practice in Brazil. Consequently, the Brazilian urban reform process still has a long way to go and many serious obstacles remain that need to be overcome.

Although Brazil's urban and legal reform process represents a natural expression of the country's specific political processes and historical, social and economic conditions, other countries and cities interested in promoting social inclusion through the right to the city could gain important universal lessons from the Brazilian experience. The Brazilian case illustrates the importance of redefining the urban legal framework in order to provide scope for the development of inclusive land and property governance frameworks; innovative legal concepts and principles; institutional mechanisms; and social and political processes that are properly articulated. The urban reform process also requires broader access to courts to assist in extending the traditional boundaries of the legal system and to guarantee the effective realisation of rights and enforcement of legislation. The following section

[308] 312.
[309] 312.
[310] 313.
[311] 314.

analyses attempts at the international level to institutionalise key aspects of the right to the city in the World Charter on the Right to the City.

3 3 3 World Charter on the Right to the City

The proclamation of the World Charter on the Right to the City represents an important step towards elaborating the content of the interrelated constituent elements of the right to the city at the international level, in a manner that is accessible to grassroots and social movements.[312] The World Charter on the Right to the City was promoted by a coalition of academics, professionals, civil society and social movements and represents the product of years of participatory dialogue.[313] In 1995, the Habitat International Coalition organised an international forum on the environment, poverty and the right to the city and the theme of this forum was taken up in the World Social Forum movement. The World Charter on the Right to the City thus stems from grassroots initiatives,[314] and is aimed at overcoming social exclusion in all forms by proposing a complex approach to the development of urban space that requires that human rights be articulated through democratic dimensions.[315]

The World Charter on the Right to the City attempts to unite different justice and human rights movements by recognising that the city is a rich and diversified cultural space that belongs to all its inhabitants.[316] In support of this view, the Charter states that it is a right to a city that is free of discrimination based on "gender, age, health status, income, nationality, ethnicity, migratory condition, or political, religious, or sexual orientation".[317] Furthermore, the Charter adopts an extended notion of

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[312] Thomas Coggin and Marius Pieterse caution however that the provisions in the Charter remain insufficiently precise to function as a blueprint for the legal articulation of the right. See T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 261.

[313] This process started in the run-up to the 1992 United Nations Conference on Environment and Development in Rio de Janeiro. See A Brown & A Kristiansen *Urban Policies and the Right to the City* (2009) 25.

[314] A Brown & A Kristiansen *Urban Policies and the Right to the City* (2009) 25.

[315] 25-26.

[316] Preamble to the World Charter on the Right to the City.

[317] Art 1(1).

citizenship by acknowledging that citizens do not only include the permanent inhabitants of the city, but also those "in transit".[318]

According to the World Charter on the Right to the City, the right to the city represents the "equitable usufruct of cities within the principles of sustainability, democracy and social justice".[319] In this sense, the right to the city is recognised as a right that is independent from all existing rights and open to the incorporation of new rights.[320] This means that the right to the city is considered the "collective right of the inhabitants of cities" and, in particular, of vulnerable and marginalised groups.[321] The right to the city confers on these groups the "legitimacy of action and organisation", based on their uses and customs, with the objective "to achieve full exercise of the right to free self-determination and an adequate standard of living".[322] Thomas Coggin & Marius Pieterse argue that this formulation of the right to the city is valuable, as it transcends the conventional legal division of rights into categories comprising civil and political rights and social, economic and cultural rights.[323]

Throughout its text, the World Charter on the Right to the City emphasises inclusion and the equal enjoyment of all of the constituent elements of the right to the city. It also recognises that the right to the city is not confined to the formal city and includes "urban territories and their rural surroundings" as spaces and locations for the "exercise and fulfilment of collective rights".[324] Several of Lefebvre's constituent elements of the right to the city are also enumerated in the Charter. These include the right to work; public health, a healthy environment and access to health services; water, energy, sanitation and telecommunications; public transport and urban mobility; and housing and adequate shelter.[325]

The World Charter on the Right to the City also contains a list of principles, which include open, transparent and participatory governance;[326] the full exercise of citizenship and use of economic and cultural resources; equality, non-discrimination

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[318] Art 1(2)(v).

[319] Art 1(2).

[320] H Ortiz *Towards a World Charter for the Right to the City* (2008) 100.

[321] Art 1(2) of the World Charter on the Right to the City.

[322] Art 1(2).

[323] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 261.

[324] Preamble to the World Charter on the Right to the City.

[325] Art 1(2).

[326] Art 6(3).

and respect for plurality;[327] physical safety and personal security;[328] special protection for vulnerable persons and groups;[329] freedom of movement, organisation and association;[330] and economic solidarity and progressive policies.[331] Coggin and Pieterse note that most of these constituent rights and principles are well known in the international human rights arena, although they are generally better defined and more widely accepted at the domestic level and many have developed their legal content in contexts other than those provided by the right to the city.[332] However, the existence of these rights and principles in international human rights law, in conjunction with their increased recognition and enforcement in domestic legal systems, suggests that it is possible to construct a legal conception of the right to the city within particular societies.[333] Perhaps, more importantly, it also means that the possibilities inherent in the right to the city are shaped, and potentially restrained, by legal understandings of its constituent components.[334] The final section examines the Global Charter-Agenda for Human Rights in the City, which represents another instrument aimed at institutionalising the right to the city at the international level.

3 3 4 Global Charter-Agenda for Human Rights in the City

The second international initiative that attempts to institutionalise the right to the city in international human rights law is the Global Charter-Agenda for Human Rights in the City. The Global Charter-Agenda for Human Rights in the City is an initiative of city mayors that was approved at a meeting of the Forum of Local Authorities for Social Inclusion during the World Social Forum in 2005.[335] The proposal now enjoys wide support and was debated at the 2007 World Congress of United Cities and

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[327] Art 2(3)(i).
[328] Art 2(3)(iv).
[329] Art 4(2).
[330] Art 7.
[331] Art 5.
[332] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 261-262.
[333] 261-262.
[334] 262.
[335] A Brown & A Kristiansen *Urban Policies and the Right to the City* (2009) 25.

Local Governments ('UCLG').[336] The Global Charter-Agenda for Human Rights in the City is being taken forward by the International Permanent Secretariat, Human Rights and Local Government, which organises the biennial World Forum on Human Rights.[337]

The Global Charter-Agenda for Human Rights in the City adopts the idea of human rights in the city as its point of departure and aims to include all sectors of society in this common agenda.[338] It provides a framework in which cities from all over the world can commit to the development of inclusive policies for safeguarding human rights at the local level, while identifying practical local actions that can take forward these commitments.[339] While the overall goal is to create a life of dignity, the Global Charter-Agenda for Human Rights in the City requires that all urban policies be centred on the substantive themes of complete citizenship, sustainability, democracy and participation.

This section illustrates that various initiatives are actively exploring rights-based approaches, instruments and practices to enhance urban responsibilities, accountability and governance through the concept of the right to the city. These novel initiatives have the potential to assist in improving the quality of life in cities, by strengthening urban livelihoods and ensuring inclusive, equitable and accessible cities. The final section of this chapter evaluates the potential of the right to the city paradigm to promote the spatial and social transformation of urban human settlements and its congruency with the fundamental values, rights, and transformative ethos of the South African Constitution.

3 4 Evaluating the potential of the right to the city paradigm

In the South African context, Coggin and Pieterse argue in favour of utilising the right to the city framework to analyse the interpretation of economic, social, and cultural rights, as well as the obligations of local governments.[340] Their view of the

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[336] The organisation of United Cities and Local Governments was founded in 2004 to promote strong and democratic local self-governance. It now has more than 1000 city members in over 95 countries. See A Brown & A Kristiansen *Urban Policies and the Right to the City* (2009) 25.

[337] 25.

[338] 25.

[339] 25.

[340] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257-278; and M Pieterse "Development, the

right to the city presents the concept as a localised and inclusive vision of governance that emphasises social concerns and participatory citizenship.[341] In particular, Pieterse observes that the scope of the right to the city beyond conventional legal understandings of what a right entails.[342]

From a legal perspective, and with reference to the South African Constitution, Coggin and Pieterse argue that the right to the city is best understood as a package of interrelated, mutually supportive, and interdependent rights.[343] They base their understanding of the right to the city as an interrelated package of rights on the provisions of the World Charter on the Right to the City. Pieterse notes that, while none of these rights contained in the Charter are novel, the uniqueness of the right to the city lies in the fact that it must be understood in the conglomerate and that this collection of rights is exercised in the context of the city and primarily at the level of local government.[344] Pieterse argues that due to its conglomerate nature, the right to the city transcends traditional conceptions of the role of the state in public law.[345] Simultaneously, he explains that the level at which the right to the city is exercised requires reconceptualising what is meant by the state, its role and obligations. Rather than conceiving of national governments as the main source of public power, the right to the city shifts the attention to local government as the source and shaping force of public power in everyday life.[346]

Pieterse accordingly identifies three further characteristics of the right to the city that transcend conventional thinking about constitutional citizenship and the legal

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right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *South African Law Journal* 149-177.

[341] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 259.

[342] M Pieterse "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *South African Law Journal* 149 at 153.

[343] Coggin and Pieterse identify the following rights contained in the South African Constitution: the rights to equality, life, freedom of movement, physical safety, freedom of assembly and association, freedom of trade and occupation, political participation, a healthy environment and socio-economic rights, such as the rights of access to housing, food, water, health care services, social security and education. See T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 261-262.

[344] M Pieterse "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *South African Law Journal* 149 at 154.

[345] 154.

[346] 154.

enforcement of fundamental rights. The first is that the state is not the only source of power against which the right to the city is invoked. In its focus on the production of urban space, the right to the city can also be asserted against other influences or sources of power that impact on the form of the city and the experiences of its inhabitants. [347] This includes power exercised by private developers and landowners.[348] Secondly, all inhabitants of the city can claim the right to the city. This broad conception of urban citizenship challenges many of the traditional conceptions or distinctions associated with the notion of citizenship.[349] Thirdly, the right to the city is not exercised primarily through existing legal or political channels, but rather by way of physical presence and participation in the city. This can include conventional legal routes and protests or more controversial actions, such as occupying abandoned buildings.[350] Understanding that the right to the city is not necessarily asserted through conventional legal and political structures suggests that urban inhabitants often experience dominant and established legal and political structures as incidental to the daily practices of real life.[351] Therefore, Pieterse concludes, that it may not be possible for legal instruments and processes to fully capture and give effect to all the dimensions of the right to the city.[352] Nevertheless, the right to the city offers a valuable theoretical lens through which to reconceptualise and understand issues associated with urban governance, citizenship, the roles of the state, and the content and mode of realising rights such as the right to housing.[353]

Within the context of this study, the value of the right to the city is that it represents a powerful paradigm for critically analysing and reconceptualising the social contradictions inherent in everyday life in modern society. Simultaneously, the right to the city advances a normative claim for the transformation of both the physical space of the city and urban society through either legal processes or the substantive and active participation of all urban inhabitants in the decisions, processes and practices that shape urban space and daily life.

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[347] 155.
[348] 155.
[349] 155.
[350] 155.
[351] 155.
[352] 155.
[353] 156.

Understanding the impact of the absolute conception of space is important within the context of this study, as it reveals valuable insights about the relationship between law and space. In particular, it raises the important question whether legal constructs, such as housing rights, have the potential to contribute to an understanding of space that gives effect to its multidimensional nature. Additionally, the right to the city supports a multidimensional conception of space and provides a framework for analysing the role of space in entrenching and perpetuating exclusion and marginalisation.

Although space can serve as a mechanism of social control and exclusion, the right to the city recognises that space also represents a powerful site of political struggle where marginalised inhabitants can contest the dominant influence of the state and market on the processes and practices that affect their daily lives. Scholarship informed by Lefebvre's theoretical approach is thus capable of simultaneously conceptualising space as a tool of the state and as a site for political contestation. Lefebvre's theory of space can add value to a critical legal analysis of the structure and form of contemporary spatial projects, such as spatial planning, housing delivery, and urban governance. Moreover, advancing the right to the city necessitates that any field in which the social relations of abstract space are reproduced, such as law, must be subject to a critical examination that interrogates established forms of spatial power.

The right to the city recognises Lefebvre's appreciation of human habitats and concern with the role of the state in housing production. Lefebvre's substantive notion of inhabitance provides a framework for critiquing state practices associated with spatial development. In particular, this framework challenges formal or technical state approaches to housing development, which neglect the substantive values represented by housing as a social good and diminishing its role in spatial and social transformation.

The right to the city is grounded in the entitlement to physically occupy urban space. By positioning the right to inhabit the city at the heart of his spatial politics, Lefebvre challenges the way in which the state and market forces reduce the human notion of dwelling to the functional aspects of housing and prioritise the exchange value of space. The right to the city also recognises that inhabiting the city is vital for enabling the meaningful participation of all urban inhabitants in the processes and

practices that affect urban space. The right to inhabit the city thus represents both an essential normative component and a political claim implicit in the right to the city.

Lefebvre's substantive notion of inhabitance also exceeds the practice of physically occupying space and entails more than the provision of adequate housing or essential urban services. A reductionist understanding of the right to housing that only concentrates on the material level or on planning the built environment is inadequate.[354] The analysis of the right to the city in this chapter has shown that a superficial approach to the realisation of the right to housing, which focuses only on the redevelopment of space, the built environment, and physical amenities, fails to give effect to the social values and goods associated with housing as a space.[355] An approach to spatial development that is informed by the right to the city must acknowledge that physical or mental changes to the built environment do not equate or guarantee the conditions needed to generate social and political change.[356] The spatial reorganisation of the physical environment does not represent a substitute for actual change.[357] In practice, the significance of this insight is that processes of housing development will not necessarily result in the substantive realisation of the housing rights of the urban poor if housing spaces or physical structures are provided without simultaneously providing and promoting the values, rights, and freedoms associated with housing.[358] Guaranteeing the right to housing is therefore a necessary prerequisite for guaranteeing the right to the city.

Despite its pronounced spatial features, a critical spatial analysis of current approaches to the interpretation and realisation of housing rights remains elusive, which is concerning given that location in space is considered fundamental to the

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[354] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 225.

[355] A Roy "Urban informality: Towards an epistemology of planning" (2005) 71 *Journal of the American Planning Association* 147 at 150.

[356] L Bennet "Do we really wish to live in a communitarian city? Communitarian thinking and the redevelopment of Chicago's Cabrini-Green public housing complex" (1998) 20 *Journal of African Affairs* 99 at 114.

[357] P Marcuse "From critical urban theory to the right to the city" (2009) *City* 195. Jessie Hohmann notes, for example, that providing formal housing to people who live in informal conditions will only solve informality if it is actually the result of a lack of housing and not the result of other structural factors, of which housing is only manifestation. See J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 224. See further C Marx "Supporting informal settlements" in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 299 at 303.

[358] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 225.

existence of all human beings.[359] Adopting the right to the city as a spatially-sensitive analytical framework applicable to housing illustrates that realising housing rights requires looking beyond the physical or built structure of housing in order to recognise the philosophical and normative attributes, as well as the social goods embedded in a home.[360] It also requires a broad understanding of the interconnections between people and the spaces they inhabit.[361]

3 5 Conclusion

In recent years, efforts aimed at addressing the complex relationship between urbanisation and deprivation have resulted in the development of a theoretical and practical framework that establishes a conceptual link between human rights and human habitat.[362] Lefebvre's notion of the right to the city has received considerable attention throughout this process. It has been advanced as a challenge to the dominance of the state and market forces and the disenfranchisement of marginalised urban inhabitants, as it proposes an alternative paradigm that requires the restructuring of social, economic, and political relations.[363]

The analysis in this chapter illustrates that the right to the city has also informed the search for alternative strategies that involve empirical examinations of emerging movements among marginalised urban populations advocating for renewed forms of democratic control. While different social movements have claimed it as a reference to a range of demands concerning the use value of urban space and questions of urban citizenship,[364] the right to the city has also been established as a theoretical concept under which various urban struggles can be identified as the reverse state

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[359] T Cresswell "Place: Part I" in J Agnew & J Duncan (eds) *The Wiley-Blackwell Companion to Human Geography* 235 at 236.

[360] J Hohmann *Right to Housing: Law, Concepts, Possibilities* (2013) 223-224.

[361] 224.

[362] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 99.

[363] M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99 at 101-102; and J Friedman "The right to the city" (1995) 1 *Society and Nature* 71 at 74.

[364] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 28.

policies and market interests and the gentrification processes engendered by them.[365]

This chapter contributes to the developing discourse on the conceptual link between human habitats and human rights by advancing the suitability of the right to the city paradigm to facilitate spatial and social transformation in South African towns and cities. The right to the city paradigm has the potential to contribute to a radical reappraisal of current approaches to the interpretation and implementation of housing rights and responsibilities in cities, particularly in relation to urban planning and local governance.[366] This rights-based approach has the potential to generate the political will required to promote equitable approaches to resource allocation in urban areas,[367] and to promote a broad understanding of urban citizenship that promotes participation in housing development. The right to the city thus promotes respect for the rights of the urban poor to access the city and suggests that an alternative, equitable future city is possible.[368]

There is no consensus regarding the constituent elements of the right to the city or whether it should be treated as a political horizon for emancipation or as a moral, individual, collective, social or human right that should be integrated into public policies and implemented by governments.[369] Despite these open theoretical questions, this chapter illustrates that housing represents a crucial point of convergence between the different struggles and contexts associated with the right to the city.[370] Conceptual links between Lefebvre's right to the city and the right to housing emerge in a number of contexts, such as the role of the state and the law in developing housing spaces, evictions, and the right of urban inhabitants to

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[365] D Harvey "The right to the city" (2008) 53 *New Left Review* 23 at 28; and R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

[366] A Brown & A Kristiansen Urban Policies and the Right to the City (2009) 10.

[367] 10.

[368] A Sugranyes & C Mathivet "Introduction: Cities for all: Articulating the social-urban capacities" in A Sugranyes and C Mathivet (eds) *Cities for All: Proposals and Experiences towards the Right to the City* (2010) 1 at 13.

[369] See for instance M de Souza "*Which* right to *which* city? In defence of political-strategic clarity" (2010) 2 *Interface: A Journal for and About Social Movements* 315-333; K Attoh "What kind of right is the 'right to the city'?" (2011) 35 *Progress in Human Geography* 669-685; and M Purcell "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99-108.

[370] R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

participate in decision-making process that produce space and affect their daily lives.[371] It is also evident in the links between Lefebvre's substantive notion of inhabitance and the need for the recognition of the citizenship rights of all urban inhabitants.[372] The right to the city acknowledges the importance of realising the substantive rights of vulnerable and marginalised urban inhabitants in facilitating the transformation of urban society. Significantly, Lefebvre identifies the right to housing as a right with the potential to transform society through its incorporation into social practice. The housing rights of South Africa's urban poor represent justiciable, legal claims that can play an important part in realising the right to the city. However, in order to give effect to the right to the city, the right to housing must be understood as part of a broader claim aimed at advancing social and spatial justice through the creation of a better urban society that meets the needs of all urban inhabitants. Due to its ability to link theory and practice, the right to the city paradigm thus provides a valuable framework for analysing current approaches to both the interpretation and the implementation of the housing rights of South Africa's urban poor.

Chapter 4 of this study builds on the theoretical foundation developed in this chapter by applying the right to the city paradigm to an analysis of the leading instruments and interpretive approaches applicable to housing rights under international human rights law.

[371] 294.
[372] 295.

Chapter 4

Developing the normative content of the right to housing in international law through the right to the city

4 1 Introduction

Chapter 3 expounded the value of the right to the city as a multidimensional framework for analysing current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. The previous chapter illustrates that the right to housing plays a significant role in advancing the transformation of urban space and society, as envisioned by the right to the city. It identifies key areas of convergence between the right to the city and housing. Most notably, these include the role of housing in promoting spatial and social transformation and inclusion, the impact of the housing spaces developed by the state on marginalised inhabitants, the role of housing in mitigating spatial displacement in urban areas and the significance of housing in promoting an inclusive, spatial conception of participation.

Chapter 4 applies the right to the city paradigm to an analysis of the leading instruments and interpretive approaches applicable to housing rights under international human rights law. The corresponding hypothesis is that the philosophically rich and multifaceted right to the city paradigm can assist in developing the normative content of housing rights in international law by providing recourse to extra-legal values and sources of understanding. In turn, this process can reveal normative purposes, novel insights, and conceptual linkages that can guide the interpretation and implementation of the housing rights of South Africa's urban poor.

The United Nations Special Rapporteur on Adequate Housing recently affirmed the transformative potential of the right to housing, which is promoted through the application of universal norms and guiding principles that apply to specific contexts and in response to emerging urban challenges.[1] More specifically, the Special Rapporteur argues that the right to adequate housing should inform the new urban

[1] United Nations General Assembly ('UNGA') *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to An Adequate Standard of Living and the Right to Non-Discrimination in this Context*, 4 August 2015, UN Doc A/70/270, para 11.

agenda that will be adopted at the forthcoming United Nations Conference on Housing and Sustainable Urban Development[2] ('Habitat III').[3] Significantly, the right to the city represents one of the conceptual themes informing the development of the agenda for Habitat III.[4]

This chapter analyses the normative content of the right to housing under international law in order to determine to what extent it facilitates the development of adequate housing environments that can facilitate spatial and social transformation in urban areas. In doing so, it relies on the key points of convergence identified between the right to the city and the right to housing in chapter 3. These include the adequacy or quality of housing spaces needed to facilitate the spatial and social transformation of society, the role of the state in housing development and the importance of the participation of urban inhabitants in promoting the social or use value of urban space. This chapter also examines the normative content of the right to housing under international law in the context of evictions and the spatial displacement of vulnerable and marginalised urban inhabitants. This section draws on intersecting themes between the right to the city and the right to adequate housing, which include the role of the state and the participation of urban inhabitants in preventing and mitigating the negative effects of evictions and spatial displacement. The analysis of the normative content of the right to housing in international law in both sections of this chapter draws on the most significant international, subject-specific and regional human rights sources on housing rights. These sources include the most prominent international, subject-specific and regional human rights instruments. This chapter further evaluates the normative content of housing rights in international law with reference to the key philosophical frames and concepts informing the right to the city paradigm. The purpose of the evaluation is twofold. Firstly, it identifies areas of congruence between the norms

[2] The United Nations Conference on Housing and Sustainable Urban Development ('Habitat III') will take place in Quito, Mexico, from 17 to 20 October 2016. The aim of Habitat III (the third in a bi-decennial series of global housing conferences) is to establish a new urban agenda aimed at ensuring sustainable urban development, confronting poverty and addressing new and emerging urban challenges over the next 20 years.

[3] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to An Adequate Standard of Living and the Right to Non-Discrimination in this Context*, 4 August 2015, UN Doc A/70/270, paras 2-3.

[4] United Nations Human Settlements Programme ('UN-Habitat') *Policy Paper Unit 1: Right to the City and Cities for All – Executive Summary* (2016).

and values informing the right to the city and the normative content of the right to housing under international law. Secondly, it identifies areas where the right to the city paradigm can assist in developing the normative content of the housing rights in international law. In turn, these insights and developments can inform the interpretation and implementation of the housing rights of South Africa's urban poor, which is the focus of the next chapter of this study.

4 2 Interpretative value of international human rights law in South Africa

International human rights law occupies a carefully defined role in South African law.[5] In *Glenister v President of the Republic of South Africa* ('*Glenister*'), the Constitutional Court affirmed the commitment to ensuring that both the Constitution and domestic law are interpreted to comply with international law and, in particular, international human rights law.[6] In *S v Makwanyane*, the Constitutional Court held that public international law includes both binding and non-binding sources of international law and provides a valuable framework within which the Bill of Rights can be evaluated and understood.[7]

Section 39(1)(b) obliges courts to consider international human rights law when interpreting a provision in the Bill of Rights. In doing so, it embodies the openness and receptiveness of the South African Constitution to the norms and values of the international community.[8] Section 39(1)(b) also expresses South Africa's commitment to taking its rightful place as a sovereign state in the family of nations.[9] This includes the responsibility to adhere to international normative standards and the obligation to contribute to the development of international law, based on

[5] John Dugard explains that South African have illustrated a great willingness to be guided by international human rights law since the establishment of the new constitutional order in 1994. He notes that the decisions of the European Committee on Social Rights ('ECSR') and the European Court of Human Rights ('ECtHR') have provided the greatest interpretative assistance, although South African courts have on occasion also considered the views of the United Nations Human Rights Committee ('UNHRC'), as well as United Nations reports on human rights matters. See J Dugard *International Law: A South African Perspective* 4 ed (2011) 63, 320-365.

[6] 2011 3 SA 347 (CC), para 97.

[7] 1995 6 BCLR 665 (CC), para 35.

[8] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 101.

[9] The Preamble to the Constitution states that the Constitution was adopted to build "a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".

domestic human rights experiences and democratic transformation.[10] Moreover, section 233 of the Constitution requires domestic legislation to be interpreted in compliance with international law.[11] The South African Constitution's deliberative vision of democracy and human rights thus extends beyond the country's geographical boundaries and incorporates the broader international community.[12]

The process of interpreting and giving meaning to human rights norms in South Africa represents a dialogic process that encompasses variety of national and international participants.[13] Kent Roach characterises this dialogic conception of rights interpretation as a process in which multiple sources of authority interact.[14] This dialogic conception of human rights interpretation is not only receptive to outside influence, but also more concerned with the persuasive force of legal arguments as opposed to their binding character.[15] Adopting international human rights law as an interpretative and guiding normative framework can thus assist in generating innovative and substantive approaches to the interpretation and implementation of the right to have access to adequate housing in section 26 of the Constitution.[16]

Notwithstanding, adopting international human rights instruments as interpretative tools does not automatically accord them the status of domestic law in South Africa.[17] In the *Glenister* case, the Constitutional Court provided guidance on the status of an unincorporated treaty in South African law by explaining that an

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[10] In *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC), para 222, the Constitutional Court affirmed that "after decades of isolation, South Africa is now a member of the community of nations" and a bearer of "obligations and responsibilities in terms of international law".

[11] S 233 of the 1996 Constitution states:

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

[12] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 101.

[13] 101.

[14] Kent Roach contrasts this dialogic approach with a more "monological and positivistic" conception of authority, as well as "judicial supremacy" in enforcing constitutional rights and remedies. See, K Roach "Constitutional, remedial and international dialogues about rights: The Canadian experience" (2004-2005) 40 *Texas International Law Journal* 537 at 538-539.

[15] 101.

[16] G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South Africa Law* (2011) LLD dissertation, Stellenbosch University, 223, 226.

[17] *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC), para 98.

international agreement that has been ratified by resolution of Parliament is binding on South Africa on the international plane, to the extent that the state can incur responsibility towards other signatory states.[18] However, until the international agreement is enacted into domestic law by national legislation, it cannot be a source of rights and obligations.[19] International agreements requiring express ratification must accordingly be incorporated into domestic law under section 231(4) of the Constitution.[20] Section 231(4) requires the enactment of national legislation to incorporate the international agreement into South African domestic law, in addition to a resolution of Parliament approving the agreement.[21] Once incorporated, the international agreement is considered a part of the South African legal framework and enjoys the same status as any other legislation, unless Parliament expressly indicates otherwise.[22]

Different considerations apply to treaties to which South Africa is a party, but which have not been incorporated into domestic law. A domestic court may, in the first instance, have recourse to an unincorporated treaty in order to interpret an

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[18] Ngcobo CJ makes this statement in a minority judgment, para 92. See further, paras 179-181 for the comments of Moseneke DCJ and Cameron J in the majority judgment.

[19] Para 92.

[20] S 231(4) of the 1996 Constitution states:

> An international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

However, in accordance with section 231(3) of the South African Constitution, if an international agreement entered into by the executive is of a technical, administrative or executive nature or does not require accession or ratification, the international agreement is binding on South African without requiring the approval of both houses of Parliament. The international agreement must, however, still be tabled in Parliament within a reasonable amount of time.

[21] The Constitutional Court in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC), para 99, identified three main methods whereby the legislature incorporates international agreements into domestic law: (a) the provisions of the agreement may be embodied in the text of an act; (b) the agreement may be included as a schedule to a statute; and (c) the enabling legislation may authorise the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette.

[22] The Constitutional Court in *Glenister v President of the Republic of South Africa* 2011 3 SA 347 (CC), para 100, also explained that an international agreement enacted into law by national legislation can only be elevated to a status superior to that of other national legislation if Parliament expressly indicates it is its intent to do so. On certain occasions, Parliament has done this by providing that, in the event of a conflict between the international convention that has been incorporated and ordinary domestic law, the international agreement would prevail.

ambiguous statute.[23] Alternatively, an unincorporated treaty may be used to challenge the validity of delegated legislation on grounds of unreasonableness.[24] South African courts have the power to judicially review legislation in terms of section 172 of the 1996 Constitution. International human rights law can thus be invoked not only as a guide to statutory interpretation, but as a challenge to the validity of legislation.[25]

The guiding international norm on the right to adequate housing is article 11(1) of the ICESCR, which recognises the right to an adequate standard of living.[26] Article 11(1) was a major source of reference for drafting the right to have access to adequate housing in section 26(1) of the South African Constitution.[27] Accordingly, the provision can play a significant role in assisting the South African legislature and courts in maintaining a consistency between domestic laws and policies and South

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[23] J Dugard *International Law: A South African Perspective* 4 ed (2011) 63.

[24] This position was confirmed by the Supreme Court of Appeal in *Progress Office Machines CC v South African Revenue Services* 2007 4 All SA 1358 (SCA); 2008 (2) SA 13 (SCA), para 11. Since the concept of reasonableness is inextricably linked with a presumption of legislative intent, there is a presumption that the legislature in enacting a law did not intend to violate South Africa's international obligations. See, J Dugard *International Law: A South African Perspective* 4 ed (2011) 64.

[25] This may take the form of a direct challenge where, for instance, it is argued that the procedures for the ratification or incorporation of a treaty under s 231 have not been followed. Alternatively, it may assume the form of an indirect challenge where international law is invoked to support an interpretation in favour of the unconstitutionality of a statute. Two major decisions of the Constitutional Court where the latter approach was followed are *Glenister* and *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 2011 3 SA 347 (CC). See further J Dugard *International Law: A South African Perspective* 4 ed (2011) 64.

[26] Art 11(1) of the ICESCR recognises the right to adequate housing as a component of the right to an adequate standard of living:

> The States Parties to the Present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. 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.

See further, United Nations Committee on Economic, Social and Cultural Rights ('CESCR') General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant), UN Doc E/1992/23, 13 December 1991 ('General Comment 4'), para 1.

[27] There are also significant textual similarities between art 2(1) of the ICESCR and art 26(2) of the South African Constitution, as both provisions refer to the obligation on the state to adopt legislative measures, the limits of available state resources and the goal of progressive realisation. See S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 16-19, 107.

Africa's obligations under the ICESCR.[28] Moreover, as an interpretive tool and valuable normative source extraneous to the Constitution,[29] international law can thus assist in developing substantive approaches to the interpretation and realisation of housing rights in South African towns and cities.

South Africa signed the ICESCR on 3 October 1994.[30] In doing so, South Africa indicated its intention to become a party to and to be bound by the provisions of the Covenant. However, South Africa only ratified the ICESCR on 12 January 2015.[31] It entered into force in South Africa on 12 April 2015, in accordance with article 27(2) of the ICESCR.[32] Through its ratification of the ICESCR, South Africa has committed itself to the obligations, goals and standards of the ICESCR and is bound in international law to act in such a way that it does not infringe upon the spirit of the ICESCR.[33] This represents an important step forwards giving the Covenant greater force in South Africa.[34] The ratification of the Covenant necessitates aligning domestic housing rights legislation and policies with the obligations contained in the

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[28] S Liebenberg "The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa" (1995) 11 *South African Journal on Human Rights* 359 at 375.

[29] K Klare "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 157. In *S v Makwanyane* 1995 3 SA 391 (CC), para 302, the South African Constitutional Court held that the task of interpretation frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can only be done by "reference to a system of value extraneous to the constitutional text itself".

[30] In terms of s 231 of the 1996 Constitution, the "negotiating and signing of all international agreements is the responsibility of the national executive". Former President Nelson Mandela signed the Covenant during his first state visit to the United Nations headquarters in New York.

[31] UNGA *Depository Notification*, C.N.23.2015.TREATIES-IV.3, 12 January 2015.

[32] Art 27(2) of the ICESCR states that:

> For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

[33] D Petherbridge *The Role of International Law in the Interpretation of Socio-Economic Rights in South Africa* (2015) LLD dissertation, Stellenbosch University 79-83. See further D Petherbridge "South Africa's pending ratification of the international Covenant on Economic, Social and Cultural Rights: What are the implications?" <http://blogs.sun.ac.za/seraj/2012/11/06/ south-africas-pending-ratification-of-the-international-covenant-on-economic-social-and-cultural-rights-what-are-the-implications/> (accessed 2015-05-22).

[34] S Liebenberg "The potential of the International Covenant on Economic, Social and Cultural Rights as a tool for poverty reduction in South Africa" (2014) 15 *Economic and Social Rights Review* 3 at 5.

ICESCR.[35] It also requires South African courts align their housing jurisprudence with the norms, values and obligations set out in the ICESCR.[36]

South Africa's ratification of the ICESCR will have further effect due to the fact that South Africa is now subject to the reporting procedures carried out by the United Nations Committee on Economic, Social and Cultural Rights ('CESCR'), whereby the implementation of the rights protected in the ICESCR are monitored through the assessment of State reports.[37] In terms of the ICESCR, the effective monitoring of the realisation of the right to housing is an obligation of immediate effect.[38] These reporting procedures will thus not only promote housing rights accountability if properly adhered to, but will also provide a platform for international and national organisations to submit counter reports to the Committee during their review of the State report.[39] This would provide a voice for organisations at grassroots level to raise their concerns around the realisation of the right to adequate housing in South Africa and possibly influence the Committee's recommendations.[40]

In light of the theoretical insights gained in the previous chapter of this study, the critical analysis in the two following sections of this chapter is organised around two themes that address the primary research aim, while facilitating a better understanding of the potential interrelationship between the right to adequate housing and the right to the city. The first theme critically assesses the role of the international human right to adequate housing in article 11(1) of the ICESCR, and its correlating state obligations, in producing or developing adequate housing spaces in

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[35] L Chenwi and R Hardowar "Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol" (2010) 11 *Economic and Social Rights Review* 3 at 4.

[36] 4-5.

[37] 5.

[38] This system of supervision obliges South Africa to submit its initial report within two years after ratification to the Committee, detailing the manner in which it is implementing the rights protected under the ICESCR. Thereafter, South Africa will be obliged to submit periodic reports to the Committee every five years. See, CESCR General Comment 4, para 13.

[39] L Chenwi and R Hardowar "Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol" (2010) 11 *Economic and Social Rights Review* 3 at 4-5.

[40] After its assessment of such periodic reports, the Committee compiles Concluding Observations that contain recommendations that would assist South Africa in improving the implementation of the rights protected in the Covenant. See, L Chenwi and R Hardowar "Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol" (2010) 11 *ESR Review* 3 5.

urban areas. It also considers two general comments of the CESCR, which explain the obligations of states in the context of the right to adequate housing and forced evictions.[41]

4 3 Determining the normative content of the right to adequate housing

4 3 1 Introduction

The right to housing occupies a significant place in the international legal system of human rights protection.[42] While its legal foundation is enunciated in article 25(1) of the UDHR,[43] the definitive international legal expression of the right to housing is recognised in article 11(1) of the ICESCR:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Various international, subject-specific[44] and regional human rights instruments,[45] as well as declarations,[46] entrench the right to housing. In addition, the interpretative

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[41] CESCR General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant), UN Doc E/1992/23, 13 December 1991; and CESCR General Comment 7: The Right to Adequate Housing (Art 11(1): Forced Evictions), E/1998/22, 20 May 1997.

[42] S Leckie "Where it matters most: Making international human rights meaningful at the national level" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 3 at 3.

[43] The UDHR is a resolution of the UNGA that sets out human rights standards. The Declaration does not provide for the implementation of the designated human rights and does not represent a binding treaty. See further H Hannum "The status of the Universal Declaration of Human Rights in National and International Law" (1995/6) 25 *Georgia Journal of International and Comparative Law* 289-340.

[44] UNGA Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137 ('CSR'), art 21; UNGA International Covenant on Civil and Political Rights, 16 December 1996, 999 UNTS 171 ('ICCPR'), arts 12(1) and 17(1); UNGA International Convention on the Elimination of Racial Discrimination, 18 December 1979, 660 UNTA 195 ('CERD'), art 14(2)(h); UNGA International Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 ("CEDAW'), art 14(2)(h); and UNGA International Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 ('CRC'), art 27(3).

[45] Council of Europe ('CoE') European Social Charter (Revised), 3 May 1996, ETS 163 ('Revised ESC'), arts 19(4), 16, 31; CoE Additional Protocol to the European Social Charter, 5 May 1988, ETS 128 ('1988 Additional Protocol'), art 4; CoE European Convention on the Protection of Fundamental Freedoms, as amended by Protocols 11 and 14, 4 November 1950, ETS 5 ('ECHR'), arts 8(1); CoE Protocol 1 to the European Convention on the Protection of Fundamental Freedoms, 20 March 1952, ETS 9, art 1; CoE Protocol 4 to the European Convention on the Protection of Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention

statements of international treaty bodies, such as the United Nations Committee on Economic, Social and Cultural Rights ('CESCR'), provide substance to the housing provisions recognised in international law.

Despite an evolving body of jurisprudence on the right to housing across international, subject-specific and regional human rights systems,[47] assessments of current approaches to the legal interpretation of the right to housing suggest that its normative substance is insufficiently developed. Moreover, these assessments suggest that, in practice, the right to housing generally fails to provide actual relief from inadequate living conditions or to serve as an adequate platform for the

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and in the First Protocol thereto, 16 September 1963, ETS 46, art 2(1); Organization of American States ('OAS') Charter of the Organization of American States, 30 April 1948, 119 UNTS 3 (as amended) ('COAS'), art 31(k); Inter-American Commission on Human Rights ('IACHR') American Declaration of the Rights and Duties of Man, 2 May 1948, OAS Res XXX, 43 AJIL Supp 133 ('American Declaration'), arts 8, 11, 23; OAS Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, OAS TS 69, 28 ILM 156 ('Protocol of San Salvador'), art 11(1); and Organization of the African Union ('OAU') African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5 ('African Charter'), arts 14, 16 and 18(1).

[46] See, for instance, UNGA Declaration on Social Progress and Development, 11 December 1969, A/RES/2542 (XXIV), Part II, art 10; UNGA Declaration on the Rights of Disabled Persons, 9 December 1975, A/RES/3447 (XXX), art 9; UNGA Habitat: United Nations Conference on Human Settlements, 16 December 1976, A RES/31/109, s III(8); and UNGA Declaration on the Right to Development: Resolution, 4 December 1986, A/RES/41/128, art 8(1).

[47] See, generally, A Azuela, E Duhau & E Ortiz (eds) *Evictions and the Right to Housing: Experience from Canada, Chile, the Dominican Republic, South Africa, and South Korea* (1998); and S Leckie (ed) *National Perspectives on Housing Rights* (2003). See further, U Khaliq & R Churchill "The European Committee of Social Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 428-454; L Clements & A Simmons "European Court of Human Rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 409-427; TJ Melish "Inter-American Commission on Human Rights: Defending social rights through case-based petitions" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 339-371; TJ Melish "The Inter-American Court of Human Rights: Beyond Progressivity" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 372-408; DM Chirwa "African regional human rights system: The promise of recent jurisprudence on social rights" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323-338; S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 146-147, 177, 214-218, 220-222, 365-366, 405-442, 465-466; and J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 15-93.

transformation of housing patterns and the social, economic and political goods it produces in urban areas.[48]

This section analyses the normative content of the right to housing under international law with reference to the most prominent sources in order to determine to what extent it can guide the development of adequate housing environments that can facilitate spatial and social transformation in urban areas.

4 3 2 The right to housing as part of a broader right to an adequate standard of living

Article 25(1) of the UDHR represents the origin of the right to housing in international law.[49] The concept of freedom from want in the UDHR gives rise to the right to an adequate standard of living in article 25(1),[50] which enshrines the right to housing as an element of a broader right to an adequate standard of living:[51]

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

Article 25(1) of the UDHR has since been supplemented with ensuing guarantees of a right to housing, as a component of the right to an adequate standard of living, in

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[48] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 120-121.

[49] For a discussion of the origins of the right to housing in the UDHR see JH Hulchanski & S Leckie *The Human Right to Adequate Housing 1945-1999: Chronology of United Nations Activity* (2000) 3-5; M Craven "History, pre-history and the right to housing in international law" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 43 at 49-51; and A Eide "Adequate standard of living" in D Moeckli, S Shah & S Sivakumaran (eds) *International Human Rights Law* (2010) 223 at 233-234.

[50] The Preamble to the UDHR states:

> Whereas disregard and contempt for human rights have resulted in barbarous acts, which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

See further A Eide "Adequate standard of living" in D Moeckli, S Shah & S Sivakumaran (eds) *International Human Rights Law* (2010) 233 at 233-234.

[51] Craven posits that the right to housing was afforded a subordinate position within art 25(1) of the UDHR due to the fact that the drafters of the UDHR believed that the realisation of the right was contingent upon the economic or social development of a particular state. They also assumed that housing rights would be protected through the rights to privacy and property. See M Craven "History, pre-history and the right to housing in international law" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 43 at 51.

article 11(1) of the ICESCR and article 27(1) of the CRC.[52] The textual resemblance between the UDHR and the ICESCR can be attributed to their drafting history[53] and to the philosophical and political influence of the Declaration on the structure and content of article 11(1) of the Covenant.[54] Given the linkages between the UDHR and the ICESCR, legal interpretations of the right to housing in international law should promote a broad understanding of the right by exploring how it contributes to the realisation of an adequate standard of living.

4 3 3 The multifaceted and interrelated nature of housing

Article 11(1) of the ICESCR represents the definitive legal expression of the international human right to housing.[55] Due to its open-ended textual formulation, the CESCR has adopted two distinct General Comments[56] on the right to adequate housing[57] and forced evictions,[58] which reflect the Committee's understanding of the nature of the right to housing and its corresponding state obligations under the Covenant.[59] Despite their non-binding status,[60] these General Comments represent

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[52] Art 27(1) of the CRC recognises the right of every child to a "standard of living adequate for the child's physical, mental, spiritual, moral and social development".

[53] M Craven "History, pre-history and the right to housing in international law" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 43 at 49-51.

[54] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 17.

[55] United Nations Committee on Economic Social and Cultural Rights ('CESCR') General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant), 13 December 1991, UN Doc E/1992/23 ('General Comment 4'), para 1. See further Centre on Housing Rights and Evictions ('COHRE') *Sources 4: Legal Resources for Housing Rights: International and National Standards* 2 ed (2000) 73.

[56] The CESCR adopts General Comments to aid and encourage member states to the ICESCR to strive for the comprehensive realisation of economic, social and cultural rights at the international and domestic levels. See E Riedel "Economic, social and cultural rights" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 rev ed (2012) 131 at 143.

[57] CESCR General Comment 4.

[58] CESCR General Comment 7: Forced Evictions and the Right to Adequate Housing, 29 May 1997, UN Doc E/1998/22 ('General Comment 7').

[59] E Riedel "Economic, social and cultural rights" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 rev ed (2012) 131 at 145. Craven explains that the CESCR's concern with the right to adequate housing is largely due to the active participation of activists and non-profit organisations concerned with housing rights. See M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 329. See further S Leckie "The UN Committee on Economic, Social and Cultural Rights and the right to adequate housing: Towards an appropriate approach" (1989) 11 *Human Rights Quarterly* 522 at 534-535.

authoritative interpretations of the right to housing under the ICESCR and have been highly influential in generating international consensus on the nature, content and scope of the right to adequate housing.[61] Additionally, the CESCR advances the normative content of the right to housing through its Concluding Observations on state reports.[62] Accordingly, the interpretative guidance provided by the CESCR through its General Comments and Concluding Observations are considered instrumental in developing the normative parameters of the right to housing.

The CESCR's significant work in elaborating on the meaning of the vaguely worded requirements of article 11(1) of the Covenant evinces a broad and multifaceted understanding of the right to housing.[63] The Committee recognises that the right to housing represents a cornerstone right that exemplifies the indivisible and interdependent nature of all human rights.[64] Stated differently, the right to adequate housing is "integrally linked to other human rights and fundamental freedoms"[65] underlying the Covenant and is of central importance to the enjoyment of all

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[60] The General Comments of the CESCR are considered soft law and are not binding in South Africa. They do, however, represent interpretative tools that South African courts can utilise in terms of s 39(1)(b) of the Constitution. See, S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 102.

[61] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 20.

[62] Concluding Observations on state reports are issued in terms of the reporting procedures provided for in arts 16 to 25 of the ICESCR and aim to encourage states to remedy their non-compliance with the provisions of the ICESCR at will, rather than insisting on a violations approach. A process of constructive dialogue during which specific state violations of the Covenant are identified, and the Committee issues suggestions and recommendations, usually precedes the issuing of Concluding Observations by the CESCR. The Concluding Observations of the Committee are not legally binding, but are considered influential in assessing state compliance with obligations raised under the Covenant. See E Riedel "Economic, social and cultural rights" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 rev ed (2012) 131 at 144-145; and M O'Flaherty "The concluding observations of United Nations Human Rights treaty bodies" (2006) 6 *Human Rights Law Review* 27 at 32-33.

[63] This implies that concepts in art 11(1) of the ICESCR that are closely associated with the right, such as the concept of home, must also be afforded a generous meeting. See, CESCR General Comment 4, paras 6-7.

[64] CESCR General Comment 4, para 7. For a general discussion of interdependence and permeability of human rights, see C Scott "The interdependence and permeability of human rights norms: Towards a partial fusion of the international covenants on human rights" (1989) 27 *Osgoode Hall Law Journal* 769-878; and D Whelan *Untangling the Indivisibility, Interdependency, and Interrelatedness of Human Rights* (2008) 2.

[65] CESCR General Comment 4, para 7.

economic, social and cultural rights.[66] The CESCR recently reaffirmed the importance of the indivisible and interdependent nature of the right to housing for its interpretation in *I D G v Spain*,[67] which is the first individual complaint considered by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[68]

Accordingly, the right to housing should not be understood in isolation from the other human rights and fundamental freedoms contained in the ICESCR and the International Covenant on Civil and Political Rights ('ICCPR').[69] For instance, the rights to freedom of expression,[70] association,[71] residence,[72] and participation in public decision-making processes[73] are all considered vital to ensure the full enjoyment of the right to adequate housing.[74]

Additionally, the right to housing should be understood as encompassing more than access to physical shelter, basic services or an economic commodity.[75] In particular, the CESCR is of the view that the right to housing is universally applicable

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[66] Para 1.

[67] *I D G v Spain*, CESCR, 13 October 2015, Communication No 2/2014 ('*IDG v Spain*'), para 11.1.

[68] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008), GA Res A/RES/63/117 ('OP-ICESCR'). The OP-ICESRC entered into force on 5 May 2013 and adds considerable impetus to the protection and promotion of economic, social and cultural rights, as well as the mandate of the CESCR. It provides for an individual complaints and inquiry procedure before the CESCR, which allows individuals or groups to submit complaints directly to the Committee, or for complaints or communications to be submitted on their behalf. On the value of the OP-ICESCR for on the interpretation, implementation and realisation of the right to adequate housing as contained in art 11(1) of the ICESCR, see CESCR *Towards an Optional Protocol to the ICESCR* (1992), A/CONF.157/PC/62/Add.5, Annex 211, paras 93-94. For a discussion of the application of the OP-ICESR see L Chenwi "An appraisal of international law mechanisms for litigating socio-economic rights, with a particular focus on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the African Commission and Court" (2011) 22 *Stellenbosch Law Review* 683 at 684.

[69] CESCR General Comment 4, para 9.

[70] Art 19(2) of the ICCPR.

[71] Art 22(1).

[72] Art 12(1).

[73] Art 25.

[74] CESCR General Comment 4, para 9. In addition, the rights to work (art 6), minimum remuneration (art 7) and social security (art 9) in the ICESCR can influence the degree to which the right to adequate housing is enjoyed. See M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 330.

[75] CESCR General Comment 4, para 7.

and denotes the right to live free from any form of discrimination[76] in security, peace and dignity.[77] This implies that both households and individuals are entitled to adequate housing, regardless of their age, economic status, political or religious affiliation, social origin or ability to access property rights.[78] In line with this broad and inclusive interpretative approach, the Special Rapporteur on Adequate Housing[79] recently affirmed the transformational qualities of the rights to housing and to non-discrimination in an urban context, due to their ability to create achievable goals and a framework of accountability for the processes and practices through which these goals can be achieved.[80]

The African Charter on Human and Peoples' Rights[81] ('African Charter') is distinctive in that its drafters were mandated to have regard to the values of African civilisations and their needs in formulating the African Charter.[82] By recognising economic, social and cultural rights as equal to civil and political rights, the African Charter goes further than any other regional human rights instrument in recognising

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[76] The right to non-discrimination is recognised in art 2(2) of the ICESCR:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[77] CESCR General Comment 4, para 7.

[78] Para 7.

[79] Ms Leilani Farha is the current Special Rapporteur on the Right to Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Non-Discrimination in this Context.

[80] See UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to An Adequate Standard of Living and the Right to Non-Discrimination in this Context*, 4 August 2015, UN Doc A/70/270, para 12.

[81] OAU African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc CAB/LEG/67/3 Rev5 ('African Charter'). The African Charter came into force in 1986 and has been ratified by all member states of the African Union. The African Charter establishes an eleven member independent Commission, whose mandate includes a communication procedure that examines complaints from individuals, nongovernmental organisations and other petitioners. The Charter also provides for a reporting procedure, whereby reports presented by states parties are examined. See further R Murrat & S Wheatley "Groups and the African Charter on Human and Peoples' Rights" (2003) 25 *Human Rights Quarterly* 213 at 216-217.

[82] M Mutua "The Banjul Charter and the African fingerprint: An evaluation of the language of duties" (1995) 35 *Virginia Journal of International Law* 339 at 339; and E Kodjo "The African Charter on Human and Peoples' Rights" (1990) 11 *Human Rights Law Journal* 271 at 274.

and advancing the interrelated nature of all human rights.[83] The Preamble to the African Charter recognises the indivisibility of rights.[84] The approach of the African Commission on Human and Peoples' Rights[85] ('ACHPR') to interpreting the African Charter reinforces the indivisible nature of rights and considers communications brought before it in light of all relevant facts.[86] The Commission's interpretation of the Charter provisions as overlapping and mutually reinforcing is appropriate, given that "the Charter itself is of an integrated nature", which means that all the substantive standards are interdependent and permeate each other.[87]

The African Charter does not contain an express right to housing. However, the African Commission has derived a right to housing as arising from a combination of the right to property,[88] the right to the highest attainable standard of physical and mental health,[89] and the right to the protection of the family as the "natural unit and basis of society".[90] These provisions ground the communal and social vision of housing that the ACHPR has developed.[91]

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[83] The African Charter prescribes the same enforcement mechanisms for all the rights and recognises not only individual rights but also peoples' rights. See C Heyns & M Killander *International Human Rights Law* (2010) 483.

[84] The Preamble to the African Charter states that that "civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality" and that the "satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

[85] African Commission on Human and Peoples' Rights is a quasi-judicial body tasked with promoting, protecting and interpreting the rights in the African Charter. The Commission also considers individual complaints of violations of the Charter. See further S Yeshanew "Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: Progress and perspectives" (2011) 11 *African Human Rights Law Journal* 317 at 318-319.

[86] DM Chirwa "African regional human rights system: The promise of recent jurisprudence on social right" in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 323 at 324.

[87] F Coomans "Ogoni case before the African Commission on Human and Peoples' Rights" (2003) 52 *International and Comparative Law Quarterly* 749 at 751.

[88] Art 14 of the African Charter.

[89] Art 16.

[90] Art 18 of the African Charter. See also *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, African Commission on Human and Peoples' Rights, Decision on merits, Communication no 155/96, 27 October 2001 ('*SERAC v Nigeria*'), para 60.

[91] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 181.

In *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* ('*SERAC v Nigeria*'), [92] the complainants alleged that the state was responsible for the violation of the rights of the Ogoni people in the Niger Delta, due to the state-led attacks that resulted in the destruction of inhabitants homes and villages. Although the African Commission's reasoning on the right to housing is not lengthy, the destruction of housing and the related human rights harms arising from the actions of the state are central to this judgment.[93] The ACHPR found that the state had:

> [D]estroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten, and in some cases, shot and killed innocent citizens who have attempted to return and rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter.[94]

Even though neither shelter nor housing appears as a separate right in the African Charter, the Commission held that, taken together, the right to the best attainable state of physical and mental health, the right to property and the right to the protection of the family under the Charter "forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected".[95]

4 3 4 Identifying factors that determine the adequacy of housing

The CESCR requires the reference to housing in article 11(1) of the ICESCR to be read as "adequate housing".[96] In this regard, the Committee identifies seven essential elements that should be present in order for housing to be considered adequate for purposes of the Covenant.[97] These seven essential elements are legal

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[92] Decision on merits, Communication no 155/96, 27 October 2001.

[93] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 77.

[94] *SERAC v Nigeria*, para 62.

[95] Para 62.

[96] CESCR General Comment 4, para 7.

[97] In turn, each of the individual elements contain a specific set of sub-elements generated by the CESCR that outline procedures, policy approaches and regulations that states should implement in order to fulfil their obligations in relation to the right. For a discussion of each of these essential elements and their sub-elements, as well as the uncritical manner in which these elements are often adopted in analyses of the right to housing, see J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 20-29.

security of tenure; [98] the availability of services, materials, facilities and infrastructure; [99] affordability; [100] habitability; [101] accessibility; [102] location; [103] and cultural adequacy.[104] In turn, each of the individual elements contain a specific set of sub-elements generated by the CESCR, which outline procedures, policy-approaches and regulations that states should implement in order to fulfil their obligations in relation to the right.[105] The approach of the Committee in General Comment 4 therefore suggests that the goal of adequate housing can be achieved through the realisation of the seven enumerated elements.[106] Moreover, the enumeration of these elements is significant, as they are intended to guide states on practical ways to implement the right to adequate housing in a manner that gives effect to its normative values and substantive goals.

However, apart from acknowledging that the adequacy of housing is determined "in part by social, economic, cultural, climatic, ecological and other factors",[107] General Comment 4 does not consider the meaning of the concept of 'adequacy'. The Committee's reluctance to define the term adequacy is understandable, given the vagueness and complexity of the concept. Hohmann explains that although "adequacy equates to the quality of being able to meet a need satisfactorily", this particular understanding of adequacy does little to clarify the applicable standard. The problem is further complicated by the fact that adequacy does not have intrinsically positive correlations.[108] In this regard, Kenna agrees that the "adequacy level of housing may act as a floor or as a ceiling in the realization of States' obligations".[109] However, the absence of a clear understanding of what adequacy means could weaken the normative parameters provided by General Comment 4 for

[98] CESCR General Comment 4, para 8(a).
[99] Para 8(b).
[100] Para 8(c).
[101] Para 8(d).
[102] Para 8(e).
[103] Para 8(f).
[104] Para 8(g).
[105] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.
[106] 21.
[107] CESCR General Comment 4 (1991), para 8.
[108] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.
[109] P Kenna "Adequate housing in international and European human rights law: A panoramic view" (2012) 7 *International Journal of Land Law and Agricultural Science* 4 at 5.

the interpretation of the right to adequate housing. In this regard, Hohmann explains that, contrary to what the CESCR's interpretative approach seems to suggest, a lack of attention to what adequacy means affects its ability to act as an effective standard against which the provision of the seven essential elements of adequate housing can be assessed.[110]

The CESCR has focused a large measure of its attention on the first requirement affecting the adequacy of housing, tenure security, due to the devastating effects of forced or arbitrary evictions.[111] Both General Comments 4 and 7 set out state obligations with regard to evictions and legal security of tenure is considered one of the cornerstones of the right to housing, as people who are subject to the threat of arbitrary eviction cannot be said to enjoy housing as a right.[112] General Comment 4 therefore states that all persons should "possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".[113]

The CESCR recognises that forced eviction can only be undertaken in line with the provisions of the Covenant and that this immediate duty on the state operates regardless of any socio-economic or development issues experienced by the state.[114] The Committee also confirms that the positive obligations of states to protect against forced evictions extend to controlling the actions of private persons and bodies.[115] Furthermore, when evictions are carried out, the CESCR asserts that they must not occur in a discriminatory fashion,[116] or as a punitive measure.[117] Evictions must always be a last resort and carried out with minimal use of force.[118] Moreover, evictions must be proportionate and all due process and procedural safeguards detailed in the General Comments must be followed scrupulously.[119] Finally, General Comment 7 stresses that if forced evictions are undertaken, they

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[110] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.
[111] CESCR General Comment 4 (1991), para 18; and CESCR General Comment 7 (1997), para 1.
[112] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.
[113] CESCR General Comment 4 (1991), para 8(a).
[114] Para 8.
[115] Para 9.
[116] CESCR General Comment 7 (1997), para 10.
[117] Para 12.
[118] Para 13.
[119] Paras 14-15.

should not otherwise affect an individual's human rights, particularly by rendering persons homeless.[120]

A key component of adequate housing that concerns the social goods that flow through the right to housing is the availability of services, materials, facilities and infrastructure.[121] Hohmann suggests that, although the list of facilities set out by the CESCR could be seen as examples of facilities that contribute to health, security, comfort and nutrition, it is preferable to regard them as an enumerated list of minimum requirements.[122] She explains that such an approach is consistent with the view that the right to adequate housing requires more than access to shelter and is in line with the minimum core approach adopted by the Committee.[123] Matthew Craven argues, however, that due to the fact that the nature of state obligations under the Covenant are subject to progressive realisation, it is more likely that the Committee views the provision of these services and amenities as long-term policy aims.[124]

Affordability, the CESCR's third element, has clear implications for the ability of the urban poor to access the right to adequate housing. Scott Leckie asserts that, across cultures, housing represents not only "the largest proportion of household expenditure", but also a "household's largest asset".[125] The financial risks and benefits attached to a home are accordingly of great significance to all people. The CESCR therefore recognises that the financial costs associated with housing should

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[120] Para 16.

[121] CESCR General Comment 4 (1991), para 8(b) states:

> An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right … should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

[122] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 23.

[123] 23.

[124] M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 345. Hohmann rejects this interpretation and argues that coupling required minimum services, materials, facilities and infrastructure with future goals is problematic from both a conceptual and practical perspective. She explains that while the specific content of the right is clarified, the possible enjoyment of the right simultaneously recedes into the future and becomes contingent upon the future policy decisions of individual states. See J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 23-24.

[125] S Leckie "Where is matters most: Making international housing rights meaningful at the national level" in S Leckie (ed) *National Perspectives on Housing Rights* (2003) 3 at 7.

not threaten or compromise a household or individual's ability to satisfy other basic needs.[126]

The Committee considers this element so vital that it has specified in great detail how it should be achieved. Firstly, the CESCR states that housing subsidies should be put in place to assist those who are unable to afford housing and that housing finance should adequately reflect housing needs.[127] Secondly, it states that tenants should be protected from unreasonable rent levels or increases in both the public and private rental markets.[128] Thirdly, it notes that where natural materials are the main source used in construction, the state should ensure these materials remain affordable for this purpose.[129] Hohmann questions whether the Committee oversteps its proper role by setting out these specific affordability measures. She explains that outlining the means through which affordability should be ensured is not only overly prescriptive, but has the potential to stifle novel and creative approaches to addressing the affordability component of adequate housing.[130] Moreover, she questions whether the Committee is institutionally competent to determine whether complex policies aimed at ensuring affordability in one state could work in another.[131]

The CESCR's definition of 'habitability', which is the fourth element of adequate housing, focuses largely on the physical safety of the dwelling and its occupants. It requires that a dwelling must provide adequate space, protect against excessive environmental factors and other threats to health.[132] In order to address this element, the CESCR suggests that states adopt legislative standards and regulations.[133]

Craven points out, however, that the overregulation of housing standards can in some circumstances have a negative impact on the right to housing. He argues that although regulation is appropriate where construction firms are operating in the private sector for profit, this is not necessarily the case where local communities or

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[126] CESCR General Comment 4 (1991), para 8(c).

[127] Para 8(c).

[128] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 24.

[129] CESCR General Comment 4 (1991), para 8(c).

[130] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 25.

[131] 25.

[132] CESCR General Comment 4 (1991), para 8(d). In this regard, the Committee invokes the World Health Organisation's Health Principles of Housing, which illustrate that unsafe, unsanitary and inadequate housing is "invariably associated with higher mortality and morbidity rates".

[133] Para 8(d).

individuals build housing themselves.[134] In these cases, overly stringent regulation can hamper the ability and will of people to build their own homes and can contribute to a continued shortage of housing.[135]

Hohmann agrees that this is especially true where regulation designed for the private sector impacts on the informal sector and results in evictions and demolitions that render previously housed individuals homeless.[136] She explains that the reason for this is that regulation aimed at making housing safer or more habitable often fails to protect inhabitants' whose housing lies in the informal sector, which by its nature, tends to be excluded by the law.[137] The Committee's approach to habitability has been criticised for being too focused on external, physical safety. As Leilani Farha, the current Special Rapporteur on Adequate Housing, notes the CESCR fails to consider "the mental health of inhabitants and the related dangers" that might threaten the physical safety of the occupants, such as domestic violence.[138] Although threats within the family are difficult to address through human rights law, because of its focus on the public domain and on state action, these hidden issues associated with habitability still significantly affect women and children.[139]

Concerning accessibility, the fifth element of adequate housing, there are two aspects of the CESCR's interpretative statements that must be considered. The first relates to the accessibility of housing for disadvantaged groups, which include the elderly; children; people with physical disabilities; terminally and mentally ill persons; people with persistent medical conditions; and victims of natural disasters or those living in disaster-prone areas.[140] In this regard, the Committee has stated that these groups "should be ensured some degree of priority consideration in the housing sphere".[141] Although the CESCR also contemplates "other groups", the enumeration

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[134] M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 345.

[135] 346.

[136] See, for example, the case of the Wolwerivier community discussed in section 1 1 of this study.

[137] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 25.

[138] L Farha "Is there a woman in the house? Re/conceiving the right to housing" (2002) 14 *Canadian Journal of Women and the Law* 118 at 129.

[139] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 26.

[140] CESCR General Comment 4 (1991), para 8(e).

[141] Para 8(e).

of a list has led to strong dissatisfaction and criticism for excluding, for example, women.[142]

This aspect of accessibility is clearly related to notions of non-discrimination in the provision of the right to housing.[143] Non-discrimination is required by article 2(2) of the ICESCR,[144] while article 3 affirms gender equality in the enjoyment of the Covenant's rights.[145] The Committee has, however, now addressed issues of equality in access to housing in General Comments 16[146] and 20,[147] in which it sets out positive and negative state obligations to ensure the equal realisation of the ICESCR's rights for all.[148] General Comment 16 addresses some of the criticisms for the earlier exclusion of women as a specific group, while General Comment 20 links access to housing, water and sanitation to overcoming substantive discrimination for women and other marginalised groups, such as informal dwellers.[149] According to Hohmann, these General Comments are evidence that the Committee's understanding of the interconnections among land, housing and substantive equality have deepened measurably over the years.[150]

The second dimension of accessibility relates to access to land. In this respect, the Committee has advocated for increased "access to land by landless or impoverished segments of society" as a central policy goal.[151] The CESCR has also explained that discernible governmental obligations need to be developed that are aimed at substantiating the right of everyone "to a secure place to live in peace and

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[142] G Paglione "Domestic violence and housing rights: A reinterpretation of the right to housing" (2006) 28 *Human Rights Quarterly* 120-147.

[143] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 26.

[144] Art 2(2) of the ICESCR states:

> States Parties to the present Covenant guarantee that the right enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[145] Art 3 of the ICESCR states:

> The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

[146] CESCR General Comment 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the Covenant), 11 August 2005, E/C.12/2005/4.

[147] CESCR General Comment 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, para 2, of the Covenant), 2 July 2009, E/C.12/GC/20.

[148] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 26.

[149] CESCR General Comment 20, para 8.

[150] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 26-27.

[151] CESCR General Comment 4 (1991), para 8(e).

dignity", which includes "access to land as an entitlement".[152] This statement raises the question whether a meaningful line can be drawn between a right to housing and a right to land.[153] Hohmann asserts that the CESCR's broad interpretation of the right to adequate housing does not only encompass a physical dwelling, but also all the conditions that make it an enduring place of safety and security.[154] She questions, however, how far these conditions can be secured without significant land reform in many states and without addressing some difficult questions concerning access to land.[155] This significant aspect of the right to adequate housing remains largely unexplored by the Committee.

The sixth element of the right to adequate housing refers to the "location" of housing. The CESCR embraces this social aspect of housing by recognising that a spacious, safe and well-appointed house is inadequate if it is constructed where the inhabitants are isolated from livelihood and schooling opportunities, health services or their traditional community ties.[156] Location, as a component of adequate housing is particularly important in cases where people are relocated to and resettled in other areas, such as in cases where alternative accommodation is provided to evictees. This is because the alternative accommodation is frequently built at a significant distance from the original location of peoples' homes and pre-existing communities are often fragmented and isolated from their livelihoods and social networks.[157] Furthermore, the location element of adequate housing is not met if the housing provided by the state is on or near a dangerous or polluted site, which threatens the health of the inhabitants.[158] The resettlement of communities to such a site would clearly amount to a violation of the right to housing.[159]

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[152] Para 8(e).

[153] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 27.

[154] 27.

[155] 27.

[156] CESCR General Comment 4 (1991), para 8(f).

[157] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 27.

[158] CESCR General Comment 4 (1991), para 8(f).

[159] The failure to notify communities of the potential health risks associated with resettlement could also represent a failure to respect the right to housing. See, for example, the decisions of the European Court of Human Rights ('ECtHR') in *Öneryildiz v Turkey*, Application No 48939/99, ECtHR GC, Judgment, 30 November 2004 (2005) 41 EHRR 20; and *Budayeva v Russia*, Application No 15339/02, ECtHR, Judgment, 20 March 2008.

Finally, according to General Comment 4, the element of "cultural adequacy" is intended to ensure that "the cultural dimensions of housing are not sacrificed" and to "enable the expression of cultural identity and diversity of housing".[160] In this regard, the CESCR states that the requirement of cultural adequacy may not be used as an excuse to avoid the appropriate modernisation of housing or to exclude the use of new technologies in the construction of housing.[161]

Devereux notes that although the notion of cultural adequacy has been used to import the negative implications of cultural relativism into the right to housing, the flexibility of the term 'adequate' permits housing rights standards to develop in parallel to a given society's views of what is desirable or appropriate in the material infrastructure of housing.[162] Moreover, this does not amount to a rejection of the universality of human rights standards.[163] Hohmann supports this position and explains that the notion of the universality of a right to housing does not require every house to be the same, just as the notion of the universality of the right to privacy will be met differently in different cultural contexts.[164] Therefore, even though the methods of fulfilling the right to housing may vary, the standard of adequate housing can remain constant.[165] Craven explains that a degree of cultural specificity in the provision of adequate housing is necessary for the right's realisation, as the adequacy of housing is highly dependent on climate, family and societal structures and faith and religious requirements, among other culturally particular variables.[166] He notes that "traditional housing in each country often reflects the form and nature of social interactions".[167]

The implication is that state-issued standardised housing is unlikely to fulfil the requirement of cultural adequacy, and may even violate it, given the diversity of human cultures, needs and experiences within groups and communities.[168] Furthermore, the requirement of cultural adequacy moves the right to housing from

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[160] CESCR General Comment 4 (1991), para 8(g).

[161] Para 8(g).

[162] AM Devereux "Australia and the right to adequate housing" (1991) 20 *Federal Law Review* 223 at 225.

[163] 225.

[164] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 28.

[165] W Osiatynski *Human Rights and their Limits* (2009) 144.

[166] M Craven *The International Covenant on Economic, Social and Cultural Rights* (1998) 347.

[167] 347.

[168] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2012) 29.

the idea of an individual right to the idea of a communal right.[169] Hohmann argues that, given the Committee's role as a monitoring body and the guiding function of the General Comments in structuring state housing policies, the CESCR's mandate has always been about housing in the aggregate. She explains that while the ICESCR contains individual human rights, the work of the Committee focuses not only on the individual, but also on the social and societal conditions that make these rights realisable.[170] Thus, the CESCR's approach here recognises that housing was not enshrined in the international human rights treaties as an isolated asset, but in recognition of its role in fostering an adequate standard of living within a society.

Due to the highly influential nature of the CESCR's General Comments, its interpretative statements have a significant philosophical and practical impact on the interpretation of the right to housing in subject-specific and regional human rights forums. Monitoring bodies and courts often begin their analysis of the right to housing by invoking or stressing the similarity of their approach to that of the CESCR. The interpretative approach of the European Committee of Social Rights ('ECSR') to provisions of the European Social Charter[171] and the Revised ESC[172] takes into account the similarly worded provisions of other human rights instruments, as well as the views of various monitoring bodies and courts.[173] In particular, the ECSR invokes the CESCR's interpretation of the right to adequate housing in article 11(1) of the ICESCR to promote the congruence of housing rights standards

[169] 29.

[170] 29.

[171] CoE European Social Charter, 18 October 1961, ETS 35.

[172] The Revised ESCR is an independent instrument from the original European Social Charter, which it does not replace or amend. The states that are parties to the 1961 Charter are, nevertheless, encouraged to accede to the newer instrument. Upon ratification, their substantive obligations under the 1996 Charter absorb their commitments under the earlier instrument. The Revised ESC enriches the original list of rights protected under the European Social Charter. It includes the 19 original guarantees listed in the 1961 Charter, sometimes with certain reformulations (arts 1-19 in Part II of the Revised ESC). The Revised ESC adds to this list the four guarantees contained in the 1988 Additional Protocol, which enabled the first minor update of the rights in the Charter (arts 20-23). Arts 24-31 complete this list by adding seven rights, including the right to protection against poverty and social exclusion (art 30) and the right to housing, as a non-core right, in art 31. This places the Revised ESC at the forefront of human rights instruments protecting the right to housing in international law. See further O de Schutter "The European Social Charter" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 rev ed (2012) 463 at 465.

[173] O de Schutter "The European Social Charter" in C Krause & M Scheinin (eds) *International Protection of Human Rights: A Textbook* 2 rev ed (2012) 463, 465.

between the Revised ESC and the ICESCR.[174] The ECSR has also affirmed that it "attaches great importance" to the CESCR's General Comments 4 and 7. Additionally, the ECSR has acknowledged that its interpretative work has benefited greatly from the reports of the United Nations Special Rapporteur on the Right to Adequate Housing.[175]

The ECSR monitors state compliance under the European Social Charter and the Revised ESCR on the basis of annual national reports.[176] The Committee interprets the rights in the Charters as imposing certain obligations.[177] Housing rights and matters related to housing feature centrally in several of the complaints received by the ECSR. Accordingly, the Committee's work has made important contributions to the interpretation and realisation of housing rights under the Revised ESC, by

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[174] Secretariat of the Social and Economic Committee of the Council of Europe *Digest of the Case Law of the ESCR* (2008) 348. The ECSR illustrated the value of adopting such a dynamic approach to the interpretation of the rights in the Revised ESC in the case of *International Federation of Human Rights Leagues (FIDH) v France*, where the Committee set aside an explicit restriction on the application of the Charter's scope to the nationals of states, in line with the value of human dignity and due to the absence of a similar restriction in the CRC. See ECSR *International Federation of Human Rights Leagues (FIDH) v France*, Complaint No 14/2003, Decision on merits, 8 September 2004 ('*FIDH v France*'), paras 26-32.

[175] ECSR *International Movement ADT Fourth World v France*, Complaint 33/2006, ESCR, Decision on merits, 5 December 2007 ('*ADT v France*'), para 71; and ECSR *European Federation of National Organisations Working with the Homeless (FEANTSA) v France*, Complaint 39/2006, ESCR, Decision on merits, 5 December 2007 ('*FEANTSA v France*'), para 67.

[176] State compliance is also assessed through the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints ('Protocol for Collective Complaints'), which provides a collective complaints mechanism for non-governmental organisations and organisations of employers and employees. It allows for a declaration that certain state laws and policies are not compatible with the commitments under the Charter, without the requirement of having to exhaust local remedies. See, CoE Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9 November 1995, ETS 158. See further R Brillat "A new protocol to the European Social Charter providing for collective complaints" (1996) 1 *European Human Rights Law Review* 53-62; and R Churchill & U Khaliq "The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?" (2004) 15 *European Journal of International Law* 417-456.

[177] The ECSR's working arrangement is similar to the methodology of the CESCR. However, while the CESCR observes, expresses concerns and makes recommendations regarding the interpretation and realisation of state obligations under the ICESCR, the ECSR makes declarations of conformity and non-conformity regarding state action. This is regarded as a more legal process, as opposed to the policy development role of the CESCR. See C O'Cinneide "Social rights and the European Social Charter: New challenges and fresh opportunities" in O de Schutter (ed) *The European Social Charter: A Social Constitution for Europe* (2010) 35 at 39.

developing a consistent and coherent jurisprudence on housing rights.[178] Determinations of the right to housing are considered fundamental to advancing the normative content of the right to housing, as well as the development of social rights in Europe.[179]

The interpretative work of the ECSR elaborates on the factors affecting the adequacy of housing. For instance, the ECSR recognises a positive obligation on the state to guarantee housing of an adequate quality for all.[180] This obligation is based on article 31 of the Revised ESC, which recognises an express right to housing, as a non-core right.[181] In particular, the standard of protection in article 31(1) requires states to guarantee the right to housing for everyone and promote access to adequate housing. Significantly, the Committee requires states to define 'adequate housing' in domestic law.[182]

In order to give effect to the obligation to promote access to adequate housing, states must ensure that housing is not overcrowded. In particular, the Committee recognises that housing should be of an adequate size for the number of occupants and for the structure of the households that lives there.[183] States must also guarantee healthy housing, which entails providing access to housing with essential

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[178] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 51.

[179] 52.

[180] ECSR *Conclusions on France* (2003).

[181] Art 31 states:

> With a view to ensuring the effective exercise of the right to housing, the parties undertake to take measures designed:
> (1) to promote access to housing of an acceptable standard;
> (2) to prevent and reduce homelessness with a view to its gradual elimination;
> (3) to make the price of housing accessible to those without adequate resources.

It is important to note that not all states of the CoE have accepted legal obligations under art 31 of the RESC. As at July 2016, only twelve states have accepted legal obligations under arts 31(1) and (2) and nine states have accepted legal obligations under art 31(3). See CoE *Acceptance of Provisions of the Revised European Social Charter (1996)* (2010) <https://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevJuly2012_en.pdf> (accessed 22-05-2016).

[182] The conclusions of the ECSR in monitoring state obligations under art 31 thus demonstrate the application of a new set of benchmarks to national housing law and policy. See Secretariat of the Social and Economic Committee of the Council of Europe *Digest of the Case Law of the ESCR* (2008) 342.

[183] ECSR *Conclusions on France* (2003).

services, such as water,[184] heating, sanitation and electricity. Additionally, states must prevent the interruption of access to essential services.[185]

Regarding the affordability of housing, the ECSR recognises that article 31(3) of the Revised ESC requires states to make housing accessible to those without adequate resources by regulating the financial costs of housing.[186] This obligation entails ensuring that the average cost of housing corresponds to average income and that the burden on the most disadvantaged households is compatible with their resources.[187] The ECSR also recognises that states must take the necessary measures to ensure the construction of sufficient housing, especially social housing.[188] In particular, the Committee recognises that the provision of social housing must target the most vulnerable households.[189] Additionally, the Committee adopts the view that the provision of housing benefits should prioritise people in low-income groups, as well as disadvantaged groups.[190]

The ECSR set out its interpretative approach to the realisation of housing rights under the Revised ESCR in two early, yet important collective complaints.[191] *International Movement ADT Fourth World v France*[192] ('*ADT v France*') and *European Federation of Organisations working with the Homeless v France*[193] ('*FEANTSA v France*') challenged state housing policies and their implementation in

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[184] In *European Roma Rights Centre v Portugal* ('*ERRC v Portugal*'), para 36, the ECSR held that the right to adequate housing included a right to fresh water sources.

[185] ECSR *Conclusions on France* (2003).

[186] In terms of art 31(3), the ECSR requires states to ensure an adequate supply of affordable housing. The Committee considers housing to be affordable when a household can (a) afford to pay the initial costs (deposit and advance rent) of housing; (b) pay the current rent or costs (which includes utilities, maintenance and management charges) on a long-term basis; and (c) still maintain a minimum standard of living "as defined by the society in which the household is located". See Secretariat of the Social and Economic Committee of the Council of Europe *Digest of the Case Law of the ESCR* (2008) 348.

[187] See ECSR *European Federation of National Organisations Working with the Homeless (FEANTSA) v Slovenia*, Complaint 53/2008, ESCR, Decision on merits, 8 September 2009 ('*FEANTSA v Slovenia*').

[188] ECSR *Conclusions on Sweden* (2003).

[189] *FEANTSA v France*, para 42.

[190] ECSR *Conclusions on Sweden* (2003).

[191] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 54.

[192] Complaint 33/2006, ESCR, Decision on merits, 5 December 2007.

[193] Complaint 39/2006, ESCR, Decision on merits, 5 December 2007.

France. Both complaints advanced that the state had failed to meet the needs of vulnerable and disadvantaged inhabitants.

In *ADT v France*, the ECSR unanimously held that the state had violated article 31(2) and (3) of the Revised ESC. Although the state enacted a significant body of legislation on the right to housing, it failed to properly implement the legislation. In addition, the particular legislation did not target the most disadvantaged citizens.[194] Regarding the application of article 31, the Committee explained that although it cannot be interpreted as imposing an obligation of results, the rights in the Charter must take "a practical and effective" rather than purely theoretical form.[195]

FEANTSA v France highlighted the desperate living conditions of poor urban inhabitants, which included overcrowding, homelessness and a lack of access to essential services.[196] The ECSR focused on the state's failure to reduce homelessness, provide sufficient social housing and access to essential services to a significant portion of the population. It also emphasised the obligation on the state to ensure that vulnerable and minority groups were not discriminated against in gaining access to housing. The ECSR unanimously found that the state had violated article 31(1), (2) and (3).

In reaching its decision in *FEANTSA v France*, the Committee formulated a definition of adequate housing that takes into account a number of material goods and legal protections that make up adequate housing:

> [A] dwelling which is safe from a sanitary and health point of view, that is, possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity, is structurally secure; nor overcrowded; and with secure tenure supported by the law.[197]

The Committee has applied and developed this definition in subsequent complaints. In *European Roma Rights Centre (ERRC) v Greece* ('*ERRC v Greece*'), for instance, the ECSR extended the application of its definition to the provision of an adequate supply of housing for families.[198] Significantly, it also held that the

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[194] *ADT v France*, paras 83, 100, 130 and 153.

[195] Para 59.

[196] *FEANTSA v France*, paras 68-72.

[197] Para 76.

[198] *ERRC v Greece*, para 24.

"obligation to promote and provide housing extends to security from unlawful eviction".[199]

In *FEANTSA v France*, the ECSR formulated a definition of affordable housing, which a state must ensure is available for those with only limited financial resources.[200] Moreover, the Committee set out state obligations in relation to the implementation of housing policies.[201] The outcome of *FEANTSA v France* is considered ground-breaking due to its attention to the substantive outcomes of housing rights violations and its contribution to the development of a definition of housing rights in a "tangible and quantifiable way".[202]

4 3 5 Role of the state in producing housing spaces

The imperative to facilitate the production of adequate housing is contained in article 2(1) of the ICESCR, which sets out state obligations in relation to the right to adequate housing when read with article 11(1) of the ICESCR.[203] Article 2(1) specifically identifies the adoption of legislative measures as an appropriate means of achieving this goal. When read with article 11(1), article 2(1) constructs a complex standard of analytical requirements and practical limitations,[204] aimed at progressively realising housing rights within available state resources. This standard requires "deliberate, concrete and targeted" steps that move as "expeditiously and effectively" as possible to the goal of realising the right to adequate housing.[205]

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[199] Para 24.

[200] *FEANTSA v France*, para 24.

[201] Para 56.

[202] P Kenna and M Uhry "*FEANTSA v France*: Collective complaint on housing rights at Council of Europe" (2008) 5 *Housing and ESC Rights Law Quarterly* 1 at 1.

[203] Art 2(1) of the ICESCR states:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[204] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 17-18. Craven is equally critical of the nature of art 2(1), arguing that the provision renders it "virtually impossible to determine the precise nature" of state obligations. See M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 151.

[205] CESCR General Comment 3: The Nature of State Parties' Obligations (Art 2(1) of the Covenant), UN Doc E/1991/23, 14 December 1990 ('General Comment 3'), paras 2, 9.

The CESCR advises State Parties to priorities the needs of persons living in "unfavourable conditions",[206] while taking certain steps in order to immediately secure the right to adequate housing within its jurisdiction, regardless of its particular level of development.[207] These steps include the obligation to refrain from interfering with existing housing rights and to facilitate the creation of empowering environments in which people can assist themselves in realising their housing rights.[208] International human rights law thus considers the adoption of legislative measures, which can create empowering environments capable of facilitating the production of housing spaces, as a primary means of realising state obligations in relation to article 11(1) of the Covenant.

The current Special Rapporteur on the Right to Adequate Housing recently identified the relationship between subnational governments and international human rights norms, commitments and procedures as a key factor contributing to the failure to realise the right to adequate housing.[209] Over the past few decades, urbanisation and attention to the realisation of human rights at the local level, as well as the potential for actors other than the nation-state in this process, has led to various developments towards explicit urban engagement with the discourse and practice of international human rights.[210] Accordingly, subnational and local governments have been afforded greater responsibilities for implementing housing rights.[211]

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[206] The CESCR has further noted that housing legislation and policy should not be designed to benefit already advantaged groups at the expense of others. See, CESCR General Comment 4, para 11.

[207] The *Maastricht Guidelines on Economic, Social and Cultural Rights* state:

> The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of states which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress towards the full realization of the rights in question.

See "The Maastricht Guidelines on Economic, Social and Cultural Rights" (1998) 20 *Human Rights Quarterly* 691, para 8.

[208] CESCR General Comment 3, para 10.

[209] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Non-Discrimination in this Context*, UN Doc A/70/270, para 15.

[210] B Oomen & M Baumgärtel "Human rights cities" in A Mihr & M Gibney (eds) *The SAGE Handbook of Human Rights* 709 at 709.

[211] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context*, UN Doc A/70/270, para 15.

Notwithstanding, international human rights mechanisms and procedures have engaged primarily with national governments, rather than directly addressing the circumstances of local governments.[212] Consequently, while local governments hold key housing responsibilities and are equally bound by their particular state's international obligations,[213] they are rarely participants in the international processes through which housing rights obligations are clarified and often lack clarity about their roles.[214] The institutional accountability frameworks for monitoring and implementing housing rights have also rarely been put in place at the city level.[215] Finally, the implementation of the right to adequate housing by local and other subnational level governments is also characterised by a number of common challenges, including inadequate resources; insufficient knowledge and capacity regarding the right to adequate housing and related human rights; overlapping, unclear or conflicting responsibilities; and tendencies towards discriminating against poor and vulnerable persons who lack access to adequate housing.[216]

A unique challenge of the international human rights framework within urban areas is therefore to ground legal and urban reforms in a dynamic understanding of how the right to adequate housing can inform transformative processes aimed at realising the goal of producing inclusive cities with adequate housing spaces.[217] This urban rights agenda must also clarify housing rights responsibilities and ensure effective coordination, accountability and monitoring between various levels of government.[218]

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[212] United Nations Human Rights Council ('HRC') *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UN Doc A/HRC/28.62, 22 December 2014, paras 11-20.

[213] Paras 9-10.

[214] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context*, UN Doc A/70/270, para 15.

[215] Para 15.

[216] HRC *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UN Doc A/HRC/28.62, 22 December 2014, para 21.

[217] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-Discrimination in this Context*, UN Doc A/70/270, para 18.

[218] Para 22.

4 3 6 Overcoming discrimination in access to housing

The individual complaints mechanism in the Convention on the Elimination of All Forms of Racial Discrimination ('CERD') has given rise to a small number of housing complaints, particularly with respect to minority communities suffering discrimination in access to housing. The case of *L R v Slovak Republic*[219] is particularly significant, as it represents the first individual complaint to the CERD Committee that substantially develops the understanding of the right to housing under the Convention. The complaint concerned the adoption of a local council resolution for the construction of low-cost housing in order to alleviate the inadequate living conditions of the Roma population.[220] Due to a citizen petition opposing the housing development, as it would "lead to an influx of inadaptable citizens of Gypsy origin",[221] the council passed a resolution overturning their previous decision to construct the housing. The second resolution did not explicitly refer to Roma or Gypsies, but it did refer to the citizen's petition.[222]

While the state argued that the resolution did not confer any "objective or subjective rights" that could be invoked before a court or other authority, the CERD Committee held that the circumstances of the case made it abundantly clear that the citizens' petition was advanced "on the basis of ethnicity and was understood as such by the council as the primary if not exclusive basis for revoking" its first resolution.[223] Having established discrimination, the Committee considered the state's argument that the resolution did give rise to a concrete right to housing. Dismissing the state's argument, the CERD Committee held that:

> [I]t would be inconsistent with the purpose of the Convention and elevate formalism over substance, to consider that the final step in the actual implementation of a particular human right or fundamental freedom must occur in a non-discriminatory manner, while the necessary preliminary decision-making elements directly connected to that implementation were to be severed and be free from scrutiny.[224]

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[219] *L R et al v Slovak Republic*, 31 March 2005, CERD/C/66/D/D/31/2003 (2005).
[220] Para 2.1.
[221] Para 2.2.
[222] Para 2.2.
[223] Para 10.5.
[224] Para 10.7.

In addition, the Committee held that the council resolutions amounted to the "impairment of the recognition or exercise on an equal basis of the human right to housing" as protected both by article 5(c) of the CERD and article 11(1) of the ICESCR.[225] It accordingly found that the state had a duty to provide an effective remedy and to ensure that the claimants were not left in a worse situation than under the local council's first resolution, while ensuring that similar violations did not occur in future.[226]

Joseph argues that the significance of this decision is broader than the particular circumstances of the claimants, as the complexities associated with implementing many domestic human rights policies makes it inappropriate to only focus on the final, enforceable policies to the exclusion of "unenforceable preliminary policies".[227] In other words, this decision illustrates that the point at which a right to housing vests in a rights holder occurs at an early stage in the development of a government policy and is not subject to that policy being followed through to the end for a claim to arise.[228] This aspect of the decision in *LR v Slovak Republic* represents a potential important normative component of the right to housing that is congruent with the right to the city, as it provides valuable protection to poor urban inhabitants who often have to assert their claims to housing in the face of grave power imbalances and a lack of political will on the part of the state to give effect to its housing policies.

The case of *LR v Slovak Republic* also illustrates the philosophical and practical breadth of the CESCR's interpretative statements in developing the normative substance of the right to adequate housing. By referring to the obligations in the ICESCR, the CERD Committee extended the relevance of its decision beyond the scope of the CERD itself.[229] This demonstrates how a human rights standard developed by one body can have bearing on the interpretative work of other bodies

[225] Para 10.7.

[226] Paras 10.10 and 10.12.

[227] S Joseph "The right to housing: Discrimination and the Roma in Slovakia" (2005) 5 *Human Rights Law Review* 347 at 349.

[228] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 45.

[229] *L R et al v Slovak Republic*, para 10.12.

and reinforces the view of human rights as interconnected and mutually reinforcing.[230]

4 4 Developing the normative content of the right to housing in the context of evictions

The CESCR has elaborated on the content of article 11(1) of the ICESCR in the context of General Comment 7, where it states that forced evictions are not compatible with the provisions of the ICESCR. General Comment 7 recognises a fundamental obligation on states to protect and improve houses and neighbourhoods.[231] In other words, states are required to protect inhabitants from and provide legal protection and redress for forced evictions that are not sanctioned by law.[232] It also develops state obligations in relation to forced evictions by building on the observation in General Comment 4 that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".[233]

The CESCR defines "forced evictions" as "the permanent or temporary removal against their will" of individuals, families and communities from their homes or the land that they occupy "without the provision of, and access to, appropriate forms of legal or other protection".[234] The Committee is critical of the use of the terms "forced evictions", "illegal evictions"[235] and "unfair evictions",[236] particularly due to the negative stereotypes and sense of arbitrariness that these terms convey.[237]

General Comment 7 develops the contextual background against which the CESCR interprets the right to adequate housing by acknowledging that "significant

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[230] Hohmann notes, however, that in referring to the obligations in the ICESCR the CERD Committee also simultaneously reinforces a hierarchical understanding of the norms in the right to housing with the ICESCR at its pinnacle. See J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 45.

[231] CESCR General Comment 7, para 2.

[232] Para 2.

[233] CESCR General Comment 7, para 1.

[234] Para 5.

[235] The CESCR notes that the term "illegal evictions" can be criticised on the ground that "it assumes that the relevant law provides adequate protection to the right to housing and conforms with the Covenant". See, CESCR General Comment 7, para 3.

[236] Similarly, the term "unfair evictions" is criticised for being too subjective, because it fails to refer to any legal framework at all. See, CESCR General Comment 7, para 3.

[237] Para 3.

problems of homelessness and inadequate housing" exist in both developed and developing societies.[238] The Committee affirms that particularly vulnerable groups are disproportionately affected by evictions, as they are often subject to overlapping forms of discrimination[239] and a lack of degree of security of tenure, which guarantees legal protection against forced eviction, harassment and other threats.[240] General Comment 7 also acknowledges that the practice of forced eviction primarily arises in heavily populated areas,[241] such as cities and towns, and frequently in the pursuit of development:

> Evictions may be carried out in connection with conflict over land rights, development and infrastructure projects, such as the construction of dams or other large scale energy projects, with land acquisition measures associated with urban renewal, housing renovation, city beautification programmes, the clearing of land for agricultural purposes, unbridled speculation in land, or the holding of major sporting events like the Olympic Games.[242]

The CESCR holds that, in all of these contexts, the right to adequate housing and the right not to be subjected to forced eviction may be violated through a wide range of acts or omissions attributable to states.[243] Accordingly, it advises states to refrain from carrying out forced evictions and to act against agents or third parties that participate in forced evictions.[244]

In the event that eviction is unavoidable, General Comment 7 advises states to ensure that, particularly in cases involving large groups, "all feasible alternatives are explored in consultation with affected persons".[245] States are also required to take "all appropriation measures" to ensure that "alternative suitable solutions" are

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[238] Para 4.

[239] CESCR General Comment 7, para 11.These overlapping forms of discrimination violate art 2(2) of the ICESCR, which states:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[240] CESCR General Comment 7, para 1.

[241] Para 5.

[242] Para 7.

[243] Para 5.

[244] The approach of the CESCR in General Comment 7, para 8, is reinforced by art 17(1) of the ICCPR, which complements the right not to be forcefully evicted without adequate protection, as it recognises, inter alia, the right to be protected against "arbitrary or unlawful interference" with one's home.

[245] CESCR General Comment 7, para 14.

provided and that appropriate procedural protection and due process are afforded to all who are affected by forced evictions.[246] In particular, the Committee states that:

> Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.[247]

By charging states to ensure that "adequate" alternative accommodation or land is made available to persons who are unable to provide for themselves, the CESCR imports the factors determining the adequacy of housing, which are developed in General Comment 4, into the context of forced evictions in General Comment 7. Accordingly, alternative accommodation or land provided by the state must also be well located in order to be considered adequate for purposes of the Covenant.

The guidance provided by the CESCR regarding the locational aspect of the right to adequate housing is particularly important due to the fact that people are frequently provided with alternative accommodation or resettled in areas that are located at a significant distance from their original homes. This results in the fragmentation and isolation of existing communities from their livelihoods, social networks and support structures[248] and has a detrimental impact on their daily lives and ability to survive.[249]

In relation to the obligations imposed on states by article 11(1) of the ICESCR, General Comment 7 states that these obligations must be read in conjunction with the obligations in article 2(1) of the Covenant.[250] Scott Leckie notes that states often rely on the broad formulation of article 2 in an attempt to justify their non-compliance with the obligations imposed by article 11(1), because its broad formulation implies that the Covenant does not impose concrete duties on states.[251] However, article 2(1) generates state obligations by requiring states to refrain from carrying out forced

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[246] Para 15.

[247] Para 16.

[248] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 27.

[249] See further section 5 4 of this study.

[250] CESCR General Comment 7, para 9.

[251] S Leckie "The human right to housing" in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 149 at 154.

evictions and requiring them to ensure that any party who participates in a forced eviction is prosecuted in terms of the law.[252]

Article 2(1) of the ICESCR also obliges states to use "all appropriate means" to provide effective protection against forced evictions.[253] In this regard, the CESCR holds that legislation represents an essential basis upon which to base a system of effective protection, provided that the legislation supports strong security of tenure, conforms to the provisions of the Covenant and strictly controls the circumstances within which evictions may be carried out.[254] General Comment 7 thus obliges states to ensure that, before carrying out any evictions and particularly in cases involving large groups, "all feasible alternatives are explored in consultation with affected persons" in an effort to avoid or minimise the need to use force.[255] A state must also ensure that all evictions within its jurisdiction comply with the provisions of international law and the general principles of reasonableness and proportionality.[256] Finally, states are expected to ensure that appropriate procedural protection and due process are afforded to all who are affected by forced evictions.[257]

At the regional level, the African Commission recognises that forced evictions and displacement have far-reaching implications for the social, economic, and cultural lives of evicted communities.[258] In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*[259] ('*Endorois v Kenya*'), the Commission affirmed the that indigenous land

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[252] CESCR General Comment 7 (1997), para 9.

[253] Para 10.

[254] Para 10.

[255] Para 14.

[256] Para 15.

[257] According to the CESCR, the procedural protections that should be applied in relation to forced evictions include (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affecter persons prior to the date of the eviction; (c) adequate information on the proposed eviction; (d) the presence, where applicable, of government officials or their representatives during the eviction; (e) the proper identification of all persons carrying out the eviction; (f) evictions should, generally, not be carried out in bad weather or at night; (g) the provision of legal remedies; and (h) the provision of legal aid, where possible, to those in need of redress from the courts. See, CESCR General Comment 7, para 16.

[258] 181.

[259] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Decision on merits, Communication no 276/03, 4 February 2010 ('*Endorois v Kenya*').

rights of the Endorois included the right to "preserve one's identity through identification ancestral lands".[260]

The Commission found that the right to religious practice in article 8 of the African Charter was violated, as the Endorois were excluded from their sites of worship and sacred practice by their exclusion from their ancestral lands.[261] In turn, this denied the Endorois a right to culture in terms of article 17(2) and (3) of the African Charter.[262] Moreover, the Commission held that the failure to provide for the full participation and consent of the Endorois in the development process over their lands constituted a violation of the right to development in article 22.[263]

4 5 Developing the normative content of the right to housing in international law through the right to the city

4 5 1 Advancing the right to housing as part of a broader right to an adequate standard of living

At the international level, the normative content of the right to housing illustrates that legal interpretations should promote an understanding of the right by exploring how it contributes to the broader realisation of an adequate standard of living. Legal interpretations of the right to housing should also advance a multifaceted and inclusive conception of the right, which is consistent with indivisible and interdependent nature of all human rights. Additionally, legal conceptions of the right to housing in international law must recognise that it encompasses more than its physical space or economic dimensions and must recognise the lived space that it represents, as well as the social goods that flow through that space. Advancing this interpretative approach assists in promoting the transformational qualities of the right in an urban context.

Due to their mutual normative, philosophical and political foundation, the UDHR frames the interpretation of the right to adequate housing in article 11(1) of the ICESCR. Despite the linkages between the UDHR and the ICESCR, Hohmann argues that current legal interpretations of the right to housing seldom adopt a broad understanding of the right by exploring how it contributes to the realisation of an

[260] Para 162.
[261] Para 173.
[262] Para 251.
[263] Para 298.

adequate standard of living.[264] She explains that an understanding of the way in which housing contributes to the adequacy of living standards should be paramount to any interpretation of the right to housing and should draw on the fundamental principles that human rights seek to protect and promote.[265] In other words, interpretations of the right to housing should clearly recognise the relationship between the physical infrastructure that constitutes housing and the human goods, needs and desires required for a fulfilled and adequate human life.[266] Such an interpretation would ensure a substantive conception of the right to housing that is firmly embedded in the conditions of material deprivation that it seeks to redress.[267]

Promoting a substantive conception of the right to housing that is cognisant of its broader role in achieving an adequate standard of living for all urban inhabitants and transforming society is congruent with the right to the city paradigm. However, the absence of such an approach in current legal interpretations of the right to housing indicates a lacuna where the right to the city paradigm can potentially assist in developing the normative content of the right to housing. Advancing the normative substance of the right to housing through the right to the city thus requires locating legal interpretations of the right to housing within the broader objective of advancing an adequate standard of living and in recognition of the role of housing in fostering the societal conditions required for a renewed right to urban life.

4 5 2 Promoting the multifaceted and interrelated nature of housing

A substantive conception of the right to housing that is firmly embedded in the conditions of material deprivation that it seeks to redress represents an important step in developing the normative content of the right. Advancing legal interpretations of the right to housing that recognise its multifaceted and interrelated nature, represents another important normative aspect of the right that is congruent with the aims of the right to the city paradigm.

In *SERAC v Nigeria* the African Commission recognises that the right to housing is exercised not only in the interest of the individual, but also in service of the family,

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[264] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 134.
[265] 134.
[266] 134.
[267] 134.

household and community.[268] The Commission interprets the Charter provisions as overlapping and mutually reinforcing. This is an appropriate approach, given the integrated nature of the Charter itself, that recognises the interdependent nature of all human rights.[269] Additionally, the decision in *SERAC v Nigeria* illustrates the readiness on the part of the African Commission to comprehend economic, social and cultural rights as interdependent and as related to civil and political rights.[270] The Commission relies on a purposive definition of the right to life, which recognises that the economic and environmental harms visited on the Ogoni could violate this right.[271] This represents a departure from the commission's earlier jurisprudence on the right to life.[272]

The African Commission's decision in *SERAC v Nigeria* is congruent with the broad and transformative conception of the right to housing that is envisioned by the right to the city. Significantly, the ACHPR acknowledges that the right to housing has a communitarian nature that can be exercised in the service of the family, household and community. The interpretative approach of the ACHPR can thus significantly guide the development of the normative substance of the right to housing in this regard.

4 5 3 Determining the adequacy of housing spaces

Raquel Rolnik, the former United Nations Special Rapporteur on Adequate Housing,[273] argues that General Comments 4 and 7 provide a valuable framework for analysing and developing the interrelationship between the right to adequate

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[268] Para 61.

[269] F Coomans "Ogoni case before the African Commission on Human and Peoples' Rights" (2003) *International and Comparative Law Quarterly* 749 at 751.

[270] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 78.

[271] 78.

[272] J Nwobike "African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter" (2005) 1 *Africa Journal for Legal Studies* 129 at 135.

[273] Raquel Rolnik was appointed as the United Nations *Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context* in May of 2008 at the seventh session of the United Nations Human Rights Council. She served in this capacity until May 2014.

housing and the right to the city.[274] This is due to the central role of the right to adequate housing in providing a point of convergence between the different claims, contexts and struggles associated with the right to the city.[275] Issues associated with the production of housing spaces, the recognition of the social value of housing, displacements, evictions, threats to the tenure security of poor and marginalised urban inhabitants, and the right to participate in decision-making processes that produce urban space are all at the core of struggles for both the right to adequate housing and the right to the city.

In light of its universal application, housing rights scholars and activists are increasingly utilising the idea of the right to the city in the context of struggles over access to housing and the production of housing spaces in urban areas in both developed and developing societies.[276] According to Rolnik, it is only possible to articulate the right to adequate housing with the right to the city, because the notion of the right to adequate housing is not restricted to access to a house or physical structure.[277] In her capacity as the United Nations Special Rapporteur on Adequate Housing, she actively campaigned for a broad and inclusive understanding of the right to housing, which includes security of all forms of tenure; protection against forced evictions; access to basic services;[278] the right to use appropriate and adequate materials ensuring habitability;[279] affordability of and access to means of subsistence;[280] the right to participate in all stages and processes of decision-making

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[274] R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

[275] 294.

[276] M Aalbers & K Gibb "Housing and the right to the city: Introduction to the special issue" (2014) 14 *International Journal of Housing Policy* 207 at 209.

[277] R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

[278] According to Rolnik, access to basic services includes access to health care; education; potable water; food; electricity; sanitation; waste disposal; transport; and a healthy environment. See R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

[279] This includes access to adequate space and effective protection against natural threats to life and health. See R Rolnik "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294.

[280] This includes access to land, infrastructure, natural and environmental resources, and sources of livelihood and work. See R Rolnik "Place, inhabitance and citizenship: The right to housing and the

related to housing; and the prioritisation of the needs of vulnerable and historically marginalised persons and minorities.

According to the approach outlined above, the rights to adequate housing and the city are congruent as both acknowledge that the right to housing entails much more than property rights over a house and must be understood as a gateway to other rights or a condition that must be fulfilled in order to ensure that all urban inhabitants can live and participate in the city.[281] This approach is also consistent with the CESCR's understanding of article 11(1) of the ICESCR as referring to "adequate housing",[282] which enumerates seven essential elements that must be present in order for housing to be considered adequate for purposes of the Covenant.[283] These essential elements have the potential to provide valuable practical guidance to states on ways in which to implement the right to adequate housing in a manner that gives effect to the normative values and substantive goals of the right. The Committee's interpretative approach suggests that the goal of adequate housing can be achieved through the realisation of these elements.[284]

Hohmann identifies two potential issues with the Committee's approach that can have a detrimental impact on the emancipatory potential of the right to housing. Firstly, she notes that even though the CESCR acknowledges that determining the adequacy of housing requires a context-sensitive analysis,[285] it does not define or clarify the meaning of the term 'adequate'. Hohmann asserts that the absence of a definitive conception of adequacy weakens the normative parameters provided in the General Comments for the interpretation of the right to adequate housing.[286] The lack of attention to what adequacy entails also affects the concept's ability to act as

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right to the city in the contemporary urban world" (2014) 14 *International Journal of Housing Policy* 293 at 294-295.

[281] 294.

[282] CESCR General Comment 4, para 7.

[283] These essential elements are legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. In turn, each of these individual elements contain a specific set of sub-elements generated by the CESCR, which outline procedures, policy-approaches and regulations that state parties should implement in order to fulfil their obligations in relation to the right. See CESCR *General Comment 4*, para 8.

[284] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.

[285] The CESCR views that the adequacy of housing as determined "in part by social, economic, cultural, climatic, ecological and other factors". See, CESCR General Comment 4, para 8.

[286] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 21.

an effective standard against which state conduct in the provision of housing can be assessed.[287] Secondly, Hohmann points out that, despite the detailed nature of the CESCR's General Comments on the nature of adequate housing, a clear definition of the right remains elusive, which renders the right uncertain and potentially inaccessible.[288] This makes it difficult to establish whether any of the policy initiatives advanced by the Committee constitute an actual obligation, or only a suggested course of action, and whether state action or inaction amounts to a violation of the right to adequate housing.[289]

Neither article 25(1) of the UDHR nor article 11(1) of the ICESCR defines the term 'adequate'.[290] With reference to the UDHR, Craven explains that its drafters found it problematic to assign a clear meaning to the notion of adequacy due to its essentially vague and context-sensitive nature.[291] Eide rejects this position and asserts that the meaning of 'adequacy' can be construed in light of the foundational objective of article 25(1) of the UDHR, which seeks to guarantee the health and well-being of the individual and the family unit. Eide's approach recognises the fulfilment of basic material needs as a precondition for a free and dignified existence, which aligns with the rationale behind including a right to an adequate standard of living in the UDHR. Moreover, it acknowledges that people should be able to participate fully in society and meet their basic needs without degrading or depriving themselves of their basic freedoms.[292]

When viewed through the right to the city paradigm, the perceived vagueness or lack of definition inherent in the CESCR's interpretation of the right to adequate housing under the ICESCR, does not represent an impediment to achieving the emancipatory potential of the right. Instead, the open-ended nature of the right to adequate housing opens up a positive space in which activists and advocates can reimagine the right and bring historically neglected harms or needs within its

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[287] 21.

[288] 122.

[289] 122.

[290] The absence of a definition for the term 'adequate' is also evident in art 27(1) of the CRC.

[291] M Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1998) 291.

[292] A Eide "Adequate standard of living" in D Moeckli, S Shah & S Sivakumaran (eds) *International Human Rights Law* (2010) 233 at 234-235.

ambit.[293] In this regard, the right to the city paradigm can assist in developing the normative essence of the right to housing by providing recourse to a set of guiding values, philosophical concepts and practical frameworks located outside traditional or current conceptions of the right.

Lefebvre's understanding of the role of housing within the broader transformative goals of the right to the city supports an inclusive and substantive legal definition of the right to adequate housing. A legal definition of the right to adequate housing formulated by a court or monitoring body, which inadvertently excludes certain vulnerable or marginalised groups or individuals from recognition and protection within the ambit of the right,[294] would be antithetical to achieving the underlying aims of the right to the city. Similarly, any legal interpretation of the right to housing that fails to suitably embed the right in the real social context of deprivation that constitutes its actual violation falls short of its emancipatory potential.[295]

Additionally, the right to the city paradigm can assist in overcoming the current conceptual indeterminacy associated with the right. This is due to the ability of the right to the city framework to challenge the way in which the vagueness in current interpretations of the right to adequate housing may, either consciously or unconsciously, entrench existing unequal power relations. This is due to the ability of those with access to vast financial or personal resources to bring those resources to bear on the legal or political system.

Developing the normative content of the right to housing remains, however, essential. The right to adequate housing must be firmly grounded in values that explicitly seek to protect vulnerable and disenfranchised communities, such as those expounded by the right to the city's inclusive conception of inhabitance. If the right to adequate housing is not firmly grounded in principles that explicitly protect poor urban inhabitants, the interpretation of the right can be pushed towards the recognition and protection of the interests of the powerful, thereby entrenching unequal power relations in society.[296]

The location of housing represents a central point of convergence between the right to the city and the right to adequate housing. General Comment 4 of the

[293] 127.
[294] 121.
[295] 121.
[296] 128.

CESCR states that housing must be well located in order for it to be considered adequate:

> Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.[297]

The Committee's interpretative statement identifies qualitative aspects of the location of adequate housing that resonate with the normative values underlying the right to the city's substantive approach to inhabiting space. For instance, the CESCR embraces the social value of housing by recognising that a house should be intimately connected to its surroundings and that a spacious, safe and well-appointed house is inadequate if it is located where its inhabitants are isolated from livelihood and educational opportunities, health care services and social or community networks.[298] This social aspect of the right to housing recognises that well-situated housing plays an important role in ensuring that inhabitants can meet their daily needs, by facilitating access to other amenities and networks and fostering participation in the city and society.

Jim Kemeny explains that a house is seldom selected based solely on its internal features.[299] Rather, the spatial relationship of a home to other houses, to its neighbourhood, to livelihood opportunities, educational and recreational facilities, and to family networks and friendships, is one of the most important factors affecting housing location. Kemeny accordingly asserts that the location of housing "constitutes one of the key elements" if not the key element in the "social integration of individuals into society".[300]

The CESCR's recognition of the significance of location, as a factor determining the adequacy of housing, is congruent with the right to the city, which is grounded in the right to inhabit space. The right to the city also recognises that poorly located housing is disconnected from the social fabric of the city and devoid of social life. As

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[297] CESCR *General Comment 4*, para 8(f).

[298] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 27.

[299] J Kemeny *Housing and Social Theory* (1992) 159.

[300] 159.

a result, inhabitants who reside in these areas maintain a bare minimum social existence.[301] Moreover, Lefebvre contends that housing that is disconnected from the social fabric of the city renders inhabitants powerless to participate in decisions that affect both their daily lives and the production of space, which includes housing. This is antithetical to the socially inclusive and politically inspired participatory processes envisioned by the right to the city.[302]

A further qualitative aspect of housing location that emerges from the CESCR's General Comment 4 is that housing – in relation to livelihood and employment opportunities – cannot be considered adequate if it imposes excessive temporal and financial demands on vulnerable households and individuals. This facet of housing location reflects a stark reality characteristic of towns and cities worldwide: housing that is proximal to employment and livelihood opportunities is often limited and priced beyond the financial means of poor households and individuals.[303] The limited availability of well-located, affordable housing in urban areas thus often compels vulnerable and marginalised inhabitants to choose between, for instance, residing in affordable housing located at a distance from economic areas (such as state-subsidised housing) or resorting to alternative forms of shelter that are less secure, but located within or near employment opportunities (such as abandoned buildings or informal settlements).[304]

In this regard, the right to the city paradigm can assist in bolstering the normative content of the qualitative aspect of housing location, by drawing attention to the social value that vulnerable and marginalised inhabitants attach to the spatial relationship that exists between their homes and their everyday lived environments. Recognising the social significance of this spatial relationship for poor households and individuals represents a vital step towards developing substantive approaches to housing that can ensure that housing is connected to the social fabric of the city and urban society.

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[301] See section 3 2 1 of this study.

[302] See section 3 2 2 of this study.

[303] UNGA *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living and the Right to Non-Discrimination in this Context*, UN Doc A/70/270, 4 August 2015, paras 53-56.

[304] Paras 57-59.

4 5 4 Promoting the social value of housing as a space

In *SERAC v Nigeria* the African Commission identifies a collective right not to be subject to forced evictions.[305] This reflects the communitarian recognition that people are not "fungible commodities capable of thriving" as easily in one place as the next, which is an issue that arises particularly in cases of forced relocations or evictions such as those the African Commission has been called upon to consider.[306] The Commission also recognises that the destruction of the physical fabric of housing results in the destruction of the fabric of society.[307] The African Commission's decision in *SERAC v Nigeria* is congruent with the broad and transformative conception of the right to housing that is envisioned by the right to the city. Significantly, the ACHPR recognises that the destruction of the physical fabric of housing has a direct detrimental impact on the fabric of society. The interpretative approach of the ACHPR can thus significantly guide the development of the normative substance of the right to housing in this regard. However, since *SERAC v Nigeria* was decided in the context of state-sponsored destruction of housing, forced eviction and the destruction of property, it is not clear whether the African Commission will find a positive right to housing within the Charter in future.[308]

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*[309] ('*Endorois v Kenya*'), the African Commission held that there was a violation of article 14 of the African Charter, which contains the right to property.[310] In this regard, the Commission (while referring to its decision in *SERAC v Nigeria*)[311] held that the eviction of the Endorois people from their land raised issues of a violation of the right to housing. This is due to the fact that the protection of the right to property in article

[305] Para 63.

[306] RM Ackerman "Mitigating disaster: A communitarian response" (2008) 9 *Cardozo Journal of Conflict Resolution* 283, 286.

[307] Para 60.

[308] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 78.

[309] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*, African Commission on Human and Peoples' Rights, Decision on merits, Communication no 276/03, 4 February 2010 ('*Endorois v Kenya*').

[310] Para 238.

[311] *SERAC v Nigeria*, para 62.

14 of the Charter includes the protection of the right to adequate housing.[312] In support of its argument, the ACHPR refers to the CESCR's General Comment 4, which states that forced evictions are prima facie in violation of the right to housing. The Commission also notes that evictions can only be justified in exceptional circumstances.[313]

Although the Commission's statement on the right to housing in *Endorois v Kenya* serves a limited purpose, the judgment nevertheless illustrates the way in which land can function as a home, particularly for indigenous peoples.[314] The ACHPR's broad and inclusive interpretation thus suggests that a right to housing can attach to a homeland, rather than to a specific dwelling. In other words, the Commission's interpretation of the right to housing creates space for an understanding of the right to housing that extends beyond the notion of a physical dwelling, to the relationship of the inhabitants to each other in their community.[315]

The right to the city paradigm recognises that housing is embedded both in our social structures and relations.[316] As a physical object, it has a pervasive influence on lifestyles, the arrangement of neighbourhoods and the attainment of social welfare, as well as patterns of household consumption.[317] Conversely, if a community is seen as a "comprehensive framework for social life",[318] housing represents, quite literally, as its physical manifestation.[319] As such, housing has an important role to play in the way communities are constituted and, as a consequence, in the types of identities fostered and encouraged within those communities.[320]

This point is illustrated by African Commission's interpretative approach, which illustrates the social linkages between communities and inhabitants in a manner that emphasises the home as a place of specific significance. As such, the quality,

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[312] *Endorois v Kenya*, para 191.

[313] Para 200.

[314] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 78.

[315] 79.

[316] See section 3 2 1 3 of this study.

[317] J Kemeny "Comparative housing and welfare: Theorising the relationship" (2001) 16 *Journal of the Built Environment* 56. See also, J Kemeny *Housing and Social Theory* (1992) 9.

[318] P Selznick "The idea of a communitarian morality" (1987) 75 *California Law Review* 445, 449 (emphasis omitted).

[319] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 178.

[320] 178.

quantity, form and nature of housing is a matter of concern beyond the individual,[321] which is consistent with the broad and inconclusive approach advanced by the right to the city in its vision of a transformed society.

Moreover, the CESCR's interpretation of the right to housing clearly encompasses several aspects of housing that recognise its embedded presence in social relationships, the expression and protection of culture, and the importance of housing beyond the individual.[322] In this regard, the normative substance of the right to housing can be considered consonant with the values underlying the right to the city and can thus assist in realising a right to the city for the urban poor.

Firstly, this reflects the position of housing as an element of an adequate standard of living both in the UDHR and in the ICESCR,[323] as housing was not enshrined in the international human rights documents as a right to an isolated asset, but in recognition of its role in fostering an adequate life in society.[324] This interpretation is reinforced by the CESCR's approach to the right. Several of the seven elements of the right to housing in General Comment 4 explicitly protect communal, social and relational aspects of housing.[325] Location is one such element, given the CESCR's express recognition that housing will not be considered adequate if it is constructed in a location where the inhabitants are isolated from their community ties, or are unable to access livelihood opportunities, health services or education.[326]

Secondly, it is possible for an inhabitant's identity to be tied to a location in a particular house, over and above the physical location of that house. Chokor explains that in Africa, the home's associations with a person's personal roots or "group lineage identity" are particularly important aspects of the family house that represent significant geographical nodes, which link the individual to "an ancestry on arrival and departure from the world". The failure to recognise the importance of these cultural factors to identity has resulted in planning practice for housing

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[321] 178-179.

[322] 179.

[323] See further, section 3 2 2 1 of this chapter.

[324] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 179.

[325] 179.

[326] CESCR General Comment 4, para 8(f).

development that propose and undertake inappropriate schemes of neighbourhood revitalisation and housing development.[327]

Accordingly, the CESCR's requirement of cultural adequacy can be a crucial element of the right to housing when resettlement schemes, gentrification or efforts to upgrade an informal settlement threaten to radically alter the form of dwelling, neighbourhoods and ultimately communities.[328] The requirement of cultural adequacy ensures that the cultural dimensions of housing are not sacrificed. It also enables the expression of cultural identity and diversity in housing.[329] These aspects of the CESCR's reasoning highlight the otherwise little-discussed aspects of the right to housing as cultural right.[330] When viewed within the right to the city paradigm, these aspects of the CESCR's reasoning can also assist in developing interpretative approaches to the right to housing that give effect to the appropriation component of the right to the city, which requires that the use value of social space should asserted over its economic value and that all inhabitants must participate in decisions that affect the production of space in order to develop space that meets everyone's needs.[331]

The analysis in this chapter illustrates that the African Commission is beginning to explore themes of identity, location and cultural adequacy in cases concerning the right to housing.[332] In this regard, the ACHPR is developing the normative principle that the right to housing plays an important role beyond the protection of the individual.[333] In addition, the cases on the right to housing decided to date illustrate that the African Commission sees housing as the site of economic, social and cultural life, family and personal identity and even national development.[334] This communitarian aspect of the right to housing can thus greatly assist in developing the normative core of the right to housing in way that is consonant with the broader, transformative values and goals of the right to the city.

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[327] BA Chokor "The meaning and use of housing: The traditional family" in E Arias (ed) *The Meaning and Use of Housing: International Perspectives, Approaches and their Applications* (1993) 289 at 293. See further section 2 2 of this study.

[328] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 180.

[329] CESCR General Comment 4, para 8(g).

[330] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 180.

[331] See further section 3 2 2 4 of this chapter.

[332] See further section 3 2 3 1 of this chapter.

[333] J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 180.

[334] 180.

4 5 5 Overcoming spatial and social exclusion

The right to the city legitimates the refusal of inhabitants to be excluded from society or removed from the space of city.[335] It challenges discriminatory practices, processes and relations that symbolically exclude or physically expel vulnerable and marginalised persons, who are precluded from participating in decisions that affect their daily lives by virtue of their economic or social status. These discriminatory acts include deliberate state policies or practices that enable the eviction or relocation of inhabitants from the space of the city, to poorly located or peripheral areas, as well as market-driven processes that exacerbate social divisions and spatial polarisation within cities. The locational element of the right to adequate housing is therefore also congruent with this aspect of the right to the city, as evicted or displaced inhabitants are frequently provided with alternative accommodation or resettled in areas that are located at a significant distance from their original homes, communities and economic and social networks.

The discrimination and exclusion exemplified by the eviction and spatial displacement of vulnerable and marginalised urban inhabitants, either through state or market-driven processes and practices, represents another significant point of convergence between the right to the city and the right to adequate housing. The CESCR's views in General Comment 7 can thus be considered consonant with the underlying values and goals of the right to the city in several respects. Firstly, by recognising a fundamental obligation on states to protect and improve houses and neighbourhoods, the Committee views them as valuable social spaces requiring protection. Recognising that housing and living environment represent valuable social spaces in urban areas that are vulnerable to interference by both state and market-driven interests is congruent with the values and insights informing the right to the city paradigm.

The CESCR's views can also be considered consonant with the values underlying the right to the city, as both recognise that vulnerable groups and individuals are disproportionately affected by evictions and spatial displacement, as well as the social exclusion that results from these practices. In this regard, the Committee's interpretative work in General Comment 7 provides valuable guidance regarding the procedural safeguards and substantive measures required to manage eviction

[335] See section 3 2 2 of this study.

processes and mitigate the discriminatory and exclusionary effects that forced evictions can have on vulnerable inhabitants.

Hohmann notes, however, that the CESCR's focus on evictions, as primarily linked to the problem of tenure insecurity, privileges the symptoms of eviction and fail to address the underlying causes and sources of insecure tenure. Accordingly, she notes that the Committee's guidelines on forced evictions will only manage to address the symptoms of eviction as long as the underlying causes of inequality and insecure tenure remain unaddressed.[336] The right to the city paradigm can, in this regard, potentially assist in developing the normative content of housing rights in the context of forced evictions, by providing a valuable critique of the structural causes underlying issues of tenure insecurity, forced eviction and spatial displacement in urban areas. In particular, this critique can be applied to the various examples of spatial practices that contribute to insecure tenure and evictions in urban areas, as identified by the CESCR in General Comment 7.[337]

Finally, by advising states to ensure that the location of alternative accommodation is adequate for purposes of the Covenant, the CESCR's approach in General Comment 7 aligns with the broader goals of the right to the city. Most significantly, it recognises the social value that people attach to the spaces that represent their homes and the spatial relationship that exists between their homes and living environments. This insight can assist in developing approaches to the provision of alternative accommodation that ensure that affected inhabitants remain connected to the social fabric and space of the city after an eviction. It can also guard against development practices that perpetuate spatial fragmentation and social exclusion in cities, by providing a critical normative framework grounded in both the right to the city and the right to adequate housing.

4 6 Conclusion

This chapter develops the normative content of the right to housing in international law and evaluates the potential of the right to the city paradigm to advance the

[336] Hohmann acknowledges that addressing deep-seated issues concerning inequality is more difficult than setting out legal procedures to govern evictions, which are more amendable to traditional legal regulation regardless of a state's acceptance of other aspects of the right to housing. See, J Hohmann *The Right to Housing: Law, Concepts, Possibilities* (2013) 23.

[337] CESCR *General Comment 7*, paras 5-7.

normative content of the right. The analysis in this chapter illustrates that current legal interpretations of the right to housing seldom explore how it contributes to the adequacy of living standards. This approach indicates a normative lacuna, as locating the right to housing within the right to an adequate standard of living suggests that the right to housing was enshrined in international human rights law in recognition of its role in fostering the societal conditions required for an adequate standard of living. In turn, this gap in current approaches to the interpretation of the right to housing provides an important platform from which the right to the city paradigm can assist in developing the normative content of the right to housing, due to its demand for a right to urban life as transformed and renewed through attention to its substantive conception of inhabitance.

Advancing legal interpretations of the right to housing that recognise its multifaceted and interrelated nature, represents another important normative aspect of the right that is congruent with the aims of the right to the city paradigm. The African Commission's broad and interrelated conception of the right to housing is consistent with the transformative goals of the right to the city. By emphasising the interrelated and communitarian nature of the right to housing, which can be exercised in the service of the family, household or community, the Commission illustrates that the right plays a substantive role in transforming society. The interpretative approach of the ACHPR can thus significantly guide the development of the normative substance of the right to housing in this regard.

Although the CESCR has also developed a broad and multifaceted understanding of the right to housing, uncertainty remains regarding the standard of adequacy in article 11(1) of the ICESCR. When viewed through the right to the city paradigm, the perceived vagueness or lack of definition inherent in the CESCR's interpretation of the right to adequate housing under the ICESCR, does not represent an impediment to achieving the emancipatory potential of the right. Instead, the open-ended nature of the right to adequate housing provides a positive space in which activists and advocates can reimagine the right and bring historically neglected harms or needs within its ambit. In this regard, the right to the city paradigm can assist in developing the normative essence of the right to housing by providing recourse to a set of guiding values, philosophical concepts and practical frameworks located outside traditional or current conceptions of the right.

Additionally, the right to the city paradigm can assist in overcoming the current conceptual indeterminacy associated with the right. This is due to the ability of the right to the city framework to challenge the way in which the vagueness in current interpretations of the right to adequate housing may entrench existing unequal power relations.

Developing the normative content of the right to housing remains, however, essential. The right to adequate housing must be firmly grounded in values that explicitly seek to protect vulnerable and disenfranchised communities, such as those expounded by the right to the city's inclusive conception of inhabitance. The location of housing represents central point of convergence between the right to the city and the right to adequate housing. The Committee's interpretative statement identifies qualitative aspects of the location of adequate housing that resonate with the normative values underlying the right to the city's substantive approach to inhabiting space. For instance, the CESCR embraces the social value of housing by recognising that a house should be intimately connected to its surroundings and that a spacious, safe and well-appointed house is inadequate if it is located where its inhabitants are isolated from livelihood and educational opportunities, health care services and social or community networks. This social aspect of the right to housing recognises that well-situated housing plays an important role in ensuring that inhabitants can meet their daily needs, by facilitating access to other amenities and networks and fostering participation in the city and society.

A further qualitative aspect of housing location that emerges from the CESCR's General Comment 4 is that housing – in relation to livelihood and employment opportunities – cannot be considered adequate if it imposes excessive temporal and financial demands on vulnerable households and individuals. In this regard, the right to the city paradigm can assist in bolstering the normative content of the qualitative aspect of housing location, by drawing attention to the social value that vulnerable and marginalised inhabitants attach to the spatial relationship that exists between their homes and their everyday lived environments. Recognising the social significance of this spatial relationship for poor households and individuals represents a vital step towards developing substantive approaches to housing that can ensure that housing is connected to the social fabric of the city and urban society.

The decisions of the African Commission are particularly valuable in illustrating how to prioritise the social value of housing as a space over its economic value. In this regard, the interpretative approach adopted by the ACHPR is congruent with the appropriation component of the right to the city. For instance, the Commission identifies a collective right not to be subject to forced evictions, which reflects the communitarian recognition that people are not commodities that can easily be moved from one place or another. This insight is extremely valuable in contemporary societies, where vulnerable and marginalised urban inhabitants are often subject to multiple evictions or temporary relocated to emergency housing areas. The Commission also recognises that the destruction of the physical fabric of housing results in the destruction of the fabric of society. The interpretative approach of the ACHPR can thus guide the development of the normative substance of the right to housing in a manner that is congruent with the broad and transformative conception of the right to housing that is envisioned by the right to the city. Additionally, the interpretative work of the Commission can assist in promoting a broad and substantive understanding of housing as a social space that extends beyond a physical dwelling to the relationship of the inhabitants to each other in their community.

The right to the city paradigm recognises that housing is embedded both in our social structures and relations. As a physical object, it has a pervasive influence on lifestyles, the arrangement of neighbourhoods and the attainment of social welfare, as well as patterns of household consumption. The interpretative work of the African Commission illustrates that housing has an important role to play in the way communities are constituted and, as a consequence, in the types of identities fostered and encouraged within those communities. In other words, it illustrates the social linkages between communities and inhabitants in a manner that emphasises the home as a place of specific significance. As such, the quality, quantity, form and nature of housing is a matter of concern beyond the individual, which is consistent with the broad and inconclusive approach advanced by the right to the city in its vision of a transformed society.

The CESCR's interpretation of the right to housing clearly encompasses several aspects of housing that recognise its embedded presence in social relationships, the expression and protection of culture, and the importance of housing beyond the individual. In this regard, the normative substance of the right to housing can be

considered consonant with the values underlying the right to the city and can thus assist in realising a right to the city for the urban poor.

Firstly, this reflects the position of housing as an element of an adequate standard of living both in the UDHR and in the ICESCR, as housing was not enshrined in the international human rights documents as a right to an isolated asset, but in recognition of its role in fostering an adequate life in society. This interpretation is reinforced by the CESCR's approach to the right. Several of the seven elements of the right to housing in General Comment 4 explicitly protect communal, social and relational aspects of housing. Location is one such element. This is due to the fact that it is possible for an inhabitant's identity to be tied to a location in a particular house, over and above the physical location of that house. This substantive understanding of the nature of the right to housing can provide valuable normative guidance to planning practices and housing development practices to ensure that housing as a space fulfils its social purpose. Additionally, the CESCR's requirement of cultural adequacy can be a crucial element of the right to housing when resettlement schemes, gentrification or efforts to upgrade an informal settlement threaten to alter the form of dwelling, neighbourhoods and ultimately communities. When viewed within the right to the city paradigm, these aspects of the CESCR's reasoning can also assist in developing interpretative approaches to the right to housing that give effect to the appropriation component of the right to the city, which requires that the use value of social space should asserted over its economic value and that all inhabitants must participate in decisions that affect the production of space in order to develop space that meets everyone's needs.

The analysis of the protection of the right to housing under the CERD illustrates that the decisions of the CERD Committee have substantially contributed to developing the understanding of the right under the Convention, particularly in relation to minority communities suffering discrimination in access to housing. The Committee's jurisprudence on the right to housing can be considered congruent with the goal of the right to the city to protect poor urban inhabitants who often have to assert their claims to housing in the face of grave power imbalances and a lack of political will on the part of the state to give effect to its housing policies. It also aligns with the key objective of the right to the city to restore the city in its totality and to overcome divisions in urban space caused by bureaucratic state policies or practices and the interests of private individuals. In addition, the Committee's decision in *LR v*

Slovak Republic illustrates that many human rights concerns are simultaneously caught up with a claim for the right to the city and the ability to enjoy adequate and secure housing.

Chapter 5 of this study utilises the right to the city paradigm to analyse current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor and to develop the normative and substantive content of these rights.

Chapter 5

The housing rights of South Africa's urban poor through a 'right to the city' lens

5 1 Introduction

Chapter 4 of this study elucidated the value of employing the right to the city paradigm to advance the normative content of the right to housing. This paradigm provides a conceptual anchor that illustrates the fundamental connection of all human rights to the spatial aspects of daily existence. This chapter applies the right to the city framework to a critical analysis of current legislative, policy and judicial approaches to the interpretation and realisation of the housing rights of South Africa's urban poor. Advancing the housing rights of South Africa's urban poor through a 'right to the city' lens requires approaches to rights interpretation and implementation that gives substantive effect to inhabitants' rights in a manner that is consistent with the values informing the right to the city. In instances where current legislative, policy, and judicial approaches fail to meet this goal, this chapter explores the potential of the right to the city paradigm to contribute towards the substantive realisation of the housing rights of South Africa's urban poor.

The Constitution of the Republic of South Africa, 1996 ('Constitution'), entrenches the right of everyone to have access to adequate housing and to be protected from arbitrary evictions in section 26.[1] The right to adequate housing holds a unique position among the socio-economic rights enshrined in the Bill of Rights, as it is the most contested, developed and successfully litigated right.[2] The manner and frequency with which section 26 is invoked in contemporary struggles over access to

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[1] S 26 of the Constitution of the Republic of South Africa, 1996, 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.

[2] Over the past 20 years, there have been over 20 socio-economic rights decisions handed down by the Constitutional Court and at least 15 of these cases have been concerned with the interpretation and application of s 26 of the Constitution. Most of these housing rights cases are considered successful in the sense that the claimants were granted some relief, often substantially what they claimed in court. See S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 472.

housing and land in urban areas is, however, also indicative of the broader struggles of South Africa's urban poor to claim a right to the city. This is due to the fact that the right to housing provides a crucial point of convergence between different struggles at the core of the right to the city and the central role of housing in the development of adequate housing spaces, spatial displacement through evictions, and the right to participate in decision-making processes that define the use of urban space. It also establishes vital linkages between notions of place, conditions of inhabitance and various citizenship rights.[3]

The struggle to claim the right to the city is evident in, but not limited to, cases where vulnerable and marginalised communities and individuals are forcibly evicted from their homes. In this regard, the South African Constitutional Court has acknowledged that eviction cases are particularly symptomatic of the harsh realties of urbanisation and homelessness in South Africa.[4] Although the phenomenon of urbanisation is not peculiar to South Africa,[5] it was arguably intensified due to the fact that only a small number of South Africa's majority black population where permitted to lawfully inhabit urban areas during apartheid.[6]

The abolishing of racially based influx controls at the end of apartheid created a substantial demand for access to housing on well-located land in urban areas in South Africa – a situation for which the state and urban planners were ill prepared.[7] As a result, South African towns and cities largely could not accommodate the inpouring of poor households and individuals who came from rural areas and outlying townships in search of new opportunities and inclusion in urban society and who had previously been legally prohibited from inhabiting urban space.[8] Consequently, many of these new urban inhabitants were forced to live on vacant land or in abandoned buildings without the explicit permission of the owners.[9]

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[3] See section 3 3 of chapter 3.

[4] *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR 723 (CC) ('*Joe Slovo II*'), para 49.

[5] See chapter 2 of this study.

[6] P Harrison "The policies and politics of informal settlement in South Africa: A historical perspective" (1992) 22 *Africa Insight* 14 at 15.

[7] 15.

[8] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 264.

[9] 264.

A critical spatial awareness of the way in which political, legal, economic and social power relations and practices affect the interpretation and implementation of the housing rights of the urban poor in South African towns and cities remains elusive in the jurisprudence and academic literature on section 26.[10] This is despite the fact that spatial inequality, which stems from deep historical and social exclusion from formal access to land and housing, continues to hold profound implications for South African's urban poor.[11] These spatial consequences are particularly manifest in urban areas, where the legal framework is often used to justify and facilitate processes and practices that result in poor and marginalised persons being relegated to poorly located state-subsidised housing or forcibly evicted and relocated from inner-city properties or informal settlements to peripheral areas.[12]

This chapter adopts the right to the city paradigm to critically analyse current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. The objective is to determine whether the city paradigm can contribute towards the substantive realisation of the housing rights of South Africa's urban poor by informing judicial, legislative and policy approaches to these rights. Such an interpretation must be responsive to the complex needs of the urban poor and redress the deep social, economic and spatial inequalities that characterise South Africa's urban areas.

The analysis in this chapter is divided into two sections. The first part of this chapter examines the legislative and policy framework applicable to the development of state-subsidised housing for the urban poor and informal settlements. It applies the right to the city paradigm within the context of housing provision that is supported by relevant legislative and policy frameworks. The second part of this chapter analyses legislative, policy and judicial approaches to the housing rights of the urban

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[10] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 428.

[11] See chapter 2 of this study.

[12] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* 127; S Wilson "Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of 'meaningful engagement'" (2011) 22 *Urban Forum* 265; S Wilson "Curing the poor: State housing policies in Johannesburg after *Blue Moonlight*" (2014) 5 *Constitutional Court Review* 279; M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428; and S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472.

poor within the context of evictions from informal settlements and abandoned buildings.

5 2 Section 26 of the Constitution and its interpretation in *Grootboom*

Section 26(1) of the Constitution entrenches the right of everyone to have access to adequate housing. Section 26(2) places a positive duty on the state to take reasonable measures to achieve the progressive realisation of this right within available resources, while section 26(3) protects against arbitrary evictions. In *Government of the Republic of South Africa v Grootboom*[13] ('*Grootboom*'), the Constitutional Court established the foundation for its interpretative approach to section 26 of the 1996 Constitution.[14] The case concerned a group of adults and children from an informal settlement who moved onto private land due to the "intolerable conditions" in which they were living while waiting to be allocated state-subsidised, low-cost housing.[15] Following their eviction from the private land, the community camped on a local sports field where they could not erect adequate shelters, as most of their building material was destroyed during the eviction process. Additionally, the community did not have access to secure tenure.[16]

As a point of departure, the Court in *Grootboom* noted that subsections 26(1) and (2) are "related and must be read together".[17] Section 26(1) entrenches the right of "everyone" to "have access to adequate housing". This provision delineates the scope of the right[18] and imposes an implied negative duty on the state. In turn, section 26(2) expressly requires the state to take "reasonable legislative and other measures" within its "available resources" to achieve the "progressive realisation" of

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[13] 2001 1 SA 46 (CC), 2000 11 BCLR (CC). The case before the Constitutional Court was an appeal from the Cape High Court decision in *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

[14] The Constitutional Court has developed its approach to interpreting socio-economic rights such as s 26 of the 1996 Constitution in subsequent cases. Most notably, these include *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC), 1997 12 BCLR 1696 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721; 2002 10 BCLR 1033; and *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC); 2004 6 BCLR 569 (CC).

[15] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 3.

[16] Paras 9-11.

[17] Para 34.

[18] S 26(1) applies to "everyone including children". See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 34.

this right. This provision defines and limits the positive duties on the state,[19] which require it to "devise a comprehensive and workable plan to meet its obligations".[20]

Section 26 of the Constitution applies both horizontally and vertically. In its negative aspect, which is frequently located within section 26(1), the right prohibits both the state and private persons from interfering with a person's existing access to adequate housing.[21] In essence, section 26(1) encompasses an implied negative obligation on the state, as well as all other entities and persons, to abstain from "preventing or impairing the right of access to adequate housing".[22] The phrase "preventing or impairing" can extend to include policies that bar persons from accessing housing rights and is not limited to interfering with their existing access.[23] Linking this negative obligation to section 26(1) implies that the qualifying elements in section 26(2) are not relevant for purposes of justifying an impairment of access to existing housing, at least not at the first stage of the constitutional analysis.[24] Stated differently, negative violations of the duty to respect housing rights are immediate and not subject to resource-based limitations.[25] The negative horizontal protection

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[19] The Court in *Grootboom* explains that section 26(2) "speaks to the positive obligation" on the state and "establishes and delimits the scope of the positive obligation imposed on the state". See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 21.

[20] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 38. The General Comment 4 of the CESCR emphasises the duty on a state to formulate and implement a national strategy and plan of action to fulfil housing rights based on a participatory and transparent process. See CESCR General Comment 4, para 12. See further section 4 2 of this study.

[21] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) ('*Grootboom'*), para 34; and *Maphango v Aengus Lifestyle Properties* 2012 3 SA 531 (CC) ('*Maphango'*), para 32.

[22] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 34. The phrase "preventing or impairing" is broader than the standard formulation of the duty to respect socio-economic rights. The international standard engages only a direct or indirect interference with a person's enjoyment of socio-economic rights. See further S Liebenberg "The inclusion of socio-economic rights in the final constitution" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2008) 33.2-1 at 33.2-2.

[23] In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR (W), paras 11-21, the court held that disconnecting an existing water supply to consumers represented a breach of a local authority's constitutional duty to respect an existing right of access to water, which requires constitutional justification.

[24] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 38.

[25] The duty on the state to respect existing access to housing does not entail positive conduct or resource allocation by the state. Accordingly, Pierre de Vos argues that the internal limitations in

afforded by section 26 applies directly to private persons,[26] as well as indirectly to and through legislation and common law principles that regulate private law relationships dealing with housing.[27]

Section 26(2) of the Constitution obliges the state to take reasonable steps to progressively realise access to adequate housing.[28] In doing so, it sets an objective standard against which state action can be assessed.[29] In *Grootboom*, the Constitutional Court stated that access to housing requires more than mere "bricks and mortar", as it also requires access to land, services and financing.[30] Moreover, it affirmed that section 26 places a positive duty on the state to ensure that those living in deplorable conditions or confronted with homelessness gain access to adequate housing.[31]

In this case, the Constitutional Court found that the state's failure to implement a housing policy that provided relief for people with "no access to land, no roof over their heads and who where living in intolerable conditions or crisis situations" amounted to a violation of section 26(2) of the Constitution.[32] The Court in *Grootboom* also observed that section 26(3) of the Constitution represents a special

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section 26(2) should "never be interpreted by the courts as an invitation to water down the negative obligation" engendered by housing rights. See P de Vos "Pious wishes or directly enforceable human rights: Social and economic rights in South Africa's 1996 Constitution" (1997) 13 *South African Journal on Human Rights* 67 at 93-94. Sandra Liebenberg cautions, however, that the analysis of negative and positive duties is frequently interlaced to the extent where courts collapse the distinction between the two obligations. Characterising the facts of a case as a breach of a negative obligation under section 26(1), or as a breach of a positive obligation in terms section 26(2), could therefore be disputed. See further S Liebenberg "Interpreting the socio-economic rights in sections 26 and 27" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Service, 2008) 33.5-1 at 33.5-2.

[26] *Tswelopele Non-Profit Organisation v City of Tshwane* 2007 6 SA 511 (SCA) ('*Tswelopele*').

[27] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC), 2012 5 BCLR 449 (CC), para 34.

[28] On the need for further clarification regarding the interaction between the subsections of s 26 of the Constitution, see K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) (OS 06) 55-1 at 55-9–55-12.

[29] S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 131-157; and K McLean *Constitutional Deference: Courts and Socio-Economic Rights in South Africa* (2009) 172-180.

[30] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 35.

[31] Paras 25-26, 35-38.

[32] Para 99.

manifestation of the obligation on the state and private parties to refrain from interfering with people's existing access to housing.[33] It accordingly made a declaratory order that the state was in breach of section 26(2) of the Constitution.[34]

The Constitutional Court has been hesitant to develop the substantive content of section 26 and accordingly it is not clear what kind of housing inhabitants are entitled to or when that housing can be considered adequate.[35] Accordingly, the social attributes of housing remain an aspiration and are not immediately claimable.[36] The practical implication is that the social goods associated with housing remain beyond the reach of many poor and vulnerable urban inhabitants partly due to the extensive legislative and policy framework that claimants must negotiate in order to be provided with access to housing or relief.[37] This current state of affairs poses an obstacle to advancing a right to the city for the urban poor and realising the transformative potential of housing as a human right.

The *Grootboom* decision did, however, outline a number of requirements for a reasonable government policy.[38] A reasonable housing policy must be comprehensive, coherent and effective; it must have sufficient regard for the social context of poverty and deprivation in South Africa; it must account for the availability of resources; it must adopt a systematic approach to housing provision; it must allocate responsibilities clearly to all three spheres of government; it must respond with care and concern to the needs of the most desperate; and it must be free of

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[33] Para 34.

[34] Para 99.

[35] K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) (OS 06) 55-1 at 55-9–55-12.

[36] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), para 95.

[37] S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 476; and D Bilchitz "Towards a reasonable approach to the minimum core: Laying the foundation for future socio-economic rights jurisprudence" (2003) 19 *South African Journal on Human Rights* 1 at 3.

[38] K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) (OS 06) 55.3-1 at 55.3-12–55.3-14; and G Quinot & S Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa" (2011) 22 *Stellenbosch Law Review* 639 at 656.

bureaucratic inefficiency and onerous regulations.[39] The principles and requirements outlined in *Grootboom* have been supplemented and developed in later decisions.[40]

The Constitutional Court has found that state action in relation to housing falls short of the constitutional standard when it is procedurally unfair due to a lack of meaningful engagement;[41] where the state fails to give effect to the legitimate expectations of poor inhabitants;[42] where state action is inconsistent with its own policies;[43] or where state action irrationally excludes large categories of people in need.[44] These cases illustrate that the aim of the Court has been to control the exercise of state and private power, rather than to prescribe or criticise the ends to which state power has been exercised.[45] Despite the limitations of this approach to the adjudication of housing rights, it has succeeded in tempering the more repressive aspects of state action and, at the very least, has directed the state's attention toward providing housing to poor urban inhabitants, rather than attempting to displace, stigmatise or ignore the poor and informally housed.[46] In this regard, the Court illustrates that it can play an important role in advancing a right to the city for the urban poor through the right to housing.

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[39] *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR (CC), paras 39, 42, 44, 45 and 99. See further S Wilson "Breaking the tie: Evictions from private land, homelessness and the new normality" (2009) 126 *South African Law Journal* 270 at 275.

[40] S Wilson & J Dugard "Constitutional jurisprudence: The first and second waves" in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) 32 at 35. For a discussion of the complex interplay between socio-economic rights and administrative law, see M Murcott "The role of administrative law in enforcing socio-economic rights: Revisiting *Joseph*" (2013) 29 *South African Journal on Human Rights* 478 at 481.

[41] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 208 (CC).

[42] *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 7 BCLR 723 (CC).

[43] *Abahlali baseMjondolo Movement SA v Premier of KwaZulu-Natal* 2010 2 BCLR 99 (CC).

[44] *City of Johannesburg v Blue Moonlight Properties* 2012 2 SA 104 (CC).

[45] S Wilson & J Dugard "Taking poverty seriously: The South African Constitutional Court and socio-economic rights" (2011) 22 *Stellenbosch Law Review* 644; and S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 477.

[46] See further section 5 4 of this study.

5 3 State obligations to develop housing spaces for South Africa's urban poor

5 3 1 Introduction

The commitment to transform South Africa's urban housing landscape is evident in the spatially conscious provisions of the extensive post-1994 legislative and policy framework adopted in response to South Africa's complex housing terrain and diversity of housing needs.[47] Key pieces of legislation and policy aimed at integrated housing development and giving effect to the housing needs of the urban poor include the Housing Act 107 of 1997 ('Housing Act');[48] the National Housing Code ('NHC');[49] and the Comprehensive Housing Plan for the Development of Integrated Sustainable Human Settlements ('Breaking New Ground' or 'BNG').[50] The following section adopts the right to the city paradigm to critically analyse the legislative and policy framework applicable to the development of state-subsidised housing for the urban poor and informal settlements.

5 3 2 Housing legislative and policy framework

5 3 2 1 Post-1994 housing policy foundation

The development of South Africa's current housing legislative and policy framework commenced in 1992,[51] with the establishment of the National Housing Forum ('NHF') – a multi-party nongovernmental negotiating body tasked with developing a coherent housing policy and strategy.[52] Although the NHF achieved a

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[47] Socio-Economic Rights Institute ('SERI') *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 8.

[48] The Housing Amendment Act 28 of 1999, the Housing Amendment Act 60 of 1999, and the Housing Amendment Act 4 of 2001 have subsequently amended the Housing Act 107 of 1997 ('Housing Act'). The Housing Act legally entrenches the policy principles outlined in the 1994 White Paper on Housing.

[49] The National Housing Code ('NHC') was published in accordance with ss 3(4)(g) and 4(1) of the Housing Act and sets out general policies, principles and guidelines that apply to all national housing programmes. See, Department of Human Settlements ('DHS') National Housing Code (2009).

[50] Department of Housing ('DoH') Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004).

[51] For an overview of pre-1994 South African housing policy, see P Wilkinson "Housing policy in South Africa" (1998) 23 *Habitat International* 215 at 216-224.

[52] Department of Housing ('DoH') *National Housing Code* (2000) 3UF.

working consensus between various stakeholders,[53] it is criticised for leaving key issues unresolved[54] and failing to adequately represent the housing needs and interests of poor, vulnerable and marginalised inhabitants.[55]

In 1994, the Office of the President published the White Paper on Reconstruction and Development ('RDP White Paper'), which established the Reconstruction and Development Programme ('RDP').[56] At the time, the RDP White Paper represented the principal policy framework for redressing the legacy of apartheid through the promotion of integrated economic and social development and the democratic transformation of South African society.[57] Recognising South Africa's history of spatial injustice, the policy document envisioned addressing the uneven spatial distribution of resources through the development of context-sensitive strategies, particularly at the provincial level.[58] Moreover, the RDP White Paper document recognised housing and essential services as basic needs and encouraged public participation in key decision-making processes regarding the location and management of housing projects.[59] The policy document also identified large-scale housing development as a potential strategy to stimulate the economy.[60]

In order to assist in giving effect to the RDP, the National Department of Housing ('NDoH') published the White Paper: A New Housing Policy and Strategy for South

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[53] F Khan "Introduction" in F Khan & P Thring (eds) *Housing Policy and Practice in Post-Apartheid South Africa* (2003) 1 at 12.

[54] M Tomlinson "South Africa's new housing policy: An assessment of the first two years, 1994-95" (1998) 22 *International Journal of Urban and Regional Research* 137 at 144. Kirsty McLean argues that many of the current issues experienced with implementing housing programmes are attributable to these unresolved issues. See K McLean "Overview of South African housing policy" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (Original Services, 2008) 55.2 at 55.2-1.

[55] M Huchzermeyer "Housing for the poor? Negotiated housing policy in South Africa" (2001) 25 *Habitat International* 303 at 305-311.

[56] Parliament *White Paper on Reconstruction and Development*, General Notice 1954 of 1994, *Government Gazette* 16085, 15 November 1994.

[57] S 1.1.1.

[58] S 2.6.1.

[59] S 1.4.3.

[60] Ss 1.4.3, 1.4.8 and 3.6.3. The Reconstruction and Development Programme ('RDP') has since been abandoned. See Socio-Economic Rights Institute ('SERI') *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 21.

Africa ('Housing White Paper') in 1994.[61] As the primary housing policy,[62] the principles and objectives of the Housing White Paper guide all aspects of housing development and implementation in South African towns and cities. The policy document thus provides the framework for the implementation of the extensive housing projects identified in the RDP.[63] In particular, the Housing White Paper enabled the establishment of the National Housing Subsidy Scheme ('NHSS'), which facilitates access to housing for qualifying beneficiaries through a capital subsidy.[64] Currently, subsidised housing represents the primary mode of state-assistance through which the urban poor can access formal housing.[65]

Additionally, the Housing White Paper provides insight into the prevailing living conditions and housing environments of South Africa's urban poor. In particular, it identifies formal housing,[66] informal housing,[67] hostels,[68] and squatter housing as prominent housing spaces.[69] Significantly, the Housing White Paper acknowledges

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[61] National Department of Housing ('NDoH') White Paper: A New Housing Policy and Strategy for South Africa, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994 ('Housing White Paper').

[62] In 2004, the Department of Human Settlements ('DHS') published *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* ('Breaking New Ground' or 'BNG')). BNG amended the Housing White Paper and represents the second major housing policy applicable in South Africa. See further section 5 3 of this chapter.

[63] Socio-Economic Rights Institute ('SERI') *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 21.

[64] S 4.6.5 of the Housing White Paper.

[65] M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 3. See further section 5 3 of this chapter.

[66] In 1994, approximately 61 per cent of urban households resided in formal housing. There was, however, a significant decline in the development of formal housing stock between 1990 and 1994. See s 3.1.3(a) of the Housing White Paper.

[67] There were approximately 1.5 million urban informal housing units in South Africa in 1994, which included 620 000 occupied serviced sites and 100 000 unutilised sites. The Housing White Paper defines urban informal housing as any informal house with tenure and access to essential services (water, sanitation and routes), which is upgraded over time. See ss 3.1.3(b) and (d) of the Housing White Paper.

[68] An estimate 5.2 per cent of households resided in either private or public hostels. See s 3.1.3(c) of the Housing White Paper.

[69] The Housing White Paper defines "squatter housing" as any housing unit of a poor standard with limited or no access to essential services and no formal tenure. See s 3.1.3(d) of the Housing White Paper.

the prevailing role of informal settlements in facilitating access to housing in urban areas prior to 1994.[70]

5 3 2 2 Primary housing legislation

The Housing Act 107 of 1997 was enacted to give effect to section 26 of the Constitution and broadly prescribes the role of the state in providing housing for the urban poor through the promotion of sustainable housing development processes.[71] The Act defines "housing development" as a spatially and socially inclusive process that entails:

> [T]he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas that allow for access to economic opportunities and health, educational and social amenities.[72]

A broad goal underlying the approach to housing development in the Housing Act is that all South Africans should progressively obtain access to permanent residential structures that ensure secure tenure, privacy, adequate protection against the elements and access to basic services.[73] For this purpose, the Act outlines general principles applicable to all spheres of government. In particular, section 2 of the Act requires all spheres of government to prioritise the needs of the poor in respect of housing development[74] and to consult meaningfully with individuals and communities affected by housing development.[75] The state must also ensure at every level that housing development provides as wide a choice of housing and tenure options as is reasonably possible;[76] is economically, socially and financially affordable and sustainable;[77] is based on integrated development planning;[78] is administered in a

[70] S 3.1.3(d).
[71] Preamble to the Housing Act.
[72] S 1(vi)(a).
[73] S 1(vi)(b).
[74] S 2(1)(a)
[75] S 2(1)(b).
[76] S 2(1)(c)(i).
[77] S 2(1)(c)(ii).
[78] S 2(1)(c)(iii).

transparent, accountable and equitable manner, while upholding the practice of good governance.[79]

In an attempt to address the spatially segregated nature of housing development in South Africa, the Act requires all spheres of government to promote processes of racial, social, economic and physical integration in urban areas,[80] and measures to prohibit various forms of unfair discrimination by all actors in the housing development process.[81] It promotes higher densities in respect of housing development to ensure the economical utilisation of land and services;[82] the meeting of special housing needs, including the needs of the disabled;[83] the provision of community and recreational facilities in residential areas;[84] and the housing needs of marginalised persons and groups disadvantaged by unfair discrimination, particularly women.[85] Moreover, it obliges local government, as part of its process of integrated development planning, to take reasonable steps to address housing issues comprehensively.

The principles and goals of the Housing Act applicable to state-subsidised housing development in South Africa are thus largely consistent with the broader norms and values underlying the right to the city. This is particularly true in so far as the Act obliges the state to develop housing that prioritises the needs of vulnerable and marginalised households and individuals and to engage inhabitants in housing development processes in order to ensure outcomes that are affordable and socially sustainable. Accordingly, the Housing Act represents an important legislative instrument that can provide a sound legal foundation from which to advance the right to the city for South Africa's urban poor.

5 3 2 3 Housing policy framework

In order to facilitate extensive access to formal housing for low-income households, the State predominantly relies on a single capital subsidy to develop

[79] S 2(1)(c)(iv).
[80] S 2(1)(e)(iv)
[81] S 2(1)(e)(vi).
[82] S 2(1)(e)(vii).
[83] S 2(1)(e)(viii).
[84] S 2(1)(e)(xi).
[85] S 2(1)(e)(x).

housing on freehold tenure sites for qualifying beneficiaries.[86] The state's objective of delivering completed physical structures at scale forms part of its broader constitutional obligation and political objective of promoting access to housing for all South Africans.[87] The policy foundation of the state's particular approach to developing formal subsidised housing for low-income households is the 1994 Housing White Paper and the National Housing Subsidy Scheme ('NHSS').[88] The Housing White Paper promotes an incremental approach to formal housing development through the delivery of a starter-home that can be consolidated over time.[89] This type of housing assistance conceptualises housing as an asset, is aimed at acquiring ownership of the residential property[90] and is premised on the assumption that beneficiaries can access financial assistance to improve their homes.[91]

As the state's approach to delivering subsidised housing evolved, it abandoned the Housing White Paper's flexible and open-ended policy position in favour of a model characterised by minimum-defined specifications.[92] The Department of Housing adopted the National Norms and Standards for the Construction of Stand Alone Residential Dwellings in terms of section 3(2)(a) of the Housing Act in 1999. In 2007, these norms and standards were revised and republished in the National Housing Code as the National Norms and Standards in Respect of Permanent

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[86] M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 3.

[87] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 254 at 254.

[88] S 4.6.5 of the Housing White Paper. See further section 5 3 2 1 of this chapter.

[89] S 4.3 of the Housing White Paper. Housing projects are planned and constructed by private companies on behalf of the state in terms of the NHSS are commonly referred to as 'RDP housing'. See further SERI *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 21, 22, 58 and 60-64.

[90] S 4.6.5 of the Housing White Paper.

[91] S 4.2 identifies access to housing credit as a prerequisite for realising the aim of developing permanent residential structures.

[92] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 254 at 254.

Residential Structures ('National Norms and Standards').[93] The National Norms and Standards emphasise the functional aspects of housing, by focusing on the size and quality of the physical structure.

The National Norms and Standards contained in the National Housing Code shifted the focus of the state from a flexible approach to housing delivery to a more technical approach that focuses on the size and quality of the physical structure being delivered. As a result, service standards related to sanitation, water and roads are often lowered in order to deliver a greater number of houses of a greater size. The preoccupation with delivering large quantities of housing structures also reinforces trends towards the development of housing on peripheral land, as housing projects are built in areas where lower service levels were more acceptable.[94]

A consequence of incorporating the National Norms and Standards into the delivery process is that they fail to recognise or assist in giving effect to the social goods that flow through housing as a human right. In doing so, the National Norms and Standards reinforce the view that housing delivery is solely concerned with the provision of physical shelter or an economic commodity, which fails to give effect to the interrelated nature and substantive aspects of the right to housing.[95] The right to the city paradigm is critical of this kind of approach to the delivery of state-subsidised housing, as it diminishes or ignores the social value and goods attained through housing as a social space. The technical nature and preoccupation with the physical structure of the house also detracts from recognising and realising the substantive goods that the right to housing provides.

5 3 2 4 Prominent state approaches to low-cost housing delivery

There are a number of issues associated with the location and quality of state-subsidised housing that has been delivered since 1994. Sarah Charlton and Caroline Kihato explain that the adjustment in the state's approach to subsidised housing

[93] The National Norms and Standards in Respect of Permanent Residential Structures ('National Norms and Standards') prescribe the minimum technical standards applicable to all freestanding houses constructed through the State's national housing programmes. See DHS "Technical and general guidelines" in *National Housing Code: Part 3(2)* (2009) 21-24.

[94] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 267.

[95] See further section 4 2 of this study.

delivery was driven by a political need to deliver large quantities of housing units of an acceptable standard.[96] This approach is, however, contrary to research indicating that the location and density of affordable housing makes a significant difference to the overall costs and benefits of housing to the urban poor.[97] Housing that is well-located in urban centres, even though it financially costs more to build due to higher land prices, holds more benefits for society and costs less over time than cheaper housing on the periphery.[98] By failing to embed its approach to housing delivery in a deeper understanding of the consequences of the location and quality of subsidised housing on beneficiaries, the state's policy thus perpetuates the marginalisation of poor urban inhabitants.[99] It also reinforces the spatial segregation of cities and contributes to the isolation of the poor from livelihood opportunities and social services, while promoting the tendency towards urban sprawl.[100] In addition, it has failed to give substantive effect to the housing rights of the urban poor, as seen through the right to the city paradigm, by not contributing to the compaction, integration and restructuring of the apartheid city. Collectively, these outcomes all contribute to denying the urban poor an effective right to the city.

This problem is exacerbated by the fact that there has been limited co-ordination between government departments regarding the development of public transport, schools and clinics for new communities.[101] More significantly, the state has acknowledged that housing delivery has had a limited impact on poverty alleviation and that houses have not become the financial, social and economic assets initially envisioned.[102] Other factors, such as the cost of home ownership due to rates and services changes and heightened unemployment, have also limited the effect of

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[96] 267.

[97] Social Housing Foundation ('SHF') *Location and Density – Cost Benefit Analysis: Social Rental Housing* (2009) 7. See further section 4 2 of this study.

[98] Social Housing Foundation ('SHF') *Location and Density – Cost Benefit Analysis: Social Rental Housing* (2009) 7.

[99] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 267-268.

[100] Centre on Housing Rights and Evictions ('COHRE') *Business as Usual? Housing Rights and 'Slum Eradication' in Durban, South Africa* (2008) 87.

[101] 87.

[102] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 268.

housing provision on poverty alleviation.[103] Consequently, many state housing developments have become residential dormitories and beneficiaries often abandon their houses in order to move back to informal settlements or other informal housing in proximity to jobs and livelihood opportunities.[104]

Finally, viewed within the broader objective of section 26 of the Constitution, which aims to provide access to adequate housing on a progressive basis, the state's dominant approach to housing delivery is not consistent with the normative values underlying the right to adequate housing. In particular, it fails to align with the recommendation of the United Nations Committee on Economic, Social and Cultural Rights ('CESCR'),[105] which states that housing must be well located for it to be considered adequate for purposes of article 11(1) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[106]

The right to the city paradigm illustrates why the provision of peripheral subsidised housing is misguided as a mechanism to give effect to section 26 of the Constitution. The preoccupation with delivering a physical structure at scale on poorly located sites that are not well connected to urban opportunities, services, or society is not conducive to promoting a right to the city for the urban poor. This is due to the fact that the current approach to delivering state-subsidised housing promotes spatial marginalisation and impedes vulnerable individuals and households from participating in urban society and accessing urban resources and opportunities.[107] The following section examines the state's evolving attempts to redress some of the spatial and related defects of its housing delivery programme.

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[103] K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 62.

[104] K Tissington, K Rust, R McGaffin, M Napier & S Charlton "South Africa: Let's see the real value in RDP houses" *Business Day* (31-08-2010), available at <http://allafrica.com/stories/201008310540.html> (accessed 28-02-2016).

[105] United Nations Committee on Economic, Social and Cultural Rights ('CESCR') General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant), 13 December 1991, E/1992/23 ('General Comment 4'), para 8(f).

[106] United Nations General Assembly ('UNGA') International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3. See further section 4 2 of this study.

[107] M Huchzermeyer *Unlawful Occupation: Informal Settlements and Urban Policy in South Africa and Brazil* (2004) 25.

5 3 2 5 Promoting spatially integrated housing settlements

Between 2002 and 2003, the state conducted a comprehensive housing policy review in order to identify and address some of the unintended consequences of its housing programmes. These unanticipated problems include peripheral residential development; poor quality housing and settlements; the lack of community participation; the limited secondary low income housing market; corruption and maladministration; a decrease in housing delivery; underspent budgets; limited or decreasing public sector participation; an increasing housing backlog; and the continued growth of informal settlements.[108] The review process aimed to identify a new policy direction that could inform and support decision-making within the housing programme and consolidate knowledge and intellectual capacity in order to address complex questions regarding space and the economy.[109]

The Breaking New Ground revised policy framework for the development of sustainable human settlements adopted in 2009 provides the basis for a shift away from an emphasis on a quantitative to a qualitative approach to housing delivery. The new policy direction taken in Breaking New Ground emphasises the value of citizen participation in processes aimed at identifying suitable tenure types and the location of settlements.[110] It also aims to increase the rate of delivery of well-located housing of an acceptable quality, through a variety of innovative and demand-driven housing programmes and projects.[111] In doing so, the policy document builds on the original principles of the 1994 White Paper on Housing, while supplementing existing mechanisms and instruments to ensure more responsive, flexible and effective approaches to housing delivery.[112]

Significantly, Breaking New Ground seeks to emphasise housing delivery processes in areas such as planning, community engagement and the sustainability

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[108] DHS *Presentation on BNG to the Programme in Housing Policy Development and Management* (2008).

[109] K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 64.

[110] DHS Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004), section 2.3.

[111] Section 2.3.

[112] K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 65.

of the housing environment.[113] It acknowledges that a lack of affordable, well-located land contributes to housing development on the periphery of existing urban areas, which achieves limited integration. Moreover, it confirms that the dominant approach of producing single houses on plots in distant locations with weak socio-economic infrastructure is inflexible to local dynamics and changes in housing demand.[114] The policy document also recognises that subsidised houses do not represent the valuable assets envisioned in earlier housing policy documents.[115]

In response to these problems, the Breaking New Ground policy promotes an approach to human settlement development that moves away from the commodification of housing delivery towards more responsive mechanisms that address the multi-dimensional needs of sustainable human settlements.[116] It also frames housing delivery more explicitly as a catalyst for achieving a set of broad socio-economic goals. In doing so, Breaking New Ground thus aims to move from a supply-centred model to a model driven by the needs of the urban poor.[117] In light of the broader goals and social values underlying the policy initiatives espoused in Breaking New Ground, this housing policy has the potential to align housing settlement development in South Africa with the substantive notion of inhabitance informing Lefebvre's understanding of the right to the city. In other words, the policy document is capable of promoting approaches to the implementation of the housing rights of South Africa's urban poor that gives substantive effect to the values and norms enshrined in section 26 of the Constitution.

Despite the positive policy developments and important practical guidance provided, Breaking New Ground is criticised for not fully addressing key weaknesses inherent in previous policy frameworks or offering clear direction on the difficult political issues of land ownership, the land market and rights around property

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[113] DHS Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004), section 2.4.

[114] Section 2.2.

[115] COHRE *Business as Usual? Housing Rights and 'Slum Eradication' in Durban, South Africa* (2008) 95.

[116] DHS Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements (2004), section 2.2.

[117] Section 2.3.

values.[118] Sarah Charlton and Caroline Kihato argue, for instance, that although Breaking New Ground strives for broader housing outcomes, the key indicators of performance appear to remain largely quantitative and focused on housing budgets.[119]

In practice, the policy document's progressive approach to offering a choice of housing options and a demand-driven approach to housing delivery, which includes offering beneficiaries a greater choice of tenure, location or affordability, has not been realised.[120] This is due to the fact that the state continues to prioritise subsidised, low-density, detached, freehold housing over other housing delivery modes, tenure systems and accommodation choices. For instance, current housing policy approaches have made little progress in stimulating the supply of affordable rental accommodation to lower-income households.[121] This is despite the fact that legislation such as the Social Housing Act 16 of 2008 requires a portion of all state delivered housing stock to be affordable to households in the lower subsidy ranges.[122] The current state of housing delivery thus remains problematic and cannot adequately respond to South Africa's diverse and changing demographic composition.[123]

Although the number of houses delivered by the South African state over the past two decades is commendable, problems pertaining to the location and construction standards of these houses remain. This suggests that the implementation of housing policy does not adhere seriously to the constitutional obligation on the state to progressively realise the right to adequate housing, as set out in section 26(2) of the Constitution. While policy measures often officially acknowledge the constitutional

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[118] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 256; and SERI *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 66.

[119] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 256.

[120] Urban LandMark & SHF *Small-Scale Private Rental: A Strategy for Increasing Supply in South Africa*" (2010) 12.

[121] SERI *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg* (2013) 20.

[122] S 5 of the Social Housing Act 16 of 2008.

[123] Urban LandMark & SHF *Small-Scale Private Rental: A Strategy for Increasing Supply in South Africa*" (2010) 13.

obligation to provide access to adequate housing, the implementation of these policy measures and the delivery of housing tend to be framed entirely within other paradigms, usually political commitments to the electorate.[124] These paradigms include, amongst others, the speeding up of housing delivery and the eradication of housing backlogs.[125]

Analysing the provision of state-subsidised housing through the right to the city lens thus suggests that where policy frameworks are not informed and driven substantially by their positive impact on the poor, and their linkages with livelihoods strategies, their outcomes can be disastrously misplaced and even detrimental to households and poverty alleviation efforts more broadly. In a country characterised by high unemployment, poverty and lingering socio-economic and geographical inequality, access to adequate housing for the urban poor can serve as a trajectory out of poverty, even if this is a gradual process or only facilitates exit from the poverty trap for younger members of a household.[126] Accordingly, low-income subsidised housing that caters to household or individual needs in close proximity to employment opportunities and educational and health care facilities, can contribute significantly to overcoming the spatial and racial disparities that continue to divide South Africa and to achieving a right to the city for the urban poor.

However, advances in addressing South Africa's severe housing shortage and achieving the transformative potential of the right to housing in urban areas continues to be frustrated by the slow pace of unlocking well-located land for housing for the urban poor, as well as constraints in access to secure tenure.[127] Chapter 3 of this study argued that, in order to promote the normative content and substantive realisation of the right to housing, it must be understood in relation to its broader role in promoting an adequate standard of living. Such an appreciation of the role of the right to housing in facilitating societal change is consistent with Lefebvre's broad

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[124] I Turok "South Africa's new urban agenda: Transformation or compensation?" (2016) 31 *Local Economy* 9, 13.

[125] K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 28.

[126] I Turok "South Africa's tortured urbanisation and the complications of reconstruction" in G McGranahan & G Marine (eds) *Urban Growth in Emerging Economies: Lessons from the BRICS* (2014) 143 at 156.

[127] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 61; and K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 1.

conception of the right to the city as a right to a renewed and transformed urban society.[128] Applying the right to the city paradigm to the provision of state-subsidised housing thus reveals the need to critically reconceptualise the relationship between housing – both as a physical structure and as a conduit for the social goods that flow through it.[129]

From this perspective, an important step towards addressing South Africa's housing crisis requires the development of alternative approaches to post-apartheid planning legislation, policy and practices in order to give effect to the norms and values underlying the Constitution, while contributing towards creating and maintaining a satisfactory quality of life for all.[130] The following section examines recent attempts to align housing and planning law with the values and principles contained in the Constitution.

5 3 3 Developing integrated approaches to housing and planning in urban areas

Before the implementation of the new democratic dispensation, the land-use control framework consisted of statutory and other measures governing both formal and informal settlement.[131] While the Physical Planning Act 125 of 1991 formed the overall planning paradigm, specific measures were also included to accelerate urban land development and housing for low-income groups. Examples of these measures include the Upgrading of Land Tenure Rights Act 112 of 1991,[132] the Less Formal Township Establishment Act 113 of 1991[133] and the Provision of Certain Land for Settlement Act 126 of 1993. The establishment of the Independent Development

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[128] See further section 3 2 1 of this study.

[129] See further section 3 2 2 of this study.

[130] J van Wyk *Planning Law* 2 ed (2012) 11-12.

[131] J Pienaar "Planning, informal settlement and housing in South Africa: The Development Facilitation Act in view of Latin American and African developments" (2002) 35 *Comparative and International Law Journal of Southern Africa* 1 at 1.

[132] The Upgrading of Land Tenure Rights Act 112 of 1991 provided for the upgrading and conversion into ownership of certain tenure rights.

[133] The Less Formal Township Establishment Act 113 of 1991 aimed to provide shortened procedures for the designation, provision and development of land and the establishment of townships for less formal forms of residential settlement.

Trust pioneered the housing subsidies that were eventually adopted by the post-apartheid government.[134]

There were also some other positive policy developments that adopted a more proactive approach to, for example, the development of informal settlements in urban areas. The 1991 White Paper on Land Reform,[135] for instance, regarded the issue of land as critical to the reform agenda and its point of departure was to broaden access to land rights for the whole population, while upgrading quality and tenure security to promote the utilisation of land as a national asset.[136] Despite the repeal of many oppressive legislative instruments from the colonial and apartheid periods, it is important to note that the apartheid legal legacy remained active in the form of legislation, regulations and practices that survived the transition to democracy largely intact. [137] Some legislative and policy measures have even become deeply entrenched in the current legal system[138] and continue to affect the realisation of the housing rights of South Africa's urban poor.

Until recently, South African planning operated under a fragmented and incoherent legal framework, which rendered the entire planning system inefficient, costly and complicated. This flawed regulatory framework failed to challenge or transcend the segregated and unequal spatial legacy of apartheid in towns and cities. It also did not resolve the uncertainty regarding the continued application of apartheid legislation at the provincial level.[139] A key assumption regarding the efficacy of planning in South Africa is thus that the impact of post-apartheid planning approaches on spatial and social transformation has been muted in comparison with

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[134] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 37.

[135] White Paper on Land Reform (B91-1991).

[136] J van Wyk *Planning Law* 2 ed (2012) 49.

[137] J van Wyk *Planning Law* 2 ed (2012) 49. The enactment of the Spatial Planning and Land Use Management Act 16 of 2013 represents an important legislative break with apartheid planning practices by providing for a new framework for land use planning and management. This framework is aligned with the broader objectives of the 1996 Constitution.

[138] *Western Cape Provincial Government: In Re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 1 SA 500 (CC), 2000 4 BCLR 347 (CC), para 1; A van der Walt *Property in the Margins* (2009) 74; and J van Wyk *Planning Law* 2 ed (2012) 49-50.

[139] 51.

apartheid planning practices.[140] Edgar Pieterse observes that contemporary South African cities are confronted with the grim reality that they may be "as segregated, fragmented and unequal" as they were in 1994.[141] This realisation is disheartening, given the amount of intellectual capital, institutional resources and political will that has been dedicated to the problem of the apartheid city.[142]

The enactment of the long-awaited Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA') represents a major opportunity to develop approaches to housing delivery, planning and land use management that can challenge the spatial legacy of apartheid, and develop a concept of housing rights more aligned with the theoretical underpinnings of the right to the city. The Preamble to the SPLUMA states that it seeks to rationalise the fragmented legislative planning system, promote socio-economic benefits and transform racially and spatially divided settlement patterns in South Africa in a manner that gives effect to the right to have access to adequate housing in section 26 of the Constitution.[143] In order to achieve this goal, the Act recognises the principle of spatial justice as a compulsory norm applicable to all spatial planning, land use management and development policies in South Africa.[144] The legislative recognition of the principle of spatial justice is consistent with the Constitution's broader commitment to social justice and aims to address spatial and other development imbalances through improved access and use of land.[145]

The SPLUMA obliges policies and spatial development frameworks at all levels of government to address the inclusion of people and spaces that were previously excluded from the development framework and specifically emphasises informal settlements, former homelands and areas characterised by widespread poverty and deprivation.[146] It also requires all spatial planning mechanisms to make provision for

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[140] P Harrison, A Todes & V Watson *Planning and Transformation: Learning from the Post-Apartheid Experience* (2008) 241.

[141] E Pieterse "Recasting urban integration and fragmentation in post-apartheid South Africa" (2004) 5 *Development Update* 81 at 82.

[142] 82.

[143] In addition to s 26 of the Constitution, the Preamble to the Spatial Planning and Land Use Management Act 16 of 2013 ('SPLUMA') also refers to ss 24, 25 and 27(1)(b) of the Constitution.

[144] S 7(a) of the SPLUMA.

[145] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 343.

[146] S 7(a)(ii)-(v) of SPLUMA.

redress in access to land, secure tenure and the incremental upgrading of informal areas. In adopting this approach, the SPLUMA represent another important legislative instrument that can provide a sound legal foundation from which to advance the right to the city for South Africa's urban poor in a manner that gives effect to the principle of spatial justice and the transformative qualities of the right to housing.

Given the considerable emphasis on the role of the state in developing housing that meets the needs of South Africa's urban poor and contributes towards the spatial and social transformation of society, the following section applies the right to the city lens to an analysis of housing obligations of the different spheres of government and particularly local government.

5 3 4 Understanding the role of the different spheres of government in the development of housing

The obligation to ensure that state-developed housing spaces meet the needs of urban inhabitants and promote the use value of urban space over its economic value rests largely on local governments. Local governments can thus play a key role in advancing the right to the city for the urban poor through the realisation of housing rights. Section 153 of the Constitution outlines the developmental duties of municipalities and requires a municipality to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of communities and to promote their social and economic development.[147] It also requires municipalities to participate in national and provincial development programmes.[148] In light of the obligations contained in section 152, local governments are required to provide democratic and accountable governance for local communities;[149] ensure the provision of services to communities in a sustainable manner;[150] promote social and economic development;[151] promote a safe and healthy environment;[152] and

[147] S 153(a) of the Constitution.
[148] S 153(b).
[149] S 152(1)(a).
[150] S 152(1)(b).
[151] S 152(1)(c).
[152] S 152(1)(d).

encourage the involvement of communities and community organisation in matters of local government.[153]

Part A of Schedule 4 of the Constitution lists housing, urban and rural development, and regional planning and development as functional areas of concurrent national and provincial legislative competence. Part B of Schedule 4 recognises building regulations; electricity and gas reticulation; municipal planning; and water and sanitation services as local government matters. Section 156(4) of the Constitution further states that national and provincial governments must assign to municipalities the administration of matters listed in Part A of Schedules 4 and 5 that relate to local government, if that matter can most effectively be administered locally and the relevant municipality has the necessary institutional capacity.

Since 1998, the state's approach to housing delivery has increasingly shifted towards local government-centred processes[154] For instance, the Local Government: Municipal Systems Act 32 of 2000 requires all municipalities to compile an Integrated Development Plan ('IDP') and to include a housing chapter in its IDP.[155] In order to strengthen the role of local government, section 9(1)(a)(i) of the Housing Act requires every municipality, as part of its process of integrated development planning, to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants within its jurisdiction have access to adequate housing on a progressive basis. Moreover, section 10(2) of the Housing Act allows for the administration of national housing programmes by local government through the accreditation of municipalities by the provincial Minister of the Executive Council ('MEC').

Changes to the procurement regime after the adoption of the Housing Amendment Act 4 of 2001 have enabled municipalities to become low-income housing developers. Accredited municipalities can now fulfil housing functions currently undertaken at the levels of provincial and national government, such as subsidy budget planning and allocation, as well as the administration and management of priority programmes. The aim of this process is to enable accredited

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[153] S 152(1)(e).

[154] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 259, 263.

[155] Ss 25 and 26 of the Local Government: Municipal Systems Act 32 of 2000.

municipalities to gain complete control over these housing functions, which includes the financial administration of housing. Accordingly, these accredited municipalities will assume responsibility for all housing-related functions within their jurisdiction, while the provincial government assumes a monitoring and evaluation role. In doing so, this process attempts to address a key power imbalance plaguing the delivery of sustainable human settlements at scale, namely the limited powers of municipalities in the sphere of housing delivery in relation to their significant responsibilities for the provision of infrastructure and the long-term management of settlements.[156]

BNG also envisions a greater role for local government in housing delivery processes, as municipalities are regarded as better placed to effectively respond to local housing conditions and demands. According to the policy document, the previous housing programme granted private developers a leading role in the delivery of housing within a supply-driven framework. In contrast, BNG shifts towards a demand-driven process by increasing its emphasis on the role of the state in determining the location and nature of housing to link the demand for and supply of housing.[157] Municipalities will assume overall responsibility for housing programmes in their areas of jurisdiction through a greater devolution of responsibility and resources to them.

BNG assumes, however, that municipalities will proactively take up their housing responsibilities given clear guidelines and resourcing from the national sphere.[158] While efforts to move away from housing delivery approaches dominated by provincial and national governments and the imperative to improve intergovernmental relations represent positive developments, the role of local governments in accepting full responsibility for housing delivery should be approached with caution.[159] There are also concerns regarding the exacerbating effect of the scant technical capacity of many local governments, which negatively affects their ability to govern effectively.[160]

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[156] South African National Treasury ('SANT') *Provincial Budgets and Expenditure Review: 2005/6-2011/12* (2009) 96.

[157] NDoH *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004) section 5.2.

[158] SERI *A Resource Guide to Housing in South Africa 1994-2010: Legislation, Policy, Programmes and Practice* (2011) 67.

[159] 10.

[160] NDoH *Annual Report 2007-2008* (2008) 22.

Accordingly, if local governments are to play a meaningful role in realising the right to the city for the urban poor through the realisation of the right to housing, then serious efforts need to be made to develop their institutional capacity and to train skilled and sensitive personnel that are genuinely responsive to the lived reality of the urban poor. Moreover, giving effect to the right to the city in a manner that realises the substantive outcomes of the right to housing will require local authorities within different departments to work together. They will also have to develop holistic approaches to planning practices and decision-making processes, as well as housing delivery processes that are consistent with their obligations in terms of section 26 of the Constitution.

5 3 5 Policy framework and development approaches applicable to informal settlements

The National Housing Code identifies the Upgrading of Informal Settlements Programme[161] ('UISP') as one of the most important programmes of government, which seeks to upgrade the living conditions of millions of poor people by providing secure tenure and access to basic services and housing.[162] The upgrading of informal settlements[163] is thus a priority development initiative for the Department of Human Settlements and national government in general. The UISP applies to those who qualify under the NHSS criteria, however, it is also applicable to excluded groups, which include households that exceed the income threshold, persons without dependants, child-headed households, aged persons who are single without financial dependants and persons who are not first-time homeowners. Funding under the UISP is linked to the number of persons who qualify for assistance (it is *individual*-based as opposed to *area*-based).

Despite the progressive nature and context-sensitive development approach advanced by the UISP, implementation has lagged behind in practice. In *Melani and*

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[161] DHS "Upgrading of Informal Settlements Programme" (Part 3, volume 4) of the *National Housing Code* (2009).

[162] DHS "Simplified Guide to the Housing Code" (Part 1, volume1) of the *National Housing Code* (2009) 16.

[163] According to the Upgrading of Informal Settlements Programme, informal settlements typically manifest the following characteristics: illegality and informality; location on unsuitable land and environmental factors; restricted public sector investment; poverty and vulnerability; and social stress.

the Further Residents of Slovo Park Informal Settlement v City of Johannesburg[164] ('*Slovo Park*') the residents of Slovo Park informal settlement approached the court for an order compelling the City of Johannesburg to upgrade their settlement. In particular, they sought access to formal services and housing – something that the residents had been promised for almost 20 years. In their application, the residents of Slovo Park argued that the City's failure to take a decision to apply to the Gauteng Provincial Government for funding to upgrade Slovo Park in terms of the UISP, which is contained in the National Housing Code, amounted to a breach of section 26(2) of the Constitution. They residents asserted that the City's failure to act was unreasonable and counter to the obligation to progressively realise the right to adequate housing in section 26(2) of the Constitution. The residents also relied on the City's obligations under sections 152(1)(a) and 153(a) of the Constitution, which requires accountable government for local communities and the provision of social and economic development, as well as to manage its administration and planning processes in a manner that gives priority to the basic needs of the community and to promote the social and economic development of the community.[165]

The Gauteng High Court found in this chase that the UISP is binding on the City and that the City's decision to ignore the policy in favour of its own plan to evict and relocate the Slovo Park residents was in breach of section 26(2) of the Constitution and the Housing Act 107 of 1997, as it was unreasonable and not inclusive. In this case, the judge also found that the City's decision was taken without any consultation with the affected residents, which was not consistent with established constitutional jurisprudence regard the need for meaningful engagement in instances where the right to adequate housing is concerned.[166] The judgment effectively set aside the City's plan to relocate the residents and directed the City to make the appropriate application to the provincial Minister for Human Settlements for a grant to upgrade the Slovo Park Informal Settlement *in situ*.

The following section analyses current approaches to the interpretation and implementation of South African evictions law through a right to the city lens.

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[164] 2016 ZAGPJHC 55 (22 March 2016).

[165] Para 38.

[166] Para 42.

5 4 Evictions through a 'right to the city' lens

5 4 1 Introduction

The state has played a key role in evictions proceedings against poor urban inhabitants and communities in terms of post-1994 legislation and housing policies. The profound impact of these evictions on spatial settlement patterns in South Africa is particularly evident when marginalised groups and individuals are moved from well-located land or properties to informal settlements on the urban periphery.[167] Confronted with losing their fragile foothold in the spaces that constitute their homes, many communities and individuals have turned to the courts to resist evictions by invoking their housing rights enshrined in section 26 of the Constitution. The judicial development of the constitutional right of access to adequate housing represents an important attempt on the part of the South African Constitutional Court to manage the conflicting interests that arise between public or private property owners and unlawful occupiers, without access to property rights to housing or land, or homeless persons in the wake of rapid and inadequately managed urbanisation.[168]

The following section examines how the South African legislature and the jurisprudence of the Constitutional Court has responded to different types of evictions with a view to evaluate to what extent it has contributed to the post-apartheid legislative and policy objectives of promoting integrated, sustainable and diverse human settlements. The right to the city is grounded in the right to inhabit space and recognises the right to housing as one means of effecting the transformation of both the physical space of the city and urban society.[169] Realising the right to the city for the urban poor thus requires giving substantive effect to section 26 in a manner that promotes the transformation of both the spatial and social relations in South Africa.

Moreover, the analysis seeks to determine how and to what extent the Court has facilitated the claims of poor and marginalised urban inhabitants for a right to the city

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[167] S Charlton & C Kihato "Reaching the poor: An analysis of the influences on the evolution of South Africa's housing programme" in U Pillay, R Tomlinson & J du Toit (eds) *Democracy and Delivery: Urban Policy in South Africa* (2006) 257 at 258.

[168] S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472, 473.

[169] See section 3 2 1 4 of this study.

that recognises their right to be physically present in the space of the city and to participate in decisions that affect urban space. It also seeks to identify to what extent the Court recognises the social or use value of housing spaces in inner city areas and informal settlements, particularly in relation to the obligation on municipalities to make emergency housing or alternative accommodation available. The right to the city recognises the right of all urban inhabitants to be physically present in the space of the city and to participate in decisions regarding the use and development of urban space.[170] Asserting the use value of urban space over its economic or exchange value represents an important normative goal of the right to the city, which recognises that space must meet the basic needs of all urban inhabitants.[171]

5 4 2 Section 26(3) of the Constitution in light of *Grootboom*

Section 26(3) of the Constitution enshrines a particular component of the negative aspect of the right by specifically subjecting evictions to constitutional scrutiny.[172] Although South African common law has always required that the removal of a person from any premises must be authorised by a court order, this principle was significantly undermined during apartheid in order to enforce racial segregation. For instance, the Prevention of Illegal Squatting Act 52 of 1951 ('PISA') was instrumental in eroding this common law principle during apartheid, particularly in instances where the common law in South Africa enabled black, poor and informally housed persons to resist evictions from land without adequate notice.[173]

The judicial enforcement of section 26 represents an important means of redressing both past and present causes of marginalisation and spatial exclusion in the context of housing rights.[174] In *Grootboom*, the Constitutional Court affirmed that

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[170] See section 3 2 2 4 of this study.

[171] See sections 3 2 1 3 and 3 2 2 4 of this study.

[172] K McLean "Housing" in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) (OS 06) 55-1 at 55-43, 55-49.

[173] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 268-269; and D Bilchitz & D Mackintosh "PIE in the sky: Where is the constitutional framework in high court eviction proceedings? *Marlboro Crisis Committee v City of Johannesburg*" (2014) 131 *South African Law Journal* 525 at 525. See further chapter 2 of this study.

[174] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 431.

these provisions place a positive duty on the state to ensure that those living in deplorable conditions or confronted with homelessness gain access to adequate housing.[175] In this case, the Constitutional Court found that the state's failure to implement a housing policy that provided relief for people with "no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations" amounted to a violation of section 26(2) of the Constitution.[176] The Court in *Grootboom* also observed that section 26(3) of the Constitution represents a special manifestation of the obligation on the state and private parties to refrain from interfering with people's existing access to housing.[177]

Section 26, in conjunction with the land reform provisions in section 25 of the Constitution, therefore vests in the judiciary a limited, yet meaningful role in facilitating spatial transformation by providing constitutional support for positive, redistributive measures that promote equitable access to land and housing.[178] Furthermore, the judicial application of constitutional norms to eviction disputes in terms of section 26(3) represents a critical means of ensuring that the right to adequate housing fulfils its transformative potential.[179] In doing so, courts can assist in preventing or mitigating the spatial exclusion caused by the forcible eviction and relocation of poor and vulnerable groups from inner-city properties or informal settlements to poorly located or peripheral areas.[180]

5 4 3 Legislative framework applicable to evictions

5 4 3 1 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act') represents a key piece of legislation enacted to give effect to section 26(3) of the Constitution. Its objective is to protect and balance constitutional housing

[175] *Grootboom*, paras 24-25, 35-38.
[176] Para 99.
[177] Para 34.
[178] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 432.
[179] 432.
[180] 432.

and property rights in an evictions context.[181] In practice, the Act protects millions of poor South Africans in urban areas who have no common law or statutory entitlements to the land they live on or rights to the properties that they unlawfully occupy.[182] The PIE Act recognises and safeguards the values and interests recognised by housing as a human right in situations where unlawful occupiers are evicted from their homes, while balancing them against constitutionally recognised property rights.[183]

The Act applies to everyone who occupies land or property without the express or tacit consent of the owner.[184] Eviction proceedings can be instituted against unlawful occupiers by either private landowners or the state.[185] In both instances, however, PIE requires that eviction proceedings comply with strict procedural safeguards[186] and subjects any decision of a court in an eviction dispute to the overriding considerations of justice and equity.[187] The PIE Act also requires special consideration for the relevant circumstances of occupiers, including the manner in which the land was occupied,[188] the period of the occupation,[189] and the position of certain particularly vulnerable groups such as the elderly, children, disabled persons and women-headed households. The availability of suitable alternative accommodation or land is a further relevant factor in the justice and equity inquiry.[190] The PIE Act thus represents a valuable legal platform from which the urban poor can assert their right to the city, as it affords the urban poor important substantive and procedural safeguards that protect their right to be physically present in the space of

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[181] Preamble to the PIE Act. See further C O'Regan "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *South African Journal on Human Rights* 361 at 361.

[182] S Wilson, J Dugard & M Clark “Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court” (2015) 31 *South African Journal on Human Rights* 472 at 474.

[183] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (‘*PE Municipality*’), paras 11-13. See further S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 271.

[184] S 2 read with ss 5 and 6 of the PIE Act.

[185] Ss 4 and 6.

[186] S 4, 6(6) and 7.

[187] S 6(3).

[188] S 6(3)(a).

[189] S 6(3)(b).

[190] S 6(3)(c).

the city, while affording them the opportunity to participate in decisions that affect urban space, such as evictions.

5 4 3 2 Health, safety and disaster management legislation

In recent years, the post-1994 state has frequently relied on health, safety and disaster management legislation to effect the eviction of unlawful occupiers from urban space. Examples of legislation used by the state to control the occupation of urban space and to facilitate the spatial displacement of the urban poor include the National Building Regulations and Building Standards Act 103 of 1977 ('NBRSA'), the Health Act 63 of 1977 and the Disaster Management Act 57 of 2002. The NBRSA permits, for example, a municipality to demolish any building that is dilapidated or in a state of disrepair.[191]

The use of legislation to control the spaces occupied by the urban poor and to enable the spatial displacement of vulnerable and marginalised inhabitants is reminiscent of the eviction practices of the pre-1994 state. Moreover, the application of health, safety and disaster management legislation to the housing environments of the urban poor has the effect of treating these sites as abstract spaces. In other words, the legislation diminishes, neglects or ignores the social or use value of the spaces occupied by the urban poor by treating these sites as empty, meaningless and devoid of social meaning or significance. The use of health, safety and disaster management legislation to effect the eviction of the urban poor is thus not conducive to realising the right to the city for the urban poor in South Africa.

5 4 4 Evictions of unlawful occupiers in terms of PIE

Port Elizabeth Municipality v Various Occupiers[192] ('*PE Municipality*') is the leading Constitutional Court decision on the interpretation of PIE in light of the values and purposes underlying section 26(3) of the Constitution. The case concerned an eviction application by a local authority against 68 residents who were occupying informal dwellings erected on privately owned land. At the time, the residents had been occupying the land for periods ranging from 2 to 8 years. Most of the occupiers

[191] See further section 5 4 5 of this chapter.

[192] 2005 1 SA 217 (CC).

settled on the land after being evicted from other land, due to its proximity to employment opportunities and social amenities.

In *PE Municipality*, the Court interpreted and applied PIE and its governing concepts of justice and equity within a "carefully calibrated constitutional matrix".[193] This matrix required the Court to mediate the tension between the applicable housing and property rights in a manner that affirmed the constitutional values of human dignity, equality and freedom.[194] It also necessitated the development of a concrete, case-specific judicial solution to the eviction dispute that considered the values and interests protected by the constitutional rights to property and housing, the broader historical and social context of evictions [195] and the specific circumstances of the case.[196]

The *PE Municiaplity* judgment confirmed that property rights are not absolute and that reconciliation must be sought between the constitutionally protected rights of landowners and the equally important right of access to adequate housing.[197] It also elaborated on the state's duty to provide alternative accommodation to unlawful occupiers facing eviction. The case established that although there is no unqualified constitutional duty on local authorities to prevent homelessness, considerations of justice and equity require that a court be reluctant to grant an eviction order against "relatively settled occupiers" unless it is satisfied that "a reasonable alternative is available, even if only as an interim measure".[198] The Court in *PE Municipality* held that the local authority had not responded reasonably to the dire situation of the occupiers, because it had failed to enter into substantive discussions with them regarding their particular circumstances and needs, which included concerns regarding the quality, safety and location of the proposed alternative accommodation. [199] This approach was not in line with the vital function of municipalities to systematically realise the rights in section 26 of the Constitution as

[193] Para 14.
[194] Para 15.
[195] On the historical context of evictions and spatial displacement in South Africa, see chapter 2 of this study.
[196] *PE Municipality*, paras 22-23. See further M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 435.
[197] Para 19.
[198] Para 28.
[199] Paras 53-58.

interpreted in *Grootboom*.[200] The Court consequently found that it would not be just and equitable to evict the occupiers due to the length of their occupation and the absence of 'any significant attempts' by the local authority to consider the particular needs and circumstances of the occupiers.[201]

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties ('*Blue Moonlight*') is a recent judgement regarding the interpretation of PIE, which dealt with an eviction application by a private owner against 86 people who were unlawfully occupying dilapidated buildings in the Johannesburg inner city. The properties were earmarked for commercial development. The occupants, who had resided in the buildings for years, made a living in the city's informal sector and opposed their eviction on the basis that it would render them homeless, as they could not afford alternative accommodation in the city. They argued that the location of the buildings was crucial to their survival and that they would not be able to afford the transport costs associated with living elsewhere. The City of Johannesburg was joined in the proceedings by reason of its constitutional and statutory duties in relation to section 26.[202]

Blue Moonlight established that the city's emergency housing policy, which excluded persons evicted by private parties from access to temporary shelter, was inconsistent with section 26(2) of the Constitution.[203] The Constitutional Court found that the city's policy was based on a misinterpretation of the National Housing Code, as it differentiated unreasonably between the two groups of occupiers.[204] This finding is significant, because left unchecked the city's emergency housing policy would have continued to exclude the majority of the inner city's population from protection against evictions.[205] Moreover, the judgement confirmed that there is an obligation on local authorities to plan, budget and provide for emergency housing situations[206] and that failure to fulfil this obligation does not exempt a municipality from providing

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[200] Para 56.

[201] Para 59.

[202] See further G Muller G & S Liebenberg "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *South African Journal on Human Rights* 554-570.

[203] *Blue Moonlight*, para. 97.

[204] Para 95.

[205] Wilson S "Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of 'meaningful engagement'" (2011) 22 *Urban Forum* 265 at 273.

[206] *Blue Moonlight*, para 96.

temporary accommodation to evictees.[207] Therefore, although the Court granted the eviction order in *Blue Moonlight*, it also ordered the city to provide the occupiers with temporary accommodation "in a location as near as possible to the area" where they were residing at the time.[208]

The Court also held that the municipality was obliged to plan and procure resources to meet emergency housing needs within its area of jurisdiction and it cannot, therefore, rely on an absence of resources to do so if it has not at least acknowledged its obligations and attempted to find resources to allocate to emergency housing projects.[209] This obligation becomes particularly apparent when one considers that municipalities are ideally suited to react, engage and plan to fulfil the needs of local communities.[210] Moreover, a municipality cannot adopt a pick and choose approach to deciding which housing crises it responds to. It must prioritise its response to emergency housing situations in a reasonable manner. The Constitutional Court consequently found that differentiating between emergency housing situations caused by eviction by reference to the identity and purposes of the evictor is unreasonable, since it matters little to a homeless person what the cause of homelessness is.[211]

The decisions in *PE Municipality* and *Blue Moonlight* illustrate that judicial interpretations of PIE have resulted in the development of procedural and substantive safeguards that protect vulnerable persons from eviction. It also enables a context-sensitive consideration of occupiers' claims to land and housing in urban areas. This suggests that the judicial application of PIE and its underlying considerations of justice and equity can contribute to realising the right to the city of the urban poor and to promoting just spatial outcomes in cases involving settled occupiers. The provisions of PIE can assist in promoting the right to the city by either preventing the relocation of the occupiers or, where relocation cannot be avoided, mitigating the spatial consequences of the relocation by ensuring that the local

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[207] Paras 67 and 74.

[208] Para 94.

[209] *Blue Moonlight*, para 74.

[210] *Blue Moonlight*, paras 47 and 57. See further J de Visser "A perspective on local government's role in realizing the right to housing and the answer of the *Grootboom* judgment" (2003) 7 *Law, Democracy and Development* 201 at 214.

[211] *Blue Moonlight*, para 95.

authority provides proximal alternative accommodation or land to affected inhabitants.

5 4 5 Evictions in terms of health, safety and disaster management legislation

The pressure to displace the poor from valuable urban land in South Africa has taken the form of ambitious state-led regeneration programmes in the inner cities of cities like Johannesburg. The City of Johannesburg's 2003 inner-city regeneration strategy was premised entirely on encouraging commercial property developers to take control of abandoned and derelict properties, by evicting the occupiers and refurbishing these properties for occupation at much higher rentals.[212] The City's strategy made no provision for alternative accommodation for the poor and vulnerable urban inhabitants that were living in the affected properties. This was problematic, given that they would be unable to afford the rents demanded by the owners of the refurbished properties and could not afford accommodation elsewhere in the city. In its early stages, part of the attraction of the scheme for private property developers was that the City would evict the current occupiers of the properties, delivering the building ready for refurbishment to the developer. The vision was one of gradual displacement of the poor from the urban core, through a process of accelerated, state-assisted gentrification.[213]

The implementation of the City of Johannesburg's regeneration strategy has generated prominent cases before the Constitutional Court. The first is *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*[214] ('*Olivia Road*'), which concerned an eviction application by the City of Johannesburg to evict over 300 people occupying two dilapidated inner city buildings. *Olivia Road* provided the Constitutional Court with a novel opportunity to consider the implications of section 26(3) of the Constitution in the context of health and safety legislation. The case concerned applications by the Johannesburg City Council in terms of the National Building Regulations and Building Standards Act 103

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[212] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* 127 at 134; COHRE *Any Room for the Poor? Forced Evictions in Johannesburg South Africa* (2005) 3; and K Tissington *Minding the Gap: An Analysis of the Supply of and Demand for Low-Income Rental Accommodation in Inner City Johannesburg* (2013) 32.

[213] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* 127 at 134.

[214] 2008 3 SA 208 (CC).

of 1977 ('NBRSA'), the Health Act 63 of 1977, and the City's by-laws for the eviction of a substantial number of poor occupants from unsafe buildings in the Johannesburg inner city.[215]

The NBRSA permits a municipality to demolish any building that is dilapidated or in a state of disrepair. The use of the Act assisted the City in characterising the abandoned properties in the inner city as health and safety nuisances, rather than sites of dire housing need urgently requiring attention. The City sought to evict the occupiers on the grounds that the buildings were unfit for human habitation and that evicting the occupiers would promote public health and safety, as well as promote inner city regeneration in line with its inner city regeneration strategy.[216]

The NBRSA also authorised the local authority to issue a written notice ordering people to vacate such a building if it is deemed necessary for the safety of any person. In particular, section 12(4)(b) of that Act permitted a municipal official that was of the opinion that it was necessary "for the safety of any person" to order the "vacation" of a property, merely by issuing a notice. The NBRSA does not require that the notice be accompanied by a court order. In this case, however, the city applied for a court order authorising the eviction of occupiers who failed to comply with its notice. In adopting this approach, the City's strategy employed a similar approach to the urban poor as the one so stringently disapproved of in the case of *PE Municipality*.

In the early years of the strategy, the City of Johannesburg evicted approximately 10,000 people under the auspices of its regeneration programme.[217] In *Olivia Road*, the occupiers contested their eviction, arguing that it would not only render them homeless, as they were too poor to secure alternative accommodation in the city, but that it would also deprive them of vital livelihood strategies, because the location of their current housing facilitated access to economic opportunities in the city.

The Constitutional Court in *Olivia Road* declared relevant provisions of the NBRSA unconstitutional for failing to incorporate judicial oversight into eviction proceedings in terms of the NBRSA[218] and read in an appropriate provision to this

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[215] Para 10.

[216] Para 7.

[217] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004-2008" (2011) 27 *South African Journal on Human Rights* 127 at 137.

[218] *Olivia Road*, para 54.

effect. It also found that homelessness and the availability of suitable alternative accommodation were relevant considerations in considering the granting of an eviction order in these circumstances.[219]

This finding is significant because without this safeguard the legitimate public purpose of ensuring safe accommodation would be undermined whenever people who are too poor to secure alternative accommodation are evicted without any alternative recourse.[220] The Court also confirmed that local authorities "do not act appropriately if they take insulated decisions in respect of different duties that they are obliged to perform".[221] This finding established that it is not acceptable for municipalities to enforce health and safety legislation in a manner that is incompatible with their duty to implement reasonable housing policies and prevent homelessness.[222]

The Constitutional Court was reluctant to delve into the critical question whether the City had an obligation to adopt a policy in terms of which the occupiers should be afforded alternative accommodation.[223] Instead, the Constitutional Court focused on the absence of meaningful engagement between the parties prior to the eviction.[224] In an attempt to resolve the dispute between the parties in light of "the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned", the Court in *Olivia Road* issued an interim order requiring the parties to "engage with each other meaningfully".[225] The interim order directed the City and the occupiers to meaningfully engage with one another in order to find ways in which to improve the safety of the buildings in the interim.

The Court derived a general obligation of meaningful engagement in the context of the eviction of people from their homes from various constitutional provisions,

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[219] Para 43.

[220] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 437.

[221] *Olivia Road*, para 44.

[222] Wilson S "Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of 'meaningful engagement'" (2011) 22 *Urban Forum* 265 at 273.

[223] S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 483.

[224] *Olivia Road*, para 23.

[225] Para 5.

including the rights to life, human dignity and housing.[226] Moreover, the Court held that failure on the part of local authorities to engage meaningfully with people who would be rendered homeless due to an eviction represented a weighty consideration against awarding an eviction order.[227]

After two months of intensive negotiations, the matter was resolved when the occupiers accepted an offer of alternative accommodation in a building elsewhere in the city.[228] The outcome of the engagement order in *Olivia Road* was a comprehensive settlement agreement between the parties. It included steps for rendering the occupied buildings more habitable, detailed provisions regarding the eviction and relocation of the occupiers to alternative accommodation in the inner city and a guarantee of alternative accommodation "pending the provision of suitable permanent housing solutions" by the city "in consultation" with the occupiers.[229] This judgement illustrates the significance of the principle of participatory, deliberative democracy in resolving conflicts involving different constitutional rights.

Although the Constitutional Court held that aspects of the dispute in the *Olivia Road* case, which relate to the constitutionality of the City's housing policy and eviction practices, had become moot due to the agreement reached between the occupiers and the City,[230] it nevertheless took the opportunity to develop the concept of meaningful engagement as a constituent element of reasonable state action required by section 26(2) of the Constitution.[231] The Court found that where the state intends to remove or displace people from their existing housing, engagement

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[226] Paras 16-18.

[227] Para 18.

[228] S Wilson "Litigating housing rights in Johannesburg's inner city: 2004–2008" (2011) 27 *South African Journal on Human Rights* 127 at 135.

[229] *Olivia Road*, paras 24-26.

[230] Para 34.

[231] S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *SAJHR* 472 484. See also, K McLean "Meaningful engagement: One step forward or two steps back? Some thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223; G Muller "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" (2011) 22 *Stellenbosch Law Review* 742; B Ray "Proceduralisation's triumph and engagement's promise in socio-economic rights litigation" (2011) 27 *SAJHR* 107; L Chenwi "'Meaningful engagement' in the realisation of socio-economic rights: The South African experience" (2011) 26 *South African Public Law* 128; and S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 1.

represents a prerequisite to the institution of eviction proceedings.[232] Engagement must be individual and collective,[233] presumably meaning that affected communities must be engaged as a group in relation to the impending removal, as well as at an individual and household level, in order to ensure all relevant personal circumstances are taken into account in the process.[234] Engagement must be undertaken without secrecy, and should focus on meeting the reasonable needs of an affected community, and providing alternative accommodation where it is needed.[235] Due to the absence of engagement in this case, the Court held that the eviction order issued by the SCA should be set aside.[236]

It is important to remember, however, that the city's eviction proceedings against the occupiers in *Olivia Road* formed part of its broader Inner City Regeneration Strategy ('ICRS'), which aimed to remove an estimated 67,000 people from 235 allegedly unsafe properties in Johannesburg.[237] The ICRS encouraged private investment in dilapidated properties in order to stimulate property values in the inner city, but did not contain a plan for protecting the housing rights of the occupiers of those buildings. Moreover, the options for low-cost housing envisaged by the ICRS were beyond the financial means of most of the affected occupiers.

The occupiers therefore claimed that the strategy amounted to a violation of section 26(2) of the Constitution and requested the Court to supervise the formulation of a reasonable housing policy for all similarly affected occupiers.[238] Although the Court acknowledged that it was apparent from the outset that the city's ICRS would amount to homelessness on a massive scale,[239] it found no need to pronounce on the constitutionality of the city's plan.[240] The Court's failure to engage with the systemic impacts of the city's ICRS is regrettable, given its ability to undermine the objectives of integrated communities and spatial justice and its potential to enable the gentrification of the Johannesburg inner-city area by

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[232] *Olivia Road,* para 30.

[233] Para 13.

[234] S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *SAJHR* 472 484.

[235] *Olivia Road,* paras 14, 18, 21.

[236] Paras 69, 199-120.

[237] COHRE *Any Room for the Poor: Forced Evictions in Johannesburg, South Africa* (2005) 41.

[238] Paras 7, 17-18.

[239] Para 19.

[240] Paras 32-36.

displacing poor and vulnerable persons to peripheral informal settlements. Advancing a right to the city for the urban poor requires addressing deep social contradictions or structural issues in South African society. By failing to engage with the impact of the City's regeneration strategy, the Court missed a valuable opportunity to assess the real or material outcomes of the state's policy and how they impact on the daily lives of urban inhabitants.

The case of *Pheko v Ekurhuleni Metropolitan Municipality*[241] ('*Pheko*') concerned the interpretation of section 26(3) of the Constitution in the context of disaster management legislation. In this case, the municipality relied on section 55 of the Disaster Management Act 57 of 2002 ('DMA') to evacuate and forcibly relocate over 700 residents from an informal settlement situated on privately owned land to an area some 30 km away from the settlement. The evacuation was motivated by evidence that the settlement was situated on land threatened by sinkholes. The municipality did not obtain a court order authorising the eviction and claimed that a directive issued in terms of the DMA authorised the evacuation of the residents to temporary shelter.[242]

The residents opposed their relocation and argued that their evacuation amounted to an unlawful eviction without a court order, which constituted a violation of their housing rights.[243] They also contended that the municipality's conduct was not in line with the provisions of the PIE Act.[244] Key issues in the *Pheko* case were whether the removal of the informal settlement community constituted an evacuation for purposes of section 55 of the DMA and whether the circumstances of the case warranted the removal of the residents without a court order.[245]

The Constitutional Court confirmed that when interpreting section 55 of the DMA in light of section 26(3) of the Constitution, section 26(3) must be read as a whole and does not permit legislation authorising evictions without a court order.[246] The Court held that section 55 must be interpreted narrowly to provide for evacuations in cases limited to temporary actions for the preservation of life, as a wide construction

[241] 2012 2 SA 598 (CC).
[242] Para 11.
[243] Para 18.
[244] Para 13.
[245] Para 24.
[246] Paras 34-35.

would adversely affect the housing rights in section 26.[247] Furthermore, it held that "properly construed and read in conjunction with other provisions" section 55 did not authorise an eviction without a court order.[248] The Court in *Pheko* consequently found that in engaging the DMA to evict the residents and to demolish their homes without a court order, the municipality had acted contrary to section 26(3) of the Constitution and outside the powers conferred on it by the DMA.[249] The decision also affirms that an evacuation in terms of the DMA is not the "equivalent of eviction, much less of demolition", because an evacuation implies that "those evicted may return to their homes, if possible".[250] On the facts of the case, it was clear that the municipality never intended for the residents to return to their homes.[251] In an attempt to remedy the constitutional breach, the Court issued an order requiring the municipality to provide the residents with suitable temporary accommodation in the form of available land in the vicinity, to engage meaningfully with the residents and to report back to the Court on its progress.[252]

The decision in the *Pheko* case illustrates that local authorities are under an obligation to enforce health, safety and disaster management legislation in a manner that is compatible with their duty to prevent homelessness. This requires a holistic approach to decision-making at the local level that is in line with the rights and values enshrined by section 26 of the Constitution.[253] Local authorities can contribute to advancing the right to the city for the urban poor by ensuring that all legislation that impacts on the lives and housing spaces of the urban poor is implemented in a manner that is consistent with the rights and values enshrined in section 26 of the Constitution. It is now clearly established that section 26(3) of the Constitution does not permit any legislation to authorise an eviction without a court order, that the availability of alternative land or accommodation remains a relevant consideration,

[247] Paras 36-37.
[248] Para 38.
[249] Para 45.
[250] Para 39.
[251] Para 40.
[252] Para 49.
[253] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 439.

and that the procedural and substantive safeguards developed under section 26(3) can be applied to different types of evictions.[254]

The decisions in *Olivia Road* and *Pheko* illustrate that local authorities are under an obligation to enforce health, safety and disaster management legislation in a manner that is compatible with their duty to prevent homelessness. This requires a holistic approach to decision-making at the local level that is in line with the rights and values enshrined by section 26 of the Constitution. It is now clearly established that section 26(3) of the Constitution does not permit any legislation to authorise an eviction without a court order, that the availability of alternative land or accommodation remains a relevant consideration, and that the procedural and substantive safeguards developed under section 26(3) can be applied to different types of evictions.

The *Olivia Road* and *Pheko* judgements also show that there is a general obligation on local authorities to engage meaningfully with people confronted with eviction and homelessness and to respond reasonably to their particular needs and circumstances. The absence of meaningful engagement constitutes a weighty judicial consideration in deciding whether an eviction order should be granted and on what terms. Furthermore, the obligation of meaningful engagement has the potential to promote spatial justice by requiring parties to engage on vital aspects regarding the eviction and relocation of poor persons, such as the location of alternative accommodation. Settlement agreements reached as a result of meaningful engagement, as in the case of *Olivia Road*, can also promote greater spatial justice by ensuring that they receive alternative accommodation, pending more permanent housing solutions, in proximity to their customary livelihood opportunities. In order to give effect to the right to the city, settlement agreements reached as a result of meaningful engagement must promote real citizen participation on, occur on an equal level and must be open to accommodating the different views and needs of urban inhabitants.

5 4 6 Evictions for purposes of upgrading or eradicating informal settlements

The Constitutional Court case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[255] (‘*Joe Slovo*’) concerned an application in terms of PIE

[254] 439.

for the eviction and relocation of approximately 20,000 people from a large informal settlement near the city of Cape Town. Thubelisha Homes, the state agency responsible for developing housing in the area where the Joe Slovo community had settled, argued that the eviction of the community was necessary to upgrade the settlement as part of the N2 Gateway Housing Project, a pilot initiative of BNG. The residents of the Joe Slovo settlement challenged their eviction, arguing that it would not be just and equitable. They contended that the eviction was sought without proper engagement, particularly regarding the possibility of conducting an *in situ* upgrade of the informal settlement, which could have rendered the eviction unjust.[256] It was also argued that the suggestion to relocate the residents failed to consider that the settlement was home to a number of well-established communities who depended on the various support networks in the area for their survival.

Moreover, it was submitted that the mass relocation of the residents would severely disadvantage an already vulnerable community, due to the considerable distance between the city's economic opportunities and social amenities and the proposed alternative accommodation. This point was emphasised in the submissions of the *amici curiae* admitted to the case.[257] Finally, the residents expressed concern that their relocation to the temporary resettlement areas ('TRAs'), some 15 km away in Delft on the urban periphery, could become permanent, because they would be unable to afford the newly developed accommodation in the Joe Slovo settlement.[258] These submissions reflect the caution that anti-poverty planning, urban renewal, social cash programmes or other interventions must keep in mind that the "everyday social contract of informality forges a bond between the members of a local community that cannot be replaced by formalisation easily".[259]

In the various separate concurring judgements delivered in the case, the question whether the eviction would be just and equitable was primarily reduced to an inquiry into the reasonableness of the state's measures aimed at giving effect to the

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[255] 2010 3 SA 454 (CC).

[256] Para 174.

[257] Submissions of the amici curiae: Community Law Centre (UWC) and Centre on Housing Rights and Evictions (COHRE) in *Joe Slovo Community, Western Cape v Thubelisha Homes* (2008), paras 98, 100–101 and 108)

[258] *Joe Slovo*, para 250.

[259] B Davy & S Pellissery "The citizenship promise (un)fulfilled: The right to housing in informal settlements" (2013) 22 *International Journal of Social Welfare* 68 at 80-81.

residents' housing rights. A central element in establishing the reasonableness of the eviction was the perceived desirability of upgrading a large informal settlement in fulfilment of the state's obligations to provide access to adequate housing and the fact that the evictees would be provided with alternative temporary accommodation in Delft. This was despite the fact that the engagement process leading up to the decision to develop the settlement, the manner of implementing the housing development and the decision to effect the residents' relocation were characterised by acknowledged deficiencies.[260]

The court in *Joe Slovo* afforded the state a wide discretion regarding its housing policy and found that the eviction was reasonable in light of the state's broader obligation to provide housing in terms of section 26 of the Constitution.[261] It consequently held that it was just and equitable to grant the eviction order and that it was reasonable to relocate the residents to the TRUs, because the state authorities regarded the *in situ* upgrading of the informal settlement to be unfeasible. Regrettably, the court failed to engage in-depth with the grave consequences that the eviction would have for the residents, as these consequences were largely viewed as "operational matters in relation to which the state should ordinarily have a large discretion".[262] At most, the judgement of Justice Ngcobo acknowledged that the state is under a duty to "have regard to the proximity of schools and employment opportunities when it seeks to relocate people for purposes of providing them with decent houses".[263] He furthermore held that where it is not possible to choose a location with adequate access to social amenities and employment, the state must attempt to ameliorate the disruptive effect of the relocation "by providing access to schools and other public amenities as the government has done in this particular case".[264]

As part of the eviction process in the *Joe Slovo* case, the court required and supervised a continuing process of meaningful engagement between the parties concerning various aspects of the eviction and relocation process.[265] This illustrates that engagement orders can be structured in specific ways to incorporate substantive

[260] *Joe Slovo*, paras 113, 166-167, 301.
[261] Para 51.
[262] Para 381.
[263] Para 256.
[264] Para 257.
[265] Order, paras 5-7, 11.

solutions for specific issues. However, the endorsement of the Court of the formalistic, procedural engagement process in relation to the series of decisions leading up to the *Joe Slovo* eviction application is inconsistent with the preventative role of meaningful engagement, and the substantive criteria for such engagements developed in the *Olivia Road* judgement.[266] Ultimately, an important issue that should have been dealt with through meaningful engagement, before considering the eviction order, was whether an *in situ* upgrade of the settlement was really feasible or not. This is particularly true, given that the state's engagement reports to the Court in the months following the granting of the eviction order eventually indicated the feasibility and intention of the state authorities to pursue an *in situ* upgrade of the Joe Slovo settlement, rather than a relocation of the community.

The court discharged its original eviction order in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[267] ('*Joe Slovo II*'). In this case, the Court held that it had a discretion to discharge eviction orders in instances where the change was necessitated by exceptional circumstances and considerations of justice and equity.[268] At that time, the circumstances of the Joe Slovo development met these criteria, as it was common cause that the in situ development of the Joe Slovo settlement was the most likely course of action and that many aspects of the original court order could no longer be complied with.[269] The outcome of *Joe Slovo II* is therefore not only more spatially sensitive and less disruptive but also more in line with the development approach argued for by the community and their advisors.[270] The *in situ* development of the informal settlement is now proceeding on this basis.

The case of *Abahlali baseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal*[271] provided the Constitutional Court with an opportunity to consider the constitutionality of legislation aimed at eradicating informal settlements. Section 16 of the KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act

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[266] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 307-310.

[267] 2011 7 BCLR 723.

[268] Paras 30-31.

[269] S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights Law Journal* 1 at 24.

[270] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 441.

[271] 2009 ZACC 31, 2009 BCLR 99 (CC).

6 of 2007 ('Slums Act') authorised the provincial state official responsible for housing to issue a notice directing landowners and municipalities to institute wholesale eviction proceedings against all residents living in the informal settlements listed in the notice.

The Abahlali baseMjondolo Movement, an organisation representing thousands of people who reside in informal settlements, challenged the constitutionality of the Slums Act. They argued that section 16 violated section 26(2) of the Constitution, because it not only precluded meaningful engagement between municipalities and unlawful occupiers but also violated the principle that eviction should be a measure of last resort, and undermined the already insecure tenure of unlawful occupiers.[272] This last argument was particularly persuasive, as the provisions of the Slums Act undermined the procedural and substantive safeguards established under PIE and implied that the provincial state official responsible for housing could, in one notice, announce a single date for the eviction of all unlawful occupiers in the province.[273] The court in *Abahlali* consequently found section 16 of the Slums Act inconsistent with the Constitution and invalid. It held that a "dignified framework" had been developed for the eviction of unlawful occupiers and that section 16 was incapable of an "interpretation that does not violate this framework".[274]

Although the political change in South Africa in 1994 called for a clear departure from apartheid-influenced terminology and policy approaches, which included the labelling of informal African settlements as "slums", the *Abahlali* case illustrates that the term is still used to refer to housing that is unsuitable for improvement and destined for demolishment.[275] This has become a central concern in recent reviews of the word's significance, particularly in the context of modern-day forced evictions.[276] Furthermore, even though post-apartheid legislation repealed the notorious Prevention of Illegal Squatting Act 52 of 1951 and the Slums Act 76 of

[272] Para 101.

[273] Paras 116 and 118.

[274] Para 122.

[275] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 5.

[276] A Gilbert "The return of the slum: Does language matter?" (2007) 31 *International Journal of Urban and Regional Research* 697-713; and R Martin & A Mathema *Development, Poverty and Politics: Putting Communities in the Driver's Seat* (2010) 15-22.

1979,[277] the term "slum" is still being used in legislation that was enacted after the advent of democracy in South Africa. The national Housing Act 107 of 1997, for example, contains the notion of slum eradication,[278] without actually defining the term "slum". More recently, the term also found its way into provincial legislation when KwaZulu-Natal enacted the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.[279]

The Constitutional Court in *Abahlali* found that section 16 of the Act could not be reconciled with the provisions of the national Housing Act or the National Housing Code, both of which had been passed to give effect to section 26(2) of the Constitution.[280] The court also found that section 16 could not be interpreted in a way that promoted the ostensible objectives of eliminating and preventing slums and providing adequate housing.[281] The KZN Slums Act effectively equated the elimination of slums with the eviction of the poor urban inhabitants who lived in them.[282] The emphasis was, therefore, on facilitating the eradication of informal living conditions, instead of fulfilling the constitutional obligation to provide those desperately in need with access to adequate housing.[283] Even though the provisions of the KZN Slums Act could have sped up the pace of housing delivery on paper, in practice it would have actively encouraged the eviction of unlawful occupiers living in informal settlements and buildings. More importantly, this case significantly illustrates that contemporary legal disputes concerning housing rights, slum conditions and informal settlements are a manifestation of a much bigger problem: access to well-located land and livelihoods for the urban poor.

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[277] See further section 2 4 3 of this study.

[278] S 2(1)(e)(iii) states that the Housing Act is aimed at promoting "the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions".

[279] According to the Long Title of the Act, it is concerned with the progressive elimination of slums, measures for the prevention of the re-emergence of slums and the upgrading and control of existing slums. In the Act, the definition of "slum" refers to "overcrowded or squalid land or buildings occupied by predominantly indigent or poor persons".

[280] *Abahlali*, para 115.

[281] Para 126.

[282] CALS "Abahlali baseMjondolo celebrates as Constitutional Court declares KZN Slums Act unconstitutional" (14-10-2009) <http://abahlali.org/node/5910> (accessed 20-08-2012).

[283] K Tissington *A Resource Guide to Housing in South Africa 1994-2010: Legislation, policy, programmes and practice* (2011) 53.

In the *Abahlali* decision, the Constitutional Court emphasised that the state must consider all reasonable alternatives through engagement before resorting to eviction. The Court clarified that reasonable engagement in this context includes considering the needs and circumstances of occupiers facing eviction, whether their area can be developed through in situ upgrading, and whether alternative accommodation will be provided.[284] The nature and scope of engagement envisioned by the Court in *Abahlali* aligns well with the substantive notion of participation advanced by the right to the city. In particular, the requirement that engagement must be context-specific and focused on the needs of the occupiers aligns with the notion of self-management or meaningful participation advanced by the right to the city. The *Abahlali* decision therefore confirms that legislation that precludes or substantially reduces the possibility of meaningful engagement can be declared inconsistent with section 26 of the Constitution.

Pursuant to the constitutional guarantee of a right to have access to adequate housing and a right not to be evicted from one's home without due legal process, South African courts have, with increasing regularity, become embroiled in disputes pertaining to the eviction and relocation of urban inhabitants.[285] The Constitutional Court decisions discussed in this section are not exhaustive of the high-level jurisprudence in this area. However they capture the tensions between the interests of local government and private capital in dictating the terms of urban regeneration on the one hand, and those of inner-city inhabitants in maintaining their livelihoods on the other.[286] Evictions law in South Africa therefore represents an area where the struggle for the right to the city is particularly evident and where the courts can play a valuable role in advancing the values and principles encapsulated in the right to the city paradigm.

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[284] *Abahlali*, para 114.

[285] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 264.

[286] 264-265.

5 4 7 Evaluating post-apartheid evictions law through a 'right to the city' lens

The legal implications for poor urban inhabitants currently living in these affected inner city buildings has been the subject of two Constitutional Court decisions[287] and four decisions of the Supreme Court of Appeal.[288] These court decisions have virtually unanimously [289] confirmed that if municipalities or private property developers institute eviction proceedings against persons living in dilapidated or abandoned buildings, the municipality must provide alternative accommodation to those who would otherwise be rendered homeless.[290] In doing so, the courts have drawn important attention to the fact that poor urban inhabitants occupy well-located, yet derelict buildings due to their inability to afford formal residential accommodation. Accordingly, the implication is that the municipality must either refrain from evicting the urban poor or provide affordable alternative accommodation.[291]

In particular, the cases of *Olivia Road* and *Blue Moonlight* illustrate that the right to have access to adequate housing places certain obligations on municipalities, which they must fulfil in good faith, in order to come to grips with the substantive implications of their various obligations.[292] This requires local authorities to develop the necessary institutional capacity and policy frameworks and to train skilled and sensitive personnel that are genuinely responsive to the lived reality of urban poverty.[293] As explained in *Olivia Road*, this also requires local authorities within different departments to work together to develop holistic approaches to planning processes and decision-making that are consistent with the rights and values

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[287] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); and *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

[288] *City of Johannesburg v Rand Properties* 2007 6 SA 417 (SCA); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 991 (SCA); *City of Johannesburg v Blue Moonlight Properties* 2011 (4) SA 337 (SCA); and *City of Johannesburg v Changing Tides* 2012 6 SA 294 (SCA).

[289] *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* 2013 1 SA 583 (GSJ).

[290] S Wilson "Curing the poor: State housing policy in Johannesburg after *Blue Moonlight*" (2014) 5 *Constitutional Court Review* 279 at 281.

[291] 282.

[292] 281.

[293] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 442.

enshrined in the Constitution, as well as their obligations to promote access to housing and prevent homelessness in terms of section 26 of the Constitution.[294]

Ultimately, municipalities must understand that the law does not prohibit the implementation of planning schemes, but limits the means adopted in doing so in the interest of poor people without secure access to land and housing.[295] In other words, the South African constitutional and legislative framework requires state authorities to implement planning in a manner that is sensitive to the wide-spread poverty, inequality and vulnerability and is consistent with the values that underlie its constitutional democracy.[296]

The *Olivia Road* and *Blue Moonlight* judgments have also developed a substantive framework governing the relationships between occupiers, the state and property owners in relation to the provision of alternative accommodation. Property owners are no longer entitled to insist on the immediate enforcement of common law rights if this results in homelessness for poor and vulnerable people with nowhere else to go. Unlawful occupiers acquire a temporary, limited and circumscribed entitlement to remain on land without an owner's consent until the state can reasonably be expected to meet its constitutional obligation to provide housing for those in need.[297] As acknowledged by the Constitutional Court in *PE Municipality*, South Africa's historical and social context necessitates recognising the acute hardship caused by the enforcement of statutory or common law rights which lend themselves to social exclusion and the reproduction of structural inequality and spatial injustice. In limiting property rights in favour of housing rights, the court has granted the poor a secure legal foothold in urban South Africa by protecting occupation rights in a balancing act with ownership rights.[298]

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[294] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 44.

[295] S Wilson "Curing the poor: State housing policy in Johannesburg after *Blue Moonlight*" (2014) 5 *Constitutional Court Review* 279 281.

[296] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 442.

[297] S Wilson "Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential of 'meaningful engagement'" (2011) 22 *Urban Forum* 265 275; and S Wilson, J Dugard & M Clark "Conflict management in an era of urbanisation: 20 years of housing rights in the South African Constitutional Court" (2015) 31 *South African Journal on Human Rights* 472 at 487.

[298] *Port Elizabeth*, paras 22 and 23.

The analysis in this section shows that, where the implementation of legislative and policy frameworks have failed to give substantive effect to the housing rights of the urban poor, the adjudication of housing rights claims by South African courts arising from section 26 of the Constitution has given legal effect to several features of the right to the city. By relying on rights in the Bill of Rights, poor and marginalised urban inhabitants have thus been able to insist that their voices be heeded and their circumstances taken into account in decision-making regarding the form and function of housing spaces in South African cities.

Simultaneously, the Constitution's entrenchment of key components of housing rights, which align with constituent elements of the right to the city, has led to urban planning and governance processes becoming increasingly legalised.[299] As a result, these processes are progressively subjected to judicial scrutiny for constitutional compliance, especially in instances where they have the effect of excluding poor and marginalised persons from housing spaces in the city. It may be expected that, as the conceptual right to the city-framework is increasingly utilised to analyse theoretical and practical approaches to the realisation of the housing rights of South Africa's urban poor, its impact will become evident in a wider range of policy fields, ranging from municipal bylaws, zoning requirements for developments, the delivery of basic services and public transport.

It should be noted, however, that the effect of legal outcomes on policy processes can be disruptive, particularly where judges are not aware of the sensitive contexts in which the impact of their judgements are felt, or where those tasked with developing or implementing urban policies are unfamiliar with the requirements posed by the constitutional standards to which they must adhere.[300] One way in which this can be ameliorated is for policy makers and practitioners to be made more aware of the human rights impact of their work and to incorporate constitutional compliance into their understandings of urban space.[301]

Thomas Coggin and Marius Pieterse argue that it is, however, also clear that the judicial enforcement of legal rights may frustrate important dimensions of the right to

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[299] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 at 275.

[300] 275.

[301] 275.

the city.[302] For instance, the case-specific and precedent bound nature of rights litigation may disrupt the fluid processes by which the right is continuously constituted and reconstituted through struggle and lived practice.[303] It is also possible that the legal weighing of constitutionally enumerated and un-enumerated constituent elements of the right may result in a hierarchical determination of the interests of the urban poor. Moreover, the atomistic characteristics of legal rights, together with the adversarial nature of the legal process and the typical one sidedness of its outcomes, may disrupt or unduly predetermine the continuous balance between competing claims to the city, in either its concrete or aspirational forms.[304] More specifically, Coggin and Pieterse argue that the current approach of the courts to the adjudication of rights claims in the housing policy arena may be detrimental to achieving the right to the city for South Africa's urban poor.[305] As discussed in this chapter, the Constitutional Court has been criticised for failing to give rights in the Bill of Rights sufficient substantive content in its interpretation and enforcement thereof.[306] It often decides matters narrowly and interprets rights only within the context of specific matters brought before it.[307] Perhaps more problematic, the court often refrains from giving specific guidance to the state on the nature of its obligations flowing from any particular right.[308] Given that the right to the city involves an examination of policy that at its core is traditionally considered to be within the domain of the state and that the right to the city is in many respects an amalgamation of other rights that require policy-formation, there is a danger that the judiciary could, in its construction of the right to the city, fall into the same trap of failing to give the rights substance.[309]

The failure of the courts to give substantive content to housing rights is, to a certain extent, understandable given that our legal system recognises the principle of separation of powers and given that it operates within a political context where the

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[302] 275.

[303] 275.

[304] 275.

[305] 275.

[306] K McLean "Housing" in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) (OS 06) 55-1 55-12.

[307] 55-13.

[308] 55-14.

[309] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 275.

executive holds much legitimacy.[310] The judiciary does not always enjoy a strong level of support from the general public[311] and courts are bound to be weary of overstepping institutional boundaries in terms of the development of policy.[312] This is particularly true regarding matters affecting city governance, perhaps due to the more localised and direct connection between the city and its inhabitants.[313] However, the danger is that, when enforcing constituent elements of the rights to housing and the city, the amount of deference shown by courts to local governments, such as in the *Joe Slovo* case, may be such that local authorities' plans and practices are left unquestioned and that their interests are allowed to dictate the terms of engagement over the form of the city, at the expense of the interests of marginalised and poor city inhabitants.[314]

Nevertheless, the constitutional development of the constituent elements of the right to the city has meant that courts have become important spaces where its content will be contested and decided.[315] Developing this space further requires advocating for increased dialogue between the legal fraternity on the one hand, and the community of architects, town planners and local government actors on the other. Lawyers and judges need to be more aware of the context, content and nuances of the right to the city and of the manner in which legal arguments and interpretative practices impact not only on its realisation, but also on the housing rights of South Africa's urban poor. Judgements impacting on the rights to housing and the city should thus reflect the interdependence of rights and should attempt to balance the competing interests at stake in a manner that does not compromise the essence of the right to the city.[316] Institutionally, the judiciary should see itself more

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[310] 275.

[311] JL Gibson & GA Caldeira "Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court" (2003) 65 *Journal of Politics* 1 9-12.

[312] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 275; and T Roux "Principle and pragmatism on the Constitutional Court of South Africa" (2009) 7 *International Journal of Constitutional Law* 106-138.

[313] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 275.

[314] 275.

[315] T Coggin & M Pieterse "Rights and the city: An exploration of the interaction between socio-economic rights and the city" (2012) 23 *Urban Forum* 257 275.

[316] 275.

as an arbiter or mediator between the city and its citizens and should provide for a space where the way in which citizens want to live, and the way in which the City wants to govern itself, is debated in a manner that is substantive and engaging, and where competing interests are balanced in a manner that allows for the full right to the city to become a lived reality.[317]

The evolving jurisprudence on the right to housing in South Africa also illustrates a need for greater emphasis on the principle of spatial justice in the way this right is interpreted and applied in the context of evictions.[318] Thus far, the Court's approach in eviction cases has focused predominantly on assessing the reasonableness of the state's actions, requiring the provision of alternative accommodation and imposing duties on parties in eviction disputes to engage meaningfully with one another. However, it has failed to sufficiently consider the systemic issues underlying the inability of large portions of South Africa's population to gain access to adequate housing.[319] These systemic issues are deeply connected to planning and include barriers to access to land, the continued marginalisation and dispossession of people due to the legacy of apartheid, the operation of current market forces and the eviction and forced removal of people from land and property for a variety of reasons. The urban renewal project adopted by the municipality in *Olivia Road* is an example of an urban programme formulated with little regard for its social and material impact on poor people or its ability to exacerbate the disadvantage suffered by marginalised groups living in Johannesburg's inner city.[320] The *Joe Slovo* case illustrates how urban decision-making processes, which value notions of economic efficiency over substantively just housing outcomes,[321] can have potentially devastating social, material and spatial consequences for vulnerable communities facing eviction.[322]

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[317] 276.

[318] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 442.

[319] 442.

[320] 442-443.

[321] S Greenberg "The Gauteng City-Region: Private and public power in the shaping of the city" (2010) 37 *Politikon* 107 at 117.

[322] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 121-122.

Furthermore, both *Olivia Road* and *Joe Slovo* illustrate how normatively weak legal judgments, which fail to engage with the real issues underlying inadequate access to housing and homelessness, can exacerbate the disadvantage suffered by unlawful occupiers in urban areas.[323] In *Olivia Road*, the court's refusal to address the systemic causes of homelessness in Johannesburg's inner city, as well as the role of the municipality's programme in deepening these conditions, resulted in a substantively weak judgment regarding the obligations imposed by the right to have access to adequate housing. By elaborating on the nature and implications of section 26 in this case, the court could have contributed to the development of a constitutional normative framework within which, firstly, context-sensitive solutions could be developed for occupiers in a similar situation and, secondly, the processes and outcomes of these solutions could be subject to constitutional assessment.[324]

Furthermore, in *Joe Slovo*, the court's condonation of the flawed and inadequate engagement process between the parties represented a retreat from the substantive, reciprocal and deliberative process envisioned in *Olivia Road*.[325] This illustrates that meaningful engagement, as a mechanism for facilitating constitutionally informed deliberation, can be inadequate and normatively empty in cases where courts abdicate their responsibility to articulate the nature and implications of the right to have access to adequate housing in the context of evictions.[326] This is concerning, given local authorities' preference for evicting unlawful occupiers and the significant power imbalances that exist between local authorities or private landowners and disadvantaged groups facing homelessness in an eviction.[327] Ultimately, the development of normative parameters in legal judgments not only contributes to appropriate, context-sensitive solutions but also guides human rights-compliant responses and policy choices in other urban contexts with similar problems.[328] In

[323] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 443.

[324] S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 20.

[325] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 443.

[326] S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement" (2012) 12 *African Human Rights Law Journal* 1 at 23.

[327] 19.

[328] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 443.

both *Olivia Road* and *Joe Slovo*, the Court therefore missed a valuable opportunity to develop normative markers for the resolution of the widespread systemic problems facing planners, municipalities and large groups of vulnerable people confronted with eviction from sub-standard, unlawful or informal housing in South Africa's urban areas.[329]

Moreover, although the housing and evictions jurisprudence of the Constitutional Court now affirms that there is a duty on local authorities to provide temporary or alternative land or accommodation to evictees, particularly in the case of settled occupiers, there is still insufficient emphasis in the court's jurisprudence on the location of this land or accommodation. This is despite the fact that the United Nations Committee on Economic, Social, and Cultural Rights ('CESCR') has stated in its General Comment 4 that the location of housing is a critical factor in evaluating the adequacy of housing as an internationally protected right.[330] In addition to allowing access to employment options and social facilities, the location of housing should be spatially sensitive to the fact that "the temporal and financial costs of getting to and from the place of work can place excessive demands on the budgets of poor households".[331] In certain cases, grating access to temporary accommodation or land can also frustrate the achievement of spatial justice in urban areas. Literature suggests that occupiers often spend prolonged periods of between 3 and 10 years in 'temporary' accommodation without access to secure tenure, often due to a local authority's inability to negotiate on the nature and location of the permanent accommodation envisaged in a court's engagement order.[332] In these cases, occupiers face profound uncertainty and a sense of dislocation, as they are assigned indefinitely to poorly locate residential areas at the urban fringe. Addressing the spatial consequences of evictions and promoting integrated urban communities thus remains unfinished business for the development of evictions law in post-apartheid South Africa.[333]

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[329] 443.

[330] CESCR General Comment 4, para 8(f). See further chapter 4 2 of this study.

[331] CESCR General Comment 4, para 8(f).

[332] M Huchzermeyer *Cities with 'Slums': From Informal Settlement Eradication to a Right to the City in Africa* (2011) 76.

[333] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 444.

Ultimately, contemporary understandings of housing rights in South Africa tend to reduce and equate the right to have access to adequate housing with a process aimed at delivering a government-subsidised top structure to inadequately housed or homeless people. Such a narrow conception of housing rights in legal interpretation puts undue emphasis on the material and the aesthetic components of housing,[334] and curtails the ability of housing rights to promote social and spatial transformation, as well as integrated communities.[335] In terms of this approach, what is redeveloped is "space, the built environment and physical amenities rather than people's capacities or livelihoods".[336] This approach is premised on the assumption that changes to the built environment will necessarily generate social and political change or social and spatial cohesion.[337] In doing so, it ignores the reality that uprooting people from their homes, regardless of how informal they might be, causes tremendous trauma.

Although the South African Constitutional Court has illustrated some awareness of the social and spatial aspects of housing, it has not, accorded sufficient weight to these factors in its evictions jurisprudence.[338] Ultimately, approaches that favour spatial reordering, the provision of formal housing or temporary alternative accommodation as a substitute for substantive solutions to poverty and marginalisation will not succeed in promoting access to housing or spatial justice in urban areas.[339] Hohmann argues that this is because these solutions can only address issues such as informality if informality is in fact the result of a lack of access to housing and not the result of other structural factors of which housing is only one manifestation.[340] The implication is that other structural factors in South Africa, such as the uneven geographical distribution of wealth and economic opportunities and the systemic impact of inequality and disadvantage along racial lines, have root causes in need of urgent attention that reach beyond planning and

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[334] J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 223.

[335] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 444.

[336] A Roy "Urban informality: Toward an epistemology of planning" (2005) 71 *Journal of the American Planning Association* 147 at 150.

[337] J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 223.

[338] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 444.

[339] 444.

[340] J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 224.

the physical provision of housing.[341] Ultimately, Hohmann asserts that in order for spatial approaches to rights interpretation to be meaningful, it must be informed by the substantive interconnections between people and the spaces they inhabit. This is because 'place' represents much more than 'location' and is philosophically distinct from the idea of 'space'.[342] Furthermore, whereas space focuses on the material and physical aspects of housing, a place is somewhere people become "experientially invested" in and to which they develop attachments.[343]

Any interpretation of the right to adequate housing that aims to overcome actual inequality, marginalisation and disadvantage must therefore look beyond the material provision of housing or alternative accommodation and recognise the social goods that flow through housing.[344] Similarly, broad approaches to planning that seek to sustain and foster community networks and the social goods associated with housing are essential. The absence of this broader perspective will perpetuate a system where planned spaces fail to achieve spatial justice and provide for viable communities,[345] and the provision of housing will not necessarily fulfil the underlying normative values and purposes of housing as a human right.

5 5 Conclusion

Utilising the theoretically rich framework established by the right to the city can contribute to developing the meaning, content and scope of housing rights in South Africa, as well as assist in critically assessing on-going legal and political processes. It can also assist in establishing a value-based understanding of housing rights that offers pragmatic solutions to material problems associated with marginalisation and deprivation. Moreover, it requires current democratic institutions, which include courts, the legislature, the executive and agencies, to work together to constitute housing rights and collectively contribute to contextualised, participatory and

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[341] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 at 444.

[342] J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 224-225.

[343] T Cresswell "Place: Part I" in JA Agnew & JS Duncan (eds) *The Wiley-Blackwell Companion to Human Geography* (2011) 235 at 237; and J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 225.

[344] J Hohmann *The Right to Housing, Law, Concepts, Possibilities* (2013) 224.

[345] 225.

localised housing solutions in South Africa. This approach is vital to unlocking both the interpretive and practical value of section 26 in the South African context.

This chapter analysed judicial interpretations of section 26 and claims of habitation or inhabitance by the urban poor. It also provided an overview of post-1994 legal and policy developments in planning and housing aimed at promoting access to adequate housing and redressing spatial injustice. The Constitutional Court's development of the housing legal framework in response to claims of urban inhabitants for the appropriation of housing spaces, which include asserting, recognising and protecting the use value of urban housing spaces over their economic value, were also considered. Moreover, this chapter examined whether jurisprudence on promoting meaningful citizen participation in housing processes can contribute to realising a right to the city for South Africa's urban poor. The chapter concluded by evaluating whether the conceptual right to the city-framework can inform judicial, legislative and policy approaches to the housing rights and spaces of the urban poor in a manner that protects and advances their complex housing rights and needs and redress the deep social, economic and spatial inequalities that characterise South Africa's urban areas.

Although advances have been made in regulating evictions and preventing homelessness in South Africa's towns and cities, the spatial perspective adopted in this discussion suggests that current legislative and jurisprudential frameworks fail to adequately address issues of spatial justice.[346] This is despite the fact that there is a clear legislative emphasis on the spatial significance of integrating poor and marginalised groups into the greater urban pattern, as well as authority in international human rights law for recognising the value of the location of housing as a factor for determining its adequacy.

Addressing the continuing legacy of evictions and spatial displacement must therefore remain a priority in the development of housing, planning, and evictions law in South Africa.[347] The analysis in this chapter illustrates that the evictions jurisprudence of the Constitutional Court has contributed significantly to preventing homelessness and ensuring alternative accommodation for poor and marginalised groups, where the implementation of legislative and policy frameworks have failed to

[346] M Strauss & S Liebenberg "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428 445.
[347] 445.

give effect to the housing rights of South Africa's urban poor. However, the normative framework of post-apartheid housing and evictions law still lacks sufficient emphasis on the social and spatial dimensions of housing as a human right.[348] Without these aspects being fully integrated in planning legislation, policy and practice, as well as the jurisprudence of the courts, the promise of spatial justice for South Africa's urban poor will remain unfulfilled.

[348] 445.

Chapter 6

Conclusion

6 1 Introduction

Although the post-apartheid state has developed an extensive and relatively progressive housing law framework aimed at realising section 26 of the Constitution, the implementation of this normative and institutional housing framework is distorted and largely unable to adequately respond to the country's complex housing crisis. The struggle to realise housing rights in South African towns and cities is symptomatic of a deep disjuncture that characterises current approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Traversing this disjuncture requires a multifaceted approach that contextualises housing rights interpretation and litigation, while viewing housing policy analysis and implementation through the normative lens of section 26. This study thus advances a multifaceted and interdisciplinary approach to the interpretation and implementation of housing law. The aim is to develop the substantive content of the housing rights of South Africa's urban poor in a manner that advances their emancipatory potential, promotes sustainable and integrated housing environments, and contributes to broader spatial and social transformation in South Africa through real citizen participation.

The 1996 South African Constitution represents the legal foundation for establishing a democratic post-apartheid society. The transformative conception of the Constitution has implications for the interpretation and implementation of the housing rights of the urban poor. Achieving the alternative political, economic, and social order envisioned by the Constitution necessitates critically evaluating and reconstructing the various institutions, processes, practices, and relations that perpetuate inequality and injustice in our society. Additionally, it entails acknowledging and addressing both existing and new manifestations of disadvantage and exclusion.

The Constitution affirms the significance of democratic deliberation in challenging the existing state of political, legal, and social affairs and encourages continuous dialogue and contestation about the nature of the political, legal, and social reforms required. These democratic processes are not limited to the state or courts, but

occur through multiple exchanges between different participants and sectors. In this way, deliberative democracy assists in facilitating transformation by engaging with the realities of structural inequality and the deep differences in our society. Processes of democratic deliberation must, however, be responsive to the diverse composition and multiple interests of society and all participants must have the substantive means to engage equitably and meaningfully. The notion of transformative constitutionalism is influential in this regard, as it envisions the democratic, participatory, and egalitarian transformation of South African society.

Moreover, South Africa's new constitutional dispensation involves fundamental changes within the legal system that necessitate a substantive vision of law. In South Africa, the courts are primarily tasked with the responsibility of developing the normative framework and substantive content of housing rights. However, developing a normative framework that supports the realisation of a substantive vision of law and promotes equality and real social change is not a simple task. Courts must thus be vigilant of the features of South African legal culture that constrain the development of a transformative jurisprudence on housing rights. Moreover, they must promote the development of creative and innovative responses to the housing rights claims of the urban poor.

Developing the substantive content of the housing rights of South Africa's urban poor requires a paradigm capable of facilitating a multifaceted approach to the interpretation and implementation of section 26 of the Constitution. The notion of the right to the city is complex and fluid and represents one important strand of Henri Lefebvre's social theory. The right to the city paradigm promotes the transformation of urban space and society in a manner that is congruent with the transformative nature of the South African Constitution. It thus provides a valuable framework within which to analyse current approaches to the interpretation and implementation of housing law in South Africa.

A multifaceted and interdisciplinary approach to South African law can gain valuable insight from the right to the city paradigm, which can guide legal scholars to conceptualise the relationship between law and state power as continually shaped by political struggles over the inhabitance of space. In turn, these insights can add value to critical legal inquiries into the nature, structure, and form of contemporary spatial projects that affect the housing rights of South Africa's urban poor, such as housing delivery, spatial planning, and urban governance. It can also assist in

understanding the multifaceted nature housing spaces, which largely remain spatially segregated in contemporary South African towns and cities. Moreover, the right to the city framework can assist in achieving a legal and urban paradigm shift that is required to redress the adverse effects of these political, legal, and economic processes and relations on the development of urban space in South Africa and particularly housing spaces for poor and marginalised urban inhabitants.

6 2 Addressing the origins of urban residential segregation

Urban residential segregation represents a significant dimension in the historical development of the spatial settlement patterns of South Africa's urban poor, which has strong links to colonialism and apartheid. This study illustrates the dramatic spatial transformation of South Africa's urban landscape over the course of more than four centuries, due to the exercise of state power facilitated by an extensive legislative and policy framework. The history of land, planning, housing and the development of informal settlements in South Africa is deeply rooted in a racial bias entrenched by a plethora of discriminatory legislation. Moreover, the legal system applicable to land-use management, planning, and housing development has historically functioned on a racially and spatially exclusive basis. Black South Africans inherited a mixed legacy of disparities in access to urban opportunities and the housing spaces they were consigned to during centuries of oppression. A lack of adequate legislative and policy responses concerning African settlement patterns have exacerbated issues associated with spatial injustice in accessing land, housing, and livelihood opportunities.

This study illustrates that the housing needs of South Africa's urban poor are inextricably linked to a myriad of political, economic, legal, social, and cultural factors. These factors underlie the spatially unjust geography of the country's towns and cities, the current housing crisis, and the segregated housing settlement patterns of vulnerable and marginalised urban inhabitants. The study highlights the importance of understanding the history of spatial engineering in South Africa, as it is critical to developing substantive approaches to the interpretation and implementation of the housing rights of South Africa's urban poor. Acknowledging this interrelationship before seeking possible solutions or alternative approaches to meeting the housing needs of South Africa's urban poor is essential.

6 3 Promoting social and spatial transformation through the right to the city paradigm

In recent years, efforts aimed at addressing the complex relationship between urbanisation and deprivation have resulted in the development of a theoretical and practical framework that establishes a conceptual link between human rights and human habitat. Henri Lefebvre's right to the city advances an alternative paradigm that requires the restructuring of social, economic, and political relations and challenges the dominance of the state and market forces and the role of the law in the production of space, as well as the disenfranchisement of marginalised urban inhabitants.

This study illustrates that the right to the city advanced the search for alternative strategies that involve empirical examinations of emerging movements among marginalised urban populations advocating for renewed forms of democratic control. While different social movements have claimed it as a reference to a range of demands concerning the use value of urban space and questions of urban citizenship, the right to the city has also been established as a theoretical concept under which variegated urban struggles can be identified as the reverse of state policies and market interests and the gentrification processes engendered by them.

This study contributes to the developing discourse on the conceptual link between human habitats and human rights by illustrating the suitability of the right to the city paradigm to facilitate the spatial and social transformation of South African society and the unjust spatial geography of its towns and cities. The concept of the right to the city paradigm has the potential to contribute to a radical reappraisal of current approaches to the interpretation and implementation of housing rights and responsibilities in cities, particularly in relation to urban planning and local governance. This rights-based approach has the potential to generate the political will required to achieve a culture of equal resource allocation in urban areas, and to promote a spatial conception of citizenship that promotes participation in urban housing development. The right to the city thus promotes respect for the rights of the urban poor to access the city and suggests that an alternative, equitable future city is possible.

This study also illustrates that housing represents a crucial point of convergence between the different struggles and contexts associated with the right to the city.

Conceptual links between Lefebvre's right to the city and the right to housing emerge in a number of the contexts, such as the role of the state and law in developing housing spaces, evictions, and the right of urban inhabitants to participate in decision-making process that produce space and affect their daily lives. It is also evident in the links between Lefebvre's substantive notion of inhabitance and the need for the recognition of the citizenship rights of all urban inhabitants.

The right to the city acknowledges the importance of realising the substantive rights of vulnerable and marginalised urban inhabitants in facilitating the transformation of urban society. Significantly, Lefebvre identifies the right to housing as a right with the potential to transform society through its incorporation into social practice. The housing rights of South Africa's urban poor represent justiciable, legal claims that can play an important part in realising the right to the city. However, in order to give effect to the right to the city, the right to housing must be understood as part of a broader claim aimed at advancing social and spatial justice through the creation of a better urban society that meets the needs of all urban inhabitants. Due to its ability to link theory and practice, the right to the city paradigm thus provides a valuable framework for analysing current approaches to both the interpretation and the implementation of the housing rights of South Africa's urban poor.

6 4 Developing the normative content of the right to housing in international law through the right to the city

Chapter 4 develops the normative content of the right to housing in international law and evaluates the potential of the right to the city paradigm to advance the normative content of the right. The analysis in this chapter illustrates that current legal interpretations of the right to housing seldom explore how it contributes to the adequacy of living standards. By locating interpretations of the right to housing within its broader goal of facilitating the right to an adequate living standard, it can assist in giving practical effect to the role of the right in fostering societal conditions envisioned by the right to the city. In doing so, this interpretative approach provides an important platform from which the right to the city paradigm can assist in developing the normative values and substantive content of the right to housing.

Advancing legal interpretations of the right to housing that recognise its multifaceted and interrelated nature, represents an important normative aspect of the

right that is congruent with the aims of the right to the city paradigm. A broad and interrelated conception of the right to housing is consistent with the transformative goals of the right to the city. By emphasising the interrelated and communitarian nature of the right to housing, which can be exercised in the service of the family, household, or community, the right to housing can play a substantive role in transforming society.

When viewed through the right to the city paradigm, the perceived vagueness or lack of definition regarding the standard of adequacy applicable to housing does not represent an impediment to achieving its emancipatory potential. Instead, the open-ended nature of the right to adequate housing provides a positive space within which the normative and substantive content of the right can be reimagined with reference to a set of guiding values, philosophical concepts, and practical frameworks located outside traditional or current conceptions of the right. Additionally, the right to the city paradigm can assist in overcoming the current conceptual indeterminacy associated with the right due to the ability of the framework to challenge the way in which the vagueness in current interpretations of the right to adequate housing may entrench existing unequal power relations.

Developing the normative content of the right to housing remains, however, essential. The right to adequate housing must be firmly grounded in values that explicitly seek to protect vulnerable and disenfranchised communities, such as those expounded by the right to the city's inclusive conception of inhabitance. For instance, the location of housing represents a central point of convergence between the right to the city and the right to adequate housing. The qualitative aspects of the location of the right to adequate housing in international law resonate with the normative values underlying the right to the city's substantive approach to inhabiting space. This social aspect of the right to housing recognises that well-situated housing plays an important role in ensuring that inhabitants can meet their daily needs, by facilitating access to other amenities and networks and fostering participation in the city and society. In this regard, it can be argued that the right to the city paradigm can assist in bolstering the normative content of the qualitative aspect of housing location, by drawing attention to the social value that vulnerable and marginalised inhabitants attach to the spatial relationship that exists between their homes and their everyday lived environments. Recognising the social significance of this spatial relationship for poor households and individuals represents a vital step towards

developing substantive approaches to housing that can ensure that housing is connected to both the physical space of the city and its social fabric.

The right to housing in international law can also provide valuable normative guidance on how to prioritise the social value of housing over its economic value. By recognising that the destruction of the physical fabric of housing results in the destruction of the fabric of society, international law conceptions of the right to housing can guide the development of the normative content of the right in a manner that is congruent with the broad and transformative conception of the right to housing that is envisioned by the right to the city. Additionally, the normative framework of the right to housing in international law can assist in promoting a broad and substantive understanding of housing as a social space that extends beyond a physical dwelling to the relationship of the inhabitants to each other in their community. This approach recognises that housing has an important role to play in the way communities are constituted and, as a consequence, in the types of identities fostered and encouraged within those communities. In doing so, it illustrates the social linkages between communities and inhabitants in a manner that emphasises the home as a place of specific significance.

The normative international law framework informing the right to housing encompasses several aspects of housing that recognise its embedded presence in social relationships, the expression and protection of culture, and the importance of housing beyond the individual. In this regard, the normative content of the right to housing in international law is consonant with the values underlying the right to the city and can thus assist in realising a right to the city for the urban poor. Firstly, it illustrates that housing, as an element of an adequate standard of living, was not enshrined in the international human rights documents as a right to an isolated asset, but in recognition of its role in fostering an adequate life in society.

This substantive understanding of the nature of the right to housing can provide valuable normative guidance to planning and housing development practices to ensure that housing as a space fulfils its social purpose. It can also guide the implementation of resettlement schemes or efforts to upgrade informal settlements, which threaten to alter the form of dwelling, neighbourhoods, and ultimately communities in which the urban poor reside. When viewed within the right to the city paradigm, these aspects of the right to housing in international law give effect to the appropriation component of the right to the city. This requires that social space

should be asserted over its economic value and that all inhabitants must participate in decisions that affect the production of space in order to develop space that meets everyone's needs.

Finally, the normative framework informing the right to housing in international law is congruent with the goal of the right to the city to protect urban inhabitants who often have to assert their claims to housing in the face of grave power imbalances and a lack of political will on the part of the state to give effect to its housing policies. It also aligns with the key objective of the right to the city to restore the city in its totality and to overcome divisions in urban space caused by bureaucratic state policies or practices and the interests of private individuals. In addition, it illustrates that many housing human rights concerns are simultaneously caught up with a claim for the right to the city and the ability to enjoy adequate and secure housing.

6 5 Advancing the right to the city for the urban poor

The failure on the part of the post-apartheid state to systematically challenge and adequately redress housing-related issues since 1994 contributes to the problems of political, economic, social, and spatial exclusion created during colonialism and apartheid. Spatial planning and access to land are intrinsically related to the provision of adequate housing and the development of sustainable and integrated human settlements in South Africa. However, in urban areas, the unlocking of well-located land for housing developing in terms of inclusive spatial planning practices has lagged behind other forms of post-1994 transformation.

Utilising the theoretically rich framework established by the right to the city can contribute to developing the meaning, content, and scope of housing rights in South Africa, as well as assist in critically assessing on-going legal and political processes associated with housing. It can also assist in establishing a value-based understanding of housing rights that offers pragmatic solutions to material problems associated with marginalisation and deprivation. Moreover, it requires current democratic institutions, which include courts, the legislature, the executive, and agencies, to work together to constitute housing rights and collectively contribute to contextualised, participatory, and localised housing solutions in South Africa. This approach is vital to unlocking both the interpretive and practical value of section 26 in the South African context.

Although advances have been made in regulating evictions and preventing homelessness in South Africa's towns and cities, the spatial perspective adopted in this study suggests that current legislative and jurisprudential frameworks fail to adequately address issues of spatial justice. This is despite the fact that there is a clear legislative emphasis on the spatial significance of integrating poor and marginalised groups into the greater urban pattern, as well as authority in international human rights law for recognising the value of the location of housing as a factor for determining its adequacy.

Addressing the continuing legacy of evictions and spatial displacement must therefore remain a priority in the development of housing and evictions law in South Africa. The analysis in chapter 5 of this study illustrates that the evictions jurisprudence of the Constitutional Court has contributed significantly to preventing homelessness and ensuring alternative accommodation for poor and marginalised groups, where the implementation of legislative and policy frameworks have failed to give effect to the housing rights of South Africa's urban poor. However, the normative framework of post-apartheid housing and evictions law still lacks sufficient emphasis on the social and spatial dimensions of housing as a human right. Without these aspects being fully integrated in planning and housing legislation, policy, and practice, as well as the jurisprudence of the courts, the promise of spatial justice for South Africa's urban poor will remain unfulfilled.

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