Chapter Ten

THE RIGHT TO ADEQUATE HOUSING

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Keywords


Summary

This chapter surveys the international, regional and domestic entrenchment of the right to adequate housing, together with the ways in which textual formulations of the right have been deployed in concrete contexts. The chapter argues that assertions of housing rights often mean the limitation of property rights and the disruption of economic hierarchies that are based on them. This claim is illustrated by an analysis of housing rights jurisprudence from around the world, focusing on the rights of informal settlers, unlawful occupiers, residential tenants and women with precarious land tenure.

List of abbreviations and acronyms

ACHPR  African Charter on Human and People’s Rights
ACHR  Arab Charter on Human Rights
AConHR  American Convention on Human Rights
CAT  Convention Against Torture
CRC  Convention on the Rights of the Child
CEDAW  Convention on the Elimination of All Forms of Discrimination against Women
CESCR  Committee on Economic Social and Cultural Rights
CRPD  Convention on the Rights of Persons with Disabilities
ESC  European Social Charter
ICCPR  International Covenant on Civil and Political Rights
ICEPD  International Convention for the Protection of All Persons from Enforced Disappearance
ICERD  International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR  International Covenant on Economic Social and Cultural Rights
INTRODUCTION

There is a basic human interest in being able to “live somewhere in security, peace and dignity”\(^1\). The home is “a zone of personal intimacy and family security”. It will often be “the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world”\(^2\). It is accordingly hard to imagine any complete account of human rights law, in any jurisdiction, that does not recognize, protect and advance the right to a home.

The sanctity of the home is obviously recognized when international law entrenches the right to adequate housing.\(^3\) But respect for the home in international human rights instruments reaches out beyond the explicit right to adequate housing. It is recognized when those instruments entrench privacy rights.\(^4\) It also receives emphasis when addressing the needs of vulnerable groups, such as children, people with disabilities and the elderly.\(^5\)

This ripple effect has an ambiguous impact on property rights. Sometimes, the right to adequate housing is reinforced by, and provides additional protection to, the rights of poor and vulnerable people to keep hold of residential property in the face of acts of dispossession. The right to adequate housing often places limits on the rights of financial institutions to extinguish home ownership.\(^6\) It can put a brake on unfair rent increases and on evictions from homes. But the right to property also underpins the very processes of dispossession – gentrification, eviction, foreclosure – that the right to housing seeks to limit. Property rights are often enforced through the extinction of housing rights.

The principal UN instruments reflect this ambiguity. The UNDHR recognizes and entrenches the right to property, but this recognition is not replicated in either the ICESCR or the ICCPR. The CESCR accepts that, where a state has chosen to entrench the right to property that state has a legitimate interest in ensuring its protection, along with all of the other rights established in the state’s legal system, “so long as this does not conflict with the rights contained in the Covenant”.\(^7\) This simply begs the question. Depending on the legal and factual context, housing rights and property rights can either conflict with, or reinforce, each other.

\(^1\) ICESCR General Comment 4, para 7. I would like to thank Fernando Ribeiro Delgado and Joie Chowdhury at ESCR-Net for their help in sourcing some of the regional and domestic jurisprudence dealt with in this chapter. I am also grateful to Julian Brown and the editors of this volume for helpful comments on an earlier draft.

\(^2\) Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) (Port Elizabeth Municipality) para 17.

\(^3\) See, for example, Article 25 UNDHR; Article 11 of the ICESCR; Article 31 of the ESC; Article 34 of the Charter on Fundamental Rights in the European Union.

\(^4\) For example in Article 12 of the UNDHR and Article 11 of the (AConHR).

\(^5\) Articles 15 and 23 of the ESC and Article 27 of the CRC.

\(^6\) Jaftha v Schoeman; Van Rooyen v Stoltz 2005 (2) SA 140 (CC) (Jaftha).

\(^7\) Lopez Alban et al. v Spain Communication No. 37 of 2018, para 11.5.
The Covenant entrenches housing rights, but not property rights. It is therefore inevitable that
the right to housing will limit and restructure some property rights with which it comes into
contact, whatever priority national legal systems give to property rights.

It is this tense relationship between the right to housing and the right to property that
renders the right to housing so important, and so contested. At the same time as it places
housing at the core of the quest for at least a basic standard of living for everyone, the right can
place important limits on the hierarchies of power and processes of dispossession that sustain
global capitalism. In this way, the right to housing is often at the centre, not only of technical
debates about how best to deliver housing units of an appropriate standard and location to all
those who need them, but also of debates about whose interests come first in decisions about
access to land, the exploitation of housing for profit and the practices of major financial
institutions in creating and marketing debt instruments secured against residential property.

Given the scale of housing need internationally, and given also that so much economic
inequality expresses itself in skewed distributions of land, housing and property, there can be
little doubt that meeting the scope and providing the content of the right to adequate housing
implies a substantial revision of existing property relationships in a wide variety of contexts. It
also implies a substantial redistribution of land, property, and, ultimately, wealth. The right to
adequate housing is, in many respects, a manifesto for a just and equal society.

If this is correct, then the right to adequate housing presents a powerful challenge to
critics of human rights that argue that social rights are “not enough” to address the substantial
economic inequality triggered by late capitalism. Samuel Moyn, in particular, suggests that
economic and social rights, at least at the international level, are not geared to tackling
inequality so much as ensuring that everyone has access to a basic minimum of goods that
keeps them out of poverty. Rights might help tackle poverty effectively, but have historically
been ill-suited to the task of curbing excessive wealth. So while rights may help solve the
problem of “insufficiency”, they do little to build substantive equality, merely “nipping at the
heels of the neoliberal giant”.

This superficial analysis overlooks the capacity of social rights to disrupt existing
property relationships, and the hierarchies of power and stratifications of wealth that underpin
them. Insofar as it does this, the right to adequate housing is a potentially powerful tool in
challenging inequality. A great deal of capital still depends on land, housing and financial
property rights that are derived from them. Accordingly, the assertion of the right to adequate
housing – of the idea of housing as something lived in and used to sustain privacy, dignity and
family life, and not just as a means of capital accumulation – must play a critical role in a much
broader project to advance struggles for substantive equality, and, perhaps, to challenge or
transform capitalism itself.

This chapter considers the right to adequate housing in international law, and in some
domestic contexts. I first provide an overview of the right to adequate housing in the principal
United Nations instruments: the United Nations Declaration on Human Rights (UNDHR), the
International Covenant on Economic Social and Cultural Rights (ICESCR), and the General
Comments, the pronouncements of the Special Rapporteurs, and limited jurisprudence

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9 Moyn (n8) 216.
developed under the Optional Protocol to the ICESCR, that elaborate upon the right entrenched in those instruments.

I then turn to the key sites of contestation over the right within international law and some regional and domestic jurisdictions. South Africa, in particular, has been an important site of sustained experimentation and development of the right to adequate housing, and its interactions with existing property rights. I argue that when concrete social struggles have reached international, regional and domestic adjudicative bodies, especially but not exclusively in South Africa, the right to adequate housing has found its greatest traction in challenges to existing property rights. It is in struggles over the upgrading of informal settlements, the eviction of illegal occupiers, the rights of residential tenants in urban areas, the rights of mortgagors, and the struggles of women to access housing through, and despite, patriarchal accounts of property law, that the right to adequate housing has sharpened its teeth. I set out how the right has been developed and applied in each of these contexts, and how housing rights struggles in these contexts have the potential to cut to the core of the social property relations that generate and reproduce inequality.

2 THE SCOPE AND CONTENT OF THE RIGHT TO ADEQUATE HOUSING IN INTERNATIONAL LAW

The Committee on Economic, Social and Cultural Rights (CESCR) is empowered, under the Optional Protocol to the Covenant on Economic, Social and Cultural Rights (CESCR-OP), to consider individual complaints of breaches of the ICESCR where a complainant has exhausted his or her domestic remedies. Its communications and recommendations to states party to the ICESCR constitute a growing jurisprudence on that instrument’s meaning and application.\(^\text{10}\) The ICESCR has generated a significant quantity of material on the right to adequate housing.\(^\text{11}\)

In addition, the UN Human Rights Council has established a series of “special procedures” to help it monitor and review the implementation of human rights norms across a wide variety of contexts. These special procedures provide for the appointment of individual experts, often known as “Special Rapporteurs”, to report to the Council on matters affecting their areas of expertise, to conduct individual country visits, and to respond to complaints made directly by affected individuals about specific rights violations. These special procedures mandates do not map neatly on to the main UN human rights instruments, because they are not creatures of those treaties. They do, however, generate a substantial quantity of material relevant to the interpretation and enforcement of the provisions of the main UN instruments.

The Special Rapporteur on Adequate Housing’s mandate, stated formally as “adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context”, speaks directly to the way the right of access to adequate housing is framed in the ICESCR.\(^\text{12}\) The Special Rapporteurs (there have been three, with a


\(^{11}\) See, for example \textit{IDG v Spain}, CESC Communication No. 2/2014.

\(^{12}\) Article 11 of the ICESCR provides for 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.”
fourth expected to be appointed at the expiration of the incumbent’s term in mid-2020), produce reports, memoranda, guidelines and other pronouncements on the meaning and impact of the right to adequate housing across a range of themes and circumstances. This material provides a rich source for defining the scope and content of the right to adequate housing.

Beyond the UN, there are a range of regional instruments, such as the African Charter on Human and People’s Rights (ACHPR), the American Convention on Human Rights (AConHR), the Arab Charter on Human Rights (ACHR) and the European Social Charter (ESC). These instruments demonstrate a wide variety of approaches to the right of access to adequate housing. The ESC entrenches multiple aspects of the right. The ACHPR does not explicitly provide for a right of access to adequate housing at all, but has found it to be implied in the right to property, which that instrument does entrench. The regional instruments may also have their own enforcement and monitoring bodies, each of which will be a source of “soft law” on the interpretation and application of the rights they enshrine.

At the domestic level, too, some national constitutions provide extensively for the right to adequate housing. They have sometimes developed a significant and binding body of case law on its enforcement. South Africa is perhaps most advanced in its interpretation and entrenchment of the right in its constitutional law. On the other hand, many national constitutions, such as the United States Constitution, fail to provide explicitly for the right to adequate housing, or indeed, for any social and economic rights at all. Some states have no constitutionally entrenched human rights framework at all, such as the United Kingdom. Even here, though, ordinary legislation can provide legal recognition of at least some aspects of the right to adequate housing.13

It is, of course, impossible to provide an account of the right to adequate housing in all its extensions and contexts in a single book chapter. Instead, I set out, below, the textual formulation given to the right in the principal UN instruments, and the scope and content of those formulations provided in the “soft law” sources generated by the CESCR and Special Rapporteur on Adequate Housing.

2.1.1 The Right to Adequate Housing in the UNDHR and the ICESCR

Both the UNDHR and the ICESCR entrench the right to adequate housing as part of a cluster of entitlements that constitute “an adequate standard of living”.14 This affirms the obvious, but seldom fully acknowledged, reality that housing is part of a network of mutually dependent and reinforcing human needs. More than mere “bricks and mortar”15 a home is the locus of the

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13 See, for example, the United Kingdom Homelessness Reduction Act, 2017. The CESCR has made it clear that the international obligation is to ensure effective remedies that give effect to the right to adequate housing, whether or not the right is constitutionally entrenched or given any explicit legal recognition domestically. See General Comment 9 on the CESCR, paras 5, 7, 14 and 15. See also Chapter 16, on the interdependence of rights in this volume.

14 Article 25 (1) UNDHR states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, 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 11 (1) of the ICESCR is very similar: “[t]he 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”.

15 Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (Grootboom).
exercise of a wide range of other human rights. It provides a point of stability in which the family is nurtured, and in which critical aspects of human identity and consciousness are formed. The home is the place to which we retire when we are sick or tired, and from which we strike forth to meet our social needs. Our housing must according not merely be fit for shelter. It must be adequate to allow us to maintain our health, to form loving connections with our families, and to mediate and control our social interactions. 

The breadth and variety of human interests bound up in the home help explain why there are two extensive General Comments on the right to adequate housing that elaborate on the ICESCR text.

General Comment 4, adopted at the sixth session of the CESCRI in December 1991, aims to give content and meaning to the right to adequate housing, apparently in response to the insufficiency of State Party reports submitted to it by that time. At the outset the Committee makes clear that the right to adequate housing’s textual formulation – that housing must be adequate to ensure the well-being of the rights-bearer “himself” and “his family” – cannot be taken so literally as to imply that the right only attaches to male-headed households containing nuclear families. The gendered language used in the covenant notwithstanding, the right extends to households headed by women, and to wide variety of family types and formations.

The Committee goes on to provide a broad interpretation of the right to adequate housing, and to parse a range of tangible and non-tangible incidents: adequate privacy, security, space, lighting, ventilation, basic infrastructure and location. It then provides a well-known seven-dimension scheme to assess the extent to which the right had been realised in any particular case.

In the first place, housing requires legal security of tenure, which boils down to security against eviction, protection from harassment or from any other threat that might deter access to the home. The form of tenure is secondary to the quality of protection it provides to the occupier. State and private rental, co-operative ownership, and even informal settlement occupation may, depending on the circumstances, constitute adequate tenure, provided that a resident is genuinely protected in possession of his or her home.

Secondly, housing must have access to an appropriate range of services and infrastructure. Facilities “essential for health, security, comfort and nutrition” must be provided. Depending on the context, these will include safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, sewers and drains, and access to emergency services.

Third, housing must be affordable. Affordable housing is housing that can be paid for without the sacrifice of any other essential. As soon as a resident is required to sacrifice the purchase of means to meet any other “basic need”, then his or her housing is unaffordable. While this standard has attractive clarity, it is arguably too mean, implying, as it does, that it would be acceptable for a person’s financial means to be exhausted simply by meeting his or

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16 ICESCR General Comment 4, para 7.
17 Ibid para 7.
18 Ibid para 7 (b).
19 Ibid para 7 (c).
her “basic needs”. It would be unfortunate indeed if the international human rights regime were based on such an attenuated vision of life. A better standard might speak to more contextual factors, such as the extent to which the resident lives in a cash economy. It might also seek to make room for an account of human flourishing. However, given that much of the world’s population remains without the basic elements of a decent existence, the Committee can be forgiven for its modesty.

Fourth, housing must be habitable. Here, the Committee locates the basic “bricks and mortar” requirements. Residents must have adequate space, protection from the cold, from damp, from heat, from rain and from wind. The housing provided must not be prone to health or structural hazards. Nor should it expose a resident to disease.\(^\text{20}\)

Fifth, housing must be accessible to the poor and to other vulnerable groups. Those without the resources necessary to access housing must be provided with them. Priority must be given to the needs of HIV-positive people, the people with physical disabilities, the terminally ill, the mentally ill, victims of natural disasters. States must develop plans that include concrete obligations to give these groups priority access to housing.\(^\text{21}\)

Sixth, housing must be adequately located. It must permit access to employment opportunities, healthcare services, schools, childcare centres and other social facilities. Housing that requires a resident to pay more in transport to get to work than he or she earns working will not be adequate. Nor will housing that is located on or immediately proximate to sources of pollution.\(^\text{22}\)

Finally, housing must be culturally adequate. The manner of its construction and the materials used must support the expression of cultural identity. The Committee gives no examples of “cultural adequacy”, but it can readily be accepted that housing which makes forms of religious worship or extended family life impossible would not be culturally adequate. Rigidly structured blocks of matchbox flats or houses that provide no space for social exchange, for communal prayer, or play, would appear to breach this requirement.

General Comment 4 emphasizes the nested system of rights that are dependent on access to a home. It also acknowledges the rights that residents must be able to access to advance and protect their existing access to adequate housing. Alongside the obvious importance of the home as a locus of dignity, privacy, family life and security, General Comment 4 recognizes the importance of the rights to freedom of expression and association for tenants’ groups and other community-based housing movements.\(^\text{23}\)

General Comment 4 then addresses the nature and the content of state obligations to give effect to the right to adequate housing in all its dimensions. These obligations include the creation of a policy, legislative and administrative framework within which meaningful state action must then be taken to realise the right. The applicable standard is that these measures must be “in aggregate . . . sufficient to realize the right [to adequate housing] for every individual in the shortest possible time in accordance with the maximum available resources”.\(^\text{24}\)

\(^{20}\) Ibid para 8 (d).
\(^{21}\) Ibid 8 (e).
\(^{22}\) Ibid 8 (f).
\(^{23}\) Ibid para 9.
\(^{24}\) Ibid para 14.
State measures must also provide individual legal remedies for breaches of the right. Examples of such remedies include the ability to restrain illegal evictions; the ability to obtain compensation for illegal evictions; the ability to make complaints about discrimination in access to and enjoyment of adequate housing, and the ability to make complaints about illegal conduct of private sector landlords.25

General Comment 4 provides a rich account of the scope and content of the international right of access to adequate housing, and sets meaningful standards against which to assess the conduct of states in giving effect to it.

At the practical level, however, the Committee soon recognized that the principal threat to the right to adequate housing is the prevalence of forced evictions. At its sixteenth session, in 1997, the Committee adopted General Comment 7 on the ICESCR, which dealt with forced evictions. General Comment 7 also made the right to adequate housing one of only two rights in the Covenant to have two General Comments devoted exclusively to it. The other is the right to education.

General Comment 7 begins by emphasising security of tenure as a core component of the right to adequate housing. Forced evictions are an interference with the right to secure tenure, and are presumed to be incompatible with the ICESCR as a result. General Comment 7 does not, however, represent an unqualified denunciation of forced evictions in practice. Nor does it prohibit “evictions carried out by force in accordance with the law and conformity with the provisions of the International Covenants on Human Rights”.26 What General Comment 7 boils down to is a scheme “to control strictly the circumstances under which evictions may be carried out.”27

General Comment 7 accordingly recognizes that some evictions may be justified, but requires that this justification be made clear in advance, and emphasizes that the range of justifications available for evictions is quite narrow. Failure to pay rent or causing damage to rented property may justify eviction,28 as might an alternative land use, or the need to use occupied land for a socially beneficial or developmental purpose, such as the installation of infrastructure.29 The justification must be legally admissible, in the sense that the law warrants an eviction on the basis of the reason given, and the reason itself must be consistent with the Covenant. Accordingly, a justified reason in domestic law may not be recognized as justified under the Covenant. Evictions meant as punitive measures are not permissible, even if authorised by law.30

Even where an eviction may be prima facie justified, states must ensure that anyone facing eviction has the opportunity the challenge the justification given, and that all “feasible alternatives” to eviction are explored. Accordingly, even a strong public or private purpose will not justify an eviction if alternative means of achieving that purpose are available. These alternative means must be explored in consultation with those facing eviction.31

25 Ibid para 17.
26 ICESCR General Comment 7, para 3.
27 Ibid para 9.
28 Ibid para 11.
29 Ibid paras 7 and 17.
30 Ibid para 12.
Where it has been established that there is a compelling and legally authorized purpose to be achieved by an eviction, and that no feasible alternatives to eviction are available, a forced eviction may be carried out. However, General Comment 7 places strict limitations on the manner in which evictions may be implemented. First, there must be “an opportunity for genuine consultation with those affected”. This is separate and independent from the consultation required in exploring alternatives to eviction. Once it is clear that there is no alternative, a further consultation is required on how an eviction will be carried out. Second, there must be “adequate and reasonable notice for all affected persons prior to the scheduled date of eviction”. This includes, where applicable, information on the alternative use to which the land or housing is being put. An agent of the state must be present when an eviction is being carried out, and those authorised to carry out the eviction must be clearly identified. Evictions may not be carried out in bad weather, or at night, unless prior consent has been obtained from those facing eviction. Post-eviction legal remedies, for example challenging the legality of the eviction itself, or seeking compensation for unlawful conduct during an otherwise lawful eviction, must also be provided.\(^{32}\)

The most important protection the ICESCR provides is that eviction must not lead to homelessness, or render an evicted person vulnerable to the violation of other human rights, through, for example, the provision of alternative accommodation that is not suitable. Where an evicted person is unable to provide for him- or herself, a state 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”.\(^{33}\)

The scope and content of the right to adequate housing can be summed up as a right to a home that is an effective holder, protector and facilitator of the locus of human needs associated with it. Where it is necessary to deprive someone of their existing access to such a home, an adequate replacement must be provided. The replacement must be adequate in the sense that it meets all of the requirements for adequate housing that the UNDHR, the ICESCR and the General Comments set out.

### 2.2 Special Rapporteur Reports and Guidelines

That the right to adequate housing has far-reaching implications for economic justice has also been made clear by the work of successive Special Rapporteurs on Adequate Housing. While not formally part of the treaty bodies provided for in the UNDHR and the ICESCR, the Special Rapporteurs play an important role in monitoring and setting standards for the implementation of the right to adequate housing. The UN Special Rapporteur on Adequate Housing monitors the implementation of the right to adequate housing, investigates the state of the realisation of the right across the world – including by undertaking country-specific missions – and responds to complaints made about particular violations addressed to her. The Special Rapporteur reports, at least annually, to the Human Rights Council and the United Nations General Assembly.

The work of the three Special Rapporteurs that have so far held the office amply demonstrates the transformative potential of the right to adequate housing. All three Rapporteurs have shown a deepening concern with what they call the “financialization” of

\(^{32}\) Ibid para 15.

\(^{33}\) Ibid para 16.
Concerns about financialization go beyond the mere use of housing as a tradable commodity. They address the range of ways in which housing is used for acquisitive purposes. The Special Rapporteur on Adequate Housing’s Guidelines for the Implementation of the Right to Adequate Housing (Housing Guidelines) provides a range of examples of financialization. These include the purchase of affordable land and housing for the purposes of gentrification; the use of housing as security for tradeable financial instruments, such as collateralised debt obligations, including packaged residential mortgages; the use of high value urban land and housing as a secure store of capital, rather than as a dwelling; and the speculative acquisition of large tracts of rural land. These are all, of course, extraneous to the social uses of housing, and to the range of human interests the right of access to adequate housing is intended to protect. To these features of financialization may be added the use of tenanted housing to profit from rents. While not obviously extraneous to the use of housing as a dwelling, the relationship between landlord and tenant, if left unregulated, creates substantial scope for exploitation.

The Special Rapporteurs have been increasingly critical of these aspects of financialization. The current Rapporteur, Leilani Farha, recommends a number of policy measures to curb them. These include preventing the privatisation of public land and housing; maintaining rental regulatory frameworks that preserve security of tenure and affordability for tenants, including rent control and rent freezes; and levying taxes on property speculation and on vacant housing. These are all strongly redistributive measures, which, if implemented would have a substantial impact on inequality both within and beyond the housing sector.

Other aspects of the Housing Guidelines reinforce this conclusion. They speak to a substantial range of contemporary social struggles that are about more than just a basic minimum of social provision. Sometimes they are, at least indirectly, about creating substantive equality. These include guidelines concerning the upgrading of informal settlements, which are visible manifestations of inequality and inequitable access to land. Even the relatively modest goal of the elimination of homelessness cannot be achieved without powerful implications for social equality. It is perhaps unsurprising that the only country in the world that can plausibly claim to have virtually eliminated homelessness, is Finland, which is also one of the most equal.

2.3 Housing Jurisprudence under the Optional Protocol to the ICESCR

The Optional Protocol to the ICESCR permits the CESCR to consider and adjudicate complaints of breaches of a state’s obligations under the ICESCR, and to make recommendations on remedial action to be taken in the event that a breach is found. The

35 Housing Guidelines, paras 64 to 66.
36 Housing Guidelines, para 65.
37 Housing Guidelines, paras 39 to 42.
39 Housing Guidelines, paras 29 to 33.
41 Article 9 (1) of the ICESCR-OP.
Committee may be approached under the Optional Protocol once a complainant’s domestic remedies have been exhausted. States party to the Optional Protocol must consider and respond to the Committee’s remedial recommendations within six months of receiving them.\footnote{Article 9 (2) of the ICESCR-OP.}

Three of the Committee’s decisions under the Optional Protocol have so far concerned the right to adequate housing. The emerging jurisprudence of the Committee is accordingly a source of international housing rights law, which is likely to grow in importance over time, as the Committee received and considers more complaints.

In \textit{IDG v Spain},\footnote{CESCR Communication No. 2/2014.} the Committee considered the adequacy of the procedures, embedded in Spanish law, for giving notice of a bank’s intention to foreclose on residential property. After three attempts to serve personally on a distressed customer, a bank in Madrid sought and received the permission of the Spanish courts to publish the foreclosure notice on a public noticeboard. The notice did not come to the complainant’s attention, but the bank nevertheless foreclosed on the complainant’s mortgaged home shortly thereafter. The complainant only became aware that foreclosure had been authorized when she received the notice that her home was to be auctioned six months later.

The Committee acknowledged that the failure to provide the complainant with pre-foreclosure notice deprived her of the opportunity to advance reasons why her home should not be sold to defray her debt. However, it also acknowledged that the procedure adopted in the Spanish court was not invalid for that reason alone. Where personal service has been attempted, there must come a point where measures short of actually drawing the attention of the debtor to the impeding act of foreclosure are permissible. The question is when this line is crossed. The Committee held that resort to public notice must be “a measure of last resort”\footnote{Ibid. para 12.3.} because of the high degree of likelihood that the foreclosure notice would not come to the attention of the mortgagor. Public notice must accordingly be “strictly limited to situations in which all means of serving notice in person have been exhausted”.\footnote{Ibid.} The Committee held that it had not been shown that the Spanish authorities had exhausted all available means to effect personal service. The failure to bring the foreclosure to the attention of the complainant had a significant impact on her right to adequate housing, as it deprived her of the right to defend the foreclosure proceedings. For this reason, the Committee held that the complaint’s right to adequate housing had been breached.

The Committee made a series of recommendations, including a recommendation that the complainant’s home not be sold unless and until she had been given a reasonable opportunity to defend the foreclosure proceedings. It also recommended that Spain amend its administrative and legislative processes to ensure that its foreclosure processes align with the decision of the Committee, and General Comments 4 and 7 on the ICESCR.

Although purely procedural, the Committee’s communication affirmed the practical application of the due process provisions of General Comments 4 and 7 on the ICESCR. Insofar as it required adequate notice of foreclosure – in the form of personal service unless practically impossible – the Committee provided homeowners facing foreclosure with a genuine opportunity to delay, suspend or resist foreclosure proceedings. I have argued
elsewhere⁴⁶ that even procedural innovations meant to temper administrative process that could lead to a deprivation of adequate housing can have potentially far-reaching redistributive effects, insofar as they force a bank or a landlord to justify the termination of a right of residence, and allow a court to consider the fairness of the termination. The first step in such an inquiry is the resident actually getting notice of the termination.

The potential scope and redistributive impact of an inquiry into the fairness of an impending termination of residence rights is illustrated by the Committee’s second communication on the merits of a housing complaint brought before it. In Djazia and Bellili v Spain⁴⁷ a couple and their two children faced eviction from their apartment for non-payment of rent. The Committee found that the eviction itself was justifiable, in that it was both procedurally and substantively fair, but that the Spanish government’s failure to make suitable alternative accommodation available to the complainants was a breach of the right to adequate housing. The Spanish government recognized that it had obligations to the family, but argued that it could not provide them with alternative housing, because its social housing programme was oversubscribed, and there was a substantial backlog of people waiting for places on the programme. In the absence of a place in social housing, the Spanish government offered Ms. Bellili and her children a place in a women’s shelter, and Mr. Djazia a place in a separate homeless shelter.

The Committee held that the mere existence of a backlog in social housing provision was, in itself, no justification for failing to make an offer of adequate alternative accommodation, especially as the Spanish government had sold a substantial quantity of social housing stock off in the years preceding the complaint. In addition, the offer of shelter accommodation that would have the effect of splitting up the evicted family was inconsistent with the obligation, under Article 10 (1) of the ICESCR to “grant the widest possible protection to the family”. In the result, the Committee recommended that the Spanish government assess the complainants’ situation in full consultation with them and “grant them public housing or any other measure enabling them to enjoy adequate accommodation”.⁴⁸

In Lopez Alban v Spain⁴⁹ the Committee dealt with a Spanish housing policy principle that excluded from consideration for social housing those who were currently unlawfully occupying their homes. The complainant lived in a vacant apartment, owned by a bank, with her six children. She applied to the Spanish government for social housing, but her application was rejected on the basis that she was currently occupying her home without legal title. The complainant was then evicted from the apartment with her children, and passed through a series of emergency shelters that were grossly inadequate to her housing needs. As a consequence of the eviction, the complainant was separated from her eight-year-old twin boys.

The Committee found that there were sound justifications for seeking an eviction, in that the Spanish government had a legitimate interest in protecting the property rights of the bank that owned the apartment. That notwithstanding, the Committee found that to comply with Spain’s obligations under the ICESCR, the Spanish courts ought to be empowered and

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⁴⁷ Communication No. 5/2015.
⁴⁸ Ibid para 20.
⁴⁹ Communication No. 37/2018.
required to consider whether eviction in the circumstances of a particular case is a proportionate response to the objective the eviction seeks to achieve. In particular, there ought to be scope for considering whether an eviction could be postponed or suspending pending the implementation of measures to prevent homelessness. There was no such proportionality enquiry mandated in Spanish law, and to that extent Spain was in breach of the ICESCR. The Spanish state’s refusal to consider the complaint’s application for social housing was, likewise, a disproportionate response to the fact that she was occupying her apartment unlawfully at the time. The exclusion of the complainant from social housing on the facts of this case seems particularly cruel, as the very fact of her unlawful occupation appears to demonstrate the urgency of her need for social housing. It hardly counts as a reason to exclude her from all consideration.

The complainant’s eviction, and her consequent homelessness, was accordingly found to be disproportionate. The Committee recommended that the Spanish state establish a legal framework for considering the proportionality of evictions that gives those facing eviction the opportunity to challenge them on proportionality grounds. The Committee also recommended that Spanish state should establish procedures for genuine consultation with those facing eviction, and a comprehensive plan for the provision of social housing that is free of disproportionately harsh exclusions.

The Committee’s decisions illustrate how an inquiry into the fairness of an impending termination of housing rights, or an eviction that has actually taken place, can lead to generation of real and substantive redistributive principles. At the time of the complaint, Spanish law had no domestic rules against homelessness following on eviction, and no requirement for an eviction to be linked to the provision alternative accommodation. The generation of this principle (which had long been established in states of far more modest means, such as South Africa) has clear redistributive potential. As Edwin Cameron, a former Justice of the South African Constitutional Court, has pointed out, the requirement that alternative accommodation be provided by the state in all cases where an eviction would otherwise lead to homelessness implies a substantial and far-reaching redistribution of resources towards poor and vulnerable people facing homelessness. If put into practice, the rule against homelessness on eviction contained in General Comment 7 is far more than a band-aid, or a plea for bare sufficiency; it is a strong push towards housing equality, and implies a substantial expansion of housing provision as a component of state welfare provision.

The Committee’s jurisprudence is still in its formative phase. However, an examination of regional and domestic jurisdictions that have been engaged in the enforcement of the right to housing demonstrates that the right can be deployed in a variety of contexts to generated substantive principles of general application, and real distributive impact. It is to those jurisdictions that I now turn.

50 See Grootboom[n15], Port Elizabeth Municipality[n2], City of Johannesburg v Blue Moonlight Properties 2012 (2) SA 104 (CC) (Blue Moonlight).
52 See Liebenberg [n10] for a comprehensive analysis of this early jurisprudence.
3 THE RIGHT TO ADEQUATE HOUSING IN REGIONAL AND DOMESTIC JURISDICTIONS

Declarations of rights, and expert glosses on their content such as the General Comments provided by the CESCR and the Guidelines and other material produced by the Special Rapporteur, have clear value to the enforcement of the right to adequate housing. But, like all rights, the right to adequate housing is really only given enduring meaning through concrete social struggles. Those struggles can be memorialized in a variety of forms, including literature, art, song, and oral and written history.

The legal meaning of human rights, however, is generally determined by contestation between parties with adverse interests in a specific context: in other words, through litigation. Individual parties (sometimes representative of entire communities and classes of people) submit to adjudication a concrete dispute about what a right means on a given set of facts, and what remedy – what practical resolution of the dispute – flows from that meaning. It is through litigation, through the actual application of law to concrete social struggles, that rights tend to bite hardest – or have their limits thrown into the sharpest relief.

The right to adequate housing in the ICESCR has arguably come alive since the Committee began to adjudicate concrete disputes in specific contexts. Even though the Committee can do no more that “recommend” individual remedies and programmatic reform to a State Party to the ICESCR, its communications in the three housing rights cases set out above provide a powerful account of the meaning of the right to housing as a break on contemporary forms of dispossession, and as a trigger for the reallocation of resources towards the poor and the vulnerable.

It is, however, in domestic and some regional jurisdictions, where the remedies are stronger and more accessible, that the right to adequate housing has started to come into its own. Its meaning and application have naturally been developed in the context of the struggles in which it has been deployed. These struggles have reflected the priorities that individuals and communities have set for themselves in the realization of the right to adequate housing.

Accordingly, much of the recent history of the right to adequate housing can be related through struggles over the upgrading of informal settlements, the eviction of illegal occupiers, the rights of residential tenants in urban areas, the rights of mortgagors, and the struggles of women to access housing through, and despite, patriarchal accounts of property law. It is these contexts: the failure to recognize informal tenure, the exclusion of poor people and vulnerable communities from metropolitan property regimes, the exploitation of residential tenants and indebted home owners, and gender discrimination, that the right to housing has bitten hardest.

In what follows, I provide a summary of the role of the right to housing in each of these struggles. The account given is necessary incomplete. It is, however, illustrative of the power of the right to housing as a tool of struggle with potentially far-reaching egalitarian effects.

3.1 Informal Settlements

Informal settlements occupy a liminal space in urban life. On the one hand, a substantial portion of the urban labor force lives in informal settlements. In South Africa, for example, 14% of households live in informal settlements, which are concentrated in urban and peri-urban areas. The number of people living in informal housing in South Africa is also on the increase. Notwithstanding the role their residents play in the urban economy, informal settlements are often blind spots in urban policy, including housing policy. They are defined by a series of negatives: they are without formality, without legality, without services, and often without any recognised social and political structure or representation.

Housing litigation in the context of informal settlements often frames simple claims for inclusion and equality: the claim to the same respect for basic tenure rights enjoyed by those living in formal housing, the claim to the same basic provision of services, such as electricity, water and sanitation, and the claim to the same consideration in urban planning process.

The biggest single disadvantage most informal settlers face is vulnerability to eviction. A wide variety of claims based on the right to adequate housing has sought to establish basic procedural and justificatory requirements for the implementation of an eviction. Legal frameworks that require notice of and a justification for an intended eviction, and the authority of the courts to implement one, tend to attach to formal common law property rights, but seldom to mere occupation itself. This is why the ICESCR and General Comment 7 place such emphasis on the need for reliable legal remedies for those who face eviction. Often, it is precisely the absence of formal tenure rights that both deprive an informal settler of due process protections and render them more vulnerable to actual removal. In Muhindo James v Attorney General the Ugandan High Court found that the Ugandan government’s failure to adopt comprehensive legal framework to protect those facing eviction to be a violation of the rights to dignity, life and property entrenched in the Ugandan Constitution, interpreted in light of the right to adequate housing in the ICESCR. The Court directed the government to develop such a framework, and to report back on its progress in doing so within seven months.

Once they have established basic tenure security, in the form of protection against eviction, informal settlers often find themselves without the basic services necessary to sustain an urban home. Water, sanitation and electricity are all vital incidents of the right to housing, at least in an urban setting, where people live in concentrated numbers in a small area. Where services are provided, they are unreliable, or come in forms that show less than the appropriate respect for the residents’ dignity. In Beja v Premier of the Western Cape the state had provided toilets to the residents of an informal settlement, but had failed to enclose them, with the effect that anyone could be seen using them. In directing that the toilets be enclosed, the South African High Court emphasised the inter-relationship between the rights of access to adequate housing, the right to privacy, and the right to dignity in the Constitution of the Republic of South Africa, 1996. International law, especially in the form of the UNDHR and the ICESCR recognizes this inter-relationship too.

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56 Miscellaneous Cause No 127 of 2016, High Court of Uganda, Civil Division (Judgment dated 25 January 2019).
57 [2011] 3 All SA 401 (WCC).
The outcome of the Beja case could be characterized as a fairly modest application of the right to adequate housing. That informal settlers have the right to go to the toilet in privacy ought not to strike us as a particularly ambitious claim to make. However, that the claim, however small, was made at all, and resulted in a re-allocation of resources to the informal settlement, demonstrates, in principle, that the right to adequate housing has some efficacy in re-allocation of resources towards informal settlers, and pressing for more egalitarian outcomes.

A case that illustrates the ability of the right to adequate housing to sustain more ambitious demands is Melani v City of Johannesburg.58 In that matter, a community of 10 000 informal settlers had managed to establish themselves on land to the south of Johannesburg, with some limited access to services, and security of tenure. The state had for many years promised to ultimately upgrade the informal settlement by providing permanent roads, services, including electricity, and formal housing. In 2015, the state abruptly reversed its position, and informed the community that it would be relocated to a large greenfield housing project, called “Unaville”, 11 kilometres further south of the Johannesburg city centre. The residents promptly reviewed that decision in the High Court, on the grounds that the right of access to adequate housing, read with the state’s informal settlement upgrading policies, required informal settlements to be upgraded in situ wherever technically possible. Since an upgrade was technically possible, the state was required to implement one. It followed that the decision to relocate the settlement was unlawful. The High Court agreed, set aside the decision to relocate the settlement, and directed the state to formulate a plan to upgrade it in situ. This had to be done in genuine consultation with the settlement’s residents – a requirement consistent with international law standards embedded in General Comment 4 and the UN Special Rapporteur’s Housing Guidelines.

The right to adequate housing accordingly provides a range of tools to informal settlers. These tools can have the rather modest effect of protecting informal settlers against sudden and unforeseen eviction. They can also be deployed to demand much deeper claims on the state’s resources. Although the existence of a domestic policy framework is helpful in deploying the right (as it was in both Beja and Melani), the absence or inadequacy of a domestic policy or legal framework to give effect to the right does not leave informal settlers without remedy. The Muhindo case demonstrates that the right can be read to require such a framework to exist, and to compel the state to construct one. Once the framework is legislated, it can be subjected to follow-up critique and litigation. Every step of the process can potentially yield concrete benefits for a claimant community, a substantial reform in housing policy and a re-allocation of resources towards the poor.

3.2 Evictions of unlawful occupiers

The right to adequate housing, and its associated protections against eviction, can be activated to protect the unrecognised interests of unlawful occupiers, such as otherwise “homeless” occupiers of urban tenements, and itinerant groups, such as the Roma people in Europe.

Most legal jurisdictions feature some form of legal pluralism, in which municipal law – law that emanates from a legislature or from common or civil law courts – comes into contact with, and attempts to displace, local mores, customs and use rights. In addition, municipal law can leave completely out of account the social needs of outsider groups, such a travellers,
informal settlers, “squatters”, and other people living, temporarily or permanently, on land that they do not formally own. The concept of ownership itself – the concept of exclusive power and domination over land or property to the exclusion of all others – conflicts with older, more socialised systems of communal use rights it displaces.

Where ownership rights assert themselves over residential uses, the right to adequate housing has the potential to provide a potent shield against displacement of poor and vulnerable people who would otherwise be rendered homeless. In imposing the requirement that evictions, even if they go ahead, ought not to lead to homelessness, the right requires a significant reallocation of resources to provide alternative accommodation to those who are displaced as a result of legally justifiable eviction. Traditionally, steps taken under domestic law to re-possess property used for residential purposes have seldom been accompanied by justificatory or ameliorative requirements, such as the provision of alternative accommodation on eviction. As we have seen, the CESCR found that no such requirement existed in Spanish law, which was one of the reasons why Spain stood in breach of its Covenant obligations.

However, the new anti-eviction law, based on the right to adequate housing, and exemplified in General Comment 7, finds far-reaching application in a range of domestic and regional circumstances. Two sets of cases illustrate the point. In Europe, the European Social Charter has been deployed the right to housing in the ICESCR, the General Comments and in Article 31 of the European Social Charter, and the right to family life in Article 16 of the European Social Charter, to provide legal recognition and protection to the Roma people, who often face arbitrary eviction and inadequate, segregated accommodation in a number of European jurisdictions. In Centre on Housing Rights and Evictions (COHRE) v. Italy, the European Committee of Social Rights found that the Italian government had “not demonstrated that the numerous examples of evictions highlighted by the complainant organization were carried out in conditions that respected the dignity of the persons concerned and that alternative accommodation was made available to them”, as required by the right to adequate housing and the associated international instruments to give effect to it. The Committee found similar violations in matters relating to the treatment of Roma people in Greece and Portugal.

But it is, perhaps, in South Africa that the most extensive human rights framework has developed to govern the eviction of unlawful occupiers and to prevent evictions from leading to homelessness. The over-riding principle, now firmly established in South Africa, is that evictions of unlawful occupiers should not lead to homelessness. Where it appears that an eviction might lead to homelessness, a court is required to conduct the necessary enquiries to decide whether and to what extent homelessness would result from an eviction, and to seek input from the state, usually the local authority, on what steps are to be taken to ensure that the unlawful occupiers concerned will have access to alternative accommodation if they are

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61 Ibid para 67.
63 European Roma Rights Centre v. Portugal (Complaint No. 61/2010).
64 Port Elizabeth Municipality [n2] para 28; Occupiers, Shulana Court v Mark Lewis Steele [2010] 4 All SA 54 (SCA) para 16; Mathale v Linda 2016 (1) SA 461 (CC) para 50.
evicted. In rare cases, a court will refuse an eviction order outright. More often, though, a court will make a structured eviction order, obliging the local authority to provide accommodation to the unlawful occupiers before the date on which the unlawful occupiers may be evicted, and specifying the nature and location of the alternative accommodation to which the unlawful occupiers are to be relocated.

The state’s response to the new duties imposed on it has been sluggish. Eviction applications have, in some cases, taken several years to finalize. Depending on the size of the community involved, and the logistical difficulties with providing alternative accommodation, large communities can establish de facto rights of occupation in the years it takes to obtain an eviction order. In Modderklip, the unlawful occupiers were simply left where they were, the state bought the land they had occupied, and a low cost housing development was eventually constructed on it. In the Ratanang informal settlement case, the local authority entered into a court-sanctioned 36 month lease with the owner of the property on behalf of the occupiers – effectively, if only temporarily, giving legal recognition to the informal settlers’ rights of occupation. In the Joe Slovo Informal Settlement case, the conditions placed by the Constitutional Court on the state’s right to evict and relocate the occupiers of the informal settlement proved so onerous that the eviction order could not be carried out, and was ultimately discharged. The unlawful occupiers in that case are now negotiating the terms on which the Joe Slovo informal settlement will be upgraded in situ.

Even where the unlawful occupiers ultimately have to move, this has had significant knock-on effects for urban planning. A series of eviction cases in the Johannesburg inner city has resulted in the creation of a small, but growing, public housing stock to accommodate unlawful occupiers evicted from buildings in the course of inner city regeneration initiatives. The terms on which that accommodation is provided have opened up a new front in unlawful occupiers’ struggles to retain access to the city. The courts have directed local authorities to provide accommodation within a reasonable distance of the land from which unlawful occupiers have been removed. They have also directed that family accommodation be provided, and struck down restrictive rules and conditions placed on residence in the housing stock the state provides.

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66 Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 2014 (3) SA 23 (SCA); All Builders And Cleaning Services CC v Matlaila and Others (42349/13) [2015] ZAGPJHC 2 (16 January 2015).
67 Hlophe and Others v City of Johannesburg and Others 2013 (4) SA 212 (GSJ).
68 City of Johannesburg Metropolitan Municipality and others v Hlophe and Others 2015 (2) All SA 251 (SCA).
69 Ibid.
72 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2010 (3) SA 454 (CC).
73 Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others 2011 (7) BCLR 723 (CC).
75 Blue Moonlight [n50].
76 Dladla and Others v City of Johannesburg Metropolitan Municipality 2014 (6) SA 516 (GJ).
Restrictions have also been placed on the legal steps private owners and the state can take to prevent the urban poor from moving onto vacant land. The courts have rejected attempts to obtain land occupation interdicts which permit eviction without a court order where unlawful occupiers have moved onto land for a relatively short period – often because they have been evicted from elsewhere.\(^{77}\) The Constitutional Court, in particular has disapproved of coercive responses to new land occupations, emphasising the need to engage with homeless people moving on to land for the first time, and to deal with their needs on a case by case basis.\(^{78}\)

In practice, this new scheme for the adjudication of eviction cases, the execution of eviction orders and the management of unlawful land occupation has opened up a fairly wide space within which unlawful occupiers can shape the terms of their access to land. South Africa’s Apartheid legal regime, in effect immediately before 1994, was buttressed by the overwhelming power that common law eviction proceedings assigned to landowners, produced a vast number of eviction orders, which were granted and executed irrespective of the social consequences of making large numbers of very poor people suddenly homeless. The post-Apartheid constitutional and statutory scheme for the management of eviction proceedings has instead sought to create a space in which the competing social claims of landowners and unlawful occupiers can be balanced and reconciled, and in which poor people can negotiate the terms of their residence in urban areas. This has led to resettlement of significant tracts of urban land by poor people, and changes in government policy and practice, increasing the availability of public rental housing stock, and the frequency with which informal settlement upgrades take place.

### 3.3 The Rights of Residential Tenants

The right to adequate housing often penetrates ostensibly private law relationships concerning the lease of residential property. Given that a large segment of the urban population secures its access to housing through becoming tenants, the right to adequate housing would have significant limitations if its application could not pierce the veil of contractual privity. Instead, the right to housing often supplements and controls the exercise of contractual power by landlord and tenant, by ensuring that restrictive rental practices are prohibited, that rents remain reasonable and affordable, and that tenants have access to remedies where landlords abuse their power. The UN Special Rapporteur’s Housing Guidelines emphasize the need to regulate and control the rental sector by “[m]aintaining a rental regulatory framework that preserves security of tenure and affordable housing for tenants, including through rent caps, controls or rent freezes where needed”.\(^{79}\)

Rent control has long been effective in ensuring affordable rental housing, but its use has receded with the neoliberal turn towards the deregulation of markets and respect for contractual privity, and a renewed focus on regulating the market through the provision of incentives rather than the imposition of rules. But, in the context of inherently unequal relationships, that emerge in conditions of oligopoly, such as urban rental housing, “contractual privity” often boils down the power of the oligopolist to exploit the consumer.

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\(^{77}\) Zulu and Others v eThekwini Municipality 2014 (4) SA 590 (CC).

\(^{78}\) Grootboom [n15] para 87.

\(^{79}\) Housing Guidelines para 69 (a) (ii).
Accordingly, and despite the retreat of rent control as a regulatory instrument, the right to housing has often underwritten more open text, flexibly applied dispute resolution mechanisms that have sought to ensure that the landlord tenant relationship is fundamentally fair. In South Africa, the role of the right to housing in regulating the landlord and tenant relationship was affirmed and delineated in *Maphango v Aengus Lifestyle Properties*. In that case, a property developer purchased a rundown building in the centre of Johannesburg. The tenants in the building at the time were paying rent in terms of leases which guaranteed them significantly lower rents than the property developer could secure on the open market. The property developer therefore offered the tenants a choice – their leases would be terminated, and they would have to vacate, or they could elect to pay up to twice their current rent to stay in the property. Not surprisingly, the tenants rejected both options and lodged a complaint with the Rental Housing Tribunal about what they said was an unfair rent. In order to avoid the Tribunal’s jurisdiction, the property developer brought an application for eviction in the High Court. The eviction order was granted in the South African High Court, and upheld in the Supreme Court of Appeal. Both courts held that they had no power to interfere with a commercial decision to terminate a lease. The Supreme Court of Appeal also held that, even if it did have such a power, it saw nothing wrong with a property owner terminating a tenant’s lease in order to secure a higher rent.

The Constitutional Court disagreed. It held that the Rental Housing Act “superimposes its unfair practice regime on the contractual arrangement that the individual parties negotiate.” This superimposition means that the Tribunal, and presumably Courts as well in appropriate cases, have the power to disallow the termination of a residential lease, and to set rents between the parties.

Because Rental Housing Tribunals are easily accessible, without legal representation, and without any of the fees and formalities imposed on litigants by courts, they constitute a vital space in which tenants can shape the terms of their relationships with landlords. Rental Housing Tribunals have acted as a source of equitable rules for the landlord and tenant relationship, and as an informal dispute resolution space within which landlords and tenants meet on more or less equal terms. One of the most important contributions to the law of landlord and tenant to emanate from the Rental Housing Tribunals is the decision of the Gauteng Rental Housing Tribunal to outlaw the practice of landlords levying service charges on a tenants’ consumption of electricity and water in residential buildings.

Elsewhere, the right to adequate housing has been used to disallow large programmes of gentrification that would significantly reduce the supply of affordable housing. In the *Rechtbank Rotterdam* case, the Dutch courts disallowed the purchase and redevelopment of a Rotterdam neighbourhood on the basis that insufficient community participation had preceded the adoption of a plan that would limit the availability of affordable housing.

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80 2012 (3) SA 531 (CC).
82 Ibid para 34.
83 Ibid para 51.
84 *Young Ming Shan CC v Chagan NO* 2015 (3) SA 227 (GJ).
85 Case No. 7989753 \ CV EXPL 19-36659
3.4 Mortgage bond foreclosures

In *IDG v Spain*, the CESCR clearly intimated that the right to adequate housing places limits on the steps a financial institution can take to foreclose a loan secured on residential property. In most jurisdictions, the right to adequate housing has a limited impact on the mortgage foreclosure process, largely because it is not generally recognized that homeownership is itself an incident of the right to adequate housing. A loss of ownership of a home does not necessarily imply the deprivation of housing altogether, and defences against foreclosure tend to focus on non-compliance with the formalities associated with such a process, such as adequate notice of the intention to foreclose. In *IDG v Spain*, those formalities were treated as incidents of the right to adequate housing, in that they were held to be part of the process and remedies to which a mortgagor is entitled under the right to adequate housing.

In South Africa, both the process and substance of the mortgage foreclosure process has been brought under the supervision of the right to adequate housing. In *Jaftha*, the Constitutional Court decided that the execution of a debt against a person’s home constitutes an infringement of the right of access to adequate housing in section 26 (1) of the Constitution of the Republic of South Africa Act, 1996. Although the Constitution might permit an infringement in terms of its limitations clause, the infringement always has to be justified. An infringement of the right of access to adequate housing to recover a debt secured against a home is only justified when it is “proportional”. In other words, the money lender taking and selling a debtor’s house to recover the debt must be a proportionate response to the debtor’s default. This principle is generally parsed to mean that alternatives to execution, if they exist, must be explored before the sale of a debtor’s home is authorized, and that execution will not be permitted for “trifling” or relatively small arrears.

The constitutional principle of proportionality opens up important spaces in which debtors can challenge unfair lending practices and even blunt a money lender’s rights to execute against their property where – a debtor’s failure to repay notwithstanding – it would be disproportionate to do so. The proportionality principle differs from other ways of monitoring corporate compliance with the law because, unlike “watchdog” agencies or media shaming, they link a money lender’s right to recover or execute on a debt in every case to the debtor’s option to seek alternative dispute resolution, to make good on his arrears, and/or to the overall fairness of executing against a person’s home.

Proportionality in debt execution is yet to find itself applied in the context of the international right to adequate housing, but presents a potentially powerful way of subjecting the excesses of private financial institutions to human rights scrutiny.

3.5 Gender discrimination

As the South African Constitutional Court has noted “[w]omen’s access to adequate housing is critical to their enjoyment of other human rights, and a gendered perspective must be adopted in order to give effect to women’s right to adequate housing.” The Court also noted that “[t]he right to adequate housing is also integral to women’s overall wellbeing. Because women are primarily responsible for taking care of the home, they are particularly vulnerable to gender-

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86 Jaftha [n6].
based violence outside the home, and adequate housing is necessary for their social empowerment”.

Yet the battleground for women’s access to adequate housing has primarily been the exclusion of women from inheritance rights. In Danamma Suman Surpur & Another v Amar & Others, the Indian Supreme Court upheld a law that affirmed equal inheritance rights for women. In Mrs. Lois Chituru Ukeje & Enyinaya Lazarus Ukeje v Mrs. Gladuy Ada Ukeje, and Bhe v Magistrate Khayelitsha Nigerian and South African courts, respectively, struck down customary law provisions that excluded women from inheritance rights. The exclusion of women from inheritance was likewise declared to be inconsistent with international non-discrimination laws in the case of EC and SC.

Given that household labor and childcare in the home are burdens that fall disproportionately on women, it might have been expected that a stronger, more distinctively housing rights-based jurisprudence would have developed on the issue of gender discrimination. If it is nothing else, the home is a gendered space, and the right to adequate housing ought to start to account for this. The South African Constitutional Court has begun, albeit modestly, to deal with the substantive implications of gender and housing by striking down homeless shelter rules that make childcare practically impossible, by locking shelter residents out during daylight hours. But there is little doubt that a more substantive account of gender and the right to housing remains to be developed in regional and domestic jurisdictions.

4. CONCLUSION

The right to adequate housing sits at the locus of a range of interconnected human interests, and power relationships. It is plain from the context in which the right has developed that it is through processes of dispossession, and through challenging the unjust relationships embedded in municipal property law that the right has found meaning and application. The right is at its most efficacious when used as a tool to resist eviction or foreclosure, and to ensure fairness on contractual regimes.

It is this aspect of the enforcement of housing rights that places limits on the critique of rights as providing no more than basic sufficiency guarantees, and doing little or nothing to challenge economic inequality. Leaving aside the question of whether more sufficiency for the worst off must necessarily lead to at least some redistribution of resources from the best off, this critique of rights overlooks the ways in which the right to adequate housing challenges and places limits on the property relationships through which economic inequality is asserted. If more housing rights means fewer evictions, no homelessness, fairer rents, and limitations on a banks’ right to foreclose against homes, they must, of necessity, mean a redistribution of resources away from property owners who hold land as a commodity, and in favour of residents

89 Dladla [n76] para 29.
90 Civil Appeal Nos. 188-189 of 2018, Indian Supreme Court.
91 Supreme Court of Nigeria, Case No. 224/2004.
92 2005 (1) SA 580 (CC).
94 Dladla [n76].
who dwell on land as a home. It must also mean more resources to ensure that adequate alternatives exist when people are dispossessed.

These profound economic consequences to the enforcement of the right to adequate housing have yet to be fully explored, either in the theoretical development of the right, or in its practical implementation. Whether or not human rights are “enough” to tackle inequality, there can be no doubt that the right to adequate housing has a great deal of potential to challenge and reshape the processes of dispossession that reproduce and sustain it.