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PARTICIPATION IN THE RIGHT OF ACCESS TO ADEQUATE HOUSING

*Ralph Wolf**

I. INTRODUCTION

Nearly one billion people live in urban slums today.¹ Their dwellings are frequently made of wood, metal, and plastic scraps; indoor plumbing and electricity are scarce. The international development community has set goals to eliminate such “informal settlements”² in accordance with United Nations Millennium Development Goal number 7 Target 11: “By 2020, to have achieved significant improvement in the lives of at least 100 million slum dwellers. . . .”³ Additionally, many nations include the right to housing in their constitutions,⁴ or

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1. UN-HABITAT, *THE CHALLENGE OF SLUMS: GLOBAL REPORT ON HUMAN SETTLEMENTS* (2003).

2. UN-HABITAT, *UNITED NATIONS HUMAN SETTLEMENT PROGRAMME, LOCALISING THE MILLENNIUM DEVELOPMENT GOALS* (2006), available at <http://www.unhabitat.org/pmss/getElectronicVersion.asp?nr=2127&alt=1>.

3. U.N. Millennium Declaration; G.A. Res. 55/2, ¶ 19, U.N. Doc A/RES/55/2 (Sept. 18, 2000).

4. See 1975 Syntagma [SYN] [Constitution] 21 (Greece); see also CONSTITUTION OF THE REPUBLIC OF HAITI art. 22; see also Constitución Política de los Estados Unidos Mexicanos [Const.] art. 4, Diario Oficial de la Federación [D.O.], 1983 (Mex.); see also Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 40; see also S. AFR. CONST. 1996.

like India, consider the right a directive principle through interpretation of legal documents.⁵

The 2010 World Cup will take place in Johannesburg, South Africa, its impact is already felt. Headlines like "Jo'burg evictions 'barbaric' and 'unconstitutional'"⁶ and "South Africa uses apartheid laws to evict thousands for World Cup"⁷ have appeared. This is in sharp contrast to Johannesburg Mayor Amos Masondo's "continued commitment to creating sustainable communities and human settlements."⁸ How can situations like that involving the upcoming World Cup be avoided?

This paper argues that participation by stakeholders in decision-making processes is the most effective way to realize the right to housing. This paper focuses on the right of access to adequate housing in South Africa. Section II provides a brief description of the circumstances leading up to today's housing dilemma including apartheid. In Section III, I will review relevant international instruments, followed by a survey of South African domestic housing law in Section IV. In Section V, I will argue for expanding the economic and social right of access to adequate housing to include access to the civil and political right to participate. This solution will be contrasted with the state-sponsored approaches whereby the right to housing is more narrowly read, technically applied, and ultimately unenforceable. This argument presupposes the indivisibility of human rights as set forth in the Universal Declaration of Human Rights.

II. HISTORY

Discrimination against African, Asian, and mixed populations has characterized the South African Cape region since the Europeans first arrived in the 17th century. The early French, German, and Dutch settlers subjugated local populations and sold others for slave labor. The British settled in the early 19th

5. U.N. Econ. & Soc. Couns. [ECOSOC], Comm'n on Hum. Rts., *The Realization of Economic, Social, and Cultural Rights: The Right to Adequate Housing*, ¶ 79, U.N. Doc. E/CN.4/Sub.2/1994/20 (June 21, 1994); see also INDIA CONST. art. 21.

6. Alex Eliseev, *Jo'burg evictions 'barbaric' and 'unconstitutionals'*, MAIL & GUARDIAN ONLINE, July 14, 2005, available at http://www.mg.co.za/articlePage.aspx?articleid=245421&area=/breaking_news/breaking_news_national.

7. Meera Selva, *South Africa uses apartheid laws to evict thousands for World Cup*, EZILON.COM, July 30, 2005, available at http://www.ezilon.com/information/article_7283.shtml.

8. Letter from Jean du Plessis, Centre on Housing Rights and Evictions ("COHRE"), Deputy Director, and Professor Cathi Albertyn, Director, Center for Applied Legal Studies, to Mr. Amos Masondo, Executive Mayor City of Johannesburg (Sept. 28, 2005), available at www.law.wits.ac.za/cals/evictions.pdf.

century and vied with the Boers for the region's human and economic resources. The Union of South Africa was formed in 1910 in an agreement between the British and the Boers and national legislation was used to institutionalize discrimination. Although Africans comprised approximately three-quarters of the population, the all-white parliament voted to limit African land ownership in 86 percent of the Republic. "Native reserves" were set up for Africans on the remaining 14 percent of the land, and other restrictions limited where Africans could live and work outside these reserves.

The newly elected National Party established the apartheid (Afrikaans for "apartness") system in 1948 to classify people by race to ensure that South Africa's white minority could continue to maintain political, military, and economic control over the country's people and resources. Tools like the "Population Registration Act" and the "Group Areas Act" were used to legally classify people by race or ethnic group and described separate areas where these groups could own land and reside.⁹ Today's housing crisis has its roots in the apartheid policies of influx control and forced removal.¹⁰

Housing policy in South Africa today is based on the 1994 Housing White Paper¹¹ and was previously articulated in the African National Congress's Reconstruction and Development Programme ("RDP").¹² The Housing White Paper includes "Participative Policy Development Processes"¹³ which demonstrates that participation was intended as part of the housing bundle of

9. AMERICAN ASSOC. FOR THE ADVANCEMENT OF SCI., *THE LEGACY OF APARTHEID* (1998), available at <http://shr.aas.org/loa/hback.htm>.

10. STATISTICS S. AFR., *THE PEOPLE OF SOUTH AFRICA POPULATION CENSUS 64, 65* (1996), available at <http://www.statssa.gov.za/census01/census96/HTML/CIB/CIB1996.pdf> (The 1996 census report illustrates how the population continues to be segregated even after the official termination of apartheid in 1993. There are about 6.5 million households in the country, and of these, 1,049,686 are in informal settlements. Of these, 1,012,343 are African. For the remaining households, white are 912, Indian 1,083, and Coloured 31,103. About one million African households have no flush toilets, pit latrines or bucket latrines, compared with 1,300 white, 428 Indian, and 37,500 Colored households.).

11. GOV'T OF S. AFR., *WHITE PAPER, NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA* (1994), available at <http://www.info.gov.za/whitepapers/1994/housing.htm>.

12. AFR. NAT'L CONG., *RECONSTRUCTION AND DEVELOPMENT PROGRAMME: A POLICY FRAMEWORK* (1994), available at <http://www.anc.org.za/rdp/rdp.html>.

13. AFR. NAT'L CONG., *A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA* § 3.4.1 (1994) ("Joint deliberations between the State and civil society interests through the National Housing Forum / Government process over the last two and a half years, with *full participation* from all affected parties and the utilisation of all relevant expertise, has forged a new approach to housing policy formulation.") (emphasis added), available at http://cfapp1-docs-public.undp.org/eo/evaldocs1/sfcele/eo_doc_757041408.doc; see also *RECONSTRUCTION AND DEVELOPMENT PROGRAMME*, *supra* note 12, § 4.4.4 ("Government is committed to a development process *driven from within communities*. . . Policies must recognize and give effect to this approach.") (emphasis added).

rights. The 1997 Housing Act legislated and extended the provisions set out in the Housing White Paper.¹⁴ These and various other mechanisms led to a monolithic policy mechanism called the “once-off capital subsidy.”¹⁵ This project, linked with capital subsidy, gradually gave way to a broad array of housing subsidy options.¹⁶ The paradigm from 1995 to 2000 gradually shifted away from “faith in the blanket solution of free-standing houses on individual plots with freehold tenure.”¹⁷ As of 2000, subsidies for the poorest households were still being spent on “poorly located, standardized, dormitory developments.”¹⁸

III. INTERNATIONAL INSTRUMENTS

A. *The Right to Adequate Housing*

The right to adequate housing is recognized in various international instruments. The most relevant international instruments containing the social and economic components of the right are the Universal Declaration of Human Rights (“UDHR”) of 1948, the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) of 1966, and the African Charter on Human and Peoples’ Rights (“African Charter (1981)”). The right to participate is found in the International Covenant on Civil and Political Rights (“ICCPR”) and the Declaration on the Right to Development. Before beginning a discussion of these instruments, it is important to elaborate on what is meant by “adequate” in the right to adequate housing.

14. The Housing Act 107 of 1997 section 1 provides:

[T]he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to – (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply. . . .

See also RECONSTRUCTION AND DEVELOPMENT PROGRAMME, *supra* note 12; S. AFR. DEP’T OF FIN., GROWTH, EMP. & REDISTRIBUTION: A MACROECONOMIC STRATEGY (1996); S. AFR. RURAL DEV. TASK TEAM, RURAL DEVELOPMENT FRAMEWORK (1997) (focusing on improving standard of living of all South Africans, with particular emphasis on the poor and those who have been previously disadvantaged).

15. Marie Huchzermeyer, *Housing for the Poor? Negotiated Housing Policy in South Africa*, 25 HABITAT INT’L 303, 312 (2001).

16. *Id.*

17. *Id.* at 325.

18. *Id.* at 311 (The needs of those whose interests were at stake—the dormitory beneficiaries—were not provided for by their participation and instead were presumed by the housing decision-makers leading to housing solutions that did not meet their needs.).

General Comment 4 (1991) of the United Nations Committee on Economic, Social and Political Rights, the treaty body that oversees the ICESCR, provides guidance to understand how “adequate” qualifies the right.¹⁹ Paragraphs 8(a)-(g) outline what is meant by adequate: legal security of tenure; “[a]vailability of services, materials, facilities and infrastructure[;]” affordability; habitability; accessibility; location and cultural adequacy.²⁰ Paragraph 9 asserts: “the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants [ICCPR and ICESCR] and other applicable international instruments.”²¹ It goes on to state that “the right to *participate in public decision-making* – is indispensable. . .” to the right.²² While the United Nations Committee on Economic, Social and Cultural Rights includes the right to participate in the right to adequate housing, the purpose of the General Comments is to provide guidance to State bodies in interpreting the covenants. However, these comments are not binding.²³

B. Socioeconomic Rights

Governments have basic duties under international human rights law—prevent violations, and protect and promote human rights. Additional duties include adhering to minimum core obligations²⁴ and progressive realization of

19. See Off. of the High Comm’r for Hum. Rts. [CESCR], General Comment 4, *The right to adequate housing (Art. 11 (1) of the Covenant)*, at 114, 6th Sess., U.N. Doc. E/1992/23 annex III (Dec. 13, 1991), available at [www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 18, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter CESCR, General Comment 4].

20. *Id.*

21. *Id.*

22. *Id.* (emphasis added).

23. UNIV. OF MINN. HUM. RTS. LIBR., GENERAL COMMENTS ADOPTED BY THE HUMAN RIGHTS COMMITTEE, INTRODUCTION, at 2, U.N. DOC. HRI/GEN/1/REV.1 (May 19, 1989), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/189/63/pdf/G9418963.pdf?OpenElement> (citing U.N. Doc. CCPR/c/21/Rev.1) (explaining the purpose of the General Comments: “The Committee wishes to reiterate its desire to assist States parties in fulfilling their reporting obligations. These general comments draw attention to some aspects of this matter but do not purport to be limitative or to attribute any priority between different aspects of the implementation of the Covenant. These comments will, from time to time, be followed by others as constraints of time and further experience may make possible.”).

24. See Off. of the High Comm’r for Hum. Rts. [CESCR], General Comment 3, *The nature of State parties obligations (Art. 2, para. 1 of the Covenant)*, U.N. Doc. E/1991/23 (Dec. 14, 1990), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+3.En?OpenDocument) [hereinafter CESCR, General Comment 3].

these rights.²⁵ Taken together, these basic tenets of international human rights law provide a framework for the following discussion.

As previously stated, socioeconomic rights are found in a variety of international instruments. Article 25(1) of the UDHR states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . ."²⁶ Article 11(1) of the ICESCR states: "The State 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."²⁷ Although the right to shelter and housing are not explicit in the African Charter, the combined effect of Articles 14, 16 and 18(1) create the right.²⁸ Several other international instruments recognize a right to housing, including:

- Article 14.2(h) of the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") (1979);²⁹
- Articles 16.1 and 27.3 of the Convention on the Rights of the Child ("CRC") (1989);³⁰

25. See *Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) (S. Afr.).

26. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 10, 1948).

27. G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

28. Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v Nigeria, Comm'n. No. 155/96, Afr. Comm'n. on Hum. & Peoples' Rts., Annual Activity Report, Annex V (2001), available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>; see also Org. of Afr. Unity, Afr. (Banjul) Charter on Hum. & Peoples' Rts., OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> [hereinafter *Banjul Charter*].

29. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, Annex, U.N. Doc. A/Res/34/180/Annex (Dec. 18, 1979), available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they *participate in* and benefit from rural development and in particular, shall ensure to such women the right To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Id. (emphasis added).

30. Convention on the rights of the Child, G.A. 44/25, arts. 16.1, 27.3, Annex, U.N. Doc. A/Con/44/25/Annex (Nov. 20, 1989), available at <http://www.ohchr.org/english/law/pdf/crc.pdf> ("No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.").

- Article 21 of the Convention relating to the Status of Refugees (1951);³¹
- Article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965);³²
- Article 17.1 of the International Covenant on Civil and Political Rights (1966);³³
- Article 43.1(d) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;³⁴ and
- Article IX of the OAS Declaration of the Rights and Duties of Man.³⁵

To further inform the socioeconomic aspects of the right, again the General Comment 4 of the ICESCR is helpful. General Comment 4, adopted in 1991, unpacks this right as “the right of all to a secure place to live in peace and

31. Convention relating to the Status of Refugees, art. 21, G.A. Res. 429(V), art. 21, 5th Sess. (Dec. 14, 1950), *available at* <http://www.ohchr.org/english/law/pdf/refugees.pdf>.

As regards housing [sic], the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Id.

32. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), art. 5(e) (iii), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965), *available at* <http://www.ohchr.org/english/law/pdf/cerd.pdf> (Obliges states “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . (e) . . . (iii) [t]he right to housing . . .”).

33. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, 21st Sess., U.N. Doc. A/6316 (Dec. 16, 1966), *available at* <http://www.ohchr.org/english/law/pdf/ccpr.pdf> (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”) [hereinafter Civil and Political Rights].

34. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, art. 43.1(d), U.N. Doc. A/RES/45/158 (Dec. 18, 1990), *available at* <http://www.ohchr.org/english/law/pdf/cmw.pdf> (“Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to . . . (d) [a]ccess to housing, including social housing schemes, and protection against exploitation in respect or rents. . .”).

35. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev.9 (2003); 43 A.J.I.L. Supp. 133 (1949), *available at* http://www.oas.org/cji/DIL/American_Declaration_of_the_Rights_and_Duties_of_Man.pdf (“Every person has the right to the inviolability of his home.”).

dignity”³⁶ Paragraph 4 states “significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies.”³⁷ Perhaps most noteworthy are steps to be taken immediately for the full realization of the right to adequate housing, regardless of available resources.³⁸

C. Civil and Political Rights

International instruments also inform the civil and political rights dimension of the right to adequate housing, which speaks to the right to participate in how decisions about housing get made. Most notable are articles 1 and 2 of the Declaration on the Right to Development and Article 2 and 25 of the ICCPR. Article 1 provides:

1. The right to development is an inalienable human right by virtue of which every human person and *all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.*
2. The human right to development also implies the *full realization of the right of peoples to self-determination*, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.³⁹

The right to self-determination is further articulated in Article 2(1) of the Declaration on the Right to Development, stating “[t]he human person is the central subject of development and should be the *active participant and beneficiary* of the right to development.”⁴⁰ Section 3 proposes:

[s]tates have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their

36. CESCR, General Comment 4, *supra* note 19, para. 8(e).

37. *Id.* para. 4.

38. *Id.* para. 10.

39. Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. Doc. A/RES/41/53/Annex (Dec. 4, 1986), *available at* <http://www.ohchr.org/english/law/pdf/rtd.pdf> (emphasis added).

40. *Id.* art. 2(1) (emphasis added).

active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.⁴¹

Finally, ICCPR Article 1 states: “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁴² Article 25 states:

“[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives”⁴³

Additionally, international instruments include comments and reports that can serve as a guide to assist in the interpretation of treaties and provide support for participation’s inclusion in the right of access adequate to housing. As previously stated, paragraph 8 of the General Comment includes “cultural adequacy” as one of seven topics to consider when giving affect to the right.⁴⁴ It states, “[t]he way housing is constructed . . . must appropriately enable the expression of cultural identity”⁴⁵ Additionally, the Committee encourages the adoption of national housing strategies, which “should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.”⁴⁶

Similarly, the Committee’s General Comment No. 7 (adopted in 1997) on forced evictions supports a right to participate.⁴⁷ It emphasizes the State’s obligations to ensure that “[e]victions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.”⁴⁸ I argue that “other human rights” in this context include civil and political rights, such as the right to participate. Additionally, paragraphs 13, 15, and 20 each

41. *Id.* art. 2(3) (emphasis added).

42. Civil and Political Rights, *supra* note 33, art. 1.

43. *Id.* art. 25 (emphasis added).

44. CESCR, General Comment 4, *supra* note 19, para. 8(g).

45. *Id.*

46. *Id.* para. 12.

47. Off. of the High Comm’r for Hum. Rts. [CESCR], General Comment 7, *The right to adequate housing (Art. 11.1 of the Covenant): Forced Evictions*, U.N. Doc. E/1998/22, Annex IV (May 20, 1997), available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument) [hereinafter CESCR, General Comment 7].

48. *Id.* para. 16.

address the need for consultation of the effected parties in the eviction context.⁴⁹ Furthermore, Article 13 of the African Charter states:

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.⁵⁰

49. *Id.* paras. 13, 15, 20.

13. State parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored *in consultation with the affected persons*, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those who are affected by eviction orders

. . . .

15. Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent to a matter such as forced evictions which directly invokes a large number of the rights recognized in both the International Covenants on Human Rights. The Committee considers that the procedural protections which 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 affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups or people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the evictions to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless affected persons consent otherwise; (g) provisions of legal remedies; and (h) provision, where possible of *legal aid to persons who are in need of it to seek redress from the courts*.

. . . .

20. Information is also sought as to “measures taken during, *inter alia*, urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics and *other sporting competitions*, exhibitions, conferences, etc.) ‘beautiful city’ campaigns, etc. which guarantee protection from eviction or guarantee rehousing *based on mutual consent*, by any persons living on or near to affected sites.”

Id. (emphasis added) (However, few State parties have included the requisite information in their reports to the Committee.).

50. Banjul Charter, *supra* note 28, art. 13. This article of the African Charter is similar to Article 25 of the ICCPR:

Special Rapporteurs also provide a rich resource of interpretive expertise in the participatory unpacking project. For example, the 2005 Report of the Special Rapporteur on adequate housing concludes:

The right to adequate housing has to be recognized as being linked to and congruent with the right to security of the person, the right to security of the home, the right to participation, the right to privacy, the right to freedom of movement, the right to information, the right to be free from inhumane and degrading treatment, and the right not to be arbitrarily detained.⁵¹

The Special Rapporteur goes on to recommend that states recognize informal property regimes that would necessarily require the participation of those adhering to such regimes.⁵²

The report discusses the international instruments that support the right to adequate housing which was undertaken to inform that right in the South African context. It included treaties containing the right and some of the interpretive materials that inform them. The socioeconomic, civil, and political elements were explored. It should be noted that South Africa has signed, but not yet

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

Id.

51. U.N. Econ & Soc. Council [ECOSOC], Comm'n on Hum. Rts., *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, at 19, U.N. Doc. E/CN.4/2005/48 (Mar. 3, 2005) (prepared by Mioon Kothari).

52. *Id.* at 20.

(i) National and regional legislation should reflect people's rights to information and participation . . . (ii) States should work to provide legal recognition of the collective/community-based property rights of indigenous and other local communities in order to minimize insecurity of land ownership and protect against forced displacement. . . .

Id. (The idea that states should include legal recognition of broader definitions of property would require that groups living within informal property regimes somehow communicate their property terms to the state. This project is well beyond the scope of this paper; however, it is worth mentioning that this paper would provide groundwork for such an exploration.)

ratified, the ICESCR.⁵³ However, the South African Constitution includes the right of access to adequate housing.⁵⁴

IV. DOMESTIC SOUTH AFRICAN LAW

A. *The Constitution*

1. The Right to Housing

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom.”⁵⁵ The right of access to adequate housing is well entrenched in South African domestic policy. One can trace the jurisprudence of the South African higher courts through statutes to the constitution and back to international instruments. There are three cases that stand for the justiciability of socioeconomic rights in South Africa. Before unpacking them, it is necessary to describe the special nature of the South African Constitution that provides for these rights.

The South African Constitution⁵⁶ includes socioeconomic rights as justiciable rights. In dialogues leading up to the Constitution’s drafting, various civic, professional, and social groups argued that the inclusion of such rights would both serve the goals of the struggle against apartheid as a fight not only for civil and political rights like the right to vote, but also for socioeconomic rights such as the right to own property, and provide practical relief for disadvantaged communities in the courts.⁵⁷ Under most constitutions, like that of the United States, the right to housing is classified under state policy, and as such is considered aspirational and not justiciable.

The South African Constitution entrenches these socioeconomic rights both in Chapter 2—the Bill of Rights, and in setting up the Human Rights Commission in article 184(3). The Right to housing and its reasonable test are in Chapter 2, article 26(1)-(3):

53. See OFF. OF THE HIGH COMM’N FOR HUM. RTS., RATIFICATION & RESERVATIONS: INTERNATIONAL CONVENTION ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (2007), available at <http://www.ohchr.org/english/countries/ratification/3.htm> (for a complete listing of countries that have ratified the ICESCR as of Apr. 19, 2007) (last visited May 15, 2007).

54. S. AFR. CONST. 1996.

55. *Id.* art. 7(1).

56. *Id.*

57. See Petition to the Constitutional Assembly by the “Ad Hoc committee for the Campaign for Social and Economic Rights,” July 1995, in SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 19 (Sandra Liebenberg & Karrisha Pillay eds., 2000).

- (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.⁵⁸

In addition, article 184(3) provides for a Human Rights Commission (“SAHRC”) that must monitor and report annually on the realization of socioeconomic rights, including the right to housing.⁵⁹

Furthermore, General Provisions found in Chapter 14 enable international law. For example, article 231 explains how treaties become binding on the Republic, article 232 provides that customary international law is law, and article 233 directs courts to interpret legislation in accord with international law.⁶⁰ John Dugard has noted: “The insertion of so many provisions on international law in our Constitution was part of a deliberate design to bring South African law into line with international law – in contrast with the law of apartheid which was in conflict with international law in so many areas, particularly human rights.”⁶¹

The Constitution places a duty on the State to respect, protect, promote, and fulfill the rights in the Bill of Rights in recognition of these internationally accepted human rights obligations.⁶² These duties imply both negative and positive obligations. For example, the right of access to adequate housing imposes an implicit negative duty on the State and third parties to desist from hindering the right of access to adequate housing.⁶³ In contrast, rights that are negatively framed imply a positive right as in the case of the prohibition against refusing emergency medical treatment and the State’s positive obligation to guarantee the requisite infrastructure to support the duty.⁶⁴

58. S. Afr. Const. 1996 art. 26.

59. *Id.* art. 184(3).

60. *Id.* arts. 231-233.

61. John Dugard, *Twenty Years of Human Rights Scholarship and Ten Years of Democracy*, 20 S. AFR. J. HUM. RTS. 345, 349-50 (2004).

62. S. AFR. CONST. 1996 art. 7(2).

63. *See Republic of South Africa v Grootboom & Others* 2000 (11) BCLR 1169 (CC) at 40 (S. Afr.).

64. *See Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at paras. 7, 10, 20, 36 (S. Afr.).

Besides imposing a duty on all state actors,⁶⁵ the South African Constitution possibly provides that the Bill of Rights applies to non-State actors as well.⁶⁶ In *Government of the Republic of South Africa v Grootboom*, the Constitutional Court offered that article 26(1) of the South African Constitution provides, “at the very least, a negative obligation . . . upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”⁶⁷ Through this process of horizontal application, the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.⁶⁸ Thus, the right to adequate housing has been interpreted to be enforceable against non-state actors.

2. Participation

In addition, the civil and political right to participate includes the right to housing. For example, the South African Constitution contains broad provisions on legal standing. Article 38 of the Bill of Rights provides a list of those having the right to approach a competent court alleging that a right has been infringed or threatened.⁶⁹ Those listed include anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; and anyone acting in the public interest.⁷⁰

Participation is most directly located in article 32 of the Bill of Rights under Access to Information:

(1) Everyone has the right of access to:

a. any information held by the state; and

b. any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

65. S. AFR. CONST. 1996 art. 8(1).

66. *Id.* art. 8(2).

67. Republic of South Africa v Grootboom & Others 2000 (11) BCLR 1169 (CC) at 28 (S. Afr.).

68. *Id.*

69. S. AFR. CONST. 1996 art. 38.

70. *Id.*

This right of access to information came into operation on March 9, 2001, in the Promotion of Access to Information Act (“PAIA”).

Taken together, the right to housing and the right to participate have the best chance of resulting in the realization of a meaningful right to *adequate* housing. Unfortunately, the civil and political rights have not been used in this way, and instead, the right of access to adequate housing has not been fully implemented.

B. Case Law

The landmark housing case in South Africa is *Republic of South Africa v Grootboom*.⁷¹ The applicants included mostly women and children who moved onto private land because of appalling conditions where they were living. Subsequently, they were evicted from the private land, which they unlawfully occupied. The High Court found that the state owed a duty under article 28(1)(c)⁷² to provide shelter to homeless children and that the parents were entitled to remain with their children. The parents’ right to shelter was a derivative right stemming from the state’s duty to provide for the children. The issue decided by the Constitutional Court, in this precedent-setting housing case, was whether article 26 imposed a duty on the state to provide temporary housing or shelter to persons in desperate need.⁷³ The Court used a balancing test and determined that the housing program had to include measures that were reasonable both in conception and implementation.⁷⁴ In this test, the court looked at

[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at realization of the right. . . . If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁷⁵

The court made several notable observations in arriving at its decision.

71. *Republic of South Africa v Grootboom & Others* 2000 (11) BCLR 1169 (CC) at 26 (S. Afr.) (Yacoob J’s holding flows from Constitution’s guarantee of socio-economic rights in the housing context.).

72. S. AFR. CONST. 1996 art. 28.

73. *Republic of South Africa v Grootboom & Others* 2000 (11) BCLR 1169 (CC) at 24-26 (S. Afr.).

74. *Id.* at 65-66.

75. *Id.* at 66-67.

There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.⁷⁶

Further, the Court noted that the right of access to adequate housing is not merely the right to a house. The duty of the state is to “create the conditions for access to adequate housing for people at all economic levels of our society.”⁷⁷ Finally, the justiciability of socioeconomic rights must be decided on a case-by-case basis.⁷⁸

The *Grootboom* Court interpreted the phrase “progressive realisation” in article 26.2 to be in harmony with the UN Committee on Economic, Social and Cultural Rights’ interpretation of article 2(1) of the ICESCR.⁷⁹ This “progressive realisation,” in the housing context, provides that housing be made accessible to “not only to a larger number of people but to a wider range of people as time progresses.”⁸⁰ This suggests that the state is under an obligation to justify any retrogressive measures taken that detract from socioeconomic rights.⁸¹

In addition, the South African Human Rights Commission and the Community Law Center (University of the Western Cape) intervened as *amici curiae* in the case and broadened the issues to include article 26 of the Constitution. They argued that the Court should impose a “minimum core obligation” on the State to satisfy minimum essential levels of, *inter alia*, the right to adequate housing.⁸² The Court qualifies the State’s positive duty in

76. *Id.* at 45-46.

77. *Id.* at 59 (“[O]ther agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.”).

78. *Id.* at 43.

79. CESCR, General Comment No. 3, *supra* note 24, para. 9 (“[A]ny deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”).

80. Republic of South Africa v *Grootboom & Others* 2000 (11) BCLR 1169 (CC) at 67 (S. Afr.).

81. Sandra Liebenberg, *South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L., DEMOCRACY & DEV. 159 (2002).

82. CESCR, General Comment 3, *supra* note 24, para. 10 (“In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources

relation to the “available resources.” “[B]oth the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.”⁸³

Grootboom is instrumental in providing precedent for judicial intervention to secure socioeconomic rights. The Court may intervene where lack of reasonableness in the implementation of laws, policies, and programs is found. In addition, situations where retrogressive measures either reduce access to a benefit or reduce the quality or quantity of a benefit are now available for judicial intervention.⁸⁴

The Constitutional Court first considered the enforceability of socioeconomic rights in *Soobramoney v Minister of Health, KwaZulu-Natal*.⁸⁵ The plaintiff was a man with late stage renal failure who sought a positive order that a state hospital provide on-going kidney dialysis treatment and interdicting the provincial Minister of Health from barring his admission to the hospital. He could not afford treatment at a private clinic, so refusal of the treatment at the hospital would lead to his death. On appeal, the Constitutional Court found that article 27(3) was not implicated because renal dialysis treatment was not within the scope of “emergency medical treatment.”⁸⁶ In addition, the Court considered Mr. Soobramoney’s claim under articles 27(1) and (2),⁸⁷ providing a wide margin of discretion in administrative matters by stating “[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.”⁸⁸

Treatment Action Campaign and Others v Minister of Health and Others is another socioeconomic rights test case that relied heavily on *Grootboom*.⁸⁹ The Treatment Action Center and others applied to compel the State to provide a

it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”).

83. Republic of South Africa v *Grootboom & Others* 2000 (11) BCLR 1169 (CC) at 69-70 (S. Afr.).

84. Liebenberg, *supra* note 81 (the state arguably has minimum core obligations).

85. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.). *See also id.* para. 18 (The Indian Supreme Court held that the denial of treatment to Samity violated his right to life under Article 21 of the Indian Constitution. Samity suffered serious injuries to his head and was denied treatment at various government hospitals. The court held that the government must institute measures to meet its Constitutional obligations including, *inter alia*, the availability of proper medical facilities for emergency cases (citing *Samity v State of West Bengal*, AIR 1996 SC 2426).

86. *Samity v State of West Bengal*, AIR 1996 SC 2426.

87. S. AFR. CONST. 1996 art. 27.

88. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

89. *Treatment Action Campaign and Others v Minister of Health and Others* 2002 (4) BCLR 356 (T) (S. Afr.).

comprehensive national program for the prevention or reduction of mother-to-child HIV transmission. Among other things, the program included voluntary counseling and testing, milk formula for feeding, and Nevirapine or other appropriate medicine. The Court found that a certain policy limiting Nevirapine use breached the negative obligation to desist from impairing the right to healthcare. The Court also held that the State's current mother-to-child-transmission program failed the reasonableness test in *Grootboom*. Judge Botha said that the program at issue could not be an "effective and progressive programme" because it was open-ended and left everything for the future.⁹⁰

The State's obligations under the right to housing were revisited by the 2003 Cape High Court in *City of Cape Town v Neville Rudolf and Others*.⁹¹ This case implicated article 26(3) and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act ("PIE") that resulted from it. The case involved eighty-three families living under intolerable circumstances in Valhalla Park, Cape Town, and their eviction. The Court found that the housing program of the City of Cape Town failed to comply with its statutory and constitutional obligations.⁹² The city "[did] not provide any form of relief for people in Valhalla Park who are in a crisis or in a desperate situation . . . and in particular does not have regard to the degree and extent of the need of the applicants."⁹³

Evictions were also addressed in *President of the Republic of South Africa and Another v Modderklip Boerdery*.⁹⁴ The case involved the court ordered eviction of a group of people from private land. The Constitutional Court ordered that people are entitled to occupy the land until the state, provincial or local authority provide an alternative. This is significant because it stands for the legal principle that people should not be evicted until alternative accommodations are made available to them.

Finally on March 3, 2006, "[t]he High Court of South Africa, sitting in Johannesburg handed down a ground-breaking judgment on concerning the housing rights of the poor in inner city Johannesburg."⁹⁵ "Judge Mahomed

90. *Id.* at para 5.

91. *City of Cape Town v Neville Rudolph and Others* 2003 (11) BCLR 1236 (C) (S. Afr.).

92. *Id.* at 124-25.

93. *Id.*; see also CTR. FOR HOUSING RTS. & EVICTIONS, ANY ROOM FOR THE POOR? FORCED EVICTIONS IN JOHANNESBURG, SOUTH AFRICA 27 (Feb. 17, 2005), available at http://www.cohre.org/store/attachments/COHRE%20Johannesburg%20FFM_high%20res.pdf (discussing the Rudolph case further).

94. *President of the Rep. of S. Afr. and Another v Modderklip Boerdery, (Pty) Ltd and Others* 2005 (5) SA 3 (CC) (S. Afr.).

95. Press Release, U.N. Habitat, South African Judge Makes a Landmark Ruling in Favour of Urban Poor Protecting their Right to Adequate Housing (Mar. 9, 2006), available at <http://www.unhabitat.org/content.asp?cid=2352&catid=5&typeid=6&subMenuId=0> [hereinafter UN Press Release]; see also Press Release, COHRE/CALS, Evictions From 'bad buildings' in

Jajbhay . . . ruled that the City of Johannesburg's housing policy fails to comply with the Constitution of South Africa because it does not cater for the needs of the inner city poor."⁹⁶ The Judge "ordered the city to devise and implement a comprehensive plan to cater for people living in the inner city of Johannesburg who are in desperate need of accommodation."⁹⁷ "The judgment makes it clear that the poor people resident in so-called 'bad buildings' of the inner city of Johannesburg must be given access to a home in the inner city area if the city wants to evict them from accommodation it considers unsafe."⁹⁸

Jean du Plessis, Deputy Director of the Geneva-based Centre on Housing Rights and Evictions (COHRE), said, "[w]e welcome the ruling of the High Court effectively banning evictions from 'bad buildings' without the provision of alternatives in Johannesburg. We are pleased to note that this is in accordance with South Africa's new Constitution and with various international legal standards, including the International Covenant on Economic, Social and Cultural Rights, which South Africa has yet to ratify." Du Plessis added, "[t]oday's ruling, similar to the *Grootboom* judgement of 2000, again confirms the importance, internationally, of the South African Constitution in advancing the right to adequate housing and protection against forced evictions. We call on the City of Johannesburg to abide by the ruling, to immediately halt all planned evictions, to enter into dialogue with affected communities to find mutually acceptable alternatives and to provide redress for those who have been evicted in the past."⁹⁹

In summary, the right of access to adequate housing in South African domestic law includes provisions for the right's, social and economic, progressive realization, including the state's duty to take reasonable measures in light of available resources, and the prohibition against arbitrary evictions. The right is justiciable and has been successfully litigated. Other provisions that support the right include: the Constitution's enablement of international law; the requirement of yearly Human Rights Commission reports; the state's duty to respect, protect, promote, and fulfill rights in the Bill of Rights; and the negative and positive state obligations that these impose; its horizontal application to non-

Johannesburg Unconstitutional, Rules High Court, (Mar. 3, 2006), *available at* http://ftp.shf.org.za/cals_media_release.pdf [hereinafter COHRE Press Release] (this case is unpublished as of the time of this writing).

96. UN Press Release, *supra* note 95; *see also* COHRE Press Release, *supra* note 95.

97. COHRE Press Release, *supra* note 95.

98. *Id.*

99. *Id.*

state actors and the fact that legal standing is granted to anyone acting in the public interest. However, problems remain in the enforcement of the right. The most effective way to realize the right is to involve those whose rights are at stake in the decision-making process.

V. EXPANDING THE RIGHT OF ACCESS TO ADEQUATE HOUSING TO INCLUDE THE CIVIL AND POLITICAL RIGHT TO PARTICIPATE.

“Community participation in housing delivery needs to be taken with more vigour. We believe that through the people’s housing process, communities will rise to the challenge of building houses they desire and deem appropriate for their own environment.”¹⁰⁰

As the *Grootboom* order demonstrated, non-directive language does not lead to enforceable rights to those whose interests are ultimately at stake.¹⁰¹ A South African specific enforcement approach is needed. That approach requires the input of those most directly affected by the current failures and those who have most at stake in the rights realization. I propose three ways to facilitate the enforcement of the right: first, the SAHRC must promote it; second, the PAIA must be used to achieve free flow of information; and finally, a system like that of democratic experimentalism¹⁰² must be introduced to allow for the greatest levels of participation.

100. Nozipho Dlamini, *Minister Calls on Three Spheres of Government to Work Together*, BUANEWS, Nov. 1, 2005, available at <http://www.eprop.co.za/news/article.aspx?idArticle=6488&pf=> (quoting Johannesburg executive Mayor Amos Masondo statement at the recent National Municipal Housing Indaba an inclusive deliberative meeting).

101. Republic of South Africa v *Grootboom* 2000 (11) BCLR 1169 (CC) at para. 44 (S. Afr.) (“A society *must* seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. . . . If the measures, though statistically successful fail to respond to the needs of those most desperate, they *may* not pass the test.”) (emphasis added); see also Bonny Schoonakker, *Treated with Contempt*, SUNDAY TIMES (S. AFR.), Mar. 21, 2004, available at http://www.queensu.ca/msp/pages/In_The_News/2004/March/23.htm (Explaining that the *Grootboom* holding does not go far enough in efforts to create socioeconomic rights. The author points out that the state is obligated to respond to the needs of those most desperate and the way to do this is through provisions for their participation in the housing decision-making process. It is only with actual participation can the state ascertain those actual needs. The *Grootboom* community would probably have its housing today had the right to participate been contained in the holding.).

102. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); see also Joshua Cohen & Charles F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997), available at <http://www2.law.columbia.edu/sabel/papers/DDP.html>; see also Charles F. Sable & William H.

Since the state's duty is to protect and *promote* the rights in the Bill of Rights, the state cannot merely enforce the right of access to adequate housing post-violation; it must actually *promote* it to avoid violations before they happen. This means that the state must be actively involved in the rights realization by providing remedies throughout the housing process: from planning through implementation. Clearly, the international violations approach to enforcement does not go far enough in this context¹⁰³ because the rights are already justiciable. It is time to shift the focus from the meaning of the right and its

Simmon, *Destabilization Rights: How Public Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019 (2004) (providing examples and articulation for basic democratic experimentalist precepts).

103. Audrey R. Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, 18 HUM. RTS. Q. 23 (1996) (Pointing out that the author is critical of progressive realization because of its monitoring difficulties and proposes a tripartite categorization of violations. These include, violations resulting from actions, policies, and legislation on the part of the government; violations related to patterns of discrimination; and violations related to the State's failure to fulfill minimum core obligations of enumerated rights.); see also Danie Brand, *The Minimum Core Content of the Right to Food in Context: A Response to Rolf Kiunnemann*, in EXPLORING THE CORE CONTENT OF SOCIOECONOMIC RIGHTS 99, 108 (Danie Brand & Sage Russell eds., 2002) (Contending that absolute minimum core obligations are unwise at the national level and that the South African judiciary would be better off focusing on the expressed constitutional requirement, "that the state take reasonable steps to realise socio-economic rights."); accord Abdullah A. An-Na'im, *The Legal Protection of Human Rights in Africa: How to Do More with Less*, in HUMAN RIGHTS: CONCEPTS, CONCEPTS, CONTINGENCIES 89 (Austin Sarat & Thomas Kearns, eds., 2001) (Providing another reason why international enforcement models may not work in South Africa, that the African legal order needs to "do more with less." A realistic enforcement model for South Africa needs to work within restrictions unfamiliar in the international context where the violations approach is common.).

protection to the enforcement of the right and its promotion.¹⁰⁴ SAHRC is ideally suited to the task of promoting the right.¹⁰⁵

This new interpretive role for SAHRC and similar Chapter 9 institutions was recently signaled in *S. v Jordan*.¹⁰⁶ Here the South African Constitutional Court stated:

In determining whether the discrimination is unfair, we pay particular regard to the affidavits and argument of the Gender Commission. It is their constitutional mandate to protect, develop, promote respect for and attain gender equality. This Court is of course not bound by the Commission's views but it should acknowledge its *special constitutional role and its expertise*.¹⁰⁷

Since, *inter alia*, the mandate of SAHRC is to monitor and report annually on the realization of social and economic rights, the Commission could use this charge to actively promote the right to housing. SAHRC's input would be given *at least* as much deference as the Court afforded the Gender Commission, a Chapter 9 institution, in *Jordan*.

104. See Kgomoane Mathipa & Geoff Budlender, *Concluding Observations*, 3 ESR REV. 38, 39-40 (July 2002), available at <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/esr-review/esr-previous-editions/esr-review-vol-3-no-1-july-2002.pdf>.

We need to give more attention to legal remedies. The critical issue is not whether these rights are justiciable, but how to enforce them. Sometimes, as an order should be made for government to take specific action to give affect to the right. Other times, where there are various permissible options, the legislature or executive should decide which option to adopt. The task of the courts is then to define the range of constitutionally permissible options, and to review policy and its implementation to see whether they meet the constitutional standard. We need to become more imaginative in designing effective remedies to achieve this.

Id.

105. See Jonathan Klaaren, *A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights*, 27 HUM. RTS. Q. 539 (2005).

106. *S. v Jordan and Others* 2002 (6) SA 642 (CC) (S. Afr.) (Even though this is not a socioeconomic case, it is useful to recognize how SAHRC's role could be expanded into right's promotion.); see also S. AFR. CONST. 1996 art. 181 (regarding the establishment of state institutions supporting constitutional democracy).

107. *S. v Jordan and Others* 2002 (6) SA 642 (CC) at 669 (S. Afr.).

Promotion of rights is integrally linked to the participation of those whose interests are most at stake in their realization¹⁰⁸ and the Promotion of Access to Information Act provides for just such enhanced participation.¹⁰⁹ Additionally, the right of access to information's location within the framework of the Bill of Rights informs the importance of civil and political rights in the realization of socioeconomic rights.¹¹⁰ South African Human Rights Committee Commissioner Jody Kollapen articulated an enhanced right of access to information:

The right of information is not something that lives in the air, or something that thrives within Academia, but in the day-to-day lives of citizens and in the important decisions they take around bread and butter issues. Access to credible, reliable and accurate information is so important in the kind of decisions they make. Not just decisions about the kind of government they want, *but decisions about the kind of house they want*, the kind of education they want for their children, the kind of accountability they are entitled to demand from local government officials and elected representatives.¹¹¹

Building a culture of openness is one of the stated goals of the PAIA.¹¹² Hence, together with an enhanced role of SAHRC, the PAIA can also catalyze the adoption of more deliberative approaches to government in South Africa.

108. Among other things, human dignity requires participation. Without the participation of the subjects, how can the state of their dignity be determined? It is obvious that dignity cannot be imposed, and the person whose dignity is in question needs to be consulted to ascertain her understanding of the integrity of her dignity. This means that individuals need to be consulted about their subjective dignity *vis à vis* their right to housing.

109. Promotion of Access to Information Act 2 of 2000, *available at* <http://www.info.gov.za/gazette/acts/2000/a2-00.pdf>.

110. See S. AFR. CONST. 1996.

111. Klaaren, *supra* note 105, at 555-56 (emphasis added) (quoting Commissioner Jody Kollapen, Remarks at the Conference on the Promotion of Access to Information Act 11 (May 22, 2003)).

112. *Id.* at 77.

The Act represented a landmark in South African history, addressing for the first time the pre-1994 culture of secrecy in state and private institutions, seeking instead to foster a culture of transparency and accountability in South Africa. . . . The Act also acknowledged the need to educate South Africans on their rights, to enable them to participate in decision-making that affects their lives.

The participation-enabling role of PAIA and the expansive-promotional role of SAHRC can be easily integrated into the practical theory of democratic experimentalism¹¹³ to create opportunities for inclusive problem solving and bottom-up innovation.¹¹⁴ Charles Sabel and Michael Dorf state that once rights

SOUTHAFRICA.INFO, ACCESS TO INFORMATION GUIDE (Mar. 7, 2005), *available at* http://www.southafrica.info/public_services/citizens/your_rights/information-030305.htm (It is noteworthy that SAHRC publishes the user-friendly guide on how to use the PAIA in all eleven official South African languages by SAHRC.); *see also* PAIA Manual, http://www.housing.gov.za/Content/PAIA/paia_manual.htm (last visited May 15, 2007).

113. *See* David M. Trubek & James Mosher, *New Governance, EU Employment Policy, and the European Social Model* (NYU School of Law Jean Monnet Center, Working Paper No. 6/01, 2001), *available at* <http://www.jeanmonnetprogram.org/papers/01/011501.rtf> (A useful model that may inform the participation model is that of "Open Method of Coordination (OMC)." The OMC, in contrast to the Community Method with its top-down, rule based, centralized approach, promotes policy learning and innovation and is considered "soft law." It includes enhanced participation in the five major governance objectives embraced by the European Employment Strategy ("EES"). The EES has developed largely as a strategy to maintain the European Social Model by reforming it through altering structural impediments to employment. Benefits of this approach may include policy learning leading to "win-win situations in which some can benefit at no cost to others, or where gains are so large than [sic] modest cost increases or losses to some can be accepted." Opponents contend that adoption of this method will lead to the dismantling of the European social order including elements such as the welfare state that depend on the status quo. Additionally, this method may conflict with international best practices in the human rights realm, as international best practices often adhere more stringently to traditional regulation.); *see also* Cohen & Sabel, *supra* note 102 (discussing further issues related to the European system of governance); *see also* Joshua Cohen, Charles Sabel & Jonathon Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union* (La Follette School of Public Affairs Working Paper Series, Paper No. 2006-018, 2006), *available at* <http://www.lafollette.wisc.edu/publications/workingpapers/zeitlin2006-018.pdf> (offering additional views on European governance systems) (examining European governance ideas); *see also* JONAHAN ZEITLIN ET AL., GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 691-750 (Jonathan Zeitlin & David Trubek eds., 2003) (explaining further viewpoints on self governance in Europe).

114. *See* Susan Strum, *New Governance and the Architecture of Learning, Mobilization, and Accountability: Lesson from Gender Equity Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 323, 325 (Grainne De Burca & Joanne Scott eds., 2006) (Describing "features central to new governance approaches: self-study, participatory problem solving, experimentation, benchmarking and centralized bodies providing pooling and assessment of bottom-up innovation."); *see also* Catherine Powell, *Lifting Our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 372 (2005-2006) (Describing "broader, more inclusive modes of implementing human rights treaties would permit women to accept or reject CEDAW norms based on a fuller understanding of what the Convention offers, rather than allow cultural objections to defeat the Convention before women across the country even have a chance to learn about CEDAW . . ."); *see also* JONATHAN ZEITLIN & DAVID M. TRUBEK, GOVERNING WORK AND WELFARE IN A NEW ECONOMY (2003) (The points are particularly laid out in the introduction and chapters 2, 6, 9, 10, 13.); *see also* John S. Dryzek, *Policy Analysis and Planning: From Science to Argument*, in THE ARGUMENTATIVE TURN

are judicially recognized, there are many ways to implement them.¹¹⁵ They argue that information pooling provides a method by which power is decentralized to enable citizens to interface with other actors to craft solutions fit to their individual circumstances.¹¹⁶ In the case of housing in South Africa, where the justiciability is now doctrinal, the right to housing must meet the needs of the people who receive the benefit of that housing. The best way for the housing to meet their needs is for the beneficiaries of the right to participate in the process of determining, *inter alia*, what their needs are.

The South African housing story could benefit from the lessons learned in the Bronx, U.S.A. as described in Julissa Reynoso's case study, *Putting Out Fires Before They Start*.¹¹⁷ Reynoso illustrates the Bronx transition from urban decay to a model for urban growth by contrasting today's Bronx with sports commentator Howard Cosell's announcement during the 1977 World Series at Yankee Stadium as the camera scanned to a burning nearby building: "[T]here it is, ladies and gentlemen, the Bronx is burning."¹¹⁸ The case study illustrates how community-based organizations are moving "beyond demanding public sector reform and intervention and towards a novel form of conflictual participation in the design, revision, and implementation of the policies and regulations of local government, while moving local government to more directly involve stakeholder citizens in problem-solving."¹¹⁹ The sport's analogy is apt given the arguable housing crisis developing in Johannesburg preceding the 2010 World Cup.

Finally, unlike the right to housing, the right to participate is not in the Constitution. However, unlike the right to housing which is in the ICESCR that South Africa has not ratified, the right to participate is in the ICCPR, the Declaration on the Right to Development and the African Charter, which have been ratified. As such and by way of the international law enabling provisions found in Chapter 14 of the South African Constitution,¹²⁰ the right to participate is subject to an enforcement regime that includes international norms, including the violations approach and progressive realization. Perhaps these approaches can be used to make participation justiciable *and* enforceable.

IN POLICY ANALYSIS AND PLANNING 213, 213-32 (Frank Fischer & John Forester eds., 1993); Paul Craig, *The Nature of the Community: Integration, Democracy and Legitimacy*, in THE EVOLUTION OF EU LAW 1, 1-54 (Paul Craig & Grainne de Burca eds., 1999).

115. Dorf & Sabel, *supra* note 102, at 268.

116. *Id.*

117. See generally Julissa Reynoso, *Putting Out Fires before they Start: Community Organizing and Collaborative Governance in the Bronx, U.S.A.*, 24 LAW & INEQ. 213 (2006).

118. *Id.* at 214.

119. *Id.* at 263.

120. S. AFR. CONST. 1996 art. 47.

VI. CONCLUSION

While South Africa has proven its ability to overcome the oppressive apartheid system, drafted a Constitution that includes socioeconomic rights, doctrinally provide for the justiciability of those rights, and made operative the civil and political right to freedom of information, it has failed in its pre and post-violation enforcement regime. Thus, the methodology proposed by democratic experimentalists, including bottom-up innovation and participation, may provide an opportunity whereby the ultimate beneficiaries of the right to housing can participate in the housing decision-making process. These democratic experimentalist methodologies can benefit from the free flow of information enabled by the PAIA and the right's promotion agenda of SAHRC to bridge the gap between justiciability and enforcement. Only with the participation of those whose interests are most at stake can their housing needs be met. Such participation will provide efficiency and coordination between the beneficiaries and all levels of civil society so that *inter alia* problems, like the evictions leading up to the upcoming World Cup and the failed *Grootboom* order, can be avoided. Let the 2010 World Cup be an opportunity for South Africa to demonstrate to the world community, not only that it has moved away from its apartheid heritage, but also that, it is a leader in upholding international human rights standards. The recent High Court of South Africa ruling on Johannesburg evictions is a strong signal to this end.¹²¹

121. COHRE Press Release, *supra* note 95.