EVICTIONS AND PARTICIPATION RIGHTS

IN INDIA AND SOUTH AFRICA

Doctor of Philosophy in Law

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ABSTRACT

India and South Africa are deeply unequal societies, including in terms of access to housing. This thesis explores the role for participation rights to enable oppressed communities to access adequate housing, by participating in decision-making around evictions. The arguments are structured around a specific context – forced evictions in India and South Africa – but have wider application.

This thesis engages with four puzzles regarding the right to housing, adopting theoretical, doctrinal and comparative analysis: (i) the nature and content of participation elements of the right to housing; (ii) the content of other substantive elements; (iii) the relationship between participation and other substantive elements of the right to housing; (iv) and the appropriate role for courts.

The thesis challenges the characterisation of participation rights as procedural, and argues that these embody substantive values underlying human rights – freedom, dignity and equality. It relies on these values to develop the content of participation rights, filling gaps in existing legal doctrine.

The thesis proposes a way to settle the relationship between participation rights, other substantive elements of rights, and courts. It carves out a valuable role for participation rights to develop the content of other elements of the right to housing. Simultaneously, it fashions a role for courts to interpret and enforce substantive normative commitments underlying the right to housing. It envisages the iterative development of other substantive elements of the right to housing. Firstly, the content of substantive elements of the right to housing ought to be developed through the process of participation between residents of informal settlements, the state, and private duty bearers. Secondly, courts ought to check that the process of participation meets

relevant criteria, and thereafter that the outcome of participation meets substantive normative constitutional commitments.

The thesis contributes to the literature on social rights, participation rights, judicial review, and deliberative democracy. It is likely to be of interest to scholars, activists, judges and lawyers working in these fields.

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TABLE OF CONTENTS

TABLE OF ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
AIR	All India Reporter
Asia Pac J Hum Rights Law	Asia-Pacific Journal on Human Rights and the Law
BCLR	Butterworths Constitutional Law Reports
BULR	Boston University Law Review
CCR	Constitutional Court Review
CJTL	Columbia Journal of Transnational Law
CLJ	The Cambridge Law Journal
COHRE	Centre on Housing Rights and Evictions
Colum HRLR	Columbia Human Rights Law Review
Colum J Eur L	Columbia Journal of European Law
CUP	Cambridge University Press
DLT	Delhi Law Times
DUSIB Act	Delhi Urban Shelter Improvement Board Act 2010
EJIL	European Journal of International Law
EPW	Economic and Political Weekly
ESR Review	ESR Review: Economic and Social Rights in South Africa
ESTA	Extension of Security of Tenure Act 1997
Geo LJ	Georgetown Law Journal
HJIL	Heidelberg Journal of International Law
HRC	Human Rights Committee
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICL Journal	Vienna Journal on International Constitutional Law
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
ICONnect	Blog of the International Journal of Constitutional Law
IJURR	International Journal of Urban and Regional Research
ILR	Indian Law Review
JABS	The Journal of Applied Behavioral Science
JILI	Journal of the Indian Law Institute
LJIL	Leiden Journal of International Law
Maharashtra Slum Act	Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971
MANU	Manupatra (legal database)
MH	Maharashtra
MLR	Modern Law Review
NGO	Non-governmental Organisation
NLSIR	National Law School India Review
OBC	Other Backward Classes
OJLS	Oxford Journal of Legal Studies
OUCLJ	Oxford University Commonwealth Law Journal
OUP	Oxford University Press
PELJ	Potchefstroom Electronic Law Journal
PIE Act	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998
PIL	Public Interest Litigation
PUCL	People's Union for Civil Liberties

PUDR	People's Union for Democratic Rights
PULP	Pretoria University Law Press
SACN	South African Cities Network
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SAMAJ	South Asia Multidisciplinary Academic Journal
SAPL	Southern African Public Law
SC	Scheduled Caste
SCC	Supreme Court Cases
SERI	Socio-Economic Rights Institute of South Africa
SMW (C)	Suo Moto Writ Petition (Civil)
SPCDF	Slovo Park Community Development Forum
ST	Scheduled Tribe
U Haw L Rev	University of Hawaii Law Review
U OxHRH J	University of Oxford Human Rights Hub Journal
UChicago Press	University of Chicago Press
UDHR	Universal Declaration of Human Rights
UFLR	University of Florida Law Review
UGA Press	The University of Georgia Press
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UTLJ	The University of Toronto Law Journal
VRÜ	World Comparative Law/ Verfassung und Recht in Übersee
WashUGSLRev	Washington University Global Studies Law Review

WJILDR	Willamette Journal of International Law and Dispute Resolution
WP(C)	Writ Petition (Civil)
Yale Hum Rts & Dev LJ	Yale Human Rights and Development Law Journal
Yale J Intl L	The Yale Journal of International Law
Yale LJ	Yale Law Journal
ZACC	South Africa Constitutional Court
ZAECMHC	South Africa: Eastern Cape High Court, Mthatha
ZAGPHC	South Africa: Witwatersrand Local Division High Court, Johannesburg
ZAGPJHC	South Africa: South Gauteng High Court, Johannesburg
ZASCA	South Africa: Supreme Court of Appeals
ZAWCHC	South Africa: Western Cape High Court, Cape Town

TABLE OF CASES

India

South Africa

TABLE OF STATUTES

Indian Statutes and Constitution

South African Statutes and Constitution

TABLE OF OTHER AUTHORITIES

Treaties and Other International Instruments

CHAPTER 1: INTRODUCTION

1 Overview

This thesis casts a spotlight on participation rights in the context of eviction of residents of informal settlements in India and South Africa. It challenges the characterisation of participation rights as procedural rights, and argues that participation rights ought to play a valuable role in developing other substantive elements of the right to housing.

Both India and South Africa recognise a justiciable right to housing. While the South African Constitution explicitly recognises the right to access adequate housing under s 26, the Indian Supreme Court has interpreted the rights to life and personal liberty under art 21,[1] and the right to reside and settle in any part of India under art 19(1)(e),[2] to recognise a right to shelter and housing. At the same time, both countries continue to see vastly unequal access to adequate housing, evidenced through the large number of homeless people, and others living in inadequate housing arrangements.[3] Moreover, forced evictions continue to take place in both jurisdictions,[4] including during the Covid-19 pandemic,[5] depriving already oppressed people of the housing they have found for themselves.

[1] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 ('*Olga Tellis*').

[2] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121 [25] ('*Nawab Khan*').

[3] Housing and Land Rights Network, 'Homelessness' (30 November 2021) <https://www.hlrn.org.in/homelessness>; Somesh Jha, '1.77 Million People Live without Shelter, Albeit the Number Decline over a Decade' Business Standard (New Delhi, 6 December 2013).

[4] Centre on Housing Rights and Evictions, 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' <https://issuu.com/cohre/docs/cohre_anyroomforthepoor_forcedevict> accessed 30 November 2021; Housing and Land Rights Network, 'Forced Evictions in India in 2019: An Unrelenting National Crisis' (2020) <https://www.hlrn.org.in/documents/Forced_Evictions_2019.pdf> accessed 30 November 2021.

[5] *South African Human Rights Commission and Others v City of Cape Town and Others* [2020] ZAWCHC 84; Housing and Land Rights Network, 'Forced Evictions in India in 2020: A Grave Human Rights Crisis During the Pandemic' (2021) <https://www.hlrn.org.in/documents/Forced_Evictions_2020.pdf> accessed 30 November 2021.

Evictions constitute gross violations of a range of internationally recognised human rights, including the rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement.[6] Evictions intensify inequality, social conflict, segregation and ghettoization, and invariably affect the poorest, most socially and economically vulnerable and marginalised.[7] This is especially so in India and South Africa, given the context of inequality and impoverishment, and the systems of oppression that contribute to this – including apartheid, colonialism, capitalism, the caste system and patriarchy.[8]

In both India and South Africa, participation rights have been recognised as elements of the right to housing, especially in the context of evictions. The South African Constitutional Court has recognised that the state must 'meaningfully engage' with residents, before an order for eviction is sought from a court.[9] The requirement to meaningfully engage forms part of the state's duty to take reasonable measures under s 26(2) of the Constitution, and the right against arbitrary evictions under s 26(3) of the Constitution.[10] Indian courts have recognised the need for the state to provide adequate notice to, and an opportunity to be heard to 'pavement and slum-dwellers' before evictions,[11] and the need to meaningfully engage with them,[12] as elements of the right to shelter and livelihood under art 21 of the Constitution. The right to meaningful and effective participation is recognised as a core element of the right to housing under the International

[6] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 6.

[7] ibid para 7.

[8] Ch 2.

[9] *Occupiers Of 51 Olivia Road, Berea Township And 197 Main Street Johannesburg v City of Johannesburg And Others* [2008] ZACC 1 [17]–[28] ('*Olivia Road*').

[10] ibid.

[11] *Olga Tellis* (n 1) [47].

[12] *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 (Delhi High Court) [54]–[55] ('*Sudama Singh*'); *Ajay Maken v Union of India* WP(C) 11616/2015 (Delhi High Court) ('*Ajay Maken*').

Covenant Economic, Social and Cultural Rights ('ICESCR'),[13] including in the context of evictions,[14] and upgrading of informal settlements.[15]

Human rights activists hail the importance of the participation of people whose rights are at stake, in determining questions about their rights. For instance, James Charlton, a disability rights activist from the US, argues:

> The disability rights movement is not unlike other new and important social movements demanding self-representation and control over the resources needed to live a decent life. Two years after hearing the slogan 'Nothing About Us Without Us' in South Africa, I noticed on the front page of the Mexico City daily La Jornada a picture of thousands of landless peasants marching under the banner 'Nunca Mas Sin Nosotros' (Never Again Without Us) (March 19, 1995).[16]

Similarly, the Nivara Hakk Suraksha Samiti, an organisation formed by workers, residents of informal settlements, and students, to resist evictions in Mumbai in India, demands the right to participate in all forums and to decide all issues that affect them.[17] The Abahlali baseMjondolo movement in South Africa ('Abahlali'), a voluntary association representing the interests of thousands of residents of informal settlements, has fought for the active participation of residents in decisions impacting their rights. S'bu Zikode from Abahlali observed, '[i]t is one thing if we are beneficiaries who need delivery. It is another thing if we are citizens who want to shape the future

[13] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 26 December 2019, A/HRC/43/43 para 20; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 15 January 2018, A/HRC/37/53.

[14] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 38.

[15] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 19 September 2018, A/73/310/Rev.1, para 72.

[16] James Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998).

[17] PK Das and Colin Gonsalves, 'The Struggle for Housing: A People's Manifesto' (Nivara Hakk Suraksha Samiti 1987) <http://www.nivarahakk.com/publications/Struggle%20for%20Housing%20-%20A%20People%27s%20Manifesto.pdf> accessed 30 November 2021.

of our cities, even our country.'[18] The recognition of participation rights ensures that residents are not viewed as 'mere receptacles of domination and development', but rather as active agents involved in struggle and resistance.[19]

This thesis explores the role of participation rights in the context of evictions. It explores how participation rights enable residents of informal settlements facing intersecting inequalities, to define the content of their right to access adequate housing, by participating in decision-making around evictions.

2 The central argument and structure

This thesis explores the relationship between participation rights and other substantive elements of the right to housing in the context of evictions. It argues that the recognition of participation rights ought not to be viewed as the 'proceduralisation' of the right to housing;[20] and participation and other elements of the right to housing ought not to be viewed in opposition to each other. Instead, this thesis explores the synergies between participation and other elements of the right to housing in India and South Africa. It argues that, firstly, participation rights are, and ought to be, one element of the right to housing, in addition to, rather than in lieu of other elements of the right to housing. Secondly, participation rights are also 'substantive', to the extent that these embody substantive values. Both the right to housing as a whole, and participation rights as element of the right to housing, embody values underlying human rights, such as equality, freedom

[18] S'bu Zikode, 'The Power of Abahlali and Our Living Politic Has Been Built with Our Blood' (Thinking Freedom from the Global South, 17 February 2021) <http://abahlali.org/node/17219/#more-17219> accessed 18 December 2021.

[19] Upendra Baxi, 'Introduction' in Upendra Baxi (ed), *Law and Poverty: Critical Essays* (NM Tripathi 1988).

[20] Danie Brand, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?"' in H Botha, A van der Walt and J van der Walt (eds), Rights and Democracy in a Transformative Constitution (Sun Press 2003).

and dignity.[21] Thirdly, the content of other substantive elements of the right to housing ought to be developed through the process of participation, so these meet the contextual needs of rights holders. Fourthly, other elements of the right to housing place boundaries on deliberations that take place during the process of participation.[22] Overall, the content of other elements of the right to participation ought to be developed iteratively, through a process of participation that is 'bounded'[23] by already recognised elements, and by courts checking that the content developed through participation rights meets substantive requirements of the right to housing.

I develop these arguments across the five chapters of this thesis. In this chapter, I introduce five puzzles regarding the right to housing. Firstly, what is the content of the right to housing, and how should this content be developed? Secondly, does the recognition of participation rights as elements of the right to housing, lead to the 'proceduralisation' of housing as a right? Thirdly, what should be the content of participation rights? Fourthly, what should be the relationship between participation and other elements of the right to housing? Fifthly, what should be the role of courts in interpreting and enforcing participation rights and other elements of the right to housing? These puzzles have confounded courts and academics engaging with housing and other 'social and economic'[24] rights more generally. I indicate how I propose to resolve these puzzles in this chapter, and thereafter develop my arguments in the remainder of the thesis.

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[21] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623, 625.

[22] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 91.

[23] ibid.

[24] This thesis eschews a strict division between social and economic rights on one hand, and civil and political rights on the other hand. Firstly, it is difficult to characterise a right as 'civil and political' or 'social and economic' because there may be substantial overlaps between the two sets of rights. For example, we may be tempted to characterise the right to life as a civil and political right, but Indian courts have interpreted this to include rights such as housing. Secondly, it is understood that all rights imply a range of duties, including duties to respect, protect and promote and fulfil. See, ibid ch 3; M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 ICON 739, 761.

In chapter 2, I examine the historical and social context of eviction of informal settlements in India and South Africa, and draw on normative values to explain the importance of participation rights in this context. I argue that the recognition of participation rights recognises the dignity, freedom and equality of rights holders. Participation rights embody these substantive values, and are thereby intrinsically important, as ends in themselves, besides being instrumentally important in enabling better informed decision-making. Consequently, although participation rights have procedural elements, these should not be viewed as entirely procedural. Moreover, the recognition of participation rights as elements of the right to housing, should not be characterised as the 'proceduralisation' of housing.

In chapters 3 and 4, I use the values of freedom, dignity and equality grounding participation rights, to develop the content of these rights.[25] I engage with three aspects of participation rights: who ought to have the right to participate; who ought to bear duties in relation to participation; and how the process of participation ought to take place. Overall, I construct a right that is not simply a procedural box to tick. Rather, it enables residents of informal settlements facing intersecting inequalities, to access housing that is adequate for them, by participating in decision-making around evictions.

In chapter 3, I argue that each resident of an informal settlement ought to have the right to participate, and that there ought to be a collective dimension to the process of participation. I argue that both horizontal and vertical obligations with respect to participation ought to be recognised. In chapter 4, I argue that the process of participation ought to take place through 'bounded deliberation'[26]. As an element of the right to housing, participation rights are purposive, meant to develop the content of housing that meets the contextual needs of rights holders. Thus,

[25] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 21).

[26] Fredman, *Comparative Human Rights Law* (n 22) 91.

deliberations aren't open ended, rather the purpose of deliberations is set – to develop the contextual content of housing.[27] Moreover, deliberations are bounded by the content of housing already recognised. For example, if it has already been recognised that alternate accommodation must be provided by the state in case of eviction from both private and public land,[28] the deliberations cannot result in negating this content. Rather, the purpose of deliberations must be to develop the details of the alternate housing to be provided, and the details of the relocation process, if the rights holders are to move from their existing housing.

Finally, in Chapter 5, I indicate how the process of participation ought to develop the contextual content of other elements of the right to housing. I also indicate the role that courts ought to play. Courts ought to ensure that participation takes place prior to evictions, and meets the principles set out in chapters 3 and 4. Also, courts ought to ensure that the contextual content developed through the process of bounded deliberation, meets the substantive normative requirements underlying the right to housing. I argue that concerns around the democratic legitimacy and competence of courts in determining the content of housing, are mitigated through the recognition of participation rights. I envisage the role of courts as developing the content of the right to housing, by drawing on bounded deliberations during the process of participation, and checking that the result of the deliberations meets substantive constitutional requirements. Courts thereby ought to play a substantial normative role, using normative principles to evaluate the process of participation, and the results of participation.

[27] Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 CCR 165.

[28] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33 [6] ('*Blue Moonlight*').

Through these five chapters, the thesis carves out a valuable role for participation rights in developing the contextual content of other substantive elements of the right to housing, through a process that respects the equality, freedom and dignity of rights holders.

3 Methods and sources

This thesis adopts doctrinal, normative and comparative methods. It is beyond the scope of the thesis to empirically examine how participation rights are exercised on the ground.

The thesis adopts a critical theoretical approach – 'a normative reflection that is historically and socially contextualised'.[29] Chapter 2 relies on secondary literature to understand the historical and social context of evictions in India and South Africa, taking place against the backdrop of apartheid, capitalism, the caste system, Islamophobia and patriarchy. It draws on normative values to understand why participation rights are important in this context.

Given the commitment to a critical theoretical approach, the arguments advanced in this thesis are closely tied to the context of eviction of informal settlements in India and South Africa. The arguments in this thesis on the importance of participation rights, the content of participation rights, the relationship between participation rights and other substantive elements of the right to housing, and the role of courts, are likely to be useful for other contexts. For example, participation rights have been recognised in the context of the right to education in South Africa,[30] access to forest land and forest resources for adivasi (indigenous) and forest dwelling communities in India,[31]

[29] Iris Marion Young, Justice and the Politics of Difference (Princeton University Press 2011) 5.

[30] *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* [2011] ZACC 13 [74] ('*Juma Musjid*'); Sandra Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1; Sandra Liebenberg, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 204; Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 27).

[31] Rishika Sahgal, 'Strengthening Democracy in India through Participation Rights' (2020) 4 VRÜ 468.

and in the context of disability[32] and children's rights under international law.[33] The approach in this thesis to participation rights are likely to be useful in those, and other, contexts. However, a critical theoretical approach requires close attention to historical and social context. Therefore, in future research endeavours, close attention will need to be paid to those contexts when extending the arguments in this thesis.

The thesis also adopts a legal doctrinal method, undertaking 'a conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[34] In South Africa, it examines jurisprudence under s 26 of the Constitution, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 ('PIE Act'). The PIE Act provides the legislative framework to operationalise s 26(3) of the South African Constitution. In India, it examines cases under arts 21 and 19(1)(e) of the Constitution related to eviction of informal settlements, and cases under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971 ('Maharashtra Slum Act) and the Delhi Urban Shelter Improvement Board Act 2010 ('DUSIB Act'). These contain the relevant statutory framework for the eviction and redevelopment of informal settlements, provision of alternate accommodation, and participation rights in Maharashtra and Delhi. Paucity of time and space prevents engagement with relevant legislation in each Indian state (India currently has 28 states in total).[35] The methods

[32] UN Convention on the Rights of Persons with Disabilities (came into force 3 May 2008) 2515 UNTS 3, arts 4(3) and 33(3); General Comment No 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention CRPD/C/GC/7 (2018); Charlton (n 16).

[33] UN Convention on the Rights of the Child (came into force 2 September 1990) 1577 UNTS 3, arts 12, 23(1); General Comment No 12 on the right of the child to be heard, CRC/C/GC/12 (2009); Aisling Parkes, 'Aisling Parkes, 'Tokenism versus Genuine Participation: Children's Parliaments and the Right of the Child to Be Heard under International Law' (2008) 16 WJILDR 1.

[34] Terry Hutchinson, 'Vale Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era' (2014) 106 Law library journal 579. See also, Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin law review 83; Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law quarterly review 632.

[35] Under the Constitution of India, states have the exclusive power to legislate on land, while both the union and states have the power to legislate on transfer and acquisition of property. In practice, it is considered that housing is a matter exclusively within the legislative domain of states, even though 'housing' is not explicitly mentioned in the Seventh Schedule, which lists the subjects under union, state and concurrent legislative jurisdiction. See, Constitution of India

used to analyse these statutes are equally applicable to analyse laws in other Indian states. Of the 28 Indian states, Delhi and Maharashtra have been selected for study, because these provide rich material for research. Prominent case law on the right to housing and participation rights, has emerged from these states. For example, *Olga Tellis* originated in Maharashtra, a case in which the right to shelter was first recognised by the Supreme Court, and wherein notice and hearing were recognised as elements of the right to housing.[36] *Sudama Singh*[37] and *Ajay Maken*,[38] which recognised meaningful engagement obligations in the context of the DUSIB Act, were handed down by the Delhi High Court. Moreover, a rich array of social science literature on evictions and struggles against the same, has chosen these states as sites for study.[39]

The thesis predominantly examines the jurisprudence of apex courts, but also traces cases that have reached apex courts from lower courts, and includes case law from lower courts making significant doctrinal developments. For example, the thesis includes *Sudama Singh* and *Ajay Maken*, decisions handed down by the Delhi High Court, because these make significant doctrinal developments in recognising meaningful engagement obligations in India.[40] Similarly, the thesis includes *Fischer*, a decision handed down by the High Court of South Africa, wherein the High Court required the municipality to explain whether it had considered expropriation of land to ensure access to adequate housing for residents living in an informal settlement.[41] Given the prior

1950, Seventh Schedule, State List, Entry 18 and Concurrent List, Entries 6 and 42; Anindita Mukherjee, *The Legal Right to Housing in India* (CUP 2019) 59.

[36] *Olga Tellis* (n 1) [45]–[46].

[37] *Sudama Singh* (n 12) [53]–[54].

[38] *Ajay Maken* (n 12) [136].

[39] Gautam Bhan, *In the Public's Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* (UGA Press 2016); Kalyani Menon-Sen, '"Better to Have Died than to Live like This": Women and Evictions in Delhi' (2006) 41 EPW 1969; Véronique Dupont, 'Which Place for the Homeless in Delhi? Scrutiny of a Mobilisation Campaign in the 2010 Commonwealth Games Context' [2013] SAMAJ <http://journals.openedition.org/samaj/3662> accessed 18 December 2021; Nikhil Anand and Anne Rademacher, 'Housing in the Urban Age: Inequality and Aspiration in Mumbai' (2011) 43 Antipode 1748; Varsha Ayyar, 'Caste and Gender in a Mumbai Resettlement Site' (2013) 48 EPW 44.

[40] *Sudama Singh* (n 12) [53]–[54]; *Ajay Maken* (n 12) [136].

[41] *Fischer v Unlawful Occupiers* [2017] ZAWCHC 99 [196]–[218] ('*Fischer*').

commitment to a critical approach, it analyses legislation and case law in light of the political, social and economic context of evictions in India and South Africa. It thereby eschews a doctrinal approach that fails to recognise the unstated assumptions, patterns and tensions within the law, and the context in which law operates.[42]

The South African Constitution requires courts to consider international law when interpreting the Bill of Rights.[43] This includes all sources of international law in art 38(1) of the International Court of Justice statute,[44] including non-binding international law.[45] The Indian Constitution directs the state to foster respect for international law including treaty obligations.[46] This has been used as a textual hook for relying on international law as a tool to interpret fundamental rights,[47] including in the context of the right to housing.[48] Courts in India have used binding and non-binding soft law instruments to interpret rights.[49]

The thesis therefore also examines the right to adequate housing enshrined under s 11(1) of the ICESCR.[50] The right to meaningful and effective participation has been recognised as a core element of the right to housing under the ICESCR.[51] South Africa signed the ICESCR in 1994,

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[42] Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 Journal of Legal Education 65.

[43] Constitution of South Africa 1996, s 39(1); *S v Makwanyane* [1995] ZACC 3 [35] ('*Makwanyane*').

[44] Charter of the United Nations and Statute of the International Court of Justice (signed 24 October 1945) 1 UNTS XVI.

[45] ibid (*Makwanyane*) [35]; *Jaftha v Schoeman, Van Rooyen v Stoltz* [2004] ZACC 25 [24] ('*Jaftha*'); Sanya Samtani, 'The Right of Access to Educational Materials and Copyright: International and Domestic Law' (University of Oxford 2021) 196.

[46] Constitution of India 1950, art 51.

[47] Lavanya Rajamani, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016); VG Hegde, 'Indian Courts and International Law' (2010) 23 LJIL 53.

[48] *Chameli Singh v State of Uttar Pradesh* AIR 1996 SC 922 [4]; *Nawab Khan* (n 2) [13].

[49] Rajamani (n 47) 152.

[50] International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.

[51] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 26 December 2019, A/HRC/43/43 para 20; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 15 January 2018, A/HRC/37/53.

and ratified it in 2015; while India ratified the ICESCR in 1979.[52] Moreover, the Indian Parliament enacted the Protection of Human Rights Act 1993, for the protection of human rights, including those contained under the ICESCR.[53] In *Ajay Maken,* the Delhi High Court held that through this enactment, rights contained under the ICESCR, including the right to adequate housing, are enforceable in India.[54]

The thesis also examines secondary soft law instruments,[55] including relevant general comments, complaints considered by the Committee on Economic, Social and Cultural Rights, under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ('Optional Protocol'),[56] international standards and guidelines developed by the special rapporteur on the right to adequate housing, and annual thematic reports[57] submitted to the General Assembly and Security Council by the special rapporteur on the right to adequate housing. While non-binding,[58] these instruments contribute to doctrinal developments[59] by setting out an interpretation of human rights obligations analytically derived from the provisions of the

[52] Status of Ratification of International Human Rights Treaties <https://indicators.ohchr.org> accessed 26 November 2021. See also, Campaign for South Africa's Ratification of the ICESCR and its Optional Protocol, 'Socio-economic rights optional protocol heralds a new dawn in the enforcement of these rights' (Dullah Omar Institute, 13 May 2013) <https://dullahomarinstitute.org.za/socio-economic-rights/international-covenant-on-economic-social-and-cultural-rights-icescr/ICESCR%20Campaign%20-%20MEDIA%20STATEMENT%20-final-%203%20May%202013.pdf> accessed 26 November 2021.

[53] Protection of Human Rights Act 1993, preamble, s 2(f).

[54] *Ajay Maken* (n 12) [56].

[55] DL Shelton, 'Soft Law' in David Armstrong (ed), *Handbook of International Law* (Routledge 2009); John Cerone, 'A Taxonomy of Soft Law: Stipulating a Definition' in Stéphanie Lagoutte (ed), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 22–23.

[56] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, came into force 5 May 2013) 2922 UNTS 29. Neither India nor South Africa have signed the Optional Protocol, and therefore complaints cannot be brought against these countries under the Optional Protocol. See (n 52).

[57] <https://www.ohchr.org/EN/Issues/Housing/Pages/AnnualReports.aspx.> accessed 26 November 2021.

[58] AE Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 ICLQ 901, 901–902.

[59] Mátyás Bódig, 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 70.

ICESCR.[60] These instruments have also been used by courts in South Africa and India to interpret constitutional rights.[61]

The thesis draws on these international law sources to develop the content of participation rights in chapters 3 and 4. It finds that there is limited development of the content of participation rights within these international law sources. The thesis indicates how participation rights ought to be developed under the ICESCR.

The thesis is comparative in nature.[62] It selects India and South Africa as relevant jurisdictions because (1) the right to access adequate housing is justiciable in both jurisdictions; (2) circumstances of inequality and impoverishment in both countries, especially with respect to access to housing, land and resources, make the thesis relevant for both jurisdictions. The comparison is also doctrinally relevant. The South African Constitution states that courts 'may' consider 'foreign law' while interpreting the Bill of Rights,[63] and Indian courts have drawn extensively on comparative law while interpreting fundamental rights.[64] The thesis is committed to comparative constitutional conversations in the global south.[65]

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[60] AF Jacobsen, 'Soft Law within Participation Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 273, 285; Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn, OUP 2013) 739.

[61] (n 45) and (n 47).

[62] Fredman, *Comparative Human Rights Law* (n 22) ch 1; Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2016).

[63] Constitution of South Africa 1996, s 39(1).

[64] Priya Urs, 'Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India' (2013) 46 VRÜ 95; Madhav Khosla, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' (2011) 59 The American Journal of Comparative Law 909.

[65] Philipp Dann, Michael Riegner and Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020) 1.

4 Scope and key concepts

This thesis is centred around the eviction of residents of informal settlements. I use the term 'informal settlements' widely, to include settlements built on public or private land, informal residence in buildings in the interior of South African cities,[66] and dwellings built in the backyards of formal dwellings.[67] The United National Conference on Housing and Sustainable Development defines informal settlements as,

> Residential areas where 1) inhabitants have no security of tenure vis-à-vis the land or dwellings they inhabit, with modalities ranging from squatting to informal rental housing, 2) the neighbourhoods usually lack, or are cut off from, basic services and city infrastructure and 3) the housing may not comply with current planning and building regulations, and is often situated in geographically and environmentally hazardous areas.[68]

Cases involving informal settlements included in this thesis, are covered within this definition. I make a deliberate choice to use the terms 'informal settlements' and 'residents', rather than the terms 'slums', 'occupiers' and 'slum dwellers', because of the presumptive illegality and illegitimacy associated with the latter. The term 'slum' is 'pejorative and stigmatising', and encourages the view that these are 'problem(s) requiring clearance, rather than communities to be supported.'[69]

This thesis does not engage with evictions and relevant legislative frameworks in other contexts, including tenancy law, the law around mortgages, evictions through land acquisition in

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[66] Josh Budlender and Lauren Royston, 'Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas' (2016) <http://www.seri-sa.org/images/images/SERI_Edged_out_report_Final_high_res.pdf> accessed 30 November 2021.

[67] Charlotte Lemanski, 'Augmented Informality: South Africa's Backyard Dwellings as a by-Product of Formal Housing Policies' 33 Habitat International 472.

[68] United Nations Conference on Housing and Sustainable Urban Development (Habitat III), 'Informal Settlements' (2015) Issue Paper No 22.

[69] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 19 September 2018, A/73/310/Rev.1.

India,[70] including from forest land,[71] and eviction from agricultural land in South Africa.[72] The arguments in this thesis are useful for those contexts, but attention must be paid to context when extending the arguments in this thesis, a task that is left to future research endeavours.

This thesis uses the term 'participation rights' rather than 'right to participation', because the thesis does not advance arguments for a free-standing right to participation, although neither does it reject the possibility that such a right ought to be developed. It examines participation in decision-making around evictions between rights holders and duty bearers. This includes decisions regarding whether an eviction should take place, whether a settlement should be upgraded or developed *in situ,* and if an eviction is to take place, then when and how it is to take place, and decisions regarding alternate accommodation to be provided to those facing evictions. I discuss the scope of participation in more detail in chapter 4. 'Participation rights' in this thesis does not refer to participation before courts. While I discuss issues around participation before courts in chapter 5, the term 'participation rights' is intended to cover participation between rights holders and duty bearers outside of courts, in the eviction context. Moreover, 'participation rights' does not cover participation in legislative assemblies. I explore the role of courts, other institutions (legislative assemblies and the executive), as well as participation rights, in chapter 5.

At the outset, the thesis considers participation rights widely, to include the requirement to provide notice and hearing,[73] consultations[74] and meaningful engagement.[75] The central questions of this thesis include who ought to have rights to participate, who ought to bear duties

[70] The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act 2013.

[71] The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights Act) 2006; Panchayats (Extension to Scheduled Areas) Act 1996; Sahgal (n 31).

[72] Extension of Security of Tenure Act 1997; Land Reform (Labour Tenants) Act 1996.

[73] *Olga Tellis* (n 1).

[74] ICESCR General Comment No 7 The right to adequate housing: Forced evictions, UN doc E/1998/22 para 13.

[75] *Olivia Road* (n 9).

in relation to participation, and how the process of participation ought to take place. I address these issues in chapters 3 and 4. The mere provision of notice and hearing, and consultation, do not fulfil the requirements I identify in these chapters. Evaluating frameworks for notice and hearing, consultation and meaningful engagement, against relevant principles, falls within the central task for this thesis. To begin with, therefore, I consider participation rights widely, so that the thesis can pursue these avenues of analysis.

Another important element of the right to housing recognised in the eviction context is the need for provision of alternate accommodation. In India, this is termed as 'rehabilitation'.[76] While discussing Indian cases, I therefore use the terminology of 'rehabilitation' synonymously with 'alternate accommodation'.

In the context of South Africa, this thesis bases its racial categories on those defined under the Employment Equity Act.[77] The term 'Black' refers to Africans, coloured, and Indian racial groups collectively. When referring to a specific group within the broader category of 'Black', it indicates accordingly.

In India, discrimination on the basis of caste is constitutionally proscribed.[78] This is in recognition of oppression and domination under the caste system, a religiously sanctioned system of graded hierarchy.[79] Dalits (meaning the broken people, or the oppressed) fall lowest in the caste hierarchy, and are officially recognised by the state as the Scheduled Castes ('SC').[80] The Adivasi (meaning original inhabitants) refer to indigenous tribes of central India, officially recognised by

[76] *Olga Tellis* (n 1).

[77] Employment Equity Act 1998, s 1.

[78] The Constitution of India 1950, arts 15(2), 17.

[79] BR Ambedkar, *Annihilation of Caste* (3rd edn, 1944) <https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/aoc_print_2004.pdf> accessed 4 February 2022.

[80] The Constitution of India 1950, art 341; Constitution (Scheduled Castes) Order 1950.

the state as the Scheduled Tribes ('ST').[81] The Adivasi also faced oppression and domination under the caste system, by being outside of it. Other Backward Classes ('OBC') refer to socially, educationally and economically marginalised caste groups.[82] These typically fall higher in the caste hierarchy than Dalits, but lower than other castes.

5 The role of participation rights: resolving outstanding concerns

In the remainder of this chapter, I introduce concerns that have been raised regarding housing jurisprudence in India and South Africa. In sections 6–9, I indicate how participation rights help resolve these concerns. I further flesh out these arguments in chapters 2–5.

In both jurisdictions, concerns have been raised regarding the content of housing as a right. In India, it has been argued that the right to housing, as recognised by the Supreme Court, is empty and rhetorical,[83] or simply conditional – dependent for its content on pre-existing state action.[84] I examine the content of the right to housing in India to find that the right is not empty, and only partly conditional. However, there is much scope to further develop the content of the right to housing. I argue that participation rights ought to play a valuable role in developing the content of other substantive elements of the right to housing, in a manner that meets the contextual needs of rights holders. In South Africa, it has been argued that courts have insufficiently developed the content of the right to housing under s 26(1) of the constitution.[85] I propose that meaningful engagement ought to serve as an important means to develop the content of the right to housing

[81] The Constitution of India 1950, art 342; Constitution (Scheduled Tribes) Order 1950.

[82] Government of India, Report of the Backward Classes Commission (1980); *Indra Sawhney and Others v Union of India* 1992 Supp (3) SCC 217.

[83] Usha Ramanathan, 'Demolition Drive' (2005) 40 EPW 2908; Usha Ramanathan, 'Illegality and the Urban Poor' (2006) 41 EPW 3193; Mukherjee (n 35) 2.

[84] Khosla (n 24).

[85] David Bilchitz, 'Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?' (2013) 5 CCR 297; G Quinot and Sandra Liebenberg, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 Stellenbosch Law Review 639.

under s 26(1) in a manner that meets the contextual needs of rights holders.[86] Of course, it must be designed to play this role, and in chapters 3 and 4 of this thesis, I pay attention to questions around who ought to be meaningfully engaged, who ought to bear duties with regards to meaningful engagement, and how the process of meaningful engagement ought to take place, so that it serves as an important means to define the contextual content of the right to housing.

Secondly, it has been argued that the right to housing in both India and South Africa is overly procedural.[87] In South Africa, it has been argued that courts have focused on 'meaningful engagement' as a cop-out strategy,[88] to avoid engaging with substantive issues.[89] By reframing participation rights as embodying substantive values, and in exploring the role of participation rights in developing the content of other substantive elements of the right to housing, I set out a way to meet these concerns.

Thirdly, it has been argued that the content of participation rights is underdeveloped, and there is need for much clarity regarding the content of meaningful engagement.[90] In its current form, the argument goes, it is inadequate and unclear, and relies too heavily on oppressed people to be well organised, properly resourced and properly informed, to tap into its potential.[91] Moreover, it has been highlighted that there is danger that meaningful engagement could become

[86] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 21).

[87] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 131.

[88] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014); Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 CCR 223; Shanelle Van der Berg, 'Conceptualising Meaningful Engagement in South Africa: Eviction Cases' Exclusive Gem?' (*OxHRH Blog*, 16 November 2012) <http://ohrh.law.ox.ac.uk/Conceptualising-Meaningful-Engagement-In-South-Africa-Eviction-Cases-Exclusive-Gem/> accessed 15 January 2022.

[89] Fredman makes a similar argument in the context of the right to education. Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 27).

[90] Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107; Liebenberg, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' (n 30).

[91] Wilson and Dugard (n 88).

a purely procedural box to tick, taking away its radical potential.[92] Chapters 3 and 4 address these concerns, by developing the content of participation rights. In chapter 3, I engage with the issue of who ought to have the right to participate, and draw attention to intersectional concerns within residents of informal settlements. I also engage with the issue of who ought to bear obligations in relation to participation, focusing on both horizontal and vertical obligations. In chapter 4, I engage with how the process of participation ought to take place, arguing for a bounded deliberative process,[93] and with the fulfilment of positive measures, including sharing of relevant information. Through these chapters, I establish relevant principles that ought to guide the design of participation rights, so that these are not simply a 'procedural box to tick'.[94]

Lastly, concerns have been raised regarding the role that courts ought to play with respect to the right to housing. Courts have been very attentive to concerns raised regarding their institutional competence and democratic legitimacy in deciding issues regarding the right to housing, especially because these issues are complex and polycentric.[95] In chapter 5, I argue that participation rights provide an important means for substantive issues around housing to be decided through bounded deliberation between rights holders and duty bearers. This ought to feed into the reasoning of the court while deciding substantive issues. By decentring the role of courts and focusing on another institutional space for decision-making around housing to take place through a process of bounded deliberation, concerns around democratic legitimacy,

[92] Kate Tissington, 'A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice' (SERI) 46 <http://www.seri-sa.org/index.php/research-7/resource-guides> accessed 30 September 2018; <http://abahlali.org/node/5538/> accessed 1 February 2021.

[93] Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2014).

[94] Tissington (n 92) 46.

[95] *The Government of the Republic of South Africa & Ors v Irene Grootboom & Ors* [2000] ZACC 19 ('*Grootboom*'); *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28 ('*Mazibuko*'); Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016) 15.

polycentricism and institutional competence, are mitigated.[96] At the same time, I indicate how courts ought to continue to play a substantial normative role, developing the contextual content of the right to housing by drawing on deliberations during participation.

Additionally, in India it has been argued that courts have enabled evictions without rehabilitation in public interest litigation, often without providing a chance to residents of informal settlements to be heard before the court.[97] By carving a role for rights holders to take part in decision-making about their housing through participation rights, and laying emphasis on the need to hear rights holders before courts, I find a way for these concerns to be met through the recognition of participation rights.

6 The content of the right to housing

In this section, I engage with concerns that have been raised regarding the content of the right to housing in India and South Africa. A 'central challenge' facing jurisprudence on the right to housing, is how to define the substance of the right.[98] This issue is closely connected to issues around the role of courts in defining the substance of the right, and I deal with the institutional concerns in section 9 below. Here, I propose that the recognition of participation rights helps to develop the contextual content of other elements of the right to housing, to meet the contextual needs of rights holders.

[96] Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267.

[97] Anuj Bhuwania, 'Public Interest Litigation as a Slum Demolition Machine' (2016) 12 Projections: MIT Journal of Planning 67; Bhan (n 39).

[98] Fredman, *Comparative Human Rights Law* (n 22) 266.

6.1 An empty and conditional right to housing in India?

It has been argued that the right to housing in India is weak, or even empty, in terms of the guarantees created for rights holders, and the duties placed on the state.[99] For instance, Anindita Mukherjee contends, 'shelter has been recognised by Indian courts as part of each person's right to life, but always in a rhetorical manner.'[100] Madhav Khosla maintains, 'the justiciable nature of social rights is passionately expressed but there is little effort to expand on their nature or to elaborate upon the scope of review that will be conducted.'[101] He proposes that social rights in general, and the rights to housing, livelihood and education in particular, are simply conditional – dependent on pre-existing state action in the form of policies or legislation, with the constitutional right serving simply as a means to implement the same.[102]

In this section, I take a more nuanced position. I find that Indian courts have begun to develop the content of the right to housing under arts 21 and 19 of the Indian Constitution, beyond broad expressive pronouncements regarding the recognition of the right and its philosophical importance. Both substantive and participation elements have been recognised as part of the right. In the context of eviction of informal settlements, both participation rights and the right to rehabilitation, have been recognised. The right is therefore neither empty, nor entirely conditional. At the same time, there is much scope for these entitlements to be further developed. Indian courts have permitted wide discretion to the state in fulfilling the right to housing, and have permitted restrictions to the right on wide grounds.[103] For example, in *Olga Tellis,* the Supreme Court

[99] Ramanathan, 'Demolition Drive' (n 83); Anup Surendranath, 'The Right to Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 770; Das and Gonsalves (n 17).

[100] Mukherjee (n 35) 2.

[101] Khosla (n 24) 743.

[102] ibid.

[103] Ramanathan, 'Demolition Drive' (n 83); Surendranath (n 99) 770; Das and Gonsalves (n 17).

permitted the state discretion in determining who was eligible for alternate accommodation upon eviction,[104] even when residents evicted from pavements indicated to the court that they would be rendered homeless under the state's policy for rehabilitation.[105] Moreover, there is much scope for recognising the synergies between different elements of the right to housing. I propose that participation rights ought to play a valuable role in developing the content of other substantive elements of the right to housing, in a manner that meets the contextual needs of rights holders.

6.1.1 The meaning of housing

The Indian Supreme Court has recognised that the right to shelter must include something more than 'the bare protection of the body', instead requiring 'suitable accommodation which would allow [all human beings] to grow in every aspect – physical, mental and intellectual'.[106] In *Chameli Singh*, the Supreme Court expanded on the meaning of the right to shelter as follows:

> Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being.[107]

In this manner, the Court has developed the definition or meaning of the right to housing recognised under the Indian Constitution. Jessie Hohmann argues that, 'none of the cases on the right to housing as a right to life have contained a substantive definition of the right itself.'[108] This thesis takes the opposing view, on the strength of the Supreme Court's decisions in *Shantistar*

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[104] *Olga Tellis* (n 1).

[105] Das and Gonsalves (n 17).

[106] *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520 [9] ('*Shantistar Builders*').

[107] *Chameli Singh* (n 48) [8].

[108] Hohmann (n 87) 119.

Builders and *Chameli Singh* described above, wherein the Court has begun to develop a definition of the right. In contrast, the South African Constitutional Court has been criticised for not expanding on the definition of the right to housing under s 26(1) of the Constitution, and for only concentrating on the obligations of the state under s 26(2) and (3).[109]

Participation rights ought to play a useful role in developing the contextual content of the right to housing. While the content developed in *Shantistar Builders* and *Chameli Singh* is abstract, participation rights enable rights holders to indicate the precise 'infrastructure necessary to enable them to live and develop as human beings'.[110] In *Olga Tellis,* for example, residents indicated that they needed to reside close to their place of work.[111] For these residents to 'live and develop as human beings', the location of their residence was important. Participation rights present residents with an opportunity to describe their contextual needs, and through the process of participation, to develop the contextual content of the right to housing. This takes seriously the concern raised by Mukherjee that,

> Closely linked to the problem of defining the right in substance is the question: who gets to enunciate a legal definition? It is trite to say that the opinions and experiences of persons who are likely to be directly affected by a legislative measure ought to be central to determining the substance of the measure.[112]

Participation rights enable residents facing precarious housing situations to define the contextual content of the right to housing, by creating space for them to share their experiences and opinions while deliberating with the state. Chapter 5 indicates how the process of participation ought to develop the contextual content of the right to housing.

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[109] Brand (n 20) 39; David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 SAJHR 1; Hohmann (n 87) 100.

[110] *Chameli Singh* (n 48) [8].

[111] *Olga Tellis* (n 1).

[112] Mukherjee (n 35) 14.

6.1.2 An obligation to frame legislation and policies, and to budget for the right to housing

The Indian Supreme Court has recognised that the state has both a constitutional and a statutory duty to make provisions for housing,[113] and that it must allocate a budget for the same.[114] It recognised that all levels of the state (union, states and local) bear a constitutional duty with respect to the right to housing, arising out of the fundamental right to housing under arts 19 and 21, read with the directive principles of state policy relating to economic and social justice, welfare and reducing inequalities.[115] With regards to budgeting, the Supreme Court acknowledged concerns around judicial competence and legitimacy, when it recognised that the judiciary could not determine budgets for ensuring access to housing. At the same time, it recognised that all levels of the state must allocate a budget for ensuring access to housing.[116] Moreover, the Supreme Court recognised the need to allocate specific budgets for ensuring access to housing for Scheduled Castes, Scheduled Tribes and other 'weaker sections' of society (the court did not elaborate on who might constitute 'weaker sections'), thereby paying attention to intersectional concerns.[117]

The recognition of a duty to make provisions for housing through statutes or schemes, and to budget for these schemes, ensures that the right to housing is not empty. It is not dependent entirely on the prior existence of legislation or executive policy for the provision of housing, because if the state has failed to make any schemes, or to budget for these schemes, the Court is empowered to direct it to do so.[118] Given that there is no paucity of legislation and schemes/policies/programmes related to housing framed either by the central government, or

[113] *Nawab Khan* (n 2) [13], [14], [26].

[114] ibid [26]–[29].

[115] ibid [4], [32].

[116] ibid [26].

[117] ibid [26]–[27].

[118] Khosla (n 24) 764.

state governments in India,[119] it is unlikely for cases to come before courts challenging the lack of any state action in the realm of the right to housing. Participation of residents of informal settlements in the drafting process for these legislation and policies would ensure that these meet the contextual needs of rights holders. It is beyond the scope of this thesis to develop an argument for participation rights in the drafting of legislation or policies, and I concentrate on participation rights in the eviction context.[120]

6.1.3 Obligation to provide shelter to the urban homeless

In an application filed after the death of numerous homeless persons in Delhi during a harsh winter in 2009-2010, the Indian Supreme Court ordered the government of Delhi to immediately set up additional shelters for the homeless, and to provide basic services in the shelters, including adequate sanitation, water and electricity, bedding and blankets, and storage facilities.[121] It extended the remedy to other cities with populations greater than 500,000, requiring that at least one 24-hour, year round shelter be set up per 100,000 people.[122] The court thereby recognised an important justiciable entitlement against homelessness. The Court did not itself come up with the figure of one shelter per one lakh population. It did not, therefore, attempt to demonstrate

[119] 109 statutes and policies related to the provision of housing have been framed by the central government alone since 1947. Mukherjee (n 35) 115–152; Sanjay Ruparelia, 'India's New Rights Agenda: Genesis, Promises, Risks' (2013) 86 Pacific Affairs 569.

[120] For arguments on participation in the drafting process for legislation and policy in India, see, Vikram A Narayan and Jahnavi Sindhu, 'A Case for Judicial Review of Legislative Process in India' (2020) 53 VRÜ; Arushi Garg and others, 'Law Reform and Deliberative Democracy: Lessons for the Committee for Reforms in Criminal Laws (India)' [2020] Centre for Criminological Research, University of Sheffield; Tarunabh Khaitan, 'Reforming the Pre-Legislative Process' (2011) 46 EPW 27; Ishika Garg and Shamik Datta, 'A Case for the Inclusion of the Right to Public Participation under Article 21 of the Indian Constitution: A Comparative Constitutional Analysis' (*ICONnect*, 7 October 2021) <http://www.iconnectblog.com/2021/10/a-case-for-the-inclusion-of-the-right-to-public-participation-under-article-21-of-the-indian-constitution-a-comparative-constitutional-analysis/> accessed 4 February 2022.

[121] *People's Union for Civil Liberties v Union of India* Writ Petition (Civil) No 196 of 2001 (10 January 2010, Supreme Court of India) <http://www.righttofoodindia.org/data/homelessness/May_2011_homelessness_supreme_court_orders_20_january_2010.pdf> accessed 6 June 2020.

[122] ibid (5 May 2010, Supreme Court of India) <http://www.righttofoodindia.org/data/homelessness/May_2011_homelessness_supreme_court_orders_5_may_2010.pdf> accessed 6 June 2020.

competence in a field it does not possess expertise in. Rather, the Court noted that the Delhi Master Plan 2021 developed by the Delhi Development Authority recognised the need to provide for one shelter for a population of one lakh.[123] The Court extended a policy already in place in Delhi, across the country. Thus, Court recognised a substantive justiciable entitlement against homelessness in urban India, and laid down obligations that must be immediately fulfilled by the state in this context. This indicates that the right to housing in India is not empty.

We may be tempted to characterise this as a 'conditional rights approach'.[124] Yet, there are important reasons not to do so. Firstly, a state action initiated in one state (Delhi) was extended across the country. Hence, this did not involve the Court ensuring implementation of a national policy across the country, or individual state policies within individual states. Instead, the Court recognised the policy adopted within one state as forming a positive obligation under Part III of the Indian Constitution, obliging all states to implement the same. Secondly, by doing so, the Court required considerable positive action to be taken by the states – to build shelters with basic services across urban spaces in India. Khosla characterised the Indian Supreme Court's jurisprudence around the right to housing as conditional because, 'the court does not ask the state to build, for instance, more housing for the poor',[125] and because, 'inadequate housing was not considered a violation of the right to shelter.'[126] In *PUCL*, inadequate shelter for the urban poor was considered a violation of fundamental rights, triggering immediately enforceable obligations to build shelter.[127]

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[123] ibid, order dated 27 January 2010, <http://www.righttofoodindia.org/data/homelessness/May_2011_homelessness_supreme_court_orders_27_january_2010.pdf> accessed 6 June 2020; Delhi Development Authority, Master Plan for Delhi 2021 <http://52.172.182.107/BPAMSClient/seConfigFiles/Downloads/MPD2021.pdf> accessed 4 February 2022.

[124] Khosla (n 24) 751.

[125] ibid.

[126] ibid.

[127] See also, *Court on its own motion v Government of NCT Delhi* Writ Petition (Civil) 29/2010 (13 January 2010, Delhi High Court) <http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=13508&yr=2010> accessed 1 June 2020; *ER Kumar v Union of India* (2017) 12 SCC 792.

Rather than viewing this case as one involving 'conditional rights', the better view of the case is that the Supreme Court exercised judicial review in a 'bounded deliberative' manner.[128] The state was required to provide reasons to justify its plan for provision of shelter for the homeless, and thereby the court served as a forum for deliberation, requiring reason-giving from the state. It ensured 'bounded' deliberation, by requiring that the state provide reasons as to how the plan fulfilled the right to housing.[129] Once it was indicated that this plan fulfilled the right to housing, the Supreme Court was willing to extend it to the rest of India, to ensure that the right to housing of all urban homeless was fulfilled.

It is also important to note the central role of the participation of litigants in *PUCL*. In the case, the Supreme Court appointed two persons as commissioners.[130] The commissioners monitored the implementation of the court's orders and advised the court as *amicus curiae*. They also engaged with various relevant actors – on the one hand state officials and bodies of the central government and state government; and on the other hand with civil society activists and rights holders.[131] The input of rights holders supported by civil society activists played an important role in the case.[132] It should be noted, however, that the mechanism of commissioners developed by the Supreme Court in *PUCL*, has also been used to *deprive* people of their homes in cases seeking the eviction of informal settlements, when commissioners failed to engage with rights holders.[133]

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[128] Fredman, *Comparative Human Rights Law* (n 22) 91.

[129] ibid 94.

[130] *People's Union for Civil Liberties v Union of India* Writ Petition (Civil) No 196 of 2001 (8 May 2002, Supreme Court of India).

[131] Alyssa Brierley, 'PUCL v. Union of India: Political Mobilization and the Right to Food' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019) 230; Arun Thiruvengadam, 'Characterising and Evaluating Indian Social Rights Jurisprudence into the 21st Century' (2013); César Rodríguez-Garavito, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 251.

[132] ibid.

[133] Anuj Bhuwania, *Courting the People: Public Interest Litigation Post-Emergency India* (CUP 2017).

In section 9.2, I engage with such concerns raised regarding public interest litigation, arguing that in these cases, the participation of rights holders must be emphasised.

6.1.4 Participation rights in eviction cases

In the context of eviction of people from their homes, Indian courts have recognised participation rights. The Supreme Court has held that a notice and hearing must ordinarily be provided prior to carrying out the eviction of persons residing on pavements and in 'slums'.[134] The Delhi High Court has gone beyond the notice and hearing framework, to require 'meaningful engagement' with persons prior to evictions.[135]

These obligations are independent of pre-existing legislative and policy commitments made by the state in the context of evictions and the rights to housing. Even when legislation has explicitly enabled evictions to be carried out without notice or hearings, the Supreme Court has required the state to fulfil these obligations.[136] For example, in *Olga Tellis*, provisions of the Bombay Municipal Corporation Act 1888 were challenged before the Supreme Court as unconstitutional, because these empowered the Municipal Commissioner to remove 'encroachments', including houses built on footpaths or pavements accessible to the public, without providing notice.[137] The Supreme Court held that such power must be interpreted narrowly, and required that notice and hearing ordinarily be provided.[138] The Court permitted these requirements to be dispensed with only under 'extraordinary circumstances' involving 'urgency', and held that the State carries the burden to show urgency where it uses its powers to dispense with notice and hearing.[139] These

[134] *Olga Tellis* (n 1); *Nawab Khan* (n 2).

[135] *Sudama Singh* (n 12) [53]–[54]; *Ajay Maken* (n 12).

[136] *Olga Tellis* (n 1).

[137] ibid [37].

[138] ibid [45]–[46].

[139] ibid [45].

obligations are not, therefore, conditional on pre-existing state action. Moreover, these rights are derived from, and an element of, the right to shelter and housing.[140]

6.1.5 Rehabilitation/ alternate accommodation

Indian courts have not taken a consistent view on the need for provision of rehabilitation/ alternative accommodation when carrying out evictions.[141] There are broadly four alternative positions that courts have taken with regards to rehabilitation. Firstly, courts have recognised a conditional obligation on the part of the state to provide rehabilitation, when existing legislation or government schemes provide for the same.[142] Secondly, courts have taken a strengthened conditional approach, requiring the state to provide rehabilitation in accordance with existing schemes, by strictly interpreting existing schemes, when the state argued that some eviction cases fell beyond the obligations it had undertaken.[143] Thirdly, courts have gone beyond the conditional rights approach.[144] Lastly, the courts have contradicted their position on the need for rehabilitation in eviction cases, and have held that no rehabilitation may be necessary when people are removed from public land, even when state policy or legislation provides for the same.[145] This sub-section explores these four strands of cases. Moreover, it lays the foundation for the central argument proposed in this thesis: that a contextual right to housing ought to be developed through a process of participation. Bounded deliberation with residents will help ascertain their contextual needs for

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[140] Larry Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 Law and Philosophy 19, 31.

[141] The polyvocality of Indian courts contributes to inconsistent doctrinal developments. See, Nick Robinson, 'The Structure and Functioning of the Supreme Court of India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019); Gautam Bhatia, 'What Is the Role of a Judge in a Polyvocal Court? Indian Constitutional Law and Philosophy' (*Indian Constitutional Law and Philosophy*, 1 April 2017) <https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/> accessed 30 October 2021> accessed 2 February 2022. It should be noted, however, that all courts may face the issue of polyvocality, even if to different degrees. Adrian Vermeule, 'The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory' [2003] University of Chicago Public Law & Legal Theory Working Paper.

[142] *Olga Tellis* (n 1) [51], [57].

[143] *Nawab Khan* (n 2); *Sudama Singh* (n 12).

[144] *Ajay Maken* (n 12).

[145] *Almitra Patel v Union of India* (2000) 2 SCC 679 ('*Almitra Patel*').

housing, and thereby develop the contextual content of rehabilitation requirements in eviction cases.

In *Olga Tellis*, the Supreme Court recognised a conditional right to alternate accommodation, requiring the state to provide alternate land under existing schemes to people being evicted, if they were found to be eligible under those schemes.[146] This excluded those people who would not qualify for rehabilitation under existing schemes.[147] *Olga Tellis* left it to the state to provide rehabilitation at its discretion, and Hohmann suggests that some of those who did not qualify for rehabilitation under existing schemes were nevertheless able to gain de facto protection against evictions, or rehabilitation through negotiating with the state.[148] However, this was achieved outside of the framework of rights, and left discretion to the state. In evictions carried out since *Olga Tellis*, a large number of people have been rendered homeless when they did not qualify for alternate accommodation under existing schemes, and the state, in exercise of its discretion chose not to provide rehabilitation. For instance, conservative estimates suggest that at least half of the total number of families evicted from informal settlements in the period 1990 to 2007 in Delhi, were not given access to alternate accommodation.[149]

In other cases, courts have taken a strengthened conditional approach. They have either required the state to frame schemes for rehabilitation when none existed, and thereafter ensured

[146] *Olga Tellis* (n 1) [51], [57].

[147] Das and Gonsalves (n 17).

[148] Hohmann (n 87) 131.

[149] Gautam Bhan and Swathi Shivanand, '(Un)Settling the City: Analysing Displacement in Delhi from 1990 to 2007' (2013) 48 EPW 54, 57; Dupont (n 39); Véronique Dupont, 'Slum Demolitions in Delhi since the 1990s: An Appraisal' (2008) 43 EPW 79; People's Union for Democratic Rights, 'India Shining: A Report on Demolition and Resettlement of Yamuna Pushta Bastis' (2004) <https://www.pudr.org/india-shining-report-demolition-and-resettlement-yamuna-pushta-bastis> accessed 4 February 2022.

rehabilitation under those schemes,[150] or strictly interpreted existing schemes to hold the state accountable for fulfilling the same, when the state attempted to circumvent its obligations.[151]

In *Ajay Maken,* the Delhi High Court went beyond the conditional rights approach, when it indicated that courts may check the reasonableness of legislation or policies on the provision of alternate accommodation, if these exclude residents facing an eviction from rehabilitation/provision of alternate accommodation.[152]

Finally, the provision of alternate accommodation under existing schemes has not been considered necessary prior to carrying out evictions.[153] Most starkly, in *Okhla Factory Owners Association*,[154] the Delhi High Court declared a scheme for rehabilitation unconstitutional,[155] when the scheme permitted evictions from public land only when alternate accommodation was made available to those being evicted. The High Court held that such a scheme served 'no social purpose' and was therefore 'illegal and arbitrary'.[156] These cases are inconsistent with the Supreme Court's holding in *Olga Tellis,* that rehabilitation must be provided under existing legislation/policies.[157] *Olga Tellis* was decided by a constitutional bench comprising five judges, and therefore is binding

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[150] *Nawab Khan* (n 2) [13], [14], [26].

[151] *Sudama Singh* (n 12) [52]; *Ajay Maken* (n 12) [116]–[118]; Subhadra Banda and Shahana Sheikh, 'The Case of Sonia Gandhi Camp: The Process of Eviction and Demolition in Delhi's Jhuggi Jhopri Clusters' (Centre for Policy Research 2014).

[152] ibid.

[153] *Almitra Patel* (n 145); *Narmada Bachao Andolan v Union of India and Ors* (2000) 10 SCC 664; Fredman, *Comparative Human Rights Law* (n 22) ch 9; Jayna Kothari, 'Social Rights Litigation in India: Developments of the Last Decade' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (1st edn, Hart Publishing 2007); Kalyani Menon-Sen (n 39).

[154] *Okhla Factory Owners' Association and Ors v Govt. of National Capital Territory of Delhi and Ors* 108 (2002) DLT 517.

[155] ibid [44].

[156] ibid [46]. Fortunately, the central and state governments immediately appealed this decision before the Supreme Court, which stayed the operation of the Delhi High Court's decision and allowed the government's rehabilitation to continue. The Supreme Court eventually set aside the Delhi High Court's decision, when the original petitioners before the Delhi High Court withdrew their case. *Union of India v Okhla Factory Owners Association* SLP Civil No 3166-3167/2003 (Supreme Court of India, order dated 3 March 2003); *Union of India v Okhla Factory Owners Association* Civil Appeal No. 1688/2007 (Supreme Court of India, 7 September 2010); Bhuwania (n 97) 75.

[157] *Olga Tellis* (n 1) [51].

on all subsequent benches of concurrent or lower bench strength.[158] To the extent that courts have subsequently permitted or ordered the state to carry out evictions without the need for rehabilitation under existing schemes, those decisions are incorrect.

This thesis proposes that rehabilitation requirements ought to be determined through a process of participation. Such an approach enables residents of informal settlements to explain their needs regarding accommodation, and therefore to develop contextual content for rehabilitation. When legislation or policies are already in place regarding provision of alternate accommodation, the application of these to a case ought to take place with the participation of residents, so that general requirements are made specific to the needs of residents. For example, whereas the National Rehabilitation and Resettlement Policy 2007 requires that those facing evictions be provided with alternate land and housing, the precise location and other parameters of the alternate land and housing ought to be developed through a process of participation, so that it meets the precise contextual needs of residents. The Policy recognises this, and requires a rehabilitation plan to be developed through 'consultation' with those facing evictions.[159] Moreover, deliberations during the process of participation, ought to feed into the reasoning of the court when it is called upon to review eviction cases. I further develop these arguments in chapter 5.

6.2 The content of the right to housing in South Africa

The Constitutional Court has refrained from developing the content of the right to housing recognised under s 26(1) of the Constitution. Instead, it has held that s 26(1) must be read along with s 26(2) to determine the scope of the right and corresponding obligations immediately placed on the state.[160] Under this approach, the Court evaluates the reasonableness of measures taken by

[158] *Central Board of Dawoodi Bohra Community v State of Maharashtra* 2005 (2) SCC 673; Robinson (n 141).

[159] National Rehabilitation and Resettlement Policy 2007, ss 5, 6.

[160] *Grootboom* (n 95) [34].

the state in relation to housing, without expanding on the content of the right to housing. This approach has been criticised, and it has been argued that courts ought to develop the content of housing under s 26(1), and thereafter determine whether state measures are 'reasonable' in relation to this content.[161] Courts have refrained from expanding on the content of housing under s 26(1) because of concerns regarding judicial competence and democratic legitimacy. I argue in chapter 5 that the content of the right to housing under s 26(1) ought to be developed through the process of participation. Moreover, deliberations during participation ought to feed into the reasoning before courts. Courts ought to draw on these deliberations while examining that the contextual content developed meets substantive criteria, such as housing that fulfils urgent survival needs,[162] or housing that enables the development of human capabilities.[163] This helps meet concerns regarding the competence and legitimacy of courts in developing the content of housing, and ensures that the content developed meets the contextual needs of residents of informal settlements. I expand on these arguments in chapter 5.

While determining the reasonableness of state measures in relation to housing, courts have recognised obligations in relation to housing, and correspondingly, the content of the right to housing. South African courts have held that the state must take some legislative and other measures to fulfil the right to housing, that these measures must allocate responsibilities between different levels of government, and that the state must allocate a budget and human resources to fulfil the measures.[164] The South African Constitutional Court has recognised participation rights

[161] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n 109); Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383; Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 SAJHR 206; Brand (n 20); Stuart Wilson and Jackie Dugard, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights Law and Poverty Special Edition' (2011) 22 Stellenbosch Law Review 664; Sandra Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (Juta 2010) ch 4; Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009) ch 5.

[162] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2008) ch 6.

[163] Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1.

[164] *Grootboom* (n 95) [39].

in the form of meaningful engagement, through interpreting s 26(2)[165] and (3)[166] of the Constitution, and provisions of the PIE Act.[167] It has also recognised an obligation to provide alternate accommodation to those that are the risk of homelessness as a result of evictions from both public and private land/buildings.[168] Overall, the kinds of obligations recognised are similar to those recognised in India – an obligation to take legislative and other measures in relation to housing; participation rights; and rehabilitation/alternate accommodation.[169] This thesis focuses on developing the synergy between these obligations, and chapter 5 indicates how the contextual content of housing ought to be developed through participation rights in both jurisdictions.

7 Proceduralisation of the right to housing

The right to housing in India is sometimes criticised for being overly procedural.[170] It is argued that courts have failed to develop the substantive content of the right, and focused on participation rights. Similarly, the South African Constitutional Court's decisions on the right to housing have been criticised for being 'a classic example of the proceduralisation of socio-economic rights',[171] as a strategy to avoid engaging with substantive issues,[172] and therefore as an 'abdication' of its judicial role.[173]

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[165] *Olivia Road* (n 9) [17], [21], [28].

[166] ibid [18].

[167] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 [43], [45] ('*Port Elizabeth Municipality*').

[168] *Blue Moonlight* (n 28); Stuart Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 SALJ 270.

[169] See this chapter, sections 6.1.2, 6.1.4 and 6.1.5.

[170] Hohmann (n 87) 131; Fredman, *Comparative Human Rights Law* (n 22) 280.

[171] Wilson and Dugard (n 88); Ray (n 95) 108.

[172] Stuart Wilson, Jackie Dugard and Michael Clark, 'Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court' (2015) 31 SAJHR 472, 483.

[173] McLean (n 88) 239; Van der Berg (n 88).

The central concern raised in the literature regarding proceduralisation, is that rights holders do not simply want to be heard, or have access to participation rights. Rather, they seek access to the substantive content of rights. For example, residents of informal settlements do not only want to be heard prior to evictions. Ultimately, residents seek to access adequate housing in the face of evictions.[174]

In this thesis, I propose a way to meet this concern. Firstly, as indicated in section 6, courts in India and South Africa have recognised a range of obligations, and correspondingly, a range of elements forming part of the right to housing, with participation being only one such element.[175] Hence, courts have recognised entitlements beyond participation rights. Secondly, participation rights ought not be viewed only in procedural terms. I indicate in chapter 2 that participation rights embody substantive values[176] – freedom, dignity and equality. These are therefore an important end in themselves.[177] There are important normative reasons for why residents want to be heard when making decisions about their lives. If participation is at all to be viewed in procedural terms, it is 'thick' proceduralisation.[178] Thirdly, we ought to pay attention to the relationship between participation and other elements of the right to housing. The process of participation enables residents of informal settlements to develop the contextual content of other elements of the right to housing,[179] through participating in bounded deliberations with the state and private landowners. I indicate how participation rights help develop the contextual content of housing in

[174] Jeff King, *Judging Social Rights* (CUP 2012) 309.

[175] Lawrence Alexander, 'The Relationship between Procedural Due Process and Substantive Constitutional Rights' (1987) 39 UFLR 323.

[176] Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 OJLS 597, 604.

[177] *Olga Tellis* (n 1) [90]–[91]; *Schubart Park v City of Tshwane* [2012] ZACC 26 [44]; Fredman, *Comparative Human Rights Law* (n 22) 281.

[178] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 OJLS 33.

[179] Fredman, *Comparative Human Rights Law* (n 22) 281.

chapter 5. Hence, by gaining access to participation rights, residents are able to define the content of adequate housing,

Moreover, the recognition of meaningful engagement in South Africa need not serve as a means to avoid deciding substantive issues, or as a 'cop-out' strategy.[180] Firstly, it is important to note that in *Abahlali*, provisions of a statute[181] were declared unconstitutional because these took away all possibility for meaningful engagement. These compelled owners or persons in charge of land or buildings to institute proceedings for eviction of 'unlawful occupiers'.[182] This removed any discretion on the part of owners, and thereby precluded the possibility of meaningful engagement prior to instituting eviction proceedings.[183] The Constitutional Court held that this thereby disturbed the 'carefully established legal framework' around evictions established under s 26 of the Constitution, and operationalised through the Housing Act and the PIE Act, including the need for meaningful engagement prior to evictions.[184] On this basis, the statute was declared to be unconstitutional. Hence, the doctrine of meaningful engagement helped determine the substantive issue in the case – whether the statute was unconstitutional – illustrating the 'possible substantive effects of procedural protections'.[185] Secondly, the process of meaningful engagement ought to be used to determine substantive issues. I indicate in chapter 5 how meaningful engagement creates space for residents to take part in deciding substantive issues concerning their right to housing. The deliberations that take place during meaningful engagement also help the court in its

[180] Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32 Nordic Journal of Human Rights 312, 327; Ray (n 95) 236; Anashri Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 ICON 732.

[181] KwaZulu-Natal Elimination and Prevention of Reemergence of Slums Act 2007.

[182] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31 [111]-[112] ('*Abahlali*').

[183] ibid (n 182) [122].

[184] ibid.

[185] Ray (n 95) 127–128.

determination of these substantive issues, while meeting concerns regarding democratic legitimacy and the institutional competence of courts in deciding polycentric issues involved in eviction cases.

8 The content of participation rights

Calls for participation often fail to engage with the issue regarding how participation should take place.[186] In South Africa, the potential for meaningful engagement to enable people to secure their right to housing is recognised. However, it is acknowledged that for this to succeed, there is need for clarity regarding the content of meaningful engagement.[187] In its current form, it is inadequate and unclear, and relies too heavily on oppressed people to be well organised, properly resourced and properly informed, to tap into its potential.[188] Moreover, there is danger that meaningful engagement could become a purely procedural box to tick, taking away its radical potential.[189] Similarly, participation rights in India have been developed to a limited degree, and questions around its detail and scope remain underdeveloped.

In chapters 3 and 4, I develop the content of participation rights, to address these concerns. I pay attention to (1) who should hold participation rights; (2) who should bear duties with regards to participation (both horizontal and vertical duties); (3) how the process of participation ought to take place through bounded deliberation and (4) the need for positive measures including information sharing and provision of legal representation during participation to ensure bounded deliberation.

[186] Black (n 175) 599.

[187] Ray (n 90); Ray (n 95); Fredman, *Comparative Human Rights Law* (n 22) 281.

[188] Wilson and Dugard (n 88).

[189] Tissington (n 92) 46; S'bu Zikode, 'Meaningful Engagement' (Roundtable discussion on meaningful engagement in the realisation of socio-economic rights, 24 July 2009) <http://abahlali.org/node/5538/> accessed 15 January 2022.

9 Role of courts

9.1 Meeting legitimacy, competence and polycentricity concerns

Courts in South Africa have been very attentive to concerns raised regarding their institutional competence and democratic legitimacy in deciding issues regarding the right to housing,[190] especially because these issues are complex and polycentric.[191] In the literature on judicial review of social and economic rights,[192] different approaches to addressing concerns around the competence and legitimacy of courts have been proposed, including use of weak-form dialogic review,[193] bounded deliberative review,[194] judicial incrementalism,[195] catalytic review,[196] and democratic experimentalism.[197] Here, I set out how the approach proposed in this thesis relates to these approaches.

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[190] *Grootboom* (n 95); *Mazibuko* (n 95); Ray (n 95) 15.

[191] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353. King has established that 'highly polycentric problems abound in public and private law', and hence this concern is not limited to social and economic rights cases. Jeff King, 'The Pervasiveness of Polycentricity' [2008] Public Law 101; King (n 174) ch 7.

[192] Housing is difficult to characterise as a 'social and economic right', given that it has been recognised through the right to life in India, and the right to privacy under the European Convention of Human Rights. In any case, the distinction between civil and political rights on one hand, and social and economic rights on the other hand, is problematic. See, Fredman, *Comparative Human Rights Law* (n 22) 266; Sandra Fredman, *Human Rights Transformed* (OUP 2008) ch 3.

[193] Mark Tushnet, *Weak Courts, Strong Rights : Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008) ch 8; Mark Tushnet, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 326; Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 ICON 391.

[194] Fredman, *Comparative Human Rights Law* (n 22) 91; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 93).

[195] King (n 174) 289; Farrah Ahmed and Tarunabh Khaitan, 'Constitutional Avoidance in Social Rights Adjudication' (2015) 35 OJLS 607.

[196] Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) ch 6; Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 ICON 385. For an application of this approach to India, see, Gaurav Mukherjee, 'The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights' (2020) 4 VRÜ 411.

[197] Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313; Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015; Dorf and Sabel (n 96); Sandra Liebenberg and Katharine G Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in Helena Alviar García, Karl E Klare and Lucy A Williams (eds), *Social and Economic rights in Theory and Practice: Critical Inquiries* (Routledge 2015); Alana Klein, 'Judging as Nudging: New

The approach in this thesis centres participation rights. I argue in chapter 5, that participation rights provide an important means for substantive issues around housing to be decided through bounded deliberation between rights holders, the state, and private landowners. This ought to feed into the reasoning of the court while deciding substantive issues. The role of the court must be to ensure that participation takes place through bounded deliberation, meeting the principles set out in chapters 3 and 4. Thereafter, the role of the court must be to see whether the substantive issues decided during the process of participation, meet substantive constitutional criterion. For example, the process of participation ought to decide what amounts to 'adequate housing' for particular residents residing in a particular settlement facing an eviction, thereby developing the contextual content of 'adequate housing', rather than a 'comprehensive and final content'.[198] Courts ought to check whether the criteria decided during participation meets substantive principles, such as housing that is in accordance with the dignity of residents.[199] I engage with this issue in detail in chapter 5 of this thesis. The court ought to tap into deliberations that took place during the process of participation. This ensures that it draws from a bounded deliberative process of decision-making, meeting concerns around democratic legitimacy. Also, by relying on the contributions of residents, the state and private landowners made during the process of participation, courts fill gaps in their knowledge and competence. In these ways, concerns around the democratic legitimacy and institutional competence of courts in deciding substantive issues in eviction cases, are met.[200]

This draws on Fredman's approach of 'bounded deliberation',[201] and applies it beyond the context of judicial review, to the context of participation rights. Fredman proposes that human

Governance Approaches for the Enforcement of Constitutional Social and Economic Rights' (2008) 39 Colum HRLR 351.

198 Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 161) 180.

199 ibid.

200 Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (n 180) 319.

201 Fredman, *Comparative Human Rights Law* (n 22) 91.

rights issues ought to be resolved deliberatively. Courts play a useful role by functioning as deliberative fora, and by steering legislative and executive decision-making towards deliberation by requiring deliberative justifications for legislative and executive decisions before courts. This decision-making is bounded by the prior recognition of human rights, and so decisions must be justified not on open-ended grounds, but in light of human rights.[202] In chapter 4, I propose that the process of participation ought to take place through bounded deliberation. In chapter 5, I argue that by drawing on this process of bounded deliberation, concerns around the democratic legitimacy and institutional competence of courts in deciding issues regarding housing in the eviction context, can be met. Hence, while viewing the process of judicial review in bounded deliberative terms like Fredman, I argue that courts ought to draw on the bounded deliberations that took place during the process of participation while deciding eviction cases.

Whereas weak-form dialogic review is concerned with creating a dialogue between courts and the legislature,[203] this thesis proposes that we create space for rights holders to access adequate housing, and define their right to access to adequate housing, through participation rights. This approach de-centres institutions including the legislature and courts, and centres rights holders themselves, by focusing on participation rights. While these institutions ought to continue to fulfil their designated constitutional roles in defining, expanding and interpreting rights, this thesis focuses on the role that participation rights may play in defining, expanding and interpreting the right to housing in the eviction context. It explores how participation rights further a deliberative version of democracy,[204] while respecting the freedom, dignity and equality of rights holders, in defining their own rights. Moreover, this thesis does not advocate for 'weak' remedies.[205] Rather,

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[202] ibid 93.

[203] Tushnet, *Weak Courts, Strong Rights : Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (n 193) ch 8; Tushnet, 'The Rise of Weak-Form Judicial Review' (n 193) 326; Dixon (n 193).

[204] Iris Marion Young, *Inclusion and Democracy* (OUP 2000).

[205] ibid.

it argues that the appropriate remedies in a case ought to be developed through the process of participation.[206]

King's judicial incrementalism approach is a 'cousin'[207] of the approach proposed in this thesis. King argues that judicial decision-making ought to proceed in small steps, where courts,

> (1) avoid significant, nationwide allocative impact, and either (2) give decisions on narrow, particularised grounds, or (3) when adjudicating a macro-level dispute with significant implications for large numbers of people, decide in a manner that preserves flexibility.[208]

Like King, the thesis advocates that the contextual or 'particularised' content of housing be developed on a case by case basis,[209] and emphasises the development of that content through participation rights. King, too, advocates for the use of meaningful engagement, hearings and consultations, and other 'procedural rights'.[210] However, the thrust of the two approaches are quite different. This thesis focuses on the contextual development of the content of housing through participation rights. It's response to the problem of democratic legitimacy and institutional competence of courts in deciding eviction cases, is to advocate for decision-making through participation rights, and for courts to enforce and tap into bounded deliberations during the process of participation. The thrust of King's approach, on the other hand, is to advocate for incremental judicial decision-making. Moreover, the approach to remedies in this thesis differs substantially from King's approach. King advocates for the use of non-intrusive remedies,[211] whereas this thesis argues that remedies ought to be determined through the process of participation. By way of example, it is unlikely that residents would be satisfied with declaratory

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[206] Ch 5.

[207] I borrow King's terminology here. See, King (n 174) 303.

[208] ibid 293.

[209] ibid 294.

[210] ibid 298.

[211] ibid 300.

relief, without more 'intrusive' remedies, including structural injunctions, to enable them to gain access to adequate housing in the face of evictions. Thus, the kind of remedies arrived at through the process of participation, are likely to be more 'intrusive' than King advocates.

The arguments in this thesis have strong affinity with the democratic experimentalist model of public decision-making. Democratic experimentalism advocates for public decision-making to take place through deliberation by people regulated by those decisions.[212] It recognises the instrumental importance of such a model for public decision-making, because it enables local knowledge and experiences to bear in addressing specific problems in local settings, while drawing on the experiences of other people facing similar problems.[213] This is expected to enable better informed and therefore more effective solutions to local problems.[214] Democratic experimentalism also recognises the intrinsic importance of such decision-making, in respecting the freedom, dignity and equality of those regulated by public decisions.[215] Courts are expected to play a valuable role under democratic experimentalism, in enforcing decision-making through this model. Simon and Sabel, for example, advocate for remedies in public law litigation to be determined through 'experimentalist' deliberation between parties, rather than by a court through a 'command and control model'.[216] In chapter 5, I argue that not just remedies, but also the substantive determination of issues in eviction cases ought to be made through deliberation between residents of informal settlements, the state, and private landowners. In similar vein, Dorf and Sabel propose,

> Even traditional courts often directly involve the parties in the formulation of remedial decrees… Experimentalism generalizes and radicalizes this procedure. It

[212] Cohen and Sabel (n 197).

[213] ibid 326; Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 21) 629.

[214] Cohen and Sabel (n 197) 333.

[215] ibid 318.

[216] Sabel and Simon (n 197) 1067.

> asks courts to involve the parties in exploring the realm of possibilities at the earlier stage of determining whether there is a legal violation.[217]

Under democratic experimentalism, the content of rights also ought to be determined through deliberation between parties. For example, parties ought to deliberate regarding what is 'adequate' housing, setting benchmarks and standards.[218] Concerns regarding the democratic legitimacy and institutional competence of courts in making decisions about rights are mitigated under democratic experimentalism, by requiring courts to enforce deliberations between parties.[219] Courts are required to make substantive decisions when confronted by a potentially serious threat to fundamental rights calling for urgent intervention, by laying down 'prophylactic rules', and inviting actors to develop improvements on these general rules through deliberative experimentation.[220]

Ray's democratic engagement draws on legalised accountability models[221] and democratic experimentalism, to envisage a procedurally focused role for courts.[222] Under this approach, the role of courts is to establish processes in which non-judicial actors work directly with the state to develop proposals for reforming state institutions. Courts do not play a stronger interpretive role to develop and enforce specific principles.[223]

I envisage the court's role similar to democratic experimentalism and democratic engagement, by arguing that in eviction cases, courts ought to (1) enforce participation rights; and draw on deliberations during participation to (2) develop the substantive content of housing; (3) to apply the 'reasonableness', 'just, fair and reasonableness' or 'proportionality' standards to check

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[217] Dorf and Sabel (n 96) 401.

[218] Liebenberg and Young (n 197) 240.

[219] Dorf and Sabel (n 96) 444; Cohen and Sabel (n 197) 337; Joanne Scott and Susan P Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13 Colum J Eur L 565; Klein (n 197).

[220] Dorf and Sabel (n 96) 453; Liebenberg and Young (n 197) 241.

[221] Charles R Epp, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (UChicago Press 2009).

[222] Ray (n 95) 274.

[223] ibid 278, 318.

limitations on the right to housing; and (4) to develop remedies. The contribution of this thesis is to explore the details of how decision-making ought to take place through such a model in a specific context – eviction of informal settlements (chapters 3 and 4), and the details of the role of courts in this context (chapter 5). It also refines the model, by drawing on Fredman's ideas of 'bounded deliberation' to design the process of participation.[224] The thesis meets criticisms regarding the normative weakness of democratic experimentalism,[225] and democratic engagement,[226] by indicating how substantive principles play a valuable role in placing boundaries on deliberations during the process of participation, as well as in the reasoning of courts while enforcing participation and checking that the result of participation meets constitutional standards.[227] It therefore combines the 'benefits of bottom-up, broad-based, deliberative participation with a stronger normative role for adjudicatory bodies.'[228]

Rodríguez-Garavito proposes that normativism and democratic experimentalism ought to be combined under 'empowered participatory jurisprudence', by requiring courts to make normative pronouncements regarding the minimum core content of substantive and procedural elements of social and economic rights, and enabling democratic experimentalism to devise remedies and monitor implementation.[229] The process of participation is therefore 'bounded' by the determination of the core content of rights.[230] This thesis also proposes a way to ensure a valuable role both for substance and participation, and views participation as 'bounded'. However,

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[224] Fredman, *Comparative Human Rights Law* (n 22) 93; Rodríguez-Garavito (n 131) 245.

[225] Liebenberg and Young (n 197) 247–251; Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 AHRLJ 1, 17; Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 27) 167.

[226] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 21) 634.

[227] Ch 5.

[228] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 21) 633; César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669, 1691.

[229] Rodríguez-Garavito (n 131) 246.

[230] ibid.

it differs from Rodríguez-Garavito in arguing that courts ought to draw on deliberations to define the content of the right to housing, including the core content. Participation ought not to be restricted to determining remedies and monitoring implementation of remedies, but also the content of elements of the right to housing.[231] Yet, the content of rights is not entirely open-ended, but must be directed towards fulfilling the right, and relate to established constitutional principles. For example, 'adequate housing' under s 26(1) of the South African Constitution cannot be determined solely through deliberations during participation, without being bounded by the requirements of, for example, the right to dignity. Courts ought to play a valuable role in determining the contextual content of 'adequate' housing by drawing on deliberations during participation, but also on these substantive rights and principles.[232]

The arguments in this thesis also have strong affinity with the approach developed by Young – the catalytic court – where the court sees itself in productive interaction with other political and legal actors,[233] adopting a value-based, deliberative method of problem-solving to catalyse transformation.[234] Catalytic courts do not set out minimum bundles of commodities or entitlements, rather require constitutional democratic institutions – courts, legislature and executive – to work with collectives to provide contextualised, particularised, and localised solutions to constitute rights.[235] Yet, the role of the court is substantial and central, [236] and courts combine procedural protections with substantive interpretations.[237] Young envisages catalytic courts employing different kinds of review, including experimental review.[238] This thesis also

[231] Ch 5.

[232] Ch 5.

[233] Young, *Constituting Economic and Social Rights* (n 196) 172.

[234] ibid 176–177.

[235] ibid 6.

[236] ibid 175.

[237] ibid 191.

[238] ibid 174.

proposes a substantial role for courts in enforcing participation rights, and drawing on deliberations to develop the substantive content of rights. It proposes 'productive interaction' between rights holders and duty bearers in developing the contextual content of the right to housing in the eviction context through a process of bounded deliberation. While the thesis envisages the development of the content of the right to housing by courts, including the minimum core content, it proposes that courts draw on deliberations between residents, the state and private landowners to develop the contextual content of housing.

9.2 Courts as 'slum demolition machines'

The role played by courts in India with respect to the right to housing, has been subject to a different kind of critique. It is argued that Indian courts have acted as 'slum demolition machines' through the exercise of their jurisdiction in public interest litigation.[239] While deciding eviction cases, courts have furthered a bourgeoisie environmentalism,[240] that views informal settlements as producers of garbage,[241] and as akin to garbage,[242] that must be cleared to meet bourgeoisie aesthetics for the city.[243] This critique fits in with some other empirical work questioning the role of courts with regards to ensuring that the rights of the most marginalised are respected, protected and fulfilled.[244] It should be noted that empirical work establishing the opposite – the success of

[239] Bhuwania (n 97); Bhan (n 39) ch 3; Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation' (2004) 39 EPW 1770.

[240] Amita Baviskar, 'Between Violence and Desire: Space, Power, and Identity in the Making of Metropolitan Delhi' (2018) 68 International Social Science Journal 199; Amita Baviskar, 'Cows, Cars and Cycle-Rickshaws: Bourgeois Environmentalists and the Battle for Delhi's Streets' in Amita Baviskar and Raka Ray (eds), *Elite and everyman : the cultural politics of the Indian middle classes* (Routledge India 2011); Amita Baviskar, *Uncivil City : Ecology, Equity and the Commons in Delhi* (Sage Yoda Press 2020) ch 2.

[241] *Almitra Patel* (n 145).

[242] D Asher Ghertner, 'Analysis of New Legal Discourse behind Delhi's Slum Demolitions' (2008) 43 EPW 57.

[243] Asher Ghertner, *Rule By Aesthetics: World-Class City Making in Delhi* (OUP 2015) ch 4; Amita Baviskar, 'What the Eye Does Not See: The Yamuna in the Imagination of Delhi' (2011) 46 EPW 45.

[244] Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95; Gerald N Rosenberg, *The Hollow Hope : Can Courts Bring about Social Change?* (2nd edn, UChicago Press 2008); OLM Ferraz, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 Health and Human Rights 33; David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard

courts in ensuring that the rights of the most marginalised are respected, protected, promoted and fulfilled – also exists,[245] including in India.[246]

In chapter 5, I propose that the recognition of participation rights creates space for residents of informal settlements to counter a bourgeoisie vision for the city, through participating in the development of the content of the right to housing that meets their contextual needs. By carving out this role for participation rights, I decentre the role of courts, and highlight the role of rights holders. Nevertheless, courts remain an important institution to check that state action respects, protects, and promotes and fulfils the right to housing, although it is not the *only* institution to do so. Rights holders themselves ensure that state action respects, protects, and promotes and fulfils their right to housing, through their participation in deliberations regarding their right to housing in the context of evictions. In chapter 5, I engage with the issue of locus standi before courts. In public interest litigation, courts have expanded the concept of locus standi, to ensure that the issues concerning the rights of the oppressed can be brought before courts, even when rights holders themselves are unable to approach courts.[247] I recognise the importance of this expansion of locus standi, and argue that thereafter, rights holders must be made part of proceedings before courts, as necessary parties. Thus, public interest litigation must serve as a means for rights holders to reach courts, and not only for their interests to be represented by others before courts.[248] In this manner, I carve out a role for courts as well as participation rights,

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International Law Journal 189; OLM Ferraz, *Health as a Human Right : The Politics and Judicialization of Health in Brazil* (CUP 2021) chs 6 and 8.

[245] Jason Brickhill, 'Strategic Litigation in South Africa: Understanding and Evaluating Impact' (University of Oxford 2021); Michael W McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (UChicago Press 1994).

[246] Rosalind Dixon and Rishad Chowdhury, 'A Case for Qualified Hope?: The Supreme Court of India and the Midday Meal Decision'; Alyssa Brierley, '*PUCL* v. *Union of India*: Political Mobilization and the Right to Food'; Karthik Rao-Cavale, 'The Art of Buying Time: Street Vendor Politics and Legal Mobilization in Metropolitan India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019).

[247] *SP Gupta v Union of India* AIR 1982 SC 149; *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; Upendra Baxi, 'Introduction' in SP Sathe (ed), *Judicial activism in India* (2nd edn, OUP 2003) x; PN Bhagwati, 'Judicial Activism and Public Interest Litigation' CJTL 561.

[248] Ch 5.

to ensure that courts play an important role in securing the right to housing of the urban poor, rather than act as 'slum demolition machines'.

10 Genesis

I end this chapter by explaining the genesis of this project. The seeds of this thesis were planted when I was an undergraduate student in Delhi. As a middle class, upper caste woman in India, I acknowledge that I had never faced housing insecurity. A course on law and poverty ensured that I read about it. We read Ramanathan write passionately about the injustice of demolitions, that,

> The right to housing has been rendered invisible, even non-existent, in this exertion of power, and the evolving meaning of 'housing' and 'adequate housing', and the injunction in the matter of forced evictions has been thrown into a cauldron of callous neglect.[249]

Baxi's writings encouraged us to think about the active struggles of the urban 'poor' against such assertions of power. He wrote,

> The poor are often portrayed *only* as a series of negativities … It is the non-poor state and civil society who have to redeem the impoverished from this state of economic destitution and culture of poverty…
>
> When we begin to use the term 'impoverished' the 'poor' cease to yield to claims of homogenization. The impoverished begin to emerge as a series of diverse groups and individuals within these, who defy an overall categorization. They have been impoverished, or maintained as such, by different causative factors and forces at different moments of domination…
>
> And they are more than mere receptacles of domination and development. Their impoverishment is not some kind of fate befalling them; rather it is an aspect involving struggle and resistance…
>
> The culture of poverty approach altogether obscures from the view the historical vitality and resilience of the impoverished and the oppressed.[250]

[249] Ramanathan, 'Demolition Drive' (n 83).

[250] Baxi (n 19).

Soon after, on field visit to the Old Delhi Railway Station, I was exposed to the praxis side of this. We were interviewing people engaged in cleaning the railway tracks, about the work they performed – manual scavenging[251] – or the cleaning of human shit[252] without any protective equipment. They were equally interested in talking about their housing, and wanted us to visit their settlement. There, they told us about how their parents' generation – low-caste, migrant communities of Bengali Muslims and Tamil Dalits – first established the settlement behind the railway station, when the area was forest-land. They told us about how they continued to struggle to secure their settlement against multiple threats of eviction over the years. While the railways needed the Muslim and Dalit workers to clean for them, they were indifferent about where and how they lived. Worse, the railways repeatedly attempted to evict the workers and their families, claiming ownership over the land on which they resided. The residents told us about their struggle to secure their settlement using every means within their grasp – approaching their elected representatives and promising votes in exchange for protection against eviction; multiple rounds of protests; and approaching the courts. Long after my visits, I was left with several 'overwhelming',[253] deeply personal/political questions: as a lawyer and researcher, what should be my role in the struggle for justice? Should I be making claims on the behalf of others? Better still, should I strive to create spaces for them to make their own claims? The DPhil gave me the opportunity to continue to grapple with and through these questions. This thesis is the reflection of that struggle. I request the reader to interpret the thesis in that light.

[251] Bezwada Wilson, 'Safai Karmachari Andolan: An Insider's Account' in Philippe Cullet, Sujith Koonan and Lovleen Bhullar (eds), *The Right to Sanitation in India* (OUP 2019).

[252] In a conference on the right to sanitation, Usha Ramanathan pointed out that we often sanitise the subject, by coaching it in the more polite language of human waste, excreta or faeces rather than what it is – shit.

[253] TS Eliot, 'The Love Song of J Alfred Prufrock' (1915) 6 *Poetry*.

CHAPTER 2: CONTEXT AND VALUES

1 Introduction

Firstly, in this chapter, I briefly examine the social and historical context of eviction of informal settlements in India and South Africa. Evictions take place against the backdrop of intersecting systems of oppression, including the continuing legacy of apartheid, capitalism, the caste system, religious intolerance, xenophobia, and patriarchy. We ought to understand the importance of participation rights in this context.

Secondly, I identify the intrinsic value of participation rights in this context. I argue that participation rights embody the values underlying other human rights, including housing – freedom, equality and dignity. I explain the notions of freedom, dignity and equality that I adopt – freedom as capabilities,[1] dignity as inherent worth of all humans,[2] and substantive equality,[3] – combined with the material and social basis of living life worthy of being human.[4] I also argue that these values must be seen together, in interaction with one another, and reinforcing one another.[5] Thus, freedom as capabilities must be seen in interaction with the inherent worth of all humans, so that everyone's freedom matters by virtue of their inherent worth, and the material basis of freedom as capabilities is secured for all. Human dignity must be seen in light of substantive equality, as signifying the inherent worth of all humans in the context of intersecting systems of oppression, rather than in individualistic, abstract terms. I also argue that these values ought to

[1] Amartya Sen, *Development as Freedom* (OUP 1999); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000).

[2] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, 2nd edn, CUP 2012).

[3] Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011).

[4] Nussbaum (n 1) 73; Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 36.

[5] Fredman, *Discrimination Law* (n 3); Susanne Baer, 'Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 The University of Toronto Law Journal 417.

shape the design of participation rights. In chapters 3 and 4, I rely on these values to argue that in the eviction context, participation ought to take place through bounded deliberation between all those facing intersecting systems of oppression, after positive measures are fulfilled to facilitate their participation.

Thirdly, I argue that participation serves an important instrumental purpose in ensuring better-informed and therefore potentially more effective decision-making in the context of eviction of informal settlements.[6]

I undertake a discussion on values in this chapter for two reasons. Firstly, to establish that participation rights should not be viewed only in 'procedural' terms, because these embody substantive values. Secondly, because these values ought to shape the content of participation rights. As discussed in chapter 1, the content of participation rights in both India and South Africa is underdeveloped. A discussion on values has much to offer in the development of the content of these rights.[7] I rely on these values in chapters 3 and 4 to develop the content of participation rights.

2 Social and historical context

Armed with bulldozers
they came
to do a job
nothing more
just hired killers.
We gave way
there was nothing we could do
although the bitterness stung in us
and in the place we knew to be part of us.[8]

[6] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623. Liebenberg also discusses both intrinsic and instrumental justifications for 'participatory justice'.

[7] Fredman, *Comparative Human Rights Law* (n 4) 30.

[8] Don Mattera, *Azanian Love Song* (African Perspectives Publishing 2007) 5.

This thesis is committed to a critical theoretical approach – 'a normative reflection that is historically and socially contextualised'.[9] It therefore needs to understand the historical and social context within which the normative reflection takes place. In this section, I briefly describe the historical and social context of eviction of informal settlements in India and South Africa. At the same time, the descriptions of the historical and social context of evictions presented in this section, are not value-neutral, but are themselves evaluative.[10] Implicit in these descriptions are a commitment to values of freedom, dignity and equality, and particular conceptions of these values. I engage in a discussion of these conceptions in section 3.

This section begins with a poem by Mattera that captures the oppression inherent in the forced eviction of residents of informal settlements. In South Africa, these evictions take place against the backdrop of systems of oppression,[11] including apartheid, capitalism and rising xenophobia.

Africans were systematically dispossessed of their land under the colonial and apartheid regimes in South Africa.[12] Under the Native Land Act,[13] the reserves, amounting to barely 8% of the land of South Africa, became the only areas where Africans could legally acquire land. In the rest of South Africa, Africans were prohibited from 'purchase, hire or other acquisition of land or of any right thereto'.[14] By 1936, Africans, comprising 73% of the people in South Africa, were to

[9] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011) 5.

[10] ibid.

[11] ibid 38.

[12] Laurine Platzky and Cherryl Walker, *The Surplus People: Forced Removals in South Africa* (Ravan Press 1985); Clive Plasket, 'Homeland Incorporation: The New Forced Removals' in Christina Murray and Catherine O'Regan (eds), *No place to rest: forced removals and the law in South Africa* (OUP 1990) 214; Aninka Claassens, 'Rural Land Struggles' in Christina Murray and Catherine O'Regan (eds), *No place to rest : forced removals and the law in South Africa* (OUP 1990) 32.

[13] Native Land Act 1913.

[14] Colin Bundy, 'Land, Law and Power' in Christina Murray and Catherine O'Regan (eds), *No place to rest: forced removals and the law in South Africa* (OUP 1990) 5.

have rights over just 13% of the area in South Africa.[15] The coloured and Indian communities in South Africa also faced rightlessness with respect to land.[16] The Surplus Peoples Project conservatively estimates that during the apartheid era, 3.5 million Black South Africans were forcibly removed and relocated.[17] This system of removal and relocation was integral to apartheid, to maintain control over Black South Africans, to maintain racial segregation, and to ensure white economic, political and social hegemony.[18] Legislation including the Group Areas Act,[19] the pass laws and the overall system of influx control ensured that Black South Africans were impoverished, in terms of access to land and housing, and otherwise.[20] Legislation such as the Black Administration Act[21] and the Prevention of Illegal Squatting Act[22] enabled forcible evictions and removals. Justice Yacoob, in *Grootboom*, acknowledged that at the end of the apartheid era, 'hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.'[23]

The effects of segregation and impoverishment have persisted in democratic South Africa. The dismantling of the apartheid spatial control regime enabled increasing urbanisation, and brought with it increasing demand for urban housing.[24] In cities such as Johannesburg, white

[15] Platzky and Walker (n 12) 92.

[16] Bundy (n 14) 5.

[17] Platzky and Walker (n 12).

[18] ibid 67.

[19] Group Areas Act 1950.

[20] Paul Maylam, 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 African Affairs 57; Michael Savage, 'The Imposition of Pass Laws on the African Population in South Africa 1916-1984' (1986) 85 African Affairs 181.

[21] Black Administration Act 1927.

[22] Prevention of Illegal Squatting Act 1951.

[23] *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19.

[24] Harrison Philip, 'Urbanization: The Policies and Politics of Informal Settlement in South Africa: A Historical Perspective' (1992) 22 Africa Insight 14; Maylam (n 20).

capital gradually fled from the inner city, leaving the buildings dilapidated and derelict.[25] Black South Africans, living in informal settlements, inner city buildings, and backyard shacks, continue to face acute impoverishment in terms of access to adequate housing and land, and this legacy of the colonial and apartheid past has not yet been fully addressed.[26] Official estimates indicate that in 2017, 1.9 million households, comprising 13.6% of all households in South Africa, lived in informal dwellings,[27] which lacked access to sufficient water, sanitation or electricity.[28] Moreover, forced evictions continue to take place regularly, accompanied by brutal violence, and frequently in violation of protections guaranteed under the Constitution and statutes.[29] For example, in July 2020, members of the Anti-Land Invasion Unit of the City of Cape Town dragged a resident of an informal settlement out of his home when he was unclothed, and demolished his home.[30] The eviction took place during the Covid-19 pandemic, purportedly under the Disaster Management Act[31] in place during the pandemic. Similar evictions of informal settlements took place in Cape Town during the pandemic, typically accompanied by use of 'excessive force'.[32] By way of another example, after the launch of the Inner City Regeneration Strategy by the City of Johannesburg in 2003, to 'develop' the dilapidated inner-city abandoned by white capital, mass evictions became a

[25] Stuart Wilson, Jackie Dugard and Michael Clark, 'Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court' (2015) 31 SAJHR 472, 473.

[26] Socio-Economic Rights Institute, 'Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2018) <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>; Gustav Muller, 'Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa' (2015) 132 SALJ 616.

[27] Statistics South Africa, 'Census 2011' (2012) <https://www.statssa.gov.za/publications/P03014/P030142011.pdf> accessed 30 November 2021; Statistics South Africa, 'General Household Survey 2017' (2018) <http://www.statssa.gov.za/publications/P0318/P03182017.pdf> accessed 30 November 2021. The 2017 survey indicates that the overall percentage of households living in informal dwellings has remained at 13.6%.

[28] Socio-Economic Rights Institute (n 26).

[29] Centre on Housing Rights and Evictions, 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' <https://issuu.com/cohre/docs/cohre_anyroomforthepoor_forcedevict> accessed 30 November 2021; Abahlali baseMjondolo, 'Evictions' <http://abahlali.org/taxonomy/term/evictions/evictions/> accessed 30 November 2021.

[30] *South African Human Rights Commission and Others v City of Cape Town and Others* [2020] ZAWCHC 84 1].

[31] Disaster Management Act 2002.

[32] ibid [10]–[36].

regular occurrence from buildings in the inner-city,[33] leading to the eviction of 10,000 residents from 122 properties between 2002–2006.[34] Evictions of undocumented African immigrants increasingly take place, against the backdrop of rising xenophobia, often in violation of guaranteed protections under the Constitution and the PIE Act.[35]

India has among the world's highest number of people living in homelessness, a staggering number of over 4 million people.[36] In urban India, 65 million people live in 'slums', or informal settlements, lacking access to basic infrastructure including clean water, sanitation and electricity.[37] Between 2017 and 2019, over 568,000 people in India were forcibly evicted and their homes demolished.[38] Between March 2020 and July 2021, during the Covid-19 pandemic, 257,700 people were forcibly evicted by the state.[39] Evictions often take place in violation of constitutional and statutory rights, including prior notice and rehabilitation.[40] For example, the Housing and Land Rights Network documented that in only 24% of the incidents of forced eviction between 2018 and 2020 for which information was available, some form of rehabilitation was provided by the state.[41]

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[33] Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 SAJHR 127, 135.

[34] ibid 137.

[35] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another* [2016] ZAGPJHC 389 [10]–[15]; *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37 [1]; Emma Alimohammadi and Gustav Muller, 'The Illegal Eviction of Undocumented Foreigners from South Africa' (2019) 19 AHRLJ 793.

[36] Housing and Land Rights Network, 'Forced Evictions in India in 2020: A Grave Human Rights Crisis During the Pandemic' (2021) 3 <https://www.hlrn.org.in/documents/Forced_Evictions_2020.pdf> accessed 30 November 2021.

[37] Census Organisation of India, 'Census 2011' <https://www.census2011.co.in/slums.php> accessed 30 November 2021; Rukmini S, '65 Million People Live in Slums in India, Says Census Data' *The Hindu* (New Delhi, 1 October 2013) <https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/65-million-people-live-in-slums-in-india-says-census-data/article5188234.ece> accessed 30 November 2021.

[38] Housing and Land Rights Network, 'Forced Evictions in India in 2019: An Unrelenting National Crisis' (2020) 7 <https://www.hlrn.org.in/documents/Forced_Evictions_2019.pdf> accessed 30 November 2021.

[39] Housing and Land Rights Network (n 36) 4.

[40] Housing and Land Rights Network (n 38) 28.

[41] Housing and Land Rights Network (n 36) 39.

These evictions take place against the backdrop of intersecting axes of oppression, including the caste system, capitalism, and increasing religious discrimination and xenophobia under Hindutva, or Hindu nationalism.[42] Since India's independence in 1947, it is estimated that of those displaced across the country for ostensible 'development' projects, 40% are Adivasis, while 20% are Dalits.[43] In 2019, about 70% of families who faced forced evictions in Delhi comprised Scheduled Castes/Dalits and Other Backward Classes.[44] Loss of housing and displacement also results from violence and discrimination against oppressed groups. For example, in June 2019, 25 houses belonging to Dalit families were set on fire in Bihar by upper caste members of the community, leading to their displacement.[45] In October 2021, in Dhalpur, Assam, the state violently demolished an informal settlement of 25,000 residents belonging to the Bengali Muslim community. Homes were burnt, and protesting residents faced police violence.[46] This is in the backdrop of xenophobia against Bengali Muslims in Assam, and state efforts to identify Muslim 'illegal immigrants' from Bangladesh during an exercise where all residents of the state of Assam were required to prove their citizenship status.[47] Moreover, the 'ghettoization' of Muslims in Indian cities is widely

[42] Christophe Jaffrelot (ed), *Hindu Nationalism: A Reader* (Princeton University Press 2009).

[43] Housing and Land Rights Network (n 38) 46; 'Report of the Standing Committee on Rural Development' (Ministry of Rural Development, Department of Land Resources, Government of India 2011) <https://www.prsindia.org/sites/default/files/bill_files/SCR__Land_Acquisition%2C_Rehabilitation_and_Resettlement_Bill_2011.pdf> accessed 30 November 2021.

[44] Housing and Land Rights Network (n 38) 46. The Scheduled Castes are lower-caste communities oppressed under the caste system, and designated as such by notification under art 341 of the Constitution of India. Other Backward Classes ('OBC') are lower caste-communities, falling higher in the hierarchy of the caste system than Scheduled Castes, designated as OBC by the state based on caste, social and economic indicators of 'backwardness'. See, Report of the Backward Classes Commission, Government of India (1980); *Indra Sawhney v Union of India* AIR 1993 SC 477.

[45] ibid 47; 'Houses of 25 Dalits Set on Fire in Katihar Village' *Hindustan Times* (Patna, 11 June 2019) <https://www.hindustantimes.com/patna/houses-of-25-dalits-set-on-fire-in-katihar-village/story-oNkoVdmlCW9Pzi4eM0H9YN.html> accessed 30 November 2021.

[46] *Debabrata Saikia v The State of Assam and others* PIL 65/2021 (Gauhati High Court, 3 November 2021); Shaikh Azizur Rahman and Hannah Ellis-Petersen, '"Do We Not Have Any Rights?" Indian Muslims' Fear after Assam Evictions' *The Guardian* (18 October 2021) <https://www.theguardian.com/world/2021/oct/18/do-we-not-have-any-rights-indian-muslims-fear-after-assam-evictions> accessed 30 November 2021.

[47] Angana P Chatterji and others, 'Breaking Worlds: Religion, Law and Citizenship in Majoritarian India; The Story of Assam' [2021] University of California, Berkeley <https://escholarship.org/uc/item/6w56781n> accessed 16 December 2021.

acknowledged.[48] Research indicates that this segregation is a result of cycles of violence against Muslims motivating them to live together for safety, combined with the perpetuation of segregation by landowners and the real estate industry, because capitalist accumulation benefited from this segregation.[49]

In section 3, I explain the importance of participation rights in furthering freedom, dignity and equality of residents of informal settlements, given this context.

3 Participation rights embody substantive values

In this section, I argue that participation rights embody substantive values. I rely on the values of freedom, dignity and equality to ground participation rights.[50] I justify the reliance on these values in two ways. Firstly, I indicate in section 3.1 that in India and South Africa, it has been doctrinally established that these values underly rights, including the right to housing and participation rights. Secondly, I engage with other literature on participation rights, that also draws on these values to ground participation rights. This literature has relied on different conceptions[51] of freedom, dignity and equality to ground participation rights. In sections 3.2, 3.3 and 3.4, I explain the conception of each value that I adopt, while acknowledging the limitations of these conceptions. In section 3.5, I draw all three values together to indicate how these values relate to one another to ground participation rights. Throughout this section, I indicate how I use these values to develop the content of participation rights in chapters 3 and 4.

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[48] Ghazala Jamil, *Accumulation by Segregation: Muslim Localities in Delhi* (OUP 2017); Laurent Gayer and Christophe Jaffrelot (eds), *Muslims in Indian Cities: Trajectories of Marginalisation* (Hurst 2012); Raphael Susewind, 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 Environment and planning A: Economy and Space 1286.

[49] Jamil (n 48).

[50] Liebenberg (n 6) 625.

[51] Ronald Dworkin, *Law's Empire* (Hart 1998) 90. Dworkin discusses the difference and relationship between concept and conception.

3.1 Justifying the choice of values

Rights need not be derived from a single foundational value, be it freedom, dignity, equality, or something else.[52] For example, King, while justifying social and economic rights, argues that the values of dignity, autonomy, utility and deliberative democracy favour the recognition of these rights, while he personally prefers arguments based on well-being and autonomy.[53] Fredman finds that the 'main candidates' for relevant values include autonomy, dignity, and basic interests, as well as a synthesis of some of these, such as the capability theory developed by Sen and Nussbaum.[54] It is evident, then, that there are a multiplicity of views regarding what might be appropriate values to ground and develop the content of rights.[55] In this section, I justify why and how I pick these three values – human dignity, equality and freedom – over other possible values.

I rely on the result of a prior deliberative consensus on the choice of values underpinning rights in India and South Africa.[56] In India and South Africa, these three values have been recognised to define the constitutional order more generally, and to underpin rights. The preamble to the Indian Constitution refers to justice, liberty, equality, fraternity and dignity;[57] whereas the South African Constitution refers to the 'democratic values of human dignity, equality and freedom' as foundational values for the republic, and in the Bill of Rights.[58] The South African Constitutional Court has held that these values are 'conjoined, reciprocal and covalent', and

[52] For instance, Waldron argues, 'I have my doubts about the claim that rights derive from any single foundation, be it dignity, equality, autonomy, or (as it is now sometimes said) security.' Jeremy Waldron and Meir Dan-Cohen, *Dignity, Rank, and Rights* (OUP 2012) 18.

[53] Jeff King, *Judging Social Rights* (CUP 2012) 20–28.

[54] Fredman, *Comparative Human Rights Law* (n 4) 29.

[55] ibid.

[56] ibid 94.

[57] The Constitution of India 1950, preamble.

[58] The Constitution of South Africa 1996, s 7(1). See also, The Constitution of South Africa 1996, ss 1, 10, 36 and 39; Drucilla Cornell and Sam Fuller, 'Introduction' in Drucilla Cornell and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials*, vol 1 (Fordham University Press 2013) 19–20.

'foundational'.[59] In international human rights law, the values of dignity, equality and freedom have been recognised to underpin rights. For example, the preamble to the Universal Declaration of Human Rights refers to the values of human dignity, equality and freedom; whereas art 1 recognises that 'all human beings are born free and equal in dignity and rights'.[60] The preamble to the ICESCR recognises that rights 'derive from the inherent dignity of the human person', while also referring to the foundational values of equality and freedom.[61] South African courts are required to consider international human rights law while interpreting the Bill of Rights,[62] and Indian courts also rely on international law, using art 51 of the Indian Constitution as an interpretive tool to justify reliance on international human rights law as a deliberative resource.[63]

In its jurisprudence on the right to housing, the South African Constitutional Court has affirmed the importance of all three 'foundational values' as grounding the right. For example, in *Grootboom*, the Court observed,

> All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied to 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 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.[64]

[59] *S v Mamabolo* [2001] ZACC 17 [41] (Kriegler J).

[60] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), preamble, art 1 ('UDHR').

[61] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res 2200A (XXI), preamble ('ICESCR').

[62] The Constitution of South Africa 1996, s 39(1); this thesis chapter 1, methods and sources.

[63] Lavanya Rajamani, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016). See also, this thesis, chapter 1, section 3.

[64] *Grootboom* (n 23) [23].

Similarly, in India, the Supreme Court has referred to the values of freedom, dignity and equality in its jurisprudence on the right to housing and shelter. In *Chameli Singh*, while interpreting the right to life to include the right to shelter, the Supreme Court observed,

> Want of decent residence, therefore, frustrates the very object of the Constitutional animation of right to equality, economic justice, fundamental right to residence, dignity of person and right to live itself.[65]

While recognising participation rights as elements of the right to housing, courts in India and South Africa have referred to these values. In *Olga Tellis*,[66] the Indian Supreme Court recognised the intrinsic value of providing a notice and hearing to those impacted by decisions of public authorities, by relying on the values of human dignity and freedom. The Court held that a right to participate in decision-making recognised the dignity of those impacted by decisions, viewing them as 'a person rather than a thing', and helped preserve personal freedom by ensuring public accountability.[67] In *Olivia Road,* the South African Constitutional Court grounded the importance of meaningful engagement in terms of the 'need to treat human beings with the appropriate respect and care for their dignity'.[68] Similarly, in *Doctors for Life*, Justice Sachs emphasised that the right to be heard in public decision-making is of particular significance for members of groups that have been the victims of processes of historical silencing and who are socially, economically or politically disadvantaged, observing that, '[i]t is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance that they will be listened to.'[69]

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[65] *Chameli Singh v State of Uttar Pradesh* AIR 1996 SC 1051 ('*Chameli Singh*').

[66] *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545 ('*Olga Tellis*').

[67] Sanford H Kadish, 'Methodology and Criteria in Due Process Adjudication: A Survey and Criticism' (1957) 66 Yale LJ 319. Cited in *Olga Tellis* (n 66) [47].

[68] *Occupiers of 51 Olivia Road v City of Johannesburg* [2008] ZACC 1 [10]-[12] ('*Olivia Road*'); *Schubart Park Residents' Association v City Of Tshwane Metropolitan Municipality* [2012] ZACC 26 [46].

[69] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11 [234] (Sachs J); Liebenberg (n 6) 626.

To conclude, the values of freedom, dignity and equality have been recognised within the text of the Indian and South African constitutions, have been referred to by courts in grounding rights, and used as deliberative resources to interpret the meaning and develop the content of rights, including the right to housing and participation rights. It is therefore apt for this thesis to rely on these values to ground participation rights as an element of the right to housing in the eviction context.

There are different conceptions of each of these values, and it is therefore important to explain what conception I adopt, and how this shapes participation rights. For example, the meaning of dignity is 'hotly contested',[70] and when used by judges, a reliance on 'dignity' does not provide a basis for principled judicial reasoning, because judges can rely on different conceptions of dignity to shape rights.[71] In the remainder of this section, I set out the conception of freedom, dignity and equality that I adopt, clarify how these relate to one another, explore how these normatively ground participation rights, and indicate how these conceptions shape participation rights. Given that this thesis is not primarily concerned with developing conceptions of freedom, dignity and equality, I limit the discussion on values to the extent necessary for this thesis.

3.2 Freedom as capabilities

The importance of participation rights has been explained in terms of the value of freedom. For example, Waldron explains the importance of participation in legislative decision-making, in terms of the value of freedom. He describes participation as the 'right of rights', because this views members of a polity not only as rights-bearers, but respects their freedom as rights-thinkers who have their own conceptions about rights.[72] Similarly, it has been argued that participation rights in

[70] Fredman, *Comparative Human Rights Law* (n 4) 33.

[71] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655.

[72] Jeremy Waldron, *Law and Disagreement* (Clarendon 1999) 250.

administrative law recognises the freedom of rights holders to think for themselves about their rights, rather than treating them as 'passive, external objects of judgment.'[73] In this section, I adopt a conception of freedom as capabilities, to explain the importance of participation rights. I also indicate how this influences the content of participation rights.

Under Sen's capabilities approach, freedom is understood as the ability to do and be what one has reason to value. The emphasis is on one's actual ability rather than a theoretical possibility to do and be what we have reason to value.[74] Sen focuses on the end of doing and being, rather than on the goods to achieve the same, because he understands that given the diversity of human beings, and the multitude of circumstances in which we find ourselves, goods do different things to different people.[75] The value of the capabilities approach lies in its sensitivity to the lived realities of people, rather than simply presenting an abstract, a-contextual idea of freedom. This is important because,

> What people can positively achieve is influenced by economic opportunities, political liberties, social powers, and the enabling conditions of good health, basic education, and the encouragement and cultivation of initiatives.[76]

Under the capabilities approach, the states of being and doing are termed 'functioning', and the freedom to achieve those states is termed 'capabilities'.[77] For instance, 'being housed' is a functioning, and having the real opportunity to be housed is a capability. Voting, and other forms of participation rights, are human functioning of the doing variety, and the real ability to participate

[73] Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7, 26–28; Liebenberg (n 6) 627.

[74] Sen, *Development as Freedom* (n 1).

[75] Amartya Sen, 'Equality of What?' in S McMurrin (ed), *Tanner Lectures on Human Values*, vol 1 (CUP 1980).

[76] Sen, *Development as Freedom* (n 1) 5; Sandra Fredman, *Human Rights Transformed* (OUP 2008) 11.

[77] Sen, *Development as Freedom* (n 1) 5; Fredman, *Human Rights Transformed* (n 76) 11; Ingrid Robeyns, 'The Capability Approach' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016, 2016) <https://plato.stanford.edu/archives/win2016/entries/capability-approach/> accessed 30 November 2021.

is a human capability.[78] The capabilities approach requires the creation of capabilities rather than functioning, to allow people to choose whether to achieve the capabilities available to them, in line with what they have reason to value.[79] Under this approach, participation rights in the eviction context are justified as human capabilities of the doing variety. In chapter 4, I draw on the capabilities approach to argue that given intersecting inequalities faced by residents of informal settlements, positive measures are required prior and during participation to ensure residents are actually able to participate in decision-making around evictions.

Elsewhere, Sen has recognised both the opportunity and process aspects of freedom as capabilities.[80] He wrote,

> Freedom is valuable for at least two distinct reasons. First, more freedom gives us the opportunity to achieve those things that we value, and have reason to value. This aspect of freedom is concerned primarily with our ability to achieve. Second, the process through which things happen may also be of importance in assessing freedom. For example, it may be thought, reasonably enough, that the procedure of free decision by the person himself (no matter how successful the person is in getting what he would like to achieve) is an important requirement of freedom. There is, thus, an important distinction between the 'opportunity aspect' and the 'process aspect' of freedom.[81]

We can similarly explain the importance of participation rights in the eviction context using this approach. It is important not only to achieve access to adequate housing when faced with evictions (the opportunity aspect of access to adequate housing as a capability), but also important that

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[78] Although Sen is apprehensive about spelling out a 'canonical list of capabilities', he has mentioned both the ability to be well sheltered as well as the freedoms that are associated with enjoying political participation as capabilities. See, Jean Drèze and Amartya Sen, *India: Development and Participation* (OUP 2002) 38; Amartya Sen, 'Human Rights and Capabilities' (2005) 6 Journal of Human Development 151.

[79] Sen, *Development as Freedom* (n 1) 76; Amartya Sen, *Rationality and Freedom* (Harvard University Press 2002).

[80] Sen, *Development as Freedom* (n 1) 17.

[81] Sen, *Rationality and Freedom* (n 79) 585; Amartya Sen, *Inequality Reexamined* (OUP 1995) 57–58; Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315; Sen, 'Human Rights and Capabilities' (n 78).

people participate in decision-making around evictions, as a valuable aspect of their freedom (the process aspect).

Sen's discussion on the three values of freedom also helps explain the importance of participation rights in the eviction context. Firstly, freedom is intrinsically important, because it is something that we have reason to value in and of itself as a human capability.[82] Similarly, participation rights are intrinsically important, as something people have reason to value in and of themselves. For example, Tyler and Meares empirically demonstrate that 'people want a voice. The public wants [authorities] to allow people to express their views or tell their side of the story before determining policies or making decisions'.[83] Secondly, Sen argues, freedom is instrumentally important for our other freedoms – if people exercise freedom in 'making their own decision and running their own lives', it may be more likely that they are able to achieve the other things that they have reason to value.[84] For instance, Sen points out that famines occur only in dictatorships, where people lack political and civil rights and are unable to hold their governments accountable, whereas in democracies people can prevent the occurrence of drastic deprivation.[85] If access to adequate housing is something people have reason to value as a human capability, then participation in decision-making around evictions may enable the achievement of this capability. Thirdly, Sen contends that freedom is constructively important, in enabling us to decide what we have reason to value, and in selecting as well as weighing our capabilities over each other.[86] Similarly, through deliberations during the process of participation, people will be able to better understand what they value – whether they value being housed in their current place of residence

[82] Sen, *Development as Freedom* (n 1) 148.

[83] Tom R Tyler and Tracey L. Meares, 'Procedural Justice Policing' in Anthony A Braga and David Weisburd (eds), *Police Innovation: Contrasting Perspectives* (2nd edn, CUP 2019) 74.

[84] Sen, *Development as Freedom* (n 1) 148; David A Crocker and Ingrid Robeyns, 'Capability and Agency' in Christopher W Morris (ed), *The Philosophy of Amartya Sen* (CUP 2009) 83.

[85] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1983) 162; Sen, *Development as Freedom* (n 1) chs 6 and 7.

[86] Sen, *Development as Freedom* (n 1) 148; Crocker and Robeyns (n 84) 83.

or being housed elsewhere, and are hence willing to move elsewhere when faced with an eviction of their settlement.

The importance of participation rights is thereby explained in terms of the three values of freedom as capabilities. Freedom as capabilities also requires positive measures to ensure that residents are actually able to participate in decision-making around evictions, and do not simply have the theoretical opportunity to do so.

3.3 Dignity as inherent worth

The value of dignity as a foundation for participation rights is also well recognised.[87] For example, Laurence Tribe explains the normative importance of the right to be heard based on a Kantian notion of human dignity,[88] as treating humans as ends in themselves, because 'to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one' (emphasis in original).[89] Similar normative reasons explain the importance of participation rights in the eviction context. Respecting the inherent worth of residents of informal settlements, and treating them as persons rather than things, requires that they, at the very least, be able to participate in an eviction decision that affects a multitude of their rights, including housing and other interconnected rights.[90] It

[87] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the rule of law* (NYU Press 2011) 16; Jerry L Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 BULR 885; Denise Meyerson, 'The Inadequacy of Instrumentalist Theories of Procedural Justice' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (1st edn, Routledge 2020) 171–173; Emanuela Ceva, *Interactive Justice: A Proceduralist Approach to Value Conflict in Politics* (Routledge 2016) 76–77.

[88] Kant (n 2) 96.

[89] Laurence Tribe, *American Constitutional Law* (2nd edn, Foundation Press 1988) 666.

[90] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 6.

thereby recognises them not as 'mere receptacles of domination and development', but as 'active agents involved in struggle and resistance'.[91]

This idea of dignity is closely tied with the value of freedom. It emphasises respecting the freedom of people to take part in decisions that affect them.[92] Kant observed, 'autonomy then is the basis of the dignity of human and of every rational nature'.[93] Yet his emphasis on autonomy as connected with rationality has been criticised to be exclusionary, because it excludes those not capable of exercising such rationality, such as children,[94] or those portrayed as incapable of exercising such rationality, such as women.[95] In the participation rights context, this asks whether only those who possess the capability of exercising rationality, ought to have the right to participate in decision-making around evictions. It also questions whether appeals to emotions and imagination, as opposed to modes of critical argumentation implied by use of the term 'rationality', can be made while exercising participation rights.[96] Given the emotive context of evictions,[97] as well as the fact that residents facing intersecting oppressions may not have had access to formal education and training in use of modes of critical argumentation, participation ought not to emphasise 'rationality'. Armed with this insight, chapter 4 argues for an emphasis on giving reasons rather than on 'rationality' during the process of participation. Residents ought to be able to provide reasons, in their own language and manner of communication, to explain their preferences

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[91] Upendra Baxi, 'Introduction' in Upendra Baxi (ed), *Law and Poverty: Critical Essays* (NM Tripathi 1988).

[92] Fredman, *Comparative Human Rights Law* (n 4) 34.

[93] Kant (n 2) 96; Fredman, *Comparative Human Rights Law* (n 4) 34.

[94] A longer discussion on the participation rights of children and their 'autonomy' and capacity for 'rationality' is beyond the scope of this thesis. For such a discussion, see, Amy Mullin, 'Children, Autonomy, and Care' (2007) 38 Journal of Social Philosophy 536.

[95] Paul Formosa and Catriona Mackenzie, 'Nussbaum, Kant, and the Capabilities Approach to Dignity' (2014) 17 Ethical theory and moral practice 875, 879; Fredman, *Comparative Human Rights Law* (n 4) 37; Sandra Fredman, *Women and The Law* (Clarendon 1997) 8.

[96] Chantal Mouffe, 'Deliberative Democracy or Agonistic Pluralism?' (1999) 66 Social Research 745; Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996); Iris Marion Young, *Inclusion and Democracy* (OUP 2000) ch 1; John S Dryzek, *Deliberative Democracy and beyond: Liberals, Critics, Contestations* (OUP 2000) ch 3.

[97] See, Mattera (n 8).

regarding their housing. This allows space for appeal to emotions and stories during the process of participation.

In this section, I draw on Nussbaum's capabilities approach to ground participation rights. Like Kant, Nussbaum, too, links the values of freedom and dignity in her capabilities approach. Yet, she adopts a different conception of both freedom and dignity, to resolve objections to the Kantian approach.

Like Sen, Nussbaum focuses on the actual ability to do and be as one has reason to value.[98] Beyond that, she develops a list of central human capabilities, based on the value of human dignity. These capabilities are central to human life, and have intrinsic value in making life worthy of being human.[99] The list includes 'control over one's environment', including 'being able to participate in political choices that govern one's life'.[100] Drawing on Nussbaum's list, we can explain the normative significance of participation rights in the eviction context, as being able to control one's housing, and being able to participate in decision-making around evictions because that governs one's access to adequate housing.

Nussbaum's conception of dignity draws on Marx and Aristotle along with Kant. She draws on Kant to view humans as having intrinsic value, and to emphasise each person's capability.[101] She draws on Aristotle and Marx to emphasise that human beings need material support and cannot be what they are without it.[102] Thus, the aim is a society where 'each person is treated as worthy of regard', and also 'in which each has been put in a position to live really

[98] Nussbaum (n 1) 71.

[99] ibid 74.

[100] ibid 80.

[101] ibid 74.

[102] ibid 73; Fredman, *Comparative Human Rights Law* (n 4) 36.

humanly'.[103] In chapters 3 and 4, I draw on Nussbaum's capabilities approach to indicate that each resident ought to have the right to participate in decision-making around the eviction of their settlements, and also positive measures ought to be undertaken to ensure that each resident is able to participate.

When recognising housing as a right, Indian courts seem to draw on a similar notion of human dignity, recognising that to live really humanly requires material support. Thus, in *Chameli Singh* the Indian Supreme Court observed,

> In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter.[104]

The emphasis was on living truly humanly, and not simply fulfilling the 'animal' needs of humans.

Nussbaum's capabilities approach also focuses on the capacity to exercise practical reason. To be 'truly human', for Nussbaum, means living a life shaped by ourselves, through exercise of our freedom, rather than being passively herded like animals.[105] This explains the importance of participation rights, as enabling residents of informal settlements to shape their access to adequate housing, rather than being passively 'herded' from place to place through evictions. Nussbaum acknowledges that an emphasis on the capacity for practical reason may exclude human beings such as those in persistent vegetative states.[106] Given the broad view taken in this thesis regarding the capacity for practical reason, including through the use of stories, emotions and imagination, we can justify participation rights for a broad range of residents of informal settlements, including

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[103] ibid.

[104] *Chameli Singh* (n 65) [8].

[105] Nussbaum (n 1) 72.

[106] ibid 73; Fredman, *Comparative Human Rights Law* (n 4) 37; Formosa and Mackenzie (n 95) 879.

children and others able to provide reasons, albeit in their own language and manner of communication, to explain their preferences regarding their housing.[107] This justifies participation rights for everyone able to communicate their reasons for their preferences about housing, through any means of communication.

Nussbaum also emphasises sociability, recognising that a truly human life involves exercising freedom in reciprocity and affiliation with others.[108] Nussbaum considers affiliation to be a central human capability.[109] The emphasis on sociability views humans not as abstract, atomistic, isolated beings, but as socially embedded.[110] The approach values love and care.[111] At the same time, Nussbaum recognises that these very social relations are a source of unfreedom, or an obstacle to the exercise of other human capabilities.[112] Therefore, Nussbaum draws on the Kantian value of dignity to emphasise each person's capability within social relationships such as families. Similarly, in chapter 3, I argue that each resident of an informal settlement ought to have the right to participate in decision-making around evictions. This does not view residents as atomistic individuals, isolated from others. Rather, it recognises the intersectional oppressions within residents of informal settlements. At the same time, in chapters 3 and 4, I recognise the importance of deliberation among and between residents of informal settlements, so they can form their views regarding what ought to be done about their access to housing, in consideration of each other. Moreover, I consider it relevant for residents of informal settlements to draw on emotions, including valuing communities of love and care, while deliberating about their housing. Hence, residents can argue that they prefer to reside in their current location because it carries

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[107] Mullin (n 94).

[108] Nussbaum (n 1) 72.

[109] ibid 79.

[110] Fredman, *Women and The Law* (n 95) 15; Natalie Stoljar and Catriona Mackenzie, 'Introduction: Autonomy Reconfigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational autonomy: feminist perspectives on autonomy, agency, and the social self* (OUP 2000) 4.

[111] Nussbaum (n 1) 245.

[112] ibid; Fredman, *Women and The Law* (n 95) 36.

sentimental value for them, as a place where their ancestors lived, and as a place where they live in communities of love and care. Only rational, atomistic arguments need not be made during deliberations.

The emphasis on freedom to shape our lives also carries with it the problem of adaptive preferences. What people choose to value may itself be determined by their circumstances, by the information that they possess, and by the social, political and economic conditions in which they find themselves. As Nussbaum argues, 'these circumstances affect the inner lives of people, not just their external options: what they hope for, what they love, what they fear, as well as what they are able to do.'[113] For instance, part-time female workers often indicate a preference for marginal work, but this may be because of their social and economic circumstances within which they bear a disproportionate burden of childcare.[114] Similarly, Sunstein argues that what one values may be a reflection of one's initial legal and social endowments.[115] Thus, power and information, or the lack thereof, influences what we value.

The recognition of adaptive preferences indicates that we should dig deeper into what people value, and not accept this as given. At the same time, a commitment to freedom should make us wary of telling people what to value, by telling them that what they currently value is based on 'false consciousness'.[116] Sen's solution to this conundrum is to concentrate on what people have 'reason to value'. Not everything that people value may have 'reason' behind it. However, it is unclear what having 'reason to value' or not having reason to value might mean.[117]

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[113] Nussbaum (n 1) 31.

[114] Fredman, *Human Rights Transformed* (n 76) 14.

[115] CR Sunstein, 'Preferences and Politics' (1991) 20 Philosophy & Public Affairs 3, 7; Fredman, *Human Rights Transformed* (n 76) 14–15.

[116] Fredman, *Human Rights Transformed* (n 76) 15.

[117] ibid.

This is a largely under-theorised aspect of Sen's capabilities approach.[118] A better way forward lies in acknowledging that what we value is often determined by our circumstances, and in changing the availability of information and creating circumstances that enable people to perceive other things as within the realm of possibility for them to value.[119]

In the eviction context, residents participating in decision-making may be limited by their social, political and economic circumstances in the kind of housing they can imagine for themselves as 'adequate'. They may also be limited by the information they possess regarding their entitlements to housing, and factual possibilities available to them with regards to housing. Therefore, in chapter 4 I emphasise the need for information sharing prior to evictions. In chapter 5, I emphasise the role of courts in ensuring both that participation takes place after sharing of information, and that the decision arrived upon meets the substantive principles already recognised as part of people's right to housing, such as the need to meet requirements of 'adequacy'.

To conclude, participation rights can be grounded in the values of freedom as capabilities, and dignity as inherent worth of all humans. While freedom as capabilities emphasises the need for people to participate in decisions that govern their lives, including their access to adequate housing, dignity as inherent worth emphasises the need to respect each resident's capabilities, and to ensure that residents are actually able to access these capabilities to live 'really humanly'.

This approach also connects participation rights with the right to access adequate housing. To live 'really humanly', people require access to adequate housing. At the same time, to respect their freedom, rather than to treat them as animals herded from place to place, residents ought to have the right to participate in deciding what is 'adequate' for them regarding their housing, and

[118] Robeyns (n 77). Robeyns argues that, 'little work has been done so far to flesh out this embryonic idea of 'having reason to value'.'

[119] Fredman, *Human Rights Transformed* (n 76) 15.

to participate in decisions that enables access to adequate housing. To ensure that participation is real, in light of the social, economic and political circumstances of residents, positive obligations become necessary, such as sharing of relevant information. In chapters 3 and 4, I draw on these conceptions of freedom and dignity to determine the shape of participation rights in the eviction context.

3.4 Substantive equality

In this section, I ground participation rights in the value of substantive equality, adopting Fredman's multidimensional approach to substantive equality.

Participation rights have been justified in terms of the value of equality, where equality is seen as requiring equal concern and respect. For example, Liebenberg argues that participation rights promote self-respect and worth as communal beings.[120] Dworkin argues that procedural rights, including the right to participate in adjudication, embody the value of equal concern and respect.[121] Stewart draws on Dworkin's emphasis on equal concern and respect to ground participation rights in litigation. He argues for the recognition of participation rights for everyone because of the need to treat persons as persons. As persons deserving of equal concern and respect, people must have the right to participate in decisions that affect them.[122]

Yet, equality should not be envisaged in terms of equal respect and concern, because firstly, this misses other dimensions of equality; and secondly, the recognition dimension ought to be envisaged differently. I explain both these arguments below.

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[120] Liebenberg (n 6).

[121] Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) 87–89; Hamish Stewart, 'Concern and Respect in Procedural Law' in Wil Waluchow and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (OUP 2016) 380; Robert G Bone, 'Procedure, Participation, Rights' (2010) 90 BULR 1011, 1019.

[122] Stewart (n 121) 384.

Fredman has proposed a multidimensional approach to equality,

> to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate difference and achieve structural change.[123]

The redressing disadvantage dimension draws attention to the asymmetric nature of substantive equality that is directed at those that face disadvantage.[124] It also draws attention to both socio-economic disadvantages, as well as disadvantages regarding power structures – structures of domination that exclude people from participating in determining their actions.[125]

The recognition dimension focuses on redressing stigma, stereotyping, prejudice and violence directed at disadvantaged groups. At the same time, it is motivated by concern for each person's humanity, or intrinsic worth as human beings.[126] Hence, both the individual and the group matter. Stigma, stereotyping, prejudice and violence directed against disadvantaged groups results from the failure to value humans as humans. While thereby related to the equal concern and respect conception of equality, the recognition dimension is somewhat different from the same. It does not view individuals as isolated beings; rather it recognises that people's sense of self and worth is constructed socially.[127] It places central importance on interpersonal affirmation of people's sense of self and worth, determined by how we recognise others, and others recognise us.[128] Moreover,

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[123] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712, 713.

[124] ibid 729.

[125] Young, *Justice and the Politics of Difference* (n 9) 31; Fredman, 'Substantive Equality Revisited' (n 123) 729.

[126] Fredman, 'Substantive Equality Revisited' (n 123) 730.

[127] Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003); Fredman, 'Substantive Equality Revisited' (n 123) 730–731.

[128] Fraser and Honneth (n 127); Fredman, 'Substantive Equality Revisited' (n 123) 730–731.

substantive equality cannot be collapsed into the recognition dimension;[129] rather all dimensions interact with, and buttress each other.[130]

The participation dimension of substantive equality draws attention to the importance of participation in collective decision-making.[131] The participation dimension also draws attention to the importance of community in the life of individuals, and on the need for 'social inclusion' – that individuals ought to be able to participate on equal terms in the life of the community.[132]

The fourth dimension highlights gender, race, caste, disability and other characteristics as important aspects of peoples' lives, and focuses on the need to respect and accommodate differences related to these characteristics, while bringing about transformation or structural change to remove the detriment attached to these differences.[133] It recognises that structures of oppression and domination, such as patriarchy, apartheid, and the caste system, cause the detriment related to differences in gender, race and caste, and combatting inequality requires changing or transforming these structures.[134] This incorporates concerns regarding intersectionality. Gender, race, caste, disability and other characteristics are not mutually exclusive, rather people lie at their intersections, as being Black/Dalit and women, and disabled, etc. A single-axis framework ignores the experience of peoples who lie at these intersections.[135] It is therefore important to pay attention to the intersection of these categories, while accommodating

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[129] Catherine Albertyn and Sandra Fredman, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments Part III: Reflections on Themes in Justice Langa's Judgments' [2015] Acta Juridica 430.

[130] Fredman, 'Substantive Equality Revisited' (n 123) 713.

[131] ibid 731.

[132] ibid 732.

[133] ibid 733.

[134] ibid.

[135] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U Chi Legal F 139; Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

differences and bringing about structural change. Overall, substantive equality consists of all these dimensions seen together, in interaction with one another.[136]

In this section, I draw on Fredman's approach to substantive equality to ground participation rights. Firstly, voice and participation is itself seen as a dimension of equality. Under Fredman's conception of equality, then, participation in decision-making around evictions is normatively justified as an important aspect of equality.

Secondly, Fredman's approach to equality emphasises the interaction between the different dimensions.[137] By drawing the participation and disadvantage dimensions together, the normative importance of participation rights is explained. We ought to redress disadvantage while enhancing voice and participation to ensure substantive equality, because both these dimensions of equality matter equally. Moreover, voice and participation are an important means to redress disadvantage. Ensuring that people's perspectives are included while designing measures to redress their disadvantage, enables those measures to be tailored to their needs. Disadvantage can be viewed in terms of capabilities,[138] and access to adequate housing is a human capability.[139] Voice and participation in decision-making around evictions ensures that the perspectives of residents of informal settlements are included when determining access to adequate housing for residents. It thereby redresses disadvantage in terms of the capability of access to adequate housing while enhancing voice and participation of the disadvantaged. In chapter 5, I argue that what amounts to 'adequate housing' ought to be developed through the process of participation. Residents are

[136] Fredman, 'Substantive Equality Revisited' (n 123); Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441.

[137] Fredman, 'Substantive Equality Revisited' (n 123) 734.

[138] ibid 729–730.

[139] Sen, 'Equality of What?' (n 75); Drèze and Sen (n 78) 38; Sen, 'Human Rights and Capabilities' (n 78).

best placed to explain their needs from their housing, and hearing their perspectives helps to ensure access to housing that is adequate for their needs.

Another way of looking at the relationship between the participation and redressing disadvantage dimensions of equality, is to view lack of voice and participation as an aspect of disadvantage. Young, for example, argues that disadvantage should be viewed not in material terms, but in terms of domination – as excluding people from participating in determining their actions.[140] Lack of voice and participation is itself a disadvantage, and redressing disadvantage requires recognition of voice and participation. Thus, by drawing the participation and redressing disadvantage dimensions together, the normative importance of participation rights is explained under Fredman's approach to substantive equality. Moreover, the interaction between participation and disadvantage also suggests that the most disadvantaged should be given a voice, especially those facing intersectional disadvantage, so that it is not only the relatively more powerful or articulate that speak 'for' the community during the process of participation.

Thirdly, the normative importance of participation rights is explained by drawing on linkages between the recognition and participation dimensions. Lack of voice and participation carries with it ideas of stigma and stereotype. For example, when residents of informal settlements are considered incapable of making decisions about their other rights, such as their access to housing, this carries ideas of stigma and stereotype. Ensuring substantive equality requires enhancing voice and participation, and through that, combatting stigma and stereotyping of poor, Black, Dalit residents of informal settlements. When residents are given the right to participate in

[140] Young, *Justice and the Politics of Difference* (n 9) 31; Fredman, 'Substantive Equality Revisited' (n 123) 729.

decision-making, this enhances the social basis of self-worth and self-respect, because the state views residents as worthy of contributing to decisions that impact their lives.[141]

Misrecognition can also be seen in terms of lack of voice and participation. Fraser, for example, argues that misrecognition should be seen in terms of social subordination, as being prevented from participating in social life as a peer.[142] Combatting misrecognition under this approach, requires 'establishing the misrecognised party as a full member of society, capable of participating on par with the rest.'[143] Under this conception of misrecognition, participation rights for residents of informal settlements are justified as a way of combatting social subordination. By participating in decision making, residents are recognised as full members of society.

Finally, drawing all dimensions together explains the normative significance of participation rights in terms of substantive equality. The means used for redressing disadvantage can themselves lead to misrecognition through stigmatising and stereotyping disadvantaged groups. For example, in *Dladla*,[144] residents facing evictions from an inner city building were provided temporary accommodation, with rules to discourage 'dependency' on the state so that residents would 'take responsibility for their own lives'.[145] A lock-out rule kept residents out of the shelter during the day, to encourage them to be engaged in employment.[146] This rule was based on stereotyped views of impoverished Black residents as lazy and dependent, requiring a push to be productive members of society. Residents challenged these rules, explaining how some of them were employed in night shifts, and thus not 'dependent', and required shelter to sleep during the

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[141] Catriona Mackenzie, 'Procedural Justice, Relational Equality, and Self-Respect' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (1st edn, Routledge 2020) 207–208.

[142] Nancy Fraser, 'Rethinking Recognition' (2000) 3 NLR 107, 113.

[143] ibid.

[144] *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42 ('*Dladla*').

[145] ibid [6].

[146] ibid [10].

day so they could work at night.[147] The rules also failed to respect the residents as humans who can manage their own affairs, rather than as children or animals that 'have to be shepherded to and fro'.[148] Voice and participation in designing rules around access to housing was an important means to combat these recognition harms while redressing disadvantage in terms of ensuring access to adequate housing. If residents were involved in decision-making while determining these rules, they would be able to gain access to housing that met their needs, while combatting stereotyped views about themselves. A multi-dimensional view of substantive equality thereby explains the importance of participation rights in decision-making around access to housing in the eviction context.

A substantive approach to equality has important implications for the shape of participation rights. It calls attention to differences, including intersectional experiences of inequality within residents of informal settlements. It emphasises participation rights for all residents, including those facing intersectional inequality. Moreover, it requires positive measures to ensure the participation of all residents, especially those facing intersectional discrimination.

3.5 The interaction between freedom, dignity and equality

In the sections above, I have grounded participation rights in the values of freedom as capabilities, dignity as intrinsic worth and the material basis to live truly humanly, and a multidimensional view of substantive equality. In this section, I explain how these values interact with each other to ground participation rights. I also indicate how these values together shape the content of participation rights.

[147] ibid [13].

[148] ibid [48].

Nussbaum's capabilities approach brings together the values of freedom as capabilities, and dignity as inherent worth combined with the material basis to live truly humanly. She relies on the value of dignity to list central human capabilities necessary to live truly human lives.[149] Under her approach, housing ought to be viewed as a central human capability, necessary to live a truly human life. Participation in decision-making about housing is also a central human capability, so that people are treated as humans capable of exercising practical reason to govern their own lives, including their housing, rather than animals herded from place to place. Together, these values gesture towards the importance of positive obligations to ensure that people are actually able to participate in decision-making, given their social, economic and political circumstances. The approach also highlights the importance of each resident having the right to participate, to value each person's dignity as inherent worth.

The conceptions of freedom and substantive equality adopted in this thesis are 'intertwined in a substantive sense'.[150] Firstly, the capabilities approach and Fredman's multidimensional approach to substantive equality highlight the importance of the context of people's lives, including structures and systems of domination such as patriarchy, apartheid, the caste system and capitalism, that create and reproduce inequality and unfreedom.[151] Secondly, the redressing disadvantage dimension of substantive equality can be seen in terms of capabilities.[152] This includes disadvantage in access to adequate housing, as well as disadvantage in participating in decision-making around housing. Thus, ensuring freedom as capabilities overlaps with the 'redressing disadvantage' dimension of substantive equality. Thirdly, both approaches highlight the importance of voice and participation, as an important human capability, and as a dimension of substantive equality. Together, both approaches highlight the need for positive obligations to

[149] Nussbaum (n 1) 74.

[150] Albertyn (n 136) 467.

[151] ibid 465–467.

[152] Fredman, 'Substantive Equality Revisited' (n 123) 729–730.

ensure that people are actually able to participate in decision-making given their context and circumstances, including intersecting axes of domination.

The recognition dimension of substantive equality is also closely connected with the value of dignity. It adopts the Kantian notion that each person has intrinsic value. Misrecognition in the form of stigma, stereotyping, prejudice and violence on the basis of characteristics such as gender, race, caste, sexuality, etcetera, denies this intrinsic worth.[153] The recognition dimension goes beyond Kant in highlighting the social basis of worth, rather than viewing people as atomistic, isolated beings.[154] Together, these notions highlight both the importance of each person as an end, as well as the importance of community in people's lives. When used to ground participation rights, these values emphasise the right for each person to participate in decision-making, as well as to recognise that people are social beings, who make decisions after taking into account their relationships of care and love. While deciding whether an eviction should take place, each resident ought to have the right to participate, and residents of informal settlements ought to be able to take into account their social relations in the decision-making process.

In chapters 3 and 4, I use these values together to develop the content of participation rights, including who ought to participate, who ought to bear duties to participate, how the process of participation ought to take place, and the need for positive measures.

[153] ibid 730.

[154] Fraser and Honneth (n 127); Fredman, 'Substantive Equality Revisited' (n 123) 730–731.

4 Instrumental importance of participation rights

Besides the intrinsic value of participation rights, these are also important for instrumental reasons.[155] It has been argued that participation results in better-informed decision-making.[156] The literature on democratic experimentalism highlights the importance of participation of rights holders in decision-making as a means to pool relevant information together, and to thereby ensure more effective collective problem-solving.[157] This is important because local contexts may require specific solutions.[158] The traditional institutions of representative democracy favour uniform solutions rather than locally specific ones, and do not take into account the impact of policies on differently situated stakeholders.[159] At the same time, localised problem-solving, when undertaken in isolation, may ignore the full range of solutions available. Democratic experimentalism, then, favours local problem-solving that takes into account the successes and failures of problem-solving efforts in similar locales, thereby pooling in other relevant information.[160] Overall, such decision-making is expected to ensure more effective problem-solving.[161]

When applied to the eviction context, participation rights can be expected to play a similar role, although empirical research is required to conclusively demonstrate this. Residents of informal settlements are best placed to understand their particularised needs from housing, such as the location of housing for access to employment opportunities. For example, in *Olga Tellis,* residents were able to convey to the Indian Supreme Court that location of housing was key for

[155] Liebenberg (n 6) 628.

[156] Lon L Fuller and Kenneth I Winston, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 364.

[157] Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267, 288–289.

[158] ibid 287–288.

[159] Liebenberg (n 6) 630; Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313, 323.

[160] Cohen and Sabel (n 159) 325; Dorf and Sabel (n 157) 277–278.

[161] Cohen and Sabel (n 159) 333.

access to employment. This explained why the demolition of informal settlements by the state would only result in the formation of new settlements. The Supreme Court observed,

> It is like a game of hide and seek. The Corporation removes the ramshackle shelters on the pavements with the aid of police, the pavement dwellers flee to less conspicuous pavements in by-lanes and, when the officials are gone, they return to their old habitats. Their main attachment to those places is the nearness thereof to their place of work.[162]

With this insight, the Supreme Court recognised the connection between the rights to livelihood and housing.[163] Similarly, in *Dladla,* residents were able to convey to the South African Constitutional Court that many of them were employed in night shifts, and so rules that kept them locked out of their accommodation during the day hampered their ability to access their particular sources of employment.[164] Residents are best placed to explain their precise housing needs, which they ought to have the right to convey during the process of participation around evictions, to ensure more effective solutions regarding access to adequate housing.

5 Conclusion

In this chapter, I rely on the values of freedom, dignity and equality to ground participation rights. I engage in this normative reflection adopting a critical theoretical perspective, sharing the commitment with other critical theorists that, 'the normative ideals used to criticise a society are rooted in the experiences of and reflection on that very society, and that norms can come from nowhere else.'[165] I therefore adopt conceptions of freedom, dignity and equality that take into account context, and explain why participation rights are important given the historical and social context of forced evictions in India and South Africa. Through a discussion on the substantive

[162] *Olga Tellis* (n 66) [6]; 66

[163] ibid [32].

[164] *Dladla* (n 144) [13].

[165] Young, *Justice and the Politics of Difference* (n 9) 5.

values underlying participation rights, I indicate that these rights should not be viewed only in 'procedural' terms, because these embody substantive values. In the next two chapters, I rely on these values to develop the content of participation rights in the eviction context in India and South Africa.

CHAPTER 3: RIGHTS HOLDERS AND DUTY BEARERS

1 Introduction

Chapter 1 establishes that courts in India and South Africa have recognised participation rights in the form of meaningful engagement in South Africa,[1] and notice and hearing[2] and meaningful engagement[3] in India. Chapter 2 establishes the normative importance of participation rights, given the context of evictions in India and South Africa. However, calls for participation ought to be the starting point, rather than the end point of discussion.[4] Subsequently, we must interrogate the content of participation rights. For example, in South Africa, the potential for meaningful engagement to enable people to secure their right to housing, is recognised. However, it is acknowledged that for this to succeed, there is need for clarity regarding the content of meaningful engagement.[5] In its current form, it is inadequate and unclear, and relies too heavily on oppressed people to be well organised, properly resourced and properly informed, to tap into its potential.[6] Moreover, there is danger that meaningful engagement could become a purely procedural box to tick, taking away its radical potential.[7] Chapters 3 and 4 together take up the challenge of bringing greater clarity to the content of participation rights.

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[1] *Occupiers Of 51 Olivia Road, Berea Township And 197 Main Street Johannesburg v City of Johannesburg And Others* [2008] ZACC 1 ('*Olivia Road*').

[2] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 [45] ('*Olga Tellis*').

[3] *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 (Delhi High Court) ('*Sudama Singh*').

[4] Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 OJLS 33, 58.

[5] Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107; Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016); Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 281.

[6] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014).

[7] Kate Tissington, 'A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice' (SERI) <http://www.seri-sa.org/index.php/research-7/resource-guides> accessed 30 September 2018; <http://abahlali.org/node/5538/> accessed 1 February 2021.

This chapter explores the following issues: (1) who should have the right to participate in decisions around evictions, and (2) who should bear duties with respect to participation rights. It places at the forefront of the exercise of developing the content of participation rights, the people who are impacted by eviction decisions – residents of informal settlements. In chapters 1 and 2, I envisage participation rights as enabling these residents to define the contextual content of their right to access to adequate housing through participating in decision-making around evictions, and in that process, furthering their substantive equality, freedom and dignity. Therefore, the exercise of developing the content of participation rights ought to begin from these very people.

Section 2 lays out the dilemmas that we need to think through when engaging with the issue regarding who ought to participate in eviction decisions. It argues that each resident ought to have the right to participate, and that there ought to be a collective dimension to participation. To establish this, I draw on the values discussed in chapter 2, explaining the implications of the choice of possible units of participation for the freedom, equality and dignity of residents. Section 3 evaluates law and jurisprudence in India and South Africa, and under the ICESCR, against these principles. It finds that the international, constitutional and statutory texts and related jurisprudence do not sufficiently engage with these dilemmas and principles, and when they do, they fall short.

Informal settlements in India and South Africa are built on both public and private land. Both kinds of evictions – private and public – carry serious consequences for residents of informal settlements. Hence it is important to explore the issue regarding who ought to bear duties with respect to participation. In section 4, I find that vertical obligations have been recognised in India and South Africa. I thereafter argue that we ought to recognise horizontal obligations corresponding to participation rights.

Overall, this chapter relies on the values discussed in chapter 2 to engage with issues regarding rights holders and duty bearers in relation to participation rights in the eviction context. Chapter 4 engages with how the process of participation ought to take place, arguing that it should be a bounded deliberative process, with the fulfilment of positive measures to facilitate the participation of all residents facing intersecting inequalities.

2 Rights holders: principles and dilemmas

In this section, I explore possible units of participation, and the implications that each unit holds for the values of substantive equality, freedom as capabilities, and dignity. I explore whether participation should take place at the level of each resident of an informal settlement, collectively with all residents as a group, or at the level of sub-groups, such as households. If participation is to take place collectively, I explore who ought to give voice to the group. I explore whether participation ought to take place through representatives, and if so, how representatives ought to be selected. I also explore the role that other bodies ought to play in this context, especially non-governmental organisations ('NGOs') and civil society organisations, and representatives elected through elections at the local, state or national levels.

The purpose of this section is to engage with the principles and dilemmas surrounding the issue of who ought to participate, and not to lay down detailed rules for the same. Principles, according to Alexy, are optimisation requirements, 'norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.'[8] Rules, on the other hand, 'are norms which are always either fulfilled or not'. These are 'fixed points in the field of the

[8] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 47.

factually and legally possible'.[9] In section 3, I rely on these principles to evaluate legislative and judicial choices regarding units of participation.

I argue that the values of substantive equality, freedom and dignity require that each resident has the right to take part in the decision-making exercise, and that there be an element of collective decision-making. These requirements – a right for each individual and the requirement of collective decision-making – seemingly pull in opposite directions. One way of reconciling these is to ensure that the collective dimension amplifies and empowers individual voices, and that each resident continues to have an individual right to participate. I indicate in section 3.1 that in the context of the Maharashtra Slum Act, there is recognition of an individual right to participation, as well as a collective dimension to the process of participation. Additionally, I argue that intersectional concerns should be considered while designing the process of participation, so that the voices of those facing intersectional inequalities are not drowned out by those relatively more powerful. Moreover, residents ought to have a right rather than an obligation to participate.

2.1 Participation rights for each resident

The values of dignity, freedom and substantive equality together require that each individual resident should have the right to participate in decision-making around evictions.

Each resident of an informal settlement has a claim to being treated as a human being, and to have their intrinsic worth recognised.[10] Hence, each resident of an informal settlement must be able to participate in decision-making around evictions. If some residents are given the right to

[9] ibid 48.

[10] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, 2nd edn, CUP 2012) 96; Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655; Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000) 74.

participate in the decision-making process, but not others, then the dignity of those excluded from participation, is denied.

The same result flows from the value of freedom as capabilities. Sen's capabilities approach places emphasis on the actual ability of people to do and be as they have reason to value.[11] A forced eviction denies people's ability to do and be as they have reason to value. People have reason to value their homes, and the choice of where they reside and settle, and a forced eviction denies them the ability to live in these homes at their chosen location. A forced eviction involves a loss of control over an important aspect of people's lives – where we live. It also often has an impact on other aspects of people's lives – where they work, where they go to school, their social relationships with other members of the informal settlement. It disrupts people's lives without giving them an opportunity to be a part of the decision-making process. It therefore denies their freedom to do and be as they have reason to value. Participation rights enable people to re-claim their freedom by being able to take part in decisions around their housing – whether they continue to reside in their homes through the rejection of an eviction decision, or whether they move someplace else. It furthers their ability to do and be as they have reason to value by participating in decisions around where they move, and the details of the alternate housing provided to them.

All residents of an informal settlement must be able to re-claim their freedom through participating in decision-making around evictions. Hence, each resident of the settlement must have the right to participate in decision-making around evictions, so each of them is able to do and be as they have reason to value. Within the informal settlement, different people may value different things – some may want to continue to reside in their homes, others may be more willing to move. Even when some are willing to move, they may have different requirements for alternate

[11] Amartya Sen, *Development as Freedom* (OUP 1999) 76.

accommodation. Respecting each of their freedom as capabilities requires, therefore, that each of them have the right to participate in these kinds of decisions.

Nussbaum's capabilities approach brings together the values of freedom as capabilities and dignity. She argues that the requirement of treating people as people, rather than animals, requires respect for their ability to exercise practical reason, to exercise 'control over one's environment', including 'being able to participate in political choices that govern one's life'.[12] She treats these as central human capabilities, necessitated by the requirement to respect the intrinsic worth of all humans as humans.[13] Using her conception of dignity linked with freedom as capabilities, we arrive at the need for each resident to have the right to participate in decision-making around evictions, to respect the intrinsic worth and capabilities of each resident.

The value of substantive equality similarly points to the need for an equal right to participation for each resident. There are important differences within residents of informal settlements, on grounds of race, caste, gender and other characteristics.[14] As I indicate in the following paragraphs, residents of informal settlements in India and South Africa lack access to adequate housing, are poor, and in South Africa, overwhelmingly Black. Moreover, residents face intersecting inequalities on grounds of caste, gender, disability, religion, age, etcetera. Substantive equality,[15] and the insights from intersectionality,[16] require that each of these residents have an equal right to participate in decision-making around evictions.

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[12] Nussbaum (n 10) 80.

[13] ibid 74.

[14] See also, Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 CCR 165, 175.

[15] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712.

[16] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U Chi Legal F 139; Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241.

In South Africa, given the context of apartheid and colonialism, it is unsurprising that residents of informal settlements and inner-city buildings in South Africa are poor and overwhelmingly Black, and, moreover, African.[17] For example, the 2011 census revealed that of the 1,249,775 households in South Africa who lived in 'informal dwellings',[18] 1,197,844 were headed by Africans, another 41,400 were headed by coloured people, and only 3,333 were headed by white people.[19] Another study found that residents of informal settlements were predominantly poor, African (87.6%), female (53.1%) and young (69.4% below 35 years).[20] This led the study to conclude that while South Africa is characterised by various forms of inequalities, these are magnified in informal settlements.

Research on specific informal settlements also reveals the intersectionality that exists within residents, including on grounds of gender, disability,[21] and age. Research on the ways in which residents of Marikana informal settlement in Western Cape negotiated access to housing within the settlement revealed that different social groups could gain access to varying degrees of

[17] Josh Budlender and Lauren Royston, 'Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas' (2016) 5 <http://www.seri-sa.org/images/images/SERI_Edged_out_report_Final_high_res.pdf> accessed 30 November 2021; Geci Karuri-Sebina, '2016 State of South African Cities Report' (SACN 2016) <http://www.socr.co.za/wp-content/uploads/2016/06/SoCR16-Main-Report-online.pdf> accessed 1 February 2021; Alhassan Ziblim, 'The Dynamics of Informal Settlements Upgrading in South Africa: Legislative and Policy Context, Problems, Tensions, and Contradictions' (Habitat for Humanity International 2013) <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/143/slum-upgrading-policies-south-africa.pdf> accessed 1 February 2021; Paul Maylam, 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 African Affairs 57; Liza Rose Cirolia, 'South Africa's Emergency Housing Programme: A Prism of Urban Contest' (2014) 31 Development Southern Africa 397, 409.

[18] Statistics South Africa defines 'informal dwellings' as 'shacks, not in the backyard of houses, e.g. shacks in an informal/squatter settlement or on a farm'. Statistics South Africa, 'Census 2011' (2012) 65 <https://www.statssa.gov.za/publications/P03014/P030142011.pdf> accessed 30 November 2021.

[19] ibid.

[20] Catherine Ndinda and others, 'A Baseline Assessment for Future Impact Evaluation of Informal Settlements Targeted for Upgrading' (Department of Human Settlements and Department of Monitoring and Evaluation, Government of South Africa 2016) ix.

[21] Kelebogile Khunou, Alana Potter and Barbara Schreiner, 'Women with Disabilities and Informal Settlement Sanitation: Implications for Policy and Practice' (SERI 2019) <https://www.seri-sa.org/images/SERI_The_struggle_to_be_ordinary_FINAL_WEB_Spreads.pdf> accessed 20 December 2021.

security of tenure based on their relative vulnerability within the settlement.[22] Similarly, research on the Siyanda informal settlement in KwaZulu Natal revealed that access to security of tenure within the settlement depended on social relations. Yet, the ability to call on social relations varied along age and gender lines. A young, female resident struggled more than some of the older men in the settlement to gain access to secure housing within the settlement.[23] Similarly, research on the Ratanang informal settlement in the North-West province revealed the experience of gender inequality faced by women living in the settlement.[24]

The case law of the Constitutional Court similarly reveals that residents of informal settlements and inner-city buildings in South Africa are not a homogeneous group, but face intersecting inequalities, highlighting the need for an equal right to participation for all residents. Here, I am not using the case law to analyse the reasoning of the Constitutional Court. Rather, I use the facts in the cases to call attention to the intersectionality within residents. For example, in *Blue Moonlight* the Constitutional Court recognized that the residents were poor migrants, employed in the informal sector. Within this group, there were children, children with disabilities, pensioners, and women headed households.[25] In *Occupiers of Erven 87 & 88 Berea* the Constitutional Court noticed that all residents were either low-income earners or unemployed, and these included women and children.[26]

[22] Lauren Royston and others, 'Here to Stay: A Synthesis of Findings and Implications from Ratanang, Marikana and Siyanda' (SERI 2019) 25 <https://www.seri-sa.org/images/SERI_Synthesis_FINAL_WEB_READY.pdf> accessed 1 February 2021.

[23] ibid 26.

[24] ibid 71.

[25] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33 [6] ('*Blue Moonlight*').

[26] *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet NO* [2017] ZACC 18 [3] ('*Occupiers of erven 87 & 88 Berea*').

Similar patterns can be seen in India, where residents of informal settlements are poor, and face intersecting inequalities on grounds including caste, religion, gender,[27] and disability. Muslims, Scheduled Castes/Dalits, Scheduled Tribes and Other Backward Classes are overrepresented among residents of informal settlements.[28] Approximately one in every three Dalit living in urban areas resides in informal settlements; and one in every five residents of an informal settlement in urban India is Dalit.[29]

Studies on urban India also indicate that cities are highly segregated on grounds of caste,[30] and religion.[31] This is confirmed in qualitative studies on eviction of informal settlements. For

[27] Kalyani Menon-Sen, '"Better to Have Died than to Live like This": Women and Evictions in Delhi' (2006) 41 EPW 1969; Varsha Ayyar, 'Caste and Gender in a Mumbai Resettlement Site' (2013) 48 EPW 44.

[28] Census Organisation of India, 'Census 2011' <https://www.census2011.co.in/slums.php> accessed 30 November 2021; Government of India, Ministry of Housing and Urban Poverty Alleviation, National Buildings Organisation, 'Slums in India: A Statistical Compendium 2015' (2015) 29 <http://nbo.nic.in/pdf/SLUMS_IN_INDIA_Slum_Compendium_2015_English.pdf> accessed 1 February 2021; Emily Rains, Anirudh Krishna and Erik Wibbels, 'Urbanization and India's Slum Continuum: Evidence on the Range of Policy Needs and Scope of Mobility' [2018] International Growth Centre 15 <https://www.theigc.org/wp-content/uploads/2018/02/Rains-et-al_Working-paper_cover.pdf> accessed 1 February 2021; Abhijit Banerjee, Rohini Pande and Michael Walton, 'Delhi's Slum-Dwellers: Deprivation, Preferences and Political Engagement among the Urban Poor' [2012] International Growth Centre 11 <https://www.theigc.org/wp-content/uploads/2014/10/Banerjee-Et-Al-2012-Working-Paper.pdf> accessed 1 February 2021.

[29] GR Konda, 'Slum Numbers Show Cities Don't Help Dalits Shed Caste' *The Indian Express* (29 November 2020) <https://indianexpress.com/article/opinion/columns/slum-numbers-show-cities-dont-help-dalits-shed-caste-7072206/> accessed 1 February 2021; Tarangini Sriraman, 'Enumeration as Pedagogic Process: Gendered Encounters with Identity Documents in Delhi's Urban Poor Spaces' [2013] SAMAJ <http://journals.openedition.org/samaj/3655> accessed 18 December 2021. Sriraman notes in her study on the Govindpuri slum cluster in Delhi, 'The ethnic, religious, caste and linguistic composition of the residents in the three camps is diverse. In the estimate of a local pradhan (unelected slum leader), 60% of the total families in the cluster come from lower-caste and backward class communities like Chamars, Bhangis, Valmikis, Jatavs, Kahars and Namasudras.'

[30] Sriti Ganguly, 'Socio-Spatial Stigma and Segregation: A Balmiki Colony in Central Delhi' (2018) 53 EPW 50; Pranav Sidhwani, 'Spatial Inequalities in Big Indian Cities' (2015) 50 EPW 55; Diya Mehra, 'Caste and Class in Indian Cities: Habitation, Inequality and Segregation' in Véronique Dupont, Marie-Hélène Zérah and Stéphanie Tawa Lama-Rewal (eds), *Urban Policies and the Right to the City in India* (UNESCO 2011) <https://www.tatatrusts.org/upload/pdf/urban-policies-and-the-right-to-the-city-in-india.pdf> accessed 30 November 2021; Sriharsha Devulapalli, 'Geography of Caste in Urban India' *Livemint* (New Delhi, 29 September 2019) <https://www.livemint.com/news/india/the-geography-of-caste-in-urban-india-1569564507580.html> accessed 1 February 2021.

[31] Ghazala Jamil, *Accumulation by Segregation: Muslim Localities in Delhi* (OUP 2017); Laurent Gayer and Christophe Jaffrelot (eds), *Muslims in Indian Cities: Trajectories of Marginalisation* (Hurst 2012); Raphael Susewind, 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 Environment and planning A: Economy and Space 1286.

example, a qualitative study on the Kathputli settlement in Delhi recognised intersectionality and segregation within residents, finding that the settlement comprised of,

> a number of distinct communities, differentiated mainly along lines of geographical origin, with those from Rajasthan constituting the majority group and occupying the major portion of the settlement. Religious affiliation (Hindus, Muslims and a small minority of neo-Buddhists from Maharashtra), caste and occupation (the artists and the rest, mainly unskilled labourers), add further differentiating criteria. The resulting social segmentation translates into spatial segregation, with distinct sections of the settlement corresponding to different communities. Thus, 17 pradhans or local leaders of varying stature could be identified, as well as several local committees. Consequently, it is difficult to visualise a monolithic "community", rather, the settlement has multiple communities.[32]

Similarly, a study of the Nangla Matchi settlement revealed the intersectionality and segregation within the settlement, with the most marginalised caste residents being denigrated by others even in the description of their settlement,

> The people of Nangla Matchi recognized three distinct settlements within the locality—Devi Nagar (the earliest), Sant Nagar, and Kali Basti—and different pradhans tended to have uneven jurisdiction over the different areas. Sant Nagar and Kali Basti had a very mixed population, both in terms of religion and place of origin, whereas Devi Nagar was predominantly Muslim. Residents of Sant Nagar and Devi Nagar considered Kali Basti a place of great danger and a 'difficult' place since, as they put it, it had a large population of 'unruly' Balmikis, the caste of sweepers—who 'are both very violent and don't listen to any one'.[33]

In the wake of the passage of the Citizenship (Amendment) Act 2019 by the Indian Parliament, widely criticised as being discriminatory against Muslims,[34] several informal settlements were ordered to be demolished by the police in Bengaluru, Karnataka on the ground that the residents

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[32] Véronique Dupont and others, 'Unpacking Participation in Kathputli Colony: Delhi's First Slum Redevelopment Project, Act I' (2014) 49 EPW 39, 41.

[33] Sanjay Srivastava, *Entangled Urbanism: Slum, Gated Community, and Shopping Mall in Delhi and Gurgaon* (OUP 2014) 11.

[34] Mihika Poddar, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-Based Discrimination and Naturalisation Law' (2018) 2 ILR 108; Gautam Bhatia, 'The Citizenship (Amendment) Act Challenge: Three Ideas' (*Indian Constitutional Law and Philosophy*, 21 January 2020) <https://indconlawphil.wordpress.com/2020/01/21/the-citizenship-amendment-act-challenge-three-ideas/> accessed 18 December 2021; Abhinav Chandrachud, 'Secularism and the Citizenship Amendment Act' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3513828> accessed 18 December 2021.

were 'illegal Bangladeshi immigrants'.[35] While the Karnataka High Court put a halt to the eviction,[36] the case demonstrates the vulnerability to evictions faced by poor Muslim residents of informal settlements. This intersectionality within residents on grounds of caste and religion, among other identities, ought to emphasise an equal right to participate in decision-making around evictions for each resident of informal settlements, to ensure that those relatively more privileged do not drown the voices of those facing intersecting inequalities.

2.2 Collective dimension

I have argued above that each resident of an informal settlement must have an equal right to participate in decision-making around evictions. This follows from the values underlying participation rights – dignity, freedom, and equality. In this section, I argue that while each resident ought to have a right to participate, there must also be a collective dimension to the process of participation. I rely on the same values to indicate the importance of a collective dimension to participation.

Fredman's conception of substantive equality indicates the importance of a collective dimension to decision-making. The participation dimension draws attention to the importance of community in the life of individuals, and on the need for 'social inclusion' – that individuals ought to be able to participate on equal terms in the life of the community.[37] The disadvantage and transformation dimensions of substantive equality together require the recognition of differences

[35] *People's Union for Civil Liberties v Bruhat Bangalore Mahanagara Palike and others* <https://www.livelaw.in/pdf_upload/pdf_upload-369397.pdf> accessed 1 February 2021; 'Karnataka High Court Pulls up Cops for Eviction after Bangladeshi Tag' *The Indian Express* (Bengaluru, 4 February 2020) <https://indianexpress.com/article/india/karnataka-high-court-pulls-up-cops-for-eviction-after-bangladeshi-tag-6249678/> accessed 18 December 2021.

[36] 'High Court Restrains Authorities from Evicting Occupants of Sheds in Bellandur' *The Hindu* (Bengaluru, 22 January 2020) <https://www.thehindu.com/news/cities/bangalore/high-court-restrains-authorities-from-evicting-occupants-of-sheds-in-bellandur/article30627008.ece> accessed 18 December 2021.

[37] Fredman, 'Substantive Equality Revisited' (n 15) 732.

in power between residents of informal settlements on one hand, and duty bearers – the state and private landowners – on the other hand, due to structural reasons.[38] To counter the unequal conditions under which decision-making around evictions takes place, a collective process of participation becomes necessary. If each resident were to participate separately with the duty bearers in decision-making around evictions, the danger becomes that the difference in power between the residents and the duty bearers will be used in favour of the duty bearers. Collective action on the part of residents holds the potential to enable residents to counter that difference in power. Together, they may be in a better position to challenge the oppressive conditions under which decision-making around evictions takes place.[39] Moreover, they will be able to fill in gaps in information that each resident has during the process of participation, because some residents may have more information than others, or different kinds of information than others.[40]

In section 2.1, I argued that the value of dignity requires each individual to matter in the process of participation, given the emphasis on the intrinsic worth of all humans under a Kantian notion of dignity.[41] In her capabilities approach, Nussbaum combines the Kantian notion with Marxist and Aristotelian notions of dignity, to emphasise the material conditions necessary to live truly humanly.[42] For Nussbaum, 'the core idea is that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others.'[43] Thus, Nussbaum's reliance on Marx and Aristotle helps her focus on the communitarian aspect of capabilities and

[38] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011) 38; Fredman, 'Substantive Equality Revisited' (n 15) 729–733.

[39] Alan Bogg, 'The Political Theory of Collective Bargaining : Pluralism, Deliberation and the Duty to Bargain', *The Democratic Aspects of Trade Union Recognition* (1st edn, Hart Publishing 2009) 272; Tonia Novitz and Paul Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart 2001) 17–18.

[40] Sriraman (n 29) para 12.

[41] Kant (n 10) 96.

[42] Nussbaum (n 10) 72; Fredman, *Comparative Human Rights Law* (n 5) 36.

[43] Nussbaum (n 10) 72.

dignity. Nussbaum considers affiliation to be a central human capability,[44] and views humans not as abstract, atomistic, isolated beings, but as socially embedded.[45] This emphasis on community and the social aspect of human beings also points to the need for a collective dimension to decision-making around evictions. People exercise their freedom and dignity together with others, and respect for people requires respect for this aspect of their being.

Moreover, a collective dimension to the decision-making process enables each individual to matter. Under structures of oppression and domination, those from racial, caste, religious, and gender minorities, among others, have not mattered, or have mattered less. When participation takes place through an individual process, these people's voices may not matter during decision-making. A collective decision-making process helps ensure that the voices of those from oppressed and dominated groups matters during the process of decision-making around eviction.[46] Similarly, the value of freedom as capabilities points to the need for a collective dimension to participation. Sen's capabilities approach places emphasis on the actual ability of people to do and be as they have reason to value, and not simply a formal ability to do so.[47] There is a difference in power between residents on the one hand, and the state and private landowners on the other hand. To ensure that residents of informal settlements are actually able to take part in deciding where they are to live, and the quality and details of their residence, a collective dimension to decision-making becomes necessary.

To conclude, although all residents must have an equal right to participate in decision-making around evictions, the process of participation should also have a collective dimension, where the collective amplifies individual voices. An equal right to participation for each resident

[44] Nussbaum 79.

[45] Sandra Fredman, *Women and the Law* (Clarendon Press 1997) 15; Catriona Mackenzie and Natalie Stoljar, 'Autonomy Refigured' 4.

[46] Bogg (n 39) 272; Novitz and Skidmore (n 39) 17–18.

[47] Amartya Sen, *Development as Freedom* (OUP 1999).

ensures that the freedom, dignity and equality of each resident is respected. A collective dimension to decision-making ensures that individual voices that may be drowned out given the unequal conditions under which participation takes place, are amplified through the collective. Both these principles – an individual right to participate, and a collective dimension to participation – ought to be optimised to the greatest extent possible given the legal and factual possibilities.[48] I indicate in section 3.1 that in the context of the Maharashtra Slum Act, there is recognition of an individual right to participation, as well as a collective dimension to the process of participation.

2.3 Representatives

In this section, I engage with three issues around participation through representatives. Firstly, I engage with the implications on the freedom as capabilities, dignity and substantive equality of residents, when residents participate through representatives. Secondly, if participation is to take place through representatives, I explore who ought to represent residents of informal settlements. I raise concerns around representation through civil society organisations and elected officials. Thirdly, I engage with pragmatic concerns about participation through each resident rather than representatives, especially in case of large settlements, where duty bearers may claim that participation with each resident is unfeasible.

2.3.1 Participation through representatives

I argued in section 2.1 that the values of substantive equality, dignity and freedom as capabilities, require that each resident of an informal settlement have the right to participate in decision-making around evictions. Each resident of an informal settlement has a claim to being treated as an end in themselves, as a human being with intrinsic worth.[49] Hence, each resident of an informal

[48] Alexy (n 8) 47.

[49] Kant (n 10) 96; McCrudden (n 10); Nussbaum (n 10) 74.

settlement ought to have the opportunity to participate in decision-making around evictions. If some residents (representative residents in this context) are given the right to participate in the decision-making process, but not all others, this impinges the dignity of those excluded from the process of participation. Similarly, each resident of an informal settlement has the right to exercise their freedom, to pursue housing that they have reason to value.[50] Designing the process of participation so that it takes place through representatives, without giving residents of informal settlements the opportunity to participate themselves in decision-making, impinges on their dignity and freedom. Moreover, substantive equality[51] and intersectionality[52] require that we ensure that residents who are oppressed along intersecting axes, can participate in decision-making. If residents are represented in the decision-making process, the danger becomes that the more powerful within residents of informal settlements become representatives, and exercise their voice during participation.[53] This will replicate, rather than transform, structures of oppression and domination.

Overall, participation through representatives has implications for the freedom, dignity and equality of residents, especially those facing intersecting inequalities. This is not to say that participation should never take place through representatives. Rather, it is to argue that when deciding whether participation should take place through representatives, and how participation should take place through representatives, these values ought to be optimised.

[50] Sen, *Development as Freedom* (n 11) 76.

[51] Fredman, 'Substantive Equality Revisited' (n 15).

[52] Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 16); Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (n 16).

[53] Dupont and others (n 32) 42.

2.3.2 Who ought to represent residents

When representation takes place either through NGOs or civil society organisations working for or with residents of informal settlements, but not themselves residents, the process of participation denies the freedom and dignity of residents of informal settlements. It fails to recognise their ability to pursue housing that they have reason to value through participating themselves in decision-making around evictions. For example, S'bu Zikode, an activist-resident of informal settlements from South Africa, has argued,

> One of the colonial ideas that we have to resist from many quarters is the view that poor African people cannot think for themselves. We find this thinking in the ruling party and the state. It is very strong in the universities and in most NGOs. There are a number of academics who call themselves socialists and are trusted by the left internationally to represent South Africa who are deeply blinded by the idea that poor African cannot think for themselves… They have often thought that they have a right to decide who should represent our movement and struggle internationally. They have contempt for our democratic structures and our own decision making.[54]

Civil society organisations are often, though not always, composed of people who are privileged along intersecting axes.[55] Their representation of residents furthers inequality along intersecting axes for residents of informal settlements, by denying voice and participation to residents,[56] and by furthering disadvantage in terms of the ability to participate and thereby to challenge domination.[57] Moreover, residents are best placed to understand their own needs regarding

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[54] S'bu Zikode, 'The Power of Abahlali and Our Living Politic Has Been Built with Our Blood' (Thinking Freedom from the Global South, 17 February 2021) <http://abahlali.org/node/17219/#more-17219> accessed 18 December 2021.

[55] Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004) 38; Steven Friedman and Eusebius McKaiser, 'Civil Society and the Post-Polokwane South African State: Assessing Civil Society's Prospects of Improved Policy Engagement' (Heinrich Boll Stiftung 2009) 18–22 <https://za.boell.org/en/2009/11/10/civil-society-and-post-polokwane-south-african-state-assessing-civil-societys-prospects> accessed 18 December 2021; John Harriss, 'Antinomies of Empowerment: Observations on Civil Society, Politics and Urban Governance in India' (2007) 42 EPW 2716, 2719; Roberto Gargarella, 'Why Do We Care about Dialogue?: "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 215.

[56] Fredman, 'Substantive Equality Revisited' (n 15) 731.

[57] Young (n 38) 31; Fredman, 'Substantive Equality Revisited' (n 15) 729.

housing, and representation by civil society organisations furthers disadvantage in terms of access to the capability of housing that is adequate for residents.[58]

Elected representatives, whether elected at the local, state or national level, may not be resident in the informal settlement. Given that they are accountable to a wider constituency, they may further the (possibly conflicting) rights and interests of constituents other than residents of informal settlements.[59] Hence, participation through elected representatives may further inequality for residents of informal settlements. Even when representatives are selected from among residents of informal settlements, residents privileged along intersecting may be selected to represent all others.[60] This furthers inequality along intersecting axes. It denies voice and participation to resident facing intersecting axes of oppression, and in that process furthers their disadvantage. It also furthers misrecognition, by creating a hierarchy within residents, where some can speak on behalf of others.

Engagement regarding evictions, redevelopment and rehabilitation of informal settlements often takes place through representatives, 'leaders' or gatekeepers among residents of informal settlements.[61] For example, while writing about efforts of residents of Slovo Park settlement in Johannesburg, South Africa, Kissington wrote about the important role played by 'strong and capacitated community leaders'.[62] At the same time, research on the Siyanda informal settlement

[58] Fredman, 'Substantive Equality Revisited' (n 15) 729–730; Gargarella (n 55) 216.

[59] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013) 209; Asher Ghertner, 'Gentrifying the State, Gentrifying Participation: Elite Governance Programs in Delhi: Gentrifying the Local State in India' (2011) 35 IJURR 504.

[60] Dupont and others (n 32) 42.

[61] A Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 Community Development Journal 269, 274.

[62] Kate Tissington, 'Towards a Synthesis of the Political, Social and Technical in Informal Settlement Upgrading in South Africa: A Case Study of Slovo Park Informal Settlement' 61 <http://rgdoi.net/10.13140/RG.2.1.3679.3847> accessed 20 December 2021; Socio-Economic Rights Institute, 'Slovo Park: 20 Years of Broken Promises' (SERI) <https://www.seri-sa.org/images/SlovoPark_CPN_Final.pdf> accessed 20 December 2021; Socio-Economic Rights Institute, 'Slovo Park: Some Gains at Last' (SERI 2020) <http://www.seri-sa.org/images/SERI_Slovo_Park_practice_notes_2020_FINAL_WEB.pdf> accessed 20 December 2021.

in KwaZulu Natal,[63] and the Ratanang informal settlement in the North-West province, [64] revealed the experience of gender inequality faced by women living in the settlement as they sought to gain access to security of tenure within the settlement, because of the gendered social relations within the settlement, including with leaders.

In India, research on informal settlements has studied the role played by 'pradhans' or local leaders within settlements in engaging with the state for access to adequate housing.[65] Sometimes, these leaders are themselves from oppressed groups, such as transgender or women.[66] At the same time, their leadership depends on their ability to exercise privilege. Srivastava notes that 'pradhans usually have a modicum of education and, most importantly, a deep familiarity with the bureaucratic geography of the city.'[67] In addition to negotiating with the state to whatever extent possible, pradhans seek to mimic the state.[68]

This is not to argue that NGOs, civil society organisations and elected representatives must have no role at all. NGOs and civil society organisations in India[69] and South Africa[70] often care about matters of equality, freedom, dignity, as well as housing, and play an important supporting role to ensure the pursuit of this. A mobilized civil society plays an important supporting role

[63] Royston and others (n 22) 26.

[64] ibid 71.

[65] Dupont and others (n 32) 42.

[66] Sanjay Srivastava, 'A Hijra, a Female Pradhan, and a Real Estate Dealer: Slum Lives between the Market, the State, and Community', *Entangled Urbanism: Slum, Gated Community, and Shopping Mall in Delhi and Gurgaon* (OUP 2014).

[67] ibid 10.

[68] ibid 20.

[69] Ananya Roy, 'Civic Governmentality: The Politics of Inclusion in Beirut and Mumbai' (2009) 41 Antipode 159; Xavier de Souza Briggs, 'The Grassroots-to-Grasstops Dynamic: Slum Redevelopment and Accountability in Mumbai', *Democracy as problem solving: civic capacity in communities across the globe* (MIT Press 2008) 103; Nikhil Anand and Anne Rademacher, 'Housing in the Urban Age: Inequality and Aspiration in Mumbai' (2011) 43 Antipode 1748, 1752.

[70] Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 Stellenbosch Law Review 742, 746; Brian Ray, 'Occupiers of 51 Olivia Road: Enforcing the Right to Adequate Housing Through Engagement' (2008) 8 Human Rights Law Review 703, 711; Socio-Economic Rights Institute and Community Law Centre, 'Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights' (2010) 39; Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 5) 255.

through organising social movements to exert pressure on national and state governments, the media, and relevant corporations, organising information campaigns, public debates, media exposés and 'contentious politics', including protests.[71] Similarly, elected representatives have an important interest in ensuring that the interests of their constituents are furthered, so that their constituents re-elect them. Through 'vote bank politics', residents of informal settlements have attempted to access housing, sometimes successfully, by engaging with elected representatives and promising political support in exchange for securing their settlements against evictions.[72] Hence, NGOs, civil society organisations and elected representatives ought to play a supporting role, rather than represent residents during the process of participation.

2.3.3 Pragmatic concerns

Even if residents must have the right to participate themselves in decision-making around evictions, the state may raise concerns regarding the feasibility of such a process of participation, especially in the case of very large settlements. For example, *Pheko* involved the removal of an informal settlement that covered 25 hectares of land,[73] with thousands of residents,[74] several hundreds of whom came before the Constitutional Court to challenge the removal.[75] Similarly, *Joe*

[71] César Rodríguez-Garavito, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 247.

[72] Jessie Hohmann, 'Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing' (2010) 13 Yale Hum Rts & Dev LJ 135, 163; Harriss (n 55) 2722; Chatterjee (n 55); Jan Nijman, 'Against the Odds: Slum Rehabilitation in Neoliberal Mumbai' (2008) 25 Cities 73, 78; Anand and Rademacher (n 69) 1752; Socio-Economic Rights Institute, 'Slovo Park: 20 Years of Broken Promises' (n 62) 14.

[73] *Nthabiseng Pheko and Others v Ekurhuleni Metropolitan Municipality and others* [2011] ZACC 34 [3], [5] ('*Pheko*').

[74] Socio-Economic Rights Institute, 'Con Court Hands down Enforcement Order in Bapsfontein Case' <https://www.seri-sa.org/index.php/more-news/278-con-court-hands-down-enforcement-order-in-bapsfontein-case-29-august-2014> accessed 20 December 2021.

[75] Socio-Economic Rights Institute, 'Pheko and Others v Ekurhuleni Metropolitan Municipality' <https://www.seri-sa.org/index.php/19-litigation/case-entries/88-pheko-and-others-v-ekurhuleni-metropolitan-municipality> accessed 20 December 2021.

Slovo involved the eviction of 4,386 households, or around 20,000 residents, from a large informal settlement.[76]

I indicate in section 3.1 that in the context of the Maharashtra Slum Act, there is recognition of an individual right to participation, as well as a collective dimension to the process of participation,[77] even when large informal settlements with thousands of residents are involved. In section 3.2, I indicate that courts have enforced the legislative requirement of decisions to be taken by residents themselves, and not by their representatives.[78] The number of residents involved has not been considered a pragmatic barrier to giving each resident the right to participate in decision-making, as well as recognising a collective dimension to participation. Both these principles have been optimised under the Act.

In any case, if duty bearers argue that it is unfeasible for participation to take place by giving an opportunity to each resident to participate, the burden must fall on them to justify this, and to show that restrictions on participation for each resident is a proportionate restriction on the freedom, dignity and substantive equality of residents of informal settlements. They must indicate how they have optimised the values of equality, dignity and freedom while designing participation rights.

[76] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 [8] ('*Joe Slovo*').

[77] Development Control Regulations for Greater Bombay 1991 No 33(10), Appendix IV, ss 1.6, 1.17.

[78] *Harshad Anil Kale and Others v The State of Maharashtra and Others* (19 September 2019, Bombay High Court) ('*Harshad Kale*'); *Sushila J Tiwari and Others. vs. Assistant Commissioner F/North Ward, MCGM and Others* (4 January 2017, Bombay High Court) ('*Sushila Tiwari*').

2.4 Sub units

Feminist,[79] disability,[80] and intersectional scholarship[81] has established the existence of structures of oppression within households. Hence, if participation rights were to be exercised through the unit of a household, the voices of those facing intersecting systems of oppression, such as women, queer individuals, and persons with disabilities, may be silenced within the household. This treats oppressed groups within households as mere means rather than ends in themselves. They are treated as mere means to fulfil the needs of the household as a whole, or, more likely, the most powerful person within the household. This, therefore, denies their dignity. It also denies their freedom to do and be as they have reason to value, by ignoring their views on what they value in terms of their housing and interrelated rights.[82] Hence, the values of dignity, freedom and substantive equality gesture against households as units of participation in decision-making around evictions, and point towards the need for participation to take place at the level of each resident of an informal settlement.

2.5 A right rather than an obligation to participate

The values of dignity, freedom and substantive equality together require that each individual resident should have the right to participate, rather than an obligation to participate.

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[79] Sandra Fredman, *Women and The Law* (Clarendon 1997) 16–17; Nussbaum (n 10) 243; Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012) 32.

[80] Kalpana Kannabirān, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012) ch 2.

[81] Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (n 16); Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (n 16); Kalpana Kannabirān and Vasanth Kannabirān, 'Caste and Gender: Understanding Dynamics of Power and Violence' in Anupama Rao (ed), *Gender and caste* (Zed Books 2005); Susie Tharu, 'The Impossible Subject: Caste and the Gendered Body' in Anupama Rao (ed), *Gender and caste* (Zed Books 2005).

[82] Nussbaum (n 10) 243.

Under the capabilities approach, freedom consists of the ability to do and be as one has reason to value. The state of being and doing is termed 'functioning', and the freedom to achieve that state is termed 'capability'.[83] The capabilities approach requires the creation of capabilities rather than functioning, to allow people to choose whether to achieve the capabilities available to them, in line with what they have reason to value.[84] When participation rights are recognised as capabilities of the doing variety, the capabilities approach requires residents to be able to choose whether to achieve that capability, in respect of their freedom to choose what they have reason to value. Hence, they ought to have a right to participate, rather than an obligation to participate.

The values of freedom as capabilities along with dignity together point to the need for a right rather than an obligation to participate for residents of informal settlements. The value of dignity according to Nussbaum, requires each person to be treated as worthy of regard, and also 'to live really humanly'.[85] To be 'truly human', for Nussbaum, means living a life shaped by ourselves.[86] A life shaped by ourselves requires us to be able to choose whether to participate, rather than being obligated to participate.

The value of substantive equality is also 'intertwined in a substantive sense' with the value of freedom.[87] While voice and participation are an important dimension of substantive equality, and also important aspects of the misrecognition and disadvantage dimensions of substantive

[83] Sen, *Development as Freedom* (n 11) 5; Sandra Fredman, *Human Rights Transformed* (OUP 2008) 11; Ingrid Robeyns, 'The Capability Approach' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016, 2016) <https://plato.stanford.edu/archives/win2016/entries/capability-approach/> accessed 30 November 2021.

[84] Sen, *Development as Freedom* (n 11) 76; Amartya Sen, *Rationality and Freedom* (Harvard University Press 2002).

[85] Nussbaum (n 10) 73.

[86] ibid 72.

[87] Catherine Albertyn, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441, 467; Catherine Albertyn, 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) 1 U OxHRH J 71, 83.

equality,[88] an overall emphasis on freedom intertwined with substantive equality requires a right rather than an obligation to express one's voice and to participate.

3 Evaluating existing law

This section engages with existing law on participation rights, to evaluate the choice of unit of participation. It finds that jurisprudence on participation rights under s 26 of the South African Constitution and the PIE Act, and under art 21 of the Indian Constitution, has not engaged with issues around the appropriate unit of participation, including participation through representatives, and intersectional concerns within residents. Courts have not engaged with the dilemmas discussed in section 2, and have therefore failed to indicate substantive resolutions of these dilemmas. The case law also indicates the importance of engagement with these issues.

Under the Maharashtra Slum Act, participation is required to take place with each resident, and there is also recognition of a collective element to the participation exercise. Participation is required to be conducted through residents themselves rather than representatives. The Act has, therefore, optimised many of the principles and dilemmas discussed in section 2. The legislation and related jurisprudence have not, however, resolved issues regarding intersectional concerns within residents.

Under the ICESCR, both individual and collective dimensions to participation are recognised, but relevant instruments do not indicate how these are to be reconciled. Moreover, there is much recognition of the intersecting inequalities faced by residents.

[88] This thesis, ch 2, section 3.4.

Overall, the law and jurisprudence in this area of law is thin. This chapter indicates how further developments in this area of law ought to take place.

3.1 Individual or collective participation

The South African Constitutional Court has not paid sufficient attention to questions around who should participate during meaningful engagement in the eviction context. In cases where it has ordered meaningful engagement to take place, it has cursorily permitted meaningful engagement sometimes with residents, sometimes with residents individually and collectively, and sometimes with residents through their representatives. For example, in *Pheko*[89] and *Ngomane*[90] the Constitutional Court required engagement with residents, whereas in *Joe Slovo*[91] and *Schubart Park*,[92] the Constitutional Court required engagement with residents through their representatives. In *Olivia Road,* the Court required meaningful engagement with residents both collectively and individually.[93] The Court did not explain its choice of unit of participation, nor acknowledge the dilemmas involved when determining what should be the unit of participation in eviction decisions. There remains scope for recognition of both an individual and collective dimension to the process of participation.[94]

Similarly, in Indian cases on the right to housing wherein the Supreme Court has recognised the need for notice and hearing prior to evictions, the Court has not paid sufficient attention to who needs to be heard while deciding whether an eviction should be carried out. It has recognised that, 'hearing may be given individually or collectively, depending upon the facts

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[89] *Pheko* (n 73) [53].

[90] *Ngomane and Others v Govan Mbeki Municipality* [2016] ZACC 31 [16] ('*Ngomane*').

[91] *Joe Slovo* (n 76) [5].

[92] *Schubart Park Residents' Association v City Of Tshwane Metropolitan Municipality* [2012] ZACC 26 [53] ('*Schubart Park*').

[93] *Olivia Road* (n 1) [13].

[94] Stuart Wilson, Jackie Dugard and Michael Clark, 'Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court' (2015) 31 SAJHR 472, 484.

of each situation'[95], without elaborating on what circumstances are relevant for making this decision. While recognising the need for meaningful engagement with residents of informal settlements prior to their eviction,[96] the Delhi High Court has not engaged with issues around who should participate in the meaningful engagement exercise.

The Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971 recognises an individual right to participation for residents of informal settlements in decision-making around redevelopment of their settlements. The applicable rules require that in case of redevelopment of a 'slum' or informal settlement, an individual agreement must be signed with each eligible resident.[97] At the same time, the legislative scheme creates space for collective decision-making. The rules indicate in some detail how participation ought to take place – it requires residents to form a cooperative housing society under the Cooperative Societies Act 1912.[98] Decision-making thereafter takes place through general body meetings of the cooperative housing society. In this manner, residents can deliberate with each other collectively while arriving at decisions regarding redevelopment of their settlement. The Act has, therefore, optimised both the need for each resident to have a right to participate, and for there to be a collective dimension to the process of participation.

Under the ICESCR, participation rights for all affected 'groups and people' are recognised.[99] There is, therefore, recognition of both an individual as well as collective dimension

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[95] *Olga Tellis* (n 2) [45].

[96] *Sudama Singh* (n 3); *Ajay Maken v Union of India* WP(C) 11616/2015 (Delhi High Court, 18 March 2019) ('*Ajay Maken*').

[97] Development Control Regulations for Greater Bombay 1991 No 33(10), Appendix IV, s 1.6 ('DCR No 33(10)'). The regulations have been framed under the Maharashtra Regional and Town Planning Act 1966. These contain the relevant scheme for redevelopment of informal settlements in Maharashtra, including under the Maharashtra Slum Act.

[98] DCR No 33(10), Appendix IV, s 1.17.

[99] ICESCR General Comment No 4, The right to adequate housing, UN doc E/1992/2, para 8(a); ICESCR General Comment No 7, The right to adequate housing: forced evictions, UN doc E/1998/22 para 13.

to participation. The ICESCR does not address how these elements – the individual and collective dimensions – are to be reconciled.

3.2 Representatives

In cases where participation has been ordered with representatives of residents of informal settlements, the courts have sometimes failed to acknowledge the problems involved with this for the freedom, dignity and equality of residents of informal settlements.

For example, *Joe Slovo* involved the eviction of 4,386 households, or around 20,000 residents, from a large informal settlement.[100] In the case, the South African Constitutional Court ordered meaningful engagement with residents through their representatives, regarding when relocation of residents was to take place.[101] The Court also ordered meaningful engagement with 'affected residents' regarding other details of the relocation.[102] The Court did not specify who could represent the residents. It also did not justify why meaningful engagement was to take place through representatives for some issues, and with 'affected residents' for other issues.

Similarly, in *Schubart Park,* 3000-5000 residents were forcibly removed from a residential complex in Pretoria after a fire broke out in one block of buildings.[103] The Constitutional Court ordered the city to restore the residents to their homes in the residential complex, through meaningfully engaging with them through their representatives.[104] The Court did not acknowledge the problems involved when legal representatives are required to participate on behalf of residents

[100] *Joe Slovo* (n 76) [8].

[101] ibid [7] sub-paragraph 5.

[102] ibid [7] sub-paragraph 11.

[103] *Schubart Park* (n 92) [8].

[104] ibid [53].

of informal settlements, nor specify how these representatives were to be selected to mitigate these concerns.

In *Olivia Road,* the Constitutional Court required that civil society organisations supporting the residents 'facilitate' the engagement process.[105] I have argued in section 2.3.2 that when civil society organisations participate on behalf of residents, this impinges on their freedom, dignity and substantive equality. However, when they support and facilitate participation by residents, this furthers rather than impedes residents' freedom, dignity and equality. Hence, *Olivia Road* optimised the principles and dilemmas discussed regarding the role of civil society organisations.

Occupiers of Erven 87 & 88 Berea indicates the importance of interrogating the issue of who represents residents during a meaningful engagement exercise. In the case, four out of 180 residents of an informal settlement were present in the High Court when the Court was deciding whether to grant an eviction order under the PIE Act. In addition, one other person (Mr Ngubane) who was neither their legal representative nor a resident, was also present in the High Court and spoke on behalf of the residents.[106] The High Court granted an eviction order based on its understanding that these four residents and Mr Ngubane had agreed to the eviction taking place. It did not interrogate the question of whether these five persons could speak on behalf of all the other residents. The Constitutional Court, in appeal, found that these five persons had only been authorised by the other residents to seek a postponement in the case, to enable the residents to engage legal representation, and therefore could not consent to the eviction on behalf of the residents.[107] The case indicates the importance of interrogating whether representatives ought to

[105] *Olivia Road* (n 1) [20].

[106] *Occupiers of Erven 87 & 88 Berea* (n 26) [28], [29], [35], [36].

[107] ibid.

participate on behalf of residents in decision-making around eviction, and if so, who these representatives ought to be.

The issue of representatives versus residents themselves participating in decision-making, has repeatedly come before Indian courts in cases under the Maharashtra Slum Act. The Act requires decision-making by residents themselves rather than through representatives. In cases under the Act, residents have challenged decisions on the basis that these were made by the managing committees of housing cooperative societies, sometimes fraudulently, but not by residents themselves.[108] For example, in *New Janta,* residents of informal settlements formed three housing cooperative societies.[109] The managing committees of two of the three housing cooperative societies passed resolutions to replace the developer originally appointed to carry out the redevelopment of the informal settlement. These resolutions had not been passed in the general body meetings of the housing societies.[110] In other words, while the representatives of the residents appointed to managing committees agreed to change the developer, residents themselves were not made a part of that decision-making exercise. The Bombay High Court enforced provisions of the Act, and required that residents themselves be made part of the decision-making process.[111]

It is important to acknowledge that some of these cases involved large settlements consisting of thousands of residents. For example, *New Janta* involved a total of 1,263 residents.[112] Despite the numbers involved, the legislative scheme considered it possible for decisions to be taken about redevelopment of the settlement by residents themselves, and not by their

[108] *Harshad Kale* (n 78); *Sushila Tiwari* (n 78).

[109] *New Janta SRA CHS Ltd. and Ors. v State of Maharashtra and Ors.* MANU/MH/2783/2019 (26 September 2019, Bombay High Court) [6] ('*New Janta*').

[110] ibid [172].

[111] ibid.

[112] ibid [6].

representatives, and courts have enforced these legislative requirements. The number of residents involved was not considered a pragmatic barrier to giving each resident the right to participate in decision-making. The legislative scheme thereby indicates the possibility for optimising the requirements that each resident have the right to participate themselves rather than through representatives, and that there be a collective dimension to participation.

Under the ICESCR, participation rights for all affected 'groups and people' are recognised.[113] Participation may take place through the representatives of those affected.[114] Moreover, those 'working on behalf of the affected',[115] may also be part of the process of participation. In other words, civil society organisations and NGOs working for residents of informal settlements can be made part of the process of participation. The details of how these different actors – those affected, representatives of those affected, and those working on behalf of those affected – are to be made part of the process of participation, are yet to be fleshed out. I have argued in section 2.3 that residents affected by eviction decisions ought to have the right to participate themselves, to further their freedom, dignity and equality. When participation takes place through representatives, care must be taken that representatives do not to drown out the voices of those facing intersectional inequalities within residents. Those working on behalf of residents, including NGOs, civil society organisations and elected representatives, ought to facilitate the process of participation, rather than participate on behalf of residents. This chapter thereby indicates how participation rights under the ICESCR ought to be further developed.

[113] ICESCR General Comment No 4 The right to adequate housing, UN doc E/1992/2, para 8(a).

[114] ibid.

[115] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 38.

3.3 Intersectional concerns

As argued in section 2.1, residents facing intersecting axes ought to have an equal right to participate in decision-making around evictions, in a manner whereby their voices are not drowned out by those relatively more privileged. There has been insufficient engagement with this issue in law and jurisprudence on participation rights in India and South Africa, while soft law instruments under the ICESCR have required attention to be paid to intersectional inequalities within residents during the process of participation. Case law in India and South Africa indicates the importance of engagement with this issue.

Beja v Premier of the Western Cape[116] indicates the importance of addressing intersectional concerns within residents during the process of meaningful engagement. The case was about the provision of toilets by the city of Cape Town in an informal settlement, as part of the process of upgrading the settlement under the Upgrading of Informal Settlements Programme. The city provided unenclosed community toilets in the informal settlements, and it was expected that the residents of the informal settlement would enclose the toilets at their own cost. The city argued that the provision of individual toilets to the residents, or enclosed community toilets, was unaffordable. The city also argued that it had meaningfully engaged with the residents of the settlement regarding its proposal on communal unenclosed toilets, and that the residents had 'agreed' to this.[117] While some residents were able to afford to enclose the toilets themselves, many of these enclosures were inadequate for privacy or dignity.[118] Others were unable to afford to enclose the toilets at all, and were forced to use the unenclosed toilets.[119]

[116] *Beja v Premier of the Western Cape* Case No. 21332/10 Western Cape High Court (29 April 2011) ('*Beja*').

[117] ibid [77]–[78].

[118] ibid [29].

[119] ibid [19], [29].

This decision of the city, and the alleged 'agreement', was challenged on several grounds. It was argued that the agreement violated provisions of the Bill of Rights, including the rights to human dignity, privacy and adequate housing. It especially did not account for the most oppressed within residents of the informal settlement. It did not account for those who were unemployed, or otherwise too poor to afford to enclose toilets themselves. Moreover, it did not account that the consequence of using unenclosed toilets was different for residents, especially for people with disabilities, or those most vulnerable to violence, particularly women and girls vulnerable to gender-based violence.[120] For example, the first applicant in the case was Mrs Beja, a 76-year-old African woman who lived in the informal settlement. One evening, Mrs Beja used one of the unenclosed toilets to relieve herself, covering herself with a blanket. On her return from the unenclosed toilet to her home in the settlement, she was attacked and stabbed, and required medical treatment for the injuries sustained.[121] The 'agreement' did not account for her needs, and the needs of those in her position. The Western Cape High Court ultimately questioned the very existence of an 'agreement' around provision of unenclosed toilets, and held that, in any case, an 'agreement' entered into by a majority, even an overwhelming majority, could not be binding if it violated the constitutional rights of 'a small and vulnerable minority within that community'.[122]

In the case, there was nothing to indicate that residents in the position of Mrs Beja, and others facing intersecting inequalities, were made part of the engagement process when the 'agreement' was allegedly entered into between residents and the city. The High Court noted that only 60 residents attended the meeting when the 'agreement' was allegedly entered into, and that

[120] ibid [102].

[121] ibid [23].

[122] ibid [99] - [101].

there was nothing on the record to indicate that these 60 residents could represent others, including those facing intersecting inequalities.[123]

Residents facing intersectional oppression must have an equal right to participate during any meaningful engagement process, to further their freedom, dignity and substantive equality.[124] This is also pragmatically important, to enable better informed decision-making.[125] If women participated in deciding the kind of toilets to be provided by the city, they would be able to explain that unenclosed toilets exposed them to the danger of gender-based violence. Persons with disabilities would explain their requirement for toilets to meet their disability-related needs.

Under the Maharashtra Slum Act, there is some acknowledgement of intersectionality within residents of informal settlements, in the context of entitlement to alternate accommodation. The rules require that housing allotted to residents must be in the joint names of the 'pramukh' or head of household and their spouse, and that first preference must be given in the allotment of houses in the redeveloped settlement to persons with disabilities (termed 'physically handicapped' in the rules) and female-headed households.[126]

Less attention is paid to intersectional concerns in the rules on participation rights. The rules require residents to form a cooperative housing society under the Cooperative Societies Act 1912.[127] One third of the members of the managing committee of the cooperative housing society must be women.[128] To that extent, the rules acknowledge intersectional concerns among residents

[123] ibid [90].

[124] This thesis, ch 2, section 2.

[125] This thesis, ch 2, section 4.

[126] DCR No 33(10), Appendix IV, 1.7, 1.8.

[127] ibid, s 1.17.

[128] ibid, s 1.17.

on the basis of gender. Other grounds including caste, and religion, do not find mention in the rules.

Participation is required to take place through general body meetings of the cooperative housing society. The applicable rules require that 70% of residents must agree to any redevelopment scheme,[129] thereby enabling a supermajority of residents to prevail, despite the opposition of a minority of residents.[130] The rules do not require that intersectional concerns be taken into account while determining who has agreed to a redevelopment scheme. For instance, it is irrelevant whether all men in the settlement have agreed to a specific plan, but hardly any women have, as long as overall 70% of residents have agreed. Similarly, it is irrelevant whether Dalit or Muslim residents have agreed to a redevelopment scheme.

In cases arising under the Maharashtra Slum Act, disputes have arisen between fractions within residents of informal settlements, although not along intersecting axes of oppression on grounds of caste, religion, gender, etcetera. For example, *Balasaheb Arjun Torbole*[131] involved the redevelopment of an informal settlement largely built on publicly owned land, with a smaller portion of the settlement built on land that was privately owned. While 124 families resided on the privately-owned portion, around 320 families resided on the publicly owned land. Overall, 82% of the residents of the entire area consented to a redevelopment scheme. Yet, residents residing on the privately-owned land contended that they belonged to a separate informal settlement, and that only 25% of the residents of their settlement had consented to the scheme. They wanted a separate redevelopment scheme for their settlement, to be developed through a separate private developer.

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[129] ibid, s 1.15; Vaibhav Charalwar, 'Slum Rehabilitation and Constitutional Rights – A Bewitching Dream' (*Indian Constitutional Law and Philosophy*, 5 June 2020) <https://indconlawphil.wordpress.com/2020/06/05/guest-post-slum-rehabilitation-and-constitutional-rights-a-bewitching-dream/> accessed 20 December 2021.

[130] Gurbir Singh and PK Das, 'Building Castles in Air: Housing Scheme for Bombay's Slum-Dwellers' (1995) 30 EPW 2477, 2480.

[131] *Balasaheb Arjun Torbole and Ors. v The Administrator and Divisional Commissioner and Ors.* (2015) 6 SCC 534.

Ultimately, the case reached the Supreme Court, which rejected the claim of the residents residing on privately-owned land. The case indicates that when there are opposing views within residents of informal settlements, a super-majority of residents (70%) will overrule the objections of a minority of residents for the redevelopment of informal settlements in Maharashtra.

Similar cases have arisen before the Bombay High Court.[132] For example, in *New Janta,* an informal settlement built on land owned by the Government of Maharashtra was to be re-developed. The residents of the informal settlement formed three housing cooperative societies, and each of these three cooperative societies passed resolutions in their general body meetings for the appointment of a developer for *in situ* redevelopment of the settlement.[133] Eventually, one of the housing cooperative societies, New Janta*,* sought to remove the developer and appoint a different developer to carry out *in situ* redevelopment of the settlement, for the reason that the developer was taking an inordinate amount of time to implement the slum rehabilitation scheme.[134] The controversy in the case revolved around whether the original developer had obtained the consent of 70% of the residents of the informal settlement as a whole to carry out *in situ* redevelopment, and if not, whether another developer could be appointed for the same. The Bombay High Court found that because 70% of the residents of the informal settlement had agreed to the redevelopment plan under the first developer, through resolutions passed in the general body meetings of the three housing cooperative societies, that was conclusive of the matter.[135]

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[132] *Pant Nagar Mahatma Phule Co-op. Hsg. Society Ltd. and Ors. v State of Maharashtra and Ors.* MANU/MH/0841/2016 (2 April 2016, Bombay High Court); *Vivek Chandrakant Mayekar and Ors. v State of Maharashtra and Ors.* MANU/MH/2082/2012 (19 December 2012, Bombay High Court); *Radhika George v Maharashtra Housing and Area Development Authority* MANU/MH/0542/2012 (24 April 2012, Bombay High Court).

[133] *New Janta* (n 109) [7].

[134] ibid [12].

[135] ibid [177].

Cases have not yet been brought before either the Supreme Court or the Bombay High Court where differences have arisen within residents of informal settlements along intersecting axes of oppression. This is somewhat surprising, given the composition of informal settlements in India.[136] Empirical research is needed to understand how participation takes place under the Maharashtra Slum Act, to examine whether differences do arise along intersecting axes of oppression, and how these differences play out.

Under the ICESCR, much attention has been paid to the intersectional inequalities faced by residents of informal settlements. It is recognised that there must be equal participation rights for all residents, especially those facing intersectional inequalities, such as 'women, informal and homeless residents, persons with disabilities and other groups experiencing discrimination or marginalization'.[137] All potentially affected groups and people, including those facing intersecting inequalities must be given an equal opportunity to participate, such as women, indigenous peoples and persons with disabilities,[138] and 'women; people who are homeless; lesbian, gay, bisexual, transgender and intersex persons; representatives from informal settlements; racial, ethnic and cultural minorities; migrants; older persons; and young persons.'[139]

3.4 A right rather than an obligation to participate

In *Olivia Road,* the South African Constitutional Court recognised that the state, rather than residents, bear an obligation to meaningfully engage. The Court recognised that residents may refuse to take part in the process of meaningful engagement. In such instances, the Court

[136] This thesis, ch 3, section 2.1.

[137] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 26 December 2019, A/HRC/43/43 para 24.

[138] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 38 and 39.

[139] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 15 January 2018, A/HRC/37/53 para 65.

emphasised the state's obligation not to walk away from the process of meaningful engagement, and rather to make reasonable efforts to engage with residents.[140] Hence, the state bears an obligation to make good faith efforts to facilitate engagement when residents are unwilling to engage. At the same time, residents have a right, but not an obligation to engage.

Overall, we find that there has been limited engagement with dilemmas surrounding the appropriate unit of participation. Cases under s 26 of the South African Constitution and the PIE Act, as well as under art 21 of the Indian Constitution, have sometimes required participation through residents individually, sometimes collectively, and sometimes through representatives. Under the ICESCR, both individual and collective dimensions of participation are recognised, but not much attention has been paid to how these elements must be reconciled. There is insufficient acknowledgement of the implication of the choice of unit of participation on the rights of residents. The Maharashtra Slum Act, on the other hand, has recognised a right to participation for each resident, themselves rather than through representatives, while requiring collective decision-making. This optimises many of the principles and dilemmas sketched out in section 2 of this chapter. It is expected that the discussion in section 2, will serve as a useful aid for any future developments on the issue of who ought to participate, when developing the content of participation rights in India, South Africa and under the ICESCR.

4 Duty bearers

Informal settlements in India and South Africa are built on both public and private land. Both kinds of evictions – whether from private or public land – carry serious consequences for residents of informal settlements. A forced eviction deprives residents of informal settlements of their

[140] *Olivia Road* (n 1) [15].

access to housing, and of interrelated rights including access to livelihood.[141] Since both private and public evictions carry these consequences, participation rights are important in both contexts.

In this section, I explore both vertical duties (borne by the state) and horizontal duties (borne by non-state actors) corresponding to participation rights. While section 4.1 establishes that vertical obligations have been recognised in both India and South Africa, sections 4.2 and 4.3 explore the possibility of horizontality in this context. The text of the South African Constitution contemplates horizontal duties,[142] and several kinds of horizontal duties have already been recognised.[143] In section 4.2, I argue that horizontal duties to meaningfully engage ought to be recognised. In chapter 4, I engage with the kind of obligations that are necessary corresponding to participation rights, including sharing of information and capacity-building measures, and explore which of those obligations ought to be horizontally applicable.

Obligations with respect to participation rights under the ICESCR fall principally on states.[144] States must protect the right to participation 'through constitutional or legislative provisions.'[145] However, non-state actors are not 'absolved of all responsibility', although their obligations have not been developed under the ICESCR. Non-state actors include 'project managers and personnel, international financial and other institutions or organizations,

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[141] *Olga Tellis* (n 2).

[142] Constitution of the Republic of South Africa 1996, ss 8, 9(4), 12(1)(c) 39(2); Aoife Nolan, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 ICON 61, 76; Danwood Mzikenge Chirwa, 'Non-State Actors' Responsibility for Socio-Economic Rights: The Nature of Their Obligations under the South African Constitution' (2002) 3 ESR Review 1; Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 SAJHR 63; Sandra Liebenberg, 'Socio-Economic Rights Beyond the Public-Private Law Divide' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014) 68–70.

[143] *Khumalo and Others v Holomisa* [2002] ZACC 12 [33] ('*Khumalo*'); *Daniels v Scribante and Another* [2017] ZACC 13 [49] ('*Daniels v Scribante*'); *Governing Body of the Juma Musjid Primary School and others v Ahmed Asruff Essay N.O. and others* [2011] ZACC 13 [58]–[60] ('*Juma Musjid*'); *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12 ('*Pridwin*') [15].

[144] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 11.

[145] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 19 September 2018, A/73/310/Rev.1, para 73.

transnational and other corporations, and individual parties, including private landlords and landowners'.[146] Engagement with the ICESCR is therefore of limited use when developing horizontal obligations in India and South Africa.

While I am normatively committed to both vertical and horizontal duties in relation to participation rights, the text of the Indian Constitution and related case law do not, yet, recognise direct horizontal duties under art 21 of the Indian Constitution, and particularly in relation to the right to housing. In section 4.3, I establish this, and thereafter explore statutory duties placed on private actors under the Maharashtra Slum Act.

4.1 Vertical duties

In both India and South Africa, duties in relation to participation rights have been placed on the state.

The PIE Act in South Africa enables organs of the state to evict people residing on both public and privately owned land within its jurisdiction.[147] Given this, it is unsurprising that the state has been made responsible for meaningfully engaging with residents residing on both public and private land, when it seeks to evict residents. Courts in South Africa have required the state to meaningfully engage with residents prior to evictions from private land in the earliest cases around meaningful engagement, including *Port Elizabeth Municipality* and *Olivia Road. Port Elizabeth Municipality* involved the eviction of people residing in shacks on privately owned land,[148] and *Olivia Road* involved the eviction of people residing in 'bad buildings' in inner city Johannesburg that had

[146] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 11.

[147] PIE Act, s 6.

[148] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 [1] ('*Port Elizabeth Municipality*').

been abandoned by the owners of the buildings.[149] In both these cases, the state initiated the eviction of residents. In *Port Elizabeth Municipality,* the municipality filed an application for eviction under the PIE Act before the South Eastern Cape Local Division of the High Court, responding to a petition signed by 1600 people in the neighbourhood of the informal settlement, including the owners of the property.[150] In *Olivia Road,* the municipality sought to evict residents from 'bad buildings' using provisions of the National Building Regulations and Building Standards Act 1977 and the Health Act 1977.[151] In both these cases, the Constitutional Court emphasised the importance of the municipality meaningfully engaging with the residents prior to evictions. In *Port Elizabeth Municipality,* the fact that the municipality had failed to make any 'significant attempts to listen to and consider the problems of the residents, formed one reason for the Constitutional Court to find that the granting of an eviction order in the case was not just and equitable,[152] while in *Olivia Road,* the Constitutional Court approved the agreement reached between the municipality and residents for the relocation of residents to other buildings, through the process of engagement.

In eviction proceedings under the PIE Act instituted by private actors, the local authority must be made party to the proceedings.[153] This is because the eviction may trigger constitutional obligations on the part of a local authority, including provision of emergency accommodation to those who would face homelessness,[154] and provision of relevant information to the court to

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[149] *Olivia Road* (n 1) [1].

[150] *Port Elizabeth Municipality* (n 148) [1].

[151] *Olivia Road* (n 1) [1].

[152] *Port Elizabeth Municipality* (n 148) [59].

[153] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998, s 4(2) ('PIE Act'); *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116 [38] ('*Changing Tides*'); *Sailing Queen Investments v The Occupants of LA Colleen Court* [2008] ZAGPHC 15 [20] ('*Sailing Queen Investments*'); Sandra Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (Juta 2010) 286–288; Stuart Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 SALJ 270, 283; J van Wyk, 'The Role of Local Government in Evictions' (2011) 14 PELJ 50, 60; Gustav Muller and Sandra Liebenberg, 'Developing the Law of Joinder in the Context of Evictions of People from Their Homes' (2013) 29 SAJHR 554.

[154] *Changing Tides* (n 153) [38]; *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* [2009] ZASCA 80 [11].

enable it to determine whether evictions are just and equitable under the circumstances of the case.[155] It follows that the local authority must also meaningfully engage with residents once it has been made party to the proceedings. For example, in *Changing Tides*, eviction proceedings were instituted by the owner of a building in inner city Johannesburg, and the local authority was joined in the proceedings.[156] The local authority was ordered by the court to meaningfully engage with residents regarding provision of temporary emergency accommodation.[157]

In India, participation duties have been placed on the state both through the jurisprudence of courts under art 21 of the Constitution, as well as in legislation. Many eviction cases have involved evictions carried out by the state, and hence the question of horizontal obligations did not arise.[158] For example, *Olga Tellis*, involved eviction of people residing on pavements and informal settlements by the Bombay Municipal Corporation. In the case, the Indian Supreme Court recognised the obligation on the Municipal Corporation to provide notice and hearing to residents prior to evictions.[159] *Sudama Singh* involved the eviction of several informal settlements by the state prior to the Commonwealth Games 2010 hosted in Delhi, for the creation of facilities for the Games.[160] *Ajay Maken* involved the demolition of an informal settlement by the Indian Railways.[161] In these cases, the Delhi High Court placed obligations for meaningful engagement on the state.

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[155] *Blue Moonlight* (n 25) [52]; *Sailing Queen Investments* (n 153) [19]; *ABSA Bank v Murray* 2004 2 SA 15 (C) [41]; van Wyk (n 153) 57; Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 153) 285; Liebenberg (n 153) 288–289.

[156] *Changing Tides* (n 153) [2]–[3].

[157] ibid [56].

[158] *Olga Tellis* (n 2); *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* AIR 1997 SC 152 [10]; *Sudama Singh* (n 3); *Ajay Maken* (n 96).

[159] *Olga Tellis* (n 2) [45]–[46].

[160] *Sudama Singh* (n 3) [14].

[161] *Ajay Maken* (n 96) [1].

Legislation around evictions has also recognised vertical obligations with respect to participation rights. For example, under the Maharashtra Slum Act, once an area is declared to be a 'slum', residents cannot be evicted without the permission of the 'Competent Authority' established under the Act.[162] The Competent Authority consists of any person or body corporate, including local authority, appointed by the state government under the Act.[163] Any private person seeking to evict residents from the 'slum area' must approach the Competent Authority. The Competent Authority is thereafter required to provide a hearing to all parties to determine whether to grant permission to evict residents. While considering whether to grant permission, the Competent Authority is required to determine factors including whether residents have access to alternate accommodation if evicted.[164] Only after the Competent Authority has granted permission, can civil courts be approached for seeking orders for eviction. Cases have been brought by residents before the Supreme Court[165] and the Bombay High Court[166] challenging evictions on the ground that the permission of the Competent Authority was not obtained prior to instituting a civil suit for eviction from an area declared to be a 'slum'. For example, when one resident instituted proceedings for eviction against another resident, claiming the other resident was a 'trespasser' in her house, the Supreme Court held that the resident needed to obtain the

[162] The Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act 1971, s 22 ('Maharashtra Slum Act').

[163] ibid s 3.

[164] ibid s 22.

[165] *Laxmi Ram Pawar v Sitabai Balu Dhotre and Ors.* MANU/SC/1014/2010 (2010, Supreme Court of India); *Shyamkunwar Giri and Ors. v State of Maharashtra and Ors.* MANU/SC/0703/1988 (13 January 1988, Supreme Court of India).

[166] *Satish Shahu Bane and Ors. v Dattatraya Tanaji Padam and Ors.* MANU/MH/3221/2019 (2019, Bombay High Court); *Sunanda Ramkrishna Ayare and Ors. v Harishchandra Gopal Parab* MANU/MH/2597/2019 (2019, Bombay High Court); *Sadruddin v Javed Iqbal and Ors.* MANU/MH/3146/2016 (2016, Bombay High Court); *Veljiben V. Satra and Ors. v Kanaiyalal Purshottamdas Shah and Ors.* MANU/MH/2116/2016 (2016, Bombay High Court); *Devnath Robai Mourya and Ors. v Shankri B. Ajimal and Ors.* MANU/MH/2554/2015 (2015, Bombay High Court).

permission of the Competent Authority before instituting proceedings for eviction in a civil court.[167]

4.2 Horizontal duties in South Africa

In this section, I firstly engage with cases involving evictions from privately-owned land, to indicate that a horizontal obligation to meaningfully engage has not yet been recognised by the Constitutional Court. Secondly, I engage with the jurisprudence on ss 8(2) and 26 of the South African Constitution, to argue that we ought to recognise horizontal obligations to meaningfully engage. Thirdly, I discuss the possibilities that open up once we recognise horizontal meaningful engagement obligations. Once residents, private landowners and the state are required to meaningfully engage with each other, they will be able to explore the most appropriate way to ensure access to adequate housing for residents under the circumstances of the case, including through expropriation of land by the state,[168] payment of compensation by the state to private landowners to enable residents to continue residing on the land,[169] or simply requiring private landowners to 'be patient' while alternate accommodation is found for residents.[170]

4.2.1 Horizontal meaningful engagement duties not yet recognised

The duty of private landowners to meaningfully engage with residents before they seek to evict resident from private land, has not yet been recognised by the South African Constitutional Court. In this section, I engage with case law involving evictions from private land to indicate this.

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[167] *Laxmi Ram Pawar v Sitabai Balu Dhotre and Ors.* MANU/SC/1014/2010 (2010, Supreme Court of India).

[168] *Fischer v Unlawful Occupiers* [2017] ZAWCHC 99 ('*Fischer*').

[169] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5 ('*Modderklip*').

[170] *Blue Moonlight* (n 25).

In *Blue Moonlight,* the Constitutional Court recognised that the City of Johannesburg was obligated to plan and budget for providing temporary accommodation to all those who may be rendered homeless as a result of an eviction instituted by private landowners.[171] It also recognised that under the statutory framework of the PIE Act, private landowners must accept a temporary restriction over their right to use and enjoy their property. Landowners must continue to accommodate residents while a court determines whether an eviction is just and equitable under the circumstances of the case, and until residents are provided with alternate accommodation.[172] In *Daniels v Scribante,* Justice Madlanga characterised this as undoubtedly a 'direct, onerous' and 'direct, positive obligation' placed on private parties.[173] However, *Blue Moonlight* did not discuss the need for meaningful engagement between the state and residents, nor the need for meaningful engagement between private landowners and residents. Given that some obligations on the part of both private landowners and the state were recognised, it is curious why the Constitutional Court did not discuss horizontal or vertical meaningful engagement obligations.

The same criticism applies to the companion cases to *Blue Moonlight – Golden Thread* and *PPC Aggregate Quarries*. In *Golden Thread,* a private landowner instituted eviction proceedings when residents began residing on its land. The local government was made a party to the eviction proceedings.[174] The Constitutional Court relied on *Blue Moonlight* to emphasize the obligation of the local government to provide alternate accommodation under the Constitution and the National Housing Code to those that may be rendered homeless as a result of an eviction ordered at the behest of private landowners.[175] However, the Court did not discuss the need for meaningful

[171] ibid [74].

[172] ibid [40].

[173] *Daniels v Scribante* (n 143) [53].

[174] *Occupiers Of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Limited and others* [2011] ZACC 35 [1]–[2] ('*Golden Thread*').

[175] ibid [17]–[18].

engagement between the local government and residents, or between the private landowners and residents.

Similarly, in *PPC Aggregate Quarries,* the Constitutional Court re-iterated its decision in *Blue Moonlight* regarding the necessity for private landowners to accept a restriction on the use and enjoyment of their property until residents had been provided with alternate accommodation, and the duty of the state to provide alternate accommodation to those that may be rendered homeless.[176] The Court did not, once again, discuss the need for meaningful engagement between the local government and residents, or between the private landowners and residents.

The question regarding the involvement of private landowners in the process of meaningful engagement was expressly raised in *Blue Moonlight II.*[177] However, the Constitutional Court declined to answer the question regarding the inclusion of private landowners during the process of meaningful engagement in relation to an eviction, leaving it open for future cases. Moreover, the Constitutional Court framed the question as regards the duty of the state and residents to meaningfully engage with private landowners, rather than as the duty of private landowners to engage with residents before seeking evictions.

Other decisions have alluded to horizontal duties in relation to s 26. In *Grootboom,* the Constitutional Court observed that under s 26(1), 'a negative obligation is placed upon the state and *all other entities and persons* to desist from preventing or impairing the right of access to adequate housing' (emphasis added).[178] Some scholars have interpreted this sentence to mean that the

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[176] *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Limited and others* [2011] ZACC 36 [11]–[14] ('*PPC Aggregate Quarries*').

[177] *The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Blue Moonlight Properties 39 (Pty) Ltd* [2012] ZACC 9 [17]–[18] ('*Blue Moonlight II*').

[178] *The Government of the Republic of South Africa & Ors v Irene Grootboom & Ors* [2000] ZACC 19 [34] ('*Grootboom*').

Constitutional Court recognised horizontal obligations on 'all other entities and persons'.[179] However, given that the Court did not expand on this, and the issue of horizontality was not brought up in the case, it is unlikely that the Court was recognising horizontal obligations.[180] In his dissenting opinion in *Abahlali*, Justice Yacoob observed that, 'all applicants for eviction must engage reasonably before instituting eviction proceedings.'[181] Wilson and Dugard have interpreted this to mean that Justice Yacoob recognised horizontal meaningful engagement obligations.[182] Given that this was one cursory sentence, and Justice Yacoob did not expand more on horizontality in the case, it is unlikely that he intended to recognise horizontal meaningful engagement obligations.

Cases from lower courts have explicitly recognised horizontal meaningful engagement obligations.[183] In *Lingwood* the High Court recognised that it would not be just and equitable to order an eviction in a case instituted by non-state actors when no attempt had been made to 'enter into any negotiations or attempt any mediations'.[184] The High Court relied on *Port Elizabeth Municipality* to come to this conclusion. It recognised that it may have been possible to arrive at a mutually acceptable solution, such as payment of a reasonable rent, if the landowner had engaged with the residents.[185] The High Court ordered both the local authority and the non-state landowner

[179] Michael Dafel, 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect' (2013) 29 SAJHR 591; Chirwa (n 142); Liebenberg (n 142) 70.

[180] Nolan (n 142) 81–82.

[181] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31 [69] ('*Abahlali*').

[182] Wilson and Dugard (n 6) 54.

[183] Dafel (n 179); Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 153) 288.

[184] *Lingwood v The Unlawful Occupiers of*R/ *FofErf9 Highlands* 2008 (3) BCLR (W) [30]–[35] ('*Lingwood*'). It is important to recognise that in the case, the court took into consideration other relevant circumstances while denying an eviction order, including the fact that the residents would face homelessness if evicted and the local authority had not been made a party to the proceedings to ensure provision of alternate accommodation to prevent homelessness. *Lingwood* [37].

[185] ibid [34].

to engage with residents to arrive at mutually acceptable solutions.[186] In other eviction cases, horizontal meaningful engagement obligations ought to be similarly recognised, and in the section below I explore how we can arrive at this through interpreting ss 8(2) and 26 of the South African Constitution.

4.2.2 Recognising horizontal meaningful engagement obligations

In this section, I argue that we ought to recognise direct horizontal meaningful engagement obligations in the eviction context. I rely on the text of s 8(2) of the Constitution read with s 26; case law interpreting s 8(2); and case law recognising horizontal obligations in the context of the right to housing.

Section 8(2) of the South African Constitution reads,

> A provision of 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.

The text of the Constitution, therefore, conceives of the possibility of horizontal application of rights. To determine whether or not any duty imposed by a right is horizontally binding, we must take into account (1) the nature of the right and (2) the nature of the duty imposed by the right. Together, these require an inquiry into whether a right is capable as well as suitable for direct horizontal application.[187]

In *Khumalo,* the Constitutional Court considered (1) the 'intensity' of the right (freedom of expression in the case), and (2) the 'potential invasion of the right which could be occasioned by

[186] ibid [38].

[187] Halton Cheadle and Dennis Davis, 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 SAJHR 44, 57.

persons other than the state or organs of state', to hold that the right to freedom of expression was of 'direct, horizontal application' in the case.[188]

In *Daniels v Scribante,* the Constitutional Court further expanded on how we can recognise horizontal duties under the South African Constitution. The Court held,

> Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the State or organs of state"; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that.[189]

The following sections apply these factors to the eviction context, to argue that we ought to impose horizontal duties on private landowners to meaningfully engage with residents prior to evictions. While recognizing horizontal obligations, the Constitutional Court has not always engaged in this exercise,[190] although it is required to do so for the sake of doctrinal consistency.

4.2.2.1 Nature of the right

The nature of housing as a right, including its history and what it 'seeks to achieve',[191] has been explored in several decisions of the Constitutional Court.[192] For example, in *Blue Moonlight,* the Constitutional Court observed,

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[188] *Khumalo* (n 143).

[189] *Daniels v Scribante* (n 143) [39].

[190] Tom Lowenthal, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 261.

[191] *Daniels v Scribante* (n 143) [39].

[192] *Grootboom* (n 178) [6]; *Port Elizabeth Municipality* (n 148) [8]–[18].

> The quest for a roof over one's head often lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy.[193]

Thus, the importance of housing as a right, given the context of forced removals during colonial and apartheid South Africa, and the persisting effects of the same,[194] has been recognised. Its connection with other rights and values has also been well established, including 'personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity'.[195]

The right to access adequate housing is involved in eviction cases. An eviction carries with it the risk of homelessness, a consequence that is inevitable in case of impoverished residents. It also jeopardises other rights and values. It exacerbates inequality, while harming the dignity and freedom of residents of informal settlements.[196]

The 'potential invasion of the right which could be occasioned by persons other than the state or organs of state'[197] was considered an important factor both in *Khumalo* and in *Daniels v Scribante,* when determining whether direct horizontal obligations apply in any case. Given that informal settlements and inner-city homes are often built on private land, an eviction application filed by a private landowner holds the potential to invade the right to housing of residents.

Given the nature of the right, horizontal obligations in relation to evictions become necessary, although we must explore the nature of obligations that may be horizontally imposed.

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[193] *Blue Moonlight* (n 25) [2].

[194] This thesis, ch 2, section 2.

[195] *Port Elizabeth Municipality* (n 148) [17].

[196] This thesis, ch 2.

[197] *Daniels v Scribante* (n 143) [39].

4.2.2.2 Nature of duty imposed by the right

The right to access to adequate housing imposes a number of obligations, but here we are concerned with meaningful engagement obligations prior to carrying out evictions. Requiring either the state or non-state actors to conduct meaningful engagement entails a number of related obligations. Firstly, the landowner is required to continue to accommodate residents while meaningful engagement is taking place. Secondly, the relevant duty bearer is required to conduct meaningful engagement. Thirdly, other positive measures are necessary to ensure a meaningful engagement exercise, such as sharing of relevant information. I discuss these positive measures in chapter 4. For now, it is sufficient to recognise that meaningful engagement entails a number of related obligations on the part of duty bearers.

Various kinds of horizontal obligations have already been recognised in the context of eviction of residents from their homes, and based on these, it becomes possible to also recognise horizontal meaningful engagement obligations.[198] Three cases of the Constitutional Court on the right to housing are important in this context – *Blue Moonlight, Daniels v Scribante* and *Baron v Claytile*[199].

In *Blue Moonlight* the Constitutional Court recognised,

> It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already

[198] Dafel (n 179).

[199] *Baron and Others v Claytile (Pty) Limited and Another* [2017] ZACC 24 ('*Baron v Claytile*').

> illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.[200]

The Constitutional Court thereby recognised an obligation on the part of private landowners to continue to provide housing, at least for the time being, until alternate accommodation is found for residents who may face homelessness as a result of an eviction. In *Daniels v Scribante,* the majority decision of the Constitutional Court held that this was a 'direct, onerous obligation', to the extent that private landowners were required to continue to house residents who would face homelessness if evicted.[201]

Direct horizontal obligations in relation to the right to land and housing were also recognised in *Daniels v Scribante* under the framework of the Extension of Security of Tenure Act 1997 ('ESTA'), read with s 25(6) of the Constitution. Because this thesis is primarily concerned with eviction in the context of PIE,[202] a brief introduction to ESTA is useful here. ESTA is a legislation that provides security of tenure for people residing on rural, peri-urban or agricultural land with the express or tacit consent of landowners.[203] It was designed specifically to recognise the rights to use and enjoy land by Black farm workers who live and work on farms owned by white people, as a result of apartheid.[204] It recognises a range of rights of residents,[205] including the

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[200] *Blue Moonlight* (n 25) [40].

[201] *Daniels v Scribante* (n 143) [53].

[202] This thesis, ch 1, section 3.

[203] Extension of Security of Tenure Act 1997, preamble, ss 1-3 ('ESTA'). As per ESTA s 2, the legislation applies to all land other than land in a township, or land encircled by a township. It also applies to land that is designated as agricultural land within a township.

[204] *Hattingh and others v Juta* [2013] ZACC 5 [35] ('*Hattingh*'); Stuart Wilson, 'ConCourt Falls Short of Farm Dweller Act's Aims' *Mail & Guardian* (18 July 2017) <https://mg.co.za/article/2017-07-18-concourt-falls-short-of-farm-dweller-acts-aims/> accessed 20 December 2021.

[205] ESTA, ss 5 and 6.

right to maintain a family life in line with the culture of the family,[206] and the right to access basic services including electricity and water,[207] healthcare and educational services.[208]

In *Daniels v Scribante,* a resident of farmland – Ms Daniels – wanted to make basic improvements to her home at her own cost, to make it suitable for dignified residence. Two aspects of *Daniels v Scribante* deserve attention. Firstly, the recognition of horizontal obligations. Secondly, the recognition of the need for meaningful engagement in the context of ESTA.

The Constitutional Court recognised in the case that s 8(2) of the Constitution imposes horizontal obligations on non-state actors. In relation to ESTA read with s 25(6) of the Constitution, non-state actors cannot improperly invade security of tenure and other rights of residents. Moreover, non-state actors are obligated to accommodate residents on land.[209]

The Constitutional Court also recognised the need for meaningful engagement. The Court recognised that residents have the right to make improvements to their homes under ESTA, and that residents did not need the consent of the owner or person in charge of the farm to make improvements that were necessary to ensure human dignity.[210] At the same time, the Court recognised that a balance between the rights of the owner/person in charge and residents under ESTA, required that there be meaningful engagement between the two regarding any improvements. In case of stalemate during the process of engagement, residents could approach

[206] ESTA, s 6(2)(d); *Hattingh* (n 204).

[207] ESTA, s 6(2)(e).

[208] ESTA, s 6(2)(f).

[209] *Daniels v Scribante* (n 143) [49].

[210] ibid [60].

the courts.[211] In similar vein, meaningful engagement obligations ought to be placed on non-state actors in the context of eviction of informal settlements.

Baron v Claytile, which came at the heels of *Daniels v Scribante,* also addressed horizontal obligations in the context of ESTA. The duty of private landowners to meaningfully engage with residents prior to seeking evictions under ESTA was raised before the Constitutional Court.[212] Eventually, the parties abandoned this issue. Residents also asked the Constitutional Court to decide whether private landowners have a duty to provide alternative accommodation to evicted residents,[213] especially when the landowner was 'commercially able'.[214] The majority of the Court observed that in the context of ESTA, when evictions are sought by a private landowner when there has been no breach or breakdown of the employment relationship, 'it might therefore be appropriate to expect the private landowner to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation.'[215] Eventually, the parties in the case agreed that the only issue to be decided by the Court was whether the City had fulfilled its obligation to provide suitable alternate accommodation,[216] and therefore the majority's views on horizontal obligations to provide alternate accommodation remain *obiter*. Nonetheless, given the kinds of horizontal obligations contemplated by the majority of the Constitutional Court in the case, it becomes possible to recognise the need for meaningful engagement obligations to be placed on non-state actors in the context of eviction of informal settlements.

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[211] ibid [61]-[65].

[212] *Baron v Claytile* (n 199) [28].

[213] ibid [28].

[214] ibid [35].

[215] ibid [37]; Elsabé van der Sijde, 'Tenure Security for ESTA Occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*' (2020) 36 SAJHR 74.

[216] *Baron v Claytile* (n 199) [38].

Other cases dealing with horizontal obligations in contexts outside of housing are also relevant, particularly *Juma Musjid*[217] and *Pridwin*[218].

Juma Musjid involved the eviction of a school, and consequently deprivation of learners' access to basic education. The context is analogous to that of an eviction of residents from their access to housing, involving deprivation of existing access to a right. Three aspects of the decision are relevant.

Firstly, the Constitutional Court recognised horizontal obligations on the part of non-state actors. The Court recognised that there was a horizontal constitutional obligation not to impair learners' right to basic education.[219]

Secondly, the Constitutional Court required non-state actor to act 'reasonably'. It held that in case the action of a non-state actor impaired learners' right to education, it must act reasonably.[220] This creates space for recognition of horizontal obligations including meaningful engagement, although the Constitutional Court did not recognise such obligations in the case. In *Olivia Road*, the Constitutional Court recognised vertical meaningful engagement obligations by interpreting s 26(2) of the Constitution, that requires the state to take reasonable measures to achieve the right to housing. It held that the obligation to act reasonably requires that the state meaningfully engage with residents prior to seeking an eviction, and respond reasonably to residents during the process of engagement.[221] Similarly, once we recognise an obligation on the part of private actors to 'act reasonably', we can recognise meaningful engagement obligations. In *Juma Musjid*, the Court held that because the landowner had made numerous attempts to resolve

[217] *Juma Musjid* (n 143).

[218] *Pridwin* (n 143).

[219] *Juma Musjid* (n 143) [58]–[60].

[220] ibid [65].

[221] *Olivia Road* (n 1) [17], [21], [28].

all disputes regarding the tenancy of the school on the property prior to instituting eviction proceedings, it had acted reasonably to minimise impairment of the right to basic education.[222]

Thirdly, the Court recognised meaningful engagement obligations in the case, but it recognised vertical rather than horizontal meaningful engagement obligations. It required the relevant state department to engage with the property owner and the school governing body, with a view to reach an agreement with regard to the tenancy of the school on the property.[223] Meaningful engagement was clearly relevant to the obligations of the state, but I argue that it is equally relevant to the obligations of non-state actors.

A difficulty that arises in the context of *Juma Musjid* is that the Constitutional Court was explicit in the case that 'positive obligations' could not be imposed in the context of the right to education on non-state actors, and only 'negative obligations' could be imposed in the context. Hence, the Court recognised that the landowner in the case owed a 'negative obligation' to refrain from unreasonably impairing learner's right to basic education. Yet, such bright lines between negative and positive obligations are difficult to draw.[224] When the Constitutional Court recognised that the landowner could not unreasonably impair learner's right to basic education, this meant that during the period when the landowner was taking reasonable steps to limit impairment on learners' right to education, it was obligated to continue to provide its land for basic education. This entails positive obligations, even if the Court did not recognise the positive aspects of the obligation.

The Constitutional Court itself questioned the positive/negative dichotomy in *Daniels v Scribante*. In the case, the Court recognised that in the context of ESTA and s 25(6) of the

[222] *Juma Musjid* (n 143) [64].

[223] ibid [74].

[224] Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591, 604; Lowenthal (n 190); Liebenberg (n 153) 54–59; Fredman, *Human Rights Transformed* (n 83) 34–36.

Constitution, the obligations placed on non-state actors included both positive and negative elements. A non-state actor is obligated not to improperly invade the rights of residents residing on farmland. This involves a negative obligation, to refrain from invading residence. It also involves a positive obligation, because the landowner is obligated to continue to accommodate residents on its farmland.[225] Hence, in *Daniels v Scribante,* the Constitutional Court sought to limit the *Juma Masjid* holding, and to recognise that that judgment should not be read to mean that 'under no circumstances may private persons bear positive obligations under the Bill of Rights'.[226]

Pridwin is also relevant in the context of horizontal obligations. The case involved the termination of a contract by an independent school with the parents of two learners, which ended the learners' education at the school.[227] The case thereby involved the deprivation of access to a right (basic education), just as an eviction results in deprivation of access to housing.

In this case, the Constitutional Court recognised that the school owed obligations to learners under the Constitution. While the school did not owe an obligation to continue to provide education to the learners for all time, it had an obligation to ensure that the right to basic education of learners was not negatively infringed. This required that the independent school provide a hearing prior to making a decision to discontinue education of the learners.[228] We can draw from this to make similar arguments for the eviction context. In *Blue Moonlight* the Constitutional Court recognised that landowners may not owe an obligation to indefinitely house residents, but they must be patient, until alternate accommodation is provided to residents who are at a risk of facing homelessness. Thus, for at least some time, non-state actors owed an obligation to continue to accommodate residents. We can extend that to require non-state actors to also meaningfully

[225] *Daniels v Scribante* (n 143) [49].

[226] ibid [48].

[227] *Pridwin* (n 143) [15].

[228] ibid [88].

engage with residents prior to seeking evictions, just as in *Pridwin,* independent schools were required to hear learners and parents prior to terminating education.

Thus, through an interpretation of s 8(2) read with s 26 of the Constitution, horizontal meaningful engagement obligations ought to be recognised in the eviction context.

4.2.2.3 Form of application of horizontal meaningful engagement obligations

I have argued above that horizontal meaningful engagement obligations ought to be recognised in the eviction context. It is pertinent to address how these obligations ought to be recognised. Bhana has succinctly described these two enquiries as the scope and form questions. While the scope question is concerned with whether rights and corresponding obligations ought to apply horizontally, the form question is concerned with how these ought to apply horizontally.[229] I discussed the scope question above, arguing that horizontal meaningful engagement obligations should be recognised in the eviction context. The form question requires us to address whether horizontal meaningful engagement obligations ought to flow directly through a reading of s 8(2) with s 26 of the Constitution, or should the obligations apply through an interpretation of statutory law or the common law. In the discussion in the section above, it is implicit that I have argued for the recognition of horizontal meaningful engagement obligations through a direct application of s 8(2) read with s 26 of the Constitution. In this section, I make that argument explicit.

It is useful to briefly recap how vertical meaningful engagement obligations came to be recognised in the context of evictions in South Africa. The 'meaningful engagement' doctrine was developed by the South African Constitutional Court in *Olivia Road*,[230] through interpreting s

[229] Deeksha Bhana, 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' (2013) 29(2) South African Journal on Human Rights 351, 366.

[230] *Olivia Road* (n 1).

26(2)[231] and (3)[232] of the Constitution of South Africa. Recall that s 26(2) requires the state to take reasonable measures within its available resources to progressively realise the right to housing. Section 26(3) prevents evictions without a court order made after considering all relevant circumstances. Similarly, we ought to recognise horizontal meaningful engagement obligations through reading s 8(2) with s 26(2) and (3).[233]

It should be noted that the text of s 26(2) refers to 'the state'. In *Daniels v Scribante,* Justices Jafta and Nkabinde paid attention to the wording of s 26(2) to argue against the imposition of positive obligations on non-state parties. They argued that the Constitution was express whenever it imposed positive obligations on the state, and hence it would be odd if the Constitution was 'obscure' when it imposed positive obligations on private persons.[234] Liebenberg and Ellmann have presented an alternate interpretation of s 26(2).[235] They argue that the provision describes part of the state's obligations with respect to the right to access to adequate housing. The provision does not, however, say that only the state must fulfil these obligations.[236]

In any case, s 26(3) does not refer only to the 'state', and hence that provision can enable us to recognise obligations for non-state actors with respect to the right to housing, at least in the eviction context. Since s 26(3) requires that an eviction be permitted by courts only after considering 'all relevant circumstances', it becomes possible to require courts to consider whether non-state actors have meaningfully engaged with residents prior to seeking evictions. The text of

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[231] ibid[17], [21], [28].

[232] ibid [18].

[233] Dafel (n 179) 608–611.

[234] *Daniels v Scribante* (n 143) [162], [175]-[185].

[235] Liebenberg (n 142) 71; Stephen Ellmann, 'A Constitutional Confluence: American State Action Law and the Application of South Africa's Socio-Economic Rights Guarantees to Private Actors' in Stephen Ellmann and Penelope Andrews (eds), *The post-apartheid constitutions: Perspectives on South Africa's basic law* (University of the Witwatersrand Press 2001) 461.

[236] Liebenberg (n 142) 71; Ellmann (n 235) 461.

s 26(3), read with s 8(2) of the Constitution, allows for the recognition of horizontal meaningful engagement obligations directly under the Constitution.

Indirect horizontal obligations may be imposed through the development of statutory and common law. Section 8(3) of the Constitution requires statutory and common law to be developed to give effect to the bill of rights. To give effect to the right to the housing, and meaningful engagement as an element of the right to housing, statutory and common law ought to be developed to recognise horizontal meaningful engagement obligations. An interpretation of the relevant statutory framework – the PIE Act – enables the recognition of statutory horizontal meaningful engagement obligations. The Act lays down the procedure for seeking evictions, and gives some flesh to the 'relevant circumstances' that must be taken into account by a court prior to giving an order for eviction, to ensure that evictions are 'just and equitable' under the circumstances. While interpreting s 6 of the PIE Act, the Constitutional Court held in *Port Elizabeth Municipality,* that whether 'serious negotiations', 'engagement' or 'mediation' had taken place with residents, forms part of the 'relevant circumstances' that a court must consider before ordering an eviction. It would not ordinarily be 'just and equitable' to grant an eviction order, if 'proper discussions' have not been attempted prior to seeking an eviction order.[237] It is possible to extend the holding of the Constitutional Court under s 6 to s 4 of the Act. While s 6 of the Act lays down the procedure for eviction applications made by 'organs of the state', s 4 lays down the procedure for eviction applications made by non-state actors ('an owner or person in charge of land').[238] The procedure to be followed under s 6 is the same as the procedure to be followed in case of eviction applications made under s 4 of the Act.[239] Hence, it becomes possible to argue that a court must consider, as a 'relevant circumstance' whether meaningful engagement has taken place between

[237] *Port Elizabeth Municipality* [43], [45].

[238] PIE Act ss 4(1) and 6(1).

[239] ibid s 6(6).

residents and non-state actors, while considering whether an eviction is 'just and equitable' under the circumstances.[240]

However, evictions may take place beyond the provisions of the PIE Act. For example, in *Olivia Road,* evictions took place under the National Building Regulations and Building Standards Act and the Health Act. As per s 8(3) of the Constitution, these statutes also ought to be interpreted to give effect to the right to housing, and meaningful engagement as an element thereof. However, if it is not possible to interpret statutory and common law to recognise indirect horizontal meaningful engagement obligations, it becomes pragmatically useful, besides being doctrinally sound, to interpret s 26 of the Constitution along with s 8(2) to impose direct horizontal meaningful engagement obligations under the Constitution. For example, statutory law may preclude meaningful engagement. In *Abahlali,* provisions of the KwaZulu-Natal Elimination and Prevention of Reemergence of Slums Act were declared unconstitutional, because these precluded the possibility of meaningful engagement prior to instituting eviction proceedings.[241] Direct horizontal obligations flowing from ss 8(2) and 26 of the Constitution enable striking down of such provisions, besides filling in gaps in statutory law when no horizontal meaningful engagement obligations are provided under statute.[242]

4.2.3 Possibilities that open up

Once both state and non-state actors are required to meaningfully engage with residents prior to seeking evictions, various possibilities can be explored during the process of meaningful engagement to ensure access to adequate housing for residents. The case law on evictions from non-state land indicates at least three possibilities – continued residence of residents with payment

[240] ibid s 4(7); Dafel (n 179) 608–611.

[241] *Abahlali* [122].

[242] Gautam Bhatia, 'Horizontal Rights: An Institutional Approach' (University of Oxford 2021) 208–212.

of compensation[243] or rent[244] by the state to the landowner for deprivation of use of the land; expropriation of the land; and 'patience' on the part of non-state landowners until alternate accommodation is found for residents. The most appropriate course of action in the circumstances of a particular case ought to be explored during meaningful engagement between residents, the state and non-state actors.

Modderklip, involved an informal settlement with thousands of residents residing on privately owned land.[245] In the case, the Constitutional Court permitted residents to continue to reside in their settlement, and ordered the state to provide compensation to the landowner until alternate accommodation was found for residents. Although the land owner had obtained an order for eviction of the residents, the eviction order could not be executed given the number of residents in the settlement.[246] The Constitutional Court relied on the rule of law provision under the Constitution (s 1(c)) and the right to an effective remedy under s 34 of the Constitution, to develop an interesting remedy in the case.[247] It recognised that the people had been residing on the land for a long time, and had formed themselves into a settled community, and that s 26(3) of the Constitution, provisions of the PIE Act, and the decision of the Constitutional Court in *Port Elizabeth Municipality,* required the Court to be reluctant to evict 'relatively settled occupiers'.[248] Therefore, the Court recognised that the residents were entitled to remain on the land until alternative land was made available to them by the state, and required the state to compensate the

[243] *Modderklip* (n 169) [68].

[244] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue and Another* Case No 11442/2006 (4 February 2010, South Gauteng High Court) [196]; Gerald S Dickinson, 'Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg' (2011) 27 SAJHR 466.

[245] *Modderklip* (n 169) [6], [8]. By October 2000 there were 4000 residential units occupied by 18,000 persons on the land. Later estimates put the number at 40,000 persons.

[246] ibid [7]–[9].

[247] ibid [51].

[248] ibid [54]–[56].

land owner for use of the property until it could provide alternate land to the residents.[249] Eventually, the state bought the land and a low-cost housing development was constructed in the location of the settlement.[250] While writing about the case, Liebenberg argues that the order in the case was intended to, 'provide a catalyst for tripartite negotiations between the State, landowner and residents on a satisfactory solution that would respect the constitutional rights of both the landowners and the residents.'[251] However, this has remained underexplored beyond *Modderklip*.[252]

The case of *Fischer* indicates the possibility of expropriation of land to enable residents to continue to reside in a settlement at a particular location.[253] The case involved 60,000 residents residing in an informal settlement encompassing land owned by three private landowners. In the case, the municipality indicated that it was unable to find alternate accommodation for the residents if they were evicted from the settlement.[254] To ensure that both the right to housing of residents as well as the right to property of the private landowners was respected, the High Court ordered the municipality to enter into good faith negotiations with the private landowners to purchase the land on which the settlement was built.[255] If negotiations failed, the courts required the municipality to explain whether it had considered expropriation of the property under s 9(3) of the Housing Act.[256] The case, therefore, indicates another possibility that ought to be explored during meaningful engagement between the state, non-state actors and residents during

[249] ibid [68].

[250] Stuart Wilson, 'The Right to Adequate Housing' in Jackie Dugard and others (eds), *Research handbook on economic, social and cultural rights as human rights* (Edward Elgar Publishing 2020) 197; Kate Tissington, 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation Beyond Modderklip?' (2011) 27 SAJHR 192.

[251] Liebenberg (n 153) 442.

[252] Jackie Dugard, 'Modderklip Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction of Unlawful Occupiers Is Not Just and Equitable?' (2018) 21 PELJ 1.

[253] *Fischer* (n 168).

[254] ibid [167].

[255] ibid [196]–[218].

[256] ibid.

meaningful engagement – that of either purchasing property from landowners, or expropriating the property so residents can continue to reside in their settlements.[257]

A third possibility was demonstrated in *Blue Moonlight*. In the case, the Constitutional Court recognised the obligation of the City of Johannesburg to provide alternate accommodation to residents facing eviction from buildings owned by non-state actors.[258] At the same time, it recognised that the non-state landowner had an obligation to be 'patient' while alternate accommodation was found for residents.[259]

The most appropriate course of action in the circumstances of a particular case ought to be explored during meaningful engagement between residents, the state and non-state actors. Once we recognise horizontal meaningful engagement obligations, non-state actors become part of the decision-making process, and these possibilities can be explored.

4.3 Horizontal duties in India

In this section, I engage with the possibility of direct horizontal participation duties in the eviction context under the Constitution of India, especially under arts 15(2) and 21. I find that direct horizontal duties have not yet been recognised in relation to the right to housing, and that considerable work needs to be done to contemplate such duties, which is beyond the scope of this thesis. I thereafter explore horizontal statutory duties recognised under the Maharashtra Slum Act.

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[257] Dugard (n 252); Lisa Draga and Sarah Fick, 'Fischer v Unlawful Occupiers: Could the Court Have Interpreted the "may" in Section 9(3)(a) of the Housing Act as a "Must" under the Circumstances of the Case?' (2019) 35 SAJHR 404.

[258] *Blue Moonlight* (n 25); Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 153).

[259] *Blue Moonlight* (n 25) [40].

Fundamental rights under Part III of the Indian Constitution 'generally' create duties for the state, as defined under art 12.[260] Direct horizontal duties are recognised under arts 15(2), 17, 23 and 24 of the Indian Constitution.[261] Art 17 abolishes the practice of 'untouchability', art 23 prohibits human trafficking and other forms of forced labour, while art 24 prohibits child labour in hazardous employment. Arts 15(2) is relevant for housing discrimination. The relevant part of the provision states,

> No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to … access to shops, public restaurants, hotels and palaces of public entertainment …[262]

In *IMA*, the Indian Supreme Court held that 'shops' include private, non-minority higher educational institutions.[263] To arrive at this construction, the Supreme Court relied on Dr Ambedkar's interpretation of 'shops' in a speech in the Constituent Assembly Debates, wherein he stated,

> To define the word 'shop' in the most generic term one can think of is to state that 'shop' is a place where the owner is prepared to offer his service to anybody who is prepared to go there seeking his service …. I should like to point out therefore that the word 'shop' used here is not used in the limited sense of permitting entry. It is used in the larger sense of requiring the services if the terms of service are agreed to.[264]

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[260] *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632 ('*Zoroastrian Cooperative*'); Ashish Chugh, 'Fundamental Rights - Vertical or Horizontal?' (2005) 7 SCC (J) 9; Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 602.

[261] *Indian Medical Association v Union of India* (2011) 7 SCC 179 ('*IMA*'); *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235 ('*PUDR*'); Bhatia, 'Horizontal Rights: An Institutional Approach' (n 242) 169; Gardbaum (n 260) 603; Gautam Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11 Asian Journal of Comparative Law 87.

[262] Constitution of India 1950, art 15(2).

[263] *IMA* (n 261) [187]; Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (n 261) 100.

[264] *IMA* (n 261) [186]; ibid.

The Court thereby endorsed an interpretation of shops that encompasses all private economic market transactions.[265] This ought to apply to private economic market transactions in relation to housing. More work is required to explore whether this ought to apply to the context of informal settlements, wherein residents may live on land owned by private persons without engaging in any economic market transactions with the landowners. For example, if residents live on privately owned land without paying rent to landowners, can landowners then evict all residents belonging to a particular religion, gender or caste, and not others, without incurring the prohibition on horizontal discrimination under art 15(2)? While I flag this question here, it is beyond the scope of the thesis to answer it.

Zoroastrian Cooperative[266] is relevant while examining horizontal housing discrimination. In the case, the Indian Supreme Court upheld the enforceability of the Zoroastrian Cooperative Housing Society's by-laws, which restricted sale of land to non-members of the Cooperative Society. Because only Parsis (adherents of Zoroastrianism) could become members of the Cooperative Society, in effect, the by-laws prevented sale of land to non-Parsis, thereby discriminating on grounds of religion. This decision has been criticised for failing to properly appreciate the impact of art 15(2) on such by-laws.[267] Art 15(2) ought to apply at least indirectly, in holding such discriminatory by-laws to be unenforceable.[268]

[265] ibid.

[266] *Zoroastrian Cooperative* (n 260).

[267] Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (n 261) 94; Gardbaum (n 260) 610; Anindita Mukherjee, *The Legal Right to Housing in India* (CUP 2019) 85–88.

[268] Bhatia, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (n 261) 94; Gardbaum (n 260) 610.

The Indian Supreme Court has occasionally recognised direct horizontal duties under art 21 of the Indian Constitution.[269] In *Consumer Education and Research Centre*,[270] a three-judge bench of the Supreme Court recognised the right to health of employees as part of the right to life under art 21. It held that the right also applied against private employers in the context of the occupational health hazards caused by the asbestos industry,[271] and that the Supreme Court had the authority to give appropriate directions under arts 32 and 142 to private employers for the enforcement of fundamental rights.[272] In the case, the Supreme Court issued a set of three directions to 'all the industries', including private entities.[273] The Supreme Court did not explain why art 21 applied directly horizontally in this case, nor expounded on principles which govern why and when art 21 applies directly horizontally.

Parmanand Katara[274] has been cited as another case wherein the Supreme Court recognised direct horizontal obligations under art 21.[275] The case involved provision of emergency medical care to protect life. In the case, the Supreme Court held that, 'Article 21 of the Constitution casts the obligation on the State to preserve life.'[276] Hence, the Court recognised vertical obligations to preserve life under art 21. It also observed that, 'every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life.'[277] The Court thereby referred to the 'professional obligation' of doctors to provide emergency

[269] Kamala Sankaran, 'Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution' (2007) 23 SAJHR 277, 289; Gardbaum (n 260) 603; Shameek Sen, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study' (2019) 10 Indian Journal of Law and Justice 141, 147.

[270] *Consumer Education and Research Centre v Union of India* (1995) 3 SCC 42 ('*Consumer Education and Research Centre*').

[271] ibid [24].

[272] ibid [28].

[273] Gardbaum (n 260) 603–604.

[274] *Parmanand Katara v Union of India* AIR 1989 SC 2039 ('*Parmanand Katara*').

[275] Sen, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study' (n 269) 147.

[276] *Parmanand Katara* (n 274).

[277] ibid.

medical care, and not a constitutional obligation. I therefore do not consider this a case wherein horizontal obligations were recognised under art 21.

Cases on sexual harassment in the workplace[278] have also been cited as examples of direct horizontality under arts 14, 19 and 21.[279] In these cases, the Supreme Court held that the state's failure to pass a sexual harassment legislation for public and private workplaces amounted to a violation of the petitioner's constitutional rights under arts 14, 19 and 21. This was a violation of the state's obligation to protect against sexual harassment in both public and private workplaces, and therefore a violation of a vertical obligation.[280] The Supreme Court did not, however, stop there. It went a step further and issued guidelines that were to be in force until a sexual harassment law was passed by the legislature. These guidelines applied to private workplaces, and until appropriate legislation was passed, women could institute proceedings for sexual harassment that took place in private workplaces, under these guidelines.[281] For example, the guidelines required employers, 'whether in the public or private sector' to take appropriate steps to prevent sexual harassment.[282] This was therefore a recognition of direct horizontal obligations under the guidelines passed by the Supreme Court under the Constitution, until appropriate legislation was passed. This creates exciting possibilities for the imposition of direct horizontal obligations under art 21, at least as an interim measure, in the absence of appropriate legislation, when the state fails to fulfil its obligation to protect the rights of persons from invasion by private parties by enacting appropriate legislation. This possibility has remained underutilised beyond the context of sexual

[278] *Visakha v State of Rajasthan* (1997) 6 SCC 241 ('*Visakha*'); *Medha Kotwal Lele and Others v Union of India and Others* (2013) 1 SCC 297 ('*Medha Kotwal Lele*').

[279] Sankaran (n 269) 289.

[280] *Visakha* (n 278); *Madhu Kotwal Lele* (n 278); Gautam Bhatia, 'Horizontality under the Indian Constitution: A Schema' (*Indian Constitutional Law and Philosophy*, 24 May 2015) <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/> accessed 30 December 2021; Gardbaum (n 260) 605.

[281] *Visakha* (n 278) [18].

[282] ibid [17].

harassment, and more work is necessary to determine the scope for using the same mechanism to impose direct, interim horizontal obligations under art 21, including, perhaps, in the context of the right to housing.

In cases involving the right to housing under art 21, horizontal obligations, whether direct or indirect, have not yet been recognised. It is beyond the scope of this thesis to argue whether and how the right to housing, including participation rights, ought to create direct horizontal duties for private actors. Given the dearth of case law and literature on horizontality beyond arts 15(2), 17, 23 and 24; and especially on horizontal duties under art 21, significant work is required to explore whether and how horizontal duties may be imposed under art 21. Given paucity of time and space, such an exploration is beyond the scope of this thesis.

The Maharashtra Slum Act provides a statutory framework for the state to fulfil its duties to protect the right to housing of residents of informal settlements built on privately owned land. The Act places statutory obligations on private entities. Under the Maharashtra Slum Act, once an informal settlement is declared to be a 'slum area', private 'owners'[283] cannot institute proceedings for eviction of residents, except with the written permission of the 'Competent Authority' established under the Act.[284] The Competent Authority consists of persons or body corporates, including local authorities, designated as such by the state government under the Act.[285] Private landowners must therefore continue to accommodate residents until and unless the Competent Authority gives permission for eviction.

Participation rights are relevant at two points – when an area is declared a 'slum', and when the Competent Authority considers whether to grant permission to institute proceedings for

[283] See definition under Maharashtra Slum Act, s 2(f).

[284] Maharashtra Slum Act, s 22; *Kumud v Pandurang Narayan Gandhewar and Others* MANU/SC/0751/2019; *Laxmi Ram Pawar v Sitabai Balu Dhotre and Others* MANU/SC/1014/2010.

[285] Maharashtra Slum Act, s 3.

eviction. In both these instances, the Act recognises vertical participation rights. When an area is declared a 'slum', any 'aggrieved party' can file an appeal within 30 days of the declaration before the tribunal established under the Act.[286] If an appeal is filed, residents must be informed about the appeal, and must be provided an opportunity to raise any objections before the tribunal.[287] Similarly, when permission is sought for eviction of residents before the Competent Authority, it must provide an opportunity to be heard to residents.[288] The landowners are not required to engage with residents prior to seeking permission from the Competent Authority to file for eviction of residents.

'Protected occupiers' – residents who possess a photo pass recording their residence in the settlement before a cut-off date[289] – cannot be evicted from their settlements, unless it is, in the opinion of the government, 'necessary in the larger public interest'. In that case, they must be relocated and rehabilitated to alternate accommodation under existing schemes for rehabilitation framed by the state.[290] This provision places statutory horizontal duties on private landowners, who must continue to accommodate residents until and unless the state government considers evictions necessary in the 'larger public interest'. While the provision does not specify participation rights, post *Olga Tellis*, notice and hearing must be provided to residents prior to their eviction.[291] *Olga Tellis* recognised vertical rather than horizontal participation rights.[292]

To conclude, under art 21 of the Indian Constitution, direct horizontal obligations in relation to the right to housing, and horizontal participation obligations in the context of eviction

[286] ibid s 4.

[287] ibid s 4.

[288] ibid s 22(3).

[289] ibid ss 3X(c), 3Y.

[290] ibid s 3Z.

[291] *Olga Tellis* (n 2) [45]–[46].

[292] See section 4.1.

of informal settlements, have not been recognised. Provisions of the Maharashtra Slum Act place statutory obligations on private landowners to accommodate residents prior to grant of permission to proceed for evictions under the Act. Only vertical participation rights are recognised under the legislation.

5 Conclusion

In this chapter, I engaged with two aspects of participation rights – who ought to have the right to participation; and who ought to bear duties in relation to participation. I relied on the values underlying participation rights, to argue that each resident of an informal settlement ought to have the right to participate themselves, rather than through representatives, and that there ought to be a collective dimension to the process of participation. I argued that participation rights are necessary in the context of evictions both from public and private land, and that horizontal meaningful engagement obligations ought to be recognised under ss 8(2) read with s 26 of the South African Constitution. While normatively, I am committed to recognising horizontal participation obligations in India, the text and related jurisprudence under art 21 of the Indian Constitution has not recognised horizontal obligations. The Maharashtra Slum Act has an indirect horizontal effect, in requiring private landowners to continue to accommodate residents on their land until legislative requirements are met to institute proceedings for eviction. However, only vertical participation obligations are recognised.

Overall, the chapter engaged in normative and doctrinal analysis to develop the content of participation rights, to meet objections regarding these rights being 'unclear'. Chapter 4 continues to develop the content of participation rights, and in particular, engages with the issue regarding how the process of participation ought to take place, so that participation rights are not reduced to a procedural box to tick.

CHAPTER 4: THE PROCESS OF PARTICIPATION

I participate
You participate
He participates
We participate
They profit.[1]

1 Introduction

Together with chapter 3, this chapter develops the content of participation rights. Chapter 3 engaged with issues regarding (1) who ought to have the right to participate and (2) who ought to bear duties in relation to participation. This chapter engages with how the process of participation ought to take place. Calls for participation often fail to engage with the issue regarding how participation should take place,[2] and this chapter fills that crucial gap. It argues that the process ought to take place through 'bounded deliberation',[3] with the fulfilment of positive measures to ensure bounded deliberation, and to ensure each resident is equally able to participate in decision-making around evictions, to further their freedom, dignity, and substantive equality. Attention is paid to the process of participation, to ensure that it is not merely a procedural box to tick prior to an eviction,[4] and not used by the state and private landowners to add legitimacy to a pre-determined eviction decision, whereby others 'profit',[5] while residents are unable to secure their right to access adequate housing.

[1] Atelier Populair Graphics Centre, École des Beaux-Arts de la Sorbonne and École des Arts Decoratifs de la Sorbonne, 'Poster'; cited in Sherry R Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216.

[2] Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 OJLS 597, 599.

[3] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 91; Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 CCR 165.

[4] Kate Tissington, 'A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice' (SERI) <http://www.seri-sa.org/index.php/research-7/resource-guides> accessed 30 September 2018; <http://abahlali.org/node/5538/> accessed 1 February 2021.

[5] Atelier Populair Graphics Centre (n 1).

In section 2, I discuss the scope of participation, or the kinds of issues that ought to be decided during the process of participation. This sets the stage for chapters 4 and 5. In these chapters, I pick up these issues to illustrate how the process of participation ought to take place, and to indicate the role of courts in drawing on deliberations to decide substantive issues in eviction cases.

In section 3, I explore how the law in India, South Africa and under the ICESCR envisages the process of participation. I find that insufficient attention has been paid to how the process of participation should take place. The Constitutional Court of South Africa has recognised that prior to evictions, residents must be meaningfully engaged,[6] but it has only begun to flesh out the details of this 'meaningful engagement'. Similarly, the Indian Supreme Court has recognised that prior to evictions, residents must be provided with a notice and hearing,[7] but it has not developed the content of such hearings. The Delhi High Court has recognised the need for meaningful engagement with residents prior to evictions,[8] but has limited the scope of meaningful engagement to determine who qualifies for alternate accommodation within existing schemes for rehabilitation. It has not fleshed out how meaningful engagement ought to take place. Similarly, under the ICESCR, the need for hearings, consultations and participation has been recognised, but the content of these hearings, consultations and participation has only begun to be fleshed out. An exception to this is the Maharashtra Slum Act, under which detailed rules have been prescribed regarding how the process of participation must take place. However, the Act envisages participation as a process of interest-bargaining rather than bounded deliberation.

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[6] *Occupiers Of 51 Olivia Road, Berea Township And 197 Main Street Johannesburg v City of Johannesburg And Others* [2008] ZACC 1 [17]–[28] ('*Olivia Road*').

[7] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 [45]–[46] ('*Olga Tellis*'); *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 121 [25] ('*Nawab Khan*').

[8] *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 (Delhi High Court) [54]–[55] ('*Sudama Singh*'); *Ajay Maken v Union of India* WP(C) 11616/2015 (Delhi High Court, 18 March 2019) ('*Ajay Maken*').

In section 4, I engage with the issue regarding how participation should take place. I argue that the process of participation ought to take place through 'bounded deliberation'[9] both among residents of informal settlements, and between residents and duty bearers (the state, and in case of settlements built on private land, private landowners). To ensure this, I argue in section 5, that positive measures are necessary prior to, and during, the process of participation. I indicate the kind of measures that are necessary, and who ought to bear the obligation to undertake these measures.

The purpose of the chapter is to lay down principles that ought to govern the process of participation, and not to lay down detailed rules for the process of participation. Principles, according to Alexy, are optimisation requirements, 'norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.'[10] Rules, on the other hand, 'are norms which are always either fulfilled or not'. These are 'fixed points in the field of the factually and legally possible'.[11] In this chapter, I argue that the principle of bounded deliberation ought to govern the process of participation. Examples are interspersed throughout the chapter, with the aim of illustrating this principle, to better explain the implication of this principle, and not to prescribe detailed rules for the process of participation. Many of the details of the process of participation will need to be specified through legislation, and developed through case law, based on the legal and factual possibilities on the ground.

2 Scope of participation

Before we discuss how the process of participation ought to take place, it is relevant to discuss the scope of participation. Several kinds of substantive issues have emerged in eviction cases. These

[9] Fredman, *Comparative Human Rights Law* (n 3) 91; Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 3).

[10] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 47.

[11] ibid 48.

issues are closely connected and it is difficult to draw bright lines between these issues. Cases will often require more than one of these substantive issues to be addressed. All these issues ought to fall within the scope of participation. I indicate in section 4 how the process of participation ought to take place to decide these issues, and indicate in chapter 5 how courts ought to draw on deliberations during participation to decide these substantive issues.

2.1 Issues immediately around evictions

Issues immediately raised around the eviction ought to fall within the scope for participation. These include questions regarding whether an eviction should take place, whether and how the settlement should be redeveloped *in situ,* and if an eviction is to take place, the details regarding the relocation, including timing of relocation, process of relocation and details of alternate accommodation. For example, courts have held that evictions cannot take place during the day when residents may be at work,[12] or at night when residents may be asleep,[13] or in the middle of the monsoon season.[14] Such issues ought to fall within the scope of participation. Decisions need to be taken regarding alternate accommodation to be provided to residents, including the location of alternate accommodation, provision of facilities at the alternate accommodation (such as water, electricity, sanitation, street lighting), quality of the alternate accommodation (such as size of homes), and whether the accommodation is temporary or more permanent. For example, in *Olivia Road,* the Constitutional Court ordered meaningful engagement between residents and the City of Johannesburg. The process resulted in agreement regarding provision of alternate accommodation to the residents in buildings close to their original homes, at an affordable rent, and with security against further eviction.[15] Even if the eviction is not to be carried out, or to be carried out at a later

[12] *Sudama Singh* (n 8) [59].

[13] ICESCR General Comment No 7, The right to adequate housing: forced evictions, UN doc E/1998/22 para 15.

[14] *Olga Tellis* (n 7) [51], [57]; ibid para 15.

[15] *Olivia Road* (n 6); Kate Tissington, 'Challenging Inner City Evictions before the Constitutional Court of South Africa: The Occupiers of 51 Olivia Road Case in Johannesburg, South Africa' (2008) 5 Housing and ESC Rights Law

point of time, decisions need to be taken regarding the provision of facilities in the existing housing for residents, including improvements to existing facilities temporarily,[16] or more permanent *in situ* development.[17]

The application of the meaningful engagement doctrine by the Constitutional Court in *Olivia Road* and *Joe Slovo* reflects a narrow use of meaningful engagement, only as a remedy post an eviction, and not in determining whether an eviction ought to take place. The scope of meaningful engagement ought to be wider, to encompass all issues discussed above, including whether an eviction should take place. The facts of these cases and their aftermath indicate the importance of a wider scope for meaningful engagement.

In *Olivia Road,* the Constitutional Court used meaningful engagement only as a remedy, in the process of relocation to alternate accommodation. It did not require meaningful engagement for determining whether the residents could continue to reside in the buildings in which they lived, without the need for relocation. The Constitutional Court observed that, 'the City had made no effort at all to engage with the residents at any time before proceedings for their eviction were brought.'[18] Despite these observations, the Constitutional Court was content with requiring meaningful engagement only for the process of relocation to alternate accommodation, and not for determining a prior question – whether the people should be relocated from their residence.

A reading of the Gauteng High Court's judgment in *Olivia Road* indicates the value of requiring meaningful engagement for determining whether a relocation ought to take place, and

Quarterly 1; Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 SAJHR 127.

[16] *Ajay Maken* (n 8) [38]–[39].

[17] *Melani and the further residents of Slovo Park Informal Settlement v The City of Johannesburg and Others* [2016] ZAGPJHC 55 ('*Melani*').

[18] *Olivia Road* (n 6) [13].

only thereafter in determining details of alternate accommodation and the relocation process. The City of Johannesburg initially filed an application before the Gauteng High Court seeking to evict people residing on properties in Joel Street, among other properties, on health and safety grounds. Later, the City admitted before the High Court that there were no longer any health or safety risks at the Joel Street properties because these risks had been mitigated through assistance offered to residents by the City, and with the cooperation of the residents.[19] Perhaps, it was possible to carry out the same exercise with respect to other properties from which the City was seeking to evict people. Meaningful engagement between the City and residents at a stage prior to seeking eviction orders would enable exploring the possibility of mitigating health and safety risks where people reside, and thereby enable them to continue to reside there without the need for relocation.

Moreover, research on the relocation of 322 people from one of the buildings, San Jose, to a former military hospital in inner city Johannesburg, MBV 1, post the decision of the Constitutional Court in *Olivia Road*, indicates the importance of meaningful engagement regarding whether a relocation should take place at all, as well as the importance of continued engagement with residents post relocation.[20] For instance, MBV 1 had not been properly refurbished, so water leaks and blocked pipes were common occurrences. There were also security failures, with no checks on who could enter the building, which posed acute security concerns.[21] Eventually, due to continued neglect of MBV 1 by the City and its failure to engage with the concerns repeatedly raised by residents, the building reached such a state that residents began to compare it to San Jose, in terms of the health and safety risks.[22] The entire exercise of relocation, therefore, became

[19] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W) [24].

[20] Socio-Economic Rights Institute, 'From San Jose to MBV 1' (SERI) 8–12 <http://www.seri-sa.org/images/San_Jose_Practice_notes_FOR_WEB3.pdf> accessed 5 January 2022; Stuart Wilson, 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"' (2011) 22 Urban Forum 265.

[21] Socio-Economic Rights Institute (n 20) 8.

[22] ibid 11.

futile. Health and safety concerns posed a problem both in San Jose and MBV I, and meaningful engagement regarding those concerns was imperative both prior to and post relocation. The case, therefore, indicates that meaningful engagement ought not to be employed narrowly, only as a remedy when a decision to relocate residents has taken place. The issues regarding (1) whether the eviction should take place, and (2) whether improvements can be made to settlement instead of eviction, ought to be part of the scope of meaningful engagement.

Again, in *Joe Slovo*[23] meaningful engagement was used only as a remedy after an eviction had already taken place. The case came on the heels of *Olivia Road,* and has been characterised as a 'missed opportunity'[24] for the Constitutional Court to apply the meaningful engagement doctrine developed in *Olivia Road.* In the case, Justices Moseneke, O'Regan and Sachs recognised that the state had failed to meaningfully engage with the residents, and that the limited engagement of the state with the residents was characterised by 'broken promises'.[25] Despite this, they found that the actions of the state, including the eviction of 20,000 people, were reasonable under the circumstances.

The decision of the Constitutional Court in *Joe Slovo* reflects an inconsistent application of the meaningful engagement framework, because the Court required meaningful engagement as a remedy at the point of relocation, and not at a point prior to taking a decision to evict.[26] In *Olivia Road,* the Constitutional Court held that meaningful engagement should take place prior to instituting proceedings for an eviction, and whether or not meaningful engagement has taken place

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[23] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 ('*Joe Slovo*').

[24] Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107, 112.

[25] *Joe Slovo* (n 23) [166]–[167] (Moseneke J); [301]–[302] and [304] (O'Regan J); [378]–[380] (Sachs J); Fredman, *Comparative Human Rights Law* (n 3) 283; Lilian Chenwi, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26 SAPL 147.

[26] Jackie Dugard and others, 'The Right to Housing in South Africa' [2017] Foundation for Human Rights Position Paper Series 27; Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 CCR 223.

is a 'relevant circumstance' that courts must consider while determining whether granting an eviction application is 'just and equitable' under the circumstances.[27] By allowing an eviction to proceed even when no meaningful engagement had taken place previously, the Court in *Joe Slovo* ignored its reasoning in *Olivia Road,* pronounced a few months prior to hearing arguments in *Joe Slovo.*[28] In such cases, meaningful engagement is of limited scope. The question regarding whether an eviction should take place, is foreclosed. Those evicted can only participate in deciding how they are to be moved to another location, and where this might be.

It seems that in *Joe Slovo,* the judges thought that setting aside the decision to relocate residents because of lack of meaningful engagement prior to making the decision, was futile, because engagement may not have made any difference to the outcome of the decision regarding whether an eviction should take place.[29] This futility argument is problematic for two reasons.[30] Firstly, the futility argument fails to recognise the intrinsic value of participation. Participation rights embody the substantive values of freedom, substantive equality, and dignity.[31] Secondly, the futility argument assumes that engagement would not change the outcome regarding whether an eviction should take place.[32] Participation rights enable more informed, and hence more effective decision-making.[33] Residents are best placed to understand their own circumstances and explain the same to the state and private landowners. The pooling together of relevant knowledge is likely to ensure more informed and hence more effective decision-making.[34] Once that knowledge is shared, it is likely to change the outcome of the decision-making process. In *Olga Tellis*, the Indian

[27] *Olivia Road* (n 6) [18].

[28] McLean (n 26).

[29] Fredman, *Comparative Human Rights Law* (n 3) 283.

[30] ibid.

[31] This thesis, ch 2, section 3.

[32] Fredman, *Comparative Human Rights Law* (n 3) 283.

[33] This thesis, ch 2, section 4.

[34] ibid.

Supreme Court recognised both the intrinsic and pragmatic values of notice and hearing, and thereby rejected a similar futility argument raised in the case.[35]

Pieterse disagrees with this criticism. He argues, '[m]oreover, critics largely overlooked the resonance of *Joe Slovo*'s conception of meaningful engagement with the Constitutional Court's broader jurisprudence on democratic participation. The *Joe Slovo* Court was loath to derail a project undertaken by a democratically elected local government in pursuit of the common good, merely because of the discontent of some affected community members.' [36] I disagree with Pieterse assessment, because I do not think that the concerns raised by residents were the 'discontent of some affected community members'. These concerns had merit, and eventually the state came to realise this. Post *Joe Slovo*, the government of the Western Cape province grasped that the relocation of thousands of people to another site in accordance with the decision of the Court in *Joe Slovo,* was not viable, and hence decided to pursue *in situ* upgradation of the informal settlement.[37] This was exactly what the residents had been arguing for in the first place, and it eventually became evident to the state that there was strength in their arguments. If meaningful engagement had taken place prior to beginning evictions, a costly and time-consuming exercise could have been averted, because the state would have been able to hear the reasons offered by residents against eviction to another location, and in favour of *in situ* upgradation of their informal settlement.

In *Sudama Singh,* the Delhi High Court indicated that prior to carrying out an eviction, the state must conduct a survey of all residents, to check their eligibility for rehabilitation under its

[35] *Olga Tellis* (n 7) [46].

[36] Marius Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 VRÜ 12, 27.

[37] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2011] ZACC 8 ('*Joe Slovo II*'); Fredman, *Comparative Human Rights Law* (n 3) 284.

existing rehabilitation policies.[38] It recognised the need for meaningful engagement at this point. This provides residents the right to participate in determining who is eligible for rehabilitation, and in how rehabilitation is to take place.[39] Yet, this does not give residents the right to participate in deciding whether the eviction ought to take place at all, and in considering alternatives such as *in situ* upgradation of their settlements. Therefore, a limited scope for meaningful engagement was recognised in *Sudama Singh,* although the decision did not close off possibilities for enlarging the scope for meaningful engagement. In *Olga Tellis*, in contrast, the Supreme Court recognised that a notice and hearing ought to be provided prior to evictions, and residents ought to be able to explain why the eviction should not take place.[40] It should be noted, however, that the Supreme Court did not enforce this requirement in the case, rather it considered that a hearing before court was sufficient even when no hearing prior to eviction was conducted by the state. The scope for meaningful engagement ought to be wider, to include the question of whether the eviction ought to take place.

2.2 Interpretation of law and policy

Issues may be raised regarding the interpretation of relevant policies, statutes, and the constitution, such as provisions of the PIE Act in South Africa. Section 4(7) of the PIE Act requires the court to consider 'all relevant circumstances' while determining whether an eviction is 'just and equitable', and illustrates some circumstances that are relevant, such as the availability of alternate housing.[41] The provision contains several open-textured phrases, including 'relevant circumstances' and 'just and equitable'. Residents are in the best position to explain their own

[38] *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 [55]–[57] ('*Sudama Singh*').

[39] ibid.

[40] *Olga Tellis* (n 7) [46].

[41] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 [28] ('*Port Elizabeth Municipality*'); *Lingwood v Unlawful Occupiers of ERF 9 Highlands* 2008 (3) BCLR 325 (W) [18] ('*Lingwood*'); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33 [41], [96] ('*Blue Moonlight*'); Stuart Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 SALJ 270.

circumstances, and to explain why those circumstances are relevant to decide whether an eviction is 'just and equitable'. Interpretation of these open textured phrases ought to be within the scope of participation.

2.3 Constitutionality of law and policy

Issues may be raised regarding the constitutionality of legislation, policies, or decisions of the executive. For example, in *Dladla*, residents argued that the temporary accommodation provided to them violated their rights to privacy, dignity, freedom and security of the person, and housing.[42] The temporary accommodation required them to follow two rules. Firstly, a lockout rule, requiring residents to leave the shelter at 8 am, and being allowed back into the shelter only at 5:30 pm. Secondly, a family separation rule, whereby separate dormitories were provided for men and women, which meant that heterosexual couples were not allowed to live with their partners.[43] The residents found these rules to be oppressive, and some moved out of the shelter even when they had no alternate accommodation, and began to live in a dilapidated building, or in a shack under a bridge.[44] Such issues ought to be part of the scope of participation. Bringing such issues within the scope of participation enables pooling of relevant information, and therefore better-informed and more effective decision-making.[45] It also enables residents to develop the content of their right to adequate housing, in a manner that respects their freedom, dignity and equality.

In chapter 5, I indicate how residents contribute to deliberations on the constitutionality of state measures, and how courts ought to tap into those deliberations while deciding such questions. Briefly, residents can deliberate on the content of 'adequate housing' under s 26(1) of

[42] *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42 ('*Dladla*').

[43] ibid [10].

[44] ibid [14].

[45] This thesis, ch 2, section 4.

the South African Constitution, by explaining what they require from their housing, and therefore what is 'adequate' for them. They can indicate why the temporary accommodation provided to them in *Dladla* was unreasonable under s 26(2) of Constitution. They can also indicate why the temporary accommodation violates their dignity, privacy and freedom and security of the person, by providing detailed narratives of their experience of living in the accommodation.

2.4 Systemic issues

This thesis does not preclude the role of participation rights in deciding all questions around land and housing law, policy, and budgets.[46] For example, Liebenberg argues that meaningful engagement, developed in the context of evictions, should be applied more broadly, to ensure a 'deepening of citizen participation in rights-based development'.[47] However, this thesis is limited to the context of eviction of informal settlements. For example, it does not include within its scope participation rights in deciding national, state, or local policies or budgets for provision of housing.

Within the eviction context, broader systemic issues regarding law, policies and budgets ought to be part of the process of participation. For example, in *Blue Moonlight*, involving the eviction of residents from a building in inner-city Johannesburg, the Constitutional Court examined the policy and budgeting processes of the City of Johannesburg, to find that these were based on an incorrect understanding of the City's obligations under the Constitution.[48] The case established that courts could inquire into these broader issues when asked to issue an eviction order.[49] These issues also ought to be part of the scope of participation. In *Ajay Maken,* the Delhi

[46] *Doctors for Life International v The Speaker of the National Assembly* [2006] ZACC 11; Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016) ch 9.

[47] Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32 Nordic Journal of Human Rights 312, 328.

[48] *Blue Moonlight* (n 41) [95].

[49] Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 236.

High Court ordered all parties in the case, including relevant bodies at the central and state levels, residents facing evictions, and civil society members supporting residents, to develop a draft protocol for operationalising the applicable rehabilitation policy in Delhi.[50] These broader systemic issues, rather than only the measures necessary to resolve a particular eviction case, ought to be part of the scope of participation.[51]

3 Examining the law

In this section, I explore how the process of participation is envisaged within the jurisdictions covered in this thesis. I find that not sufficient attention has been paid to how the process of participation should take place. At the same time, it is recognised that positive measures are necessary to facilitate participation. In section 4, I argue that the process ought to take place through 'bounded deliberation'. In section 5, I engage with the positive measures that have been recognised, and justify these on the basis that these are necessary to ensure bounded deliberation that furthers the freedom, equality and dignity of residents.

In South Africa, courts have recognised the need for meaningful engagement prior to instituting eviction proceedings, but have not fleshed out how the process of meaningful engagement ought to take place. In *Olivia Road,* the Court required that the municipality respond reasonably to the views of the residents.[52] In *Abahlali* the Constitutional Court held, that '[p]roper engagement would include taking into proper consideration the wishes of the people who are to be evicted.'[53] Yet, what does it mean to 'respond reasonably' to the views of residents, or to take into 'proper consideration' the wishes of the residents? While the Constitutional Court has been

[50] *Ajay Maken* (n 8) [79].

[51] Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 236.

[52] *Olivia Road* (n 6) [21], [28].

[53] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31 [114] ('*Abahlali*').

clear that courts can, ultimately, determine whether the process of meaningful engagement has proceeded in a 'reasonable' manner, it has not explained on what basis it will do so.

The Constitutional Court has been criticised for omitting to set out substantive boundaries within which the process of meaningful engagement is to take place. Given that residents of informal settlements face 'unequal bargaining power' in comparison with duty bearers (the state and private landowners), their rights and interests may be in jeopardy during the process of meaningful engagement, unless substantive boundaries are put in place.[54]

The Supreme Court of India has recognised the need for providing a notice and hearing prior to evictions.[55] Yet, the Supreme Court has not indicated how the hearing must be conducted. Without a more detailed understanding of the process of hearing, the danger remains that the hearing will be reduced to mere formality.

The Delhi High Court has recognised the need for a survey through meaningful engagement prior to evictions to determine the eligibility of residents for rehabilitation. It has, to a limited degree, explained how the process should take place.[56] Firstly, it has emphasised the values that must underpin the survey – the fulfilment of the fundamental right to housing of residents facing evictions, observing that,

> If jhuggi dwellers are kept at the centre of this exercise and it is understood that the State has to work to ensure protection of their rights, then the procedure adopted will automatically change, consistent with that requirement.[57]

[54] Lilian Chenwi, 'A New Approach to Remedies in Socioeconomic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' (2009) 2 CCR 371, 384.

[55] *Olga Tellis* (n 7).

[56] *Sudama Singh* (n 8) [55]–[57]

[57] ibid [59].

Secondly, the Court has placed much importance on the time for conducting the survey. It emphasised that since residents are likely to be engaged in work during the day, it becomes necessary for the survey to be conducted at times that residents are most likely to be at their homes, and for repeated visits to be made to the informal settlement to ensure that every resident is covered within the survey.[58] In *Ajay Maken,* the High Court recognised that the list of residents eligible for rehabilitation must be shared with residents, and they must be given an opportunity to object to exclusions.[59] While these details regarding the timing and process of participation are important, these do not answer the crux of the issue regarding what principles should underlie the process of participation. Is the process to take place through interest bargaining between residents and the state? Should it take place through deliberation? In section 4, I engage with these issues, to argue for participation through bounded deliberation.

Under the Maharashtra Slum Act, the applicable rules indicate in some detail how participation ought to take place. The rules require residents to form a cooperative housing society under the Cooperative Societies Act 1912.[60] Decision-making thereafter takes place through general body meetings of the cooperative housing society. The applicable rules require that 70% of residents must agree to any redevelopment scheme.[61] Hence, the legislative scheme requires decision-making through voting, where a supermajority of residents (70%) can prevail. The legislative scheme does not conceive exploring alternates through deliberation prior to voting. It requires an aggregation of preferences, enabling the will of a supermajority to prevail. In section 4, I explain why participation through an aggregation of preferences in this manner fails to respect

[58] ibid [59].

[59] *Ajay Maken* (n 8) [40]–[41].

[60] Development Control Regulations for Greater Bombay, 1991 No 33(10), Appendix IV, s 1.17 ('DCR No 33(10)'). The regulations have been framed under the Maharashtra Regional and Town Planning Act 1966. These contain the relevant scheme for redevelopment of informal settlements in Maharashtra, including under the Maharashtra Slum Act.

[61] DCR No 33(10) Appendix IV, s 1.15.

the freedom, dignity, and equality of all residents, and argue instead for a bounded deliberative form of participation.

3.1 The process of participation under the ICESCR

Over time, the process of participation under the ICESCR has changed from being conceived of in terms of notice and hearing and consultations, to recognising the need for residents to affect the outcome of the decision-making process.

General Comment 4 (1992) recognised the importance of 'the right to participate in public decision-making'.[62] It also recognised the need for 'genuine consultation'.[63] It noted that to fulfil the right to housing, states are required to adopt a housing strategy, and emphasised,

> Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive **genuine consultation** with, and **participation** by, all of those affected, including the homeless, the inadequately housed and their representatives.[64] (Emphasis added).

General Comment 4 did not, however, elaborate on how the process of genuine consultation and participation ought to take place.

General Comment 7 on forced evictions (1998) recognised the need for 'procedural protections' and 'due process' prior to evictions, including an opportunity for genuine consultation with those affected,[65] and provision of adequate and reasonable notice.[66] The General Comment did not specify how the process of consultation ought to take place.

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[62] ICESCR General Comment No 4, The right to adequate housing, UN doc E/1992/2.

[63] ibid para 8(a).

[64] ibid.

[65] ICESCR General Comment No 7, The right to adequate housing: forced evictions, UN doc E/1998/22 paras 13 and 15.

[66] ibid para 15.

In *IDG v Spain*,[67] the Committee on Economic, Social and Cultural Rights ('Committee') further developed the requirements of 'adequate and reasonable notice' while deciding the merits of a communication under the Optional Protocol.[68] It required that notice be properly and effectively served, to enable persons affected by evictions to participate in proceedings to defend their rights.[69] On considering the facts of the communication, it found that notice had not been effectively served to enable the author to defend her rights, and that the state had thereby violated the right to housing of the author.[70] While hearing other complaints, the Committee has emphasised the need for a real opportunity for genuine consultation with those affected prior to evictions,[71] but has not had an opportunity to develop the requirements of such consultation.

International standards and guidelines developed by the Special Rapporteur on the right to adequate housing, and thematic reports prepared by the Special Rapporteur, have also recognised the importance of participation in the context of evictions specifically, and in relation to the right to adequate housing more generally.[72]

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[67] *IDG v Spain* Communication No 2/2014, Views, 19 June 2015, E/C.12/55/D/2/2014.

[68] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623, 636.

[69] *IDG v Spain* (n 67) paras 12.1–12.4.

[70] ibid para 13.7.

[71] ibid para 11.2; *Djazia and Bellili v Spain* Communication No 5/2015, 20 June 2017, E/C.12/61/D/5/2015, paras 15.1, 20, 21(c); *López Albán v Spain* Communication No 37/2018, 11 October 2019, E/C.12/66/D/37/2018, paras 8.3, 13.3 and 17(d); *Goumari and Tidli v Spain* Communication No 85/2018, 18 February 2021, E/C.12/69/D/85/2018 para 8.4; Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 68) 638.

[72] Guiding Principles on Security of Tenure for the Urban Poor, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 30 December 2013, A/HRC/25/54, Principles 2 and 9 and paras 30 and 40; The right to adequate housing, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 7 August 2014, A/69/274, para 34; Responsibilities of local and other subnational governments in relation to the right to adequate housing, 22 December 2014, A/HRC/28/62, paras 58 and 71; Adequate housing as a component of the right to an adequate standard of living, 4 August 2015, A/70/270, para 74; Homelessness as a global human rights crisis that demands an urgent global response, 30 December 2015, A/HRC/31/54, para 49; Financialization of housing and the right to adequate housing, A/HRC/34/51, para 16 (Mechanisms must be established for rights-holders to be fully heard and engaged in decisions that affect them); Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 12 July 2017, A/72/128, para 42 (recognising the importance of participation as part of the right to housing of persons with disabilities); Access to justice for the right to housing, 15 January 2019, A/HRC/40/61, paras 15, 27; Report of the Special Rapporteur on adequate housing as a component

The Basic Principles and Guidelines on Development-based Evictions and Displacement,[73] developed by the Special Rapporteur in 2007, require participation to take place through holding public hearings prior to an eviction, where residents can challenge the eviction decision and present alternatives.[74] The Principles do not indicate, however, how the hearing ought to take place. The process of participation is implicitly recognised to be 'bounded' through the recognition of various substantive entitlements. For example, the Principles specify that an eviction cannot result in homelessness, that resettlement must include provision of facilities such as water, sanitation, health and education,[75] and that alternate housing must be as close as possible to the original place of residence and livelihood of those facing evictions.[76]

In the 2018 thematic report, the Special Rapporteur provided further details on what participation should look like, observing that,

> Rights-based participation should be distinguished from consultation. In consultations, governments may solicit input, but decision-making continues to rest with Governments, and often disregards contributions received from relevant constituencies. Rights-based participation emerges from community action and is led by rights holders who identify what is lacking and what needs to change. Governments must respond accordingly.[77]

The Special Rapporteur went further than previous reports, and specified that residents be able to affect the outcome of the decision-making process.[78] Later in 2018, the Special Rapporteur

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of the right to an adequate standard of living, and on the right to non-discrimination in this context, 17 July 2019, A/74/183, paras 54 and 56 (recognising the importance of participation as part of the right to housing of indigenous peoples).

[73] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 38 and 39.

[74] ibid para 37.

[75] ibid para 52.

[76] ibid para 43.

[77] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 15 January 2018, A/HRC/37/53 para 62 ('A/HRC/37/53').

[78] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 26 December 2019, A/HRC/43/43 ('A/HRC/43/43').

required participation through 'democratic decision-making',[79] but provided no further elaboration on what this means. There are many different versions of democracy, and any calls for 'democratic decision-making' needs to elaborate on what this means. In section 4, I indicate that the process of participation ought to take place through bounded deliberation, adopting a bounded deliberative version of democracy, and explain how this furthers the freedom, dignity, and equality of residents, while enabling them to define the content of their right to adequate housing.

4 Enabling bounded deliberation

In section 3, I established that the content of participation rights has not been sufficiently developed in South Africa, India or under the ICESCR. It is unclear how meaningful engagement in South Africa, a hearing in India, and participation under the ICESCR ought to be conducted. In this section, I argue that participation ought to take place through 'bounded deliberation'.[80] The bounded deliberation ought to take place both within residents of informal settlements, as well as between residents of informal settlements and duty bearers – relevant state authorities, and in case of informal settlements built on private land, private landowners.

Here, I discuss both these elements – 'boundedness', and 'deliberation'. In section 4.1, I explain why I adopt a 'deliberative' form of participation. In section 4.2, I highlight boundaries to deliberation. In section 4.3, I consider alternatives to bounded deliberation, and argue that deliberation is better suited than these alternatives to fulfil the aims of participation – to enable residents to exercise their freedom, dignity and equality while developing the substantive content

[79] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 19 September 2018, A/73/310/Rev.1, para 76 ('A/73/310/Rev.1').

[80] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 106; Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2014).

of their right to housing. In section 4.4, I acknowledge concerns with participation through bounded deliberation, and indicate how these concerns ought to be addressed.

4.1 Deliberation

Participation ought to take place through bounded deliberation. In this section, I justify my commitment to a deliberative form of participation by relying on the values underlying participation rights – freedom, dignity, and equality. I rely on deliberative democratic theories, and particularly the conception of deliberative democracy adopted by Young.[81] In section 4.2, I adopt the conception of 'boundedness' developed by Fredman to refine deliberative democratic theory.[82]

4.1.1 Why deliberation

In chapter 2, I argued that participation rights further the freedom, dignity, and equality of residents of informal settlements. Evictions take place under intersecting systems of oppression, including apartheid, the caste system and capitalism. Living under these intersecting systems, poor, Black, Dalit and other peoples facing intersectional inequalities, lack access to adequate housing and security of tenure, and are vulnerable to evictions.[83] I have argued that participation rights, in this context, helps further the freedom, dignity and equality of residents facing intersecting inequalities. Here, I go a step further to engage with the form that participation should take to fulfil this purpose. I argue that participation rights ought to be deliberative to further the freedom, dignity, and equality of residents.

[81] Iris Marion Young, *Inclusion and Democracy* (OUP 2000).

[82] Fredman, *Human Rights Transformed* (n 80) 106; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 80).

[83] This thesis, ch 2.

It is widely argued that democracy, and democratic decision-making, further the freedom, dignity and equality of those who are impacted by decision, by giving them an equal right to participate in collective decision-making.[84] For example, Cohen and Sabel argue that, 'democratic arrangements have the intrinsic virtue of treating those who are subject to binding collective decisions with respect, as free and equal."[85] Similarly, Bogg argues, '[t] he ideal of democratic citizenship has attracted widespread support in law and political philosophy, connected as it is to values of freedom and equality."[86] Democracy is based on the principle that all individuals matter equally, and hence should have an equal share in collective decision-making. However, this does not end the enquiry, rather it begs a further question, regarding how collective decision-making should take place to ensure that all individuals impacted by a decision have an equal share in it. This is especially so given that in India and South Africa, collective decision-making involves peoples with a diversity of needs, wants, interests, values and preferences living under intersecting systems or structures of oppression.[87] In the following paragraphs, I rely on Young to argue that a deliberative version of democracy is best suited, normatively, to address these concerns – ensuring an equal share in collective decision-making under conditions of diversity of values, interests, preferences and intersecting systems of oppression.

Collective decision-making should not take place through bargaining between peoples with diverse preferences and interests living under structural inequality. This is because under such a system, those more powerful would bargain with those oppressed to push in favour of their needs, wants, preferences. Such a version of decision-making is designed in favour of those already

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[84] Seyla Benhabib, 'Towards a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996).

[85] Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313, 319.

[86] Alan Bogg, 'The Political Theory of Collective Bargaining : Pluralism, Deliberation and the Duty to Bargain', *The Democratic Aspects of Trade Union Recognition* (1st edn, Hart Publishing 2009) 245.

[87] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011) 31; Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712, 729. See, this thesis, chapter 2 for a more extensive discussion on intersecting systems of oppression.

privileged under systems of oppression and domination, and to the detriment of the oppressed, and fails to realise the need to ensure that all peoples have an equal share in decisions that impact them. It gives those already privileged under systems of domination and oppression a greater share in collective decision-making.[88]

Collective decision-making should also not take place through an aggregation of the diverse preferences of peoples (i.e. 'majority wins'). An aggregation model of democracy takes preferences and interests as fixed, without interrogating how they come about.[89] People's preferences are often adapted to their circumstances, so that what they prefer is impacted by their socialisation and their political, social and economic circumstances.[90] For example, women can show a preference for housework and care-work, but they are often socialised into preferring these types of work under patriarchy, which both undervalues such work, and requires women to bear a disproportionate responsibility for such work.[91] An aggregation model does not interrogate the formation of preferences under conditions of structural inequality, and can, therefore, reproduce structural inequality. The reproduction of structural inequality in turn threatens an equal share in collective decision-making for everyone, giving those already privileged under systems of domination and oppression a greater share in collective decision-making.

The aggregation model also does not account for the change of people's preferences. Peoples' preferences can change when they speak to one another and are convinced of the

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[88] Joshua Cohen, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997) 67; Jürgen Habermas, 'Three Normative Models of Democracy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996); Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996). Habermas argues that there are 3 normative models of democracy, the first being a liberal model, which envisages democracy to function like a market, involving bargaining between people with different interests. Young calls this an 'interest based democracy'.

[89] Black, 'Proceduralizing Regulation: Part I' (n 2) 607; Fredman, *Comparative Human Rights Law* (n 3) 84.

[90] Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000) 31; Fredman, *Human Rights Transformed* (n 80) 14; CR Sunstein, 'Preferences and Politics' (1991) 20 Philosophy & Public Affairs 3, 7.

[91] ibid.

rightness of different views, or are manipulated using material, social and cultural capital. In this manner, the aggregation model suffers from a different problem to that of the bargaining model – it does not account for bargaining, let alone deliberation between people and their preferences as they interact with one another.[92]

Moreover, for the aggregation model, the substantive outcome of the decision-making process does not matter, as long as it is what the maximum number of people prefer (i.e. majority wins).[93] It does not matter whether the decision fails to enable residents to access housing that is adequate for them. It also does not matter if the decision furthers inequality along any or all its dimensions.[94] I argue in section 4.2 that deliberation ought to be 'bounded', aimed at enabling residents to develop the content of adequate housing in the eviction context.

For reasons outlined above, collective decision-making ought not to be based on interest bargaining or aggregation of preferences. Instead, it ought to be deliberative, where collective decisions are made through a process of deliberation where everyone puts forth their reasons publicly to convince others on the strength of their reasoning.[95] This idea can be traced back to Habermas, who argued in favour of 'value-oriented' rather than 'interest governed' coordination, where people justify their positions by appeal to reasons that all people can accept, and are willing to be persuaded by reasons advanced by others, with the aim of arriving at consensus through the process of reasoned deliberation, rather than through power-play.[96]

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[92] Young, *Inclusion and Democracy* (n 81) 20–21; Cohen (n 88) 77–78; Fredman, *Human Rights Transformed* (n 80) 36.

[93] Young, *Inclusion and Democracy* (n 81) 27–36.

[94] Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in James Bohman and William Rehg (eds), *Deliberative democracy: essays on reason and politics* (MIT Press 1997) 411.

[95] Cohen (n 88); Benhabib (n 84); Fredman, *Human Rights Transformed* (n 80) 34.

[96] Jürgen Habermas, *Between Facts and Norms* (William Rehg tr, Polity Press 1997) 139–140; Fredman, *Human Rights Transformed* (n 80) 35.

Deliberative decision-making therefore consists of at least the following elements – inclusion, political equality, reasonableness, and publicity.[97] Firstly, 'a democratic decision is normatively legitimate only if all those affected by it are included in the process of discussion and decision-making'.[98] Secondly, everyone affected must be included in the process on equal terms. These two elements are obvious from the understanding of democracy I adopt at the very outset – it is based on the idea that all individuals matter equally, and hence should have an equal share in collective decision-making. Of course, 'any definition of essentially contested concepts like democracy, freedom, and justice is never a mere definition; the definition itself already articulates the normative theory that justifies the term'.[99]

Thirdly, everyone must be willing to listen to each other in recognition of everyone's equal standing, and be willing to explain their reasons for why they prefer (or don't) any course of action, or why they think a course of action is more just. They must be willing to be persuaded by the force of people's reasoning. Fourthly, the process must be public – people must state their reasons publicly, to have their reasons accessible to all others who may then decide whether to be persuaded by these reasons, or to challenge them.[100] The third and fourth elements combined make this version of democracy 'deliberative'. It is the giving of reasons publicly that is the essence of deliberation, and decision-making through the process of giving reasons publicly, lies at the heart of a deliberative democracy.

This deliberative version of collective decision-making enables everyone to have an equal share in collective decision-making by centring the principles of inclusion and political equality,

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[97] Young, *Inclusion and Democracy* (n 81) 20.

[98] ibid.

[99] Benhabib (n 84) 68.

[100] Young, *Inclusion and Democracy* (n 81) 21–25; Amy Gutmann and Dennis F Thompson, *Democracy and Disagreement* (Belknap Press 1996); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2009).

and requiring decision-making through deliberation. In such a version of democracy, materially, socially, or culturally powerful people and groups cannot determine collective decisions merely using their advantages under systems of oppression and domination. Instead, they are compelled to share reasons for their preferred course of action, such that these reasons must be compelling for others. This version is therefore structured in a manner that enables all people to take part in collective decision-making, and not for the powerful to have a greater role in collective decision-making than the less powerful. In this manner, it helps further substantive equality.

It also respects the dignity and freedom of all persons, by giving each person an equal opportunity to participate in decision-making, and, at the same time, ensuring that their voice counts in a substantive sense during the process of decision-making. Their voice is not simply aggregated to determine collecting decisions through a 'majority wins' model. This version of decision-making requires the articulation of reasons for one's interests and preferences, enables interrogation of how these were formed, and enables the changing of interests and preferences based on more convincing reasons. The voice of people thereby counts in a substantive sense, and public reasoning can enable changing of outcomes based on more convincing reasons. The exercise of freedom through participation has the ability to substantively change other people's minds, and change the outcome of the decision-making process.

It should be noted that deliberative decision-making does not eliminate difference, disagreement, and conflict. Rather, it attempts to creates a process for decision-making in the face of difference, disagreement, conflict and structural inequality, in a manner wherein the voice of the most oppressed is not 'deliberately silenced or preferably unheard.'[101] It is 'a critical theory, which exposes the exclusions and constraints in supposed fair processes of actual decision-

[101] Arundhati Roy, *An Ordinary Person's Guide to Empire* (Penguin 2006).

making'.[102] I elaborate on this in section 4.4, wherein I engage with concerns raised regarding the deliberative democratic ideal.

4.1.2 What deliberation entails

Deliberation requires that everyone be willing to listen to each other in recognition of everyone's equal standing, and be willing to explain their reasons for why they prefer (or do not) any course of action.[103] They must be willing to be persuaded by the force of other people's reasoning. The process must be public – people must state their reasons publicly, to have their reasons accessible to all others who may then decide whether to be persuaded by these reasons, or to challenge them.[104] It is the giving of reasons publicly that is the essence of deliberation.

In the eviction context, everyone is required to explain why they think agreeing to an eviction may be the best option. Residents may think that the existing housing conditions are inadequate because of lack of sanitation, electricity, and water,[105] and may think that the alternate accommodation being offered to them is more 'adequate' because of provision of sufficient sanitation, electricity, water, etc. Women may think that the existing housing exposes them to the risk of sexual violence,[106] due to lack of proper street lighting[107] and safe transportation options, and that alternate accommodation being offered to them better meets their requirements of physical safety. Alternatively, residents may think that the existing location helps them easily access

[102] Iris Marion Young, 'Activist Challenges to Deliberative Democracy' (2001) 29 Political Theory 670, 688.

[103] Young, *Inclusion and Democracy* (n 81) 21–25; Gutmann and Thompson, *Democracy and Disagreement* (n 100); Gutmann and Thompson, *Why Deliberative Democracy?* (n 100).

[104] Young, *Inclusion and Democracy* (n 81) 21–25; Gutmann and Thompson, *Democracy and Disagreement* (n 100); Gutmann and Thompson, *Why Deliberative Democracy?* (n 100); Roberto Gargarella, 'Why Do We Care about Dialogue?: "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 214.

[105] *Olivia Road* (n 6); Tissington (n 15) 1; Wilson, 'Litigating Housing Rights in Johannesburg's Inner City' (n 15).

[106] Tarangini Sriraman, 'Enumeration as Pedagogic Process: Gendered Encounters with Identity Documents in Delhi's Urban Poor Spaces' [2013] SAMAJ 14 <http://journals.openedition.org/samaj/3655> accessed 18 December 2021.

[107] *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33.

jobs,[108] education and healthcare, whereas the alternate accommodation being offered to them would result in them losing their jobs, would disrupt the education of their children, and, because of inaccessibility to quality healthcare, would put their health in jeopardy. For example, when residents of the Yamuna Pushta informal settlement were evicted from Central Delhi and relocated to the outskirts, some men were able to find work in nearby factories, while women who were engaged in domestic work in middle-class homes near their settlement in Yamuna Pushta, lost their source of employment.[109] Residents may therefore prefer that their existing housing is improved *in situ*, to ensure access to adequate sanitation, water, electricity, street lighting, safe transportation, etcetera. Whatever the reason, residents will be required to state it openly to convince others as to why that is the best course of action.

Similarly, private landowners and the state must provide reasons regarding any option they prefer, and be willing to listen to the options that residents put forth, and the reasons that residents offer. Moreover, residents too must consider the reasons put forth by private landowners and the state. Note that I argue in section 4.2 that these deliberations ought to 'bounded', aimed at securing access to adequate housing for residents of informal settlements through a process that respects their freedom, dignity and equality.

4.2 Boundedness

Fredman has refined the deliberative democratic ideal by introducing the idea of 'boundedness'. Deliberative models often assume an open-ended approach, allowing the process of deliberation to produce a solution with no preconditions.[110] However, in the sphere of human rights decision-making, decision-making is not entirely open ended. Rather, it is bounded by prior commitment

[108] *Olga Tellis* (n 7) [32].

[109] Kalyani Menon-Sen, '"Better to Have Died than to Live like This": Women and Evictions in Delhi' (2006) 41 EPW 1969, 1970.

[110] Fredman, *Comparative Human Rights Law* (n 3) 92.

to human rights.[111] While Fredman has developed her idea of 'bounded deliberation' to justify judicial review of human rights,[112] a view that has been accepted by courts in India,[113] her work translates well to contexts beyond courts. Here, I extend it to the process of participation around evictions.

Boundedness in the process of deliberative participation around evictions in India and South Africa follows for several reasons. Firstly, this chapter seeks to develop the content of already recognised participation rights. Chapter 1 indicated that participation rights are recognised as one element of the right to housing in India and South Africa. It follows that participation rights are being developed in light of pre-commitments to the right to housing; participation rights as an element of the right to housing; other rights recognised as interconnected to housing; relevant statutes; and judicial interpretations of constitutional rights and statutes. As an element of the right to housing, participation rights are purposive, meant to develop the content of housing that meets the contextual needs of rights holders. Thus, deliberations aren't open ended; rather the purpose of deliberations is set – to develop the contextual content of housing.[114] Secondly, boundedness also follows from the justifications of participation rights. Chapter 2 argued that participation rights enable residents of informal settlements to further their freedom, equality, and dignity, through participation in decision-making about their housing. These substantive values ought to place boundaries on the process of participation, to enable furthering of these values through the process of participation. The process of participation cannot therefore be entirely open ended, but is bounded by the recognition of substantive rights and values.[115] Participation must take place

[111] ibid.

[112] Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 80).

[113] *In Re: Distribution of Essential Supplies and Services During Pandemic* SMW (C) No 3/2021 (27 April 2021, Supreme Court of India) [6].

[114] Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 3).

[115] Fredman, *Human Rights Transformed* (n 80) 106; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 80); Gutmann and Thompson, *Why Deliberative Democracy?* (n 100) 23–26.

within these substantive boundaries. These form the floor upon which the process of participation ought to build.[116]

For example, s 26 of the South African Constitution has been interpreted to by the Constitutional Court to mean that evictions cannot result in homelessness.[117] In case of both publicly and privately instituted eviction proceedings, the local authorities bear an obligation to plan, budget for, and provide accommodation to all those who may be rendered homeless as a result of the eviction, at least on a temporary and emergency basis.[118] The Court has also recognised that although private landowners may not be expected to provide housing for the homeless on their property for an indefinite period, they must be patient, and accept temporarily restrictions on their property until residents are provided alternate housing.[119] The recognition of these substantive entitlements place boundaries on the process of participation. In other words, the process of participation cannot result in an eviction without any form of alternate housing, if that will render residents homeless. While a range of outcomes are possible – no eviction, a delayed eviction, in situ development, and relocation to alternate accommodation temporarily or permanently – being rendered homeless cannot be an outcome of the process of participation. During the process of participation, local authorities cannot argue that they bear no obligations to provide housing when evictions take place from private land, because such deliberations are precluded by substantive obligations recognised in *Blue Moonlight*. Similarly, private landowners cannot argue that the eviction must take place immediately so as not to limit their right to use the property as they see fit, because this argument is precluded by the obligations recognised in *Blue Moonlight*. Rather, the purpose of participation is to gain access to accommodation that meets the

[116] César Rodríguez-Garavito, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 246–248.

[117] Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 41).

[118] *Blue Moonlight* (n 41) [74].

[119] ibid [40].

contextual needs of residents, determined through bounded deliberation between residents, the state and private landowners.

The kind of alternate accommodation that can be provided is also bounded based on existing rights recognised under the Constitution, including the rights to dignity, freedom and security of the person, and privacy, recognised in sections 10, 12 and 14 of the South African Constitution. Relevant, here, is the case of *Dladla*. In that case, the Constitutional Court found that the temporary accommodation provided to residents, and specifically the lock out and family separation put in place at the accommodation, were unconstitutional.[120] Hence, any alternate accommodation provided to residents facing an eviction cannot, at the very least, put in place such rules. The substantive rights in relation to alternate accommodation recognised in *Dladla* place boundaries on any future deliberations taking place regarding the details of alternate accommodation offered to residents.

Similarly, the recognition of the right to non-discrimination means that through the process of participation, residents cannot be provided with segregated housing. For example, in an informal settlements in India with residents belonging to multiple caste-groups, residents belonging to dominant castes cannot ask for redevelopment of the settlement, or for alternate residence, to continue along caste lines. The recognition of the right to equality and non-discrimination, therefore, creates boundaries on the process of participation. Participation cannot result in provision of housing that violates other substantive rights.

The right to participation is also bounded by the rights and values of equality, dignity, and freedom of residents of informal settlements. These rights and values place boundaries on how participation ought to take place, and point towards the need for positive measures to be

[120] *Dladla* (n 42).

undertaken around the process of participation to ensure that all residents, including those facing intersecting oppressions, are able to participate. I flagged many of these concerns in chapters 2 and 3, and elaborate on the need for positive measures in section 5 below.

Hence, the process of participation ought to be designed to be both 'bounded' by the recognition of a substantive right to housing, and the rights and values of equality, dignity, and freedom; as well as 'deliberative', requiring decision-making through the giving of reasons in public, to enable everyone to listen to and be convinced by those reasons, or to attempt to change other people's minds.

Courts ought to play an important role in ensuring that participation is deliberative, as well as bounded. For example, while writing about the engagement that took place between residents and the city of Johannesburg after the Constitutional Court's decision in *Olivia Road,* Wilson argues that the fact that the results of meaningful engagement would be reported to the court, and that the court had indicated that the city was required to provide alternate accommodation, helped place boundaries on what could be deliberated on during the process of meaningful engagement. This 'focused the minds of the parties and went a long way towards ensuring that the discussions took place in good faith'.[121] In chapter 5, I elaborate on the role of courts in ensuring that the process of participation fulfils the criteria set out in chapters 3 and 4.

4.3 The alternatives

Bounded deliberation is better suited to fulfil the aims of the right to participation – to secure access to adequate housing, to exercise freedom and dignity, to challenge oppression and inequality – than alternate forms of participation.

[121] Wilson, 'Planning for Inclusion in South Africa' (n 20).

I have argued above that collective decision-making ought not to take place through 'interest bargaining'. In the eviction context, if decisions were to be made based on bargaining intra residents, given the experience of intersecting inequalities within residents, those more powerful would bargain with those less powerful to make a decision that meet their interests. If decisions were to be made based on bargaining between the state authorities and residents, given the difference in power involved, state authorities would be able to push for a decision that meets their requirements, but not necessarily the requirements of residents of informal settlements. Similarly, if decisions were to be made based on bargaining between private landowners and residents, again, given the difference in power involved, private landowners would be able to push for a decision that meets their requirements, but not necessarily the requirements of residents of informal settlements.[122] In contrast, under a deliberative decision-making process, everyone is required to share reasons for their preferred course of action. Decision-making takes place through people listening to each other's reasons, and being open to being convinced by those offering better reasons. The aim is for everyone to arrive at a decision through consensus, because everyone has agreed to the best way forward after deliberating on the various options. This deliberative version of decision-making is therefore structured in a manner that enables all people to take part in collective decision-making, and not for the powerful to push their own interests and preferences because of their greater bargaining power. In this manner, it addresses the shortcomings of a 'bargaining' model of decision-making.

Sherry Arnstein's piece on the 'ladder of participation'[123] has gained salience in the literature around participation.[124] The typology developed by Arnstein has been applied to

[122] Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (n 47) 329.

[123] Arnstein (n 1).

[124] Carissa Schively Slotterback and Mickey Lauria, 'Building a Foundation for Public Engagement in Planning: 50 Years of Impact, Interpretation, and Inspiration From Arnstein's Ladder' (2019) 85 Journal of the American Planning Association 183; John Gaber, 'Building "A Ladder of Citizen Participation": Sherry Arnstein, Citizen Participation, and Model Cities' (2019) 85 Journal of the American Planning Association 188; A Cornwall, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 Community Development Journal 269.

participation in various contexts, including children's participation.[125] It has also been applied to the context of meaningful engagement in South Africa.[126] It therefore becomes important to engage with her writing on the subject. Arnstein understands the goal of participation as being 'the real power needed to affect the outcome of the process'.[127] She develops a typology of participation based on the ability of people to affect the outcome of the process. She arranges different types of participation along the rungs of a ladder, with each rung corresponding to increasing power to determine the end of the process of participation.[128]

Arnstein makes significant contributions by drawing attention to the difference of power during the process of participation, especially between citizens and the state, and emphasising that participation ought not to be an empty token, but must genuinely give people the ability to affect outcomes of decision-making processes. These insights are in-built in a deliberative process of participation. It is a given that a deliberative process requires that residents of informal residents take part in decision-making around evictions, where their deliberations will impact the outcome of the decision.

Beyond this, Arnstein views participation essentially as a process of bargaining, and endeavours to give people greater power within that process. For example, she sees participation when it consists simply in rubber stamping pre-decided outcomes, as illusory participation. Here, residents do not have the power to affect the outcome of the decision-making process. On the other hand, she views 'partnership' more favourably, where decision-making powers are shared between all stakeholders. She argues that such 'partnerships' are most effective where there is an

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[125] Roger A Hart, *Children's Participation: From Tokenism to Citizenship* (UNICEF 1992).

[126] Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 Stellenbosch Law Review 742; Sameera Mahomedy, 'Extra-Judicial Engagement in Socio-Economic Rights Realisation: Lessons from #FeesMustFall' (2020) 36 SAJHR 49; Sameera Mahomedy, 'The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns' (Stellenbosch University 2019) 26.

[127] Arnstein (n 1).

[128] ibid.

organised power base in the community to which citizen leaders are accountable. In this process, she argues, citizens may have 'a genuine bargaining influence over the outcome of the plan'.[129] While this may be an accurate description of how participation took place in the examples she drew from to develop her typology, I argue that bargaining is not what participation ought to be about.[130]

Participation ought to be a deliberative process, whereby people who are oppressed and dominated in society (such as residents of informal settlements), arrive at reasoned decisions regarding their housing, along with duty bearers (such as the state and private landowners and developers in the context of eviction of informal settlements). This giving of reasons helps mitigate the difference in economic, social, and political power that oppressed people hold, as well as the intersectional inequalities faced within groups of oppressed people. The difference in power that Arnstein identifies is better tackled in a deliberative process of participation, than in a process based on bargaining. Moreover, the 'bounded' nature of the deliberative process I argue for, further helps mitigate power differences. Participation is bounded by the recognition of a right to housing, and substantive elements of the right to housing. This ensures that the result of the process of participation cannot be homelessness, nor derogate from already recognised aspects of the right to housing, and other relevant constitutional and statutory rights. Participation is also bounded by procedural constraints that enable bounded deliberation, including sharing of information, capacity-building efforts and assistance from lawyers and civil society (see section 5). As argued above, a process of participation that is based on bargaining will be favoured, by design, on those that have greater bargaining power. In the eviction context, this means the state and

[129] ibid.

[130] For different critical engagements with Arnstein's work, see Nico Carpentier, 'Beyond the Ladder of Participation: An Analytical Toolkit for the Critical Analysis of Participatory Media Processes' (2016) 23 Javnost - The Public 70; Jonathan Quetzal Tritter and Alison McCallum, 'The Snakes and Ladders of User Involvement: Moving beyond Arnstein' (2006) 76 Health Policy 156.

private landowners, as well as those within residents who are comparatively more privileged within intersecting axes of oppression and domination.

Several academics have applied Arnstein's ladder of participation to the context of the right to housing. For example, Muller, who also ostensibly argues for a deliberative meaningful engagement process in South Africa, relies on Arnstein's ladder of participation. Hence, although using the terms 'deliberative' and 'dialogic', without unpacking those concepts, he seems to implicitly envisage a bargaining model of meaningful engagement.[131] Similarly, Mahomedy also adopts Arnstein's ladder of participation as a tool to evaluate meaningful engagement in South Africa, and thereby implicitly accepts bargaining as the basis of meaningful engagement.[132] Neither Muller nor Mahomedy explain how they conceive of participation, in terms of the underlying normative basis of participation or in terms of what participation ought to be about. By relying on Arnstein's ladder of participation, they implicitly accept bargaining as the basis of participation. Given my misgivings about Arnstein's approach, the same concerns apply to Muller's and Mahomedy's work.

Another alternative is an aggregation model of decision-making, for example through voting. In the eviction context, if decisions were to be made merely through an aggregation of preferences through a vote, residents would lose the opportunity to listen to one another, and to thereby expand their understanding of the situation they face, the range of options available to them, and why one option is better than another. One group of residents may think that moving holds no advantages at all, and therefore be inclined to vote against that option. However, if they were to be provided with an opportunity to discuss this with other residents, they may find that moving, in fact, holds distinct advantages for them, and therefore be inclined to change their

[131] Muller (n 126) 753.

[132] Mahomedy, 'Extra-Judicial Engagement in Socio-Economic Rights Realisation' (n 126); Mahomedy, 'The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns' (n 126) 26.

original views. Decision-making through deliberation among residents of informal settlements enables more informed decision-making, and decision-making based on what people are convinced is the best option for them, rather than simply based on an unreflective vote. Hence decision-making through bounded deliberation is better suited to fulfil the aims of the right to participation – securing access to adequate housing for residents of informal settlements, along with exercising their freedom and dignity and challenging inequality.

In section 3 I illustrated that under the Maharashtra Slum Act, decision-making is to be made through aggregation of votes among residents, requiring 70% of residents to agree to the development of their settlement.[133] A decision-making process based on aggregation of preferences is stacked in favour of the numeric majority. It also takes preferences and interests as fixed, without interrogating how they come about.[134] Moreover, concerns have been raised regarding the process of decision-making under the Maharashtra Slum Act that,

> Worse still is the possibility of the use of muscle power to obtain the 70 percent 'consent' that is statutorily required. This is likely to open the doors to the burgeoning real estate mafia in the city, which has not had much stake in the slum sector so far.[135]

A deliberative decision-making process requires the articulation of reasons for one's interests and preferences. It enables interrogation of how these were formed, and enables the changing of interests and preferences based on more convincing reasons. It allows for decisions to be made based on factors other than a numeric majority, because of the emphasis on reason giving rather than a simple aggregation of preferences. By requiring residents to give reasons for their preferences, it also creates a check on use of raw muscle power to obtain consent. Residents cannot simply vote in favour of a preference, but must explain why they prefer that option. This enables

[133] DCR No 33(10) Appendix IV, s 1.15.

[134] Gutmann and Thompson, *Why Deliberative Democracy?* (n 100) 28.

[135] Gurbir Singh and PK Das, 'Building Castles in Air: Housing Scheme for Bombay's Slum-Dwellers' (1995) 30 EPW 2477, 2480.

more reflective decision-making rather than a decision forced through muscle power. Moreover, the decision-making process ought to be bounded, and positive measures ought to be undertaken prior to participation. Those measures are also likely to act as checks on use of muscle power to obtain consent.

4.4 Meeting concerns around deliberation

Although deliberation is a better form of decision-making than bargaining or aggregation of preferences, because it is better suited to further the values underlying participation, it raises its own set of concerns. Here, I discuss five concerns, and indicate how these ought to be addressed.

4.4.1 Reason-giving rather than rationality

The deliberative democratic ideal has been critiqued for constructing the idea of deliberation very narrowly, restricted to modes of critical argument and an emphasis on rationality.[136] This emphasis on rationality is exclusionary, because it excludes those not capable of exercising such rationality, such as children,[137] or those portrayed as incapable of exercising such rationality, such as women.[138] The idea of reasoned deliberation I adopt does not require rationality, rather it requires giving of reasons. This includes appeals to emotions and imagination.[139] It also allows for 'rowdy, disorderly and decentred' communication,[140] as well as use of pictures, songs, poetic imagery, and other

[136] Chantal Mouffe, 'Deliberative Democracy or Agonistic Pluralism?' (1999) 66 Social Research 745; Young, 'Communication and the Other: Beyond Deliberative Democracy' (n 88); Young, *Inclusion and Democracy* (n 81) ch 1; John S Dryzek, *Deliberative Democracy and beyond: Liberals, Critics, Contestations* (OUP 2000) ch 3; Julia Black, 'Proceduralizing Regulation: Part II' (2001) 21 OJLS 33, 37; Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] Social Text 56, 59.

[137] A longer discussion on the participation rights of children and their capacity for 'rationality' is beyond the scope of this thesis. For such a discussion, see, Amy Mullin, 'Children, Autonomy, and Care' (2007) 38 Journal of Social Philosophy 536.

[138] Paul Formosa and Catriona Mackenzie, 'Nussbaum, Kant, and the Capabilities Approach to Dignity' (2014) 17 Ethical theory and moral practice 875, 879; Fredman, *Comparative Human Rights Law* (n 3) 37; Sandra Fredman, *Women and The Law* (Clarendon 1997) 8.

[139] Young, *Inclusion and Democracy* (n 81) 36–40; Dryzek (n 136) ch 3.

[140] Young, 'Activist Challenges to Deliberative Democracy' (n 102) 689.

'playful' ways to communicate.[141] For example, residents can use stories to explain that the land on which they reside is important to them for emotional reasons, because it contains the graves of their ancestors.[142]

Reasons can include interests and preferences,[143] but people must use the process of deliberation to explain why those interests and preferences are important and should be considered during the decision-making process. For example, residents can explain that they prefer to reside in their current location because there are good public schools nearby that offer high quality education to their children. Residents can explain that good schools are an important interest that should be given weight while deciding whether to relocate or to continue to reside in their settlement. Overall, the emphasis is on sharing reasons publicly and on being open to being convinced by reasons offered by others.

The idea of deliberation I adopt thereby meets feminist and other critical scholarship concerns around the limits of 'rationality'. I also indicate in section 5.6, that the process of participation should be designed to account for the different modes in which people communicate with one another, to allow for appeal to stories, emotions, and imagination.

4.4.2 Partial emancipation

Mouffe argues that 'power is ineradicable', and that 'there can never be total emancipation, but only partial ones'.[144] Young, similarly acknowledges, that given the intersecting systems of oppression under which deliberation takes place, there may be limited alternatives to deliberate upon – alternatives that do not question the very intersecting systems of oppression under which

[141] ibid 687.

[142] See, Extension of Security of Tenure Act 1997, s 6(4).

[143] Fraser (n 136) 70.

[144] Mouffe (n 136) 752; Fraser (n 136) 63.

deliberations take place.[145] For example, while deliberating in the eviction context in South Africa, the deliberations do not question the unequal distribution of land ownership, which is a cause of unequal access to adequate housing for residents of informal settlements.

I have argued that decision-making through reasoned deliberation offers a chance at countering inequality, because decision-making cannot simply aggregate preferences to allow the preferences of a numeric majority to prevail, nor allow more powerful peoples to advance their preferences through interest-bargaining. Additionally, I argue in section 5 that positive measures are necessary to enable bounded deliberation, to counter the unequal conditions under which bounded deliberation takes place, given intersectionality within residents of informal settlements, as well as the inequality between residents on one hand, and the state and private landowners on the other hand.

Even after these measures, however, inequality and power are not eliminated. When informal settlements are recognised to be built on land owned by the state or private landowners, the situation involves inequality along the disadvantage dimension, where the state and private landowners are more advantaged than residents, in terms of access to resources and the underlying legal arrangements regarding property.[146] At the same time, the recognition of the right to housing of residents and participation rights enables a 'partial emancipation'.[147] Now, property rights are not the only thing that matters. The right to housing of residents of the settlement also matters.[148] Also, participation rights enable residents to gain some power with regards to decision-making about their access to housing. Through the process of participation, creative solutions can be found to ensure access to adequate housing for residents of informal settlements, solutions that

[145] Young, 'Activist Challenges to Deliberative Democracy' (n 102).

[146] Young, *Justice and the Politics of Difference* (n 87) 31; Fredman, 'Substantive Equality Revisited' (n 87) 729; Rodríguez-Garavito (n 116) 243.

[147] Mouffe (n 136) 752.

[148] Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 41).

chip away at these intersecting systems of inequality and oppression under which participation takes place. Overall, I accept Mouffe's argument, that deliberation enables partial rather than total emancipation.

4.4.3 The difficulty in achieving consensus

Consensus or agreement through bounded deliberation may not occur. Given the difference in interests, preferences and experiences of inequality involved both within residents of informal settlements and between residents and the state and private landowners, the various actors in the situation may not be able to convince everyone regarding the best course of action based on reasons offered during deliberation. Hence, the process of deliberation may result in a stalemate, and a decision may need to be arrived upon through another manner, such as through an aggregation of preferences or a vote.[149]

Even when a vote becomes necessary, the deliberative democratic process remains different from a purely bargaining or an aggregative process of decision-making, because of the emphasis on decision-making through the giving of reasons.[150] By requiring reason-giving, the deliberative process offers checks against pure bargaining between those participating in decision-making. The process of deliberation requires consideration of various possible courses of action, as well as a genuine attempt to reach consensus prior to a vote, making the process different from a purely aggregative one. Moreover, the deliberative process can influence the course of action preferred by all those participating in the deliberative process, through the information and reasoning offered by others during the process of deliberation. People may change their minds about their preferences based on reasons offered by others.[151] This also enables future re-

[149] Cohen and Sabel (n 85) 321; Fredman, *Comparative Human Rights Law* (n 3) 85; Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 80) 115–116.

[150] Cohen and Sabel (n 85) 321.

[151] ibid; Fredman, *Comparative Human Rights Law* (n 3) 85.

evaluation of the decision. The airing of views and reasons form an important resource for everyone involved to be used in future deliberations. I argue in chapter 5 that the reasons offered during deliberations also form an important resource for courts reviewing decisions.

4.4.4 Agonistic deliberation

A deliberative process of participation does not eliminate conflict and contestation in search for consensus. Contestation remains alive.[152] There may be genuine difference in preferences among residents, especially given intersectional inequalities within residents, and these differences may not be entirely resolved through deliberations. There will be genuine differences between residents and landowners, with landowners desiring to use their property for their own interests, and residents needing access to adequate housing. The process of participation is not meant to mask these differences, or to pretend that these do not exist. Rather, the process is meant to enable residents to make decisions about their housing, and to develop the content of their right to adequate housing, in the face of disagreement and conflict in the eviction context. A deliberative form of participation is better suited than other forms to find solutions in the face of disagreement, because it better furthers the ideals of participation – enabling residents to further their freedom, dignity and equality while developing the content of their right to access adequate housing.

Overall, as Young argues, deliberative democratic theory is 'a critical theory, which exposes the exclusions and constraints in supposed fair processes of actual decision-making'.[153] It does not consider that power, contestation, and inequality will disappear if decision-making is deliberative. I also accept Mouffe's framing of decision-making through 'agonistic politics', and argue that this insight is consistent with deliberative decision-making that is in part collaborative and in part

[152] Mouffe (n 136) 755–757.

[153] Young, 'Activist Challenges to Deliberative Democracy' (n 102) 688.

conflictual.[154] Under deliberative decision-making, like agonistic politics, all parties are required to accept that each has a right to defend their own positions, even when they are 'adversaries' with conflicting ideas about what is to be done. Through the process of deliberation, all parties provide reasons to convince others about the best course of action, not with a view to eliminate all disagreement, but to find a way forward under conditions of difference, disagreement, conflict, and structural inequality.[155]

4.4.5 A right rather than a duty to participate for residents

Given the concerns I have highlighted above, it becomes important to acknowledge that participating in decision-making around evictions poses dangers for residents of informal settlements, and particularly those residents facing intersecting inequalities.[156] These residents may prefer to remain outside the process of participation, if they consider the conditions of participation to be stacked against them. They may prefer, instead, to participate in direct action – through marches, protests, and boycotts and other 'invented spaces'[157] to be able to genuinely voice their concerns.[158] For example, while attempting to avoid eviction and upgrade their settlement in situ, residents of Slovo Park informal settlement engaged with the state through multiple methods. They deliberated with local authorities, engaged with elected representatives

[154] Mouffe (n 136) 755.

[155] Young, *Inclusion and Democracy* (n 81) ch 1; Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267, 288; Cohen and Sabel (n 85) 323.

[156] Young, 'Activist Challenges to Deliberative Democracy' (n 102) 688; Mouffe (n 136) 752; Richard Pithouse, 'Rethinking Public Participation from Below' 2 Critical Dialogue 24.

[157] Andrea Cornwall, 'Locating Citizen Participation' (2002) 33 IDS Bulletin i; Cornwall (n 124) 275. Cornwall distinguishes between invited spaces for participation, wherein citizens are invited to participate, and invented spaces created by citizens themselves.

[158] Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 300; Richard Pithouse, 'Abahlali BaseMjondolo and Struggle for the City in Durban, South Africa' 6 Cidades 241; Julian Brown, *South Africa's Insurgent Citizens: On Dissent and the Possibility of Politics* (Zed Books 2015) 16–20; Laila Smith and Margot Rubin, 'Beyond Invented and Invited Spaces of Participation: The Phiri and Olivia Road Court Cases and Their Outcome' in Claire Benit-Gbaffou (ed), *Popular Politics in South African Cities: Unpacking Community Participation* (HSRC Press 2015) 249; Susan Booysen, 'Public Participation in Democratic South Africa : From Popular Mobilisation to Structured Co-Optation and Protest' (2009) 28 Politeia 1, 27.

through the electoral process to use their vote to bring about upgradation, filed proceedings in court to enforce their rights under statute,[159] and also took part in protests.[160] Similarly, Abahlali baseMjondolo ('Abahlali'), a shack dwellers' movement based in KwaZulu Natal that campaigns for land, housing, and democracy, has also engaged with the state through multiple means, including protests, engagement with local and provincial authorities to secure access to adequate housing, as well as court proceedings.[161] They have continued to organise and engage for access to adequate housing in the face of hostility from the state and non-state actors, including arrests and assassinations.[162]

It follows from this dilemma, that participation ought to be a right, and not a duty for residents of informal settlements. I argued in chapter 3 that given the values underlying participation rights, especially freedom and dignity, participation must be a right for residents of informal settlements, and not an obligation.[163] I find here that the same follows once we acknowledge the limitations of deliberative decision-making. Residents ought to always have the option to refuse to deliberate, if they believe that the process of deliberation will enable others to 'profit',[164] while they continue to lack access to adequate housing.

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[159] *Melani* (n 17).

[160] Socio-Economic Rights Institute, 'Slovo Park: 20 Years of Broken Promises' (SERI) 20 <https://www.seri-sa.org/images/SlovoPark_CPN_Final.pdf> accessed 20 December 2021.

[161] *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31; Tshepo Madlingozi, 'Post-Apartheid Social Movements and Legal Mobilisation' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014) 114–122; Pithouse (n 158).

[162] Abahlali baseMjondolo, 'Arrests' <http://abahlali.org/taxonomy/term/arrests/arrests/> accessed 10 January 2022; Abahlali baseMjondolo, 'Assassinations' <http://abahlali.org/taxonomy/term/assassinations/assassinations/> accessed 10 January 2022; Madlingozi (n 161) 114–122.

[163] This thesis, ch 3, section 2.5.

[164] Atelier Populair Graphics Centre (n 1).

5 Positive measures

To enable bounded deliberation, it is necessary that positive measures be undertaken. Fredman argues that, '[i] t is not necessary to only understand the conditions under which a deliberative process takes place, but also to affirmatively create them.'[165] These measures must be directed both at ensuring the 'boundedness' of the process of participation, and at ensuring 'deliberative' participation. In this section, I discuss the positive measures that have been recognised in India, South Africa and under the ICESCR. I ground these measures in the requirement to ensure bounded deliberation that furthers the dignity, equality, and freedom of residents.

5.1 Positive measures recognised in law

Several decisions of the Constitutional Court of South Africa have recognised the need for positive measures prior to and during the process of meaningful engagement, although there is scope for this to be further developed. In *Ngomane,* the Constitutional Court required that the Municipality 'choose measures that facilitate engagement, but those measures must reasonably enable the applicants to participate meaningfully in the processes of engagement'.[166] In *Olivia Road,* the Constitutional Court recognised the need for capacity building of those responsible for engagement with residents, highlighting the need for 'competent, sensitive council workers skilled in engagement'.[167] The Court ought to extend this requirement, to necessitate capacity building for residents. In its current form, the process relies on residents to be well organised and well informed about their rights to harness the potential of meaningful engagement.[168]

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[165] Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 3) 167.

[166] *Ngomane and Others v Govan Mbeki Municipality* [2016] ZACC 31 [16] ('*Ngomane*').

[167] *Olivia Road* (n 6) [19]; Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (n 24) 117.

[168] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014).

The case *Occupiers of Erven 87 & 88 Berea* indicates the importance of positive measures including sharing information and building the capacity of residents. In the case, the High Court permitted evictions when it was informed that residents had consented to the eviction proceedings. It was later revealed that the residents did not have access to legal representation, did not understand the legal regime surrounding evictions, only four out of 180 residents had attended court proceedings when the High Court granted the eviction order, and that they had only been authorised to ask for a postponement to enable the residents to arrange for legal representation.[169] In appeal, the Constitutional Court recognised that the residents were not aware of their rights under the Constitution and the PIE Act, especially since they did not have legal representation, and they therefore could not have legally consented to the eviction.[170] The Constitutional Court recognised the need for courts to inform residents about their right to apply for legal aid, and to supply them with a name and address of a legal aid clinic, when hearing eviction cases.[171] This requirement ought to be extended to the point of meaningful engagement, rather than at the point when the court is asked to grant an eviction order. I indicate below that information sharing, capacity building and access to legal representation are necessary to ensure a process of participation through bounded deliberation that enables residents to further their equality, dignity, and freedom.

The Delhi High Court has also recognised the need for positive measures to be undertaken during the process of meaningful engagement. However, given the limited scope of meaningful engagement, to check the eligibility of residents for rehabilitation under existing schemes,[172] positive measures are also limited in scope. The High Court required the state to ensure that the

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[169] *Occupiers of Erven 87 and 88 Berea v De Wet NO and Another* [2017] ZACC 18 [7], [25], [28] ('*Occupiers of Erven 87 and 88 Berea*').

[170] ibid [25], [33].

[171] ibid [50].

[172] *Sudama Singh* (n 8) [55]–[57].

documents of the residents were kept securely.[173] This is important, because these documents form the basis to prove their residency in the informal settlement prior to a specific date, and thereby their basis to claim resettlement to alternate accommodation under existing state schemes. The Court was cognisant of the reality that the documents of residents are often destroyed in the informal settlements due to the vagaries of weather, as well as destructive demolition drives carried out by the state, which pay no heed to the personal possessions of the residents.[174] The High Court also required the state legal services authority to publicise its judgment in local languages within informal settlements in the state of Delhi, and to hold periodic camps within informal settlements to ensure residents were aware of their rights in relation to housing.[175]

The need for positive measures to facilitate participation is recognised under the ICESCR, including the need for notice to those affected by a proposed eviction,[176] access to relevant information,[177] including information about relevant laws and rights,[178] access to legal, technical and other advice about their options,[179] and necessary institutional and other supports'.[180] The Special Rapporteur has recognised that, 'technical support and expertise must be made available drawing on local capacities where possible. Methods of communication and interaction should be accessible and respect community practices.'[181] Professionals should be provided with training in community engagement and accountability. Resources and disbursements for expenses should be provided to support the participation of residents. Remuneration should also be available to

[173] ibid [58].

[174] ibid.

[175] ibid [64].

[176] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, 5 February 2007, A/HRC/4/18, Annexure 1, para 37 ('A/HRC/4/18').

[177] ibid para 37; A/HRC/43/43 (n 78) para 24.

[178] A/73/310/Rev.1 (n 79) para 79.

[179] A/HRC/4/18 (n 176) Annexure 1, para 37.

[180] A/HRC/43/43 (n 78) para 24.

[181] A/HRC/37/53 (n 77) para 63.

residents, chosen by the community, who play particular leadership roles.[182] The need for positive measures to facilitate the participation of 'vulnerable groups' has also been recognised.[183] In this section, I indicate that these are necessary to ensure bounded deliberation that furthers the freedom, dignity and equality of residents of informal settlements.

5.2 Information sharing

The need for information sharing prior to participation in the eviction context has been recognised under the ICESCR.[184] In South Africa, courts have required detailed information to be provided to them prior to evictions, to enable them to determine whether the eviction is just and reasonable under the circumstances.[185] All parties to the process of participation must, similarly, possess relevant information to enable bounded deliberation.

To ensure that the process of participation is 'bounded', residents must know what their substantive right to housing entails, under the constitution and relevant statutes.[186] Of course, given that constitutional rights cannot be waived,[187] a decision that results in the denial of recognised rights is liable to be set aside by courts.[188] However, the absence of information, or gap in information about substantive rights, impacts the boundedness of the process of participation,

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[182] A/73/310/Rev.1 (n 79) para 79.

[183] ibid para 63.

[184] A/HRC/4/18 (n 176), Annexure 1, para 37; A/HRC/43/43 (n 78) para 24; A/73/310/Rev.1 (n 79) para 79.

[185] *Blue Moonlight* (n 41) [52]; *Sailing Queen Investments v The Occupants of LA Colleen Court* [2008] ZAGPHC [19]; *ABSA Bank v Murray* 2004 2 SA 15 (C) [41]; J van Wyk, 'The Role of Local Government in Evictions' (2011) 14 PELJ 50, 57; Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (n 41) 285; Sandra Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (Juta 2010) 288–289; Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 322.

[186] Siri Gloppen, 'Courts and Social Transformation: An Analytic Framework' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and social transformation in new democracies: an institutional voice for the poor?* (Ashgate 2006). Gloppen notes that often, those whose social rights are most severely violated, lack knowledge regarding their rights.

[187] *Olga Tellis* (n 7) [29]; *Basheshar Nath v The Commissioner of Income Tax Delhi* AIR 1959 SC 149; Stu Woolman, 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on Barkhuizen' (2008) 125 SALJ 10.

[188] *Occupiers of Erven 87 and 88 Berea* (n 169) [25], [28].

prior to it reaching court. Participation would simply become an exercise used to deny residents access to already recognised rights, rather than to add meaning to those rights. Additionally, it would reduce the quality of deliberations because residents would enter the process not understanding the rights that they do hold, and thereby deliberate over options that may limit existing rights.

Residents must be provided with information prior to the process of participation. This should be undertaken proactively, rather than requiring residents to seek information using the Right to Information Act 2005 in India or the Promotion of Access to Information Act 2000 in South Africa.[189] Information ought to include the reasons for considering eviction, how the land on which they reside is proposed to be used, alternative land available for fulfilling the same purpose, reasons why the alternatives may not be as suitable, availability of alternate housing for residents, whether this is to be of temporary or permanent nature, distance from their current place of residence, facilities to be provided at the alternate location, assistance to be provided during the relocation process, plans and budgetary allocations for providing permanent housing, etcetera. This ensures that residents can properly deliberate over viable options to define and secure access to adequate housing in the face of evictions. It will enable residents to understand the implications of the various options open to them, and enable them to come up with solutions that advance their rights while engaging with possible objections. Without access to detailed information, the quality of deliberations will suffer, because information asymmetry would prevent residents from offering considered views and reasonable alternatives.

[189] Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 322; Kristina Bentley and Richard Calland, 'Access to Information and Socio-Economic Rights: ATheory of Change in Practice' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014) 348–349.

All information should be shared in formats understood by residents.[190] The language and tools of information sharing must be tailored to the needs of the specific residents, depending on their language and educational background and distinct abilities (for example information provision in braille and other accessible formats for persons with disabilities). This is important to ensure that all residents, especially those facing intersecting inequalities, can take part in the deliberations. The information must be provided in a timely manner, to enable the rights holders to comprehend the information, mull over it, and arrive at their considered views. This will ensure that the process of participation is truly deliberative.

It is important to acknowledge the limitations and dangers in the process of information sharing. Here, I flag relevant issues that must be considered while designing a process of information sharing.

Firstly, information sharing should not become the whole of the process of participation. The purpose is not to inform residents of informal settlements about a decision that has already been taken, but rather to share all relevant information to ensure participation through bounded deliberation. Arnstein has criticised participation when it consists simply of sharing information with participants,

> Informing citizens of their rights, responsibilities, and options can be the most important first step toward legitimate citizen participation. However, too frequently the emphasis is placed on a one-way flow of information – from officials to citizens – with no channel provided for feedback and no power for negotiation. Under these conditions, particularly when information is provided at a late stage in planning, people have little opportunity to influence the program designed 'for their benefit'.[191]

[190] A/HRC/37/53 (n 77) para 63.

[191] Arnstein (n 1) 219.

Mazibuko[192] is instructive regarding this issue. In the case, the 'consultation' process was exhausted by the sharing of information regarding a pre-decided outcome. The City of Johannesburg began a new project for supply of water to residents, initiated in one of the poorest areas in Soweto, and residents argued that the project violated their right to access sufficient water under s 27 of the Constitution.[193] The City argued that it had conducted a consultation process regarding the project. It had appointed community facilitators to 'explain the project and its implications carefully to each household,'[194] and conducted public meetings and workshops through ward councillors and ward committees.[195] In the words of the Constitutional Court, '[t]here was extensive consultation with communities about what the project would entail and how it would be implemented.'[196] It is evident that information sharing exhausted the process of participation. The City did not give residents an opportunity to participate in developing the project for water supply. Rather, the City developed the project, and simply informed residents about it through 'consultations'. Similarly, if residents of an informal settlement facing an eviction are simply informed about the state's plans to evict them, without being able to participate in the decision-making process, information sharing exhausts the process of participation. Information sharing ought not to exhaust the process of participation, but should rather facilitate participation through bounded deliberation.

This is true even in the case of sharing of technical information. While technical information may be relevant to the decision-making process,[197] it must form part of the bounded

[192] *Mazibuko and others v City of Johannesburg and others* [2009] ZACC 28.

[193] ibid [6].

[194] ibid [15].

[195] ibid [133].

[196] ibid [167].

[197] Susan G Hadden, 'Technical Information for Citizen Participation' (1981) 17 JABS 537.

deliberative exercise, and not exhaust it.[198] The facts of *Pheko* are a useful starting point for this discussion. In this case, residents of an informal settlement built on privately-owned land were removed from the settlement and their homes were demolished, ostensibly because the settlement was built on unsafe land. According to a study commissioned by the municipality, the area on which the settlement was built was prone to sinkholes due to an unstable dolomite formation, making it unsafe for human habitation.[199] Such information regarding the land can be considered 'technical' in nature, in the domain of experts such as civil engineers or geologists. The issue then becomes whether this information exhausts the decision-making process, or whether it should form only one relevant piece of the puzzle, to be taken into consideration while deciding what is to be done regarding residence in the informal settlement.[200] The state and private landowners may frame the whole issue as a technical one, and through that, remove scope for residents to contribute to deliberations.[201] The technical information presented by experts must not exhaust the decision-making process, and there must be space for residents to try to understand this information, to take it into consideration, to balance it against their needs and interests, to consult their own experts, and even to contribute to the process of developing such information.[202] Residents must be able to use this information as a resource while deliberating upon possible solutions regarding their access to adequate housing in the face of evictions.

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198 Thea N Riofrancos, *Resource Radicals: From Petro-Nationalism to Post-Extractivism in Ecuador* (Duke University Press 2020) ch 5.

199 *Nthabiseng Pheko and Others v Ekurhuleni Metropolitan Municipality and others* [2011] ZACC 34 [6].

200 Phillip De Wet, 'The Curious Case of the Apartheid Dolomite' *Daily Maverick* (16 September 2011) <https://www.dailymaverick.co.za/article/2011-09-16-the-curious-case-of-the-apartheid-dolomite/> accessed 15 January 2022; Centre on Housing Rights and Evictions, 'Holding Your Ground: Resisting Evictions in South Africa' 22 <http://abahlali.org/files/Holding_Your_Ground.pdf> accessed 15 January 2022.

201 Black, 'Proceduralizing Regulation: Part II' (n 136) 44; Julia Black, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 MLR 621, 652–657.

202 Anant Maringanti, 'No Estoppel: Claiming Right to the City via the Commons' (2011) 46 EPW 64.

Secondly, we must be critical of the process of information sharing, and acknowledge that the information sharing process makes claims to epistemic authority.[203] What counts as information?[204] Who can claim to possess necessary information? Does relevant information consist only of 'technical' information in the possession of experts? These issues must be interrogated. It is not only the state and private landowners who possess information necessary for deliberations in the context of eviction of informal settlements. Residents also possess vital information, especially regarding their own housing and other needs, and information about themselves and their settlement.[205] Chapter 2 argues that the pooling together of such local information through participation enables better-informed decision-making.[206] Feminist theory encourages us to consider all knowledge as situated,[207] and the situated knowledge of residents of informal settlements is valid and important during the process of participation. My purpose here is to flag these issues, but a detailed exploration of these issues is beyond the scope of this thesis.

For example, in eviction cases in India, access to alternate accommodation depends on the ability of residents to indicate residence in the settlement prior to a cut-off date.[208] The state requires the possession of official documents, or inclusion in official lists, to prove residence in the settlement prior to the cut-off date. Many residents may not possess such documentation, especially those residing on private land.[209] Thus, only information in the state sanctioned form

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[203] Riofrancos (n 198) ch 5; Miranda Fricker, *Epistemic Injustice* (OUP 2007).

[204] Mary Poovey, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (UChicago Press 1998).

[205] Sheela Patel, Carrie Baptist and Celine D'Cruz, 'Knowledge Is Power: Informal Communities Assert Their Right to the City through SDI and Community-Led Enumerations' (2012) 24 Environment and Urbanization 13; Sriraman (n 106).

[206] This thesis, ch 2, section 4; Cohen and Sabel (n 85) 326; Dorf and Sabel (n 155) 277–278; Gargarella (n 104) 214.

[207] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 575; Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Taylor & Francis 1991) ch 9.

[208] *Olga Tellis* (n 7) [53]*; Sudama Singh* (n 38) [2]–[4].

[209] Jessie Hohmann, 'Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing' (2010) 13 Yale Hum Rts & Dev LJ 135, 162–163; Anupama Katakam, 'Ground Realities'

counts as information. Information that residents may possess regarding their own residence does not count. Oral testimonies of residents and their neighbours do not count. This claim to epistemic authority has serious consequences for residents in their access to adequate housing. To try to mitigate this claim to epistemic authority, the Delhi High Court in *Sudama Singh* required that a survey be conducted prior to evictions to determine which residents qualified for relocation to alternate housing within existing schemes, through meaningful engagement with the residents.[210] Yet, residents were still required to produce official documents to prove their residence prior to the cut-off date, ensuring very limited scope for 'meaningful engagement' to challenge the epistemic authority of the state with regards to indicating the period of residence in the informal settlement.

Thirdly, it is important to acknowledge that the process of sharing of information is not neutral.[211] What information is shared and how information is shared matters. The state and private landowners may share information that furthers their own interests. Moreover, who shares information with whom creates a hierarchy. That, in and of itself, may debilitate the conditions for deliberations, where one party makes a greater claim to epistemic authority, and this impacts the ability for others to have their reasons considered during deliberation. It is therefore essential to interrogate the process of information sharing to ensure bounded deliberation.

Frontline (29 June 2007) <https://frontline.thehindu.com/other/article30191896.ece> accessed 15 January 2021; Usha Ramanathan, 'Demolition Drive' (2005) 40 EPW 2908, 2911; Sriraman (n 106).

[210] *Sudama Singh* (n 38) [58]–[62].

[211] Riofrancos (n 198) ch 5.

5.3 Capacity building

The impoverished and oppressed have often been viewed as 'incapable'.[212] The entire premise of this thesis is that residents of informal settlements, who are impoverished and face intersecting inequalities, are capable.[213] Moreover, they are best placed to understand their own needs, wants, interests and desires regarding what is adequate housing for them. Ensuring that they are part of any decision-making around evictions as a matter of right, enables them to define their right to housing in a manner that is adequate to meet their needs.

Views that deny the capacity of residents to participate in deliberations, are partly based on a narrow notion of deliberation. If deliberations are imagined in a specific format, such as a parliamentary debate, this requires the building of specific oratory skills, through access to formal education and training. In this thesis, I take a wider view of deliberation. I argue that deliberation requires, in essence, that people share their reasons for action.[214] They explain why they prefer one course of action over another. They can share these reasons in the format that best works for them – through songs, through heated debates and arguments, through civil discussions.[215] Deliberation need not involve 'polite, orderly, dispassionate, gentlemanly, well-structured arguments'.[216] If we are to design the format of participation to fit with people's existing modes of communication, we will begin to view them as perfectly capable of taking part in deliberations.

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[212] S'bu Zikode, 'The Power of Abahlali and Our Living Politic Has Been Built with Our Blood' (Thinking Freedom from the Global South, 17 February 2021) <http://abahlali.org/node/17219/#more-17219> accessed 18 December 2021.

[213] Upendra Baxi, 'Introduction' in Upendra Baxi (ed), *Law and Poverty: Critical Essays* (NM Tripathi 1988).

[214] Young, *Inclusion and Democracy* (n 81) 47–51; Gutmann and Thompson, *Why Deliberative Democracy?* (n 100) 3.

[215] Martin Hébert, 'Indigenous Spheres of Deliberation' in André Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (1st edn, OUP 2018) 100; Donatella della Porta and Nicole Doerr, 'Deliberation in Protests and Social Movements' in André Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (1st edn, OUP 2018) 392; Young, 'Activist Challenges to Deliberative Democracy' (n 102).

[216] Young, *Inclusion and Democracy* (n 81) 47–51.

It is often argued that 'democracy cannot thrive without a well-educated citizenry,' and especially when taking a deliberative view of democracy.[217] Such views must be interrogated. What counts as education? Does education mean only formal education? Is formal education the only means to prepare people to participate in a democracy? A wide range of work exists in the field of education and deliberative democracy, with scholars exploring what formal education should look like if it is to prepare people to take part in a deliberative democracy.[218] A significant strand of scholarship within the field recognises that the ability to deliberate is cultivated through practicing to deliberate.[219] Thus, deliberation, it is widely viewed, is a skill learned through practice. This should help us understand that the skills for deliberation need not be picked up only through formal education or formal capacity-building efforts. We should not be wary of residents of informal settlements practising deliberation through the very process of deliberation around evictions. [220]

With this wide understanding of deliberation, and with the recognition of the capacity of the impoverished and oppressed, including residents of informal settlements, to take part in deliberations, some capacity building efforts may nonetheless be necessary, to ensure that all residents, including those facing intersecting inequalities, are able to participate in the deliberations.

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[217] Gutmann and Thompson, *Why Deliberative Democracy?* (n 100) 35.

[218] Martin Samuelsson and Steinar Bøyum, 'Education for Deliberative Democracy: Mapping the Field' (2015) 24 Utbildning och demokrati 75; Jarrod S Hanson and Kenneth R Howe, 'The Potential for Deliberative Democratic Civic Education' (2011) 19 Democracy & Education.

[219] Samuelsson and Bøyum (n 218) 79.

[220] Sriraman (n 106). Sriraman explores how women residents of an informal settlement in Delhi engaged in 'piecemeal pedagogies' around gaining access to identity documents. These documents were essential to access housing entitlements, food entitlements, and claim urban citizenship. These 'piecemeal pedagogies' learned through practice gave women access to incremental knowledge immersed in the minute and the everyday aspects of engaging with bureaucratic processes. In similar vein, the practice of deliberation rooted to a particular set of circumstances can help residents gain the skills to deliberate within that context.

5.4 Role of other actors

I argued in chapter 3 that other actors, such as lawyers and civil society organisations, ought to play an important role in facilitating the participation of residents.[221] This has been recognised in *Olivia Road*,[222] as well as under the ICESCR.[223] While residents must have the right to participate themselves, rather than through these other actors,[224] the other actors ought to facilitate their participation. Hence, it becomes important to ensure that residents have access to these other actors through the provision of legal aid, through the provision of funding for civil society organisations, and public authorities such as officials trained to conduct deliberations. These actors ought to ensure that residents have access to information about their substantive rights, information about details around the eviction, access to other positive measures, and that the process of participation takes place through bounded deliberation. These actors can thus assist residents in safeguarding their rights around the process of participation.[225] Hence, it becomes important to ensure that residents have access to these actors. The need for training and developing the capacity of these actors, so they can facilitate the participation of residents, has also been recognised.[226]

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[221] This thesis, ch 3, section 2.3; Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (n 46) 319.

[222] *Olivia Road* (n 6) [20].

[223] A/HRC/37/53 (n 77) para 63.

[224] The Power of Abahlali and our Living Politic has been Built with Our Blood' Talk delivered by S'bu Zikode as part of the virtual speaker series "Thinking Freedom from the Global South" <http://abahlali.org/node/17219/#more-17219> accessed 5 May 2021.

[225] Muller (n 126) 746; Brian Ray, 'Occupiers of 5l Olivia Road: Enforcing the Right to Adequate Housing Through Engagement' (2008) 8 Human Rights Law Review 703, 711; Socio-Economic Rights Institute and Community Law Centre, 'Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights' (2010) 39.

[226] *Olivia Road* (n 6) [19]; A/73/310/Rev.1 (n 79) para 79; Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (n 3) 167; Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (n 24) 117.

5.5 Duty bearers

I have discussed a range of positive measures that must be fulfilled to ensure bounded deliberation, including information sharing, capacity building, and ensuring access to supporting actors. Here, I indicate who ought to bear these duties.

Vertical positive obligations to facilitate participation have already been recognised in India, South Africa and under the ICESCR.[227] It therefore ought to be uncontroversial to recognise the vertical positive obligations discussed in this section.

The possibility for recognising horizontal obligations connects with chapter 3. There, I argue that both the state and private landowners ought to bear duties in relation to participation. Chapter 3 indicates how horizontal duties to meaningfully engage ought to be recognised under the South African Constitution. While horizontal duties have not yet been recognised under art 21 of the Indian Constitution, the thesis is normatively committed to the recognition of such duties to further the freedom, dignity, and equality of residents of informal settlements residing on privately owned land, and leaves open the possibility for such duties to be doctrinally recognised. Here, I indicate that additional duties may be horizontally imposed, at the very least the duty to share relevant information prior to participation.

Chapter 3 argues that in South Africa, direct horizontal duties around participation ought to be recognised under section 8(2) read with section 26 of the constitution. This includes the duty for private landowners to participate in the bounded deliberations, as well as the duty to continue to bear the consequences of residence on their property until the end of the process of participation. In addition, private landowners seeking evictions ought to share all information within their possession with residents. For example, if private landowners are seeking an eviction,

[227] Section 5.1.

they ought to explain their reasons for why the eviction is necessary, for example because of deteriorating health and safety in the building,[228] or for the re-development of the property, and so on.[229] Such information is necessary for residents to deliberate about the eviction. It has been recognised that direct horizontal positive obligations can be recognised under the South African Constitution, depending on the (1) the nature of participation rights and (2) the nature of the duty imposed.[230] Sharing of information facilitates bounded deliberation, and once a duty to participate is recognised, a duty to share information to facilitate deliberative participation ought to also be recognised, given that this does not overly burden private parties beyond the burden already imposed within the duty to participate.

5.6 Timing, language, and other details of the process of participation

I have discussed how participation should take place – through bounded deliberation – and positive obligations that ought to be conducted around the process of participation. Here, I flag other details that must be ensured during the process of participation, including timing, duration, and conditions of participation. This is an indicative rather than an exhaustive list. Overall, the process of participation should be designed to enable bounded deliberation by residents of informal settlements.

Firstly, deliberations should take place prior to any decision being made, so that residents can impact the outcome of the decision.[231] If participation takes place after a decision has already

[228] *Olivia Road* (n 6).

[229] *Blue Moonlight* (n 41).

[230] Constitution of South Africa 1996, s 8(2); *Khumalo and Others v Holomisa* [2002] ZACC 12 [33]; *Daniels v Scribante and Another* [2017] ZACC 13 [39].

[231] Arnstein (n 1).

been made, it would be reduced to a formality. Deliberations would end up being futile, because the outcome of the deliberations would not be able to play a role in the eviction decision.

Secondly, the time that deliberations take place must be convenient for residents. [232] For example, Cornwall argues,

> It is not uncommon to find that little thought goes into the timing and duration of participatory activities, which count out people who work, people who have small children to put to bed or feed, people who are unable to justify spending hours outside the household. These people are more often than not women, but they may also be men, especially in communities where men's work takes them outside the community, and the return home at night is to eat and sleep.[233]

If participation is to take place at a time when the residents may be at work, it would, by design, exclude residents from taking part in the deliberations.

Thirdly, the language and manner of discussion should be designed to ensure all residents could take part in the deliberations.[234] Residents of a single settlement may belong to multiple linguistic groups,[235] and it may therefore become necessary to ensure the presence of translators, so that all residents can deliberate with each other during the process of participation. Moreover, the way deliberations take place must be closely tied to local practices of communication and deliberation. Deliberation need not involve 'polite, orderly, dispassionate, gentlemanly, well-structured arguments';[236] instead, it ought to be linked to how people within a specific settlement already deliberate amongst each other.

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[232] *Sudama Singh* (n 8) [59].

[233] Cornwall (n 124) 279.

[234] A/HRC/37/53 (n 77) para 63.

[235] Véronique Dupont and others, 'Unpacking Participation in Kathputli Colony: Delhi's First Slum Redevelopment Project, Act I' (2014) 49 EPW 39, 41.

[236] Young, *Inclusion and Democracy* (n 81) 47–51.

While opining about the working of the meaningful engagement framework in South Africa, S'bu Zikode from the Abahlali observed,

> Active citizen participation is discouraged by those that hold the power. Sometimes it is discouraged with contempt. Sometimes it is discouraged with violence. Sometimes it is discouraged by making simple issues too complicated for ordinary people to understand. Sometimes it is discouraged by just making it too difficult to engage.[237]

It is imperative that the process of participation be designed to enable deliberation by residents of informal settlements, by making things as easy and convenient as possible for them, to reverse the exclusion described by Zikode.

6 Conclusion

Together with chapter 3, this chapter develops the content of participation rights, to ensure it is not simply a procedural box to tick,[238] rather it furthers the values underlying participation rights – the freedom, dignity, and equality of residents of informal settlements.

Chapter 5 builds on this, to indicate how the process of participation ought to develop the contextual, substantive content of the right to access adequate housing. It also explores the role for courts in ensuring that the process of participation meets the criteria set out in chapters 3 and 4. Courts ought to ensure that the process of participation is deliberative and bounded, and that the contextual substantive content developed through the process of participation meet already recognised substantive principles. Chapter 5 therefore indicates the valuable role for participation rights in developing the contextual substantive content of the right to housing, as well as a valuable role for courts in ensuring access to adequate housing.

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[237] S'bu Zikode, 'Meaningful Engagement' (Roundtable discussion on meaningful engagement in the realisation of socio-economic rights, 24 July 2009) <http://abahlali.org/node/5538/> accessed 15 January 2022.

[238] Tissington (n 4).

CHAPTER 5: PARTICIPATION RIGHTS AND THE ROLE OF COURTS

1 Introduction

> Despite its pervasiveness in social rights adjudication, the relationship between participatory justice and the substantive dimensions of social rights remains unsettled. On the one hand, it is claimed that by focusing primarily on enforcing duties of participatory justice, courts can stimulate responsive and accountable social rights decision-making by government without unduly straining their institutional legitimacy and capacity. On the other hand, critics warn that an overemphasis on procedure and participation can lead courts to abdicate their duty to interpret and enforce the substantive normative commitments of social rights.[1]

This chapter engages with the complex relationship highlighted by Liebenberg, between participation rights and other substantive dimensions of the right to access adequate housing; as well as the role of participation rights and courts in relationship to other substantive dimensions of the right to access adequate housing. It carves a role for participation rights to develop the contextual, substantive content of the right to access adequate housing through a process of bounded deliberation. While engaging with the appropriate role for courts, it argues that, firstly, courts ought to enforce participation rights, and ensure that the process of participation takes place through bounded deliberation between the state, private landowners, and residents facing intersecting axes of oppression. Secondly, courts ought to play an important role in interpreting and enforcing substantive normative commitments. The substance of the right to housing ought to be developed through an iterative process, whereby deliberations develop the contextual content of the right, and courts check that this content meets constitutional requirements previously recognised, as well as relevant principles used to develop the content of relevant rights. This approach helps meet concerns raised regarding the institutional competence and democratic legitimacy of courts in adjudicating social rights cases, including eviction cases. Courts here act as

[1] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623, 624.

an additional deliberative forum,[2] and draw upon bounded deliberations while adjudicating eviction cases. At the same time, courts do not 'abdicate their duty to interpret and enforce the substantive normative commitments of social rights'.[3]

The chapter begins by exploring the role for participation rights and other institutions of democracy in eviction cases in section 2. Participation rights create an institutional setting for residents of informal settlements to deliberate about their contextual right to access adequate housing in the face of evictions. This creates an additional deliberative forum in a 'polyarchy'.[4] Participation rights do not displace the role of other institutions – the legislature, executive and courts. The other organs of the state ought to continue to play the role assigned to them under the constitution in making decisions about rights, including decisions about the right to housing in the eviction context. The chapter briefly explores what role each institution ought to play in this context.

The rest of the chapter focuses on the relationship between participation and other substantive elements of the right to access adequate housing; and the role for participation rights and courts in developing the content of other substantive elements of the right to housing. Section 3 argues that courts must, firstly, enforce participation rights, and thereafter engage in substantive review of the outcome of the process of participation as against relevant statutes and the constitution. Courts must first check whether participation took place, and whether the process of participation met the parameters set out in chapters 3 and 4 with regards to who participated, whether the process of participation took place through bounded deliberation, and whether positive measures were taken by the appropriate duty-bearers (the state and private landowners). I argue that this approach is not only normatively and doctrinally sound, but also that there are

[2] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 90.

[3] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 1) 624.

[4] Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313.

other benefits to such an approach. I highlight two benefits. Firstly, enforcing participation rights before deciding substantive issues helps resolve concerns around democratic legitimacy and institutional competence in making decisions about the right to housing. It ensures courts play an important role in enhancing deliberative democracy. Secondly, the deliberations that take place during the process of participation are an important resource for courts in deciding substantive issues in eviction cases in a manner that meets democratic legitimacy and competence concerns.

Section 4 explores the different ways in which the contextual content of other elements of the right to housing ought to be developed during the process of participation. Moreover, it explores how a range of substantive issues raised in eviction cases,[5] ought to be addressed during the process of participation. Thereafter, section 4 indicates how deliberations that take place during the process of participation ought to feed into the court's reasoning in a) reviewing the outcome of the process of participation; b) reviewing substantive issues raised regarding the interpretation of statutes and the constitution and c) in reviewing constitutional challenges to statutes and executive decisions by applying the appropriate standard of review. In this manner, courts play an important role in engaging with substantive norms, and, at the same time, create space for substantive norms to be developed through the participation of rightsholders. Section 5 argues that appropriate remedies in eviction cases must also be determined through a process of participation. The role of courts must be to ensure that the process of participation meets the criteria set out in chapters 3 and 4, and to check that the remedies meet substantive requirements under the constitution, as being just, equitable or appropriate.[6]

If courts are to play this role in enforcing participation rights and deepening deliberative democracy, the process of litigation before courts is also relevant. Section 6 explores the issue of

[5] This thesis, ch 4, section 2, 'scope of participation'.

[6] Constitution of South Africa 1996, ss 38, 172.

widening of locus standi in public interest litigation in India and in South Africa, arguing that residents of informal settlements must be heard when the eviction of their settlements is being considered. The widening of locus standi cannot mean eliminating the voice of the oppressed before the court. It critiques public interest litigation in India, where the voice of the oppressed has often been eliminated before courts.

2 Participation rights in a 'polyarchy'

In this thesis, I have argued for the recognition of participation rights in the eviction context. These participation rights create space for residents of informal settlements to make decisions about their right to housing in the face of evictions. It enables contextual, localised problem-solving,[7] enabling residents to define housing that is adequate for them, given their particular circumstances. This institutional setting adds to other democratic institutions, in creating an additional forum for deliberation about rights. Rights holders do not displace courts, legislatures, and the executive in decision-making about rights, rather the thesis assumes the continued presence of these other institutions.[8]

Moreover, in committing to a bounded deliberative form of democracy, the thesis does not consider representative institutions such as legislatures, to be incompatible with the deliberative ideal, nor require only face to face deliberations. Rather, it envisages a plurality of deliberative institutions.[9] In this section, I briefly explore the role of, and relationship between, these different institutions – participation rights, courts, legislatures, and the executive. I also

[7] Cohen and Sabel (n 4); Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267.

[8] Cohen and Sabel (n 4) 334.

[9] Iris Marion Young, *Inclusion and Democracy* (OUP 2000) 44; Seyla Benhabib, 'Towards a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996).

explore how decision-making within each of these institutions meets concerns around institutional competence and democratic legitimacy in enabling collective decision-making.

Participation rights fulfil requirements of institutional competence and democratic legitimacy. Residents are competent to participate in the decision-making process, because they are best placed to understand their own needs and interests about their housing and other interrelated rights.[10] The process of participation also pools together information available with the state and private landowners, enabling better informed and therefore potentially more effective decision-making.[11]

Participation in these decisions through bounded deliberation is also democratically legitimate. Firstly, the recognition of participation rights in the context of evictions results in the creation of an additional forum for deliberative collective decision-making. This deliberative forum enables local problem-solving,[12] or decision-making about local decisions that impact rights, such as an eviction of a specific informal settlement that impacts the right to housing and other interrelated rights of residents in that settlement.[13] Thus, the recognition of participation rights creates a forum for deliberations of a kind that might be different from those in other democratic fora such as in legislative assemblies, enabling local problem-solving to develop contextualised solutions to local problems, rather than uniform solutions.[14]

Secondly, residents of informal settlements, just as other oppressed groups, are often excluded from other institutions of democracy, including legislatures and courts.[15] These

[10] This thesis, ch 4, section 5.3, 'capacity building'.

[11] This thesis, ch 2, section 4; Dorf and Sabel (n 7) 288–289.

[12] Cohen and Sabel (n 4) 334.

[13] Rishika Sahgal, 'Strengthening Democracy in India through Participation Rights' (2020) 4 VRÜ 468.

[14] Cohen and Sabel (n 4) 334.

[15] Sandra Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32 Nordic Journal of Human Rights 312, 327.

democratic institutions can be critiqued for failing to ensure inclusion and political equality for the most oppressed groups, and of course, should be reformed to further these ideals. Nevertheless, the recognition of participation rights, helps deepen deliberative democracy, by enabling residents of informal settlements to take part in deliberative decision-making at least with regards to this aspect of their lives.[16]

This does not render the role of other institutions superfluous. Courts, legislatures and the executive ought to continue to fulfil their constitutionally assigned roles. In this section, I briefly explore the role of the legislature and executive. The remainder of the chapter explores the role of courts.

The legislature ought to use its legislative powers to enable localised problem-solving through participation rights, and create rights compliant[17] boundaries for the process of participation by laying down broad benchmarks and standards that ought to be fulfilled.[18] For example, the Maharashtra Slum Act provides for a process of participation to determine the redevelopment of informal settlements. The applicable rules require residents to form a cooperative housing society under the Cooperative Societies Act 1912,[19] and for decision-making to take place through general body meetings of the cooperative housing society, specifying that 70% of residents must agree to any redevelopment scheme.[20] Rules framed under the legislation also specify standards that must be met under any redevelopment scheme. For example, the rules require that housing allotted to residents in the redeveloped settlement must be in the joint names

[16] Marius Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 VRÜ 12, 31; Sahgal (n 13).

[17] I argue below that legislation remains open to constitutional challenges.

[18] Cohen and Sabel (n 4) 334.

[19] Development Control Regulations for Greater Bombay, 1991 No 33(10), Appendix IV, s 1.17 ('DCR No 33(10)'). The regulations have been framed under the Maharashtra Regional and Town Planning Act 1966. These contain the relevant scheme for redevelopment of informal settlements in Maharashtra, including under the Maharashtra Slum Act.

[20] DCR No 33(10) Appendix IV, s 1.15.

of the 'pramukh' or head of household and their spouse, and that first preference must be given in the allotment of houses to persons with disabilities and female-headed households.[21] These rules place boundaries on the redevelopment scheme that is agreed upon through the process of participation.

At the same time, legislative provisions ought to remain open to challenge during the process of participation, and before courts. Residents ought to be able to argue that a legislative provision violates a constitutional requirement regarding the right to access adequate housing. In such cases, residents would need to engage with the legislative provisions, to indicate why these provisions violate the constitution, and why the provisions should not create boundaries on the process of participation. These deliberations ought to feed into the reasoning of courts while determining the constitutionality of legislative provisions. I elaborate on this in section 4.

The executive also ought to enable participation rights in the eviction context in the policies that it develops in the context of land and housing, as well as place rights compliant boundaries on the process of participation through setting broad benchmarks within the policies it formulates. These boundaries must be compliant with constitutional rights, and remain open to challenge on the basis that these violate constitutional rights. In addition, the executive must fulfil its obligations during the process of participation, as a duty bearer during that process. As argued in chapter 4, it ought to bear the obligation to fulfil positive measures prior to participation, and to engage with residents through bounded deliberations during the process of participation. Given that it possesses the resources and institutional capacity to fulfil positive measures, the executive is institutionally competent to play this role. It is also institutionally competent to participate in the deliberations by bringing to the table information within its reach – the extent of its resources, availability of alternate accommodation, its plans for provision of long-term housing, and so on.

[21] DCR No 33(10), Appendix IV, 1.7, 1.8.

By participating through bounded deliberations, the executive plays a role that is democratically legitimate.

Lastly, courts play an important role in enforcing participation rights, as well as in judicially reviewing the substance of decisions arrived at through the process of participation. As the organ of the state constitutionally empowered to judicially review executive decisions in India and South Africa,[22] it is democratically legitimate for the court to enforce participation rights, and to judicially review decisions arrived at through the process of participation. By playing this role, courts are exercising a power granted to them through a prior deliberative process that took place during the drafting of the Indian and South African constitutions.[23]

In enforcing participation rights, courts enable decision-making by those who are competent to make decisions about the right to housing in the eviction context – residents of informal settlements, as well as the executive. In ensuring the process of participation meets the criteria set out in chapters 3 and 4, requiring bounded deliberation, courts ensure that the process of decision-making is compatible with a deliberative version of democracy. Therefore, by enforcing participation rights, courts augment a deliberative version of democracy, rather than impede it.[24] In section 3, I therefore argue that when courts are called upon to judicially review cases involving the right to housing in the context of evictions, they must first enforce participation rights.

When reviewing the decisions arrived at through the process of participation, courts ought to call the executive to account for its role during the process of participation, requiring it to justify

[22] Constitution of India 1950, arts 226 and 32; Constitution of South Africa 1996, s 172.

[23] Fredman, *Comparative Human Rights Law* (n 2) 93.

[24] Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (n 16) 31.

its decisions through a deliberative process before the courts.[25] Moreover, courts ought to draw on the deliberations that take place during the process of participation, to review the substance of the decisions arrived at through the process. In section 4, I indicate how the deliberations ought to feed into reasoning of the court while reviewing decisions arrived at through the process of participation.

3 Role of courts: enforcing participation rights

If no participation took place prior to an eviction, courts must halt the eviction and require parties to participate. At that point, courts ought to oversee the process of participation to ensure that participation meets the criteria set out in chapters 3 and 4. If parties approach courts after participation has taken place, arguing that participation was inadequate, and/or calling for a review of the decision arrived at through participation, courts must first check whether the participation met the criteria set out in chapters 3 and 4. There, I argue for a bounded deliberative process of participation, wherein residents facing intersecting inequalities have an equal right to participate, after the fulfilment of positive measures to enable participation through bounded deliberation. Courts ought to check that the process of participation meets these criteria. Thus, courts ought to play an important role in holding the state accountable for fulfilling its obligations with respect to participation rights through the power of judicial review. In that way, courts ought to play an important role in enhancing rather than impeding deliberative democracy.[26] Thereafter, courts should review the outcome of the process of participation, and other substantive issues raised by parties.

[25] Fredman, *Comparative Human Rights Law* (n 2) 92.

[26] Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (n 16) 31; Fredman, *Comparative Human Rights Law* (n 2) 90.

In this section I argue that this is the doctrinally and normatively sound approach. Once participation rights are established as an element of the right to housing, it is doctrinally sound to require participation to take place, when it has not. This is to ensure that constitutional rights are respected. Courts in India and South Africa have not always taken this approach. For example, in *Olga Tellis* and *Joe Slovo,* courts recognised that participation had not taken place, but did not, at that point, order participation. These cases are open to doctrinal critique for failing to protect participation rights, and I elaborate on that critique below. Enforcing participation rights when participation has not taken place is also the normatively sound approach, because it ensures that the intrinsic value of participation rights is respected, and that the instrumental benefits of making decisions through the process of participation can be reaped. Recall that I discuss the intrinsic value and instrumental benefits of participation rights in chapter 2.

In *Olga Tellis,* the Indian Supreme Court recognised the intrinsic and instrumental importance of notice and hearing prior to evictions.[27] It held that prior to an eviction, a notice and hearing must be provided to residents, and these requirements can be dispensed with only under 'extraordinary circumstances' involving 'urgency'. The state carries the burden to show urgency when it uses its powers to dispense with notice and hearing.[28] The Supreme Court also recognised that no notice was given and no hearing took place between the Bombay Municipal Corporation and the pavement dwellers in the case. This was, therefore, a violation of the notice and hearing obligation by the Bombay Municipal Corporation. Thereafter, the Court held that it had heard pavement dwellers before itself, and therefore, the notice and hearing requirements were fulfilled before the Court.[29] This approach is doctrinally incorrect. Once notice and hearing were

[27] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 [47] ('*Olga Tellis*').

[28] ibid [45].

[29] ibid [51].

recognised as elements of the right to housing under art 21 of the Constitution, the court ought to have enforced these rights.

In South Africa, the Constitutional Court held in *Olivia Road* that meaningful engagement forms part of the state's obligation to take 'reasonable measures' to fulfil the right to housing under s 26(2) of the Constitution.[30] The Constitutional Court held that meaningful engagement should take place prior to instituting proceedings for an eviction, and whether meaningful engagement took place is a 'relevant circumstance' that courts must consider while determining whether allowing an eviction in the circumstances is 'just and equitable' under s 26(3) of the Constitution, and under the PIE Act.[31] The Constitutional Court also recognised that it was for the Court to examine any agreement arrived at through the process of meaningful engagement, to check whether the state responded reasonably to the process of engagement.[32] Hence, in eviction cases, courts must check whether meaningful engagement took place, and thereafter check the process of engagement, to check the state responded 'reasonably'.

Joe Slovo[33] has been characterised as a 'missed opportunity'[34] for the Constitutional Court to apply the meaningful engagement doctrine developed in *Olivia Road*. In the case, Justices Moseneke, O'Regan and Sachs recognised that the state had failed to meaningfully engage with the residents, and that the limited engagement of the state with the residents was characterised by 'broken promises'.[35] Yet, they did not enforce the requirement of meaningful engagement, except

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[30] *Occupiers Of 51 Olivia Road, Berea Township And 197 Main Street Johannesburg v City of Johannesburg And Others* [2008] ZACC 1 ('*Olivia Road*').

[31] ibid [18].

[32] ibid [28].

[33] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 ('*Joe Slovo*').

[34] Brian Ray, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107, 112.

[35] *Joe Slovo* (n 23) [166]–[167] (Moseneke J); [301]–[302] and [304] (O'Regan J); [378]–[380] (Sachs J); Fredman, *Comparative Human Rights Law* (n 2) 283; Lilian Chenwi, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26 SAPL 147.

as a remedy in the process of relocation. This has been criticised as an inconsistent application of the meaningful engagement framework.[36] By allowing an eviction to proceed even when no meaningful engagement had taken place previously, the Court in *Joe Slovo* ignored its reasoning in *Olivia Road,* pronounced a few months prior to hearing arguments in *Joe Slovo.*[37] As discussed in chapter 4, the scope of participation rights, including meaningful engagement in South Africa should include details of relocation. However, meaningful engagement on this point must take place only once meaningful engagement has taken place regarding a prior question – whether an eviction and relocation should take place at all. If no meaningful engagement has taken place around that question, courts must first enforce meaningful engagement.

Ngomane[38] indicates how meaningful engagement ought to be enforced by courts. It involved the municipality approaching the Gauteng High Court to seek an order to evict 200 families residing on municipal land under the PIE Act, without first meaningfully engaging with residents. The High Court granted an eviction order, even though meaningful engagement had not taken place. When the case came before the Constitutional Court, it recognised that the order of the High Court had deprived the residents of the opportunity to meaningfully engage with the municipality prior to eviction proceedings.[39] The Constitutional Court, therefore, set aside the order of the High Court, and required the municipality and the residents to meaningfully engage with each other, to find a solution that conformed with the right to housing of the residents, and

[36] Jackie Dugard and others, 'The Right to Housing in South Africa' [2017] Foundation for Human Rights Position Paper Series 27; Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 CCR 223; Roberto Gargarella, 'Why Do We Care about Dialogue?: "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 229.

[37] McLean (n 36).

[38] *Ngomane and others v Govan Mbeki Municipality* [2016] ZACC 31 (*'Ngomane'*).

[39] ibid [14].

the obligation of the municipality under s 26 of the South African Constitution.[40] This is precisely how the meaningful engagement doctrine developed in *Olivia Road* ought to be applied.

Once participation has taken place, and participation meets the requirements set out in chapters 3 and 4, thereafter courts should examine substantive questions raised in eviction cases.

I leave open the possibility that there may be situations when deliberations between the state, residents and private landowners come to a standstill, perhaps because duty-bearers drag their feet during the process of participation, or because residents believe that the deliberations are stacked against them and refuse to participate. At that point, residents may prefer to maintain status quo until it becomes possible to restart deliberations, because, perhaps, status quo involves them continuing to reside at their preferred location. For example, Rao-Cavale indicates through his research on the eviction of street vendors, that when deliberations were prolonged indefinitely, often because of the unresponsiveness of the state, and vendors had obtained a court order for the maintenance of status quo until solutions were found through deliberations, vendors preferred to maintain status quo and continue to sell their wares at their original location.[41] Residents may also choose to approach the court to decide substantive issues, to protect their rights and interests. The legal and factual possibilities may be such that the courts are required to decide substantive issues to fulfil their role in upholding the rights of residents. In such cases, courts must engage with the legal and factual circumstances of the case to indicate why enforcing participation rights is not just and equitable, and why it must decide substantive issues. For example, in *South African Informal Traders Forum v City of Johannesburg*,[42] the City of Johannesburg had forcibly evicted street

[40] ibid [16].

[41] Karthik Rao-Cavale, 'The Art of Buying Time: Street Vendor Politics and Legal Mobilization in Metropolitan India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019).

[42] *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8.

vendors under 'operation clean sweep'.[43] The street vendors sought to engage with the city to return to their location and resume their trading activities, and all parties reached agreement regarding a process of verification and re-registration to enable the vendors to return.[44] However, even after the verification and re-registration process, the City refused to allow them back, and it became evident that 'operation clean sweep' was an initiative to remove them permanently from their trading stalls, to relocate some or all of them to unknown 'alternative designated areas', and to prohibit them from trading in the interim. The vendors approached the court for urgent relief, to enable them to resume their livelihood.[45] The Constitutional Court granted urgent relief,[46] indicating that it would protect rights-holders and residents' interests 'directly and uncompromisingly', where the state was unresponsive during the process of participation, and rights were left vulnerable.[47]

4 Resolving substantive issues: participation rights and the role of courts

The contextual content of other substantive elements of the right to housing ought to be developed through the process of participation. For example, the process of participation ought to decide what amounts to 'adequate housing' for particular residents residing in a particular settlement facing an eviction, thereby developing the contextual content of 'adequate housing', rather than a 'comprehensive and final content'.[48] Other substantive issues raised in eviction cases, such as the interpretation of statutory provisions and state policies regarding housing, also ought to be addressed during the process of participation.[49] Thereafter, the deliberations that take place

[43] ibid [13].

[44] ibid [8]–[10].

[45] ibid [10].

[46] ibid [38].

[47] Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (n 16) 31.

[48] Sandra Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (Juta 2010) 180.

[49] This thesis, ch 4, section 2, 'scope of participation'.

during the process of participation ought to feed into the reasoning of courts. These deliberations form an important resource for courts while deciding substantive issues in a manner that meets democratic legitimacy and competence concerns. Courts ought to rely on the content of deliberations while deciding substantive issues, helping to overcome their epistemic limitations, or limitations in their knowledge of the circumstances around evictions. By relying on deliberations between all parties that have a stake in the case, courts can also overcome concerns regarding democratic legitimacy.[50] Courts serve as an additional forum for bounded deliberations.[51] The process of litigation before courts, and the exercise of power of judicial review by courts, becomes a continuation of bounded deliberation that took place during the process of participation. Courts also play an important role in checking that the substantive norms developed through the process of participation meet constitutional principles, such as housing that is in accordance with the dignity of residents.[52] Thereby, courts do not 'abdicate their duty to interpret and enforce the substantive normative commitments of social rights'.[53]

In the remainder of this section, I indicate how substantive issues ought to be determined during the process of participation. I also indicate how deliberations that take place during the process of participation feed into the court's reasoning when deciding substantive issues. I first indicate how this should take place in India, and thereafter how this should take place in South Africa. Overall, I propose a valuable role for both participation rights and other substantive normative principles; as well as for participation rights and courts in developing the content of other substantive normative principles.

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[50] César Rodríguez-Garavito, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 233.

[51] Fredman, *Comparative Human Rights Law* (n 2) 90; Marius Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383, 395.

[52] Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 48) 180.

[53] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 1) 624.

4.1 India: Determining substantive issues through the process of participation

Consider *Olga Tellis*. One set of petitioners before the Indian Supreme Court were residing on pavements in Mumbai, and were evicted by the Bombay Municipal Corporation to ensure pavements could be used by pedestrians.[54] Residents challenged the decision of the Bombay Municipal Corporation to demolish their homes and evict them from the pavements. One substantive issue in the case was whether the removal of pavement homes for the reason stated by the state violated the rights to housing and livelihood under art 21 of the Indian Constitution. The competing claims over pavements ought to be balanced through the process of participation. Moreover, enforcing participation rights would help the court to decide this issue while meeting concerns around democratic legitimacy and institutional competence.

Pavements are undoubtedly important, for the reasons the Supreme Court acknowledged in *Olga Tellis*: 'the main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security'.[55] The bulk of India walks to work, travelling between 0-5 kilometres to get to work,[56] and it is unsurprising that the impoverished, and especially migrants, form an overwhelming proportion of those who walk to work in urban spaces.[57] Pedestrians face intersecting inequalities. When these statistics are disaggregated by gender, it is found that women are more likely to walk to work, than to use other modes of transport.[58] Yet most Indian cities lack adequate pavements or footpaths, and only 30

[54] *Olga Tellis* (n 27) [3]–[7].

[55] ibid [43].

[56] S Rukmini, 'India Walks to Work: Census' *The Hindu* (New Delhi, 14 November 2015) <https://www.thehindu.com/data/india-walks-to-work-census/article7874521.ece> accessed 15 January 2022.

[57] Deepak Baindur, 'Urban Transport in India: Challenges and Recommendations' (Indian Institute for Human Settlements 2014) <http://iihs.co.in/knowledge-gateway/wp-content/uploads/2015/07/RF-Working-Paper-Transport_edited_09062015_Final_reduced-size.pdf> accessed 19 January 2022.

[58] Rukmini (n 56).

percent of all roads in Indian cities have any footpaths, forget adequate footpaths.[59] It is unsurprising, then, that pedestrian lives are put at risk in the absence of adequate footpaths. This is evidenced by the fact that 62 pedestrians die in India daily, constituting a significant share of total road fatalities.[60]

It was recognised in *Olga Tellis* that the right to shelter is closely linked to the right to livelihood, because people need to live close to their work, and may otherwise lose their means of livelihood.[61] By the same logic, access to a safe means to get to work, including pavements, are closely linked to the right to livelihood. Those who need to live close to their places of work, and will otherwise lose their jobs, also need pavements to safely walk to work. Pavements are therefore essential to the rights to life and livelihood, especially for impoverished migrants, and those among them facing intersecting axes of marginalisation. According to the internal logic of the Supreme Court's decision in *Olga Tellis,* the right to pavements should therefore be recognised as a right under art 21, closely linked to other rights already recognised.

I have argued here, therefore, that access to pavements may be implied as a right through art 21 in the same manner in which access to housing was implied as a right under art 21. My intention has been to characterise the competing claim against housing in its strongest possible terms, and thereafter to explore how the competing claims can be resolved. The issue should not depend on whether the competing claim is a 'right' or an 'interest', rather the focus must be on how the claims regarding both housing and other rights/interests can be resolved. Therefore, even if a reader is unconvinced by the characterisation of access to pavements as a 'right', and they

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[59] Baindur (n 57) 15.

[60] ibid; Dipak K Dash, 'Killer Indian Roads Claim Lives of 56 Pedestrians Daily' *The Times of India* (1 October 2018) <http://timesofindia.indiatimes.com/articleshow/66021092.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 15 January 2022; Dipak K Dash, '62 Pedestrians Die Daily in India, up 84% in 4 Years' *The Times of India* (18 November 2019) <http://timesofindia.indiatimes.com/articleshow/72101003.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 15 January 2022.

[61] *Olga Tellis* (n 27) [32].

would prefer to characterise access to pavements as an 'interest', the arguments that follow remain unchanged. Even if access to pavements is characterised as an interest and not a right, participation rights ought to play an important role in navigating the competing claims over pavements by residents needing access to homes as a matter of 'right', and pedestrians needing access to pavements, as a matter of 'interest'.

Residents of informal settlements ought to have the right to deliberate with the state regarding how these competing rights and interests should be balanced during the process of participation, especially in the context of their specific settlement. During a hearing (the kind of participation rights recognised in *Olga Tellis*, which I have argued to be inadequate in chapter 4), those living on pavements can use their local knowledge and experience to explore ways to access adequate housing as well as access safe pavements.[62] Here, I give some examples by way of illustration, but it should be noted that the particular arguments raised by residents would depend on their specific circumstances and context. For example, residents can argue that the obstruction of pavements is 'so slight and negligible as to cause no nuisance or inconvenience to other members of the public',[63] and that it was possible to safely use the pavements by pedestrians. They would have important local knowledge regarding the extent of use of the pavement for walking, and whether their homes posed an obstruction to the same. They could indicate to the state the form of housing they had built on the pavements – such as makeshift housing that they dismantled during the day, when pavements were in greater use.[64] Moreover, they, too, are likely to walk to their places of work. Their resistance to being moved from the pavements stemmed from the fact that their places of employment were close to the pavements on which they lived. As both pedestrians and pavement dwellers, they would be able to share their requirements in both

[62] Cohen and Sabel (n 4); Dorf and Sabel (n 7).

[63] *Olga Tellis* (n 27) [46].

[64] *Ngomane and others v City of Johannesburg Metropolitan Municipality and Another* [2018] ZASCA 57 [2] ('*Ngomane v Johannesburg*').

capacities. They would know if other pavements on parallel roads could serve as an alternative route for those needing to use pavements. In *Olga Tellis,* the Court argued that water and sanitation could not be provided on pavements, and hence there were health and hygiene concerns posed by allowing people to reside on pavements.[65] This formed part of the Court's reasoning in concluding that pavement homes posed a 'nuisance'.[66] The Court did not consider the possibility of providing toilets, bathing and drinking water facilities nearby. During the process of participation, such possibilities can be deliberated upon and properly explored between residents and the state.

I have argued in chapter 4 that the state ought to be required to provide relevant information to the pavement dwellers prior to the hearing. For example, it ought to share information regarding availability of alternate accommodation close by where the pavement dwellers could move. Residents themselves may have gathered such information, with the support of civil society organisations or networks of residents.[67] These are simply examples of the type of deliberation that can take place during a hearing, to ensure that the right to housing of pavement dwellers, as well as the right to safe pavements, and the corresponding obligations on the state, are secured. It is meant to indicate how participation rights can help us resolve the competing claims over the use of pavements.

This method for the resolution of competing claims through participation rights carries intrinsic and instrumental benefits associated with participation rights.[68] It respects the freedom as capabilities of residents, and their dignity as intrinsic worth, in enabling each resident of an informal settlement to take part in decisions about what they have reason to value in terms of their

[65] *Olga Tellis* (n 27) [43].

[66] ibid.

[67] Sheela Patel, Carrie Baptist and Celine D'Cruz, 'Knowledge Is Power: Informal Communities Assert Their Right to the City through SDI and Community-Led Enumerations' (2012) 24 Environment and Urbanization 13, 17.

[68] This thesis, ch 2.

housing.[69] It furthers multidimensional substantive equality,[70] by enabling participation,[71] enabling residents facing intersecting inequalities to challenge disadvantage in access to adequate housing through their own voice and participation in decision-making about their housing,[72] and challenges stigma and stereotyping of residents as incapable of making decisions about their housing.[73] Moreover, using their knowledge and experience, residents help arrive at better informed, and hence potentially more effective solutions.[74] In this manner, the process of participation ought to resolve substantive issues in eviction cases.

4.2 India: Deliberations feed into the reasoning of the court

The deliberations that take place during the process of participation ought to feed into the court's reasoning when it tests the outcome of the process of participation against the rights to livelihood and housing recognised under art 21. I therefore envisage that courts ought to play an important role in interpreting and enforcing substantive normative commitments. While doing so, they ought to tap into deliberations during the process of participation.

In *Olga Tellis,* the Supreme Court applied the 'just, fair and reasonable' standard of review when determining whether the eviction of residents living on pavements was constitutionally permissible. I argue here that it applied the standard incorrectly. I also indicate how the deliberations that take place during the process of participation would have helped in its reasoning.

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[69] Amartya Sen, *Development as Freedom* (OUP 1999); Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (CUP 2000) 71.

[70] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 ICON 712.

[71] ibid 731.

[72] Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 2011) 31; Fredman, 'Substantive Equality Revisited' (n 70) 729.

[73] Fredman, 'Substantive Equality Revisited' (n 70) 730; Catriona Mackenzie, 'Procedural Justice, Relational Equality, and Self-Respect' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (1st edn, Routledge 2020) 207–208.

[74] Dorf and Sabel (n 7) 288–289.

Thereafter, I argue that post *Puttaswamy*, the Supreme Court is now required to apply the proportionality standard to test violations of the right to life and liberty, including the right to housing and livelihood recognised to form part of the right to life. I indicate how the Supreme Court ought to decide a case like *Olga Tellis* using proportionality analysis, and how the deliberations that take place during the process of participation ought to feed into its analysis.

4.3 Just, fair and reasonable standard of review

In *Olga Tellis,* the Supreme Court recognised that the right to life under art 21 includes the rights to livelihood and housing.[75] It also recognised that evictions involve deprivation of the rights to livelihood and housing.[76] The Supreme Court recognised that pavements are constructed for the use of pedestrians.[77] Hence, the Supreme Court ought to have decided whether restrictions on the rights to livelihood and housing of pavement dwellers through evictions for the sake of pedestrians, with or without provision of alternate accommodation, were 'just, fair and reasonable'. Instead, the Supreme Court concentrated on the procedure for removal of encroachments, and interpreted the procedure laid down under ss 312-314 of the Bombay Municipal Corporation in a manner that rendered it just, fair and reasonable, by ordinarily requiring a notice and hearing prior to evictions.[78] However, it did not consider whether the substance of the law – removal of homes for the sake of pedestrians, with or without provision of alternate accommodation – was just, fair and reasonable. Hence, it applied the 'just, fair and reasonable' standard of review incorrectly in *Olga Tellis,* by not properly applying the standard to the substance of the law.

[75] *Olga Tellis* (n 27) [37].

[76] ibid [37].

[77] ibid [43].

[78] Usha Ramanathan, 'Demolition Drive' (2005) 40 EPW 2908, 2909.

At this point, it is useful to briefly discuss how courts conduct limitations analysis of measures restricting the rights to life and personal liberty under art 21. The text of art 21 states, 'no person shall be deprived of his life or personal liberty except according to procedure established by law'. In *AK Gopalan*, the Supreme Court interpreted art 21 literally, to hold that those deprivations of life and personal liberty were constitutionally permissible for which there was a procedure prescribed by a validly enacted law.[79] This position changed in *Maneka Gandhi*, wherein the Supreme Court held that 'procedure established by law' must be interpreted to mean a procedure that is 'just, fair and reasonable' and not 'fanciful, oppressive, or arbitrary'.[80] In subsequent cases, prior in time to *Olga Tellis,* the Supreme Court examined not only the procedure prescribed, but also the substance of the law, to determine whether it was just, fair and reasonable.[81] For example, in *Sunil Batra,* J Krishna Iyer held that post *Maneka Gandhi,* punishment that was cruel, inhumane and amounted to torture, would be unreasonable and arbitrary, and violate arts 14, 19 and 21.[82] He held that solitary confinement was cruel, inhumane and amounted to torture, therefore was unreasonable and arbitrary, and violated arts 14, 19 and 21.[83]

The Indian Supreme Court has been criticised for its failure to articulate a consistent principle or method to determine what amounts to just, fair and reasonable.[84] The Court held in *Olga Tellis* that '[t]here is no static measure of reasonableness which can be applied to all situations alike'.[85] While applying the just, fair and reasonableness test, the Indian Supreme Court has

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[79] *AK Gopalan v State of Madras* AIR 1950 SC 27 [21] (CJ Kania), [155] (J Mahajan), [194] (J Mukherjea) and [284] (J Das).

[80] *Maneka Gandhi v Union of India* (1978) 1 SCC 248 [5] (J Bhagwati); VN Shukla, *VN Shukla's Constitution of India* (MP Singh ed, 13th edn, Eastern Book Company 2017).

[81] *Sunil Batra v Delhi Administration* (1978) 4 SCC 494 ('*Sunil Batra*'); *Prem Shankar Shukla v Delhi Administration* (1980) 3 SCC 526; *Bachan Singh v State of Punjab* (1980) 2 SCC 684; *Mithu v State of Punjab* (1983) 2 SCC 277.

[82] ibid (*Sunil Batra*) [52], [56], [197-A] (J Krishna Iyer).

[83] ibid.

[84] Aparna Chandra, 'Limitation Analysis by the Indian Supreme Court' in Andrej Lang, Mordechai Kremnitzer and Talya Steiner (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020) 479.

[85] *Olga Tellis* (n 27).

generally pursued three lines of enquiry. The Court has reviewed rights infringing measures to examine whether these follow a legitimate aim, through means that are rationally connected to that aim, and that on a 'general balance' between the right and the public interest sought to be pursued, the measure is a justified infringement of that right.[86] The Court has not explained the principles on the basis of which it will conduct a 'general balancing', and this is not the same as proportionality. Moreover, the Court has not pursued all three lines of enquiry in a consistent manner, and has more often limited itself to the first two lines of enquiry, checking whether rights infringing measures follow a legitimate aim through means that are rationally connected to the aim.[87] In *Olga Tellis,* the Supreme Court failed to pursue any of these lines of enquiry with regards to the substance of the law.

In *Olga Tellis,* the Supreme Court ought to have pursued all three lines of enquiry while checking whether the substance of the law was 'just, fair and reasonable'. The Supreme Court recognised that the rights to livelihood and housing were being restricted (or deprived) for the sake of the interest of pedestrians to use footpaths. While this may be a reasonable purpose for restricting the rights to livelihood and housing of pavement dwellers, this should have been acknowledged explicitly. Thereafter, the Supreme Court ought to have considered whether the restriction was rationally connected to the aim. Again, the Court may have found that there was a rational connection, but this ought to have been stated explicitly. Lastly, the Court ought to have conducted a general balancing between the rights to livelihood and housing, and the interest of pedestrians over pavements. The Court refused to characterise the rights to livelihood and housing of residents of pavements as a 'competing claim' to that of pedestrians. The Supreme Court held,

> There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that

[86] Chandra (n 84) 461.

[87] ibid.

> of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that, the former should be preferred to the latter.[88]

In other words, the Supreme Court refused to explicitly conduct a general balancing between the rights to livelihood and housing of residents and the interest of pedestrians. Of course, implicitly the Court did conduct this balancing, by representing the issue in the case as a contest between pedestrians and pavement dwellers, in which the pavement dwellers lost.[89] The Supreme Court drew on the common law of tort, and characterised pavement dwellings as 'an act of trespass' and 'unquestionably a source of nuisance', and recognised the statutory duty of the Municipal Corporation to abate nuisances.[90] It did not interpret the common law or statutory law in light of the constitution, and more specifically, the fundamental rights to livelihood and housing.[91] It should be noted that the Court did not characterise the use of pavements by pedestrians as a competing right recognised under art 21 as I have argued above, but simply as an interest. This makes it even more surprising that it refused to consider the right to livelihood and housing as something that could even compete with the interest of pavement dwellers. The Court ought to have conducted the general balancing, to find that even if eviction of residents for the sake of pedestrians was just, fair and reasonable, it could be so only if residents were provided alternate accommodation.

Although the Supreme Court recognised the obligation to provide alternate accommodation, it did so to the extent that the state had already undertaken to provide alternate accommodation to those facing evictions.[92] Khosla has characterised this approach to the rights to livelihood and housing in *Olga Tellis* as 'conditional', because the content of the right is

[88] *Olga Tellis* (n 27) [43].

[89] Ramanathan (n 78) 2910.

[90] *Olga Tellis* (n 27) [43].

[91] Anindita Mukherjee, *The Legal Right to Housing in India* (CUP 2019) 79.

[92] *Olga Tellis* (n 27) [53], [57].

dependent on pre-existing statutory rights or policies.[93] The Court could have avoided this characterisation, if it had made the rehabilitation requirement as part of its reasoning, while checking whether the restriction on the rights to livelihood and housing was just, fair and reasonable. This would have allowed the Supreme Court to recognise stronger rehabilitation requirements. In the case, the Court did not require the provision of alternate accommodation or rehabilitation 'as condition precedent' to the eviction of pavement dwellers.[94] In other words, pavement dwellers could be evicted without first being provided alternate accommodation, even if this would render them homeless. Also, the Court did not require alternate accommodation to be provided to those who did not fulfil the state's criteria, predicated on residents being able to prove their residence in Mumbai prior to 1976 through inclusion in the 1976 census.[95] Instead, the Court ought to have required the provision of alternate accommodation to all those who would be rendered homeless as a result of the eviction, because eviction of pavement dwellers for the sake of pedestrians could be 'just, fair and reasonable' only if they were not rendered homeless. The state may raise arguments regarding its financial incapacity in making budgetary decisions, to argue that it could not provide alternate accommodation to those rendered homeless as a result of an eviction. I engage with these arguments while discussing the proportionality standard of review in the subsequent section.

Deliberations between residents and the state during the process of participation would aid the court in its analysis while applying the just, fair and reasonable standard of review. Residents would have described during the process of participation, the impact of eviction on their housing, livelihood and lives. This would help the Court to appreciate how evictions for the sake of pedestrians restricted the rights to livelihood and housing of residents. The arguments presented

[93] M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 ICON 739.

[94] *Olga Tellis* (n 27) [53], [57].

[95] *Olga Tellis* (n 27) [53], [57].

by the state during the process of participation regarding why residents needed to be evicted for pedestrians, would help the Court understand whether the purpose of restrictions was legitimate, and whether the means were rationally connected to the aim. The deliberations would help the Court conduct a general balancing between the rights of residents and the interests of pavement dwellers. The Court would understand the factual possibilities regarding the use of pavements for both pedestrians and housing. The Court would be able to understand the precise needs and possibilities for provision of alternate accommodation to residents. The Court would then be able to properly evaluate how evictions restricted the rights to housing and livelihood of residents, and why eviction could be just, fair and reasonable only when those rendered homeless were provided with alternate accommodation. The Court would be in a more competent position to decide these issues, by relying on the epistemic contributions of both residents and the state during the process of participation. The Court would also be able to provide a forum to continue the deliberations that took place during the process of participation, and thereby enhance deliberative version of democracy.[96]

4.4 Proportionality standard of review

More recently, the Indian Supreme Court has adopted the proportionality test to check limitations on fundamental rights. In *Modern Dental* and *Akshay N Patel* the Supreme Court adopted the proportionality test to check limitations on the right to freedom of occupation under art 19(1)(g).[97]

[96] Fredman, *Comparative Human Rights Law* (n 2) 90.

[97] *Modern Dental College and Research Centre v State of Madhya Pradesh* (2016) 7 SCC 353 ('*Modern Dental*'); *Akshay N Patel v Reserve Bank of India* CA No 6522/2021 (6 December 2021, Supreme Court of India) ('*Akshay N Patel*').

In three interconnected judgments arising out of a challenge to the constitutionality of Aadhaar[98],[99] the Supreme Court adopted the structured four-part proportionality test to test violations of the right to privacy under art 21. It has been argued that *Puttaswamy I* ushered in a new constitutional era in India, one marked by a culture of justification through use of the proportionality test to check limitations on fundamental rights.[100]

In this section, I argue that the proportionality standard ought to apply to cases involving the right to housing. I thereafter explore how a case like *Olga Tellis* ought to be decided in this new constitutional era, on adopting a four-step proportionality test to check restrictions on the rights to livelihood and housing. I also indicate how deliberations during the process of participation ought to feed into the court's reasoning while applying the proportionality standard of review.

4.4.1 The proportionality standard ought to apply

In several fundamental rights cases decided post *Puttaswamy I,* the Supreme Court did not adopt the proportionality test, even when finding a violation of the right to privacy under art 21 of the Constitution.[101] In *Joseph Shine,* all five judges of a constitutional bench of the Supreme Court found that s 497 of the Indian Penal Code 1860, which criminalised the offence of adultery, violated, *inter alia*, the rights to dignity and privacy under art 21 of the Indian Constitution.[102] Only J Malhotra used a version of the proportionality test to reach this conclusion, finding that although the

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[98] Aadhar is a 12-digit unique identity number available to residents in India, based on biometric and demographic data. The data is collected by an organisation set up for this purpose – the Unique Identification Authority of India. The executive and legislative frameworks operationalising Aadhar were challenged on multiple grounds, primarily on the basis that these violated the right to privacy. See, Reetika Khera, *Dissent on Aadhaar: Big Data Meets Big Brother* (Orient Blackswan 2019).

[99] *Binoy Viswam v Union of India* (2017) 7 SCC 59; *Justice KS Puttaswamy v Union of India* (2017) 10 SCC 1 ('*Puttaswamy I*'); *Justice KS Puttaswamy v Union of India* (2019) 1 SCC 1 ('*Puttaswamy II*').

[100] Shreya Atrey and Gautam Bhatia, 'New Beginnings: Indian Rights Jurisprudence After Puttaswamy' (2020) 3 U OxHRH J.

[101] ibid; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 ('*Navtej*'); *Joseph Shine v Union of India* (2019) 2 SCC 84 ('*Joseph Shine*').

[102] ibid (*Joseph Shine*) [58] (CJ Misra and J Khanwilkar), [107] (J Nariman), [209] (J Chandrachud) and [279] (J Malhotra).

provision fulfilled a legitimate aim – to preserve the institution of marriage – it did not adopt a means that was rationally connected to, and necessary to fulfil that aim.[103] In *Navtej,* the same five judges read down s 377 of the Indian Penal Code 1860, which criminalised 'carnal intercourse against the order of nature', to exclude consensual same-sex relationships between adults. They found that criminalising consensual same sex relations between adults violated *inter alia* the right to privacy under art 21 of the Indian Constitution.[104] None of the judges, including J Malhotra, used the proportionality test to arrive at this conclusion. This should be a point of criticism of these decisions. The judges in *Joseph Shine* and *Navtej*, as part of five-judge benches, were bound by the *Puttaswamy I* decision, decided by a nine-judge bench of the Indian Supreme Court.[105] It is well established that decisions of a higher bench strength (higher number of judges) of the Supreme Court of India, are binding on benches with the same or lower bench strength.[106] In *Puttaswamy I,* the majority held that limitations on the right to privacy under art 21 should be checked using the proportionality test, and hence the Supreme Court ought to have used the proportionality test in *Joseph Shine* and *Navtej.* While the outcome of these cases would remain unchanged, these decisions would be doctrinally consistent were they to use the proportionality test. Other decisions explicitly employed the proportionality test, although not uniformly.[107]

Post *Puttaswamy I,* the proportionality test should be used to check limitations on all rights falling within the scope of art 21 of the Indian Constitution, including the right to housing.

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[103] ibid [279]–[282] (J Malhotra).

[104] *Navtej* (n 101) [175] (CJ Misra and J Khanwilkar), [350] (J Nariman), [469] (J Chandrachud) and [640] (J Malhotra).

[105] The Indian Supreme Court has a sanctioned strength of 34 judges. The established practice in the court is for judges to sit in benches of 2 or 3 judges, rather than *en banc*. The Supreme Court is both a court of appeal and a constitutional court. Substantial questions of constitutional law are heard by a bench of five judges, also known as a constitutional bench. Nick Robinson, 'The Structure and Functioning of the Supreme Court of India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019).

[106] *Central Board of Dawoodi Bohra Community v State of Maharashtra* 2005 (2) SCC 673.

[107] *Puttaswamy II* (n 99); *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 ('*Anuradha Bhasin*'); *Internet and Mobile Association v Reserve Bank of India* (2020) 10 SCC 274 ('*Internet and Mobile Association*'); *Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal* (13 November 2019, Supreme Court of India).

Although *Puttaswamy I* was about the right to privacy under art 21, there is no sound reason to treat privacy differently from other rights under art 21. There is no internal hierarchy within the text of art 21. Surendranath has argued that there ought to be an internal hierarchy within art 21, and that differing standards of review ought to be employed to test limitations on rights falling at different levels in the hierarchy.[108] He did not suggest a principle for differentiating between different rights falling within the scope of art 21, but recognised that because art 21 has been 'expanded in such numerous directions in so many different ways', that it is reasonable to treat the variety of rights falling within art 21 differently. I am unsure about whether rights within art 21 ought to be treated differently. In any case, I do not think there is any principled reason for treating the right to privacy differently from the right to housing. If there is to be a hierarchy of rights within art 21, privacy and housing, both recognised to be important for a life of dignity,[109] ought to fall at a similar level within the hierarchy.

Surendranath's proposal for a hierarchy of rights within art 21, is motivated by the concern that a just, fair and reasonable standard of review, used to test limitations on rights under art 21, was a weak and deferential standard. He was concerned that this left rights such as the right against torture, insufficiently protected against executive and legislative action.[110] To overcome this problem, he suggested that a more rigorous standard of review ought to be used when testing limitations on rights falling higher in the hierarchy of rights within art 21, in comparison with those rights falling lower in the hierarchy. There is another way of engaging with Surendranath's concerns – to apply the proportionality test, understood to be more rigorous than the reasonableness test,[111] to all rights recognised under art 21. This would ensure that all rights within

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[108] Anup Surendranath, 'The Right to Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 774.

[109] *Puttaswamy I* (n 99); *Olga Tellis* (n 27).

[110] It should be noted that even when the standard of review under art 21 was 'just, fair and reasonable' review, torture was found to be a violation of art 21. *Sunil Batra* (n 81) [52], [56], [197-A] (J Krishna Iyer).

[111] Aparna Chandra, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 U OxHRH J 55; Vikram Aditya Narayan and Jahnavi Sindhu, 'A Historical Argument for Proportionality under the Indian Constitution' (2018) 2 ILR 51, 84;

art 21 are better protected, including those rights falling higher in the hierarchy for Surendranath, such as the right against torture. Moreover, proportionality itself can be applied with varying intensities of review.[112] Hence, even if there is to be a hierarchy of rights within art 21, where the right to torture is treated differently from the right to reputation or sleep, that hierarchy can be respected even when adopting a proportionality standard of review for all rights under art 21. Applying the proportionality test to all rights within art 21 would ensure that limitations on all rights are subject to a baseline intensity of review, but a varying intensity beyond that baseline.[113] Hence, the adoption of the proportionality test for all rights under art 21 should meet Surendranath's concerns. A more detailed development of this argument is beyond the scope of this thesis.

J Das in his concurring opinion in *AK Gopalan* adopted a similar view to Surendranath, wherein he argued that there are certain primary rights, and then auxiliary rights, protected under arts 19 and 21.[114] He identified the right to life as the 'first and foremost right', and after it, the right to 'freedom of the person', as the two primary rights. Within 'freedom of the person', J Das included only the right 'not be touched, violated, arrested or imprisoned and one's limbs shall not be injured or maimed.' J Das considered all other rights falling within the scope of art 21 as auxiliary rights, and the rights protected under art 19 as auxiliary rights that were 'so important and fundamental that they are regarded and valued as separate and independent rights.'[115] It is difficult to understand why certain rights within art 21 should be treated as 'primary' and others as 'auxiliary', and what principle can be used to identify which rights would fall within which category. In any case, for J Das, the standard of review applicable for primary versus auxiliary rights did not

Tarunabh Khaitan, 'Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 JILI 177; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174, 202.

[112] Rivers (n 111); Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1.

[113] Chan (n 112).

[114] *AK Gopalan* (n 79) [247] (J Das).

[115] ibid.

change. Both kinds of rights could be restricted/deprived through a procedure established by a validly enacted law. In that case, what difference does it make to characterise some rights within art 21 as primary, and others as auxiliary? Moreover, if we were to adopt the typology of J Das, privacy and housing both would be considered auxiliary rather than primary rights. Therefore, the standard of review applicable for both should be the same. Since the Supreme Court held in *Puttaswamy I* that limitations on privacy ought to be checked using the proportionality test, it should follow that limitations on housing, too, ought to be checked using the proportionality test.

Sindhu and Narayan have argued that a historical, textual and structural reading of the Indian Constitution necessitates the proportionality test to check limitations on rights.[116] Through the recognition of fundamental rights and judicial review, the framers of the Indian Constitution intended to usher in a culture of justification, and the proportionality test best serves this purpose.[117] If we are to adopt that line of reasoning, then again limitations on the right to housing ought to be checked using the proportionality test.

Before expanding proportionality to the right to housing, do we need to be concerned that proportionality might apply differently in the case of the right to housing as opposed to the right to privacy? Often, housing is characterised as a social and economic right, and privacy as a civil and political right. However, a strict division between social and economic rights on one hand, and civil and political rights on the other hand, has been negated.[118] Firstly, it is difficult to characterise a right as 'civil and political' or 'social and economic' because there may substantial overlap between the two sets of rights. For instance, if the right to life were to be characterised as a civil and political right, perhaps Indian courts would not be able to interpret it to include rights such as housing. Clearly, Indian courts have read the right to life widely enough to include within

[116] Narayan and Sindhu (n 111).

[117] ibid.

[118] Fredman, *Comparative Human Rights Law* (n 2) ch 3; Sandra Fredman, *Human Rights Transformed* (OUP 2008) ch 3.

its ambit the rights to livelihood and housing.[119] Secondly, it is understood that all rights imply a range of duties, including duties to respect, protect and promote and fulfil.[120] It is often difficult to create bright lines between positive and negative duties.[121] For example, in the eviction context, should we characterise the state's duty as a negative one, to refrain from depriving the right to housing, or to respect the right to housing? Yet, if an eviction is to be carried out, the state may need to provide alternate accommodation to those who are rendered homeless. The negative duty to refrain from depriving people of their housing therefore very soon becomes a positive one to provide housing.[122] In any case, it has been argued that proportionality ought to be applied to test whether both positive and negative duties comply with human rights,[123] and to test the limitation of both social and economic and civil and political rights.[124] Hence, we need not be concerned before applying proportionality analysis to test limitations on the rights to livelihood and housing, any more than applying it to the right to housing. The issue we need to engage with is *how* proportionality ought to apply. I therefore explore below *how* to apply the proportionality test to check limitations on the rights to livelihood and housing under art 21.

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[119] *Olga Tellis* (n 27).

[120] Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (40th Anniversary, Princeton University Press 2020) 52; Fredman, *Comparative Human Rights Law* (n 2) ch 3; Fredman, *Human Rights Transformed* (n 118) ch 3; Sandra Liebenberg, 'Grootboom and the Seduction of the Negative/Positive Duties Dichotomy' (2011) 26 SAPL 37.

[121] Shue (n 120) 52; Fredman, *Comparative Human Rights Law* (n 2) ch 3; Fredman, *Human Rights Transformed* (n 118) ch 3; Liebenberg, 'Grootboom and the Seduction of the Negative/Positive Duties Dichotomy' (n 120).

[122] Fredman, *Comparative Human Rights Law* (n 2) 271; Malcolm Langford, 'Housing Rights Litigation' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014) 207.

[123] Matthias Klatt, 'Positive Obligations under the European Convention of Human Rights' (2011) 71 HJIL 691; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2011) ch 15.

[124] Sandra Fredman, 'New Horizons: Incorporating Socio-Economic Rights in a British Bill of Rights' [2010] Public Law 297, 317; Xenophon Contiades and Alkmene Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 ICON 660; David Bilchitz, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 ICON 710.

4.4.2 Applying the proportionality standard

The Supreme Court has not adopted a uniform proportionality test, nor uniformly applied all parts of the four-step test even in cases where it purports to use the test.[125] In *Modern Dental*, a five-judge bench of the Supreme Court adopted the following four-step test to check measures limiting rights,

> (i) it is designated for a proper purpose;
>
> (ii) the measures undertaken to effectuate such a limitation are rationally connected to the fulfilment of that purpose;
>
> (iii) the measures undertaken are necessary in that there are no alternative measures that may similarly achieve that same purpose with a lesser degree of limitation;
>
> (iv) there needs to be a proper relation ("proportionality stricto sensu" or "balancing") between the importance of achieving the proper purpose and the social importance of preventing the limitation on the constitutional right.[126]

These incorporate the steps largely accepted as forming part of a proportionality analysis – suitability, necessity and proportionality in the narrow sense.[127] These four steps have broadly been adopted in subsequent cases, although not uniformly.[128] In *Puttaswamy I*, the formulation of the proportionality test by the plurality of judges eschewed the necessity requirement.[129] For these

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[125] Chandra (n 111); Mariyam Kamil, 'The Aadhaar Judgment and the Constitution II: On Proportionality' (*Indian Constitutional Law and Philosophy Blog*, 30 September 2018) <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/> accessed 15 January 2022; Ankush Rai, 'Proportionality in Application – An Analysis of the "Least Restrictive Measure"' (*Indian Constitutional Law and Philosophy Blog*, 8 May 2020) <https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/> accessed 15 January 2022; Abhinav Chandrachud, '*Wednesbury* Reformulated: Proportionality and the Supreme Court of India' (2013) 13 OUCLJ 191; Ashwita Ambast, 'Where's Waldo? Looking for the Doctrine of Proportionality in Indian Free Speech Jurisprudence' (2015) 9 ICL Journal 344.

[126] *Modern Dental* (n 97) [60].

[127] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002); Robert Alexy, 'Proportionality and Rationality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017).

[128] In *Puttaswamy II*, J Sikri modified the *Modern Dental* test. See *Puttaswamy II* (n 99) [155]-[158] (J Sikri). In *Anuradha Bhasin*, the Supreme Court referred to both the *Modern Dental* as well as the *Puttaswamy II* version of the test, and it is not clear which version it ultimately applied. See, *Anuradha Bhasin (n 107)* [67], [74]. In *Internet and Mobile Association* the Supreme Court only referred to the *Modern Dental* test. See, *Internet and Mobile Association (n 107)* [207].

[129] *Puttaswamy I* (n 99) [310] (J Chandrachud).

reasons, I will apply the four steps as expounded in *Modern Dental.* A detailed discussion of the most appropriate proportionality test, and a justification of the same, is beyond the scope of this thesis.

The Supreme Court has not deliberated on who should bear the burden of proof regarding the four steps of the test, nor the standard of proof (beyond reasonable doubt or a balance of probabilities) and evidentiary standard (through provision of first order cogent evidence, or through second order reasoning by claiming expertise) that should be met to prove whether the substantive steps of the test have been met.[130] The Court has applied differing evidentiary standards, and placed the burden of proof sometimes on the state, and sometimes on those arguing that the state's measures violate fundamental rights.[131] I indicate below how the recognition of participation rights has important contributions to make on issues of the burden of proof and evidentiary standard that ought to apply while applying the proportionality analysis to test limitations on the right to housing.

If we were to apply the proportionality test to a case like *Olga Tellis,* the impugned measures would fail at the necessity stage of the *Modern Dental* test. It may be legitimate for the state to ensure that pavements can be used by pedestrians for walking, and eviction of homes may be rationally connected to the fulfilment of that legitimate aim. Yet the measures adopted to fulfil the legitimate aim must be 'least restrictive'. Thus, it would need to be shown before the court that it was not possible for the specific pavements to be used both for walking and for residence. Even if both uses of the pavements were not possible, it would need to be shown that a less restrictive measure was not possible – eviction with the provision of alternate accommodation to those

[130] Chan (n 112); Chandra (n 111); Rai (n 125).

[131] Chan (n 112); Chandra (n 111); Rai (n 125).

residents who would otherwise be rendered homeless, with the alternate accommodation meeting their needs, such as the need to be close to their place of work.

Here, a negative obligation – not to deprive residents of their homes, is being turned into a positive obligation – to provide alternate accommodation to those that will become homeless as a result of the eviction. The eviction context is such, that these two obligations are intrinsically connected. If an eviction can be shown to fulfil a legitimate aim, and suitable to fulfil that aim, at the necessity stage of the proportionality analysis, we should consider alternate means of fulfilling the same legitimate aim that restricts the right to housing to a lesser degree. Provision of alternate accommodation is one such alternate means. At that stage, the state may argue that it is unable to provide alternate accommodation to all residents, citing resource constraints. In India, the Supreme Court has repeatedly held that resource constraints cannot be used as a justification for the inability to fulfil positive obligations. In *Paschim Banga*,[132] the Supreme Court recognised a positive obligation to provide emergency medical treatment, and held that resource constraints were not a valid justification for the state to violate its obligation. In *Khatri (II)*,[133] the Supreme Court held that in criminal cases, poor and indigent accused have a right to free legal aid, and that financial constraints and administrative inability cannot be a justification for failure to fulfil the state's positive obligation. In these cases, the Supreme Court did not provide a detailed explanation for why this is the case. We can, however, construct an argument for why resource constraints ought not to matter in the eviction context, with the help of proportionality analysis.

The lack of resources argument must itself be subjected to proportionality analysis. The state may raise two kinds of arguments regarding resource constraints: firstly, factual inability due to lack of resources, and secondly, its institutional competence in setting priorities for the use of

[132] *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

[133] *Khatri (II) v State of Bihar* (1981) 1 SCC 627.

state resources. Factual inability must be proved, and not simply stated. Moreover, the process of participation would indicate the precise finances and resources required by residents of a particular settlement to enable access adequate housing. Once residents indicate what they require, it may be found that, factually, the state does possess the financial ability and resources to enable access to alternate accommodation that meets the needs of residents.

Factual inability may arise due to lack of budgetary provision, and not because of the lack of financial capacity. There may have been no budget set aside to provide alternate accommodation to those the state seeks to evict, even though it may have been within the financial capacity of the state to provide alternate accommodation if such budget had been set aside. The lack of budgetary provision may be a result of the state's failure to acknowledge its positive obligation to provide housing to those it seeks to evict.[134] In this scenario, the financial inability argument would fail at the necessity stage of a proportionality analysis, for failure of the state to consider alternate means to fulfil its obligations.

Proving financial inability raises questions around evidentiary standards and burden of proof. I argue that the state ought to bear the burden to prove financial inability; it ought to be subject to a 'balance of probabilities' standard of proof; and it ought to provide cogent evidence to prove this claim. An extensive justification of these evidentiary standards and burden of proof requirements is beyond the scope of this thesis.

Within the proportionality analysis, the state may be able to show that it was fulfilling several other legitimate interests through allocating a budget to those interests, such as health, education, public housing, etcetera. This will enable the state to fulfil the first two stages of the proportionality test. However, it must thereafter indicate that it considered a less restrictive means

[134] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* [2011] ZACC 33 [69] ('*Blue Moonlight*').

to pursue the other legitimate interests. Even if the state can show that it considered less restrictive alternatives but chose not to make budgetary provisions to provide alternate accommodation to those it seeks to evict, the state's failure to fulfil its positive obligations due to lack of budgetary provision, will fail at the final balancing stage. At this stage, we will need to examine the intensity of interference with the right and the importance of the right, against the importance of the legitimate interest and the degree of inference with that interest to realise the right.[135] Given the importance of the right to housing at least in the minimal sense of having *any* accommodation, as well as the degree of interference with this right when people are rendered entirely homeless due to an eviction, the state's lack of budgetary provision for providing alternate accommodation will fail the balancing stage of the proportionality analysis. Although it is important for the state to fulfil other legitimate interests through budgetary allocations to those interests, the degree of interference with those interests pales in comparison with the importance and degree of interference with the right to housing in the eviction context. Moreover, this is not an instance when residents are asking the state to proactively plan and budget for provision of housing. The eviction context involves the state depriving residents of housing they have found for themselves, and in that context, needing to prove alternate accommodation to those being rendered homeless as a result of the eviction.

Subjecting the state's failure to allocate a budget to fulfil its positive obligation, to scrutiny through proportionality analysis, does not question the state's competence to decide budgetary matters. Instead, it asks the state to provide reasons and justifications for its decisions in relation to budgetary matters. In doing so, courts enhance, rather than impede a deliberative version of democracy.[136] Moreover, as I discuss below, the recognition of participation rights helps us to

[135] See Alexy's weight formula. Alexy, 'Proportionality and Rationality' (n 127) 17.

[136] Fredman, *Comparative Human Rights Law* (n 2) 90.

resolve questions around judicial competence and democratic legitimacy in requiring the state to provide reasons regarding its choice of budgetary allocation.[137]

In the analysis above, I have characterised use of pavements as a 'legitimate interest' rather than a 'right'. It ought to be flagged here, that the application of the proportionality test in cases in which competing rights are involved, such as the right to pavements and the right to housing, may be 'much less straightforward'.[138] It has been suggested, that proportionality analysis must be conducted twice in such cases.[139] Firstly, by treating the right to pavements as an interest restricting the right to housing. This analysis would proceed in the way I have indicated above. Secondly, by treating the right to housing as an 'interest' restricting the right to pavements. This analysis may also fail at the necessity stage. It may be shown that pavements cannot be used because of homes built on pavements, and that there is another means by which the interest in housing could be fulfilled, that restricts the right to pavements to a lesser degree – eviction with provision of alternate accommodation. Of course, the factual situation would determine this analysis. If the 'necessity' stage of analysis is crossed both when checking whether the right to housing is restricted because of the right to pavements, and vice versa, then the fourth stage of proportionality analysis – balancing or proportionality in the narrow sense – must be conducted. A longer discussion of this issue is beyond the scope of this thesis, given the focus of this thesis on participation rights.

Participation rights help resolve issues around who should bear the burden of proof, what should be the standard of proof, what evidentiary standard must be met before the court, and what degree of deference the court must show to the state while conducting the proportionality analysis.

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[137] Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2014).

[138] *Central Public Information Officer, Supreme Court of India v Subhash Chandra Agarwal* (Supreme Court of India, 13 November 2019) [111] (J Chandrachud); citing *Campbell v MGM Limited* [2004] UKHL 22 [140] (Baroness Hale); Gautam Bhatia, 'The RTI Judgment: On Proportionality' (*Indian Constitutional Law and Philosophy Blog*, 15 November 2019) <https://indconlawphil.wordpress.com/2019/11/15/the-rti-judgment-on-proportionality/> accessed 25 October 2021; Klatt (n 123).

[139] ibid.

During the process of participation, residents and the state would have already explored the questions that need to be addressed during the proportionality analysis, although not necessarily in the same structured manner. Once these questions have been explored during the process of participation, and both residents and the state have made epistemic contributions based on their own areas of knowledge and expertise, the court need not be too concerned about being deferential to the state while applying the proportionality test. The state would already have needed to give evidence to residents during the process of participation, to convince residents as part of a deliberative process. Hence, the court would not be requiring the state to do anything extra when it asks the state to provide cogent evidence to indicate whether it considered alternate measures that fulfilled its legitimate aim while impairing the right to housing to a lesser degree, and why it did not pursue any of those alternate measures. Moreover, the court need not be deferential to the arguments raised by the state, as it has access to a process that is democratically legitimate – the process of participation – as well as access to another body that has epistemic competence regarding the issue at hand – the residents themselves. Hence, the court need not be concerned about requiring the state to meet a higher evidentiary burden in order to prove the limbs of the four-part proportionality test. It ought not to let the state simply claim expertise in the area and rely on second order expertise reasons to meet the requirements of the proportionality test, but to require first order reasons based on cogent evidence.

4.5 South Africa: meaningful engagement need not be a cop-out strategy

In sections 4.1–4.4, I indicated how substantive issues raised in eviction cases in India ought to be decided during the process of participation, and how deliberations during that process ought to feed into the reasoning of courts in deciding those issues. In sections 4.5–4.9, I indicate the same for South Africa.

In South Africa, meaningful engagement has often been characterised as a 'cop-out strategy' employed by the courts to avoid engaging with substantive issues raised regarding the interpretation of the constitution and statutes, and in deciding the constitutionality of statutes.[140] For example, while discussing the principle of meaningful engagement, Ray has argued,

> Rather than continuing a democratic dialogue between the court and the government over the meaning of section 26, this principle effectively cuts off consideration of whether and how section 26 should be interpreted on the specific facts in each case, including the state's efforts to develop constitutionally compliant policies.[141] […] A court also can join other parties, order parties to submit information, and structure and manage an engagement process without further elaboration of either the statute or the constitution.[142]

Yet, this need not be the case.[143] Firstly, as I have argued above with examples from India, the process of meaningful engagement ought to be used to determine substantive issues, including the interpretation of statutes and the constitution, and the constitutionality of statutes. Meaningful engagement ought to create space for residents to take part in deciding substantive issues concerning their rights under statutes and the constitution. Secondly, the deliberations that take place during meaningful engagement ought to feed into the reasoning of courts in their determination of these substantive issues, while meeting concerns regarding democratic legitimacy and the institutional competence of courts in deciding polycentric issues involved in eviction cases.

I illustrate these arguments in this section with the help of examples, drawing on the facts and issues raised in eviction cases heard by South African courts. Thereafter, in sections 4.6–4.9,

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[140] Stuart Wilson and Jackie Dugard, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014); McLean (n 36); Shanelle Van der Berg, 'Conceptualising Meaningful Engagement in South Africa: Eviction Cases' Exclusive Gem?' (*OxHRH Blog*, 16 November 2012) <http://ohrh.law.ox.ac.uk/Conceptualising-Meaningful-Engagement-In-South-Africa-Eviction-Cases-Exclusive-Gem/> accessed 15 January 2022.

[141] Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016) 239.

[142] ibid 242.

[143] Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (n 15); Ray (n 141) 236; Anashri Pillay, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 ICON 732.

I discuss how different ways to examine the constitutionality of state action ought to be addressed during the process of participation/meaningful engagement, and how those deliberations ought to feed into the reasoning of courts while determining constitutionality of state action.

For example, s 26(3) of the South African Constitution requires that, '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.' The provision has been operationalised through the PIE Act.[144] Section 4(7) of the PIE Act requires the court to consider 'all relevant circumstances' while determining whether an eviction is 'just and equitable', and illustrates some circumstances that are relevant, such as the availability of alternate housing.[145] These provisions contain several open-textured phrases, including 'relevant circumstances' and 'just and equitable'. Residents should have the opportunity to make valuable contributions to the interpretation of these phrases through the process of meaningful engagement. They are in the best position to explain their own circumstances, to explain why those circumstances are relevant, and why an eviction is not 'just and equitable' given those circumstances. The deliberations during meaningful engagement ought to feed into the court's reasoning while interpreting these phrases.

In eviction cases instituted by private landowners, courts have required that the local government be joined as a party.[146] One reason stated for this is that local governments can assist the court in filling its epistemic gaps in understanding the 'relevant circumstances' of the case. Clearly, the local government will have information about relevant circumstances such as the

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[144] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 [11] ('*Port Elizabeth Municipality*'); *Blue Moonlight* (n 134) [36].

[145] ibid (*Port Elizabeth Municipality*) [28]; *Lingwood v Unlawful Occupiers of ERF 9 Highlands* 2008 (3) BCLR 325 (W) [18] ('*Lingwood*'); *Blue Moonlight* (n 134) [41], [96]; Stuart Wilson, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 SALJ 270.

[146] ibid (*Lingwood*); *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W); *Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and others* (2010) (4) BCLR 354 (SCA) ('*Daisy Dear Investments*'); *ABSA Bank v Murray* 2004 2 SA 15 (C); ibid (Wilson, 'Breaking the Tie'); Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 47); J van Wyk, 'The Role of Local Government in Evictions' (2011) 14 PELJ 50.

alternate accommodation that it is able to offer to the residents. However, residents are best placed to provide information regarding their own circumstances. The process of participation or meaningful engagement provides space for deliberations regarding all relevant circumstances of the case, and courts ought to draw on those deliberations to fill their epistemic gap by relying on multiple sources, and not just on the information provided by local governments. Courts have somewhat recognised this, when they held that the joinder of local government in eviction cases enables meaningful engagement between the local government and residents on all relevant circumstances of the case.[147] In this section, I further develop that nascent insight, to argue that meaningful engagement ought to be necessary in eviction cases to allow for deliberation over all relevant circumstances.

By way of another example, in several cases, courts have been asked to decide whether the case involved an eviction of people from their 'homes', and therefore whether s 26(3) and the provisions of the PIE Act applied to the case.[148] For example, *Ngomane v Johannesburg*[149] involved a group of people who made a home for themselves on a traffic island. Each night they would erect makeshift shelters out of cardboard boxes and plastic sheeting, and each morning they would dismantle the shelters and pack the material, along with personal belongings such as food, mattresses, blankets and clothing, while they went looking for food and work.[150] When their belongings were forcibly confiscated and destroyed by the police, they challenged this act as an eviction in violation of s 26(3) and the PIE Act. The courts were required to decide whether their makeshift shelters constituted a 'home', and therefore whether s 26(3) of the Constitution and the

[147] *Daisy Dear Investments* (n 146) [9]–[10].

[148] *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C); *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) [37]–[40]; *Breede Vallei Munisipaliteit v Die Inwoners van ERF 18184 and Others* [2012] ZAWCHC 390; *Ngomane v Johannesburg* (n 64) [16]; Mostert Hanri and Cramer Richard, '"Home" and Unlawful Occupation : The Horns of Local Government's Dilemma Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)' (2015) 26 Stellenbosch Law Review 583.

[149] *Ngomane v Johannesburg* (n 64).

[150] *Ngomane v Johannesburg* (n 64) [2].

PIE Act applied to the case. Residents are in the best position to explain why their residence should be considered a 'home' during the process of meaningful engagement, drawing from their own experience of living in those 'homes'. Courts ought to draw on those deliberations while deciding what constitutes a 'home' for the purpose of the application of s 26(3).

Also consider *Blue Moonlight*.[151] The case involved 86 residents of a building in inner city Johannesburg facing an eviction instituted by the private owner of the building. The landowner was interested in redeveloping the property, and therefore sought an eviction. The residents were arguing that they should be provided with alternate accommodation if they were to be evicted from their homes. The City of Johannesburg did not want to bear the responsibility to provide alternate accommodation to the residents, and argued that it was not legally and constitutionally bound to provide alternate accommodation in privately-instituted eviction cases.[152]

Three different kinds of substantive issues were raised in the case.[153] Firstly, questions immediately around the eviction of the 86 people were to be decided in the case, including whether the eviction should be carried out, whether residents should be provided with alternate accommodation if evicted, and the details of the alternate accommodation to be provided.[154] Secondly, it was necessary to interpret the PIE Act to determine whether an eviction was just and equitable under the circumstances.[155] One factor to be considered while determining this question was whether alternate accommodation would be available to those facing evictions.[156] Since the residents were unable to afford alternate accommodation themselves, it became necessary to interpret the state's policy with regards to provision of emergency accommodation to those in

[151] *Blue Moonlight* (n 134).

[152] ibid [3].

[153] This thesis, ch 4, section 2, 'scope of participation'.

[154] *Blue Moonlight* (n 134) [3].

[155] ibid [15].

[156] PIE Act, s 4(7).

desperate need. Chapter 12 of the National Housing Code provided the framework for provision of emergency accommodation to those in desperate need, pursuant to the decision of the Constitutional Court in *Grootboom*.[157] It was to be determined whether the 86 residents in the case were entitled to be provided accommodation by the City under Chapter 12. Thirdly, it was necessary to determine the constitutionality of the City's housing policy, based on whether s 26 of the Constitution required the City of Johannesburg to provide alternate accommodation to those who would become homeless once evicted by a private landowner, and whether the City's housing policy violated this obligation.[158]

All three issues ought to be decided during the process of meaningful engagement between residents, the landowner, and the city. When deciding the first issue, residents would be able to explain their contextual circumstances to explain why an eviction ought not to take place, and if it were to take place, why they ought to be provided with alternate accommodation. Residents would be able to explain their precise requirements for alternate accommodation, for example that the location of accommodation be close to their employment. The City would be able to explain the kinds of alternate accommodation that it could provide at that point in time, as well as its plan for provision of long-term accommodation. Ultimately, local, contextual solutions for access to adequate housing for residents could emerge through the process of meaningful engagement.[159]

While deciding the second issue, residents would be able to explain their circumstances, to indicate why an eviction was not just and equitable under the PIE Act unless they were provided with alternate accommodation. The process of meaningful engagement ought to thereby be used to interpret and apply the provisions of the PIE Act to the circumstances of the residents in the case. Moreover, the City's housing policy, as well as Chapter 12 of the Housing Code, ought to

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[157] *Blue Moonlight* (n 134) [15], [27].

[158] ibid [3].

[159] Cohen and Sabel (n 4); Dorf and Sabel (n 7).

also be interpreted through the process of meaningful engagement. If the City's housing policy did not plan for accommodation to be provided to the residents, residents would argue that it was unconstitutional. They would be able to explain their vulnerability and indicate why they fell within the category of those in 'desperate need' who must be provided housing under Chapter 12 of the Housing Code, as per *Grootboom*.[160] A deliberative process of meaningful engagement would require the City to engage with the reasons presented by the residents, and to accept those reasons, or to provide alternate reasons to convince them otherwise. Ultimately, the process of meaningful engagement ought to be used to address all the questions raised in the case.

The deliberations during the process of meaningful engagement ought to feed into the reasoning of the courts when deciding these issues. The court is required to test that the decisions arrived at through the process of meaningful engagement conformed to the PIE Act and the Constitution. The Court would have access to information from three different sources regarding the circumstances of the case – the residents, the private duty bearers, as well as the state. This would help the court to overcome its epistemic limits while deciding whether an eviction was just and equitable under the circumstances. The question of the court's legitimacy to decide this issue does not arise, because the court is required to independently consider whether the parameters of s 4(7) have been made out under the PIE Act,[161] and is empowered to consider whether statutory provisions and executive action conforms with the Bill of Rights.[162]

There are three ways in which the constitutionality of measures, taken in relation to housing, has been tested by courts. Firstly, courts have checked whether measures are 'reasonable' under s 26(2) of the Constitution.[163] Secondly, courts have checked whether the measures conform

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[160] *The Government of the Republic of South Africa & Ors v Irene Grootboom & Ors* [2000] ZACC 19 [44] ('*Grootboom*').

[161] PIE Act, s 4(7); *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18; Clireesh Cloete and Zsa-Zsa Temmers Boggenpoel, 'Re-Evaluating the Court System in PIE Eviction Cases' (2018) 135 SALJ 432.

[162] Constitution of South Africa 1996, s 172.

[163] *Grootboom* (n 160) [44]; *Blue Moonlight* (n 134) [86]–[95].

with the general limitations clause under s 36 of the Constitution.[164] Lastly, courts have checked whether the measures violate other rights recognised under the Constitution, such as equality or dignity.[165] Academic have argued for a fourth 'minimum core' approach, to check whether measures violate the minimum core of the right to housing.[166] Here, I indicate how these issues ought to be addressed during meaningful engagement, and how the deliberations that take place during the process of meaningful engagement ought to feed into the court's reasoning under each of these approaches.

4.6 Meaningful engagement and s 26(1)

The Constitutional Court has refrained from developing the content of the right to housing recognised under s 26(1) of the Constitution. Instead, it has held that s 26(1) must be read along with s 26(2) to determine the scope of the right and corresponding obligations immediately placed on the state.[167] Under this approach, the Court will only check the reasonableness of measures taken by the state in relation to housing, without expanding on the content of the right to housing. The Court has reiterated the same approach in relation to other social and economic rights.[168]

A preferable approach would be to develop the content of the right under s 26(1), recognising this to be a *prima facie* or conditional content.[169] The unconditional right immediately available to rights holders through s 26(2) may be less than the *prima facie* conditional right recognised under s 26(1). This *prima facie* or conditional content of the right to access adequate

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[164] *Jaftha v Schoeman* [2004] ZACC 25 [35]–[48] ('*Jaftha*'); *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42 ('*Dladla*') [52]–[53].

[165] ibid (*Dladla*) [47].

[166] David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2008) chs 5 and 6.

[167] *Grootboom* (n 160) [34].

[168] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15 [39] ('*TAC*'); *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28 [48]–[50] ('*Mazibuko*').

[169] Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (n 166) chs 3 and 6.

housing under s 26(1) can be viewed in terms of Alexy's concept of principles, as a principle or norm which must be realised to the greatest extent possible given the legal and factual possibilities.[170] Thus, the principle need not always obtain, based on the legal and factual circumstances of a case.

There are several advantages to this approach. Firstly, this approach is supported by the text and structure of s 26.[171] This approach ensures that both ss 26(1) and 26(2) play a role in constitutional interpretation, and neither provision is rendered superfluous.[172] Otherwise, what role would be left for s 26(1), if courts are only to determine the reasonableness of measures under s 26(2)? Secondly, paying attention to s 26(1) ensures that the right to housing under s 26 is viewed as the right to access adequate housing, and not simply as a right to reasonable government action in the context of housing.[173] Thirdly, this approach enables the state to understand what the ultimate obligations placed on it are, and what it must progressively strive towards.[174] Fourthly, it better structures a limitations analysis under s 26(2). It becomes clear what the standard for access to adequate housing is, and therefore makes it clear that the state must present justifications as to why its measures in relation to housing are reasonable as against this standard, in the circumstances of a case, and as against the duty to progressively realise this standard through available resources.[175] In other words, it clarifies that the state must justify under s 26(2) why the principle

[170] Alexy, *A Theory of Constitutional Rights* (n 127) 47; Fredman, *Comparative Human Rights Law* (n 2) 73.

[171] David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 SAJHR 1; Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (n 51).

[172] Craig Scott and Philip Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 SAJHR 206.

[173] *Mazibuko* (n 168) [59]; Danie Brand, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?"' in Henk Botha, André van der Walt and Johan van der Walt (eds), *Rights and Democracy In a Transformative Constitution* (1st edn, Sun Press 2004).

[174] Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009) ch 5.

[175] Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n 171).

developed under s 26(1) need not obtain in the legal and factual circumstances of a case, including availability of resources and the need to progressively realise the right.

The Constitutional Court has been reluctant to develop the content of s 26(1) because of its recognition of the contextual nature of people's needs with regard to housing. In *Grootboom,* the Court stated,

> The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.[176]

The Court thereby considered it inappropriate to develop the content of s 26(1) in the abstract. Yet, the content of s 26(1) need not be developed in the abstract, and can be developed instead in the context of a specific case.[177] In the same vein, Liebenberg argues that courts ought to develop the substantive meaning of the right under s 26(1) without arriving at a 'comprehensive and final definition'. Instead, the 'normative content ought to remain contingent and incomplete, allowing space for the evolution of new meanings in response to changing contexts and forms of injustice.'[178] This can be done through participation rights. The recognition of participation rights in the form of meaningful engagement will enable the court to develop the contextual content of s 26(1) in a manner that meets competence and legitimacy concerns.[179] Dugard and Wilson have made a similar argument, proposing that courts develop the contextual content of rights by 'listening more closely to what poor litigants say in their papers about how the social context of

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[176] *Grootboom* (n 160) [37].

[177] Sandra Liebenberg, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 Law, Democracy & Development 159.

[178] Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 48) 180.

[179] ibid.

poverty affects their access to socio-economic goods.'[180] Here, I argue that deliberations during meaningful engagement can help develop this contextual content. Firstly, the court can tap into deliberations to fill its epistemic gaps. A rich amount of information would be available regarding the precise needs of residents coming before the court, including whether they need access to 'land, building material, finance and/or services'[181]. Secondly, the court can draw on the process of bounded deliberation to develop the contextual content of s 26(1), and thereby draw on a democratically legitimate process to develop the content. Of course, when the case comes before the court, the court's role cannot be simply to rubber stamp the process of participation and the content of the right developed through that process. In any event, the case would come before the court when there is disagreement between the parties who participated in the deliberations, and hence the court would be called to settle the disagreement. Then, the court would need to check whether deliberations met the procedural and substantive requirements set out in chapters 3 and 4 of this thesis, to ensure that the process truly fulfilled the requirements of bounded deliberation. Thereafter, the court would need to examine the substantive content of deliberations, based on substantive principles. Below, I discuss possible principles that it may rely on. Even then, the court would be furthering rather than impeding a deliberative version of democracy.[182] Through hearing the case, the court provides a forum for the deliberations to continue regarding what should be the contextual content of s 26(1). Through its decision, the court becomes a participant in the deliberations, providing reasons for why it prefers a specific contextual content of the right to housing under s 26(1). This addresses concerns regarding the democratic legitimacy of courts to decide the contextual content of the right to access adequate housing under s 26(1).

[180] Stuart Wilson and Jackie Dugard, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights Law and Poverty Special Edition' (2011) 22 Stellenbosch Law Review 664, 665.

[181] *Grootboom* (n 160) [37].

[182] Fredman, *Comparative Human Rights Law* (n 2) ch 4.

There may be two kinds of content to the right to access adequate housing under s 26(1) of the Constitution – a minimum core content and a progressively realisable content. The Constitutional Court has refused to adopt the minimum core approach with respect to social and economic rights, including housing.[183] The court has offered several reasons for this. Firstly, that it might not have sufficient information to develop the minimum core content of the right to housing.[184] Secondly, that it is not institutionally appropriate for the court to develop this content based on reasons of democratic legitimacy.[185] Thirdly, that it may be inappropriate to develop a rigid, acontextual minimum core. Recognising participation rights in the form of meaningful engagement helps address these concerns, in the same way in which it helped address concerns regarding whether it is appropriate for the court to develop the content of s 26(1). By tapping into the deliberation that take place during meaningful engagement, the court can overcome its information deficit. By relying on deliberation between residents facing specific circumstances, a contextual minimum core can be developed,[186] rather than an absolute, abstract, universal minimum core. By continuing the process of deliberation, the court furthers rather than impedes deliberative democracy through its process of adjudication.[187]

The court will need to rely on some general principles to help it to develop the minimum core content.[188] The deliberation during meaningful engagement may have discussed what

[183] *Grootboom* (n 160); *TAC* (n 168); *Mazibuko* (n 168); Katharine G Young, *Constituting Economic and Social Rights* (OUP 2012) 84–85.

[184] *Grootboom* (n 160) [31]–[33].

[185] *Mazibuko* (n 168) [61].

[186] Oliver Fuo and Anel Du Plessis, 'In the Face of Judicial Deference: Taking the "minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19 Law, Democracy & Development 1. The authors argue that a contextual minimum core content of social and economic rights can be developed by the local government through public participation.

[187] Fredman, *Comparative Human Rights Law* (n 2) ch 4.

[188] Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale J Intl L 113. Young disaggregates the major approaches to determining the minimum core, arguing that there must be clarity regarding which approach is adopted and why.

principles are appropriate to develop the minimum core content. The deliberation will also help the court to contextually apply those principles in the circumstances of the case.

One way of arriving at the content of the minimum core of the right to housing is by focusing on urgent survival needs, while the progressively realisable component of housing would include those needs related to human flourishing.[189] Another way of developing the minimum core is by focussing on normative values, including equality, dignity and freedom. The minimum core is that level of the right necessary for a life of dignity, equality and freedom. Liebenberg, for example, relies on Nussbaum's framework for human dignity and human capabilities[190] to explain why basic social and economic needs must be accorded a higher level of protection than other aspects of social and economic rights. Dignity requires respect for the intrinsic worth of human beings. The basic worth of human beings is disrespected if they do not have access to the basic level of material conditions to enable them to survive and develop their capabilities.[191] A third approach to developing the minimum core content of the right under s 26(1) would rely on the universal minimum core developed under the ICESCR as the absolute minimum, and to adapt this absolute minimum to the context of residents coming before courts in South Africa.[192] A contextual minimum core would pay attention to the specific circumstances in which residents in a case find themselves, and to apply the general principles to the specific circumstances of residents. For example, if we accept that the minimum core of the right should comprise basic survival needs, those residents living in a cold climate may require housing with heating, while residents living in extreme heat may require housing with cooling facilities to meet their basic

[189] Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (n 166) ch 6; David Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 SALJ 484; Bilchitz, 'Towards a Reasonable Approach to the Minimum Core' (n 171); John Dugard, 'Twenty Years of Human Rights Scholarship and Ten Years of Democracy' (2004) 20 SAJHR 345.

[190] Nussbaum (n 69).

[191] Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1.

[192] Scott and Alston (n 172); Geraldine van Bueren, 'Alleviating Poverty through the Constitutional Court' (1999) 15 SAJHR 52.

survival needs. Deliberation between residents and duty bearers will help the court determine the contextual minimum core in a specific case, because residents would have discussed their survival needs during deliberation.

The Constitutional Court has expressed concerns that recognising a minimum core content of social and economic rights such as housing, may require that this content be immediately realisable on demand. Yet, this need not be the implication of recognising a minimum core content of the right to housing under s 26(1). The obligations immediately placed on the state would be determined through a limitations analysis under s 26(2), while checking whether the measures taken by the state to fulfil the right under s 26(1) are reasonable.[193] The implication of recognising a minimum core would be that a higher threshold of justification must be offered when the state is unable to fulfil its obligations with respect to the minimum core content.[194] Thus, the implication of recognising a minimum core would not be that it will always obtain, but that a higher justification regarding the legal and factual circumstances of a case would need to be provided when the state is unable to fulfil its obligations with respect to this minimum core.[195]

Another way of thinking of the content of the right to housing under s 26(1) is to view the right not in terms of a strict binary between minimum core and non-core content, but rather to view the right to housing as a continuum, requiring the state to provide increasing levels of justification for limitations on the right as we move towards the minimum core.[196] I lean towards this approach to the content of the right to housing under s 26(1). In any case, however we view the content of the right to housing, bounded deliberation during meaningful engagement helps

[193] The Colombian Constitutional Court has adopted a similar approach. See, David Landau, 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014).

[194] Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (n 191) 17.

[195] Fredman, *Comparative Human Rights Law* (n 2) ch 4.

[196] Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (n 191).

develop the substantive, contextual content of the right, as opposed to a universal, abstract and acontextual content.[197]

4.7 Meaningful engagement and s 26(2)

Section 26(2) requires the state to take reasonable measures, within its available resources, to progressively realise the right to housing. The recognition of participation rights in the form of meaningful engagement has important contributions to make to the interpretation and application of s 26(2). A bare reading of s 26(2) raises the question, how should we determine whether the state's measures are reasonable? This question can be a matter to be deliberated on during the process of participation/meaningful engagement. The principles that are eventually accepted as forming the basis of the reasonableness enquiry under s 26(2), can be applied during the process of meaningful engagement to the context of a specific settlement. Residents can deliberate with the state regarding why the measures taken by it are not reasonable, given their context. These deliberations can feed into the court's reasoning when it is called upon to decide challenges to state measures under s 26(2).

The Constitutional Court has taken different approaches towards reasonableness review in relation to social and economic rights. In *Soobramoney,* the court examined whether the state's measures were rationally conceived and applied in good faith.[198] In subsequent cases, it went beyond requirements of rationality and good faith, and laid down several open-ended, non-exhaustive parameters that must be fulfilled for the state's measures to be considered reasonable.[199]

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[197] Cohen and Sabel (n 4) 334.

[198] *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17 [25], [29] ('*Soobramoney*'); Danie Brand, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?"' in H Botha, A van der Walt and J van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press 2003).

[199] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11 [44] ('*Khosa*'); G Quinot and Sandra Liebenberg, 'Narrowing the Band: Reasonableness Review in

Many of these requirements can be characterised as largely procedural, relating to 'structural principles of good governance',[200] including the requirements that, the

i. state must take some measures.[201]
ii. measures must be capable of progressively realising the right within the state's resources.[202]
iii. measures must be well co-ordinated, allocating responsibilities between different levels of government.[203]
iv. state must allocate a budget and human resources to fulfil the measures.[204]
v. measures must be reasonably implemented.[205]
vi. state must continually review the measures.[206]

Other requirements are, however, clearly substantive, such as the prerequisite to respond to the needs of the most vulnerable,[207] and the requirement that the state's measures must not make unreasonable limitations or exclusions.[208] The substantive values of human dignity, equality and freedom underlie these requirements. For example, in *Grootboom,* Justice Yakoob held,

> 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**. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be

Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 Stellenbosch Law Review 639.

[200] Brand (n 198).

[201] *Mazibuko* (n 168) [67].

[202] *Grootboom* (n 160) [41].

[203] ibid [39].

[204] ibid [39].

[205] ibid [42].

[206] *Mazibuko* (n 168) [67].

[207] *Grootboom* (n 160) [44]; *Blue Moonlight* (n 134) [86]–[92].

[208] *TAC* (n 168) [78], [80]; *Khosa* (n 199).

> ignored by the measures aimed at achieving realisation of the right… Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.[209] (Emphasis added.)

The reasonableness enquiry in its substantive sense is ultimately a means-end enquiry that goes beyond mere rationality review. It requires attention to be paid to the gravity of the needs and vulnerability of the rights holders, and to the extent of denial of their rights.[210] Reasonableness review is thereby infused by the principle of proportionality – that greater the impact on rights, stronger will be the justification required by the state.[211] However, without expanding on the meaning of housing under s 26(1), in a contextual and non-abstract manner, it becomes difficult to conduct a rigorous means-end enquiry under s 26(2).[212] Moreover, the Court has refused to examine whether more desirable or favourable measures could be adopted by the state,[213] and to justify why those measures were not adopted. As a result, the reasonableness enquiry under s 26(2) is not as rigorous as a proportionality analysis.

The recognition of participation rights enables a more rigorous proportionality analysis to be adopted by courts while examining the reasonableness of state measures under s 26(2). I have discussed above how deliberation during meaningful engagement could be used to develop a contextual content of the right to housing under s 26(1). The state's measures can thereafter be tested against this right. Also, more favourable measures would have been discussed during the process of meaningful engagement. Hence, recognising participation rights in the form of

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[209] *Grootboom* (n 160) [44].

[210] Carol Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 SALJ 264.

[211] Katharine G Young, 'Proportionality, Reasonableness, and Economic and Social Rights' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017); Anashri Pillay, 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 SALJ 419; Quinot and Liebenberg (n 199). These academics argue that reasonableness review in the context of social and economic rights ought to incorporate a proportionality analysis.

[212] Quinot and Liebenberg (n 199); Brand (n 173); Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (n 166) ch 5.

[213] *Grootboom* (n 160) [43].

meaningful engagement may allow the court to fill gaps in its knowledge, as well as rely on a democratically legitimate process, to conduct a more rigorous means-end enquiry than currently adopted under s 26(2).

Recognising meaningful engagement may also help resolve the issue regarding who ought to bear the burden of proof in cases involving the right to housing, and what evidentiary standard must be discharged. The conflation of the enquiries under s 26(1) and s 26(2) may place the burden of proof on those challenging state measures to indicate that these are not reasonable.[214] Once we adopt an approach wherein the content of the right to housing under s 26(1) is developed, and thereafter state measures are tested as against this content, then the burden of proof need not lie on those challenging state measures. Once it is shown that the right under s 26(1) is engaged, the burden can be placed on the state to indicate why its measures are reasonable. Courts may also place a higher evidentiary burden on the state to discharge this burden. Courts are often reluctant to place a high evidentiary burden due to concerns regarding competence and democratic legitimacy. It is believed that the state is more competent to make choices around housing, having greater expertise at its disposal, and being the organ of the state mandated to take measures to progressively realise the right to housing. Yet, residents of informal settlements also have knowledge to offer, of a kind different from the state. They are best placed to understand their own needs, and to understand the details of their situation. The state is not, therefore, the only expert, but residents of informal settlements bring their own expertise to the table. This should mean that deference need not be shown to the state's choices, but that those choices ought to be interrogated, by relying on the arguments made by right holders during the process of participation. Also, given that the process of participation is based on bounded deliberation, relying on those deliberations while interrogating the state's choices, furthers a deliberative version of democracy.

[214] Young, 'Proportionality, Reasonableness, and Economic and Social Rights' (n 211); Kevin Iles, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 SAJHR 448, 461.

Overall, courts ought to be able to conduct a more rigorous means-end analysis, while meeting concerns regarding democratic legitimacy and competence, once they draw on deliberations during the process of meaningful engagement.

4.8 Meaningful engagement and s 36

In this section, I briefly explore the appropriate roles for s 26(2), 26(3) and s 36 in checking limitations on the right to housing. I acknowledge that this is a difficult and unsettled area of law. I thereafter argue that the issue regarding whether a limitation on the right to access adequate housing is constitutionally permissible, ought to be addressed during meaningful engagement. I have argued above that residents ought to deliberate whether measures taken by the state are 'reasonable' under s 26(2),[215] and whether an eviction is 'just and equitable' after considering all 'relevant circumstances' under s 26(3) and the PIE Act.[216] Here, I argue that residents ought to also deliberate over whether limitations on the right to housing meet the requirements of s 36. Moreover, the deliberations that take place during meaningful engagement can aid the court in conducting the limitations analysis.

In most cases where state measures have been challenged as violating the right to housing, the Constitutional Court has restricted its enquiry to s 26(2) of the Constitution. However, in *Jaftha* the Constitutional Court was willing to interpret s 26(1) to recognise security of tenure as an aspect of the right to access adequate housing,[217] and thereafter to check whether limitations on this right were justified under s 36.[218] The Court justified its reliance on s 36 as opposed to s 26(2), by arguing that the case involved negative obligations in relation to the right to access adequate housing,

[215] Section 4.7.

[216] Section 4.5.

[217] *Jaftha* (n 164) [25].

[218] ibid [35]–[48].

because the petitioners were challenging provisions that took away their access to secure tenure. S 26(2) would come into play when positive obligations in relation to the right were challenged.[219]

Some writers argue that this is a neat way of demarcating an appropriate role for the internal limitations clause in provisions relating to social and economic rights, and the general limitations clause under s 36.[220] They argue that s 26(2) will come into play when the state's positive measures to protect or promote and fulfil the right to housing are considered inadequate, and s 36 will come into play when the state's measures fail to respect the right to housing of residents. I think that the issue is more complicated, for two reasons. Firstly, as I have shown above, it is difficult to draw strict boundaries between negative and positive obligations, especially in the context of eviction of informal settlements. If residents are deprived of access to housing and rendered homeless, the state carries a positive obligation to provide access to adequate housing. Thus a negative obligation to respect the right, becomes a positive obligation to promote and fulfil the right.[221] Secondly, even if we are to accept that strict boundaries can be drawn between positive and negative obligations, both s 26(3) and s 36 may come into play in case of breach of negative obligations. If a statute permits arbitrary evictions, this violates the state's negative obligation to respect the right to housing, as well as the obligation under s 26(3) to prevent arbitrary evictions.[222]

A discussion of *Jaftha* helps illustrate this issue. It is possible to characterise *Jaftha* as a case concerning legislation that permitted arbitrary evictions. Given the implications of this – that the obligation under s 26(3) applies immediately, and measures violating s 26(3) cannot be justified

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[219] *Jaftha* (n 164) [31]–[33].

[220] Marius Pieterse, 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council' (2003) 120 SALJ 41; Iles (n 214).

[221] Section 4.4.2, page 35.

[222] See *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others* [2009] ZACC 31 [113]–[118]. Although the Constitutional Court held that the impugned legislation was 'seriously invasive of the protections against arbitrary evictions', it referred only to s 26(2), rather than s 26(3). This is curious, and I am unable to find a satisfactory explanation for this.

through a limitations analysis – the Constitutional Court may have been reluctant to use s 26(3). This is similar to the Court's reluctance to use s 27(3) in *Soobramoney,* or the Court's reluctance to use s 28(1) in *Grootboom.*

One way to resolve this issue, is to consider that reasonableness enquiry under the internal limitations clause in s 26(2) need not be any less rigorous than the proportionality enquiry under the general limitations clause (s 36). The same kind of factors listed in the general limitations clause should be considered while conducting a limitations analysis under the internal limitations clause. The internal limitations clause provides two additional factors that must be taken into consideration – the need for progressive realisation of the right, and regard to the level of resources available with the state. These factors should be taken into consideration along with the other factors listed in s 36, and neither of these factors should be determinative of whether the state's measures are reasonable under the internal limitations clause. For example, when the state claims that it does not have the resources to fulfil the right to housing in a case, the state must prove genuine lack of resources, and the court must consider whether the state's measures are unreasonable even when it lacks resources. In *Blue Moonlight,* for example, the City of Johannesburg argued that it did not have resources to provide alternate accommodation to those who would be rendered homeless as a result of evictions instituted by private landowners. The Constitutional Court scrutinised this claim and found that the City had not planned for providing accommodation to this category of people, had not made budgetary provisions from its own funds, and had not requested funds from the provincial government, because of a wrongful understanding of its obligations. Thus, the lack of resources was on account of its wrongful understanding of its obligations, and the Court was willing to hold that the state's measures were unreasonable in the circumstances.[223] Similarly, in *Khosa,* the Constitutional Court required the state to discharge its evidentiary burden regarding why resources were insufficient to provide social assistance to

[223] *Blue Moonlight* (n 134) [69].

permanent residents. The Court was left dissatisfied by the limited information provided by the state, and was willing to scrutinise the state's arguments to find that the cost of providing social assistance to permanent residents was a small proportion compared with the total costs undertaken by the state.[224] Thus, the lack of resources argument had limited purchase for the Court.

In cases where the court is to conduct a limitations analysis, whether under s 26(2) or under the general limitations clause, deliberations during meaningful engagement help the court to fill gaps in its knowledge, and to scrutinise the state's arguments more rigorously by relying on information provided by residents during meaningful engagement so as to meet competence and legitimacy concerns. Section 36 requires courts to consider factors including 'the nature and extent of the limitation' on rights. Residents are best placed to explain how, and to what extent, they face limitations on their rights, and can do so during the process of meaningful engagement. Residents may also have useful insights to offer regarding 'less restrictive means to achieve the purpose', although the burden should not be placed on them to provide less restrictive alternatives. It is generally understood that the burden is placed on the state to indicate that the requirements of s 36 have been fulfilled, and hence to indicate that limitations on rights are constitutionally permissible. In section 4.4, I argued that the process of participation helps courts to conduct a proportionality analysis in the Indian context. Here, I have shown how the same argument applies under the South African Constitution.

4.9 Meaningful engagement and other rights

In cases on the right to housing, courts have often tested the state's measures against multiple rights protected under the Constitution, such as the rights to equality, dignity, privacy, and freedom and security of the person, besides the right to housing.[225] This is in line with its view that the

[224] *Khosa* (n 199) [62].

[225] *Blue Moonlight* (n 134) [58]; *Dladla* (n 164) [47].

rights protected under the Bill of Rights are interconnected. Meaningful engagement may be recognised as an aspect of other rights, although it is beyond the scope of this thesis to establish that argument. Deliberations during meaningful engagement can help shed light on the circumstances of residents, the impact of eviction on their multiple rights, and to therefore help establish a violation of other rights. The Court ought to draw on those deliberations while deciding substantive issues raised in the case regarding violation of other rights. In this manner, the process of meaningful engagement helps courts to decide substantive issues involving other rights in eviction cases, besides the right to housing.

I have therefore established in section 4 that the recognition of participation rights enables the development of a contextual content of other substantive elements of the right to housing through bounded deliberations between residents and duty-bearers. These deliberations ought to feed into the reasoning of courts while they develop the content of other substantive elements of the right to housing. Other substantive issues also ought to be addressed during the process of participation, and the deliberations ought to feed into the reasoning of courts while deciding those issues. This enables the development of local, contextualised resolutions to substantive issues, in a manner that meets concerns regarding the institutional competence and democratic legitimacy of courts in deciding these issues. Overall, I have carved out a valuable role for both participation rights and other substantive dimensions of the right to access adequate housing; as well as a valuable role for participation rights and courts to develop other substantive dimensions of the right to access adequate housing.

5 Remedies

In section 3, I argued that if no participation took place prior to evictions, or if participation was inadequate, as a remedy, courts should order participation that meets the requirements set out in chapters 3 and 4. Here, I argue that post that, the remedy for substantive violation of legal and

constitutional rights in eviction cases must also be decided through the process of participation. If, for example, an eviction is found not to be 'just and equitable', or if the state's measures in relation to provision of alternate accommodation are found to be unreasonable, the remedy that must be ordered should be determined through the process of participation. Hence, in the first instance, courts should order participation as the remedy, and thereafter subsequent remedies should be crafted through the process of participation. Participation, then, ought to be both a remedy, and a means for crafting subsequent remedies.

In the literature on remedies, the importance of the participation of parties in crafting remedies through a process of reasoned deliberation has been recognised.[226] It has also been recognised that the process of participation can result in 'creative' remedies that meet the requirements of residents, while mitigating concerns around the competence and democratic legitimacy of courts ordering remedies.[227] This section builds on that body of work, emphasising both the role of parties in crafting remedies through participation rights, as well as the role of courts in ensuring that those remedies meet substantive constitutional requirements.[228] Those substantive requirements are themselves a matter of deliberation, addressed during the process of participation, so that the whole process of deciding appropriate remedies is deliberative (through deliberation during process of participation as well as in court), and iterative (first elaborated during the process of participation, then checked by the court relying on deliberations during the process of participation). The remedies are arrived at through deliberation between those who have the epistemic knowledge regarding the case – the state as well as residents and private landowners.

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[226] Susan P Sturm, 'A Normative Theory of Public Law Remedies' (1991) 79 Geo LJ 1355; Charles F Sabel and William H Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015; Sandra Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1, 11.

[227] Kent Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021) ch 8; Liebenberg, 'Participatory Approaches to Socio-Economic Rights Adjudication' (n 15); Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (n 226) 10; Gaurav Mukherjee, 'Democratic Experimentalism in Comparative Constitutional Social Rights Remedies' [2021] Milan Law Review 75.

[228] Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (n 226) 7; Owen M Fiss, 'Against Settlement' (1984) 93 Yale LJ 1073, 1085.

This therefore meets concerns about competence and democratic legitimacy that are raised 'most acutely'[229] around the choice of appropriate remedies in rights cases.[230]

The Constitution of South Africa requires courts to grant 'appropriate', 'just and equitable' relief in case a right has been infringed or threatened.[231] Courts have wide remedial powers,[232] and several remedies are available in case of violation of the right to housing in South Africa, including declaratory orders, prohibitory and mandatory interdicts and orders, structural interdicts, and constitutional damages.[233] Other remedies are also be available in eviction cases under the common law (*mandament van spolie* or spoliation), and under the PIE Act (criminal prosecution under s 8).[234] In cases regarding eviction from private land, three kinds of remedies have been ordered by courts. Firstly, a requirement for the landowner to 'be patient' until alternate accommodation is found for residents.[235] Secondly, rent[236] or compensation[237] to the landowner in case relocation of residents

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[229] Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (n 51).

[230] Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (n 226) 11.

[231] Constitution of South Africa 1996, ss 38, 172; *Fose v Minister of Safety and Security* 1997 (7) BCLR 851; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA I (CC); Mia Swart, 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 SAJHR 215.

[232] Helen Taylor, 'Optimisation through Innovation: Judicial Exercise of Discretionary Remedial Power to Enforce the State's Positive Human Rights Duties' (University of Oxford 2020); Helen Taylor, 'Forcing the Court's Remedial Hand : Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 CCR 247. For a critical view on wide discretionary powers of courts with respect to remedies, see Robert Leckey, 'The Harms of Remedial Discretion' (2016) 14 ICON 584.

[233] Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 48) ch 8; Kent Roach and Geoff Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 SALJ 325.

[234] Jeremy Phillips, 'Opposing Cynical Evictions : A Framework of Appropriate Remedies' (2020) 137 SALJ 733; ZT Boggenpoel, 'Revisiting the Tswelopele Remedy : A Critical Analysis of Ngomane v City of Johannesburg Metropolitan Municipality' (2020) 137 SALJ 424; Jackie Dugard, 'South African Supreme Court of Appeal Confirms Principle of "Constitutional Damages" for Homeless People Whose Property Is Destroyed by State' (*OxHRH Blog*, 31 May 2019) <https://ohrh.law.ox.ac.uk/south-african-supreme-court-of-appeal-confirms-principle-of-constitutional-damages-for-homeless-people-whose-property-is-destroyed-by-state> accessed 15 January 2022.

[235] *Blue Moonlight* (n 134) [40].

[236] *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue and Another* Case No 11442/2006 (4 February 2010, South Gauteng High Court) [196]; Gerald S Dickinson, 'Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg' (2011) 27 SAJHR 466.

[237] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5 [68] ('*Modderklip*').

is not feasible. Lastly, ordering expropriation of the land.[238] Ultimately, what is the most appropriate remedy in a case ought to be decided through the process of meaningful engagement. In case of evictions from privately owned land, as argued in chapter 3, the private landowner ought to be part of the process of meaningful engagement.

Similarly, in the Indian context, arts 32 and 226 of the Indian Constitution empower the Supreme Court and High Courts to order 'directions or orders or writs' for the enforcement of fundamental rights. Art 142 grants the Supreme Court the power to do 'complete justice'. Indian courts have wide remedial powers and have crafted a range of remedies in case of violation of fundamental rights, especially in public interest litigation cases.[239] What is an appropriate 'direction or order or writ' for the enforcement of the right to housing in eviction cases ought to be determined through participation. Residents are best placed to understand what they need, and what may be an appropriate order or writ or direction for them. The process of participation enables residents to deliberate directly with the state regarding their needs.

Courts ought to play a role in checking that the remedies agreed upon through the process of participation meet the substantive requirements of the South African and Indian Constitutions. In section 4, I argued that courts ought to continue to play an important role in resolving substantive issues, by drawing from deliberations that take place during the process of participation. Similarly, courts ought to continue to play a role in ensuring that the remedies crafted through the process of participation vindicate the substantive requirements of the constitution.

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[238] *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC) [196]–[218]; Jackie Dugard, 'Modderklip Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction of Unlawful Occupiers Is Not Just and Equitable?' (2018) 21 PELJ 1; Lisa Draga and Sarah Fick, 'Fischer v Unlawful Occupiers: Could the Court Have Interpreted the "may" in Section 9(3)(a) of the Housing Act as a "Must" under the Circumstances of the Case?' (2019) 35 SAJHR 404.

[239] *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161 ('*Bandhua Mukti Morcha*'); Chintan Chandrachud, 'Structural Injunctions and Public Interest Litigation in India' in Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge 2019); Wouter Vandenhole, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 3 Asia Pac J Hum Rights Law 136.

Hence, in South Africa, courts ought to check whether the remedies arrived at through the process of meaningful engagement are appropriate, just and equitable. In doing so, parties can use courts as a forum to continue deliberation when there is no consensus reached during the process of meaningful engagement. Courts also ought to play an important role in checking that the remedies arrived at through meaningful engagement relate to the violation of substantive rights found in the merits stage. The remedies must not subvert already gained substantive rights, rather must ensure the vindication of those rights.[240]

Courts ought to develop and rely on substantive principles to guide the choice of remedies in constitutional rights cases. Taylor has identified four principles that ought to be optimised in choosing remedies: the principle of effective relief, the principle of systemic compliance, the principle of institutional responsiveness and the principle of institutional complementarity.[241] Roach has also argued for optimisation of principles to guide the choice of remedies in cases involving human rights, and identified the following principles: (i) the need to consider what is necessary to recognise and compensate for a past violation; (ii) what is necessary to reduce similar violations in the future; (iii) restraints imposed by the appropriate role of the court; and (iv) what is necessary to strike a proportionate balance between remedial principles and legitimate competing social interests and rights.[242] It is beyond the scope of this thesis to determine what ought to be the most appropriate principles to guide remedies. Courts ought to check that the remedies that are decided through meaningful engagement or participation meet the principles settled upon to determine what remedies are appropriate, just and equitable.

Courts recognise the importance of using meaningful engagement to craft appropriate remedies in eviction cases. Courts in South Africa have often ordered meaningful engagement as

[240] Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (n 226) 8.

[241] Taylor, 'Optimisation through Innovation' (n 232) ch 4.

[242] Roach (n 227) ch 2.

a remedy in eviction cases.[243] In India, the Delhi High Court took inspiration from South Africa to order meaningful engagement as a remedy in several eviction cases.[244] In this section, I argue that participation or meaningful engagement ought to both be a remedy, and a means for crafting subsequent remedies.

An issue that is important to confront is whether remedies arrived at through participation tend towards a more case-specific rather than systemic approach to remedies.[245] Liebenberg and Young, for example, caution that this approach tends towards local solutions and detracts from nation-wide redistribution of resources, services and opportunities.[246] Case-specific remedies offer wronged persons approaching the court some relief, fulfilling a corrective justice role. Yet, these carry the risk of privileging those who are able to come before courts, enabling them to 'queue jump',[247] which may have consequences for distributive justice.[248] Systemic remedies, on the other hand, attempt to resolve systemic problems, faced by a wider group of people, and therefore fulfil the aims of distributive justice.[249] However, an exclusive focus on systemic remedies may also be problematic, for failing to vindicate the rights of those that have come before the court. It has therefore been argued that a 'two-track' approach ought to be adopted, including both case-

[243] *Olivia Road* (n 30); *Joe Slovo* (n 23); *Schubart Park Residents' Association v City Of Tshwane Metropolitan Municipality* [2012] ZACC 26 [53] ('*Schubart Park*').

[244] *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 (Delhi High Court) ('*Sudama Singh*'); *Ajay Maken v Union of India* WP(C) 11616/2015 (Delhi High Court, 18 March 2019) ('*Ajay Maken*').

[245] Ray (n 141).

[246] Sandra Liebenberg and Katharine G Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in Helena Alviar García, Karl E Klare and Lucy A Williams (eds), *Social and Economic rights in Theory and Practice: Critical Inquiries* (Routledge 2015).

[247] *Soobramoney* (n 198) [58]–[59]; A Sachs, 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' (2003) 56 Current Legal Problems 579; Roach (n 227) ch 2.

[248] David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 189; Pedro Felipe De Oliveira Santos, 'Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-Economic Rights' (2019) 18 WashUGSLRev 493.

[249] Landau, 'The Reality of Social Rights Enforcement' (n 248); De Oliveira Santos (n 248); Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281; Kent Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009); Christopher Mbazira, '"Appropriate, Just and Equitable Relief" in Socio-Economic Rights Litigation: The Tension between Corrective and Distributive Forms of Justice' (2008) 125 SALJ 71.

specific and systemic remedies.[250] In eviction cases, this would mean that remedies are directed at the residents facing eviction in a case, as well as wider systemic remedies are ordered. Remedies arrived at through meaningful engagement or participation rights need not be limited to case-specific remedies directed at residents facing an eviction. If the situation faced by residents is a result of systemic problems faced by others, systemic remedies ought to be ordered. The process of meaningful engagement with residents in a specific case can help identify systemic issues, and a wider meaningful engagement process can help identify the kind of systemic remedies that ought to be ordered.

Grootboom is a good example to discuss this point. In the case, the Constitutional Court gave both systemic and individual remedies. The Court made a declaratory order that the state's measures were unreasonable to the extent that they did not plan for housing for those in 'desperate need'.[251] The Court also offered individual remedies in the case,[252] although this aspect of the case is often neglected.[253] In an interlocutory order, the Constitutional Court gave effect to an agreement reached between residents and the provincial and local governments to secure relief for the residents before the Court. Residents were to be provided temporary structures on the sports field on which they were living, along with access to sanitation and water.[254] It is unclear if the 'agreement' was a result of meaningful engagement that meets the parameters set out in chapters 3 and 4 of this thesis. It should not be surprising, then, that residents found the relief to be inadequate, including because they lacked security of tenure, and the temporary accommodation

[250] Roach (n 227) ch 8; Taylor, 'Optimisation through Innovation' (n 232) chs 4 and 6.

[251] *Grootboom* (n 160) [44].

[252] Kameshni Pillay, 'Implementation of Grootboom : Implications for the Enforcement of Socio-Economic Rights' (2002) 6 Law, Democracy & Development 255; Sachs (n 247) 595; Malcolm Langford and Steve Kahanovitz, 'South Africa: Rethinking Enforcement Narratives' in César Rodríguez-Garavito, Julieta Rossi and Malcolm Langford (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017) 322–326.

[253] Roach (n 227) 430; Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 48) 400.

[254] Pillay, 'Implementation of Grootboom : Implications for the Enforcement of Socio-Economic Rights' (n 252).

was prone to fires and water-logging.[255] Moreover, the fact that Irene Grootboom, the resident who lent her name to the case, died before permanent housing was provided to her, has been used as one factor to indicate the inadequacy of the remedy provided to the residents.[256] The systemic remedy ordered in the case – a declaratory order without exercising supervisory jurisdiction to ensure compliance with the order – has also been criticised as inadequate,[257] although some consider 'weak' remedies more appropriate.[258] Future litigation was necessary to ensure that emergency programs were adopted to provide for those in 'desperate need'.[259] Nevertheless, the general approach taken by the Court – to offer systemic remedies as well as remedies directed at residents in a specific case – ought to be emulated. However, such remedies ought to be developed through a process of meaningful engagement.

Olivia Road is another good example to discuss this issue. In the case, the Constitutional Court offered remedies to residents coming before the court, arrived at through the process of meaningful engagement. It also gave a systemic declaratory order, that prior to evictions, the state must meaningfully engage with residents.[260] Thus, both case-specific and systemic remedies were provided.[261] Yet, should the court have gone further in providing systemic remedies? Litigants argued before the Court that all over inner-city Johannesburg, residents were living in 'bad buildings' and were at a risk of homelessness through evictions. Instead of adopting a piece-meal

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[255] ibid.

[256] Christopher Mbazira, 'Non-Implementation of Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer Here to Stay?' (2008) 9 ESR Review 2.

[257] Bilchitz, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (n 189); T Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2008) 7 ICON 106; DM Davis, 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 SAJHR 301.

[258] Mark Tushnet, *Weak Courts, Strong Rights : Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008).

[259] *City of Cape Town v Neville Rudolph and Others* 2003 (11) BCLR 1236 (C).

[260] *Olivia Road* (n 30); Kate Tissington, 'Challenging Inner City Evictions before the Constitutional Court of South Africa: The Occupiers of 51 Olivia Road Case in Johannesburg, South Africa' (2008) 5 Housing and ESC Rights Law Quarterly; Stuart Wilson, 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 SAJHR 127.

[261] Roach (n 227) 447–448.

approach and requiring meaningful engagement as and when residents in specific buildings faced evictions, should the Court have ordered the state to meaningfully engage with all residents in inner-city Johannesburg living in 'bad buildings'? In the case, the Court did not decide the systemic issue raised regarding whether the state's housing plan was unreasonable, because it did not plan for the thousands of residents living in inner-city Johannesburg.[262] Since the Court did not decide the systemic issue, it also did not provide a systemic remedy. I have argued in section 4 that 'meaningful engagement' ought not to be used as a cop-out strategy from deciding substantive issues, and, moreover, that meaningful engagement ought to be used to address such substantive issues. Residents could argue that the state's policy was unreasonable because it did not have a plan in place for those in desperate need in a situation like theirs. They could explain why they fit the 'desperate need' criteria set in *Grootboom*. Once this issue was decided, and it was found that the housing policy was unreasonable, the court should have granted the systemic remedy of requiring the state to devise a 'reasonable' plan for ensuring access to adequate housing for all those living in inner-city bad buildings. This plan ought to be developed through participation with residents of inner-city bad buildings, although this thesis does not specifically raise arguments for a general right to participate in legislative and executive decision-making. Residents in the case could argue that the court ought to maintain supervisory jurisdiction until a new plan was devised, and until the plan was implemented through meaningful engagement with residents of bad buildings. Thus, the process of meaningful engagement can and should be used to decide systemic issues, and to arrive at systemic remedies.

Landau has argued that not all cases require a 'two-track' approach to remedies. Rather, whether remedies are case-specific or systemic, should depend on the social and political

[262] For a critique of *Olivia Road* on this count, see Lilian Chenwi and Sandra Liebenberg, 'The Constitutional Protection of Those Facing Eviction from "Bad Buildings"' (2008) 9 ESR Review 12; Lilian Chenwi, 'Democratizing the Socio-Economic Rights Enforcement Process' in Helena Alviar García, Karl E Klare and Lucy A Williams (eds), *Social and Economic rights in Theory and Practice: Critical Inquiries* (Routledge 2015).

context.[263] The social and political context of a case are best explored during the process of participation, and residents are best placed to explain why the context of a case requires a one-track or a two-track approach. Moreover, the distributive effects of different types of remedies are unclear. While many argue that individualised claims tend to benefit more privileged groups and structural remedies tend to benefit the disadvantaged,[264] Ferraz has questioned this claim. He argues that the distributive effects of remedies depend, rather, on whether the remedies target the rights and interests of the disadvantaged.[265] The participation of the disadvantaged in the choice of remedies can mitigate Ferraz' concerns. If residents of informal settlements facing intersecting axes of oppression are part of bounded deliberations to choose appropriate remedies in eviction cases, they will have the opportunity to secure their rights and interests during the deliberations. Individual remedies, then, would not benefit privileged groups.

For example, in several public interest litigation cases ('PIL') in India, courts have ordered systemic remedies leading to large-scale eviction of informal settlements.[266] Through an analysis of PILs filed before the Delhi High Court resulting in large-scale evictions in Delhi, Bhuwania has critiqued systemic remedies. These cases were typically filed by middle-class residents, seeking the eviction of informal settlements in their neighbourhood, on grounds such as 'nuisance'.[267] The Delhi High Court identified this as a systemic problem across the city, and converted these cases into, what Bhuwania terms, 'omnibus PILs' – cases filed about a specific problem in a specific part of the city turned by the court into a PIL that deals with that issue 'wherever it comes up in the city'.[268] Bhuwania's research, thereby, illustrates Ferraz' argument. The distributive effects of

[263] David Landau, 'Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases' (2019) 69 UTLJ 105.

[264] Landau, 'The Reality of Social Rights Enforcement' (n 248); De Oliveira Santos (n 248); Chayes (n 249); Roach (n 249); Mbazira (n 249).

[265] OLM Ferraz, 'Social Rights, Judicial Remedies and the Poor' (2019) 18 WashUGSLRev 569.

[266] Anuj Bhuwania, *Courting the People: Public Interest Litigation Post-Emergency India* (CUP 2017) ch 3.

[267] ibid.

[268] ibid 82.

remedies in these cases were based on the interests being furthered in the case – those of the more privileged. In these cases, systemic remedies tended to benefit the privileged, because the remedies were directed towards vindicating the interests of the more privileged.

One aspect of such omnibus PILs is the failure to engage with residents of informal settlements prior to ordering their eviction.[269] Here, I have argued that remedies ought to be developed through the process of participation. The Court ought to order participation between all parties to arrive at appropriate remedies. If residents of informal settlements were made part of the process of arriving at appropriate remedies through bounded deliberation that meets the criteria set out in chapters 3 and 4, it is difficult to see how their eviction would be the most appropriate remedy agreed upon by all parties. It is also difficult to see how the process of participation between all parties, including residents of informal settlement, will result in the consideration of systemic remedies in the form of ordering evictions across the city. Thus, the problem identified by Bhuwania with systemic remedies in PIL cases, could be resolved under the model I propose for dealing with eviction cases – resolving substantive issues as well as remedies through a process of participation involving residents of informal settlements, and with judicial oversight checking that the process meets the parameters set out in chapters 3 and 4, as well as the substantive requirements of statutory and constitutional law. This ought to lead to systemic remedies in favour of the disadvantaged.

I have argued here that remedies ought to be decided in the same manner in which substantive issues ought to be decided in eviction cases – through a process of participation between residents and duty bearers. Courts also ought to play an important role in checking that the process of participation meets the criteria set out in chapters 3 and 4, and that the outcome of participation meets substantive normative principles. Thereby, the process of participation, courts

[269] ibid 91.

and substantive normative principles ought to play a valuable role in arriving at just, equitable and appropriate remedies.

6 Participation before courts

Given that the focus of this chapter is on the role of courts, it becomes important to engage with the issue of participation before courts. In this section, I argue that residents of informal settlements ought to be given the opportunity to participate in deliberations before the court while deciding eviction cases. While generous rules of standing have enabled others to bring cases before courts to vindicate the rights of residents of informal settlements in both India and South Africa, it is important that residents themselves remain a part of court proceedings.

The reason why residents ought to participate in court proceedings are similar to the reasons offered to justify participation rights.[270] It denies the freedom of residents if others argue on their behalf, because residents ought to be able to exercise their freedom as capabilities to do and be as they have reason to value by advocating for themselves.[271] It denies their dignity by denying them a sense of self-respect,[272] and denying their inherent worth as human beings who can argue for themselves rather than objects that need to be 'saved' by others.[273] It perpetuates multidimensional substantive inequality when those facing intersecting inequalities are denied a right to participate (participation dimension),[274] and perpetuates stigma and stereotype of residents

[270] This thesis, ch 2.

[271] ibid; Promit Chatterjee and Sreerupa Chowdhury, 'A Capabilities Approach to Access to Justice' (2013) 4 Journal of Indian Law and Society 107; David Bilchitz, 'Socio- Economic Rights and Expanding Access to Justice in South Africa' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020).

[272] D Meyerson, 'The Moral Justification for the Right to Make Full Answer and Defence' (2015) 35 OJLS 237.

[273] Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the rule of law* (NYU Press 2011); Antony Duff (ed), *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Hart 2007); Hock Lai Ho, 'Liberalism and The Criminal Trial' [2010] Singapore Journal of Legal Studies 87; Abenaa Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge 2017).

[274] Fredman, 'Substantive Equality Revisited' (n 70) 731.

as incapable of participating in decisions about their rights (recognition dimension).[275] Moreover, the dimensions of substantive equality ought to be seen together, in interaction with each other.[276] We ought to redress disadvantage in terms of access to adequate housing for residents of informal settlements through courts, while enhancing their voice and participation. Moreover, voice and participation are important means to redress disadvantage. Ensuring that people's perspectives are included while designing measures to redress their disadvantage, enables those measures to be tailored to their needs. Residents also ought to participate for reasons of democracy.

Concerns have often been raised regarding the democratic legitimacy of courts in deciding issues about rights.[277] These concerns can be allayed if we view the role of courts as facilitating a deliberative version of democracy, by providing a forum for deliberations to take place and including those who may be otherwise excluded from other democratic institutions.[278] If courts are to play a role in ensuring participation of residents in deliberative decision-making, then it should follow that residents must be part of the deliberations before court. Hence, in eviction cases, residents of informal settlements ought to be part of the deliberations before court.

In chapter 3, I argued that residents must participate during the process of participation. Other actors, including lawyers and civil society organisations, ought to support residents during the process, but not participate on their behalf. Before courts, given the nature of court proceedings, residents ought to be represented by lawyers. This raises the issue of access to legal aid.[279] In South Africa, the Constitutional Court has recognised the right to access civil legal aid in

[275] ibid 730.

[276] ibid 734.

[277] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346.

[278] Fredman, *Comparative Human Rights Law* (n 2) ch 4; David Bilchitz, 'Are Socio-Economic Rights a Form of Political Rights?' (2015) 31 SAJHR 86.

[279] Pieterse, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (n 16) 19; Andrea Durbach, 'The Right to Legal Aid in Social Rights Litigation' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009) 69.

'exceptional circumstances', as part of the right to access courts under s 34 of the Constitution.[280] In India, the state's duty to provide legal aid is recognised as a directive principle under art 39A, and art 21 has been interpreted by courts to include the right to legal aid in criminal cases.[281] In eviction cases, residents ought to be provided with access to good quality legal representation. A more detailed engagement with this issue is beyond the scope of this thesis.

Concerns regarding who ought to participate before courts in eviction cases, are borne out in PIL cases engaging the right to housing in India. A lot has been written about PILs in India, and in this section, I do not canvass those debates. I engage with a single issue relating to PILs, regarding who is heard by courts. Among other things, PIL cases permitted the dilution of the rules of standing, and enabled any 'public spirited' person to approach the Indian Supreme Court or state High Courts invoking their writ jurisdiction under arts 32 or 226 of the Indian Constitution.[282] These courts can also take up such matters on their own motion, for instance by taking cognisance of newspaper reports.[283] The dilution of the rules of standing was justified, among other things, by the need to enable cases that involve people's fundamental rights to be heard by courts when marginalised people are themselves unable to access the judiciary.[284] For instance, in *SP Gupta* the Supreme Court observed,

> It may therefore now be taken as well established that where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reasons of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law

[280] *Legal Aid South Africa v Magidiwana & Others* [2015] ZACC 28; Jason Brickhill and Christine Grobler, 'The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana' (2016) 8 CCR 256.

[281] *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369; Andrew Higgins, 'Legal Aid and Access to Justice in England and India' (2014) 26 NLSIR 13.

[282] *SP Gupta v Union of India* AIR 1982 SC 149 ('*SP Gupta*'); *Bandhua Mukti Morcha* (n 239).

[283] Marc Galanter and Vasujith Ram, 'Suo Motu Intervention and the Indian Judiciary' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019).

[284] Arun Thiruvengadam, 'Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India' in Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (PULP 2013) 520; PP Craig and SL Deshpande, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9 OJLS 356.

> or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for an appropriate direction, order or writ.[285]

While this is certainly an important goal, what should courts do after admitting cases involving the rights of persons unable to access courts? In other words, how should the hearing proceed to ensure that these persons' interests are properly represented and heard when they are unable to access courts themselves? This issue has not always been paid sufficient attention by courts.

Early PIL cases held that persons who would be affected by any decision of courts in exercise of their writ jurisdiction must be heard by the court. In *Prabodh Verma*, for instance, the Supreme Court held:

> A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non-joinder of necessary parties.[286]

The same position has been reiterated in several cases.[287] Moreover, art 226(3) of the Indian Constitution is explicit about the importance of parties being heard when an interim order is made against them.[288]

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[285] *SP Gupta* (n 282).

[286] *Prabodh Verma v State of Uttar Pradesh* AIR 1985 SC 167 [30] ('*Prabodh Verma*'); in Bhuwania (n 266) 86.

[287] *Suresh v Yeotmal District Central Co-Operative Bank* AIR 2008 SC 2432 [12]; *Ranjan Kumar v State of Bihar* (2014) 16 SCC 187 [4].

[288] Constitution of India 1950, art 226(3): 'Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without--(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which

The same position has also been taken in cases involving the eviction of informal settlements. In *Mahesh R Desai*,[289] petitioners belonging to a 'relatively affluent section of the society' pleaded for the demolition of an informal settlement on the ground of public nuisance, arguing that the homes were obstructing public streets. The petition was dismissed on the ground of non-joinder of necessary parties. The High Court observed:

> The persons who are alleged to have made encroachment and who are alleged to be residing in hutments are not parties in this petition. Without hearing them no order which may adversely affect them can be passed. It may be that they may not have encroached upon public land and they might be residing on a private land which may be open, or they might be residing on public land for a number of years which might have ripened into a right to lawful possession and ownership. These are questions of fact which cannot be decided by affidavits and in absence of parties who are alleged to have made such illegal encroachment.[290]

Yet, in several PIL cases, courts have made interim orders and passed final judgments without hearing persons who may be impacted by these orders, particularly residents of informal settlements in cases involving the eviction of their settlement. As Rajamani notes, 'PILs are often filed on their behalf [on the behalf of the most marginalised], but not usually by them'.[291] In this section, I make the limited argument that when courts are hearing cases that impact the right to housing of residents of pavements and informal settlements, they must be heard before either interim orders or final judgments are pronounced. The PIL jurisdiction must not be used to exclude the voices of persons whose rights are at stake. This should apply both when (i) petitions are filed for securing the right to housing of residents of informal settlements, as well as (ii) when petitions involve the right to housing of residents of informal settlements because, for example,

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the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.'

[289] *Mahesh R Desai v Ahmedabad Municipal Corporation* AIR 1986 Guj 154.

[290] ibid, as cited in Anuj Bhuwania, 'Public Interest Litigation as a Slum Demolition Machine' (2016) 12 Projections: MIT Journal of Planning 67, 72.

[291] Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 Journal of Environmental Law 293, 303.

the eviction of informal settlements is sought before courts. Cases of the first kind include *Olga Tellis* and *Nawab Khan.* Cases of the second kind include *Almitra Patel.*

It is interesting, from a participation viewpoint, to examine who has been heard by courts in cases involving the eviction of informal settlements before Indian courts. In cases filed to secure the rights to livelihood and housing of residents of pavements and informal settlements, residents themselves have often been heard. *Olga Tellis,* the first constitutional bench decision on the right to housing, involved a PIL filed by the journalist Olga Tellis. Other petitioners in the case included human rights organisations People's Union of Civil Liberties ('PUCL') and the Committee for the Protection of Democratic Rights. At the same time, several petitioners in the case were themselves residents of pavements and informal settlements.[292] *Nawab Khan* involved a writ petition filed by 29 pavement dwellers in Ahmedabad.[293] *Sudama Singh* involved several petitions filed directly by residents of informal settlements before the Delhi High Court.[294] *Ajay Maken* was initially filed as a PIL by politician Ajay Maken, but later two residents of the informal settlement demolished by the state were impleaded as petitioners in the case.[295]

In cases of the second kind, filed in the interest of various public causes other than the right to housing of residents of informal settlements, residents have often not been heard by courts prior to ordering evictions. Bhuwania, for instance, found that in a set of 63 petitions relating to the eviction of informal settlements before the Delhi High Court in *Pitampura Sudhar Samiti*,[296] residents of informal settlements were 'hardly ever' made a party to the case and heard by the court.[297] These petitions, filed by resident welfare associations ('RWAs') of middle class residential

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[292] *Olga Tellis* (n 27) [3], [7].

[293] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* AIR 1997 SC 152 [3] ('*Nawab Khan*').

[294] *Sudama Singh* (n 244) [7], [12], [17].

[295] *Ajay Maken* (n 244) [1].

[296] *Pitampura Sudhar Samiti v Union of India* Writ Petition (Civil) No 4215 of 1995 (2002, Delhi High Court).

[297] Bhuwania (n 290) 72.

colonies, or factory owners, led to the demolition of thousands of homes, and consequent eviction of thousands of residents of the informal settlements, without hearing the residents of these settlements. Similarly, in *Hemraj*[298] the Delhi High Court ordered the demolition of an informal settlement of 2,800 houses in central Delhi named Nangla Machi, where the residents were Dalit daily wage workers. Bhuwania notes that, 'at no point during these court proceedings were the residents of Nangla Machi given a chance to be heard in the case.'[299] Rajamani, similarly notes that in *Almitra Patel* there was limited participation of those impacted by the orders of the Supreme Court – the residents of informal settlements whose homes were demolished. While there were limited avenues for participation of non-government organisations ('NGOs') working on behalf of waste-pickers and other groups impacted by the orders of the Supreme Court before committees set up by the Court, there were no avenues for direct participation of residents facing evictions.[300] While writing about the demolition of homes in Sanjay Gandhi National Park as a result of an order by the Bombay High Court in a public interest litigation filed by an environmental group (BEAG), Muralidhar also notes that, 'at no stage no did the BEAG or the Government or even the Court think it necessary to solicit the views of the slum dwellers who were in fact the ones directly affected. None of the orders reflect their point of view.'[301]

An opportunity for residents of informal settlements to be heard before cases involving their settlements, is a legal requirement established in the jurisprudence of the Supreme Court through cases such as *Prabodh Verma*. It has also often been instrumentally useful in enabling them to secure their right to housing. In cases such as *Olga Tellis, Nawab Khan, Sudama Singh* and *Ajay Maken,* when residents of informal settlements were heard by the court, residents secured varying

[298] *Hemraj v Commissioner of Police* Writ Petition (Civil) No 3419 of 1999 (1 October 2008, Delhi High Court).

[299] Bhuwania (n 290) 81.

[300] Rajamani (n 291) 304; Fredman, *Human Rights Transformed* (n 118) ch 5.

[301] S Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009).

degrees of protection against evictions, or access to alternate accommodation.[302] Similarly, the recognition of the right of residents of informal settlements to be heard in any PIL case involving their informal settlements, can enable residents to secure their right to housing before courts.

The rules of standing in South Africa are also broad and enable anyone to approach courts for enforcement of fundamental rights who are acting in their own interest, those acting on behalf of persons who cannot act in their own name, class actions, actions in the public interests, and associations acting in the interest of their members.[303] Courts have interpreted the rules of standing generously,[304] recognising that a broad approach is necessary to facilitate cases involving the rights of the most disadvantaged to come before courts.[305] The Constitutional Court has been cognisant of the risk that public interest action may be abused by 'busybodies' who do not genuinely represent the interests and concerns of affected communities, and has developed criteria to determine whether a person or organisation is genuinely acting in the public interest.[306] The Court has held that 'the range of persons or groups who may be directly or indirectly affected by any order made by the court, and the opportunity that those persons or groups have had to present evidence and argument to the court' is relevant in determining whether a claim 'in the public interest' is valid.[307] Given the Indian experience with PILs, the importance of this criteria for

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[302] For a discussion of the precise rights and remedies recognised in these cases, see this thesis, ch 1, section 6.

[303] Constitution of South Africa 1996, s 38.

[304] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) (*'Ferreira v Levin'*); Liebenberg, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (n 48) 88; Tembeka Ngcukaitobi, 'The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice' (2002) 18 SAJHR 590; Jackie Dugard, 'Courts and the Poor in South Africa : A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 SAJHR 214.

[305] See also, Jackie Dugard, 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 SAJHR 261; Jackie Dugard, 'Closing The Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access, 1995–2013' (2015) 31 SAJHR 112. Dugard criticises the Constitutional Court's restrictive direct access rules, and argues for a more expansive approach towards direct access to the Constitutional Court for poor litigants. Expanding direct access for residents of informal settlements to approach the Constitutional Court in eviction cases, is consistent with my argument for participation of residents in cases involving their rights to housing.

[306] *Ferreira v Levin* (n 304).

[307] *Lawyers for Human Rights v Minister for Home Affairs* 2004 (4) SA 125 (CC) 68.

admitting PILs in South Africa cannot be overstated.[308] Moreover, it is common to include plaintiffs as part of public interest actions in South Africa,[309] so that even if cases are initially brought 'in the public interest', persons directly affected are made a part of the proceedings. Such an approach to PILs ought to be continued. In eviction cases, this ought to mean that residents of informal settlements are made a part of the proceedings, even if cases are initially brought as PILs.

7 Conclusion

This chapter has set out the role for participation rights in developing the content of other elements of the right to housing. It has analysed how deliberations during the process of participation ought to develop the contextual content of the right to adequate housing, by enabling residents to explain their needs from their housing. It has explored how other substantive issues, such as the interpretation of constitutional and statutory requirements, ought to be addressed through the process of participation, such as the content of 'relevant circumstances' that must be considered to determine whether an eviction is 'just and equitable'.[310] It has also explored how deliberations during the process of participation ought to feed into judicial reasoning while deciding substantive issues. In this manner, it has established that participation rights need not be viewed in opposition to developing the substantive content of other elements of the right to housing; rather participation rights themselves enable the development of contextually relevant content. Moreover, the recognition of participation rights need not be viewed as an abdication of the role of courts in deciding substantive issues. Rather, the chapter has indicated how these

[308] See also, James Fowkes, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian Pil' (2011) 27 SAJHR 434; Jason Brickhill, 'A River of Disease: Silicosis and the Future of Class Actions in South Africa' (2021) 37 SAJHR 31. Fowkes argues for a 'modest' and 'cautious' approach towards adopting PILs in South Africa, given the Indian experience. Brickhill also argues for a cautious approach towards standing, and especially recommends caution with regards to the direct access suggestions made by Fowkes and Dugard.

[309] *Madzodzo v Minister for Basic Education* [2014] ZAECMHC 5; James Rooney, 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 SAJHR 406.

[310] Constitution of South Africa 1996, s 26(3); PIE Act, ss 4 and 6.

deliberative fora – participation rights and courts – work together to resolve substantive issues, and develop the contextual content of the right to access adequate housing.

CONCLUSION

1 Contribution

A DPhil at the University of Oxford is expected to make a 'significant and substantial contribution to knowledge'.[1] Here, I indicate the contribution made by this thesis.

This thesis casts a spotlight on participation rights as elements of the right to housing in India and South Africa, in the context of eviction of residents of informal settlements. It contributes to knowledge about several puzzles in this area of law, including (1) the nature of participation rights; (2) the content of participation rights; (3) the content of other elements of the right to housing; (4) the relationship between participation rights and other elements of the right to housing; and (5) the role of courts. It also contributes to knowledge about the horizontal application of human rights; the proportionality framework as applied to 'social' rights; and debates on public interest litigation in India. Eviction cases frequently and urgently come before courts in India[2] and South Africa,[3] and it is therefore crucial to fill gaps in existing law. It is hoped that the thesis will contribute to the future development of this area of law.

Chapter 2 explores the nature of participation rights as substantive, by drawing attention to the substantive normative underpinnings of participation rights. This challenges the characterisation of participation rights as procedural, and the recognition of participation rights as the 'proceduralisation' of housing. If at all participation is to be viewed in procedural terms, it is

[1] Faculty of Law, University of Oxford, *Graduate Research Student Handbook* (2021–2022) 43.

[2] 'UP Elections: Eviction Notices, Harassment and Intimidation - The Plight of Chitrakoot Tribals' *Newsclick* (2 February 2022) <https://www.newsclick.in/elections-eviction-notices-harassment-and-intimidation-plight-chitrakoot-tribals>.

[3] 'High Court Victory for Occupiers Comes in The Nick of Time' (*Lawyers for Human Rights*, 24 January 2022) <https://www.lhr.org.za/lhr-news/press-statement-high-court-victory-for-occupiers-comes-in-the-nick-of-time/>.

'thick' proceduralisation.[4] Chapter 2 explains the importance of participation rights in terms of the values of freedom, dignity and equality.

Chapters 3 and 4 develop the content of participation rights. The chapters identify gaps in legal doctrine regarding the content of participation rights in India, South Africa and under the ICESCR. Questions remain around who ought to have the right to participation, who ought to bear duties with regards to participation, and how the process of participation ought to take place. These chapters indicate how these gaps in legal doctrine ought to be filled, to ensure that participation rights are not simply a procedural box to tick,[5] but fulfil their substantive normative underpinnings, to enable residents of informal settlements to develop a contextually relevant content of their right to adequate housing.

Chapter 3 relies on the values underlying participation rights, to argue that each resident ought to have the right to participate, and that there also ought to be a collective dimension to the process of participation. The insights from intersectionality are placed at the heart of the design of participation rights. This contributes to the emerging scholarship on applying intersectional concerns beyond the context of discrimination law, and more generally in human rights law.[6] This thesis proposes that intersectional concerns must influence the appropriate unit for participation, as well as how the process of participation ought to take place.

Chapter 3 explores the possibility of recognising both vertical and horizontal participation obligations. It thereby contributes to the growing interest in horizontal application of human

[4] Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 OJLS 597.

[5] Kate Tissington, 'A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice' (SERI) 46 <http://www.seri-sa.org/index.php/research-7/resource-guides> accessed 30 September 2018; <http://abahlali.org/node/5538/> accessed 1 February 2021.

[6] Shreya Atrey, 'Introduction: Intersectionality from Equality to Human Rights' in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (1st edn, Hart Publishing 2020).

rights.[7] In indicating how horizontal meaningful engagement obligations ought to be recognised in South Africa, it is likely to be useful for the development of legal doctrine on horizontality in South Africa.

Chapter 4 argues that participation ought to take place through 'bounded deliberation'[8] between rights holders and duty bearers. It relies on Young's refinement of deliberative democracy,[9] and Fredman's idea of 'boundedness',[10] to argue for a bounded deliberative process of participation. It indicates why this process is normatively better suited than its alternatives, to enable residents facing intersecting inequalities to define the contextually relevant content of their right to adequate housing. The chapter contributes to the literature on the design of participation processes. Both chapters 3 and 4 doctrinally analyse the Maharashtra Slum Act. There is hardly any doctrinal legal literature on this piece of legislation and related case law,[11] and this thesis fills this gap.

The thesis contributes to the understanding of the content of the right to housing in India and South Africa. Chapter 1 challenges existing views about the content of the right to housing in India as empty and rhetorical,[12] or wholly conditional – dependent for its content on pre-existing state action.[13] It argues that the right is not empty, and only partly conditional. Courts have recognised unconditional participation rights as elements of the right to housing,[14] as well as

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[7] For example, see Gautam Bhatia, 'Horizontal Rights: An Institutional Approach' (University of Oxford 2021).

[8] Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2014).

[9] Iris Marion Young, *Inclusion and Democracy* (OUP 2000).

[10] Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 8).

[11] Vaibhav Charalwar, 'Slum Rehabilitation and Constitutional Rights – A Bewitching Dream' (*Indian Constitutional Law and Philosophy*, 5 June 2020) <https://indconlawphil.wordpress.com/2020/06/05/guest-post-slum-rehabilitation-and-constitutional-rights-a-bewitching-dream/> accessed 20 December 2021.

[12] Usha Ramanathan, 'Demolition Drive' (2005) 40 EPW 2908; Anindita Mukherjee, *The Legal Right to Housing in India* (CUP 2019) 2; Usha Ramanathan, 'Illegality and the Urban Poor' (2006) 41 EPW 3193.

[13] M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 ICON 739.

[14] *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 [45]–[46] ('*Olga Tellis*').

unconditional obligations to provide shelter to the urban homeless.[15] Only a conditional right to rehabilitation in eviction cases has been recognised.[16] At the same time, the chapter argues that the right to housing ought to be further developed, and proposes that the contextually relevant content of the right to housing ought to be developed through participation between rights holders and duty bearers. Chapter 5 advances that argument, indicating how participation ought to play a valuable role in developing the content of other substantive elements of the right to housing, in a manner that meets the contextual needs of rights holders.

In South Africa, it has been argued that the content of the right to housing under s 26(1) of the Constitution, is underdeveloped.[17] Chapter 5 indicates how the gap in legal doctrine ought to be filled. It argues that the contextual content of the right to housing under s 26(1) ought to be developed through the process of meaningful engagement, so that meaningful engagement serves as a means to 'catalyse' substance, rather than a cop-out strategy to avoid substantive issues.[18]

The thesis contributes to knowledge on the relationship between participation rights and other substantive rights, by proposing a way to 'settle'[19] the relationship between participation rights and the substantive dimensions of the right to housing. In chapter 5, it carves out a valuable role for participation rights to develop the contextual content of the right to housing in the face of eviction of informal settlements.

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[15] *People's Union for Civil Liberties v Union of India* Writ Petition (Civil) No 196 of 2001 (Supreme Court of India).

[16] Khosla (n 13).

[17] David Bilchitz, 'Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?' (2013) 5 CCR 297; G Quinot and Sandra Liebenberg, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 Stellenbosch Law Review 639.

[18] Katharine G Young, 'The Avoidance of Substance in Constitutional Rights' (2013) 5 CCR 233, 238.

[19] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623, 624.

The thesis also contributes to debates on the role of courts in human rights adjudication, and especially social rights adjudication. A qualification is warranted here. This thesis follows in the tradition of Fredman to push against the drawing of strong differentiation between social and economic rights on the one hand, and civil and political rights on the other hand.[20] Nevertheless, the literature and case law on social and economic rights, has raised concerned about the role that courts ought to play in deciding cases involving rights such as housing. Chapter 1 argues that concerns regarding democratic legitimacy, competence and polycentricity are mitigated with the recognition of participation rights. It also indicates how the approach in this thesis fits with existing literature in this field. Chapter 5 advances the argument further. It indicates that courts ought to enforce participation rights, so the content of 'adequate housing' in the face of evictions is developed through bounded deliberation between residents and duty bearers. This ensures that those who are competent to make these decisions, given their special knowledge, do so. Courts ought to ensure that participation takes place through bounded deliberation, that all residents facing intersecting inequalities are able to participate, and that positive measures to facilitate participation are taken. Courts thereby ensure that decision-making is democratically legitimate.

At the same time, courts also ought to interpret and enforce the substantive normative commitments underlying the right to housing. This helps meet concerns raised in the literature regarding the 'abdication' of the judicial role in upholding 'social' rights,[21] while simultaneously finding a way to meet concerns regarding the legitimacy and competence of judicial decision-making. Chapter 5 envisages the iterative development of other substantive elements of the right to housing. Firstly, through bounded deliberation between residents of informal settlements, the state, and private duty bearers (in case of eviction from private land). Thereafter, it envisages the

[20] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) ch 3.

[21] Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 19) 624.

process of bounded deliberation to move before the courts as another deliberative forum,[22] wherein courts check that the process of participation meets relevant criteria, and thereafter check that the outcome of participation meets substantive normative commitments. This meets concerns around the competence of courts, because courts draw upon the knowledge of rights holders and duty bearers revealed during participation. Given that courts act as another deliberative forum, they improve rather than impede bounded, deliberative, democratic decision-making.

Chapter 5 contributes to the literature on the proportionality standard of review as applied to 'social' rights. There remains much work to be done in this area of law,[23] including in India. The proportionality standard is yet to be applied in India to rights typically termed as 'social' rights. Chapter 5 argues that the proportionality standard of review ought to apply to check limitations on all rights under art 21 of the Indian Constitution,[24] including the right to housing. It thereafter indicates how the standard ought to apply in eviction cases.

Lastly, the thesis contributes to the heated debate on public interest litigation ('PIL') in India. Concerns have been raised regarding the procedure in PIL cases, including liberalised rules of standing to allow cases to be brought on behalf of the marginalised, and the impact of this on the rights of the most marginalised.[25] Chapter 5 indicates how these concerns ought to be mitigated, by ensuring participation of rights holders in PIL cases, including residents of informal settlements facing intersecting inequalities in eviction cases.

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[22] Fredman, 'Adjudication as Accountability: A Deliberative Approach' (n 8).

[23] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017).

[24] Shreya Atrey and Gautam Bhatia, 'New Beginnings: Indian Rights Jurisprudence After Puttaswamy' (2020) 3 U OxHRH J.

[25] Anuj Bhuwania, 'Public Interest Litigation as a Slum Demolition Machine' (2016) 12 Projections: MIT Journal of Planning 67.

The thesis contributes to comparative constitutional law conversations in the global south. In doing so, it follows in a long ongoing conversation between India and South Africa, both in academic literature,[26] and in the courts[27].

2 Future direction of research

While there have been several doctrinal and normative books[28] and articles[29] written about meaningful engagement in South Africa, there is scope for socio-legal research on meaningful engagement. The Socio-Economic Rights Institute of South Africa ('SERI') has developed several community practice notes,[30] describing the struggles against eviction by many communities, and lawyers and researchers associated with SERI have also written about specific eviction cases.[31] These notes do not, however, describe the process of meaningful engagement in detail. Informal conversations with lawyers working on eviction cases at SERI indicates that local authorities often simply ask for information from residents, to ascertain their need for temporary emergency accommodation, through the filling of a 'TEA' form. Does this count as meaningful engagement?

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[26] For example, Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013).

[27] For example, *Sudama Singh and Ors v Government of Delhi and Ors* 168 (2010) DLT 218 (Delhi High Court).

[28] Brian Ray, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016).

[29] Lilian Chenwi, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26 SAPL; Roberto Gargarella, 'Why Do We Care about Dialogue?: "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019); Sameera Mahomedy, 'The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns' (Stellenbosch University 2019); Gustav Muller, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 Stellenbosch Law Review 742; Kirsty McLean, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 CCR 223; Liebenberg, 'Participatory Justice in Social Rights Adjudication' (n 19).

[30] For example, see, Socio-Economic Rights Institute, 'Slovo Park: 20 Years of Broken Promises' (SERI) <https://www.seri-sa.org/images/SlovoPark_CPN_Final.pdf> accessed 20 December 2021; Socio-Economic Rights Institute, 'Slovo Park: Some Gains at Last' (SERI 2020) <http://www.seri-sa.org/images/SERI_Slovo_Park_practice_notes_2020_FINAL_WEB.pdf> accessed 20 December 2021; Kate Tissington, 'Towards a Synthesis of the Political, Social and Technical in Informal Settlement Upgrading in South Africa: A Case Study of Slovo Park Informal Settlement' <http://rgdoi.net/10.13140/RG.2.1.3679.3847> accessed 20 December 2021.

[31] For example, Stuart Wilson, 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"' (2011) 22 Urban Forum 265.

Can such a process help develop the contextual content of the right to access adequate housing? To answer these questions, more socio-legal research is necessary, to examine the praxis of meaningful engagement. Similarly, in India, there exists limited socio-legal research on the process of participation in the context of upgrading informal settlements.[32] There is scope for this to be developed, to understand the praxis of participation in the context of evictions, and the right to housing more generally. This is one direction in which future research in this subject area ought to be developed. Socio-legal research on participation rights ought to employ participatory research methodologies.[33]

There also remains scope for doctrinal scholarship to extend and develop participation rights in the context of other rights. For example, participation rights have been recognised in the context of the right to education in South Africa,[34] access to forest land and forest resources for adivasi (indigenous) and forest dwelling communities in India,[35] and in the context of disability[36] and children's rights under international law.[37] The approach in this thesis to participation rights is likely to be useful in those, and other, contexts. There remains scope for future research endeavours to extend the arguments in the thesis, while playing close attention to relevant context, such as the context of education and land deprivation, and the struggles for the rights of persons

[32] Véronique Dupont and others, 'Unpacking Participation in Kathputli Colony: Delhi's First Slum Redevelopment Project, Act I' (2014) 49 EPW 39.

[33] For example, Kalyani Menon-Sen and Gautam Bhan, *Swept off the Map: Surviving Eviction and Resettlement in Delhi* (Yoda Press 2008).

[34] *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* [2011] ZACC 13 [74] ('*Juma Musjid*'); Sandra Liebenberg, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1; Sandra Liebenberg, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019) 204; Sandra Fredman, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 CCR 165.

[35] Rishika Sahgal, 'Strengthening Democracy in India through Participation Rights' (2020) 4 VRÜ 468.

[36] UN Convention on the Rights of Persons with Disabilities 2006, arts 4(3) and 33(3); UNCRPD General comment No 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention CRPD/C/GC/7 (2018); James Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998).

[37] UN Convention on the Rights of the Child 1989, arts 12, 23(1); UNCRC General Comment No 12 on the right of the child to be heard, CRC/C/GC/12 (2009); Aisling Parkes, 'Aisling Parkes, 'Tokenism versus Genuine Participation: Children's Parliaments and the Right of the Child to Be Heard under International Law' (2008) 16 WJILDR 1.

with disabilities and children. There is also scope to extend the arguments in this thesis to argue for a free-standing right to participation. Overall, there remains much scope for theoretical and doctrinal research on participation rights. It is hoped that this thesis stimulates conversation and research in this exciting area of domestic and international human rights law.

BIBLIOGRAPHY

Books/Chapters

Alexy R, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002)

——, 'Proportionality and Rationality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017)

Atrey S, 'Introduction: Intersectionality from Equality to Human Rights' in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (1st edn, Hart Publishing 2020)

Barak A, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2011)

Baviskar A, 'Cows, Cars and Cycle-Rickshaws: Bourgeois Environmentalists and the Battle for Delhi's Streets' in Amita Baviskar and Raka Ray (eds), *Elite and everyman : the cultural politics of the Indian middle classes* (Routledge India 2011)

——, *Uncivil City : Ecology, Equity and the Commons in Delhi* (Sage Yoda Press 2020)

Baxi U, 'Introduction' in Upendra Baxi (ed), *Law and Poverty: Critical Essays* (NM Tripathi 1988)

——, 'Introduction' in SP Sathe (ed), *Judicial activism in India* (2nd edn, OUP 2003)

Benhabib S, 'Towards a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996)

Bentley K and Calland R, 'Access to Information and Socio-Economic Rights: ATheory of Change in Practice' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014)

Bhan G, *In the Public's Interest: Evictions, Citizenship, and Inequality in Contemporary Delhi* (UGA Press 2016)

Bhuwania A, *Courting the People: Public Interest Litigation Post-Emergency India* (CUP 2017)

Bilchitz D, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2008)

——, 'Socio- Economic Rights and Expanding Access to Justice in South Africa' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020)

Bódig M, 'Soft Law, Doctrinal Development, and the General Comments of the UN Committee on Economic, Social and Cultural Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016)

Bogg A, 'The Political Theory of Collective Bargaining : Pluralism, Deliberation and the Duty to Bargain', *The Democratic Aspects of Trade Union Recognition* (1st edn, Hart Publishing 2009)

Brand D, 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or "What Are Socio-Economic Rights For?"' in H Botha, A van der Walt and J van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press 2003)

Brierley A, 'PUCL v. Union of India: Political Mobilization and the Right to Food' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019)

Briggs X de S, 'The Grassroots-to-Grasstops Dynamic: Slum Redevelopment and Accountability in Mumbai', *Democracy as problem solving: civic capacity in communities across the globe* (MIT Press 2008)

Brown J, *South Africa's Insurgent Citizens: On Dissent and the Possibility of Politics* (Zed Books 2015)

Bundy C, 'Land, Law and Power' in Christina Murray and Catherine O'Regan (eds), *No place to rest: forced removals and the law in South Africa* (OUP 1990)

Cerone J, 'A Taxonomy of Soft Law: Stipulating a Definition' in Stéphanie Lagoutte (ed), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016)

Ceva E, *Interactive Justice: A Proceduralist Approach to Value Conflict in Politics* (Routledge 2016)

Chandra A, 'Limitation Analysis by the Indian Supreme Court' in Andrej Lang, Mordechai Kremnitzer and Talya Steiner (eds), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (CUP 2020)

Chandrachud C, 'Structural Injunctions and Public Interest Litigation in India' in Po Jen Yap (ed), *Constitutional Remedies in Asia* (Routledge 2019)

Charlton J, *Nothing About Us Without Us: Disability Oppression and Empowerment* (University of California Press 1998)

Chatterjee P, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (Columbia University Press 2004)

Chenwi L, 'Democratizing the Socio-Economic Rights Enforcement Process' in Helena Alviar García, Karl E Klare and Lucy A Williams (eds), *Social and Economic rights in Theory and Practice: Critical Inquiries* (Routledge 2015)

Claassens A, 'Rural Land Struggles' in Christina Murray and Catherine O'Regan (eds), *No place to rest : forced removals and the law in South Africa* (OUP 1990)

Cohen J, 'Deliberation and Democratic Legitimacy' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press 1997)

——, 'Procedure and Substance in Deliberative Democracy' in James Bohman and William Rehg (eds), *Deliberative democracy: essays on reason and politics* (MIT Press 1997)

Cornell D and Fuller S, 'Introduction' in Drucilla Cornell and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials*, vol 1 (Fordham University Press 2013)

Crocker DA and Robeyns I, 'Capability and Agency' in Christopher W Morris (ed), *The Philosophy of Amartya Sen* (CUP 2009)

Dann P, Riegner M and Bönnemann M, 'The Southern Turn in Comparative Constitutional Law: An Introduction' in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (OUP 2020)

Dixon R and Chowdhury R, 'A Case for Qualified Hope?: The Supreme Court of India and the Midday Meal Decision' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019)

della Porta D and Doerr N, 'Deliberation in Protests and Social Movements' in André Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (1st edn, OUP 2018)

Drèze J and Sen A, *India: Development and Participation* (OUP 2002)

Dryzek JS, *Deliberative Democracy and beyond: Liberals, Critics, Contestations* (OUP 2000)

Duff A (ed), *The Trial on Trial: Towards a Normative Theory of the Criminal Trial* (Hart 2007)

Durbach A, 'The Right to Legal Aid in Social Rights Litigation' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009)

Dworkin R, *A Matter of Principle* (Clarendon Press 1986)

——, *Law's Empire* (Hart 1998)

Ellmann S, 'A Constitutional Confluence: American State Action Law and the Application of South Africa's Socio-Economic Rights Guarantees to Private Actors' in Stephen Ellmann and Penelope Andrews (eds), *The post-apartheid constitutions: Perspectives on South Africa's basic law* (University of the Witwatersrand Press 2001)

Epp CR, *Making Rights Real: Activists, Bureaucrats, and the Creation of the Legalistic State* (UChicago Press 2009)

Ferraz O, *Health as a Human Right : The Politics and Judicialization of Health in Brazil* (CUP 2021)

Fitzmaurice M, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (1st edn, OUP 2013)

Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013)

Fraser N and Honneth A, *Redistribution or Recognition? A Political-Philosophical Exchange* (Verso 2003)

Fredman S, *Women and The Law* (Clarendon 1997)

——, *Human Rights Transformed* (OUP 2008)

——, *Discrimination Law* (2nd edn, OUP 2011)

——, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2014)

——, *Comparative Human Rights Law* (OUP 2018)

Fricker M, *Epistemic Injustice* (OUP 2007)

Galanter M and Ram V, 'Suo Motu Intervention and the Indian Judiciary' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019)

Gardbaum S, 'Horizontal Effect' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)

——, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017)

Gargarella R, 'Why Do We Care about Dialogue?: "Notwithstanding Clause", "Meaningful Engagement" and Public Hearings: A Sympathetic but Critical Analysis' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019)

Gayer L and Jaffrelot C (eds), *Muslims in Indian Cities: Trajectories of Marginalisation* (Hurst 2012)

Ghertner A, *Rule By Aesthetics: World-Class City Making in Delhi* (OUP 2015)

Gloppen S, 'Courts and Social Transformation: An Analytic Framework' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and social transformation in new democracies: an institutional voice for the poor?* (Ashgate 2006)

Gutmann A and Thompson DF, *Democracy and Disagreement* (Belknap Press 1996)

——, *Why Deliberative Democracy?* (Princeton University Press 2009)

Habermas J, 'Three Normative Models of Democracy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996)

——, *Between Facts and Norms* (William Rehg tr, Polity Press 1997)

Haraway D, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Taylor & Francis 1991)

Hart RA, *Children's Participation: From Tokenism to Citizenship* (UNICEF 1992)

Hébert M, 'Indigenous Spheres of Deliberation' in André Bächtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (1st edn, OUP 2018)

Hirschl R, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2016)

Hohmann J, *The Right to Housing: Law, Concepts, Possibilities* (Hart 2013)

Jacobsen A, 'Soft Law within Participation Rights' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016)

Jaffrelot C (ed), *Hindu Nationalism: A Reader* (Princeton University Press 2009)

Jamil G, *Accumulation by Segregation: Muslim Localities in Delhi* (OUP 2017)

Menon-Sen K and Bhan G, *Swept off the Map: Surviving Eviction and Resettlement in Delhi* (Yoda Press 2008)

Kannabirān K, *Tools of Justice: Non-Discrimination and the Indian Constitution* (Routledge 2012)

Kannabirān K and Kannabirān V, 'Caste and Gender: Understanding Dynamics of Power and Violence' in Anupama Rao (ed), *Gender and caste* (Zed Books 2005)

Kant I, *Groundwork of the Metaphysics of Morals* (Mary J Gregor and Jens Timmermann trs, 2nd edn, CUP 2012)

Khera R, *Dissent on Aadhaar : Big Data Meets Big Brother* (Orient Blackswan 2019)

King J, *Judging Social Rights* (CUP 2012)

Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009)

Kothari J, 'Social Rights Litigation in India: Developments of the Last Decade' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (1st edn, Hart Publishing 2007)

Landau D, 'The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures' in Aoife Nolan (ed), *Economic and Social Rights after the Global Financial Crisis* (CUP 2014)

Langford M, 'Housing Rights Litigation' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014)

Langford M and Kahanovitz S, 'South Africa: Rethinking Enforcement Narratives' in César Rodríguez-Garavito, Julieta Rossi and Malcolm Langford (eds), *Social Rights Judgments and the Politics of Compliance: Making it Stick* (CUP 2017)

Liebenberg S, *Socio-Economic Rights : Adjudication under a Transformative Constitution* (Juta 2010)

——, 'Socio-Economic Rights Beyond the Public-Private Law Divide' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014)

——, 'The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019)

Liebenberg S and Young KG, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?' in Helena Alviar García, Karl E Klare and Lucy A Williams (eds), *Social and Economic rights in Theory and Practice: Critical Inquiries* (Routledge 2015)

Mackenzie C, 'Procedural Justice, Relational Equality, and Self-Respect' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (1st edn, Routledge 2020)

Madlingozi T, 'Post-Apartheid Social Movements and Legal Mobilisation' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014)

Mattera D, *Azanian Love Song* (African Perspectives Publishing 2007)

McCann MW, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (UChicago Press 1994)

Mehra D, 'Caste and Class in Indian Cities: Habitation, Inequality and Segregation' in Véronique Dupont, Marie-Hélène Zérah and Stéphanie Tawa Lama-Rewal (eds), *Urban Policies and the Right to the City in India* (UNESCO 2011) <https://www.tatatrusts.org/upload/pdf/urban-policies-and-the-right-to-the-city-in-india.pdf> accessed 30 November 2021

Meyerson D, 'The Inadequacy of Instrumentalist Theories of Procedural Justice' in Denise Meyerson, Catriona Mackenzie and Therese MacDermott (eds), *Procedural Justice and Relational Theory: Empirical, Philosophical, and Legal Perspectives* (1st edn, Routledge 2020)

Mukherjee A, *The Legal Right to Housing in India* (CUP 2019)

Muralidhar S, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009)

Nedelsky J, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2012)

Novitz T and Skidmore P, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart 2001)

Nussbaum M, *Women and Human Development: The Capabilities Approach* (CUP 2000)

Owusu-Bempah A, *Defendant Participation in the Criminal Process* (Routledge 2017)

Plasket C, 'Homeland Incorporation: The New Forced Removals' in Christina Murray and Catherine O'Regan (eds), *No place to rest: forced removals and the law in South Africa* (OUP 1990)

Platzky L and Walker C, *The Surplus People: Forced Removals in South Africa* (Ravan Press 1985)

Poovey M, *A History of the Modern Fact: Problems of Knowledge in the Sciences of Wealth and Society* (UChicago Press 1998)

Rajamani L, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution*, vol 1 (OUP 2016)

Rao-Cavale K, 'The Art of Buying Time: Street Vendor Politics and Legal Mobilization in Metropolitan India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019)

Ray B, *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (CUP 2016)

Riofrancos TN, *Resource Radicals: From Petro-Nationalism to Post-Extractivism in Ecuador* (Duke University Press 2020)

Roach K, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009)

——, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law* (CUP 2021)

Robinson N, 'The Structure and Functioning of the Supreme Court of India' in Gerald N Rosenberg, Shishir Bail and Sudhir Krishnaswamy (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (CUP 2019)

Rodríguez-Garavito C, 'Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (CUP 2019)

Rosenberg GN, *The Hollow Hope : Can Courts Bring about Social Change?* (2nd edn, UChicago Press 2008)

Roy A, *An Ordinary Person's Guide to Empire* (Penguin 2006)

Sen A, 'Equality of What?' in S McMurrin (ed), *Tanner Lectures on Human Values*, vol 1 (CUP 1980)

——, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1983)

——, *Inequality Reexamined* (OUP 1995)

——, *Development as Freedom* (OUP 1999)

——, *Rationality and Freedom* (Harvard University Press 2002)

——, 'Elements of a Theory of Human Rights' (2004) 32 Philosophy & Public Affairs 315

——, 'Human Rights and Capabilities' (2005) 6 Journal of Human Development 151

Shelton D, 'Soft Law' in David Armstrong (ed), *Handbook of International Law* (Routledge 2009)

Shue H, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (40th Anniversary, Princeton University Press 2020)

Shukla V, *VN Shukla's Constitution of India* (MP Singh ed, 13th edn, Eastern Book Company 2017)

Smith L and Rubin M, 'Beyond Invented and Invited Spaces of Participation: The Phiri and Olivia Road Court Cases and Their Outcome' in Claire Benit-Gbaffou (ed), *Popular Politics in South African Cities: Unpacking Community Participation* (HSRC Press 2015)

Srivastava S, 'A Hijra, a Female Pradhan, and a Real Estate Dealer: Slum Lives between the Market, the State, and Community', *Entangled Urbanism: Slum, Gated Community, and Shopping Mall in Delhi and Gurgaon* (OUP 2014)

——, *Entangled Urbanism: Slum, Gated Community, and Shopping Mall in Delhi and Gurgaon* (OUP 2014)

Stewart H, 'Concern and Respect in Procedural Law' in Wil Waluchow and Stefan Sciaraffa (eds), *The Legacy of Ronald Dworkin* (OUP 2016)

Stoljar N and Mackenzie C, 'Introduction: Autonomy Reconfigured' in Catriona Mackenzie and Natalie Stoljar (eds), *Relational autonomy: feminist perspectives on automony, agency, and the social self* (OUP 2000)

Surendranath A, 'The Right to Life and Personal Liberty' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016)

Tharu S, 'The Impossible Subject: Caste and the Gendered Body' in Anupama Rao (ed), *Gender and caste* (Zed Books 2005)

Thiruvengadam A, 'Swallowing a Bitter PIL? Reflections on Progressive Strategies for Public Interest Litigation in India' in Frans Viljoen, Oscar Vilhena, and Upendra Baxi (eds), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (PULP 2013)

Tribe L, *American Constitutional Law* (2nd edn, Foundation Press 1988)

Tushnet M, *Weak Courts, Strong Rights : Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008)

——, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011)

Tyler TR and L. Meares T, 'Procedural Justice Policing' in Anthony A Braga and David Weisburd (eds), *Police Innovation: Contrasting Perspectives* (2nd edn, CUP 2019)

Waldron J, *Law and Disagreement* (Clarendon 1999)

——, 'The Rule of Law and the Importance of Procedure' in James Fleming (ed), *Getting to the rule of law* (NYU Press 2011)

Waldron J and Dan-Cohen M, *Dignity, Rank, and Rights* (OUP 2012)

Wilson B, 'Safai Karmachari Andolan: An Insider's Account' in Philippe Cullet, Sujith Koonan and Lovleen Bhullar (eds), *The Right to Sanitation in India* (OUP 2019)

Wilson S, 'The Right to Adequate Housing' in Jackie Dugard and others (eds), *Research handbook on economic, social and cultural rights as human rights* (Edward Elgar Publishing 2020)

Wilson S and Dugard J, 'Constitutional Jurisprudence: The First and Second Waves' in Malcolm Langford (ed), *Socio-economic Rights in South Africa: Symbols or Substance?* (CUP 2014)

Young IM, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and difference: contesting the boundaries of the political* (Princeton University Press 1996)

——, *Inclusion and Democracy* (OUP 2000)

——, *Justice and the Politics of Difference* (Princeton University Press 2011)

Young KG, *Constituting Economic and Social Rights* (OUP 2012)

——, 'Proportionality, Reasonableness, and Economic and Social Rights' in Mark Tushnet and Vicki C Jackson (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2017)

Journal Articles and Papers

Ahmed F and Khaitan T, 'Constitutional Avoidance in Social Rights Adjudication' (2015) 35 OJLS 607

Albertyn C, 'Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion towards Systemic Justice' (2018) 34 SAJHR 441

——, 'Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts' (2019) 1 U OxHRH J 71

Albertyn C and Fredman S, 'Equality beyond Dignity: Multi-Dimensional Equality and Justice Langa's Judgments Part III: Reflections on Themes in Justice Langa's Judgments' [2015] Acta Juridica 430

Alexander L, 'The Relationship between Procedural Due Process and Substantive Constitutional Rights' (1987) 39 UFLR 323

——, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 Law and Philosophy 19

Alimohammadi E and Muller G, 'The Illegal Eviction of Undocumented Foreigners from South Africa' (2019) 19 AHRLJ 793

Ambast A, 'Where's Waldo? Looking for the Doctrine of Proportionality in Indian Free Speech Jurisprudence' (2015) 9 ICL Journal 344

Arnstein SR, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216

Atrey S and Bhatia G, 'New Beginnings: Indian Rights Jurisprudence After Puttaswamy' (2020) 3 U OxHRH JAnand N and Rademacher A, 'Housing in the Urban Age: Inequality and Aspiration in Mumbai' (2011) 43 Antipode 1748

Ayyar V, 'Caste and Gender in a Mumbai Resettlement Site' (2013) 48 EPW 44

Baer S, 'Dignity Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' (2009) 59 The University of Toronto Law Journal 417

Banda S and Sheikh S, 'The Case of Sonia Gandhi Camp: The Process of Eviction and Demolition in Delhi's Jhuggi Jhopri Clusters' (Centre for Policy Research 2014)

Banerjee A, Pande R and Walton M, 'Delhi's Slum-Dwellers: Deprivation, Preferences and Political Engagement among the Urban Poor' [2012] International Growth Centre <https://www.theigc.org/wp-content/uploads/2014/10/Banerjee-Et-Al-2012-Working-Paper.pdf> accessed 1 February 2021

Baviskar A, 'What the Eye Does Not See: The Yamuna in the Imagination of Delhi' (2011) 46 EPW 45

——, 'Between Violence and Desire: Space, Power, and Identity in the Making of Metropolitan Delhi' (2018) 68 International Social Science Journal 199

Bhagwati P, 'Judicial Activism and Public Interest Litigation' CJTL 561

Bhan G and Shivanand S, '(Un)Settling the City: Analysing Displacement in Delhi from 1990 to 2007' (2013) 48 EPW 54

Bhatia G, 'Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach' (2016) 11 Asian Journal of Comparative Law 87

Bhuwania A, 'Public Interest Litigation as a Slum Demolition Machine' (2016) 12 Projections: MIT Journal of Planning 67

Bilchitz D, 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119 SALJ 484

——, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 SAJHR 1

——, 'Avoidance Remains Avoidance: Is It Desirable in Socio-Economic Rights Cases?' (2013) 5 CCR 297

——, 'Socio-Economic Rights, Economic Crisis, and Legal Doctrine' (2014) 12 ICON 710

——, 'Are Socio-Economic Rights a Form of Political Rights?' (2015) 31 SAJHR 86

Black J, 'Regulation as Facilitation: Negotiating the Genetic Revolution' (1998) 61 MLR 621

——, 'Proceduralizing Regulation: Part I' (2000) 20 OJLS 597

——, 'Proceduralizing Regulation: Part II' (2001) 21 OJLS 33

Boggenpoel Z, 'Revisiting the Tswelopele Remedy : A Critical Analysis of Ngomane v City of Johannesburg Metropolitan Municipality' (2020) 137 SALJ 424

Bone RG, 'Procedure, Participation, Rights' (2010) 90 BULR 1011

Booysen S, 'Public Participation in Democratic South Africa : From Popular Mobilisation to Structured Co-Optation and Protest' (2009) 28 Politeia 1

Boyle AE, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 ICLQ 901

Brickhill J, 'A River of Disease: Silicosis and the Future of Class Actions in South Africa' (2021) 37 SAJHR 31

Brickhill J and Grobler C, 'The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana' (2016) 8 CCR 256

Carpentier N, 'Beyond the Ladder of Participation: An Analytical Toolkit for the Critical Analysis of Participatory Media Processes' (2016) 23 Javnost - The Public 70

Chan C, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Legal Studies 1

Chandra A, 'Proportionality in India: A Bridge to Nowhere?' (2020) 3 U OxHRH J 55

Chandrachud A, '*Wednesbury* Reformulated: Proportionality and the Supreme Court of India' (2013) 13 OUCLJ 191

——, 'Secularism and the Citizenship Amendment Act' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3513828> accessed 18 December 2021

Chatterjee P and Chowdhury S, 'A Capabilities Approach to Access to Justice' (2013) 4 Journal of Indian Law and Society 107

Chatterji AP and others, 'Breaking Worlds: Religion, Law and Citizenship in Majoritarian India; The Story of Assam' [2021] University of California, Berkeley <https://escholarship.org/uc/item/6w56781n> accessed 16 December 2021

Chayes A, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harvard Law Review 1281

Cheadle H and Davis D, 'The Application of the 1996 Constitution in the Private Sphere' (1997) 13 SAJHR 44

Chenwi L, 'A New Approach to Remedies in Socioeconomic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others' (2009) 2 CCR 371

——, '"Meaningful Engagement" in the Realisation of Socio-Economic Rights: The South African Experience' (2011) 26 SAPL

Chenwi L and Liebenberg S, 'The Constitutional Protection of Those Facing Eviction from "Bad Buildings"' (2008) 9 ESR Review 12

Chirwa DM, 'Non-State Actors' Responsibility for Socio-Economic Rights: The Nature of Their Obligations under the South African Constitution' (2002) 3 ESR Review 1

Chugh A, 'Fundamental Rights - Vertical or Horizontal?' (2005) 7 SCC (J) 9

Cirolia LR, 'South Africa's Emergency Housing Programme: A Prism of Urban Contest' (2014) 31 Development Southern Africa 397

Cloete C and Boggenpoel Z-ZT, 'Re-Evaluating the Court System in PIE Eviction Cases' (2018) 135 SALJ 432

Contiades X and Fotiadou A, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 ICON 660

Cornwall A, 'Locating Citizen Participation' (2002) 33 IDS Bulletin i

——, 'Unpacking "Participation": Models, Meanings and Practices' (2008) 43 Community Development Journal 269

Craig P and Deshpande S, 'Rights, Autonomy and Process: Public Interest Litigation in India' (1989) 9 OJLS 356

Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U Chi Legal F 139

——, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) 43 Stanford Law Review 1241Cohen J and Sabel C, 'Directly-Deliberative Polyarchy' (1997) 3 European Law Journal 313

De Oliveira Santos PF, 'Beyond Minimalism and Usurpation: Designing Judicial Review to Control the Mis-Enforcement of Socio-Economic Rights' (2019) 18 WashUGSLRev 493

Dafel M, 'The Negative Obligation of the Housing Right: An Analysis of the Duties to Respect and Protect' (2013) 29 SAJHR 591

Davis D, 'Adjudicating the Socioeconomic Rights in the South African Constitution: Towards "Deference Lite"?' (2006) 22 SAJHR 301

Dickinson GS, 'Blue Moonlight Rising: Evictions, Alternative Accommodation and a Comparative Perspective on Affordable Housing Solutions in Johannesburg' (2011) 27 SAJHR 466

Dixon R, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 ICON 391

Dorf MC and Sabel CF, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia Law Review 267

Draga L and Fick S, 'Fischer v Unlawful Occupiers: Could the Court Have Interpreted the "may" in Section 9(3)(a) of the Housing Act as a "Must" under the Circumstances of the Case?' (2019) 35 SAJHR 404

Dugard J, 'Twenty Years of Human Rights Scholarship and Ten Years of Democracy' (2004) 20 SAJHR 345

——, 'Court of First Instance? Towards a Pro-Poor Jurisdiction for the South African Constitutional Court' (2006) 22 SAJHR 261

——, 'Courts and the Poor in South Africa : A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 SAJHR 214

——, 'Closing The Doors of Justice: An Examination of the Constitutional Court's Approach to Direct Access, 1995–2013' (2015) 31 SAJHR 112

——, 'The Right to Housing in South Africa' [2017] Foundation for Human Rights Position Paper Series

——, 'Modderklip Revisited: Can Courts Compel the State to Expropriate Property Where the Eviction of Unlawful Occupiers Is Not Just and Equitable?' (2018) 21 PELJ 1

Dugard J and others, 'The Right to Housing in South Africa' [2017] Foundation for Human Rights Position Paper Series

Dupont V, 'Slum Demolitions in Delhi since the 1990s: An Appraisal' (2008) 43 EPW 79

——, 'Which Place for the Homeless in Delhi? Scrutiny of a Mobilisation Campaign in the 2010 Commonwealth Games Context' [2013] SAMAJ <http://journals.openedition.org/samaj/3662> accessed 18 December 2021

Dupont V and others, 'Unpacking Participation in Kathputli Colony: Delhi's First Slum Redevelopment Project, Act I' (2014) 49 EPW 39

Eliot T, 'The Love Song of J Alfred Prufrock' (1915) 6 *Poetry*

Ferraz O, 'The Right to Health in the Courts of Brazil: Worsening Health Inequities?' (2009) 11 Health and Human Rights 33

Finn M, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591

Fiss OM, 'Against Settlement' (1984) 93 Yale LJ 1073

Formosa P and Mackenzie C, 'Nussbaum, Kant, and the Capabilities Approach to Dignity' (2014) 17 Ethical theory and moral practice 875

Fowkes J, 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian Pil' (2011) 27 SAJHR 434

Fraser N, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' [1990] Social Text 56

——, 'Rethinking Recognition' (2000) 3 NLR 107

Fredman S, 'New Horizons: Incorporating Socio-Economic Rights in a British Bill of Rights' [2010] Public Law 297

——, 'Procedure or Principle: The Role of Adjudication in Achieving the Right to Education' (2014) 6 CCR 165

——, 'Substantive Equality Revisited' (2016) 14 ICON 712

Friedman N, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 SAJHR 63

Fuller LL and Winston KI, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353

Fuo O and Du Plessis A, 'In the Face of Judicial Deference: Taking the "minimum Core" of Socio-Economic Rights to the Local Government Sphere' (2015) 19 Law, Democracy & Development 1

Gaber J, 'Building "A Ladder of Citizen Participation": Sherry Arnstein, Citizen Participation, and Model Cities' (2019) 85 Journal of the American Planning Association 188

Galanter M, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95

Ganguly S, 'Socio-Spatial Stigma and Segregation: A Balmiki Colony in Central Delhi' (2018) 53 EPW 50

Garg A and others, 'Law Reform and Deliberative Democracy: Lessons for the Committee for Reforms in Criminal Laws (India)' [2020] Centre for Criminological Research, University of Sheffield

Ghertner A, 'Analysis of New Legal Discourse behind Delhi's Slum Demolitions' (2008) 43 EPW 57

——, 'Gentrifying the State, Gentrifying Participation: Elite Governance Programs in Delhi: Gentrifying the Local State in India' (2011) 35 IJURR 504

Hadden SG, 'Technical Information for Citizen Participation' (1981) 17 JABS 537

Hanson JS and Howe KR, 'The Potential for Deliberative Democratic Civic Education' (2011) 19 Democracy & Education

Haraway D, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 Feminist Studies 575

Harrison Philip, 'Urbanization: The Policies and Politics of Informal Settlement in South Africa: A Historical Perspective' (1992) 22 Africa Insight 14

Harriss J, 'Antinomies of Empowerment: Observations on Civil Society, Politics and Urban Governance in India' (2007) 42 EPW 2716

Hegde V, 'Indian Courts and International Law' (2010) 23 LJIL 53

Higgins A, 'Legal Aid and Access to Justice in England and India' (2014) 26 NLSIR 13

Ho HL, 'Liberalism and The Criminal Trial' [2010] Singapore Journal of Legal Studies 87

Hohmann J, 'Visions of Social Transformation and the Invocation of Human Rights in Mumbai: The Struggle for the Right to Housing' (2010) 13 Yale Hum Rts & Dev LJ 135

Hutchinson T, 'Vale Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era' (2014) 106 Law library journal 579

Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin law review 83

Iles K, 'Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 SAJHR 448

Kadish SH, 'Methodology and Criteria in Due Process Adjudication: A Survey and Criticism' (1957) 66 Yale LJ 319

Kalyani Menon-Sen, '"Better to Have Died than to Live like This": Women and Evictions in Delhi' (2006) 41 EPW 1969

Khaitan T, 'Beyond Reasonableness - A Rigorous Standard of Review for Article 15 Infringement' (2008) 50 JILI 177

——, 'Reforming the Pre-Legislative Process' (2011) 46 EPW 27

Khosla M, 'Making Social Rights Conditional: Lessons from India' (2010) 8 ICON 739

——, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' (2011) 59 The American Journal of Comparative Law 909

King J, 'The Pervasiveness of Polycentricity' [2008] Public Law

Klatt M, 'Positive Obligations under the European Convention of Human Rights' (2011) 71 HJIL 691

Klein A, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights' (2008) 39 Colum HRLR 351

Landau D, 'The Reality of Social Rights Enforcement' (2012) 53 Harvard International Law Journal 189

——, 'Choosing between Simple and Complex Remedies in Socio-Economic Rights Cases' (2019) 69 UTLJ 105

Leckey R, 'The Harms of Remedial Discretion' (2016) 14 ICON 584

Lemanski C, 'Augmented Informality: South Africa's Backyard Dwellings as a by-Product of Formal Housing Policies' 33 Habitat International 472

Liebenberg S, 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 Law, Democracy & Development 159

——, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1

——, 'Grootboom and the Seduction of the Negative/Positive Duties Dichotomy' (2011) 26 SAPL 37

——, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 AHRLJ 1

——, 'Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law' (2014) 32 Nordic Journal of Human Rights 312

——, 'Remedial Principles and Meaningful Engagement in Education Rights Disputes' (2016) 19 PELJ 1

——, 'Participatory Justice in Social Rights Adjudication' (2018) 18 Human Rights Law Review 623

Lowenthal T, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 261

Mahomedy S, 'Extra-Judicial Engagement in Socio-Economic Rights Realisation: Lessons from #FeesMustFall' (2020) 36 SAJHR 49

Maringanti A, 'No Estoppel: Claiming Right to the City via the Commons' (2011) 46 EPW 64

Mashaw JL, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 BULR 885

Maylam P, 'The Rise and Decline of Urban Apartheid in South Africa' (1990) 89 African Affairs 57

Mbazira C, '"Appropriate, Just and Equitable Relief" in Socio-Economic Rights Litigation: The Tension between Corrective and Distributive Forms of Justice' (2008) 125 SALJ 71

——, 'Non-Implementation of Court Orders in Socio-Economic Rights Litigation in South Africa: Is the Cancer Here to Stay?' (2008) 9 ESR Review 2

McCrudden C, 'Legal Research and the Social Sciences' (2006) 122 Law quarterly review 632

——, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655

McLean K, 'Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo' (2010) 3 CCR 223

Meyerson D, 'The Moral Justification for the Right to Make Full Answer and Defence' (2015) 35 OJLS 237

Minow M, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 Journal of Legal Education 65

Mostert Hanri and Cramer Richard, '"Home" and Unlawful Occupation : The Horns of Local Government's Dilemma Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)' (2015) 26 Stellenbosch Law Review 583

Mouffe C, 'Deliberative Democracy or Agonistic Pluralism?' (1999) 66 Social Research 745

Mukherjee G, 'The Supreme Court of India and the Inter-Institutional Dynamics of Legislated Social Rights' (2020) 4 VRÜ 411

Mukherjee G, 'Democratic Experimentalism in Comparative Constitutional Social Rights Remedies' [2021] Milan Law Review 75

Muller G, 'Conceptualizing Meaningful Engagement as a Deliberative Democratic Partnership' (2011) 22 Stellenbosch Law Review 742

——, 'Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa' (2015) 132 SALJ 616

Muller G and Liebenberg S, 'Developing the Law of Joinder in the Context of Evictions of People from Their Homes' (2013) 29 SAJHR 554

Mullin A, 'Children, Autonomy, and Care' (2007) 38 Journal of Social Philosophy 536

Narayan VA and Sindhu J, 'A Historical Argument for Proportionality under the Indian Constitution' (2018) 2 ILR 51

——, 'A Case for Judicial Review of Legislative Process in India' (2020) 53 VRÜ

Nedelsky J, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 Yale Journal of Law and Feminism 7

Ngcukaitobi T, 'The Evolution of Standing Rules in South Africa and Their Significance in Promoting Social Justice' (2002) 18 SAJHR 590

Nijman J, 'Against the Odds: Slum Rehabilitation in Neoliberal Mumbai' (2008) 25 Cities 73

Nolan A, 'Holding Non-State Actors to Account for Constitutional Economic and Social Rights Violations: Experiences and Lessons from South Africa and Ireland' (2014) 12 ICON 61

Parkes A, 'Tokenism versus Genuine Participation: Children's Parliaments and the Right of the Child to Be Heard under International Law' (2008) 16 WJILDR 1

Patel S, Baptist C and D'Cruz C, 'Knowledge Is Power: Informal Communities Assert Their Right to the City through SDI and Community-Led Enumerations' (2012) 24 Environment and Urbanization 13

Phillips J, 'Opposing Cynical Evictions : A Framework of Appropriate Remedies' (2020) 137 SALJ 733

Pieterse M, 'Towards a Useful Role for Section 36 of the Constitution in Social Rights Cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council' (2003) 120 SALJ 41

——, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 383

——, 'Socio-Economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 51 VRÜ 12

Pillay A, 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 SALJ 419

——, 'Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10 ICON 732

Pillay K, 'Implementation of Grootboom : Implications for the Enforcement of Socio-Economic Rights' (2002) 6 Law, Democracy & Development 255

Pithouse R, 'Abahlali BaseMjondolo and Struggle for the City in Durban, South Africa' 6 Cidades 241

——, 'Rethinking Public Participation from Below' 2 Critical Dialogue 24

Poddar M, 'The Citizenship (Amendment) Bill, 2016: International Law on Religion-Based Discrimination and Naturalisation Law' (2018) 2 ILR 108

Prashant Bhushan, 'Supreme Court and PIL: Changing Perspectives under Liberalisation' (2004) 39 EPW 1770

Quinot G and Liebenberg S, 'Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa' (2011) 22 Stellenbosch Law Review 639

Rains E, Krishna A and Wibbels E, 'Urbanization and India's Slum Continuum: Evidence on the Range of Policy Needs and Scope of Mobility' [2018] International Growth Centre

<https://www.theigc.org/wp-content/uploads/2018/02/Rains-et-al_Working-paper_cover.pdf> accessed 1 February 2021

Rajamani L, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 Journal of Environmental Law 293

Ramanathan U, 'Demolition Drive' (2005) 40 EPW 2908

——, 'Illegality and the Urban Poor' (2006) 41 EPW 3193

Ray B, 'Occupiers of 5l Olivia Road: Enforcing the Right to Adequate Housing Through Engagement' (2008) 8 Human Rights Law Review 703

——, 'Proceduralisation's Triumph and Engagement's Promise in Socio-Economic Rights Litigation' (2011) 27 SAJHR 107

Rivers J, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174

Roach K and Budlender G, 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 SALJ 325

Rodríguez-Garavito C, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669

Rooney J, 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 SAJHR 406

Roux T, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2008) 7 ICON 106

Roy A, 'Civic Governmentality: The Politics of Inclusion in Beirut and Mumbai' (2009) 41 Antipode 159

Ruparelia S, 'India's New Rights Agenda: Genesis, Promises, Risks' (2013) 86 Pacific Affairs 569

Sabel CF and Simon WH, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 Harvard Law Review 1015

Sachs A, 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' (2003) 56 Current Legal Problems 579

Sahgal R, 'Strengthening Democracy in India through Participation Rights' (2020) 4 VRÜ 468

Samuelsson M and Bøyum S, 'Education for Deliberative Democracy: Mapping the Field' (2015) 24 Utbildning och demokrati 75

Sankaran K, 'Special Provisions and Access to Socio-Economic Rights: Women and the Indian Constitution' (2007) 23 SAJHR 277

Savage M, 'The Imposition of Pass Laws on the African Population in South Africa 1916-1984' (1986) 85 African Affairs 181

Scott C and Alston P, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise' (2000) 16 SAJHR 206

Scott J and Sturm SP, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13 Colum J Eur L 565

Sen S, 'Transformative Constitution and the Horizontality Approach: An Exploratory Study' (2019) 10 Indian Journal of Law and Justice 141

Sidhwani P, 'Spatial Inequalities in Big Indian Cities' (2015) 50 EPW 55

Singh G and Das P, 'Building Castles in Air: Housing Scheme for Bombay's Slum-Dwellers' (1995) 30 EPW 2477

Slotterback CS and Lauria M, 'Building a Foundation for Public Engagement in Planning: 50 Years of Impact, Interpretation, and Inspiration From Arnstein's Ladder' (2019) 85 Journal of the American Planning Association 183

Sriraman T, 'Enumeration as Pedagogic Process: Gendered Encounters with Identity Documents in Delhi's Urban Poor Spaces' [2013] SAMAJ <http://journals.openedition.org/samaj/3655> accessed 18 December 2021

Steinberg C, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 SALJ 264

Sturm SP, 'A Normative Theory of Public Law Remedies' (1991) 79 Geo LJ 1355

Sunstein C, 'Preferences and Politics' (1991) 20 Philosophy & Public Affairs 3

Susewind R, 'Muslims in Indian Cities: Degrees of Segregation and the Elusive Ghetto' (2017) 49 Environment and planning A: Economy and Space 1286

Swart M, 'Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor' (2005) 21 SAJHR 215

Taylor H, 'Forcing the Court's Remedial Hand : Non-Compliance as a Catalyst for Remedial Innovation' (2019) 9 CCR 247

Thiruvengadam A, 'Characterising and Evaluating Indian Social Rights Jurisprudence into the 21st Century' (2013)

Tissington K, 'Challenging Inner City Evictions before the Constitutional Court of South Africa: The Occupiers of 51 Olivia Road Case in Johannesburg, South Africa' (2008) 5 Housing and ESC Rights Law Quarterly

——, 'Demolishing Development at Gabon Informal Settlement: Public Interest Litigation Beyond Modderklip?' (2011) 27 SAJHR 192

Tritter JQ and McCallum A, 'The Snakes and Ladders of User Involvement: Moving beyond Arnstein' (2006) 76 Health Policy 156

Urs P, 'Making Comparative Constitutional Law Work: "Naz Foundation" and the Constitution of India' (2013) 46 VRÜ 95

van Bueren G, 'Alleviating Poverty through the Constitutional Court' (1999) 15 SAJHR 52

van der Sijde E, 'Tenure Security for ESTA Occupiers: Building on the *Obiter* Remarks in *Baron v Claytile Limited*' (2020) 36 SAJHR 74

van Wyk J, 'The Role of Local Government in Evictions' (2011) 14 PELJ 50

Vandenhole W, 'Human Rights Law, Development and Social Action Litigation in India' (2002) 3 Asia Pac J Hum Rights Law 136

Vermeule A, 'The Judiciary Is a They, Not an It: Two Fallacies of Interpretive Theory' [2003] University of Chicago Public Law & Legal Theory Working Paper

Waldron J, 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346

Wilson S, 'Breaking the Tie: Evictions from Private Land, Homelessness and a New Normality' (2009) 126 SALJ 270

——, 'Litigating Housing Rights in Johannesburg's Inner City: 2004–2008' (2011) 27 SAJHR 127

——, 'Planning for Inclusion in South Africa: The State's Duty to Prevent Homelessness and the Potential of "Meaningful Engagement"' (2011) 22 Urban Forum 265

Wilson S and Dugard J, 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights Law and Poverty Special Edition' (2011) 22 Stellenbosch Law Review 664

Wilson S, Dugard J and Clark M, 'Conflict Management in an Era of Urbanisation: 20 Years of Housing Rights in the South African Constitutional Court' (2015) 31 SAJHR 472

Woolman S, 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on Barkhuizen' (2008) 125 SALJ 10

Young IM, 'Activist Challenges to Deliberative Democracy' (2001) 29 Political Theory 670

Young KG, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale J Intl L 113

——, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 ICON 385

——, 'The Avoidance of Substance in Constitutional Rights' (2013) 5 CCR 233

Theses

Bhatia G, 'Horizontal Rights: An Institutional Approach' (University of Oxford 2021)

Brickhill J, 'Strategic Litigation in South Africa: Understanding and Evaluating Impact' (University of Oxford 2021)

Mahomedy S, 'The Potential of Meaningful Engagement in Realising Socioeconomic Rights: Addressing Quality Concerns' (Stellenbosch University 2019)

Samtani S, 'The Right of Access to Educational Materials and Copyright: International and Domestic Law' (University of Oxford 2021)

Taylor H, 'Optimisation through Innovation: Judicial Exercise of Discretionary Remedial Power to Enforce the State's Positive Human Rights Duties' (University of Oxford 2020)

Reports

Baindur D, 'Urban Transport in India: Challenges and Recommendations' (Indian Institute for Human Settlements 2014) <http://iihs.co.in/knowledge-gateway/wp-content/uploads/2015/07/RF-Working-Paper-Transport_edited_09062015_Final_reduced-size.pdf> accessed 19 January 2022

Budlender J and Royston L, 'Edged Out: Spatial Mismatch and Spatial Justice in South Africa's Main Urban Areas' (2016) <http://www.seri-sa.org/images/images/SERI_Edged_out_report_Final_high_res.pdf> accessed 30 November 2021

Centre on Housing Rights and Evictions, 'Any Room for the Poor? Forced Evictions in Johannesburg, South Africa' <https://issuu.com/cohre/docs/cohre_anyroomforthepoor_forcedevict> accessed 30 November 2021

——, 'Holding Your Ground: Resisting Evictions in South Africa' <http://abahlali.org/files/Holding_Your_Ground.pdf> accessed 15 January 2022

Census Organisation of India, 'Census 2011' <https://www.census2011.co.in/slums.php> accessed 30 November 2021

Das P and Gonsalves C, 'The Struggle for Housing: A People's Manifesto' (Nivara Hakk Suraksha Samiti 1987) <http://www.nivarahakk.com/publications/Struggle%20for%20Housing%20-%20A%20People%27s%20Manifesto.pdf> accessed 30 November 2021

Friedman S and McKaiser E, 'Civil Society and the Post-Polokwane South African State: Assessing Civil Society's Prospects of Improved Policy Engagement' (Heinrich Boll Stiftung 2009)

<https://za.boell.org/en/2009/11/10/civil-society-and-post-polokwane-south-african-state-assessing-civil-societys-prospects> accessed 18 December 2021

Government of India, Ministry of Housing and Urban Poverty Alleviation, National Buildings Organisation, 'Slums in India: A Statistical Compendium 2015' (2015) <http://nbo.nic.in/pdf/SLUMS_IN_INDIA_Slum_Compendium_2015_English.pdf> accessed 1 February 2021

Housing and Land Rights Network, 'Forced Evictions in India in 2019: An Unrelenting National Crisis' (2020) <https://www.hlrn.org.in/documents/Forced_Evictions_2019.pdf> accessed 30 November 2021

——, 'Forced Evictions in India in 2020: A Grave Human Rights Crisis During the Pandemic' (2021) <https://www.hlrn.org.in/documents/Forced_Evictions_2020.pdf> accessed 30 November 2021

Karuri-Sebina G, '2016 State of South African Cities Report' (SACN 2016) <http://www.socr.co.za/wp-content/uploads/2016/06/SoCR16-Main-Report-online.pdf> accessed 1 February 2021

Khunou K, Potter A and Schreiner B, 'Women with Disabilities and Informal Settlement Sanitation: Implications for Policy and Practice' (SERI 2019) <https://www.seri-sa.org/images/SERI_The_struggle_to_be_ordinary_FINAL_WEB_Spreads.pdf> accessed 20 December 2021

Ndinda C and others, 'A Baseline Assessment for Future Impact Evaluation of Informal Settlements Targeted for Upgrading' (Department of Human Settlements and Department of Monitoring and Evaluation, Government of South Africa 2016)

People's Union for Democratic Rights, 'India Shining: A Report on Demolition and Resettlement of Yamuna Pushta Bastis' (2004) <https://www.pudr.org/india-shining-report-demolition-and-resettlement-yamuna-pushta-bastis> accessed 4 February 2022

'Report of the Standing Committee on Rural Development' (Ministry of Rural Development, Department of Land Resources, Government of India 2011) <https://www.prsindia.org/sites/default/files/bill_files/SCR__Land_Acquisition%2C_Rehabilitation_and_Resettlement_Bill_2011.pdf> accessed 30 November 2021

Royston L and others, 'Here to Stay: A Synthesis of Findings and Implications from Ratanang, Marikana and Siyanda' (SERI 2019) <https://www.seri-sa.org/images/SERI_Synthesis_FINAL_WEB_READY.pdf> accessed 1 February 2021

Socio-Economic Rights Institute, 'Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living' (2018) <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>

——, 'Slovo Park: Some Gains at Last' (SERI 2020) <http://www.seri-sa.org/images/SERI_Slovo_Park_practice_notes_2020_FINAL_WEB.pdf> accessed 20 December 2021

——, 'Con Court Hands down Enforcement Order in Bapsfontein Case' <https://www.seri-sa.org/index.php/more-news/278-con-court-hands-down-enforcement-order-in-bapsfontein-case-29-august-2014> accessed 20 December 2021

——, 'Pheko and Others v Ekurhuleni Metropolitan Municipality' <https://www.seri-sa.org/index.php/19-litigation/case-entries/88-pheko-and-others-v-ekurhuleni-metropolitan-municipality> accessed 20 December 2021

——, 'Slovo Park: 20 Years of Broken Promises' (SERI) <https://www.seri-sa.org/images/SlovoPark_CPN_Final.pdf> accessed 20 December 2021

——, 'From San Jose to MBV 1' (SERI) <http://www.seri-sa.org/images/San_Jose_Practice_notes_FOR_WEB3.pdf> accessed 5 January 2022

Socio-Economic Rights Institute and Community Law Centre, 'Report on the Roundtable Discussion on Meaningful Engagement in the Realisation of Socio-Economic Rights' (2010)

Statistics South Africa, 'Census 2011' (2012) <https://www.statssa.gov.za/publications/P03014/P030142011.pdf> accessed 30 November 2021

——, 'General Household Survey 2017' (2018) <http://www.statssa.gov.za/publications/P0318/P03182017.pdf> accessed 30 November 2021

Tissington K, 'Towards a Synthesis of the Political, Social and Technical in Informal Settlement Upgrading in South Africa: A Case Study of Slovo Park Informal Settlement' <http://rgdoi.net/10.13140/RG.2.1.3679.3847> accessed 20 December 2021

——, 'A Resource Guide to Housing in South Africa 1994–2010: Legislation, Policy, Programmes and Practice' (SERI) <http://www.seri-sa.org/index.php/research-7/resource-guides> accessed 30 September 2018; <http://abahlali.org/node/5538/> accessed 1 February 2021

United Nations Conference on Housing and Sustainable Urban Development (Habitat III), 'Informal Settlements' (2015) Issue Paper No 22

Ziblim A, 'The Dynamics of Informal Settlements Upgrading in South Africa: Legislative and Policy Context, Problems, Tensions, and Contradictions' (Habitat for Humanity International 2013) <https://cps.ceu.edu/sites/cps.ceu.edu/files/attachment/basicpage/143/slum-upgrading-policies-south-africa.pdf> accessed 1 February 2021

Blogs

Bhatia G, 'Horizontality under the Indian Constitution: A Schema' (*Indian Constitutional Law and Philosophy*, 24 May 2015) <https://indconlawphil.wordpress.com/2015/05/24/horizontality-under-the-indian-constitution-a-schema/> accessed 30 December 2021

——, 'What Is the Role of a Judge in a Polyvocal Court? Indian Constitutional Law and Philosophy' (*Indian Constitutional Law and Philosophy*, 1 April 2017) <https://indconlawphil.wordpress.com/2017/04/01/what-is-the-role-of-a-judge-in-a-polyvocal-court/> accessed 30 October 2021> accessed 2 February 2022

——, 'The RTI Judgment: On Proportionality' (*Indian Constitutional Law and Philosophy Blog*, 15 November 2019) <https://indconlawphil.wordpress.com/2019/11/15/the-rti-judgment-on-proportionality/> accessed 25 October 2021

——, 'The Citizenship (Amendment) Act Challenge: Three Ideas' (*Indian Constitutional Law and Philosophy*, 21 January 2020) <https://indconlawphil.wordpress.com/2020/01/21/the-citizenship-amendment-act-challenge-three-ideas/> accessed 18 December 2021

Charalwar V, 'Slum Rehabilitation and Constitutional Rights – A Bewitching Dream' (*Indian Constitutional Law and Philosophy*, 5 June 2020) <https://indconlawphil.wordpress.com/2020/06/05/guest-post-slum-rehabilitation-and-constitutional-rights-a-bewitching-dream/> accessed 20 December 2021

Dugard J, 'South African Supreme Court of Appeal Confirms Principle of "Constitutional Damages" for Homeless People Whose Property Is Destroyed by State' (*OxHRH Blog*, 31 May 2019) <https://ohrh.law.ox.ac.uk/south-african-supreme-court-of-appeal-confirms-principle-of-constitutional-damages-for-homeless-people-whose-property-is-destroyed-by-state> accessed 15 January 2022

Garg I and Datta S, 'A Case for the Inclusion of the Right to Public Participation under Article 21 of the Indian Constitution: A Comparative Constitutional Analysis' (*ICONnect*, 7 October 2021) <http://www.iconnectblog.com/2021/10/a-case-for-the-inclusion-of-the-right-to-public-participation-under-article-21-of-the-indian-constitution-a-comparative-constitutional-analysis/> accessed 4 February 2022

Kamil M, 'The Aadhaar Judgment and the Constitution II: On Proportionality' (*Indian Constitutional Law and Philosophy Blog*, 30 September 2018) <https://indconlawphil.wordpress.com/2018/09/30/the-aadhaar-judgment-and-the-constitution-ii-on-proportionality-guest-post/> accessed 15 January 2022

Rai A, 'Proportionality in Application – An Analysis of the "Least Restrictive Measure"' (*Indian Constitutional Law and Philosophy Blog*, 8 May 2020) <https://indconlawphil.wordpress.com/2020/05/08/guest-post-proportionality-in-application-an-analysis-of-the-least-restrictive-measure/> accessed 15 January 2022

Van der Berg S, 'Conceptualising Meaningful Engagement in South Africa: Eviction Cases' Exclusive Gem?' (*OxHRH Blog*, 16 November 2012) <http://ohrh.law.ox.ac.uk/Conceptualising-Meaningful-Engagement-In-South-Africa-Eviction-Cases-Exclusive-Gem/> accessed 15 January 2022

Other Internet Sources

Ambedkar B, *Annihilation of Caste* (3rd edn, 1944) <https://ccnmtl.columbia.edu/projects/mmt/ambedkar/web/readings/aoc_print_2004.pdf> accessed 4 February 2022

Atelier Populair Graphics Centre É des B-A de la S and É des AD de la S, 'Poster'

baseMjondolo A, 'Evictions' <http://abahlali.org/taxonomy/term/evictions/evictions/> accessed 30 November 2021

——, 'Arrests' <http://abahlali.org/taxonomy/term/arrests/arrests/> accessed 10 January 2022

——, 'Assassinations' <http://abahlali.org/taxonomy/term/assassinations/assassinations/> accessed 10 January 2022Housing and Land Rights Network, 'Homelessness' (30 November 2021) <https://www.hlrn.org.in/homelessness>

Robeyns I, 'The Capability Approach' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2016, 2016) <https://plato.stanford.edu/archives/win2016/entries/capability-approach/> accessed 30 November 2021

Zikode S, 'Meaningful Engagement' (Roundtable discussion on meaningful engagement in the realisation of socio-economic rights, 24 July 2009) <http://abahlali.org/node/5538/> accessed 15 January 2022

——, 'The Power of Abahlali and Our Living Politic Has Been Built with Our Blood' (Thinking Freedom from the Global South, 17 February 2021) <http://abahlali.org/node/17219/#more-17219> accessed 18 December 2021

Newspaper Reports and Opinion Pieces

Azizur Rahman S and Ellis-Petersen H, '"Do We Not Have Any Rights?" Indian Muslims' Fear after Assam Evictions' *The Guardian* (18 October 2021) <https://www.theguardian.com/world/2021/oct/18/do-we-not-have-any-rights-indian-muslims-fear-after-assam-evictions> accessed 30 November 2021

Dash DK, 'Killer Indian Roads Claim Lives of 56 Pedestrians Daily' *The Times of India* (1 October 2018) <http://timesofindia.indiatimes.com/articleshow/66021092.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 15 January 2022

——, '62 Pedestrians Die Daily in India, up 84% in 4 Years' *The Times of India* (18 November 2019) <http://timesofindia.indiatimes.com/articleshow/72101003.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 15 January 2022

De Wet P, 'The Curious Case of the Apartheid Dolomite' *Daily Maverick* (16 September 2011) <https://www.dailymaverick.co.za/article/2011-09-16-the-curious-case-of-the-apartheid-dolomite/> accessed 15 January 2022

Devulapalli S, 'Geography of Caste in Urban India' *Livemint* (New Delhi, 29 September 2019) <https://www.livemint.com/news/india/the-geography-of-caste-in-urban-india-1569564507580.html> accessed 1 February 2021

'High Court Restrains Authorities from Evicting Occupants of Sheds in Bellandur' *The Hindu* (Bengaluru, 22 January 2020) <https://www.thehindu.com/news/cities/bangalore/high-court-restrains-authorities-from-evicting-occupants-of-sheds-in-bellandur/article30627008.ece> accessed 18 December 2021

'High Court Victory for Occupiers Comes in The Nick of Time' (*Lawyers for Human Rights*, 24 January 2022) <https://www.lhr.org.za/lhr-news/press-statement-high-court-victory-for-occupiers-comes-in-the-nick-of-time/>

'Houses of 25 Dalits Set on Fire in Katihar Village' *Hindustan Times* (Patna, 11 June 2019) <https://www.hindustantimes.com/patna/houses-of-25-dalits-set-on-fire-in-katihar-village/story-oNkoVdmlCW9Pzi4eM0H9YN.html> accessed 30 November 2021

Jha S, '1.77 Million People Live without Shelter, Albeit the Number Decline over a Decade' *Business Standard* (New Delhi, 6 December 2013)

'Karnataka High Court Pulls up Cops for Eviction after Bangladeshi Tag' *The Indian Express* (Bengaluru, 4 February 2020) <https://indianexpress.com/article/india/karnataka-high-court-pulls-up-cops-for-eviction-after-bangladeshi-tag-6249678/> accessed 18 December 2021

Katakam A, 'Ground Realities' *Frontline* (29 June 2007) <https://frontline.thehindu.com/other/article30191896.ece> accessed 15 January 2021

Konda G, 'Slum Numbers Show Cities Don't Help Dalits Shed Caste' *The Indian Express* (29 November 2020) <https://indianexpress.com/article/opinion/columns/slum-numbers-show-cities-dont-help-dalits-shed-caste-7072206/> accessed 1 February 2021

Rukmini S, 'India Walks to Work: Census' *The Hindu* (New Delhi, 14 November 2015) <https://www.thehindu.com/data/india-walks-to-work-census/article7874521.ece> accessed 15 January 2022

S R, '65 Million People Live in Slums in India, Says Census Data' *The Hindu* (New Delhi, 1 October 2013) <https://www.thehindu.com/todays-paper/tp-national/tp-newdelhi/65-million-people-live-in-slums-in-india-says-census-data/article5188234.ece> accessed 30 November 2021

'UP Elections: Eviction Notices, Harassment and Intimidation - The Plight of Chitrakoot Tribals' *Newsclick* (2 February 2022) <https://www.newsclick.in/elections-eviction-notices-harassment-and-intimidation-plight-chitrakoot-tribals>

Wilson S, 'ConCourt Falls Short of Farm Dweller Act's Aims' *Mail & Guardian* (18 July 2017) <https://mg.co.za/article/2017-07-18-concourt-falls-short-of-farm-dweller-acts-aims/> accessed 20 December 2021