Demolishing Housing Rights in the Name of Market Fundamentalism: The Dynamics of Displacement in the United States, India, and South Africa

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I. INTRODUCTION

The right to housing is recognized as a fundamental human right within the international human rights system, initially adopted in 1948 by the United Nations General Assembly in Article 25 of the Universal Declaration on Human Rights as an essential aspect of an adequate standard of living, and reaffirmed in Article 11 of the International Covenant on Economic, Social and Cultural Rights in 1976. However, as is the case with most rights, housing rights violations occur throughout the world. These violations include, inter alia, homelessness, forced eviction, demolition of shacks, lack of adequate low-income housing supply, and so forth (UN-HABITAT 2009). An evolving jurisprudence intended to address these violations has developed in a number of countries (UN-HABITAT 2002). Although the right to housing is no different from a jurisprudential perspective than other human rights – insofar as, to fully realize a right to housing, there must be universal access that is adequate and afforded to all without discrimination – on a practical level, housing poses a particular set of challenges to which human rights law and policy work are currently limited in their ability to respond.

Housing situations may differ across regions, countries, provinces, states, cities and towns, but most places have at least two things in common. First, the poor encounter both the greatest barriers to accessing adequate housing as well as the greatest tenure insecurity and instability (i.e., the most forced displacement) (Advisory Group on Forced Evictions [AGFE] 2007). Second, unlike in education and health care, for example, there are few if any publicly designed or regulated comprehensive national systems for housing that ensure decent access and stability for all. Formal, lawfully occupied housing is primarily market based, with some supplementary government housing for poor and eligible members of society. As a result, housing is often an object of investment as much as a home or a part of a community. Although informal settlements exist, there is generally little if any legal protection extended by the state to "unlawful" occupants; even within the formal market, security of tenure varies based on an occupant's status as an "owner" or "renter."

This poses a serious challenge to human rights activists advocating for laws, policies, and approaches that challenge the current housing paradigms. Within the human rights framework, needs, including basic and adequate housing, create obligations on the part of the government to not only fulfill human rights, but also to respect and protect them. That is, not only is the government required to refrain from forcibly evicting inhabitants itself, it must also prevent private actors – individuals, corporations, and any other institution – from doing the same. Despite this clear obligation to regulate the market, often very little is done.

Even where poor or economically distressed individuals have ownership rights – arguably the highest level of legal protection enforced by the state – displacement still occurs. The ongoing foreclosure crisis in the United States, as well as elsewhere, is a prime example. In this context,

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1 For example, according to the Executive Summary Report of the Advisory Group on Forced Evictions (AGFE) to the Executive Director of UN-HABITAT (AGFE 2007, 2), forced evictions will affect 18-70 million people worldwide between 2000 and 2020, as it has become "common practice in lieu of urban planning and inclusive social policies."

2 In a 2011 report, UN-HABITAT noted that force evictions are certainly on the rise across the globe, and that urban evictions, in particular, have seen a dramatic increase in recent years with the rising number of projects financed in cities.

3 There are many government programs to create access to housing for the poor, from government housing to subsidies. However, these tend to be patchwork programs to address gaps left by the market, rather than a systemic approach. Considered another way, Kenna (2008) suggests that the development and maintenance of a housing market require legal instruments and state involvement in five essential categories: private property, housing finance, residential infrastructure, regulatory, and housing subsidy/public housing.

4 For example, as of April 2, 2012, the U.S. Department of Housing and Urban Development (HUD) lists generally on its Web site: eligibility criteria, income limits, and waitlist process for its public and subsidized housing programs. HUD subsidizes roughly 3 million low-income housing units as of February 2012 (HUD 2012).

5 Indeed, the global real estate investment trust (REIT) industry has more than doubled in the last ten years. There are 134 publicly traded U.S. REITs as of April 2, 2012. REITs are corporate entities that facilitate capital investment in real estate, designed to derive income from rents and mortgage interest.

6 AGFE (2007) identifies as a central cause of evictions, limitations to acquiring property rights, and inter alia, security of tenure, via the private market.
the role of private debt has led to tenuous living situations and massive displacement. In particular, lower-income owners in the United States (as well as women and people of color) deemed “risky” by the market were forced to pay high, often fluctuating, interest rates and higher monthly payments than those with greater financial means (Fishbein and Bunce 2005). Moreover, in areas with rising land values, even debt-free owners may be subject to eviction as a result of rising property taxes and service costs, which can lead to unaffordable conditions and displacement. Thus, ownership, as commonly conceived of today, is not a panacea. Where people living in poverty are renters instead of owners, or informal occupants without any formal legal recognition, levels of protection against displacement are even lower. Irrespective of the status of inhabitants, current legal frameworks do not appear to protect against the massive levels of displacement witnessed globally (AGPF 2007).

This does not necessarily further an argument against private homeownership. In most places, people have a strong psychological and social investment in owning their homes. The sense of autonomy and stability associated with homeownership is important and cannot be underestimated. Yet, within that notion of property ownership is a “bundle of rights,” and most of these rights (e.g., the right to use and enjoy the property in privacy) are not intrinsically tied to making a profit from the resale of property. For many, the right to profit off the sale of their home is not a central concern; rather, the social, cultural, and economic values derived from its use are more important.

As countries around the world struggle through a global economic crisis that many ascribe to the deregulation of the housing market under neoliberal economies (Kenna 2008), this is an important moment to raise the question of what the relationship should be between housing and the market. The neoliberal worldview has become increasingly influential since the 1980s and, in broad terms, posits that markets have self-correcting mechanisms that function best without regulation, and that governments are not as well situated as the private market to address needs in a vast range of sectors, including housing (Peet and Hartwick 2009). Therefore, a neoliberal restructuring of economies mandates deregulation and privatization (Peet and Hartwick 2009).

As human rights lawyers and practitioners, we recognize that these central assumptions of neoliberalism have significant relevance for the legal concepts necessary to ensure government policies and practices meet obligations to both respect and protect the right to housing (Kenna 2008). How we resolve our understanding of the relationship between the state and the market, as well as the relationship among rights such as the right to property and profit and the right to housing as a component of the right to life, is critical to ensuring stable communities and the protection of security of tenure for vulnerable families and individuals. Thus, the housing market and financial apparatuses that have been built up around it should be examined extremely closely.

It appears that, rather than coexist in a careful balance, a right to housing has been allowed to exist only within small spaces not already claimed by market interests. Indeed, housing rights have been shaped by (and have accommodated to) these forces, finding minimal recognition when forced to come head to head with an increase in the profitability of land and/or the economic benefits of development to wealthy elites in society, both highly interrelated phenomena.

These concerns have been heightened by increasing wealth inequality in countries and across countries, which many ascribe to neoliberal economic policies (Mahmud 2010). In countries where poverty is low and there are also low levels of wealth inequality, there is far greater access to housing even though a great deal of housing is market global corporations and the globalization of housing finance and real estate investments, as well as privatizations.

Kenna (2008, 424), for example, quotes a European Federation of National Organizations Working with the Homeless (FEANTSA) report from 2005, which raised the following issue: “Where states were once ‘providers’ they now increasingly adopt the role of ‘enablers’, where they had little history of involvement, their new roles take on a demonstrable ‘support the market’ function.”

According to Mahmud (2010, 23), “As interests of global finance capital took precedence over survival needs of the poor, the impact on the vulnerable was quick, and the main single cause of increases in poverty and inequality during the 1980s and 1990s was the threat of the state.”
based. In democracies with adequate levels of wealth equitably distributed, the market may in fact function to meet housing needs overall. In countries where poverty is prevalent but wealth inequality is low, housing struggles remain serious; however, the nature of the threat to housing rights changes. In countries where there is significant wealth inequality (always paired with significant poverty and representing the vast majority of countries in the world), market interests in the form of investment and development pose the most constant threat of displacement for poor communities, regardless of whether they own or rent formal housing or live in informal settlements.

With a view to examine these dynamics more closely, this chapter will briefly focus on three case studies – Mumbai, Chicago, and Johannesburg – where the housing rights of poor communities have come into direct conflict with market interests. Two of these communities – Mumbai and Chicago – were displaced; one is fighting to remain – Johannesburg. Across the world, poor communities are routinely forcibly removed from their homes, without voice or vote over what happens to them or to the land and homes they are forced to leave. The three case studies were chosen because they highlight specific occasions where communities attempted to use legal avenues to prevent their displacement, but the legal framework in place was inadequate to meet the obligations of government to protect residents from displacement of market forces. This chapter will discuss commonalities and differences between the case studies, and assess where existing legal concepts and avenues may be of use or fall short. Finally, this chapter will suggest some important concepts, currently absent in law and policy, which could assist in developing a systemic and coherent approach to protecting housing as a human right.

a. Mumbai, India: Whose World-Class City?

Mumbai is described as “the financial hub” of India, and seeks to be seen as a “world-class city,” with companies from across the world submitting proposals and bids to the Maharashtra State in the hopes of redeveloping the city (Whiting 2008). In 2003, a global management consulting firm issued an influential report – *Vision Mumbai* – detailing a comprehensive plan for turning Mumbai into a world-class city by 2023 (McKinsey & Company). *Vision Mumbai* identifies housing and land availability as central obstacles to the city’s achievement of world-class status, and recommends increased private-sector participation in slum redevelopment through the government’s adoption of market principles. The report proposes such model policies as government auctions of public land as an incentive for private investment in the development of low-income housing (McKinsey & Company 2003).

Not surprisingly, with scarce land to develop in Mumbai, global investors have placed significant pressure on Maharashtra State to address informal settlements on government-owned property in the city center (McKinsey & Company 2003). At the same time, public attitudes and policies related to the city’s slum dwellers have undergone a significant shift. Many of Mumbai’s slums have been there for generations. Through the 1970s and 1980s, the housing rights of slum dwellers were met with some political and legal support. Nonetheless, with the beginning of the 1980s – also coincidentally the beginning of the neoliberal period – the tide began to turn.

On July 13, 1981, the then-Chief Minister of Maharashtra Shri A.R. Antulay made an announcement that all slum dwellers in the city of Mumbai would be evicted forcibly and deported to their respective places of origin or removed to places outside the city. In 1985, the legal groundwork for mass displacement was established, despite what was still sympathetic discourse. In Olga Tellis & Others v Bombay Municipal Council, the Supreme Court of India found that evicting slum dwellers – who created their livelihoods out of their makeshift homes – involved the right to life, stating that:

16 Sweden, Denmark, and Norway’s combined average is slightly more than 20,000 homeless people (1 in 1,000 inhabitants) (Benjamin and Dyb 2008).
17 For example, in Serbia there is a severe shortage of units, but most evictions and displacement stem from discrimination against minorities rather than economic incentives (Cirkovic and Terzic 2010).
18 According to some, neoliberal policies advance particular understandings of development and poverty that “disregard the social context of provision, the lived experiences of the poor and dismiss and/or reinforce the way in which deprivations are constituted” (Higgott and Weber 2005, 435, 442).
19 In the United States, this is currently also hitting the middle class hard in the form of foreclosed auctions. See Goodman (2011).
An equally important facet of that right [to life] is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live.24

The Supreme Court also noted that this was a matter in “which the future of half of the city’s population is at stake.”25 Still, the Court found that their presence was unauthorized and therefore illegal:

There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to commit an offence or intimidate or annoy any person, which is the gist of the offence of “Criminal trespass” under section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachment committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice.26

Ultimately, the Court ruled that some slumdwellers – those who had been documented in a 1976 census and had identity cards – must be resettled and given alternative accommodation, and could not be evicted without process and notice. This falls far short of acknowledging a right to housing for the average resident (or, at least, the average resident in the lower half of the socioeconomic scale). Moreover, in practice, the slumdwellers were largely evicted without resettlement assistance (Centre for Development and Human Rights 2001). Thus, although the case contextualized the slumdwellers in a sympathetic manner, affording them some procedural rights, in reality this case became a “green light” for those looking to move the interests of outside investors and wealthier classes in the redevelopment of Mumbai.27 By the end of the 1990s, slum redevelopment schemes were being tailored to attract private investors.28

The rhetoric of court cases going forward in time also reflects the loss of ground politically for the slumdwellers. In 2000, the Supreme Court shifted its paradigm dramatically and declared that, “Rewarding an encroacher on public land with an alternative free site is like giving a reward to a pickpocket for stealing.”29 Although previous cases supported the displacement as a “necessary evil,” this change in rhetoric fueled an ever-present tactic against the poor: criminalization and exclusion as full rights holders. Five years later, the state began penalizing so-called illegal encroachers for occupation of public lands by denying slumdwellers voting rights, thus stripping them of recognition as legitimate members of society (D’Monte 2004).

In 2004, the state, with the assistance of the World Bank, began implementing Vision Mumbai.30 To make land available for the myriad projects proposed to transform the city, the state began to rid government property of encroachers through demolition drives supervised by the state’s police force (Katakam 2005). In the first year alone, more than 32,000 homes were demolished, displacing more than 400,000 people, with tens of thousands additional demolitions completed in each subsequent year (Kothari 2006). Under national regulation, “eligible” slumdwellers subject to demolition were still, in theory, entitled to resettlement in free government housing (COHRE 2002). The documentation required to establish eligibility, because of difficulty of proof and costs, has rendered as many as 70% of residents ineligible for resettlement and, ultimately, homeless (COHRE 2002). Living conditions have also become worse for those moved to resettlement sites far from work in the city center with few amenities, including water (COHRE 2002).

b. Chicago, Illinois: Left out of the Loop

Throughout the 1990s, Chicago increased in population, and the value of housing rose, as was the case in most cities in the United States (Levy, Comey, and Padilla 2006).31 In part, the rising prices were driven by the “speculative fever” of private investors during the real estate boom

24 Ibid., 22.
25 Ibid.
26 Ibid., 31.
28 Mukhija (2003) notes that most redevelopment projects on public land in Mumbai resulted in the transfer of land to private actors.
30 For example, the World Bank’s Web site establishes the Bank’s contributions at approximately $1.542 million to the Mumbai Urban: Transport Project. George Peterson (2006) explains the role of public-to-private land sales.
31 Levy et al. (2006) used data from the Urban Institute’s Neighborhood Change Database, which is based on 1990 and 2000 U.S. Censuses.
However, growth did not happen uniformly across the city (Silva 2011). Neighborhoods bordering Lake Michigan north of the central business district (known as the Loop) and those immediately south and west of the downtown area were focal points of the city's housing market boom (Silva 2011). One of the Chicago Housing Authority's (CHA) largest public housing complexes — Cabrini-Green — covered tens of acres in the middle of the heavily gentrified Near North Side.

In 1992, Congress created the Urban Revitalization Demonstration program, commonly known as the Housing Opportunities for People Everywhere or HOPE VI program, to redevelop "severely distressed" public housing (Salama 1999). In Chicago, before comprehensive demolition plans were even announced, real estate speculators began purchasing property adjacent to the Cabrini-Green projects with the explicit expectation that the complexes would be removed (Fleming 2008). After sixteen years of public and legal battles against displacement, the last resident of Cabrini-Green's high- and mid-rise apartment buildings (most of whom were there as legal tenants renting government housing) was moved out in December 2010 (Terry 2010). The New York Times reported:

For pundits and politicians, the once-sprawling development on the Near North Side has long been a symbol — and a scapegoat — for all that is wrong with public housing. They saw Cabrini, and the city's other massive high-rise public housing developments, as both houses for drugs, gangs and broken families, their dense poverty unsustainable. They will shed no tears

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when the 15-story building at 1230 North Burling Street comes down next year.

But for the last tenant, Annie Ricks, a 54-year-old teacher's aide and grandmother of 10, it requires all of her strength and faith not to simply sit on the edge of her bed and weep. For her, Cabrini isn't a symbol. It is home. Now it is gone (Terry 2010, 1).

During the 1990s, public housing gained a widespread and generally undeserved negative reputation. With unsupported arguments that public housing caused crime and self-perpetuating concentrations of poverty, political and business leaders set out to eliminate public housing — in particular public housing in high-value areas — in the United States. In New Orleans, one of the primary arguments for eliminating the remaining public housing in the city despite the severe housing shortage after Hurricane Katrina was that it brought crime to the city. As witnessed in many parts of the world, criminalization was a central tactic used to displace multigenerational communities living in public housing stock across the United States.

In Chicago, Cabrini-Green in particular became synonymous with this negative image, thanks to high-profile crimes that received national attention. This targeting of Cabrini-Green occurred despite evidence that its residents did better on most indicators than residents in public housing that had been built far from high-opportunity areas (Terry 2010). The mainstream media in Chicago generally promoted this
narrative of Cabrini-Green as an untenable place to live, needing to be torn down, but residents tried to dispute this. The more independent (and often African-American) progressive media also took a different position:

More to the point, HUD [the U.S. Department of Housing and Urban Development, the federal agency responsible for administering low-income housing programs] came to Chicago to bury an idea. One enshrined in a series of United Nations declarations and international covenants reaching back to the 1940s. One instituted by the practices of about seven decades of U.S. housing policy, beginning with the Depression-era's U.S. Housing Act of 1937, which declared it to be the “policy of the United States [Government] to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of lower income,” and to produce a “decent home and suitable living environment for every American family” (Peterson 1997).

Moreover, although the government kept insisting the demolition was for the good of the residents, property owners and developers in the area were far more frank about the underlying motivation for tearing down Cabrini-Green, as opposed to other complexes that were far more troubled but far from the city center. As one independent media source reported in 1997:

You can’t miraculously invite market-rate people to buy on a nine-acre island in the shadow of Cabrini, developer Dan McLean noted last year. “There’s just no point because it wouldn’t fly.” Mary McGinty, the president of the Near North Property Owners Association, was equally frank. “Middle-class and upper-class people won’t move into Cabrini if it’s surrounded by buildings that are a problem,” she observed. “The majority of Cabrini-Green needs to be pulled down” (Peterson 1997).

Demolition of Chicago’s large, centrally located public housing was accomplished both by de facto – or constructive – demolition and demolition by bulldozer. In 1996, HUD issued new eviction guidelines to local public housing authorities (PHAs). The “one-strike” policies encouraged PHAs to develop and enforce zero-tolerance rules, which gave PHAs the authority to evict residents based solely on allegations of criminal activity – even if charges were dropped or residents were affirmatively cleared – as well as a range of fairly ordinary human behavior, including such things as “poor housekeeping,” using “abusive language” with a PHA employee, or missing two appointments with a PHA representative (Mahmud 2010).45

Furthermore, the U.S. Supreme Court upheld evictions under the one-strike policy that were based on a guest or family member’s violation of the rules, even where the tenant had no knowledge.46

Between 1996 and 1998, occupancy rates in CHA properties declined by more than 20% (Rogal 2007). In 1997 alone, the CHA, wielding its new authority under the one-strike law, filed evictions against more than a quarter of the families living in the Cabrini-Green Homes Extension, a mix of mid- and high-rise buildings on the city’s Near North Side (Rogal 2007). This compared with the less than 1% filed at Altgeld Gardens on the far South Side, an area removed from gentrification pressures (Rogal 2007). At its peak, Cabrini-Green housed as many as 18,000 people, but by the time the city announced a comprehensive redevelopment plan, only about 6,000 people remained.47

In 1998, the HOPE VI redevelopment tools were made permanently available to PHAs through HUD (Salama 1999). To date, HOPE VI provides grants to tear down severely distressed public housing units (a term that includes social connotations related to theories of crime and poverty concentration) and replace them with mixed-income developments (National Housing Law Project et al. 2002).48 A central feature of the HOPE VI redevelopment model is its requirement of PHAs to retain private developers, leverage private investment, and enter the private real estate market.49 In 2000, the CHA adopted the HOPE VI-funded Plan for Transformation, a ten-year redevelopment effort to replace all of Chicago’s public housing with mixed-income housing. This has resulted in the demolition of roughly 20,000 public housing units across Chicago.50

Roughly 75% of all CHA families have expressed an interest in returning to their old neighborhood, yet fewer than 20% will be able to return


This decision stated that the Anti-Drug Abuse Act of 1988 allows local PHAs to evict tenants for drug-related activity of non-tenant relatives or guests, regardless of whether tenants know, or should have known, about the activity.


46 The National Housing Law Project et al. (2002) notes both the loose nature of the definition of “severely distressed” and HUD’s shift away from the “most severely distressed” complexes.

47 National Housing Law Project et al. (2002) cites the notes of auditors from the General Accounting Office and HUD’s inspector general finding a shift in the HOPE VI program toward incentive payments with the greatest potential to attract private investment, not the most in need.

because of the higher rents of replacement units, in addition to prohibitive eligibility requirements for low-income families (Venkatesh and Celimli 2004). Although many families threatened with eviction walked away from their units without housing vouchers (public subsidies that low-income families must use on the private market), those who did take a voucher faced new challenges on the private market, given the insufficient supply of available affordable units (Popkin et al. 2004). More than 90% of CHA residents have been resegregated to high-poverty, high-crime neighborhoods under the Plan for Transformation (Fischer 2003).

Although the residents engaged in a sixteen-year legal battle, the grounds upon which they brought the lawsuit did not include a right to housing or any argument involving the positive obligation of the government to respect residents' rights to remain. This is because there is no right to housing recognized in the U.S. Constitution or in most state constitutions. Instead, a great deal of the litigation stemmed from a 1969 consent decree that was still in effect in order to protect residents from racial discrimination. Although most public housing constituted primarily poor African Americans, the location of Cabrini-Green appeared controversial from the start, and the government initially wanted to move mostly white families into the complexes, claiming it was necessary in order to avoid a hostile and perhaps violent reaction from the neighboring communities. This was rejected as unconstitutional by the courts, and a complex consent decree and receivership were set up to protect against discrimination.

Thus, the focus of the litigation once the displacement plans were in place was whether the displacement would move residents into more segregated housing situations in violation of the 1969 consent decree

51 For instance, in 1997, 86.3% of those who moved out of Cabrini did not leave with Section 8 vouchers (Rogl 2007).

52 Popkin et al. (2004) found that former public housing residents face barriers to finding new stable homes in right private rental markets. These include stigma related to public housing special needs (e.g., large families, a member with disabilities), as well as increased likelihood of housing instability.

53 According to Fischer (2003), 78% of the involuntarily displaced families have been moved to census tracts in which the racial composition is more than 95% African American. More than 86% of the families have been moved to census tracts in which the racial composition is between 80% and 100% African American, and more than 93% have been moved to census tracts in which the racial composition is more than 90% percent African American.


(Wilen 2006). Additionally, the local housing agency had entered into a contract regarding relocation, and the litigation was also focused on these contractual rights arising from the agreement between the local housing agency and the Local Advisory Council, which represented residents. Another focus of the various lawsuits was whether the local government agency had meaningfully engaged residents in the relocation plans, in particular to avoid racially discriminatory relocation. A review of the cases finds that most of the decisions hinged on procedural technicalities with no emphasis on the right of residents to live in a stable community or to, in fact, have access to basic and decent housing at all.

c. Johannesburg, South Africa: Resisting Inner-City Evictions

In the two case studies previously described, urban centers became more attractive to private investment over time. In Johannesburg, which bills itself as a “world-class African city,” the local municipality embarked on a concerted process of inner-city regeneration in 2003 with the launch of its Inner City Regeneration Strategy. The aim was to stimulate property values in the inner city by encouraging private-sector investment in the urban core, an area of around 12 square kilometers, which had experienced a period of decline during the 1990s. When apartheid influx controls fell away in 1986, many African people, previously barred from living in the city center, began to move into the Johannesburg inner city. There was a rapid increase in demand for housing, and many property owners began to charge exorbitant rents to African tenants who moved into the inner city in the late 1980s and early 1990s (Wilson 2011). In response to the influx of black residents, white residents in neighboring apartments would often move out, rather than share their living space with black people. According to Stuart Wilson:

While black tenants in the inner city were initially relatively affluent, profiteering by landlords meant that even salaried black tenants found it difficult to rent flats and/or houses without subletting their properties to other households and groups. In many residential blocks of flats, the consequent overcrowding put pressure on infrastructure and services in the inner city.

56 See, for example, Calvini-Green Loc. Advisory Council v. Chicago Housing Authority, No. 64 C 3792 (N.D. Ill. 2008).

57 See, for example, Calvini-Green Loc. Advisory Council v. Chicago Housing Authority, No. 96 C 6949 (N.D. Ill. 1997).

58 See Ngwabi (2009).

59 Ibid.

60 See, for example, Calvini-Green Loc. Advisory Council v. Chicago Housing Authority, No. 64 C 3792 (N.D. Ill. 2008).
Demand for water and electricity skyrocketed, while lifts and sewerage systems struggled to cope. This led to a decline in the living environment in many residential areas of the Johannesburg inner city (Wilson 2011, 132).

A report published by the Centre on Housing Rights and Evictions (COHRE) in 2005 estimated about 67,000 people living in so-called bad buildings in the inner city of Johannesburg, many of whom were “paying no rentals or rentals (to slum lords) at rates far below market rates for residential accommodation in the inner city” (Wilson 2011, 134).

Between 2002 and 2006, mass evictions in the inner city of Johannesburg were a regular occurrence, and were presented as “a necessary corollary of development and rejuvenation” (Wilson 2011, 135). Property developers moved in to buy so-called bad buildings and convert them to middle- to upper-income accommodation, unaffordable to those families and individuals currently living there. The government evicted people on a regular basis from state-owned buildings on health and safety grounds, using a piece of national legislation called the National Building Standards and Building Regulations Act 105 of 1977 (NBRA). This process commenced with the issuing of a notice in terms of section 12(4)(b) of the NBRA, declaring a building unfit for occupation and ordering all its residents to vacate the building within one week of the date of the notice. It is estimated that between 2002 and 2006, about 10,000 residents of 122 properties in the inner city of Johannesburg were evicted in this way. Evictions were not only state initiated; private-led evictions increased considerably over the years, as developers began buying properties in the inner city.

This mechanism was an effectively speedy bypass to some of the obstacles posed by South Africa’s more progressive national housing and eviction laws, which include a constitutional right to adequate housing and a clause that prescribes that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances” (Constitution of the Republic of South Africa 1996, para. 26(3)). In terms of the latter, South Africa has national legislation that provides both procedural and substantive protections for unlawful occupants facing eviction from privately or state-owned

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60 These figures are based on the outcome of an access to information request filed with the City of Johannesburg during 2006. See also Wilson (2006).

61 These properties were, in effect, subsidised by the state through the Urban Development Zone tax incentive, which is a tax allowance that covers an accelerated depreciation of investment made in either the refurbishment of an existing property or the creation of new developments within the inner city of Johannesburg.

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land; the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998. In response to the rampant inner-city evictions and the recognized need for support to inner-city tenants, a community-based group called the Inner City Resource Centre (ICRC) emerged. In 2005, the ICRC began linking inner-city occupiers with public interest lawyers to challenge the mass evictions, and numerous challenges to eviction applications were launched. Two important precedent-setting cases in this regard are the Olivia Road and Blue Moonlight cases.

The Olivia Road case involved the city attempting to evict more than 300 people from two dilapidated buildings in the inner city. The case was first heard in the Johannesburg High Court in February 2006, after which it was appealed twice and landed in the Constitutional Court in August 2007. The Court handed down an interim order requiring the parties to “engage with each other meaningfully” in an effort to resolve the differences and difficulties aired in the application in light of the values of the constitution. Negotiations were subsequently held between the parties and a settlement agreement was reached between the occupiers and the city, which provided inter alia that the city would install temporary interim basic services at the two buildings and provide the occupiers of the properties with accommodation in two refurbished inner-city buildings, on condition that they agreed to vacate the current buildings permanently and pending the formulation of permanent housing solutions for the occupiers.

The Constitutional Court endorsed the settlement agreement and handed down its judgment in February 2008, although much of the fate of the occupiers of the two buildings in question had already been negotiated as per the settlement agreement. The judgment discussed broader issues relating to inner-city evictions by local authorities, emphasizing that “the City must take into account the possibility of homelessness of any resident consequent upon a Section 12(4)(b) [in terms of the NBRA] eviction in the process of making the decision as to whether or not to proceed with the eviction” (Olivia Road 2008, para. 46). Perhaps the most important aspect of the judgment was the stress it placed on the need for “meaningful engagement” between local authorities and occupiers in the event of a possible eviction. The judgment criticized the

62 Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others 2008 (3) SA 268 (CC).

63 Ibid.

64 The court stated that some of the objectives of a two-way process of meaningful engagement would be to take into account: the potential consequences of an eviction on the
city’s failure to facilitate “structured, consistent and careful engagement” during the implementation of its Inner City Regeneration Strategy, when it “must have been apparent that eviction of a large number of people was inevitable.”

The court chose not to pronounce on the question of permanent housing solutions for poor people living in the inner city, and accepted the city’s willingness to engage with the residents as evidence of its good faith to further develop this plan in the future. Further, the court made no mention of the proximity issue in relation to the alternative accommodation, which could have acknowledged the importance of housing poor people near their places of work and livelihood opportunities, and the potential for gentrification of Johannesburg’s inner city as a result of one-sided urban regeneration strategies. The occupiers were eventually relocated by the city to the new buildings, where they currently reside on a temporary (albeit de facto permanent) basis, as no permanent housing solutions have been provided.

In the Blue Moonlight case, which concerns a community of eighty-six poor people living in a disused industrial building, a private developer attempted to evict the occupiers in 2006 after buying the property. The occupiers challenged the eviction application, arguing that they could not be evicted unless and until the City of Johannesburg discharged its constitutional obligation to provide them with temporary alternative accommodation. The occupiers joined the city to the proceedings and sought an order compelling the city to report on what steps it had taken, and would in future take, to provide accommodation to the occupiers (Tissington and Wilson 2011). The case was appealed to the Constitutional Court, which handed down a remarkable judgment on December 3, 2011, that solidified obligations on the part of the city to not render occupants homeless by eviction. The court ordered the eviction of the occupiers in fourteen days, but only after the city provided those occupiers who were in need with temporary accommodation “in a location as near as possible to the areas where the property is situated.”

In essence, the court held that the city was both entitled and obliged to provide temporary accommodation to desperately poor people facing homelessness as a result of eviction. The court also criticized the city’s failure to plan and budget for housing crises, and labeled its argument that it was not legally entitled to do so “unconvincing.” The city’s policy of providing shelter to people it removes from allegedly unsafe buildings, but refusing to provide shelter to equally desperate people evicted by private owners, was found to be unreasonable and unconstitutional. The court also held that, where a property owner purchases land knowing it to be occupied (as in this case), “an owner may have to be somewhat patient, and accept that the [owner’s] right to occupation may be temporarily restricted” if an eviction would lead to homelessness. Further, “An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiries mandated by PIE.”

Therefore, the court established an implicit hierarchy of interests, in which the temporary shelter of the poor was placed at the top, and private investors’ interests in developing property are temporarily frustrated until this has been achieved. This does not mean that private property is ignored or subverted, as some have claimed, but rather that the law responds to the emergency needs of the poor. Blue Moonlight will not end urban regeneration in inner-city Johannesburg. Instead, the obligations it imposes and the legal relationships it establishes will simply be factored into the cost analyses of the state and the private sector in their ordinary course of business. Nor will they impoverish municipalities, as the court made clear that national and provincial government must bear the cost of providing shelter when a municipality cannot (Dugard and Tissington 2011). Although shelter is not housing, and therefore the provision of which falls short of meeting more fundamental principles within the right to housing, at least this case established that no one can be dispossessed unless and until the state acts on its obligations to provide shelter and, thus, seeks to eliminate cases of homelessness by eviction.

Most importantly, the Blue Moonlight case challenges the view that municipalities must merely facilitate free enterprise, protect property rights, and minimally regulate the creation of nuisance in urban areas. Traditionally, South African cities have conceived of their role as being merely to ensure compliance with building regulations and the enforcement of health and safety by-laws. The cities argue that the primary responsibility for providing housing falls within the ambit of national government, and accordingly have dealt with housing quite
separately, merely by supporting ownership of houses in new township developments on the urban periphery. These have been funded by a capital subsidy provided by national government. The other view, embodied in Blue Moonlight, is that a municipality can and should have additional duties to protect its inhabitants and, notably, their interactions with powerful market interests.

Although a victory, it is also important to acknowledge that in practice, residents in the Olivia Road case report a lack of autonomy in the new buildings, which leads to a strong dissatisfaction with these temporary accommodations. They are not in homes where they can determine how to run their daily lives or are empowered to resolve their own problems. Instead, they are in settings where government sets the rules, which can create deep resentment. Thus, although the law has prevented abject street homelessness, its great shortfall is that it has regulated the residents via its balance of municipal obligations and power and not offered regulation of the market.70

2. CHANGING THE QUESTION

When land is at issue, the question most often asked is “What is the greatest market value that can be derived from a particular piece of land?” Too often, governments are asking this question in the same way a private corporation might, and, consequentially, attracting investors and maximizing financial returns become the overriding goals of housing provision schemes and redevelopment projects (Carty 2008).71 Across the world, investors may be corporations seeking to set up businesses, developers seeking to make a profit through sales of high-value homes, or other governments seeking to exploit natural resources or simply invest abroad. Whatever the configuration, the underlying assumption remains the same: what the market values for a particular piece of land is deemed to be its optimal use for society, and any government intervention to stop community displacement – rare as it might be – is viewed as an interference with obtaining that highest value.72 This is completely at odds with the human rights obligation of governments to both protect against displacement and to fulfill the right to housing by creating a system of land and housing that ensures stable communities for all. Moreover, the obligation to use maximum available resources must include resources within the private sector that require regulation by government.

Although poor communities may in fact highly value their right to remain in their homes and occupy certain land, they do not have the economic power to express that value in monetary terms. Therefore, land-use decisions based solely on market valuations do not take into account their interests. The employment of human rights values would perhaps lead to a different set of norms, as well as a different process for assessing the most valuable use of land. However, current legal concepts – even those grounded in human rights – often fail to address this fundamental challenge. One potential reason for this is because present legal human rights concepts are mostly shallow, particularly where conflicts with market interests and long-term security of tenure arise.

The reality is that the market’s current presence in the realm of housing is so pervasive that it touches the life of every inhabitant. Even in informal settlements, there is generally a thriving informal economy in selling and renting shacks, and in accessing basic services, which also in turn feeds into the formal economy (Werbach 2011). Renters pay landlords for the use of their property. Yet, it is quite clear that these particular inhabitants – who are poorer and afforded lesser legal protections to varying degrees for their living arrangements – do not have an equal say in land-use decisions, nor do they equitably benefit from development, and, as a result, are subject to greater instability. The case studies discussed reflect how disparities in power in the market put poor communities at imminent risk of displacement. In all three cases, the market value of land rose due to gentrification processes.

Further, in all three cities, the criminalization of the communities became a primary tactic, along with arguments that the living conditions were not fit for anyone. Criminalization was both a political public-relations tool as well as a legal tool to justify displacement, stripping any perceived right of the occupants to have a voice in the redevelopment. In Chicago, the primary counterargument was that the displacement would lead to racially discriminatory effects, and in Mumbai that basic livelihoods would be threatened. Both arguments led to delay in the evictions, but neither appeared to ever have any possibility of preventing them.

In both the cases of Mumbai and Chicago, there were agreements to relocate and provide alternative accommodation that were not fully

70 Observations from a site visit to the new buildings, organized by the Socio-Economic Rights Institute of South Africa (SERI) in 2010.
71 Carty (2008, 169–170) argues that the goal of neoliberalism is to turn the nation-state into the market-state.
72 See, for example, HUD’s Asset Management Overview Web page, which explains HUD’s move to a “business model” on the basis of recommendations made in Harvard University Graduate School of Design’s Public Housing Operating Cost Study in 2003.
honored. Only 20% of Cabrini-Green residents were afforded new accommodation on-site (Fullerton 2011), and only 30% of Mumbai's displaced residents were afforded alternative accommodation at all (Center for Development and Human Rights 2010). In inner-city Johannesburg, whole communities won rights to alternative accommodation in the nearby vicinity. The process of meaningful engagement required by the South African Constitutional Court was likely vital to this achievement, more vigorous than either Mumbai or Chicago's guidelines. This is likely attributable to South Africa's distinct legal framework, which recognizes housing rights. Yet, even our most progressive examples fail to ensure that land and housing are used primarily toward meeting human needs in an equitable manner, and thus fail to ensure a human rights-based system of housing. Indeed, government is not only failing; it is in some very practical terms an accomplice to the abuses by implementing a legal system that regulates and subsidizes market interests. Thus, one can argue these cases demonstrate a failure to respect (by empowering the market to displace), protect (by failing to stop the market once displacement is a looming threat), and fulfill (by failing to develop a coherent housing policy framework that ensures stable communities) the right to housing.

3. CHALLENGING ASSUMPTIONS

Despite the three different legal frameworks (nondiscrimination, right to life and livelihood, and right to housing) utilized by communities in the case studies, there are assumptions in each of the cases the law did not in any way challenge, and in fact reinforced and affirmed.

a. Ownership Trumps All

The first concept is that an occupant's right to remain in a particular place is the exclusive determination of the owner of the property. In Mumbai and Chicago, the owner was the government; therefore, negotiating private property rights was not central. Yet, without even an articulation of housing rights, this is precisely the framework within which the government proceeded. In Chicago, where the residents had the most legal protection as subsidized renters, their security of tenure was—like private

73 Despite being behind in building hundreds of public housing units promised, the CHA has made a deal with Target Company to build a four-story mega-store where William Green Homes used to stand (Fullerton 2011).

b. State Provision of Alternative Accommodation

The second concept relevant in all three case studies is the obligation of unlawful occupiers to relocate and of the government to provide alternative accommodation. In Chicago, alternative accommodation simply could not lead to racial segregation, but nearly all other issues remained unaddressed. In the Olivia Road case in South Africa, the accommodation was agreed upon through a process of negotiation between the parties, although nothing specific was articulated by the court. Likewise in Blue Moonlight; however, the court did rule that the alternative accommodation should be "in a location as near as possible to the areas where the property is situated." Accommodations in both cases were temporary. Moreover, in both Chicago and Mumbai, stringent conditions were placed to determine eligibility of those being moved to the alternative accommodation. Finally, alternative accommodations were strangely perceived as a victory for tenants, when in fact once that concept became central they had clearly lost their right to stay in their homes.

c. Engagement

The third concept relevant in all these case studies was the obligation of the state to engage the occupants in a participatory process. Adequate engagement and participation failed to occur in any of these instances. In the Olivia Road case in South Africa, engagement was ordered as an antidote to the lack of engagement, and became the mechanism through which a settlement agreement was reached. In Blue Moonlight, the city refused to engage as it disputed the primary tenet of the case, that it had a responsibility to people under threat of homelessness because of private evictions. In Chicago, the obligation was to develop the relocation plans with the Local Advisory Council, which represented the public housing residents—subject to the changing interests of the property owner (in this case, political whim).
residents, and in Mumbai there was also supposed to be community notice and consultation. However, all three involved engagement after the fact — after a decision was made that the land had a higher value if the community was displaced. Although there have been cases where such engagement has been successful, as these case studies demonstrate, such success is far from universal.74

4. CONCLUSION

In terms of the relationship between housing rights and the market, the question should be asked whether available legal concepts properly align such a relationship in a way that gives housing rights at least as much weight as market interests. To begin with, why should communities accept alternative accommodation, even if well-defined, when without their participation it has been determined that their use of the land upon which they live is not of the highest value? That is, under current paradigms, the alternative accommodation doctrine is not being used by courts as a last resort, but rather a default whenever property rights are invoked. Furthermore, as the Supreme Court in India noted in the first slumdwellers lawsuit in 1985, an occupant’s “lawfulness” is most often not a matter of choice.75 It is apparent, from these case studies, that the South African Constitutional Court has come the closest to addressing the core conflicts of interest. Yet, the legal concepts wielded fall short of a comprehensive solution ensuring a human right to housing, giving weight only to factors that occurred after the highest value had been assigned and displacement was underway.

The authors of this chapter do not pretend to have a comprehensive solution to these issues or tensions, but we think it is important to rigorously examine the thinness and inadequacy of the legal concepts available to ensure communities’ right to housing, giving particular attention to state obligations to respect and protect this right. These shortcomings are mostly based on the assumption that displacement is acceptable and simply attach conditions after the fact, such as notice, due process, some alternative accommodation obligations, and a limited form of ex post facto community engagement. Although these are undoubtedly important, the question yet to be answered — and rarely raised — is “What would a legal and policy framework look like based on the assumption that stable housing is a fundamental social value equal to, or greater than, increasing wealth (often at the expense of the quality of life for the poor)?”

It must be recognized that a state’s obligation to protect the right to housing requires the government to regulate the market to this end. At minimum, a more serious right to participation and engagement should take effect prior to any decision to change land use; these decisions cannot be left exclusively to market valuations. Here, the government must step in to ensure these fundamental rights are protected. There are limited participation and engagement prior to these decisions in many areas, involving government hearings on zoning and redevelopment. However, it appears that the interests of occupants are rarely taken into account, arguably due to a lack of normative alternatives to market-based principles. Mechanisms to allow the needs of occupants to shape the outcome must be far better developed. One possible starting point may be legal concepts currently still under construction within the field of indigenous rights. Recognizing the rampant misuse of words such as “consultation” and “participation,” advocates have begun to champion indigenous communities’ right to “free, prior and informed consent” (Office of the President National Commission on Indigenous Peoples 1998).76 In South Africa, the developing concept of meaningful engagement is also very useful in this regard.

Second, lawfulness should be re-conceived. If housing is a human right, security of tenure cannot be left to the goodwill of property owners. Occupancy, particularly when it has existed for a significant period of time, should be protected. That is, it should be an important factor in determining not only prior lawfulness, but also the future lawfulness of continued occupancy.77

Finally, a serious balancing test should be developed that lends more weight to interests other than narrow profit margins in decisions.

74 Wilen (2006) offers the Horner redevelopment as a “success,” in part based on the creation of a representative resident body, with whom a judicial decree required the developers and property managers negotiate all aspects of the redevelopment; it compares the 65% of units promised at Horner with the lower numbers of promised units at other sites within Chicago that did not benefit from judicial intervention, for one.

75 Olga Tellis and Others v Bombay Municipal Council (note 24).

76 The Office of the President National Commission on Indigenous Peoples (1998) recognizes the right of indigenous peoples to free, prior, and informed consent for all activities affecting their lands and territories, including development and use of natural resources.

77 Oberlander (1985) argues that security in occupancy is an essential concern of the poor in securing land and a central component of an answer to poverty.
regarding land use and development. There are many values in addition to housing rights that might also be given weight (e.g., cultural, environmental, dignity, and equity). For the purposes of this chapter, however, we are primarily concerned with a test that would give value to the interests of occupiers. In addition to needing to make explicit the social value of land, the costs to the community of enduring displacement remain hidden and are rarely analyzed. One suggestion is that courts conduct more rigorous evidence-based factual reviews of these social costs, as well, including the mortality and morbidity costs often associated with displacement (Fulfilove 2004). The resulting articulation of costs and benefits on both sides of the conflict may provide a platform for poor communities to at least begin articulating their interests.

There is a need for the development and support of proactive, rather than merely defensive, legal and political concepts. Fundamental housing rights should be developed into a comprehensive framework. The notion that housing is a universal right, for example, needs to be further articulated to deal with prevailing assumptions that markets can serve all economic needs, and put an end to the retreat of the state from its human rights obligations. This could also serve to address the use of criminalization by market interests and similar tactics to exclude the poor from economic hubs and high-opportunity areas. Additionally, the notion of equity is underdeveloped and rarely, if ever, utilized. If housing is a human right, then governments must ensure processes are established that lead to equitable use of housing and land resources.

There are three times as many empty homes as homeless people in the United States, and hundreds of thousands of these homes are actually owned, as of April 1, 2012, by the U.S. government (Olick 2012). Equity may also be used to challenge the notion that redevelopment must be designed to attract higher-income residents— as was central to the gentrification in the Chicago and Mumbai case studies—when lower-income residents are struggling to access and keep housing. Looking more closely at the principle of equity would also importantly open the door to systemic assessments and responses to issues of housing finance and budgeting, which have also been subject to regression under neoliberalism (Dreier 2006).

As has already been introduced, traditional homeownership is not a panacea. Therefore, there is a deep need to reexamine concepts of property rights in light of housing rights. Although there are not, again, any existing national systems that comprehensively address this question and provide a clear alternative to explore in this chapter, there are some fantastically creative alternative structures that have been created and experimented with at the local level. Through the use of contracts, community development practitioners have sought to establish different legal relationships and, as a result, have introduced the community land trust and other shared- and limited-equity arrangements that enhance certain rights within “the bundle,” at the same time providing useful democratic checks on the “right” to profit and future development. Also, alternative valuation processes for redevelopment have been explored through the use of public land banks in U.S. cities where the abandonment of the market has left large wastelands of old industry and empty homes (Alexander 2005). These, and certainly other, local efforts might have transferable concepts to more far-reaching policy development in determining how to structurally protect and promote housing rights given market realities.

In conclusion, although housing is deemed a human right under international law and in some domestic jurisdictions, market interests still regularly trump access to stable and secure housing for the poorest
communities. Moreover, the current legal frameworks are at best defensive, and do not challenge the underlying neoliberal assumptions or the systemic conditions of chronic homelessness, ongoing displacement, and pervasive rent burdens. More vigorous concepts need to be developed to both defend housing rights and create a stronger set of obligations and vision for systemic solutions that ensure access to housing for all on an equitable basis.

REFERENCES

AGFE (Advisory Group on Forced Evictions), 2007. Finding solutions to forced evictions worldwide: A priority to meet the MDGs and implement the Habitat Agenda. Executive Summary Report of AGFE to the Executive Director of UN-HABITAT.


UN-HABITAT, 2009. Right to Adequate Housing. Fact Sheet No. 27/Rev.


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I. INTRODUCTION

Article 22 of the 1948 Universal Declaration of Human Rights and Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) require that parties recognize the right to social security, including social insurance. Realization of the right to social security is also a fundamental part of the mandate of the International Labor Organization (Cichon and Hagemeyer 2007). General Comment 19 of the Committee on Economic, Social and Cultural Rights (CESCR) notes:

[The right to social security] encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents (CESCR 2008, 2).

Despite the widespread international acceptance of the ICESCR, the implementation of its obligations is reportedly quite poor. According to the CESCR, approximately 80% of the world’s population lacks access to meaningful social security protection (CESCR 2008; ILO 2010). The gap between policy and implementation highlights the need for monitoring and reporting on the status and progressive realization of the right to social security.

The views expressed in this chapter are those of the authors and do not necessarily reflect the views of the Federal Reserve System, the Board of Governors, or the regional Federal Reserve Banks.
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