

TITLE:

**The Effect of Corruption on the ‘Available Resources’ for the Right to Housing as
Espoused by the Constitution of South Africa**

By

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DECLARATION

I, **Soraya Beukes**, the undersigned, hereby declare that this thesis is original and has never been presented in any other institution. No part of this thesis has been submitted in the past, or is being submitted, or is to be submitted for a degree at any other university. I also declare that the sources used have been duly acknowledged in this thesis



S Beukes

Date: 24 November 2016

ABSTRACT

The objective of this study was to expose how the ineffectiveness of the anti-corruption measures contributed in delaying the right to housing, as proffered by the Constitution of South Africa, to the impoverished population at large. The result of this study has shown that the available resources of the state were not sufficiently protected against malfeasance in the public service.

The plethora of anti-corruption measures has not deterred wayward public officials from personally abusing the 'available resources' earmarked for housing. Stark evidence of corruption was revealed by the SIU Reports (2011, 2012, and 2013) that confirmed endemic proportions of corruption in the public housing programme that had seen housing projects delayed, half-completed and not built.

The point is, that the right to housing is not necessarily delayed by a lack of economic resources as often claimed by the government, but rather that those resources are available, but not amply protected against corruption by the anti-corruption measures and agencies in place, to do this. Procurement processes are undermined by public officials, including management, who by-pass laws that govern public finance. This behaviour has been pervasive in the human settlement programme since 2007 when the SIU embarked on its proclamation to investigate corruption in the social housing programme.

Exacerbating the abuse of available resource is the first citizen, the President who the Constitutional Court found has unlawfully benefited from security upgrades at his private home, Nkandla. Thus the public service suffers from an acute lack of ethical behaviour and thereby good governance and this has made the government vulnerable to breaching international treaty obligations insofar as realisation of the minimum core in housing and protecting the maximum available resources for housing against malfeasance in government. Instead that government realises the right to housing for the impoverished soonest, the government was rather pre-occupied with abusing state funds earmarked as such and thereby deprived the right to enjoy access to housing, in particular to the homeless and the most desperate.

DEDICATION

I dedicate this study to my departed mom Rugaya Josephs. Whose memory is with me daily and who has inspired me with the energy and dedication to ride life's roller-coaster.

I also dedicate this study to my dear friend Levi Engelbrecht whose memory lives on and who encouraged me to not stop studying until I have a PhD.



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KEYWORDS

Available resources

Corruption

Ethics

Executive

Government

Human settlements

Housing

Judiciary

Parliament

Socio-economic rights



LIST OF ACRONYMS

| | |
|--------|--|
| ACC | Administrative Committee on Coordination |
| ACCC | Anti-Corruption Co-ordinating Committee |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| AFU | Asset Forfeiture Unit |
| AG | Auditor-General |
| AIDS | Acquired Immunodeficiency Syndrome |
| ARC | Administrative Reform Committee |
| AU | African Union |
| AUCPCC | African Union Convention on Preventing and Combating Corruption |
| AVC | Administrative Vigilance Commission |
| BAS | Basic Accounting Systems |
| BNG | Breaking New Ground |
| BoR | Bill of Rights |
| CA | Constitutional Assembly |
| CBI | Central Bureau of Investigation |
| CBOs | Community-based organisations |
| CC | Constitutional Court |
| CEDAW | Committee on the Elimination of Discrimination against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CHR | Commission on Human Rights |
| COHRE | Centre on Housing Rights and Evictions |
| CoSP | Conference of the States Parties to the United Nations Convention against Corruption |
| CPI | Corruption Perceptions Index |
| CRC | Committee on the Rights of the Child |
| CVC | Central Vigilance Commission |
| DCS | Department of Correctional Services |
| DoHS | Department of Human Settlements |
| DoJCD | Department of Justice and Constitutional Development |
| DORA | Division of Revenue Act |
| DPW | Department of Public Works |
| EACC | Ethics and Anti-Corruption Commission (Kenya) |

| | |
|--------|--|
| ECOSOC | Economic and Social Council |
| ENCA | E -News Channel Africa |
| FAO | Food and Agriculture Organization of the United Nations |
| FCC | Financial and Fiscal Commission |
| GA | General Assembly |
| GAC | Governance and Anti-corruption |
| GCB | Global Corruption Barometer |
| GDP | Gross Domestic Product |
| GEAR | Growth, Employment and Redistribution Programme |
| GNP | Gross National Product |
| HIV | Human Immunodeficiency Virus |
| HSRC | Human Sciences Research Council |
| IAC | India against Corruption |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Convention on Economic, Social and Cultural Rights |
| ICJ | International Commission of Jurists |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |
| ISS | Institute for Security Studies |
| MTSF | Medium Term Strategic Framework |
| NA | National Assembly the lower house of Parliament |
| NATT | National Anti-Corruption Task Team |
| NGC | National General Council |
| NHA | National Housing Act |
| NHC | National Housing Code |
| NHRC | National Human Right Commission |
| NIA | National Intelligence Agency |
| NCOP | National Council of Provinces |
| NDoHS | National Department of Human Settlements |
| NCOP | National Council of Provinces |
| NHBRC | National Home Builders Registration Council |
| OAU | Organisation of the African Union |
| OHCHR | Office of the High Commissioner for Human Rights |
| PDOs | Parliamentary Democracy Offices |

| | |
|--------|--|
| PIA | Public Interest Actions |
| PMG | Parliamentary Monitoring Group |
| PPPFA | Preferential Procurement Policy Framework Act |
| PSC | Public Service Commission |
| PFMA | Public Finance Management Act |
| PAJA | Promotion of Administrative Justice Act |
| OECD | Organisation for Economic Co-operation and Development |
| OCPO | Office of the Chief Procurement |
| RDP | Reconstruction and Development Programme |
| SAHRC | South African Human Rights Commission |
| SALC | South African Law Commission |
| SANS | South African National Standards |
| SAPS | South African Police Service |
| SASAS | South African Social Attitude Survey |
| SCM | Supply Chain Management |
| SCI | Supreme Court of India |
| SERI | Socio-Economic Rights Institute of South Africa |
| SERs | Socio-economic Rights |
| SIU | Special Investigating Unit |
| TPTTP | Taking Parliament to the People |
| UNCRC | United Nations Convention on the Rights of the Child |
| UDHR | Universal Declaration of Human Rights |
| UNCAC | United Nations Convention against Corruption |
| UNDP | United Nations Development Programme |
| UNCHR | United Nations Commission on Human Rights |
| UNHCHR | United Nations High Commissioner for Human Rights |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNHRC | United Nations Human Rights Council |
| UNICEF | United Nations Children's Fund |
| UNOD | UN Office on Drugs and Crime |
| UPR | Universal Periodic Reports |
| WB | The World Bank |
| WHO | World Health Organization |
| WTO | World Trade Organization |

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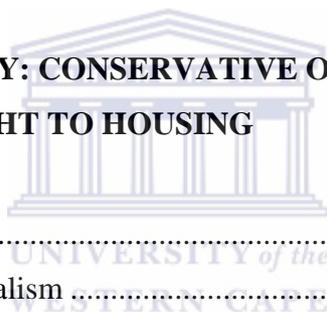
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Chapter 1

Introduction

1.1 Background to the study

The National Planning Commission maintains that:

‘South Africa suffers from high levels of corruption that undermine the rule of law and hinder the state’s ability to effect development and socio-economic transformation.’¹

After labouring under non-democratic apartheid rule, the victory of democracy for the South African people came with the hope of access to socio-economic rights (SERs) which were in short supply for the majority during the apartheid years. One of the major devastations of the deprivation of SERs was the lack of public housing for the impoverished. For this reason this South Africa included enumerated SERs in its constitution to ensure that these rights apply to everyone and particularly the impoverished.

The Constitution² of South Africa provides explicitly for the right to housing. To give credence to this, over the last 22 years, the government embarked on a zealous programme for public housing to make up for the neglect during apartheid. Despite the government’s enthusiasm complemented by the Constitutional Court (CC) giving credence to the justiciability of SERs,³ and interpretation of the government’s duties, housing the most desperate is still a huge challenge.

The biggest hurdle for the court is to determine whether resources for SERs are being appropriated effectively. For instance does homelessness prevail whilst those in basic shelters receive upgraded adequate accommodation? The CC in its reasonableness review has not come up with any meaningful approach to determining whether reasonable measures are being undertaken to protect the available resources and whether the allocated resources are

¹National Planning Commission. ‘National Development Plan—Vision for 2030’ Pretoria November (2013) 410.

²Constitution of the Republic of South Africa Act 108 of 1996 (hereafter the Constitution) s26. See chapter 3 for detailed discussion on s26.

³See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Constitution of the Republic of South Africa 1996 1997 (2) SA 97 (CC)*.

efficiently used.⁴ The closest that the CC has come to doing this is in *Government of the Republic of South Africa and Others v Grootboom and Others*,⁵ finding that a reasonable programme must ‘ensure that the appropriate financial and human resources are available’.

The discourse on the state’s duty to provide housing for the impoverished has shown that economic resources are imperative in the realisation of SERs. It is the importance of this element that is the focus of this dissertation, in that without it the right to housing may be delayed or not materialise for some or at all. Thus, due to the importance of budgeted resources to realise SERs, government has an obligation to safeguard these resources against malfeasance on the part of the state. In order to make this connection the link between corruption and human rights is explored to raise awareness on how corruption in the public service can censure the rights of the individual, in that corrupt acts have the potential of denying and interfering with the availability, accessibility and quality of public housing.⁶

The anti-corruption measures that ring-fence the international community, enjoy scrutiny to show South Africa’s obligations in terms of combating corruption. The primary concern of this study is the approach of government in applying the anti-corruption laws and measures to stifle corruption in the delivery of public housing. It is the view of this study that the omnipresence of corruption in the public housing programme of South Africa, delays access to housing and thereby deprives the individual of his or her rights. This delay occurs due to funds earmarked for housing being misappropriated by those who are entrusted to exercise their powers in line with the Constitution. This dissertation is not about analysing corruption in the public sector, but rather the right to housing and how corruption negatively affects delivery by eroding the ‘available resources’ earmarked as such.

This study explores the fact that a fair share of the non-delivery in public housing is because of corrupt practices plaguing the public housing programme.⁷ Good governance, ethical and honest behaviour on the part of entrusted public officials⁸ is marred by endemic corruption.

⁴See chapter 2 for discussion on the United Nations’ history of the phrase ‘available resources’. See chapter 5 for discussion on the reasonableness review of the CC

⁵2000 (11) BCLR 1169 (CC) para 39 (hereafter *Grootboom CC*). See chapter 4 for discussion on this ground breaking case dealing with the right to housing under the Constitution.

⁶This dissertation explores public and not private corruption which is perpetrated by those in government and could be in collaboration with a private person or business.

⁷See chapter 5 for the Special Investigations Unit (SIU) Report on this. This Unit has been instructed by the President, through proclamation in 2007 to investigate corruption in the public housing programme. See

1.2 The adoption of socio-economic rights in South Africa

Socio-economic rights have through decades emerged and become an integral area of international law chiefly through the acceptance of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by the international community.⁹

In this jurisdiction a new constitution came about through the National Assembly and Senate sitting together as the Constitutional Assembly (CA) in the drafting process during 1994. The CA initiated a public participation programme in which all South Africans had the opportunity to express their views about the content of the new Constitution, on paper. The overwhelming response was requests for rights to jobs, houses and education. The new Constitution ended decades of authoritarian parliamentary sovereignty based on colonial practice and transformed South Africa to adopting constitutional supremacy. The result of this was that this jurisdiction boasts a constitution with an enumerated Bill of Rights (BoR) that binds all organs of state including the legislature, executive and the judiciary.¹⁰ The reason the Constitution includes such an explicit BoR was to address the most compelling socio-economic needs of the overwhelmingly impoverished South Africans.¹¹ Moreover, the courts were given wide powers of interpretation and are required to apply and develop law to be compatible with the BoR.¹² Despite these progressive strides the needs of the impoverished are still dominated by the lack of adequate shelter, inter alia.

The rights under section 26 of the Constitution follows with an inhibitor from the ICESCR¹³ which states that governments have an:

Proclamation R7 of 2007, published on 25 April (2007) see

<http://www.siu.org.za/sites/default/files/documents/SIU%20INTERIM%20REPORT%201June%202012.pdf>

⁸Is the same as 'public officer' means any person who is a member, an officer, an employee or a servant of a public body, and includes-

(a) any person in the public service as contemplated in s8 (1) of the Public Service Act 103 of 1994.

(b) any person receiving any remuneration from public funds.

⁹ See chapter 2 for discussion on this instrument.

¹⁰ Constitution s8 (1). Also see Dlamini C 'The South African Law Commission's Working Paper on Group and Human Rights: Towards a Bill of Rights for South Africa' (1990) *S A Public Law* 96; Didcott J 'Practical Workings of a Bill of Rights' in Van der Westhuizen J & Viljoen H (eds) *A Bill of Rights for South Africa* (1988).

¹¹ See Haysom N 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 *SAJHR* 451; Mureinik E 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 *SAJHR* 464.

¹²Constitution s39. See chapter 4 for discussion on the judiciary interpreting SERs.

¹³Article. 2(1). Also see Sepúlveda M *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (2003).

‘Obligation to take steps to the maximum of their available resources with a view to progressively achieve the full realisation of economic, social, and cultural rights.’

Thus the right to housing and its progressive realisation is underpinned by the ‘available resources’ of the government.¹⁴ Therefore, this dissertation expounds on the importance of the ‘available resources’ to the realisation of the right as explained in chapter two by tracking the history this term into the field of human rights. The reason for this exploration is to illuminate the importance of this resource in bringing about public housing and for this reason, point out the importance of protecting it from abuse in the public service. The thrust of this dissertation is to highlight that corruption is one of the main obstacles that frustrates the optimal delivery of housing, in South Africa. A housing project tainted by corrupt procurement procedures, easily falls prey to no or poor delivery and the end result affects the individual right to access.

1.3 Endemically corrupt practices in South Africa (and Africa)

Corruption in the public service in South Africa is of great concern.¹⁵ It is alleged at various levels, including the public housing programme, due to the large budgets made available for public housing projects.

In *Glenister v President of the Republic of South Africa and Others*¹⁶ the CC pointed out:

‘That corruption has become a scourge in our country and it poses a real danger to our developing democracy in that it undermines the ability of government to meet its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.’

¹⁴Section 26(2). See chapter 2 on the origin of the phrase ‘available resources’.

¹⁵Also see Lodge T ‘Political Corruption in South Africa’ (1998) 97 *African Affairs* 157; Mbaku J *Bureaucratic and Political Corruption in Africa: The Public Choice Perspective* (2002).

¹⁶2011 (3) SA 347 (CC) para 58. This case challenged the decision of the South African government to disband the anti-corruption agency, Directorate of Special Operations (the Scorpions) which was situated in the National Prosecuting Authority (NPA) and replace it with the Hawks which is under the control of the South African Police Service (SAPS). The CC held that the Hawks under the SAPS control is not sufficiently independent from political interference and this should be rectified as South Africa no longer had an independent anti-corruption agency in place. The legislature was ordered to amend the South African Police Service Act 68 of 1995 (amended by Act 83 of 1998) to change this. It obliged with the South African Police Service Amendment Act 10 of 2012 published in GG 35663/2012 of 14 September 2012. As far back as 1989 authors predicted that corruption would loom large in the ‘new’ South Africa. See Wilson F & Ramphel M *Uprooting Poverty in South Africa: Report for the 2nd Carnegie Inquiry into Poverty and Development in South Africa* (1989); Ladikos A ‘Corruption: The Enemy from Inside’ (1999) 12 *Acta Criminologica* 28-36; Sangweni S & Balia D *Fighting Corruption: South African Perspectives* (1999).

Therefore, Aristotle argues ‘to protect the treasury from being defrauded, let all money be issued openly in front of the whole city, and let copies of the accounts be deposited in various wards.’¹⁷

Needless to say accountability is pivotal to good governance and inspires trust on the part of the populous. As it is, corruption often thrives where there is apathy or ignorance of laws, regulation and accountability in the public service. This is exacerbated by conflict of interest and failure to adhere to fiduciary duties whereby accounting officers are tardy with oversight. South Africa’s standing on the international stage is blemished by its high-ranking on Transparency International’s list of perceived corruption, so much so that South Africa ranks 61 out of 168 countries on the 2015 Corruption Perceptions Index (CPI). Notwithstanding this, 114 African countries score below 50 on the CPI, indicating serious levels of public sector corruption on this continent.¹⁸ Amplifying this bleak picture is the fact that 68 percent of countries worldwide have a serious corruption problem, of which 50 percent are from the G20.¹⁹

Adding to this perception are the statistics revealed by the African edition of the Global Corruption Barometer (GCB) 2015 where key findings are that corruption is on the rise; most governments do not meet citizen’s expectations in fighting corruption and many people feel helpless in fighting corruption.²⁰ Moreover, the survey found that 83 percent of South Africans believed that corruption was increasing and 79 percent believed that government was doing a poor job in combating corruption. The main finding of the GCB is that Africa is overwhelmed by weak performance on anti-corruption measures across the continent. The comparison between countries showed that people in South Africa, Ghana and Nigeria perceived that corruption had risen in 2014 (12 months prior to the survey).²¹ South Africa is amongst the countries where four in five people believe government’s anti-corruption

¹⁷Clayton E ‘Aristotle (384 -322 B.C.E.) ‘The Politics: *Book VI The Best Kind of Democracy Internet Encyclopaedia of Philosophy* (no date) para 12 (b) available at <http://www.iep.utm.edu/aris-pol/#H7> (accessed on 10 March 2015). Also see Antonia L *Locke’s Moral Man* (2012).

¹⁸Transparency International Corruption Perceptions Index 2015 available at <http://www.transparency.org/cpi2015> (accessed on 28 February 2016).

¹⁹Transparency International Corruption Perceptions Index 2015.

²⁰People and Corruption: Africa Survey 2015, Global Corruption Barometer, Transparency International and Afro Barometer (hereafter *People and Corruption: Africa Survey 2015*) available at <http://www.wathi.org/people-and-corruption-africa-survey-2015-global-corruption-barometer-transparency-international-and-afrobarometer/> (accessed on 20 February 2016).

²¹See Lawal G & Tobi A ‘Bureaucratic Corruption, Good Governance and Development: The Challenges and Prospects of Institutional Building in Nigeria’ (2006) 2 *Journal of Applied Science Research* 642.

efforts are doing badly.²² The Ibrahim Index for African Governance, released on the 15 October 2012 reveals that some of Africa's regional powerhouses, Nigeria and South Africa, show unfavourable governance performance, largely due to corruption and maladministration.²³ Nigeria is losing hundreds of millions of dollars due to various practices including allowing oil ministers to award contracts at their own discretion without an attempt being made at a formal tender process.²⁴

The trend of corruption in South Africa is also confirmed by the South African Social Attitude Survey (SASAS) conducted by the Human Sciences Research Council (HSRC) in 2011, which reported that 74 percent of South Africans believed that the incidence of corruption had increased in this jurisdiction. Furthermore, the report revealed that 63 percent of South Africans believed that politicians (government and Parliament) do not do enough to fight corruption and 33 percent believed there is no real punishment for corruption.²⁵ Olutola believes that in both South Africa and Nigeria the leaders are not leading by example.²⁶ Kgosiore explains that white-collar crime²⁷ is ingrained in the fabric of the 'new' South African society but it dates back to long before democracy.²⁸ Friedrichs depicts political white-collar crime as an illegal and improper activity by a government or political party officials for personal gain instead of advancing government/political ideology.²⁹

The realisation of housing is very dependent on economic resources; therefore good governance that protects those resources against malfeasance is key to delivery. Due to resources at their disposal public officials are under temptation to bow to corruption whereby

²²People and Corruption: Africa Survey 2015. The other countries are Benin, Liberia, Nigeria and Zimbabwe.

²³Ibrahim M 'Nelson Mandela 11th Annual Lecture: Building Social Cohesion 17 August 2013 Dialogue for Justice, Annual Lecture 2013 available at: <https://www.nelsonmandela.org/news/entry/11th-nelson-mandela-annual-lecture-transcript-of-dr-mo-ibrahims-speech> (accessed 01 March 2016).

²⁴Ridabu N 'Nigeria: How to Lose \$35bn' *The Guardian Nigeria/OnlineInsider* 13 November 2012 available at <https://www.theguardian.com/2012/nov/13/Nigeria-oil-corruption-ridabu> (accessed on 25 November 2014).

²⁵Human Sciences Research Council 2011.

²⁶Olutola A A Long-term Crime Prevention and the Criminal Justice Systems of Nigeria and South Africa: A Hopeless Hope? (2012) 2 *Acta Criminologica: CRIMSA* 17-30. See chapter 5 discussing the President and Parliament flouting constitutional obligations in abuse of state funds found by the Public Protector.

²⁷White-collar crime includes public officials, politicians, businesspeople and professionals, who, violate trust placed in them or act in an unethical manner.

²⁸Kgosiore D 'White Collar-crime: A Phenomenon of Post-apartheid South Africa?' (2001) 20 *Politeia* 91. Apartheid government corruption extends amongst others to Hennie van der Walt deputy Minister of Development and Land Affairs sentenced for five years imprisonment of theft involving R800 000, Louis Nel Minister of Information resigned after bidding to buy prime land owned by the Department of Foreign Affairs in Tokyo, Pietie du Plessis was sentenced to nine years imprisonment for fraud and Leon de Beer was sentenced to two years imprisonment for election fraud.

²⁹Friedrichs D *White Collar Crime in Contemporary Society* (1996) 143. Also see Croall H *White Collar Crime: Criminal Justice and Criminology* (1992) 8.

they enter into private deals by providing or withholding services in exchange for bribes, kickbacks and personal advantages.³⁰ This action continues in the embezzlement of funds or awarding of government contracts by not following the laws in place. Furthermore, corruption that has been exposed in the public administration includes the use of public office by some officials to run their own affairs, social-housing fraud and irregularities in state and government procurement, to name but a few.³¹

Some authors are of the view that even though *Grootboom* was a successful litigation insofar as public housing, the socio-economic conditions of the impoverished communities have not improved dramatically.³² Much of this delay in access to housing is as a result of corrupt activities that are endured in the public housing programme through manipulation of public procurement and thereby of state funds.

The Auditor-General (AG) confirms that key areas such as quality of financial statements and supply-chain management are where corruption flourishes. This is exacerbated by the high level of tolerance for audit disclaimers by the AG against local, provincial and national government. This shows that there is a high potential for illegal expenses or attempts to hide illegal activities involving fiscal resources. At the end of the day the irregular use of economic resources leading to corruption goes against the grain of the obligation under the ICESCR³³ to use the ‘maximum of its available resources’ to achieve the full realisation of SERs rights. An end to this behaviour will not find closure in ‘change-management’ but rather in the soul of entrusted public officials.

1.4 Hypothesis

On the one hand the government allocates ‘available resources’ to realise public housing which resonates with their constitutional obligations.³⁴ On the other hand the housing so envisioned does not always materialise due to malfeasance in the public housing programme. Investigations into this behaviour by public officials have proved positive but the necessary

³⁰Also see Cohen A & Short R Jr ‘Crime and Delinquency’ in Merton R & Nisbet R (eds) *Contemporary Social Problems* (1976).

³¹See chapter 5 on the SIU Reports exposing this behaviour.

³²See Pillay K ‘Implementation of Grootboom: Implications for the Enforcement of Socio-economic Rights’ (2002) 2 *Law, Democracy and Development* 225.

³³Article 2 (1).

³⁴Section 26.

sanctions are not consistently applied. Thus the obligations contained in the domestic and international laws to realise SERs and combat malfeasance in government, do not prove to be optimally used. As a result of this void, corruption in the government's housing programme has been allowed to erode the resources for housing which results in delaying access to public housing and thereby the enjoyment of the right to housing.

1.5 Research question

The general question is whether government has optimally used the state machinery such as the three branches of government, (legislation, regulations, policies and agencies), in the realisation of housing and the fight against corruption in the public housing programme. Flowing from the general question is how important the available resources are to the realisation of public housing. Therefore, the jurisprudence of the phrase 'available resources' is tracked for this clarification; how the three branches of government (legislative, executive, and judiciary) have performed their constitutional obligations to realise the right to housing, is explored. This will entail looking at how progressive the government's plans are to house the most desperate. To complement this question, how proactive is the judiciary in its interpretation of the right to housing? Similarly, the approach from the bench on the preservation of the available resources for housing from malfeasance in government is questioned.

To round off this research begs the question of which lessons pertaining to housing and anti-corruption measures can enrich the South African jurisdiction. This question is answered in a comparative review of the Indian judiciary and their liberal approach to the interpretation of SERs and experiences in combating public corruption through social-action litigation.

1.6 Aims of the study

The aim is two-fold: first to point out the importance of economic resources to the realisation of public housing. In this pursuit this study will illuminate the historical journey of the term 'available resources' into the human rights lexicon and into the South African jurisdiction. The three branches of government are discussed to elucidate their role and duties in the delivery of housing. The relevant laws and policies regarding housing are discussed.

Secondly, the focus of this study is on the effect that corruption has on the non-delivery of public housing and thereby on the realisation of the right thereto. Hence this study seeks to evaluate the practical soundness of the anti-corruption measures in place, to combat corruption in the public service. The reason for this exploration is to demonstrate how malfeasance has negatively influenced progressive realisation of housing in that available resources allocated for public housing are not optimally used to realise these rights. Demonstrative of this is the Special Investigating Unit (SIU) reports discussed in chapter five, which show the omnipresence of corruption in the government's human settlement programme.

In conclusion, a comparison is drawn with India in judicial enforcement of human-rights standards (housing) and anti-corruption measures because this jurisdiction is rich in experience on how to hold the government accountable in this regard.

1.7 Significance and objectives of the study

This study attempts to draw attention to the importance of the 'available resources to the realisation of housing on the one hand and to elaborate on how corruption is eroding access to public housing, on the other. The reason for this focus is to draw attention to the fact that corrupt activities in the public housing programme have resulted in non-delivery of housing despite the fact that public funds have been 'allocated'.

Knowing the importance of available resources to delivery in public housing, in 2007 the government instigated investigations into alleged claims of corruption in the public housing programme countrywide. These investigations are pending completion, but various preliminary reports have been presented to Parliament and the President. These reports forms a basis for the analogy that the state is failing in its duty to protect the available resources for housing against abuse by public officials. Malfeasance in government is witnessed by citizens unable to act against the state's inability to contain the scourge. The most vulnerable and poor experience the effect of corruption first-hand in that corrupt activities in the public housing programme have deprived them of access to a basic home. This is so because corruption in the public service has been allowed to erode the available resources earmarked for public housing which in turn has an extremely negative impact on the individual's access to a home.

This study attempts to show that the fiscus makes, as expected provision for those resources but these are not optimally used to progressively realise the right to housing.

1.8 Literature review

The literature on the right to housing is rich with arguments on how the right should be realised and how the courts should give content to the right through interpretation. Liebenberg, Bilchitz, Brandt and Dugard have provided the academia with insurmountable input on these issues. In an attempt to enrich this discourse, a comprehensive research is explored as to the effect that corruption has on the economic resources, for public housing and the realisation of the right to housing.

This research draws attention to the fact that there has been very limited interrogation of the importance of economic resources to the realisation of housing. Due to the importance of economic resources in the delivery of housing, the focus will be on accountability in the distribution and management of these resources. The academic discourse embraces the link between corruption and the realisation of human rights, but does not interrogate how corruption contributes to the on-delivery of SERs. Attention is drawn to Malherbe's academic contribution as to the plight of corruption on social security.³⁵ This dissertation thus brings a novel argument in contribution to the discourse on housing. Most notable is that the analysis of the SIU Reports into corruption in public housing will enrich this contribution in that the findings in these reports have not been recorded in the legal academic discourse.³⁶

The literature kaleidoscope that will make up the tapestry of this study, will confirm the link between corruption and the under or non-delivery of housing and thereby the suppression of the fulfilment of a human right. Further enriching the reading will be the anti-corruption measures that the international community embraces in the fight against corruption and South Africa's response in this regard.

³⁵Malherbe K 'Stretching Solidarity Too Far: The Impact of Fraud and Corruption on Social Security in South Africa (2001) 5 Law Democracy & Dev. 107.

³⁶See chapter 5.

1.8.1 Corruption the antithesis of the fulfilment of human rights

Those who hold office have to provide account for their activities at regular intervals 'where the city's funds came from, where they went, what actions they took, and so forth'.³⁷ Furthermore, the improper and unlawful enrichment of those entrusted with public power erodes the rule of law and thereby leads to denial of human rights due to the hindering of socio-economic development of a country.

Corruption and human rights are separate areas of law the procedures of which should always be respected and rights of due process should be observed. However, corruption threatens both democracy and development because it erodes the capacity of states to ensure sustainable livelihood for their citizens. Corruption impedes the state's ability to use its available resources optimally. This is because there are instances where national resources are diverted for personal gain or development aid is mismanaged, misused or misappropriated. The UN Commission on Human Rights (UNCHR) maintains that corruption is a hydra-headed monster that remains one of the deadliest enemies of the translation into reality of the potential with which humanity is endowed.³⁸

Corruption is a global pandemic with some 6 billion people around the world living in countries tainted by the scourge.³⁹ The negative effect of corruption on SERs was a concern raised at the UN which led to the Sub-Commission on the Promotion and Protection of Human Rights being tasked in 2002 to prepare a comprehensive study on corruption in its impact on the full enjoyment of human rights, in particular SERs.⁴⁰ The report focused on the effect of corruption on the institutions necessary to sustain democracy, namely political parties and Parliament. The study emphasises the problem posed by political corruption, focusing on developing countries. In this regard the study illuminates that political parties are often seen to abuse their powerful positions and parliamentarians compromise their legislative, oversight, financial control and representative roles. The working paper submitted to the Sub-Commission noted that corruption should be condemned and that those guilty of it

³⁷Clayton E The *Politics: Book VI* 'The Best Kind of Democracy' para 12 (b).

³⁸Commission on Human Rights 57th session 22 June 2005 UN Doc E/CN.4/Sub.2/2005/18.(hereafter Commission on Human Rights 57th session).

³⁹See Transparency International available at <http://www.transparency.org/cpi2015> (accessed on 14 February 2016).

⁴⁰Commission on Human Rights 57th session.

should face international justice if they escaped national retribution.⁴¹ The Commission raised the crucial role played by the judiciary and law enforcement agencies in the fight against corruption to root out its negative impact on the full enjoyment of human rights.⁴²

The face of a well ordered state is where the government regards human rights as guiding principles of good governance. Moreover, states are internationally responsible to combat the violation of human rights which is given recognition as a branch of public international law and can bind states and change domestic laws. Notwithstanding this the pacta sunt servanda rule applies whereby states are bound by treaties they ratify; therefore states have obligations to uphold human rights in good faith.⁴³ Most notably, the Universal Declaration of Human Rights (UDHR) provides that ‘all human beings are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.⁴⁴ Megret affirms that international human rights appear as the cement that binds groups of states together in a collective that is domestic, transnational and supranational.⁴⁵ According to the Human Development Report 1997, law enforcement must play a pivotal role in ensuring the protection of fundamental human rights in a democratic society.

Annan confirms that the presence of this evil phenomenon is found everywhere but it is in the developing world where its effects are most destructive, through the diversion of funds intended for development which in turn undermines the government’s ability in providing basic services.⁴⁶ The consequences of this are diminished economic development which affects social equality.⁴⁷ In the 21st century government’s monopoly of economic activities combined with systemic maladministration and political soft-peddling in developing countries, provide fertile ground for corruption which breeds widespread poverty and

⁴¹The Sub-Commission at its 55th session UN Doc E/CN.4/Sub.2/2003/18.

⁴²Commission on Human Rights 57th session. See chapter 6 for discussion on how the judiciary in India deals with public corruption.

⁴³Also see *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application: 1962) [1970] ICJ Rep 3 para 33.

⁴⁴Article 1.

⁴⁵Megret F ‘Nature of Obligation’ in Moeckli D Shah S & Sivakumaran S (eds) *International Human Rights Law* (2010)125, 130.

⁴⁶Press Release Annan K ‘Secretary-General Lauds Adoption by General Assembly of UNCAC’ 31 October 2003 available at <http://www.un.org/press/en/2003/sgsm8977.doc.htm> (accessed on 27 February 2015). Also see Wraith R & Simpkins E ‘Corruption in Developing Countries’1963.

⁴⁷See Delaney P ‘Transnational Corruption: Regulation Across Borders’ (2007) 47 *VA. J. INT’L L* 413; Kaufmann D ‘Human Rights, Governance and Development: An Empirical Perspective’ (2006) *Development Outreach World Bank Institute* 19.

economic inequalities. This behaviour stunts development thereby leaving the rights holder at a loss.

De Beco contends that accountability is key to human - rights monitoring because the purpose is to hold the duty-bearers accountable to their human rights commitments.⁴⁸ Transparency International believes that poverty can be halved if efforts are coupled with better governance.⁴⁹ Moreover, the misappropriation of state wealth denies the indigent of life-saving, SERs.⁵⁰ In order to protect the available resources earmarked for SERs it has become necessary to establish a framework for monitoring corruption from a human-rights perspective.⁵¹ This is to assist in preventing human rights violations from occurring, through the corruption of state economic resources. It stands to reason that to fast track the realisation of housing, acts of corruption which infringe on this right should fall under amplified scrutiny.

1.8.2 What is understood by 'corruption'?

UN Office on Drugs and Crime (UNODC) warns that:

'Corruption is the thief of economic and social development; stealing the opportunities of ordinary people to progress and to prosper.'⁵²

The scourge of corruption has been haunting society for centuries; Plato said in the fourth century 'like illness, corruption will always be with us.'⁵³ Authors on the discourse of

⁴⁸De Beco G (2011) 1117.

⁴⁹Transparency International press release on Millennium Development Goals, 19 January 2005 available at http://www.unmillenniumproject.org/documents/endorse_TI_19Jan05.pdf (accessed on 10 April 2015). According to Eigen, Chairperson of Transparency International Berlin the success of the MDGs was under threat due to corruption.

⁵⁰Greenwood E 'Corruption and the Corruptibility of *Logos* in Greek Historiography' (2011) 4 *Acta Classica* 63.

⁵¹See Nowicki M & Fialova Z 'Human Rights Monitoring' *Warszawa: Helsinki Foundation for Human Rights* (2001) 15; Landman T 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26 *Human Rights Quarterly* 923; Krommendijk J 'The Impact and Effectiveness of Non-Judicial Mechanisms for the Implementation of Human Rights' (2011) 5 *Human Rights and International Legal Discourse* 264.

⁵²Yury Fedotov Executive Director of the UN Office on Drugs and Crime (UNODC) in his address to the Fifth Session in Panama City, 2013 available at <https://www.unodc.org/unodc/en/press/releases/2015/November/eliminating-corruption-is-crucial-to-sustainable-development> (accessed on 27 February 2016).

⁵³See Hamilton E & Cains H (eds) *Plato The Laws: Book 12* (1961) section d; Serfontein J 'Corruption and Fraud in the Empire of Constantine the Great between AD 327 and AD 337' (2011) 17 *Fundamina: A Journal of Legal History* 127.

corruption agree that corruption is immemorial, as old as government itself.⁵⁴ In the fourteenth century Abdul Rahman Ibn Kaldun said the main cause of corruption is ‘the passion for luxurious living within the ruling group’.⁵⁵ Ameresekere argues that in order to meet the expenditure on luxury the ruling group resorted to corrupt dealings.⁵⁶ This dissertation does not seek a ‘new’ definition on corruption, merely to examine the diverting of public funds from government for personal gain, as opposed to service delivery. There has been corruption in ancient times in Elizabethan England, Europe and present day USA, China, India and Japan: corruption does not pertain to culture or region.⁵⁷

It is trite law that there is no universally accepted definition for corruption. The commonly understood definition for corruption is ‘the abuse of entrusted power for private gain’ which basically translates into the abuse of entrusted power for private gain. The most agreed upon explanation of corruption is the embezzlement of public funds, assets or the acceptance of bribes by a public official. The simple dictionary definition of corruption is ‘dishonest or illegal behaviour especially by powerful people (such as government officials or police officers)’.⁵⁸

The Southern African community boasts a most apt definition provided by the Southern African Development Community Protocol against Corruption (SADC Protocol):⁵⁹

‘Corruption’ means any act referred to in Article 3⁶⁰ and includes bribery or any other behaviour in relation to persons entrusted with responsibilities in the public and private sectors which violates their duties as public officials, private employees,

⁵⁴Also see Klitgaard R *Controlling Corruption* 1988; Noonan J *Bribes* 1984 tracing the concept of bribery to the Middle East and finding out that in Mesopotamia and Egypt, from the fifteenth century B.C. on, there has been a concept that could be rendered in English as ‘bribe’ a gift that perverts judgment; Bardhan P ‘Corruption and Development: A Review of Issues’ (1997) XXXV *Journal of Economic Literature*.

⁵⁵Ameresekere N ‘Corruption: Causes, Consequences & Control’ Session Two – ‘Entrepreneurial Vision on Corruption and the Global Mandate’(2013) available at <http://pp.lao.org.pk/wp-content/uploads/2013/07/Entrepreneurial-Vision-on-Corruption-and-the-Global-Mandate.pdf> (accessed 20 Feb 2015).

⁵⁶Ameresekere N (2013). For a comprehensive take on both private and public corruption see Khan M ‘A Typology of Corrupt Transactions in Developing Countries’(1996) 27(2) *Institute of Development Studies Bulletin* 12.

⁵⁷See Porta D & Meny Y (eds) *Democracy and Corruption in Europe* 1997; Heidenheimer A & Johnston M (eds) *Political Corruption, Concepts and Contexts* (3ed) 2001.

⁵⁸Miriam Webber Dictionary (2015).

⁵⁹(2001) s1.

⁶⁰SADC Protocol.

independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind for themselves or others.’

The World Bank (WB) provides a commonly accepted definition for corruption as ‘the use of public power for private benefit’. The World Bank Institute and Institute for Contemporary Studies also lend their opinion to public office corruption labelling it as a crime of calculation and not of passion.⁶¹ Transparency International terms corruption as ‘the abuse of entrusted power for private gain’.⁶² Grubiša argues that corruption, is the cancer of most political systems but foremost of democracy.⁶³ Van Klaveren maintains that a corrupt civil servant regards his public office as a business, the income of which he will seek to maximise and thus the office then becomes a maximising unit.⁶⁴ Public officials engage in political corruption by manipulation of policies, institutions and rules of procedure in the allocation of resources. According to the Organisation for Economic Co-operation and Development (OECD), in corruption cases involving the public sector, at least one perpetrator comes from the ranks of persons holding a public office.⁶⁵

Most anti-corruption measures refer to a non-exhaustive list of acts that comprise corruption, but no universal general definition of the scourge. Moreover, international conventions do not define or criminalise corruption; instead it lists criminal acts amounting to corruption. Nonetheless, corruption does not refer to a particular behaviour but rather to a group of criminal acts in parallel with an abuse of entrusted power, such as embezzlement and bribery to name but a few. According to TI, sadly not a single country, anywhere in the world, is corruption-free and poor countries lose up to USD1 trillion per year to corruption. No matter how corruption is described, it is a known fact that it engenders the denial of SERs which mainly affects the poor. Therefore cognisance should be taken of the fact that, if public officials at any level engage in wrongdoing or mismanagement, they should be liable for

⁶¹The World Bank Institute and Institute for Contemporary Studies, Washington (2007) 28 available at <http://siteresources.worldbank.org/KFDLP/Resources/461197-1199907090464/BuildingKEbook.pdf> (accessed on 20 March 2015).

⁶²Transparency International available at <http://www.transparency.org/what-is-corruption/#define> (accessed 28 February 2016).

⁶³Grubiša D ‘Political Corruption in Transitional Croatia: The Peculiarities of a Model’ (2005) XLII *Politička Misao* 58.

⁶⁴Van Klaveren J ‘The Concept of Corruption’ in Heidenheimer A *Political Corruption: Readings in Comparative Analysis* (1978) 26.

⁶⁵OECD ‘Specialised Anti-Corruption Institutions: Review of Models’ (2008) 17.

prosecution because it is the fear of this prosecution that will keep them honed and ensure that they act according to the wishes of the democracy.⁶⁶

1.8.3 The link between corruption and human rights

The economic resources used for SERs emanate from the large budgets that governments control and the lack of effective oversight can lead to reckless expenditure, by unethical government employees who do not follow the letter of the law. For this reason it is important to highlight the link between the realisation of SERs and corruption, which erodes the available resources.

The international image of governments depends to a great degree on their respect for human rights and whether they obey the obligations set out under the international instruments, in particular the international bill of rights, the UDHR, ICESCR and ICCPR.⁶⁷ Today, international human rights law represents the standard by which the conduct of a state may be judged.

Scholars who have examined the links between corruption and human rights generally hold the view that corruption violates human rights. Delaney notes that the negative flows from corruption diminish economic development and increase social inequality.⁶⁸ Sandgren states that ‘corruption is now seen as a cause of poverty, not merely a consequence.’⁶⁹ Bacio-Terracino argues that there is a lack in showing a detailed manner in the ways the rights are infringed upon by various corrupt practices.⁷⁰ This dissertation attempts to bridge this gap by researching the effect that corruption has on the available resources for public housing and thereby on the access to the right to housing. It inevitably has a negative knock-on effect.

⁶⁶Clayton E The *Politics: Book VI* ‘The Best Kind of Democracy’ para 12 (b).

⁶⁷See chapter 2 for this framework. The UDHR influenced the Constitution of Organisation of the African Union (OAU) of 1963, the African Charter on Human and People’s Rights 1981 (ACHPR), the European Convention on Human Rights 1950, European Commission and Court of Human Rights 1969, the Organisation of American States Convention of Human Rights 1969 and the human rights chapter of the constitutions of the Asian states.

⁶⁸Delaney P ‘Transnational Corruption: Regulation Across Borders’ (2007) 47 *VA. J. Int’l L* 413, 419. Also see Kaufmann D ‘Human Rights, Governance and Development: An Empirical Perspective’ (2006) *Development Outreach World Bank Institute* 19.

⁶⁹Sandgren C ‘Combating Corruption: The Misunderstood Role of Law’ (2005) 39 *INT’L L* 717.

⁷⁰Bacio-Terracino J ‘Corruption as a Violation of Human Rights’ Geneva: International Council on Human Rights Policy (2008) *Corruption and Human Rights: Making the Connection* available at <http://www.ichrp.org/en/projects/131> (accessed on 20 January 2015).

Considering that the delivery of public housing is dependent on economic resources, corrupt acts that erode these resources, can have a direct connection in delaying accesses to housing. Therefore corruption has an undeniable connection with individuals and their inherent human rights; by taking a social approach to the scourge places emphasis on the rights-holder who suffers the consequences.⁷¹ Kumar believes that the problem of corruption can be addressed by framing it as a human rights violation.⁷² If corruption is seen as a violation of human rights, the victims will be empowered to look for redress. For instance, victims should be able to approach a court when housing projects are delayed due to corrupt practices in the government that led to the available funds for a housing project, being diverted for self-interest and not the fulfilment of the right. Key to this pattern is complacency in the application of laws, policies and regulations by public officials.⁷³

The ICESCR⁷⁴ provides for the right to adequate housing, which is a component to an adequate standard of living as espoused by the UDHR.⁷⁵ The state is obliged to provide the core components of SERs regardless of its available resources.⁷⁶ This indicates that a certain degree of legal security of tenure should be afforded to the impoverished. What constitutes adequate housing is dependent on various factors such as social, economic and certain minimum elements that underpin the right. These attributes are violated through corruption and thereby restricted, leading to the infringement of a human right. Furthermore accessibility may also be affected through corruption, in that, although housing should be available for all disadvantaged groups, a bribe may get a person a higher place on the housing list, ahead of, for instance a disabled person.⁷⁷

The international community have generally taken a 'silo' approach in the discourse on human rights on the one hand and anti-corruption measures on the other. Corruption again came into sharp focus internationally during the 1990s, which gave rise to the OECD creating

⁷¹Bacio-Terracino J (2008).

⁷²See Kumar C. Raj 'Challenges of Corruption and Good Governance: A Human Rights Perspective' (2012)1 *Jindal Journal of Public Policy*. Kumar C. Raj 'Corruption and its Impact on Human Rights and the Rule of Law: Governance Perspectives' in Human Rights, Justice and Constitutional Empowerment 2007.

⁷³See chapter 5 for discussion on delays in public housing due to corruption.

⁷⁴Article 11(1). CESCR, *General Comment No. 4: The Right to Adequate Housing, Article 11(1) of the Covenant* U.N. Doc. E/1992/23, 13 December 1991, para. 8.

⁷⁵Munro J 'Why States Create International Human Rights Mechanisms: The Asean Intergovernmental Commission on Human Rights and Democratic Lock-in theory' (2009) 10 *Asia-Pac. J. on Hum. Rts & L1*.

⁷⁶General Comment No 3: The Nature of the States Parties' Obligations in terms of article 2 (1) of the ICESCR.

⁷⁷See chapter 3 on the myths of the existence of a housing list.

the first international corruption convention, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.⁷⁸ The main impetus of this awareness was aimed at anti-corruption measures to eradicate the global economy of corrupt transactions.⁷⁹ Thus the focus was nowhere near how corruption affects human rights. Not only the recognition of corruption as the converse to human rights but also the integration of legislation and policy is necessary for improving governance, the rule of law and the minimising of corruption. Thus the fight against corruption is not just to curb public power used for personal benefit, but also to protect human rights.

The Economic and Social Council (ECOSOC) decries the serious problems posed by corruption in that it ‘endangers the stability of societies, undermines the values of democracy and morality, jeopardises social, economic and political development’.⁸⁰ This Council crystallises the universality of the phenomenon of corruption and makes the clear link between the undermining effects of corruption to the developmental efforts of developing countries; the poor being the most vulnerable are the likely victims of corruption due to the negative consequences of corruption on SERs. The UNCHR⁸¹ underlines the importance of ‘political leadership in the fight against corruption: highlighting the role of asset-recovery provisions; adopting national anti-corruption mechanisms and legislation; and of cooperation among countries in fighting corruption, including prevention, investigation and the prosecution of offenders’.⁸² In essence the international community is frightfully aware of the profoundly negative effect corruption may have on governance.

The WB submits that there is a link between the existence of corruption and the lack of socio-economic development in that corruption is an obstacle to the fulfilment of SERs.⁸³ An example of this is where economic resources, earmarked for public housing development, are diverted to contractors sporting ill credentials, and entrusted powers benefitting thereby. Funds are either paid before completion of development or contractors get paid without

⁷⁸Adopted in 1999.

⁷⁹See Transparency International address on the central role of civil society in combating corruption in the era of globalisation, Carter Centre ‘Transparency for Growth’ Conference, Atlanta, Georgia 4 May 1999 available at <http://www.cartercenter.org/documents/1189.pdf> (accessed on 17 March 2016).

⁸⁰ECOSOC adopted resolution 2001/13 entitled ‘Strengthening international cooperation in preventing and combating the transfer of funds of illicit origin, derived from acts of corruption, including the laundering of funds, and in returning of such funds.’

⁸¹The UNCHR functioned from 1946 until replaced by the UN Human Rights Council in 2006.

⁸²Commission on Human Rights 57th session.

⁸³See John H *Depoliticizing Development: The World Bank and Social Capital* (2002).

having delivered the agreed quality or quantity of housing.⁸⁴ Thus corruption usurps the available resources for housing and thereby delays access to the just recipient.

In its latest attempt at raising awareness on the negative effects of corruption on human rights, the UNODC expressed in November 2015 that corruption undermines democratic institutions, slows economic development and thereby proves to be a key obstacle to progress and prosperity for the poor.⁸⁵ This awareness-drive was preceded by the General Assembly (GA) in September 2015 setting out 17 sustainable Development Goals aiming to create a life of dignity for all by 2030.⁸⁶ Goal 16 aims to promote the building of effective, accountable institutions and reducing all forms of corruption and bribery. The barriers to achieving these targets include corruption which the UN admits threatens the erosion of social and economic development and human rights, and flourishes where rule of law is weak and administration of criminal justice ineffective.⁸⁷

Ongoing research states that corruption disables a state from meeting its obligations to respect, fulfil, and protect the human rights of its citizens.⁸⁸ These attributes are the essence of human rights in any jurisdiction. Hence, where a state does not conform to these elements a breach of human rights occurs. This is to say that the non-delivery or poor workmanship for public housing by contractors appointed by government officials through adverse means, points to corruption being used to directly to violate the realisation of the right to housing and thereby affecting the fulfilment of the right. This action does not gel with the obligation to fulfil as the delivery has been stunted by corruption in government; the available resources were not sufficiently guarded and thereby the obligation to protect human rights, suffers. Moreover, respect for human rights is flouted through the flagrant disregard of laws and of anti-corruption measures in place. As it is, where funds for housing projects are stolen by

⁸⁴See chapter 5 for discussion on this.

⁸⁵United Nations Office on Drugs and Crime 'Eliminating Corruption is Crucial to Sustainable Development' Press Release 1 November 2015 available at <https://www.unodc.org/unodc/en/press/releases/2015/November/eliminating-corruption-is-crucial-to-sustainable-development>.(accessed 26 February 2016).

⁸⁶The new development agenda adopted at a United Nations Sustainable Development Summit 2015 25-27 September 2015 New York available at <https://sustainabledevelopment.un.org/post2015/summit> (accessed on 17 March 2016).

⁸⁷See chapter 4 for discussion on the judiciary, public protector and national prosecuting authority in dealing with corruption. Also see chapter 6 for discussion on the progressive judiciary of India engaging social action litigation in adjudicating SERs and public corruption.

⁸⁸Gathii J T 'Defining the Relationship Between Human Rights and Corruption' (2009-2010) 31 *U. Pa. J. Int'l L* 125.

entrusted public officials, the resources are not being used to their maximum in the realisation of SERs.⁸⁹

The UN Special Rapporteur on the Right to Health warns that when a state does not reach its goals in progressive realisation due to corruption, then the state has failed to comply with its treaty obligations concerning the right.⁹⁰ The United Nations Committee on the Rights of the Child has referred to the fact that corruption has a negative effect on the level of resources available for the implementation of the Convention on the Rights of the Child.⁹¹ Therefore, states cannot comply with their obligation to implement the SERs of children to the maximum extent of available resources as provided under Article 4 of the Convention.⁹²

The government is obliged to protect economic resources earmarked for the realisation of SER programmes against public officials who abuse their power. Failing to take appropriate action against wayward public officials, whose acts lead to deprivation of human rights, culpably exposes the government to human rights violations. Therein lies the link whereby corruption violates human rights namely where corruption causes the failure to meet the obligation to respect, protect and fulfil human rights. Regrettably, the recognition of corruption as a threat to human rights and thereby the enjoyment of SERs has been static in not receiving the zealous support it deserves from the international community. This may be due to the fact that the international community had not bargained for the unforeseen negative consequences corruption would impart on the delivery of SERs. As it is, a clean human rights record is now used as a condition to allow states to become members of international organisations such as the European Union or the World Trade Organisation. Furthermore, TI's Corruption Perception Index also illustrates the monitoring of corruption internationally. It is evident that the fight against corruption cannot ignore the latter's negative implications on human rights.

⁸⁹ See chapter 2 for discussion on the ICESCR espousing the maximum use of the available resources for housing.

⁹⁰ Hunt P ECOSOC Report of the Special Rapporteur on the 'Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health' U.N. Doc. E/CN.4/2006/48 (3 March 2006) para 40.

⁹¹ See chapter 2 for discussion on this Convention.

⁹² Committee on the Rights of the Child 'Concluding Observations of the Committee on the Rights of the Child: Kenya' U.N. Doc. CRC/C/15/Add.160 (7 November 2000) para 9; Committee on the Rights of the Child, 'Concluding Observations of the Committee on the Rights of the Child: Georgia' U.N. Doc. CRC/C/15/Add.124 (28 June 2000) paras 18, 19.

Therefore the relationship between corruption and human rights should be monitored in order to curb the undermining of the realisation of SERs. This will mean providing early warning measures where funds are at risk of being abused. Ignoring corruption on the part of government would amount to trivialising international instruments aimed at combating corruption in the public service. The inevitable negative link between corruption and non-delivery of human rights cannot continue to be ignored.⁹³

1.8.4 International anti-corruption measures

1.8.4.1 Human rights obligations for international banking organisations

It is important to note that in delivering on its SERs obligations, states must, if necessary, obtain funding from the international community.⁹⁴ The International Monetary Fund (IMF) and the WB are international financial institutions providing assistance to developing countries. The WB is a multilateral organisation with annual funding that reaches USD 43 trillion. The economic resources provided by these institutions can fall prey to corruption and thereby the anticipated development is impeded. The WB acknowledges the importance of anti-corruption measures. In this regard it developed the Governance and Anti-corruption Strategy. This strategy was introduced because corruption and poor governance significantly undermine the Bank's poverty reduction mission; these undermine the legitimacy of the institution and its programme, divert resources from priority sectors and increase the debt of developing and countries in transition.⁹⁵ The WB has played a very active role in fighting corruption and since 1996 it has supported more than 600 anti-corruption programmes.⁹⁶

In its 2015 anti-corruption brief the WB submitted that the reforms on fighting corruption were built on the idea that corruption was a dysfunction of public administration and could be curbed by accountability and transparency.⁹⁷ Furthermore, the WB believes that attacking corruption is critical to the achievement of the Bank's overarching mission of poverty reduction. The Bank is clear that its development finance must be corruption-free. In 2007 the

⁹³See para for discussion on link between corruption and human rights.

⁹⁴See chapter 2 for discussion on Comment no 3 'The Nature of the States Obligations' in terms of SERs.

⁹⁵The World Bank Anticorruption Overview available at <http://web.worldbank.org/> (accessed on 20 February 2016).

⁹⁶The World Bank Anticorruption Overview.

⁹⁷World Bank Anti-corruption Brief 3 August 2015 available at <http://www.worldbank.org/en/topic/governance/brief/anti-corruption> (accessed on 20 February 2016).

Bank adopted the strategy ‘Strengthening World Bank Group Engagement on Governance and Anti-corruption’ (GAC).⁹⁸ This has lent investigative and preventive measures to reduce the risk of fraud and corruption in Bank-financed projects. Through the GAC initiative the WB has debarred many firms and individuals found to be corrupt, but the Bank is yet to find any wrongdoing by a government and debar it as such.

In 2010 the Bank launched the International Hunters Alliance, a network of 286 anti-corruption officials from 134 countries, aimed at strengthening global anti-corruption efforts in a parallel fashion.⁹⁹ This is all good and well but the Tilburg Guiding Principles on the WB, IMF and Human Rights¹⁰⁰ warns that it has become urgent that the WB and IMF integrate human rights considerations into all aspects of their operations.¹⁰¹ Frankly these financial institutions’ macro-economic policies should take into account their impact on human development, including human rights.¹⁰²

The Tilburg Principles relate to human rights obligations for the international financial institutions such as the WB and the IMF, which links legal obligations to the field of human rights to economic and political realities. The Principles state that the WB and IMF have international legal obligations in taking full responsibility for human rights situations, whence their own programmes undermine the fulfilment of human rights. This the possible redress for the impact of adverse human rights on the activities of the financial institutions. Thus the WB policies should be enabled to include international human rights law when reviewing Bank actions.¹⁰³ Furthermore, the sharing of information with the ECOSOC is recommended.

Regrettably the Tilburg Principles have not been accepted by these institutions. The IMF has refrained from enforcing human rights conditions on its assistance to members. A big void is

⁹⁸Fact Sheet: World Bank Achievements in Governance and Anti-Corruption: Moving the Agenda Forward available at http://siteresources.worldbank.org/EXTPREMNET/Resources/GAC_FACT_SHEET.pdf (accessed on 20 February 2016).

⁹⁹Also see ‘Strengthening Governance: Tackling Corruption The World Bank Group’s Updated Strategy and Implementation Plan 2012’ available at <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/285741-1326816182754/GACStrategyImplementationPlan.pdf> (accessed 22 February 2016).

¹⁰⁰This was drafted by a group of experts, meeting at Tilburg University, The Netherlands, in October 2001 and April 2002 available at <https://www1.umn.edu/humanrts/instate/Tilburg%20Guiding%20Principles%5B1%5D.pdf> (accessed on 12 March 2016).

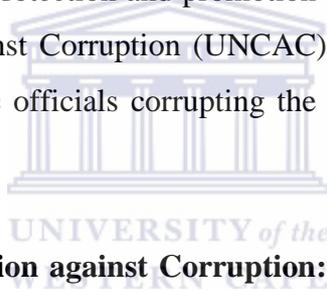
¹⁰¹Tilburg Principles para 24.

¹⁰²Tilburg Principles para 23.

¹⁰³Tilburg Principles 39.

that the WB does not in any of its programmes explicitly recognise human rights in governance. The WB clarifies that it is not an enforcer of human rights, although it acknowledges that there is a link between development and human rights.¹⁰⁴ The World Bank's Governance and Anti-Corruption strategy has not been fully taken up across institutions and the way it deals with whistleblowers has come under scrutiny by outside watchdogs.¹⁰⁵

The importance of available economic resources to the realisation of housing makes it imperative upon these financial institutions to take the impact of corruption on the fulfilment of these rights, more seriously. The WB has a responsibility to acknowledge the harm done to victims by corruption and should take governments to task in this regard in its relief efforts. Importantly, the GA in its 1986 Declaration on the Right to Development¹⁰⁶ maintains that the denial of human rights is an obstacle to development therefore equal attention must be afforded to the implementation, protection and promotion of human rights. In this regard the United Nations Convention against Corruption (UNCAC) attempts to provide guidelines to outlaw and sanction those public officials corrupting the available resources from the state coffers.



1.8.4.2 United Nations Convention against Corruption: measures to curb corruption in the public service

1.8.4.2.1 Corruption and public procurement

Public procurement is a hive where corrupt activities flourish due to the large amounts of public funds available for buying goods and services. Moreover, corruption occurring in public procurement is arguably the most pervasive type of corruption in the public service.¹⁰⁷

¹⁰⁴Van Genugten W Hunt P & Nijmegen M S (eds) World Bank, IMF and Human Rights (2003) 247-255.

¹⁰⁵Transparency International 'Are we there yet? The World Bank's Anti-corruption Record' 28 June 2012 available at http://www.transparency.org/news/feature/are_we_there_yet_the_world_banks_anti_corruption_record (accessed on 20 February 2016).

¹⁰⁶GA Resolution 128 UN Doc A/RES/41/128 (1986) 186.

¹⁰⁷PWC 'Global Economic Crime Survey' (South Africa) available at www.pwc.com (accessed on 21 March 2015). Also see Soreide T *Corruption in Public Procurement: Causes, Consequences, Cures* (2002); Kelman S *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990).

Therefore it is important to highlight the place of public procurement in the chain of wayward behaviour by public officials.¹⁰⁸

The negative synergy between corruption and public procurement¹⁰⁹ deserves scrutiny, before explaining how the UNCAC is geared at dismantling this relationship. In buying goods and services it has been shown that different branches of government pay very different prices for the exact same products or services. Therefore public procurement is the means used by government to ensure goods and services are procured in the most cost-effective manner.¹¹⁰ It stands to reason that the available resources for public housing development projects are limited and need to be protected in that public officials should follow procurement processes, ensuring transparency in awarding contracts to service providers who can deliver on the mandate.

The reason public procurement is one of the key areas where corruption thrives is due to large sums of money that is available for infrastructure development such as public housing.¹¹¹ Despite the legislative protection against mischief in the public service, procurement processes for public housing projects are often tainted by corruption.¹¹² Where there is transgression of procurement laws it leads to the awarding of housing contracts to contractors who deliver shoddy work or do not complete the contract but get paid regardless.¹¹³

Public officials in charge of procurement processes have the discretion to take procurement decisions that could affect the credibility of the process by favouring contractors who have dubious credentials. This happens where corruption taints public procurement for housing projects, through bribery in the selection of contractors and which may result in sub-standard housing or no delivery at all. This way corruption taints the financing of housing which is essential for delivery. Through this action entrusted power has a direct hand in the non-

¹⁰⁸The scope of this thesis does not include an exploration of the public procurement process. The focus is rather on corruption which is most prevalent in procurement processes and thereby erodes the available resources for public housing. See chapter 5 for discussion on corruption in the public housing programme.

¹⁰⁹For detailed explanation on public procurement see Bolton P *The Law of Government Procurement in South Africa* (2007)57. Also see Transparency International *Handbook on Curbing Corruption in Public Procurement* 2006.

¹¹⁰See chapter 5 for discussion on procurement laws and its abuse by public officials in the public housing programme.

¹¹¹See Beukes S *The Efficacy of Public Procurement as Policy Tool for Black Economic Empowerment* (unpublished LLM thesis UWC 2011). See Chapter 5 for discussion on corruption in public housing in South Africa.

¹¹²Also see chapter 6 on how the judiciary in India deals with corruption in the public service.

¹¹³See chapter 5 for the SIU Reports uncovering this behaviour.

delivery of a right due to the bias of personal interest. Hence corruption in procurement has a direct link to the non-supply of housing. Worldwide, procurement corruption also taints 25 percent of medicine procurement representing approximately USD 12.5 billion.¹¹⁴ Price-fixing and ‘tenderpreneurships’¹¹⁵ are realities of the world in that they runs into estimates of USD 80 billion a year which is roughly the amount the UN believes is needed to eradicate global poverty.¹¹⁶

The occurrence of human rights violations could be reduced if there were sharp focus on how public officials attended to the distribution of resources earmarked to realise SERs.¹¹⁷ In order to protect the available resources for housing there should be a keen focus on accountability at the relevant institutions that provide the delivery of the right.¹¹⁸ At hand is an international treaty dealing with the scourge of corruption in the public service and procurement, which is explore below.

1.8.4.2.2 United Nations Convention against Corruption

In 2003, the UNCAC was opened for signature. It entered into force in 2005 and has become one of the most widely ratified international instruments, with 176 signatories as of 1 August 2015.¹¹⁹ Complementing this initiative is the United Nations Anti-Corruption Day¹²⁰ which raises continued awareness in bringing the issue of corruption to the fore. The global effort to

¹¹⁴United Nations News Service UN Health Agency Launches Initiative to Fight Corruption in Medicines Procurement 30 October 2006 available at <https://www.unodc.org/unodc/en/press/allpress.html?ref=fp> (accessed on 27 February 2016).

¹¹⁵Collins Dictionary (2013) - A *tenderpreneur* is a South African government official or politician who abuses their powers and influence to secure government tenders and contracts. Also see Beukes S (2011) for an expose of this practice in South Africa.

¹¹⁶Soros G & Srinivasan ‘Briefing 19: Corruption, Privatisation and Multinationals: The Corner House’(2000) available at: <http://www.icaap.org./Cornerhouse> (accessed on 5 February 2016).

¹¹⁷Also see Toebe B ‘The Impact of Acts of Corruption on the Enjoyment of the Right to Health’ (Geneva: International Council on Human Rights Policy (2007) 6 available at <http://www.ichrp.org/files/papers/122/131 - Brigit Toebe - 2007.pdf> (accessed 15 January 2015); Dimitrijevic V ‘State Reports’ in Moller J Alfredsson G et al (eds) *International Human Rights Mechanisms. Essays in Honour of* (2001) 199.

¹¹⁸See World Economic Forum ‘Full Survey: Trust in Governments, Corporations and Global Institutions Continues to Decline’ Geneva Switzerland (2005). The World Economic Forum’s tracking of public opinion in 14 countries –Argentina, Brazil, Canada, Germany, India, Indonesia, Italy, Mexico, Nigeria, Russia, Spain, Turkey, the United Kingdom and the US – found a strong deterioration in public trust in government between 2001 and 2005 in all but a few of the countries. In only six of the 14 did more than half of the citizens trust government.

¹¹⁹UNCAC was adopted by the GA on 31 October 2003 by Resolution 58/4. G.A. Res. 55/61 effective 14 December 2005 available at <http://unpanl.un.org/intradoc/groups/public/documents/un/unpanO10993.pdf> (accessed 3 July 2013).

¹²⁰Marked on 9 December 2004.

combat corruption is evident by the signatures to the UNCAC by the international community. The UNCAC was brought about in the quest to stymie corruption in the public service as an international collective initiative and it singles out corruption in public procurement specifically.

The UNCAC notes in its preamble that the key reasons in addressing corruption are:

‘The undermining of institutions, values of democracy, ethical values, justice, jeopardising sustainable development and the rule of law. Furthermore to promote integrity, accountability and proper management of public affairs and public property.’

Although there is no single comprehensive list of universally accepted acts constituting corruption, UNCAC provides the broadest international anti-corruption convention which contains what is generally accepted as ‘corrupt acts’.

The international community is keenly aware of the malfeasance that taints the purchasing of state goods and services in government and therefore UNCAC makes provisions on how to hinder this practice.¹²¹ International scrutiny through UNCAC¹²² requires the maintenance of transparent, competitive and efficient public procurement systems to combat corruption in this system.¹²³ As a starting point public officials have to make declarations to appropriate authorities regarding, inter alia, ‘their outside interests,¹²⁴ employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials’.¹²⁵ This means that public officials dealing with procurement for public housing should not do business with the state in this regard.¹²⁶ Notwithstanding this, such officials must follow the laws that govern public procurement including the laws pertaining to public financial management. UNCAC criminalises illicit enrichment, bribery and embezzlement in the public service.¹²⁷

¹²¹Also see Carr I ‘The United Nations Convention on Corruption: Making a Real Difference to the Quality of Life of Millions’ (2006) 3 *Manchester J. Int’l Econ. L* 40.

¹²²Articles 9, 10. Also see Yukins C ‘Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNICTRAL Model Procurement Law’ (2007) 36 *Public Contract Law Journal* 3.

¹²³In South Africa the Constitution s217 the Procurement Clause, promotes these attributes for public procurement.

¹²⁴Article 9 (1) (e).

¹²⁵Articles 7, 8.

¹²⁶In South Africa senior managers are found to be doing business with the state through their own departments, see chapter 5.

¹²⁷Articles 15, 17, 20-1.

Preceding the adoption of UNCAC, other international and regional efforts at combating corruption were effected through the GA adopting the International Code of Conduct for Public Officials¹²⁸ and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions.¹²⁹ These instruments, although non-binding, are politically relevant as they represent a broad agreement by the international community on these matters.

A fatal flaw in the UDHR, ICESCR and the UNCAC is that it does not include the right to be free from corruption in the realisation of SERs. Although the mischief of public officials is a point of focus in UNCAC, it fails to tackle political corruption; it refrains from mentioning any political system and therefore omits the importance of parliaments in holding their governments to account.¹³⁰ Another bone of contention is the lack of mandatory language in UNCAC. It is recommended that efforts of states to combat corrupt practices should go in concert with the OECD Convention on Combating Bribery for Foreign Public Officials in International Business Transactions and countries should be encouraged to ratify this Convention as well. Otherwise the instruments fail in their purpose and thereby rendering them ineffective. However as the guardian of the UNCAC, UNODC is committed to promoting good governance, integrity and transparency to help countries achieve the Sustainable Development Goals. The African continent is also under scrutiny through regional anti-corruption instruments which will be explored below.

1.8.5 Regional anti-corruption measures: The African Union Convention on Preventing and Combating Corruption (AUCPCC)

Corruption comes at great costs to economic development and the African Union attests that 25 percent of the continent's GDP (about USD150 billion) is lost to corruption.¹³¹ Needless to say these lost billions could have improved on the African continent's record of slow delivery on SERs. The UNODC reports that corrupt acts cost some UDS1.26 trillion per year for

¹²⁸UN Doc Resolution 51/59.

¹²⁹UN Doc Resolution 51/191.

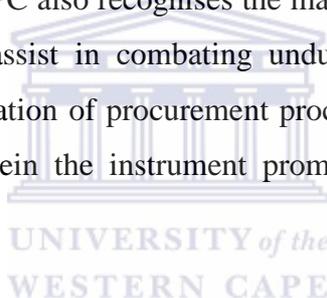
¹³⁰See Transparency International, had observer status on the drafting on flaws in the UNCAC available at http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/uncac#sth.ash.YFeGQCjH.dpuf (accessed on 21 July 2013)

¹³¹UNODC 'Eliminating Corruption is Crucial to Sustainable Development' *Press Release* 1 November 2015.

developing countries. The AUCPCC ¹³² recognises the effect of corruption on SERs and proffers in its preamble that it is:

‘Concerned about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples.’

This untenable situation can be eased by improving rule of law, oversight and accountability. It therefore became necessary to provide for an instrument that would assist in fighting corruption because the backlog in the delivery of SERs has resulted in a growing disenchantment with government performance in Africa. ¹³³ Following the example of UNCAC, ¹³⁴ the AUCPPC also acknowledges the embezzlement of state funds through public procurement and seeks to thwart it. ¹³⁵ In this regard and to protect the economic resources on the African continent, the AUCPPC also recognises the mandatory declaration of assets of on the part of public officials to assist in combating undue enrichment derived from state resources. ¹³⁶ Where there is negation of procurement processes, the AUCPPC promotes the recovery of assets. ¹³⁷ In this vein the instrument promotes repatriation of stolen or ill-acquired assets or money. ¹³⁸



Although the preamble, recognises the negative effects corruption has on socio-economic stability and development in Africa. Surprisingly, the loss of SERs experienced over time and the endemic corruption in Africa did not encourage the AUCPCC to characterise corruption as a direct assault on human rights. ¹³⁹ Another damper is that this Convention does

¹³²Adopted in Maputo, Mozambique on 11 July 2003, entered into force on 5 August 2006. South Africa signed on 16 March 2004 and ratified on 11 November 2005. Also see the SADC Protocol against Corruption Similar regional anti-corruption conventions are: the Inter-American Convention against Corruption (1996); Council of Europe Criminal Law Convention on Corruption (1999).

¹³³See Rondinelli D ‘Governments Serving People: The Changing Roles of Public Administration in Democratic Governance’ in Public Administration and Democratic Governance (2007). Also see Burger J ‘Irreproachable Ethical Behaviour as Prerequisite for Reversing the Downward Performance Spiral’ (2002) 21 *Politeia* 40.

¹³⁴Articles 9, 11.

¹³⁵Article 11(2).

¹³⁶Articles 7, 8. Art 1(1) contains a broad definition of the term public official which ‘means any official or employee of the State or its agencies including those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State at any level of its hierarchy.’

¹³⁷Article 18.

¹³⁸Articles 16, 19(3).

¹³⁹Also see Jatto L Jnr ‘Africa’s Approach to the International War on Corruption: A critical Appraisal of the African Union Convention on Preventing and Combating Corruption’ (2010) 10 *Asper Rev. Int’l Bus. & Trade L* 79.

not provide a framework to remedy the violation of the rights of individuals or groups, as a result of corruption. The AUCPCC instead only provides for criminal sanctions which exclude victims who are denied access to compensation and restitution. Other weaknesses include the fact that access to information is too limited, there is no provision on statutes of limitations and there is a lack of resources for follow-up mechanisms. Kiwinda contends that the regional human rights system in Africa is stuck between the gap of promise of human rights and their actual realisation.¹⁴⁰

Following in the tracks of the UNCAC other regional regimes on corruption also do not mention the violation of human rights by this scourge. A case in point is the Inter-American Convention that has already celebrated its 20-year anniversary, and which implemented its Follow-Up Mechanism and yet still has not included human rights into its regime.¹⁴¹

1.8.6 The South African response to corruption

1.8.6.1 Prevention and Combating of Corrupt Activities Act

The preamble of the Prevention and Combating of Corrupt Activities Act (Corruption Act)¹⁴² is in sync with the international community's sentiments on corruption and the devastating effects thereof, as it proffers that:

‘corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardise sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organised crime. The illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies, ethical values and the rule of law.’

It is evident in the preamble of the Corruption Act of 2004 that the South African government has no excuse not to be aware of the devastation that corruption wreaks in the national economy. The common law name for corruption was known as bribery which could only be

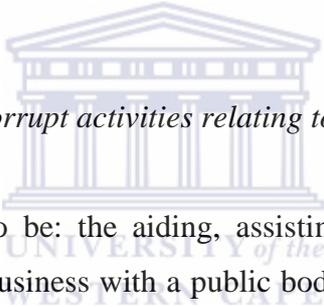
¹⁴⁰Kiwinda M *International Human Rights and their Enforcement in Africa* (2011) xiii.

¹⁴¹For more on this convention see Sutton R *Controlling corruption through collective means: Advocating the inter-American convention against corruption* (1996) 20 *Fordham International Law Journal* 1426-1478.

¹⁴²Act 12 of 2004.

committed by or through state officials. In South Africa the common law crime of bribery has been repealed and replaced by the Corruption Act of 1991 (as amended by the 2004 Act). In its quest to stymie and combat corruption the legislature sought relief through the Corruption Act which establishes an all-encompassing offence of corruption in section 1. This is the primary national anti-corruption legislation seeking to combat public sector corruption in government in recognition of the UNCAC.¹⁴³

The available resources in the public purse, in this jurisdiction, should enjoy the ‘protection’ of this Act against malfeasance generally and against members of the public service specifically. The aim of the Corruption Act to root out corruption can be derived from its legislative precepts. It pertinently prohibits corrupt activities in public procurement and creates offences that are relevant to this process.¹⁴⁴ The prudent use of resources in the state is protected through this legislation which aims to combat particularly, procurement corruption in the public service.



Section 4 Offences in respect of corrupt activities relating to public officers

This section deems corruption to be: the aiding, assisting or favouring of any particular person in the transaction of any business with a public body; aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person in relation to the transaction of any business with a public body.¹⁴⁵ The legislators deemed it necessary to single out specific offences relating to public officers.¹⁴⁶ In this regard the Act refers to offences of corruption relating to contracts.¹⁴⁷ This is a clear indication that the lawmakers intended to protect state resources against reckless contracting by public officials. This Act is furthermore embellished by the provision for offences in respect of corrupt activities relating to procurement and withdrawal of tenders.¹⁴⁸ The Act also prohibits the promotion, execution or procurement of any contracts with a public body, a public official

¹⁴³See Preamble providing ‘and whereas the Republic of South Africa desires to be in compliance with and to become Party to the *United Nations Convention against Corruption* adopted by the General Assembly of the United Nations on 31 October 2003. South Africa signed UNCAC on 9 December 2003 and ratified on 22 November 2004.

¹⁴⁴Sections 12, 13.

¹⁴⁵Section 4.

¹⁴⁶Section 4.

¹⁴⁷Section 12.

¹⁴⁸Section 13.

(or private person) who from being at liberty to accept or agree or offer to accept any gratification¹⁴⁹ from another person for reciprocal gain.¹⁵⁰

Thus, public officers are warned by the Act not to act in a manner that amounts to the misuse of legislative duties, which in turn is tantamount to abuse of position.¹⁵¹ The Act proscribes public procurement irregularities¹⁵² leading to corruption and any public official found in this position, is liable to a fine or imprisonment of up to 18 years.¹⁵³ This will apply where a public official is found to have appointed contractors and made disbursements to contractors, irregularly by disregarding legislation and policy guidelines, unduly gained thereby.¹⁵⁴ Furthermore the Corruption Act explicitly prohibits a public official from acquiring a private interest in a contract connected with the public body in which he is employed and the Act details penalties regarding this violation.¹⁵⁵

In terms of this Act¹⁵⁶ it is also an offence when a tender has been awarded to a pre-designated entity. A very important section is the Act provides for the establishment of a register for tender defaulters. Williams argues that the World Bank's rejection and debarment-measures represent a watershed in corruption control by a developmental institution.¹⁵⁷ Alas, the register for tender defaulters in South Africa is non functional and the national treasury website claims that there are no tender defaulters currently, despite the fact that the register is operational since 2004.¹⁵⁸ The paucity in names is due to the very few convictions being secured for tender-corruption under the Corruption Act. In the main it is due to the difficulty of detecting corruption and tardiness in investigating public procurement corruption all of

¹⁴⁹Section 2 (3)(a) to accept or agree or offer to accept gratification includes (i) to demand, ask for, seek, request, solicit, receive or obtain; (3)(b) a reference in this act to give or agree to give any gratification included to (i) promise, lend, grant, confer or procure.

¹⁵⁰S12 (1) (a) (i) (aa).

¹⁵¹Section 4. See chapter 4 for discussion on how the President abused his office for personal gain.

¹⁵²Sections 12, 13.

¹⁵³Section 26.

¹⁵⁴The Public Finance Management Act 1 of 1999 (PFMA) provides the laws on how state funds should be spend. See chapter 5 for discussion on this. Also see Yukins C 'Suspension and debarment: Re-thinking the process' (2004) 13 *Public Procurement LR* 256.

¹⁵⁵Section 17(1)-(2). See chapter 5 for discussion on the SIU investigations into procurement irregularities by public officials in public housing projects.

¹⁵⁶Section 13.

¹⁵⁷Williams S 'The Debarment of Corrupt Contractors from World Bank-Financed Contractors' (2007) 36 *Public Contract Law Journal* 305.

¹⁵⁸National Treasury available at <http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf> (accessed on 10 March 2016).

which tests the public service regularly. The Corruption Act ¹⁵⁹ comprehensively covers all persons including private persons, public figures extending to public officers, members of the legislature, judiciary and members of the prosecuting authority. Whilst there have been several court challenges¹⁶⁰ on public procurement irregularities, these cases have not lead to any public officials being criminally charged under the specific provisions of the Corruption Act of 2004. Most notable is the lack of political will in enforcing the anti-corruption measures, particularly the Corruption Act against public officers.

1.8.6.2 Case law of public officials charged under the Corruption Act

The obligation to fulfil is only complete when legislation promulgated to assist in the fight against corruption is tried and tested against the people it is aimed at, should transgression of such law happen. This is to instil deterrence in the hope of reaping the desired effect of enforcing compliance.

The high profile case of *S v Shaik and Others* ¹⁶¹ was the most prominent case with a conviction under the Corruption Act of 1992 which exposed public sector corruption. This case proved the fraudulent and corrupt relationship between a business person and a South African politician, anti-apartheid leader, the deputy president of the country at the time, now President, Zuma. ¹⁶²

The issues before the court were whether a benefit was given to induce this senior politician to use his influence in favour of the accuser's interests and whether the intervention sought involved the politician exercising his duties as a minister in the provincial government of KwaZulu-Natal or, later as deputy president of the Republic of South Africa. Evidence revealed four instances where this senior politician intervened to protect assist or further the interests of the accuser's business enterprises.¹⁶³ Thus the procurement process for contracts was compromised in favour of the accused' companies and thereby the constitutional principles of transparency, competitiveness, cost-effectiveness, fairness and equitability,¹⁶⁴

¹⁵⁹Part 2 s4-9.

¹⁶⁰For the latest case on this see: *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (4) SA 179 (CC).

¹⁶¹2007 (1) SACR 142 (D).

¹⁶²See chapter 4 for discussion on pending corruption charges against Zuma.

¹⁶³*S v Shaik* paras 187c – e; 189f – h; 190b - 191j.

¹⁶⁴See Constitution s217 the procurement clause.

were compromised. Furthermore it was a textbook case for the Corruption Act in its aim to stunt public sector corruption.

It was found that the accused and his companies, from October 1995 to September 2002, made some 238 payments of money to this politician, with the object of inducing him to use his name or political influence in favour of the accused' businesses, or as a reward for having done so, which amounted to corruption. The accused was charged with corruption in contravention of the Corruption Act of 1992¹⁶⁵ which sets out that the granting of a benefit is corrupt when it is done with intention of influencing the recipient of the benefit to perform or disregard his duty. Furthermore, the Court argued that even if the payments could be regarded as loans, despite all the evidence to the contrary, the basis on which they were made unarguably amounts to a 'benefit' within the Corruption Act of 92.¹⁶⁶

An aggravating factor was that payments were not made to a low-salaried bureaucrat.¹⁶⁷ The Court was at pains in emphasising that corruption at the highest level of government should accordingly be sanctioned by imposing the 'maximum' sentence prescribed.¹⁶⁸ An effective sentence of 15 years' imprisonment was imposed in terms of the Criminal Law Amendment Act.¹⁶⁹ Axiomatic is that the higher the status of the beneficiary of corruption the more serious the offence.

The evidence revealed that the corruption constituted a violation of the human rights of people who experienced it, since it discriminates against those people who could not afford to resort to it, or who would not do so.¹⁷⁰ The Court said that it left citizens with the perception that it was futile to deal with government through the official channels and if so others could pre-empt them through bribery or the use of connections.¹⁷¹ This applies where public officials do not follow procurement laws and award contracts illegally to undeserving businesses leaving honest service providers at a loss. The funds earmarked for public procurement were compromised and thereby the optimal use of the available resources for

¹⁶⁵Section 1(1) (a) (i) and (ii).

¹⁶⁶*S v Shaik* paras 187c – e; 189f – h; 190b - 191j.

¹⁶⁷*S v Shaik* paras 240e - f; 241e - g; 242c – h; 243b – c.

¹⁶⁸According to the Criminal Law Amendment Act 105 of 1997 see *S v Shaik* paras 156e – i.

¹⁶⁹Section 51(2) (a) (i). On 3 March 2009 Shaik was released on medical parole, after serving two years and four months of his 15-year prison term.

¹⁷⁰*S v Shaik* paras 187c - e; 189f – h; 190b - 191j.

¹⁷¹*S v Shaik* paras 238f - 239j; 240a – e.

SERs left the rights-holder unfulfilled. The *Shaik* judgement and the new Corruption Act have been heralded as redefining the boundaries of those morally reprehensible in society.

Despite the evident collusion between the accused and the senior politician in *Shaik*, the accused faced the wrath of the law without his ‘counterpart’ in high office also facing the same fate.¹⁷² In essence the Corruption Act 1992 was used against the corruptor but not against the corruptee.¹⁷³ This, despite the Court acknowledging that Zuma acted on a quid pro quo basis by using his influence for gain to Shaik’s companies.¹⁷⁴

The Corruption Act has not found zealous application as an anti-corruption measure against public sector corruption. Despite conclusive reports on corrupt activities in the public housing programme, there is a tardy response from the NPA in prosecuting these public officials.¹⁷⁵ Moreover the Corruption Act is used inconsistently in protecting state funds against abuse. For example the Act has been used against a police commissioner and sentenced him as such, but not for procurement of contracts but rather for an unholy relationship with a private person of ill repute.¹⁷⁶ Furthermore, there are cases of low-end public service workers who have been convicted under the Corruption Act of 1992.¹⁷⁷ In *S v Davids*¹⁷⁸ an accused prison warden was convicted of corruption in terms of this Act¹⁷⁹ for agreeing to accept a bribe from a prisoner in return for assisting his escape. The warden was sentenced to four years imprisonment. In the matter of *S v Mogotsi*¹⁸⁰ a traffic officer accepted R100 from a motorist for cancelling a traffic summons and was found guilty of corruption. He received a sentence of four years’ imprisonment wholly suspended for five years.

¹⁷²There is a High Court review underway to reinstate corruption charges against Zuma that was previously controversially withdrawn available at <http://www.news24.com/SouthAfrica/News/zuma-corruption-charges-da-optimistic-20160303> (accessed on 4 March 2016). See chapter 4 for discussion on this.

¹⁷³See chapter 4 discussing the attempt to get Zuma to answer to 783 charges of corruption etc.

¹⁷⁴*S v Shaik and Others* 2007 (1) SACR 247 (SCA) paras 278h – 280i.

¹⁷⁵See chapter 5.

¹⁷⁶*S v Selebi* 2012 (1) SACR 209 (SCA). (Selebi) was convicted in the High Court of corruption in contravention of s4(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 for a Quid pro quo for gratification received from a private person, Agliotti.

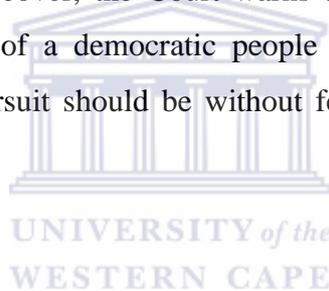
¹⁷⁷*S v Davids* 1998 (2) SACR 313 (C): an accused prison warden was convicted of corruption in terms of s 1(1)(b) of the Corruption Act of 1992 for agreeing to accept a bribe from a prisoner in return for assisting his escape. The warden was sentenced to four years imprisonment.

¹⁷⁸1998 (2) SACR 313 (C).

¹⁷⁹Section 1(1) (b).

¹⁸⁰1999 (1) SACR 604 (W).

However, senior figures although implicated and prosecuted, remained in office throughout.¹⁸¹ Misconduct on procurement processes worth millions perpetrated by the police commissioner who succeeded *Selebi* has been rewarded with employment as a deputy minister.¹⁸² The Department of Correctional Services (DCS) has suffered media exposure and an investigation by the SIU who established large scale procurement corruption by their biggest service provider, Bosasa.¹⁸³ Despite the proven allegations of corrupt relationships between public officials and Bosasa, by the SIU report, Bosasa continues to provide services to DCS.¹⁸⁴ The ex-minister of communications was found guilty for having wilfully misled Parliament regarding a tender that benefited her life-partner by more than R6 million. This minister was given the punishment of forfeiting one month's salary. The Public Protector is inundated with allegations of corruption in various enclaves of government, including public housing.¹⁸⁵ This office noted with concern that 'post-independence Africa and certainly in South Africa the accumulation of riches is recognised even in the absence of visible means of accumulating the riches.'¹⁸⁶ Moreover, the Court warns that corruption is a pervasive and insidious evil and the interests of a democratic people and their government require its rigorous suppression.¹⁸⁷ This pursuit should be without fear or favour, unfettered by rank-and- file positions.



¹⁸¹ Another senior politician John Block: Northern Cape Finance MEC: granted bail of R50 000 for charges of fraud, corruption and money laundering worth R69 million (Editorial, 2012). However, despite that there were irregularities and kickbacks in the awarding of the tenders involving Block and others, this case was not tried under the Corruption Act but rather the Prevention of Organised Crime Act 121 of 1998 . This politician stayed in office throughout his trial and after found guilty by the court, until sentencing.

¹⁸² The Editor 'How the ANC Rewards Corruption' 27 June 2012 available at www.inside-politics.org. available at: <http://inside-politics.org/2012/06/27/7-of-the-worst-how-the-anc-rewards-corruption/> (accessed on 1 July 2013).

¹⁸³ Special Investigations Unit findings on investigation into the Department of Correctional Services (2009) available at <https://pmg.org.za/committee-meeting/11105/> (accessed on 3 March 2016).

¹⁸⁴ Chapter 5 renders analysis on the SIU Report into corruption in the public housing programme. The scope of this thesis does not encompass analysing the SIU Report on Bosasa.

¹⁸⁵ See chapter 5. See 'Ten Investigations the Public Protector is due to Complete August 2015' available at <https://www.enca.com/south-africa/ten-investigations-public-protector-going-complete-soon> (accessed on 26 February 2016); The Public Protector 'Complaints Relating to the Delivery of RDP Houses' available at

https://pmg.org.za/files/docs/130220pprotect_0.ppt (accessed 16 March 2016).

¹⁸⁶ Madonsela T 'Corruption and Governance Challenges: The South African Experience' presented at the National Conference on Corruption and Governance Challenges Nigeria 21 January 2010 available at <http://www.cleen.org/Corruption%20and%20Governance%20Challenges%20in%20Nigeria%20-%20Final%20Version.pdf> (accessed on 12 March 2016).

¹⁸⁷ *S v Shaik* (SCA) paras 238f - 239j; 240a – e.

1.8.7 Role of civil society in combating and preventing corruption

Civil society has a definite role to play in the enforcement of anti-corruption measures.¹⁸⁸ This is particularly important where civil society raises awareness around malfeasance. At its third session in 2009 the Conference of the States Parties to the United Nations Convention against Corruption (CoSP)¹⁸⁹ discussed the role of civil society on the review of the implementation of UNCAC. State parties were not of one mind on whether NGOs should be allowed and a compromise was reached in that they could attend as observers.¹⁹⁰ The report of the fifth session of CoSP noted that ‘all speakers agreed that civil society had an important role to play in the fight against corruption, the Conference and its subsidiary bodies.’¹⁹¹ In 2014 the disagreement on the proper role of NGOs in the review mechanism continued.¹⁹² Pakistan expressed concern over this and confirmed the important role of civil society in the efforts to prevent and combat corruption and in assisting state parties in the effective implementation of the UNCAC.¹⁹³ Moreover the CoSP confirmed to the UNCAC in 2015 the usefulness of civil society¹⁹⁴ in cooperation with government on local or national level, in prevention and control of corruption. During the review process it was established that the engagement of civil society was a good practice.¹⁹⁵

The Preamble of the Corruption Act also recognises the importance of support and mutual cooperation between public officials and groups outside the public sector, such as organs of civil society, NGOs and community-based organisations (CBOs), in pursuit of effectiveness and efficiency. Therefore NGOs and CBOs should be encouraged to participate in the anti-corruption strategies that government wished to pursue.¹⁹⁶ As it is, civil society has a vested interest in the safe-keeping of state funds earmarked for socio-economic relief. To

¹⁸⁸See chapter 6 for discussion on how civil society assist the progressive Indian judiciary in social action litigation.

¹⁸⁹CoSP third session, Resolution 3/1 (2009) ‘Evolution of the debate on the role of civil society in the review of the implementation of UNCAC.’

¹⁹⁰CoSP sixth session St. Petersburg, Russian Federation (2-6 November 2015) 6 UN DOC CAC/COSP/2015/CRP.3

¹⁹¹CoSP fifth session UN DOC CAC/COSP/2013/18 (2013) para102.

¹⁹²CoSP sixth session St. Petersburg, Russian Federation (2-6 November 2015) 8.

¹⁹³ CoSP sixth session St. Petersburg, Russian Federation (2-6 November 2015) 9.

¹⁹⁴ Non-governmental organisations have also been referred to as civil society organisations.

¹⁹⁵ CoSP sixth session St. Petersburg, Russian Federation 2-6 November 2015.

¹⁹⁶ See chapter 6 for discussion on how civil society assists the Indian judiciary in social action litigation.

complement this quest, various anti-corruption NGOs also highlight the trail of destruction that corruption wreaks.¹⁹⁷

It should be accepted that the embezzlement of funds destined for social programmes is a violation of human rights and that corruption reinforces the exclusion of vulnerable groups to those rights. Therefore, the obligation to realise SERs begs the inclusion of anti-corruption measures that become a strategy that forms part of the day-to-day operations in government.

1.9 Research methodology

This research is approached through empirical document analysis. This includes primary sources and secondary sources. Primary sources such as the United Nations reports are examined for the discussions of state parties in the development of the ICESCR and the inclusion of the term ‘available resources’ in this instrument. These discussions will be enriched by various academic writings on the topic. Case law on SERs and corruption form part of the tapestry of primary sources. Legislation and government reports further enrich the primary source list. Secondary sources are books, academic journal articles and reports from various authors on university databases which includes Sabinet, Hein-on-line, Jutastats and NexisLexis. The SIU Reports will be used for factual data on corruption in the human settlement public housing programme. The preliminary reports to Parliament and to the President form part of the exploration. Internet sources and the mass media play a pivotal role in reporting public sector corruption. Therefore this source and newspaper articles are used to supplement for information in this regard.

1.10 Limitations of this study

This study is limited to the abuse of public economic resources pertaining to the delivery of public housing as a constitutional obligation. This dissertation will not expound on the attributes of adequate housing which the literature on housing covers sufficiently.

¹⁹⁷Centres for Corruption Research World-wide, the Global Trade-Union Anti-corruption Network, the Anti-Corruption Network for Transition Economies, the World Anti-Corruption Knowledge Centre, the Centre for Study of Transnational Corruption and Crime, the Global Forum on Fighting Corruption, the Internet Centre for Corruption Research, UK’s Corner House Anti-Corruption Initiatives, the Open Society Institute, Corruption monitoring and the Freedom-House Nations in Transit Political Corruption Review.

Although private office for private gain is included in the act of corruption, the purview of this study is limited to the abuse of public office for private gain. Therefore the numerous forms of corruption will not be scrutinised but rather the action of public officials who bypass the rule of law to engage in corrupt activities which in turn usurp the available resources earmarked for realising public housing. Furthermore, crime statistics in the civil service are not a focus of this study.

1.11 Overview of chapters

Chapter 1

The background to the study is set out in this chapter. This is complemented by the aims, significance and the questions the study purports to answer. This chapter also provides for a comprehensive literature review on corruption and its links to the realisation of human rights. The link between human rights and corruption is explored to illustrate the importance of safeguarding the ‘available resources’ against corruption in the public service. This discussion will include examining the relevant international and regional instruments on anti-corruption measures in the public service, including the UNCAC and the main anti-corruption legislation in South Africa.

Chapter 2

To demonstrate the importance of economic resources to the realisation of housing, the archives of the UN will be examined to see what led to the inclusion of SERs in a covenant. Most, importantly this chapter analyse how the term ‘available resources’ came to be accepted as the key to unlock access to housing. Thus, this chapter covers the general framework of international law on SERs, including the UDHR and ICESCR. In doing so, it tracks the origin of the phrase ‘available resources’ as to its route through the UN treaty body discussions. The sessions of the treaty bodies on the terms and the general comments thereto will be explored in its original narrative. The African regional instruments relevant to the phrase ‘available resources’ are discussed to explore this continent’s approach to realising SERs. This chapter concludes with the Constitutional Court’s response to the available resources at the disposal of government in order to realise SERs.

Chapter 3

The role of the South African government including the Executive and Parliament is analysed to present how these branches of government have fared in implementing the right to housing. Particular attention is paid to constitutional obligations and how the most desperate have been catered for in legislation versus delivery on the ground in order to point out the relative failure of government to progressively realise this right within its available resources. Furthermore, the duty of Parliament as representatives of the people is scrutinised as to whether it has adequately kept the Executive in check on how it fares on its budget spent for housing.

Chapter 4

Following on from what the government has achieved in the delivery of public housing, this chapter explores how the judiciary has interpreted the right. This is to establish the degree to which the judiciary is compliant in its duty to transform society in terms of the Constitution. Various case law including *Grootboom*, receives attention to highlight the Constitutional Court's interpretation on the right to housing and its reasonableness approach to the realisation of SERs. Included in this chapter is the approach of the judiciary against public corruption in protection of the available resources for SERs against malfeasance in government. This analysis includes the Public Protector's powers and the abuse of state funds by the President.

Chapter 5

The relevance of this chapter is to demonstrate that there is misuse of the 'available resources' earmarked for housing which leads to delay in the delivery of public housing. This chapter further unpacks the anti-corruption regime in South Africa with a focus on public procurement as this is where corruption in housing is most prevalent. This chapter is further enriched with an analysis of the SIU investigations into malfeasance in the public housing programme. The role and objectives of the SIU and analyses of the reports to Parliament and the President on the uncovering of corruption in public housing will be illustrated.

Chapter 6

This chapter presents a comparative study with India so as to see whether it may be useful in the South African context. This is done by highlighting the judicial ‘activism’ pursued by the Supreme Court of India (SCI), in the quest to hold government to account in its duties towards SERs and in fighting corruption. Included in this analysis are the interpretations of the right to housing by the SCI and its interpretation as to how the anti-corruption agencies should deal with public sector corruption. India has a very robust civil society and media with a progressive judiciary that works together to see that corruption in the public service is brought to book. The Indian system is not the panacea for how to fight corruption and realise the right to housing, but lessons can perhaps be learned from this populous jurisdiction.

Chapter 7

Conclusion and recommendations



Chapter 2

The Provenance of the Term ‘Available Resources’ – the Tool to Realise Socio-Economic Rights

2.1 Introduction

Economic, social and cultural rights (SERs) have had a contentious route in their quest for recognition and implementation, through a period of 20 years (1946-1966). The acceptance of the ICESCR¹⁹⁸ by the international community was the acknowledgment that certain SERs cannot be realised without the available resources so required. Therefore the maximum of available resources has to be set aside by governments in order to deliver on its international obligations in terms of SERs. This phrase ‘available resources’ has come to underscore the realisation of SERs (including the right to housing) and this important qualifier to SERs needs closer scrutiny.

The recognition of SERs has been deliberated on by the UN since the development of the UDHR. It was these discussions that led to a separate covenant for SERs (as distinct from civil and political rights). During the deliberations of member states it was recognised that the progressive realisation of SERs would be dependent on the ‘available resources’ of the states parties. Thus there was a consciousness around the importance of available resources in realising SERs, from the start.

This chapter will trace the historical discussions by member states and UN treaty organisations to show how the expression ‘available resources’ came into the lexicon of SERs. In doing so, this chapter will narrate in real term the discussions that took place in terms of realising a covenant for SERs. The reason for exploring the history of the term ‘available resources’ is to highlight the important role that economic resources play in the realisation of SERs and the right to housing, in particular.¹⁹⁹ To complement this, the main international instruments will be explored, particularly those protecting vulnerable groups,²⁰⁰

¹⁹⁸South Africa ratified on 12 January 2015.

¹⁹⁹See Constitution of South Africa Act 108 of 1996 s26 the right to access housing. See chapter 3 for discussion on the right to housing in South Africa.

²⁰⁰Women and children will enjoy focus as vulnerable groups bearing the brunt of slow SERs delivery.

which promote the realisation of SERs. This is to give insight into the way the UN Treaty Bodies incorporated the phrase into subsequent treaties and general comments. The focus will examine the general comments²⁰¹ of the Committee on Economic, Social and Cultural Rights (CESCR/Committee), in particular General Comment no 3.²⁰²

The African continent's approach to the 'available resources' insofar as vulnerable groups are concerned will also enjoy focus. This will be done through the relevant regional human rights instruments in Africa. Further enriching this chapter is the Constitutional Court (CC) of South Africa's view on the available resources. In summation, international obligations towards SERs are discussed.

2.2 The evolvement of human Rights instruments

The starting point of the history of codified human rights is typically taken to be the Magna Carta of 1215²⁰³ but it is the English Bill of Rights of 1689 that is considered the foundation stone upon which the introduction of human rights was built.²⁰⁴ The UN²⁰⁵ emerged after the Second World War by 51 countries committing to maintaining international peace and security; developing friendly relations among nations; and promoting human rights which include social progress and better living standards for all humans. This was codified in the UN Charter²⁰⁶ as the first universal multilateral treaty with human rights provisions and the

²⁰¹ A general comment is the most authoritative statement that the CESCR is able to adopt on any matter and this Committee is the most authoritative body which monitors the ICESCR. The CESCR was established under the United Nations Economic and Social Council (ECOSOC) Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the ECOSOC in Part IV of the Covenant. States parties are obliged to submit regular reports to the CESCR on how the rights are being implemented. The Committee examines each report and addresses its concerns and recommendations to the state party in the form of 'concluding observations'.

²⁰² CESCR General Comment No 3: The Nature of the States Parties' Obligations (Art 2 para 1 of the ICESCR) 14 December 1990 UN Doc E/1991/23 (hereafter GC 3) available at <http://www.refworld.org/docid/4538838e10.html> (accessed 20 January 2015).

²⁰³ Britain's King John was forced by his lords to sign the Magna Carta acknowledging that free men are entitled to judgment by their peers and that even a sovereign is not above the law available at <http://www.udhr.org/history/timeline.htm> (accessed on 23 March 2013). Also see The UDHR: 'A Magna Carta for All Humanity' (1997) United Nations Department of Public Information available at <http://www.un.org/rights/50/carta.htm> (accessed on 12 April 2013).

²⁰⁴ It established the rights of the 'House of Commons' to limit the king's actions and even remove him from power if he should act against their interests.

²⁰⁵ Principal organs of the UN are: General Assembly (GA), Security Council, ECOSOC, Trustee Council and Secretariat.

²⁰⁶ Signed at San Francisco 26 June 1945 entered into force on 24 October 1945 when ratified by the five permanent members of the Security Council and the majority of other signatories available at <http://www.un.org/en/aboutun/history/1941-1950.shtml#content> (accessed on 12 April 2013)

foundation for large bodies of international human rights laws.²⁰⁷ The UN Charter is considered a prelude to the UDHR.

Needless to say the promotion and protection of human rights is the cornerstone of the work of the UN around the world. The UN Charter and UDHR have been lauded as part of the constitutional structure of the world community and as international customary law it binds all states irrespective of membership or not of the UN. Since the adoption of the UDHR a network of human rights instruments and mechanisms have been developed to safeguard human rights and eliminate human rights violations.²⁰⁸

The making of the UDHR proliferated into the expanded hard law versions of the ICESCR²⁰⁹ and the International Covenant on Civil and Political Rights (ICCPR)²¹⁰ which forms part of the International Bill of Human Rights. The focus of this chapter is on SERs (housing) therefore the history depicting the inclusion of these rights in the UDHR is scrutinised to show how a separate instrument, the ICESCR, came about and where we encounter the phrase ‘available resources’ for the realisation of SERs .

2.3 History on including socio-economic rights in the UDHR

The ECOSOC²¹¹ created the CHR²¹² which was charged with dealing with the development and implementation of an ‘international bill of rights’ (bill of rights).²¹³ The Drafting Committee held its first session from 9-25 June 1947²¹⁴ to deliberate on the draft outline of this bill of rights. At these discussions, the inclusion of SERs as part of international human rights instruments, posed a strong global and regional tendency that wanted to limit the entitlements associated with SERs. Moreover the inclusion of SERs in the UDHR was not

²⁰⁷See Vijapur A & Savitri K ‘International Covenants on Human Rights: An Overview?’(2006) 62 *India Quarterly: A Journal of International Affairs* 4.

²⁰⁸See Elliott M ‘The Institutional Expansion of Human Rights 1863–2003: A Comprehensive Dataset of International Instruments’ (2011) 48 *Journal of Peace Research*.

²⁰⁹ Adopted and opened for signature, ratification and accession by GA resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.

²¹⁰Adopted by the GA on 19 December 1966.

²¹¹ECOSOC was established under the UN Charter article 7(1) as the principal organ to coordinate economic, social, and related work of the 14 UN agencies, 10 functional commissions and five regional commissions.

²¹²The CHR was established by ECOSOC acting under article 68 of the UN Charter, at its first meeting on 10 December 1946. The CHR has been dissolved and the Human Rights Council, established by GA resolution 60/251 15 March 2006, is now charged with addressing human rights violations.

²¹³Discussion on the international bill of human rights covenants took place from the first to the 9th session of the CHR.

²¹⁴UN Doc E/CN.4/AC.1/11. (4 June 1947).

taken very seriously and various positions were put forward by predominantly four groups of states in the debates.²¹⁵ States parties did eventually agree that a declaration should be accompanied or followed by a convention on specific groups of rights.²¹⁶

Pursuant to this, drafts for a bill of rights declaration were submitted by the UK, Northern Ireland, US and France.²¹⁷ Significantly, the French proposal was without reference to housing or shelter. France was against including SERs in the UDHR and argued that SERs were simply thought to symbolise a stage in development.²¹⁸ The suggestions that the UK submission 'be submitted to the CHR as possibly forming the basis of a draft convention', was rejected for alluding to SERs in a vague manner.²¹⁹

Argentina²²⁰ maintained that SERs was part of modernity or progress and the US²²¹ argued that personal liberty required some form of economic security. Eventually, the SERs proclaimed in the UDHR were a compromise, based on the firm position of the Latin American delegates and the equally firm position of the US in supporting or moderating contributions by European, Asian, and Arab delegates. The fruits of their labour resulted in an article protecting SERs as follows:

'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.'²²²

Nonetheless, the CHR was responsible for the hard drafting work on the international bill of human rights and envisaged a 'civil and political rights' bill that would include 'economic and social rights' or simply 'social rights'. However, the question of two covenants, one for SERs and the other for civil and political rights came under scrutiny.

²¹⁵The groups are the Latin American states, the US and its Western European allies, the Eastern European countries, the Arab and Asian states.

²¹⁶CHR first session International Bill of Human Rights 9-25 June 1947 para 12 UN Doc E/CN.4/21 (1 July 1947).

²¹⁷CHR first session UN Doc A/2929 (1 July 1947) para 4; also see UN Doc E/CN.U/21 annexes A, B, C and D.

²¹⁸Rene Cassin of France CHR third session UN Doc E/CN.4/SR.72 (14 June 1948) 8.

²¹⁹CHR first session 'Draft Convention' UN Doc E/CN.4/AC.1/4 Annex 1 (1 July 1947).

²²⁰Enrique V Corominas of Argentina UN GA third session UN Doc E/CN.U/21 (30 September 1948) 35.

²²¹Eleanor Roosevelt of the US CHR third session UN Doc E/CN.4/SR.64 (8 June 1948) 5.

²²²Article 25. SERs are enshrined in articles 22 to 28 of the UDHR.

2.3.1 Why two covenants?

The ECOSOC was conscious of the two different streams of rights they were including in one covenant and asked the GA to consider two covenants.²²³ The GA acceded to this at its session in 1952 asking for proposals on two drafts: one to cover civil and political rights and the other to cover economic, social and cultural rights.²²⁴ It also requested that ‘the two covenants contain, in order to emphasise the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible...’²²⁵

It is no secret that the journey to the implementation of a separate ICESCR was long and winding. The CHR at its first session (1947) on the draft covenants recognised that observance of human rights could not be completely ensured unless conditions of social progress and better standards of life were established in larger freedoms.²²⁶ On this contentious route the Latin American states took the lead in making a strong call in favour of a new set of rights in a single convention. The US also punted for a single instrument and stipulated that text on SERs should be limited to general language relating to the development of socio-economic principles rather than actual enforceable rights.²²⁷ Moreover the obligations relating to civil and political rights were believed to be binding in nature whereas SERs were deemed declarations of intent only.²²⁸ This is due to SERs not being justiciable rights and their method of implementation being different.²²⁹

India disagreed with a single covenant and argued that ‘the economic, social and cultural rights are equally fundamental and therefore important, and should form a separate category of rights from that of civil and political rights’.²³⁰ For these reasons India asked that SERs not be included in the civil and political instrument, but form a separate covenant. This recommendation was rejected by Chile, China, Egypt, France, Guatemala, Lebanon, Pakistan, Sweden, the Ukrainian Soviet Socialist Republic, Uruguay, Yugoslavia and the UK.²³¹ Those

²²³ECOSOC thirteenth session (30 July 1951).

²²⁴GA (November 1951-February 1952) Resolution 543 (VI) of 5 February 1952.

²²⁵GA sixth session (10 May 1952).

²²⁶CHR first session ‘Draft Convention’ (1 July 1947) para 20.

²²⁷CHR seventh session UN Doc E/CN.4/539/REV.1 (25 April 1951).

²²⁸CHR seventh session (25 April 1951).

²²⁹CHR seventh session UN Doc E/CN.4/619 (10 May 1951).

²³⁰CHR seventh session (10 May 1951). See chapter 6 for discussion on the progressive Indian judiciary in the realisation of SERs and in the combating of public corruption.

²³¹One abstention (Australia) UN Doc E/CN.4/635/ADD.3 (18 May 1951).

states in agreement of this recommendation were Denmark, Greece and India. Thus the majority of states did not opt for a separate covenant for SERs, but rather the consideration of including SERs in one instrument which contains civil and political rights. The CHR was also not content with two instruments as they believed separate covenants might weaken the international significance of the documents.²³²

The GA put an end to the debate by adopting a resolution calling for two covenants by a close call of votes.²³³ What won the order of the day was that the GA recommended that the CHR draft two separate covenants which would be submitted and opened for signature at the same time. This apparently split not only the conventions in two but also the UN.²³⁴ Although the full text of both covenants was revealed to the GA at its ninth session, 1954, it would be another 12 years (1966) before the ICESCR and the ICCPR became two separate legal instruments.

2.3.2 Economic, social and cultural rights: the proposed covenant

Proposals for the inclusion of SERs in the bill of rights were mainly discussed during the seventh session of the CHR. At its second session the CHR decided that the term ‘international bill of rights’²³⁵ would apply to the entire series of documents in preparation, namely a declaration on human rights and a convention or covenant on human rights. The Union of Soviet Socialist Republics (Soviet Union) argued that the drafting of a covenant was premature before the text of the declaration on human rights had been written.²³⁶ The GA declared that civil, political and SERs were interconnected and interdependent and decided to include in the covenant a ‘clear expression of economic social and cultural rights’²³⁷

The CHR observed that a more effective method for establishing human rights would be to embody them in a convention whereby signatories recognise them as international law.²³⁸ On

²³²The draft resolution was rejected in a roll-call vote by 9 votes UN Doc E/CN.4/SR.390.

²³³GA Resolution 543 (vi) accepted by 27 to 20 votes with 5 abstentions.

²³⁴See Humphreys J P ‘Human Rights and the United Nations: A Great Adventure’ (1984).

²³⁵GA tenth session UN Doc A/2929 (1 July 1955) para 6.

²³⁶CHR second session UN Doc E/600 (17 December 1947) 38 they voted against taking any decision on the draft covenant

²³⁷UN Doc 421 E (v) A/C.3/L.78, 81, 91 (Rev.1) and 93.

²³⁸CHR first session ‘Draft Convention’ (1 July 1947) para 20.

the day the UDHR²³⁹ was accepted, the GA requested the CHR to prepare as a priority, a draft covenant on human rights and draft measures for implementation. It was agreed that the proposals by member states for SERs be discussed at the seventh session of the CHR, and be used as such.²⁴⁰

Debates on the ICESCR differed from the debates on the UDHR in that specialised agencies²⁴¹ particularly the ILO,²⁴² the Food and Agriculture Organisation of the United Nations (FAO), the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation also participated in the discussions, not just member states. The GA requested that ‘member states and appropriate specialised agencies submit drafts or memoranda containing their views on the form and content of the proposed covenant on SERs, to reach the Secretary-General before 1 March 1952.’²⁴³

As early as session two of the deliberations on a bill of rights, Lebanon proposed that ‘maintenance food, clothing and shelter be included in the single proposed draft covenant’. This motion was defeated at the time but Lebanon wished that the amendment be considered further in the future.²⁴⁴ Cuba²⁴⁵ and Panama²⁴⁶ wanted the inclusion of adequate food and living conditions with regard to housing. Panama suggested the inclusion of an article on ‘food and housing,’ stating, firstly, that ‘[e]very one has the right to adequate food and housing’ and secondly, that it was the state’s ‘duty to take such measures as may be necessary to [e]nsure that all its residents have an opportunity to obtain these essentials’.²⁴⁷ The Eastern European countries were ad idem with the stance of Panama, but the US fought off attempts

²³⁹CHR second session (2-17 December 1947) UN Doc E/600 (17 December 1947) 4. The Commission decided, by a majority vote of 10 to 4 with one abstention, to proceed without delay to the consideration of the articles suggested for inclusion in an International Declaration of Human Rights, contained in Annex F of the Report of the Drafting Committee UN Doc E/CN.4/21

²⁴⁰April-May 1951.

²⁴¹The specialised agencies gained significant influence on the final wording of some rights, such as the right to social security.

²⁴²The CHR agreed that fleshing out the content of ‘social security’ was basically to remain the business of the ILO. That is why the ICESCR art 9 contains but one brief sentence: ‘The States Parties . . . recognise the right of everyone to social security, including social insurance.’

²⁴³GA sixth session November 1951-February 1952 resolution 543 (vi) of 5 February 1952 ‘Draft Resolution Concerning Economic, Social and Cultural Rights’ submitted by Denmark, Egypt, France and Lebanon UN Doc E/CN.4/485 (10 May 1952) (hereafter GA sixth session); also see CHR sixth session ‘Amendments and Votes’ UN Doc E/CN.4/SR.187 (11 May 1952).

²⁴⁴CHR second session UN Doc E/600 (17 December 1947) 39. Their wish was realised at the seventh session.

²⁴⁵CHR ‘Draft Declaration on Human Rights’ transmitted by letter 12 February 1946, Cuban Delegation to the President of the ECOSOC UN Doc E/HR/1 (22 April 1946).

²⁴⁶GA ‘Statement of Essential Human Rights Presented by the Delegation of Panama’ (hereafter Panama draft) UN Doc A/148 (24 October 1946).

²⁴⁷Panama draft.

to specify state duties insofar as SERs were concerned. In this endeavour the US filed four drafts proposing the inclusion of 'food and housing' but insisted that the declaration be confined to enunciating rights and not try and define the methods by which governments were to realise these rights.²⁴⁸

Despite the US opposition, the delegates agreed that SERs necessarily involved state duties and should be specified to some extent.²⁴⁹ The UK believed that the granting of civil and political rights would serve economic and social rights.²⁵⁰ The Eastern European representatives were not in favour of this and fought fiercely to get more elaboration on the realisation of SERs.²⁵¹ Embellishing this was India which voiced the need for various social rights including 'the right to housing, health and food'.²⁵² France proposed a general clause for economic, social and cultural rights ensuring amongst others, 'shelter and adequate standard of living'.²⁵³ The ILO suggested that articles on SERs should be simply stated without too much detail. Moreover, specific obligations should be placed on governments ensuring certain conditions for the enjoyment of these rights. Furthermore the latter work had to be carried out by the specialised agencies concerned.²⁵⁴

Significantly, the proposal by the Soviet Union was rejected, in that it stated that 'the state shall take all the necessary steps, especially legislative measures, to ensure to everyone living accommodation worthy of man,' (instead of adequate housing).²⁵⁵ The same fate was suffered by the Chinese proposal, which wanted to add the words 'with special reference to housing, food and clothing'.²⁵⁶ Australia's proposal of 'the state parties to the covenant recognise the

²⁴⁸United States, represented by Eleanor Roosevelt, who was also chairing the CHR. See first draft 'United States Proposals Regarding an International Bill of Rights' UN Doc E/CN.4/4 (28 January 1947); second draft UN Doc E/CN.4/17 (6 February 1947); third draft UN Doc E/CN.4/AC.1/3, U.N. Doc. E/CN.4/AC.1/8 (11 June 1947); fourth draft UN Doc E/CN.4/36 (26 November 1947).

²⁴⁹ See the various statements of the delegates to the CHR seventh session UN Doc E/CN.4/SR.216 (27 April 1951).

²⁵⁰CHR second session UN Doc E/CN.4/SR.42 (16 December 1947) (Lord Dukeston, UK).

²⁵¹CHR second session (16 December 1947).

²⁵²CHR third session 'India and the United Kingdom: Proposed Amendments to the Draft' UN Doc E/CN.4/SR.49 (27 May 1948).

²⁵³CHR seventh session France UN Doc E/CN.4/618 (9 May 1951) para 1. French proposal adopted by 11 votes to none with 6 abstentions.

²⁵⁴CHR seventh session UN Doc E/CN.4/635/Add.1 (18 May 1951). Also see Seymour JR 'Economic and Social Human Rights and the New International Economic Order' (1986) 67 *AM. U. J. Int'l L. & POL'Y* 1 contending that progress was achieved through the work of specialised agencies, such as the ILO or the FAO, rather than through human rights bodies.

²⁵⁵By 6 votes to 5, with 7 abstentions see CHR seventh session UN Doc E/CN.4/AC.14/2/add.3, section V (12 May 1951).

²⁵⁶Rejected by 7 votes to 3, with 5 abstentions CHR seventh session UN Doc E/CN.4/635/Add.1 (18 May 1951).

right of everyone to an adequate standard of living,' prevailed and was adopted.²⁵⁷ Article 11(1) of the ICESCR, 'the right to an adequate standard of living, including adequate food, clothing and housing' also corresponds to the Latin American drafts of 1946. Nonetheless, the article is based on the draft filed by the US,²⁵⁸ the result of which was that article 11 (1) of the ICESCR resonated with article 25 of the UDHR.

2.3.3 Adoption of the phrase 'available resources'

Various proposals by member states on SERs were underscored by the presumed availability of resources. Panama recognised that SERs rights had developmental implications.²⁵⁹ The Federal People's Republic of Yugoslavia also alluded to 'the available resources' for SERs 'in accordance with the level of their economic development'.²⁶⁰ The US ostensibly responded to the proposals put forward by both the Soviet Union and Australia which suggested a text that simply highlighted a number of policy goals formulated as state 'undertakings,' to be dependent upon the organisation of the state and the 'resources available'.²⁶¹ After three rejected proposals the US forwarded a fourth proposal in April 1951, stating, inter alia: 'each state party to this covenant undertakes, with due regard to its organisation and resources, to promote conditions of economic, social and cultural progress.'²⁶² This US draft invoked criticism from Chile and Egypt for avoiding language referring explicitly to 'rights'. The Egyptian delegate observed that the US refers vaguely to progress and development, which was different from defining rights.²⁶³

France proposed the notable article 'the state parties to the present covenant undertake to take steps, individually and through international co-operation, to the maximum of their available resources with a view to achieving progressively the full realisation of the rights

²⁵⁷The Australian proposal was eventually adopted by 14 votes to none with 4 abstentions UN Doc E/CN.4/635/Add.1 (18 May 1951). Researching these sessions proves that unanimity of the votes was extremely rare; also so see CHR seventh session UN Doc E/CN.4/SR.223 (2 May 1951). Draft article 24 of the Covenant then read: 'The States Parties to the Covenant recognise the right of everyone to an adequate standard of living and the continuous improvement of living conditions.'

²⁵⁸Adopted by 6 votes to 5, with 7 abstentions CHR seventh session 'Working Group on Economic, Social and Cultural Rights: Compilation of Proposals Relating to Economic, Social and Cultural Rights' UN Doc E/CN.4/AC.14/2/Add.3 (27 April 1951).

²⁵⁹Panama draft.

²⁶⁰CHR seventh session UN Doc E/CN.4/609 (5 May 1951).

²⁶¹CHR fifth session 9 May- 20 June 1949 UN Doc E/1371 (23 June 1949).

²⁶²Adopted by 6 votes to 5 with 7 abstentions. CHR seventh session UN Doc E/CN.4/539/REV.1 (25 April 1951).

²⁶³Statement of Mahmoud Azmi Bey, Egypt CHR seventh session, first meeting UN Doc E/CN.4/AC.14/SR.1 (26 April 1951) 23.

recognised in the present covenant.²⁶⁴ The word ‘available’²⁶⁵ did not receive a unanimous vote and neither did the phrase ‘to the maximum of their available resources’.²⁶⁶ There were a rather high number of abstentions.²⁶⁷ Be it as it may ‘available resources’ form an integral part of the realisation of SERs and the allocation of economic resources were to remain in the sphere of the political branches of government, where the courts continue to be reluctant to tread.²⁶⁸

2.3.4 Adoption Implementation of the ICESCR

The CHR returned to the drafting process of the covenants during its eighth, ninth and tenth sessions, between 1952 and 1954. The report of the eighth session²⁶⁹ of the CHR contained the text of the draft provisions on SERs consisting of a preamble and three parts, part III setting forth certain economic, social and cultural rights (section A). The ECOSOC requested the CHR to completion of its work on the ICCPR and the ICESCR at its ninth session.²⁷⁰

Taking heed of this the full text of both covenants was conveyed to the GA during its ninth session, in 1954.²⁷¹ Considerations were made of the two draft covenants at the GA’s tenth session, in 1955. The Third Committee’s debate in 1957 was effectively the final discussion on the provision of SERs, although the GA revisited the ICESCR twice in following years,²⁷² before formally adopting the full convention in 1966.²⁷³ The ICCPR and the ICESCR were thus adopted on 16 December 1966 and entered into force on 26 March 1976 and 3 January 1976 respectively. Although the text of the UDHR and the ICESCR are very similar it was

²⁶⁴CHR seventh session ‘Draft International Covenant on human rights and measures of implementations’ UN Doc E/CN.4/L.55 (25 APRIL 1952).

²⁶⁵11 votes to none, with 7 abstentions.

²⁶⁶CHR seventh session UN Doc E/CN.4/612 (8 May 1951) para 4, adopted by 12 votes to none with 6 abstentions. The first clause, reading ‘undertake to take steps, individually and through international cooperation’ was adopted by 12 votes to none with 6 abstentions. The word ‘progressively’ was adopted by 11 votes to 5 with 2 abstentions. The Egyptian amendment to add the words ‘if necessary’ after the word ‘progressively’ was rejected by 7 votes to 6 with 5 abstentions.

²⁶⁷CHR seventh session UN Doc (E/CN.4/618) (9 May 1951).

²⁶⁸ See chapter 4 for discussion on the South African judiciary’s approach on the available resources for SERs.

²⁶⁹CHR ninth session 7 April - 30 May 1953 UN Doc E/22S6 Annex I. (6 June 1953).

²⁷⁰CHR ninth session UN Doc E/2447 E/CN.4/689 (6 June 1953).

²⁷¹CHR ninth session UN Doc E/CN.4/689 9 (6 June 1953).

²⁷²In 1962 to discuss articles 2-5 and in 1963 to introduce the explicit right to freedom from hunger. Cultural rights were only discussed at the twelve session of the CHR.

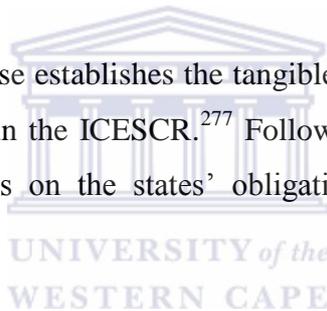
²⁷³See ‘Drafting History of the International Covenant on Economic, Social and Cultural Rights’ UN Doc E/C.12/2000/15 (9 October 2000).

conceded that a covenant was a very different kind of document because it was legally enforceable.²⁷⁴

The text of the draft covenant was examined and revised, on the comments received by governments and suggestions by specialised agencies. Based on this, the CHR drafted 14 articles on economic, social and cultural rights. This culminated in an ICESCR with core rights such as social security and an adequate standard of living being included, starting with a preamble and 16 articles adopted for the draft ICESCR.²⁷⁵ The end result was an ICESCR with an ‘umbrella’ article 2 (1) stating:

‘Each State Party hereto undertakes to take steps, individually and through international co-operation, to the *maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognised in this Covenant by legislative as well as by other means.’²⁷⁶

According to Robertson this phrase establishes the tangible response states must make to the challenge of realising the rights in the ICESCR.²⁷⁷ Following on to the ICESCR is General Comment no 3 which elaborates on the states’ obligations in terms of SERs, which is discussed next.



2.3.5 CESCR General Comment No 3: The nature of the states parties’ obligations in terms of article 2 (1)

The scope of the ICESCR is impressive, but suffers from the fact that its terms are phrased in an excessively general manner. For example, the European Social Charter has extensive articles dealing with the right to social security²⁷⁸ and pertinently refers to the prevention and reduction of homelessness with a view to gradual elimination.²⁷⁹ Significantly, this Charter²⁸⁰ advocates housing for those without adequate resources and makes no mention of the

²⁷⁴UN Doc E/C.12/2000/15 (9 October 2000) paras 4-5.

²⁷⁵Part I (Article 1): The Right of Self-determination; Part II (Articles 2-5): General Provisions; Part III (Articles 6-16): Economic, Social and Cultural rights.

²⁷⁶UN Doc E/2256. ICESCR art 2(1); economic, social and cultural rights are expressed in arts 1-15 (emphasis added).

²⁷⁷Robertson R ‘Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realising Economic, Social, and Cultural Rights’ (1994)16 *Hum. RTs.Q* 694.

²⁷⁸Articles 12-17.

²⁷⁹Article 31.2.

²⁸⁰Article 31.3.

state's available resources. The reason for the general wording of the ICESCR was to avoid restricting the scope of the articles and thereby preventing conflict with standards established by the specialised agencies, for example the ILO. It is precisely the generality and breadth of the ICESCR's terms that contribute to its longevity by providing scope for a dynamic interpretation of its provisions. The CESCR endeavours through its general comments to enlighten states parties through its experience gained by examination of state party reports.

The CESCR responded to an invitation from the ECOSOC to prepare general comments based on the various articles and provisions of the ICESCR in order to assist state parties to fulfil their obligations. The CESCR, starting from its third session, established the practice of adopting a general comment on one aspect of the ICESCR.²⁸¹ This was done to give a greater understanding of the meaning of the rights contained in the ICESCR. The main purpose of the general comment is to assist states parties to report effectively on their SERs' progress.

During its discussions on General Comment 3 the CESCR observed that homelessness and inhuman housing conditions were increasing in virtually every state, both North and South.²⁸² As a prelude to General Comment 3 the Committee stated that the need for greater precision and enforceability of housing rights and adopting further standards clearly existed.²⁸³ Calls were made at all levels to develop further standards focusing on the right to adequate housing. The CESCR has paid increasing attention to the right to housing at each of its successive sessions, devoting an entire day to holding a 'general discussion' on this right in early 1990.

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The CESCR at its fifth session with 97 states parties in attendance adopted General Comment 3 as regards states parties' obligations in terms of the ICESCR article 2(1). The CESCR also drew on the expertise of the specialised agencies such as the ILO, FOA, WHO and Habitat. Furthermore, it drew advice from selected experts on housing and human rights issues.²⁸⁵ Importantly, General Comment 3 elaborated on how states parties should realise the undertakings of the umbrella clause in article 2 (1).

²⁸¹See CESCR fifth session 21 November – 14 December 1990 'Official Records of the Economic and Social Council Supplement No. 3 General Comments' UN Docs E/1991/23, E/C.12/1990/8 (1990) para 42.

²⁸²CESCR fourth session UN Doc E/C12/1990/CRP.I/Add.10 (1990) para 108.

²⁸³CESCR fourth session (1990) para 108.

²⁸⁴CHR forty-second session 6-31 August 1990 'Realisation of Economic, Social and Cultural Rights' UN Doc E/CN.4/Sub.2/1990/19 (6 July 1990) para 109 (hereafter CHR forty-second session)

²⁸⁵Leckie S and Weid D consulted on housing issues.

Whilst the ICESCR art 2 (1) qualifies the realisation of SERs with available resources, General Comments 3 provide clarity to what extent the term ‘available resources’ applies, so much so that it provides that states must endeavour to apply their available resources expediently to ensure that core obligations are delivered.²⁸⁶ For instance, the economic resources earmarked for public housing should at least realise housing to the most desperate, living in intolerable conditions. Although the Comment clarifies that states must decide which means are the most appropriate under its own circumstances, the ultimate determination as to whether all appropriate measures have been taken will rest with the CESCR.²⁸⁷ What would not be deemed appropriate measures is in cases where the government spend available resources on ‘better’ housing for people who are in adequate shelter already; at the expense of the homeless remaining as such and then maintaining that resources are exhausted. This would in effect not resonate with using available resources to their maximum to provide core obligations.²⁸⁸ As it stands there should always be programmes and strategies realising SERs and resource constraints should adapt to accordingly.²⁸⁹ Therefore low-cost targeted programmes must be employed to protect the vulnerable members of society, particularly during economic recession.²⁹⁰ Important to note is, when measuring state resource allocation, that there is a distinct difference between ‘steps’ and ‘economic resources’. For instance steps towards realising the right to housing would be appropriate laws and economic resources being used for the delivery of housing to fulfil the right. Thus taking steps will be meaningless without making the necessary the budgetary allocations.

In addition to General Comments 3, two pertinent documents of influence are the Limburg Principles²⁹¹ which build on the application of the ICESCR and elaborate on the use of ‘available resources’ and the Maastricht Guidelines²⁹² which identify violations of the ICESCR.

²⁸⁶GC 3 para 7.

²⁸⁷GC 3 para 4.

²⁸⁸GC 3 para 10.

²⁸⁹GC 3 para 11.

²⁹⁰GC 3 para 12.

²⁹¹The Limburg Principles on the Implementation of the International Covenant on Economic UN Doc E/CN.4/1987/17 reprinted in (1987) 9 *Hum. Rts Q.*

²⁹²The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights UN Doc E/C.12/2000/13 reprinted in (1998) 20 *Hum Rts. Q.*

2.4 What are the 'available resources'?

Resources include economic and human resources, information-sharing and technology²⁹³ to attain for example the right to housing. Alston and Quinn state that the reference to resources is taken to mean the real resources of the country which include budgetary allocations, technical assistance and international co-operation.²⁹⁴ Notwithstanding this, economic resources are at the heart of realising these rights without which delays may ensue.

A point of focus is where there is extreme deprivation and the legitimacy of non-ICESCR expenditures such as on arms, debt reduction and the need to balance long-term economic investments against short-term social expenditure.²⁹⁵ As it is spending more on the military than on housing, health and education is indicative of non-compliance with using the maximum available resources for realising SERs.²⁹⁶ That said, international bodies cannot determine resource allocation for governments but it can check whether decision-making demonstrates awareness and respect for ICESCR rights. For example, historically the CESCR criticised Canada for unacceptable levels of homelessness and inadequate living conditions and despite this spending only 1.3 percent of government expenditure on social housing.²⁹⁷

Thus the misappropriation of economic resources for public housing would be in conflict with General Comment 3 because this action results in non-delivery or under-delivery.²⁹⁸ This will go against the grain of using the maximum of available resources in realising the minimum of the right to housing. Furthermore, available resources refer to those economic resources

²⁹³Robertson R (1994) 694.

²⁹⁴Alston P & Gerard Quinn G 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987)9 *Hum. RTs.Q* 178-9.

²⁹⁵Robertson R (1994) 702. South Africa spent billions on arms to upgrade its military despite millions still living in intolerable condition, see Corruption Watch 'The Arms Deal- What you Need to Know available at <http://www.corruptionwatch.org.za/content/arms-deal-what-you-need-know> (accessed 14 November 2014); The Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement Packages 2February 2015 available at <http://www.armscomm.org.za/#sthash.yblprHYB.dpuf> (accessed 10 February 2015).

²⁹⁶See chapter 4 discussing available resources abuse by the President of South Africa spending R246 million on his private home 'Nkandla'. Also see Kenya National Commission on Human Rights in its report 'Living Large: Counting the Cost of Official Extravagance in Kenya' (2005), showing Kenya's government has spent more than \$12 million on new cars for senior government officials enough money to send 25,000 children to school for eight years. Similarly, the United Nations Development Programme (UNDP) cites a notorious example of a project in the Ivory Coast whose principal aim is to enhance the prestige of its national leadership through the construction of the \$250 million basilica to rival St. Peters, in a country where only 10% of the population is even nominally of that religious denomination, and where 820% of people lack access to safe water, see Human Development Report 1991 published for the UNDP available at http://hdr.undp.org/sites/default/files/reports/220/hdr_1991_en_complete_nostats.pdf (accessed on 10 February 2015).

²⁹⁷See 'Canada's third report on the ICESCR' UN Doc E/1994/104/Add17 (1997).

²⁹⁸See chapter 5 on misappropriation of funds for public housing in South Africa.

existing within a state as well as those available from the international community through co-operation and assistance as outlined in the ICESCR²⁹⁹ and followed on in General Comment 3.³⁰⁰ Problematic is that according to General Comment 4 on housing,³⁰¹ traditionally less than five percent of all international assistance has been directed at human settlement.

The CESCR is criticised for not providing any indication of the level of economic resources that should be spent on public housing, either as a percentage of government expenditure or as a percentage of a broader measurement, like Gross Domestic Product (GDP).³⁰² According to Dowell-Jones the CESCR has failed to articulate standards of state performance due to the daunting challenge that universal standard-setting presents in this regard.³⁰³ For example, Hong Kong, one of the world's richest economies with massive financial reserves, still has 10 percent of its population living in abject poverty.³⁰⁴ On the flip side of this is the Democratic Republic of Congo (DRC) with its economic destroyed by civil war.³⁰⁵ The Committee failed to address the real economic costs underlying its recommendations in its review of the DRC during the civil war.³⁰⁶ It was borne out to the Committee by the IMF, WB, ILO and the FAO that the country was in severe economic, social and political crisis and any 'available resources' for the purpose of article 2(1) were minimal.³⁰⁷

In order for state parties to take the ICESCR seriously the CESCR should be armed with a comprehensive awareness of economic realities and how these influence progressive realisation of ICESCR standards.³⁰⁸ However, this will not be easy to determine because enquiring into a state's economic wellbeing can bear on its sovereignty. In the meantime states should be cognisant of General Comment 4³⁰⁹ urging that a substantial proportion of financing be earmarked to create a higher number of people being adequately housed.

²⁹⁹Articles 2 (1), 11, 15, 22, 23.

³⁰⁰GC para 14.

³⁰¹GC 4 para 19.

³⁰²See 'Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the CESCR: Canada, Committee on Economic, Social and Cultural Rights' UN Doc E/C.12/1993/5 (10 June 1993) 4, 9, 20.

³⁰³Dowell-Jones M 'The Committee on Economic, Social and Cultural Rights: Assessing the Economic Deficit' (2001) 1 *Hum. Rts. L. Rev.* 12. This author is an economist and previous banker.

³⁰⁴Dowell-Jones M (2001) 13.

³⁰⁵Dowell-Jones M (2001) 13.

³⁰⁶Dowell-Jones M (2001) 16.

³⁰⁷Dowell-Jones M (2001) 16.

³⁰⁸Dowell-Jones M (2001) 33.

³⁰⁹CESCR General Comment No 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) adopted at the Sixth Session of the CESCR 13 December 1991 UN Doc E/1992/23) (hereafter GC 4) para 19.

Robertson argues that both private and state resources previously used for other purposes should be employed to deliver ‘core’ entitlements.³¹⁰ Moreover, if austerity measures are necessary, ‘available resources’ for the delivery of basic shelter for the homeless should not be compromised.

2.4.1 How should the available resources be applied and measured?

The CESCR states that:

‘... In order for a State to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations’.³¹¹

A common misunderstanding to the right to housing is that it does not impose immediate obligations, but in reality the state must make every possible effort within its available resources to realise the rights and take steps in that direction, without delay. General Comment 4³¹² provides that the measures taken should be sufficient to realise the right of each individual in the shortest possible time within the maximum of available resources.

The CESCR states that despite times of severe resource constraints, the vulnerable members of society must be protected.³¹³ Furthermore, notwithstanding externally caused problems, the obligations under the ICESCR cannot be compromised by austerity measures.³¹⁴ This attests to the fact that the right to housing entails a certain degree of security of tenure for the most desperate and the available resources must include those deliverables. Moreover, homelessness should be addressed immediately to provide access to basic shelter to the most

³¹⁰Robertson R (1994) 693, 702.

³¹¹GC 3 para 11.

³¹²GC 4 para 14.

³¹³GC 3 para 12. In support of this approach the CESCR takes note of the analysis prepared by UNICEF entitled ‘Adjustment with a Human Face: Protecting the Vulnerable and Promoting Growth’, the analysis by UNDP in its Human Development Report 1990 and the analysis by the World Bank in the World Development Report 1990.

³¹⁴See GC 4 (13 December 1991) UN Doc E/1990/23 annex III. Also see Desierto D ‘ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises’ (2012) 44 *Geo. Wash. Int'l L. Rev* 492.

desperate communities.³¹⁵ These groups must be protected through low-cost targeted programmes as provided for in General Comment 3.³¹⁶ Key to this is to distinguish whether actions or omissions amounting to violation of SERs is the inability or the unwillingness of a state to comply with its treaty obligations. It should be highlighted that state parties are to refrain from adopting lending and debt-relief programmes that do not contain adequate social safeguards. For the failure to repay debt may lead to even greater adverse consequences for SERs.³¹⁷

There is also a rebuttable assumption that if every state is sufficiently aggressive in resource acquisition it possesses sufficient resources for subsistence purposes.³¹⁸ Moreover, applying available resources in a fruitless manner by building inadequate public housing, due to bad workmanship should be seen as a dereliction of the duty to deliver housing.³¹⁹ This action should be viewed as deliberately retrogressive and has to be justified in the context of the full use of the maximum available resources.³²⁰ Moreover, according to the Maastricht³²¹ guidelines, the failure to utilise the maximum of available resources towards the full realisation of the ICESCR amount to being an act of violation through omission.

2.5 Progressive realisation: determined by available resources

The ICESCR states that:

‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.’³²²

³¹⁵In 2003 the Scottish Parliament passed the landmark Homelessness Scotland Act 2003, which fundamentally changed Scotland’s homelessness legislation by progressively introducing a fully justiciable right to housing. As from 2012 every unintentionally homeless person in Scotland has a legally challengeable right to permanent accommodation. Since 2003 the Scottish law has become a model for other states. Following this example the French constitutional law of 2008 created a legally challengeable right to housing (droit opposable au logement) that would be progressively realised. When gaining legal force, in 2008, the French law applied only to homeless persons and those living in poverty. By 2012, it included anyone eligible for social housing.

³¹⁶GC 3 para 12.

³¹⁷See Friedman E ‘Debt Relief in 1999: Only One Step on a Long Journey’ (2000) 3 *Yale Human Rights and Development Law Journal* 191; Tooze J ‘Aligning States’ Economic Policies with Human Rights Obligations: The CESCR’s Quest for Consistency’ (2002) 2 *Human Rights Law Review* 229.

³¹⁸Robertson R (1994) 693,702.

³¹⁹See chapter 5 on the SIU investigations into corruption in social housing

³²⁰GC 3 para 9.

³²¹Paragraph 15(e).

³²²Article 11 (1).

To give credence to continuous improvement of living conditions, the principal obligation of results reflected in the ICESCR article 2 (1) is to take steps ‘with a view to achieving progressively the full realisation of the rights recognised’.³²³

The concept of progressive realisation constitutes a recognition of the fact that full realisation of all SERs will generally not be able to be achieved in a short period of time. To this extent at the CHR sixtieth session, Portugal maintained that progressive realisation should not take as long as the state can, but should rather be fully realised within a reasonably short time.³²⁴ Mexico agreed that the obligations of progressive realisation of SERs compelled states to take steps immediately to the maximum of their available resources, devoid of justified regression.³²⁵ The Netherlands added that progressive realisation does not diminish the value of SERs and confirmed that their realisation was linked to the availability of resources.³²⁶

In 2011 the Special Rapporteur on adequate housing pointed out that ‘current indicators from diverse sources show regressive results such as: reductions in public housing, soaring private rental rates, an acknowledged housing affordability crisis and no real reduction in the number of people who are homeless in Australia.’³²⁷ This behaviour negates the principle of progressive realisation. The Rapporteur also urged the federal authorities of Canada ‘to adopt an official definition for homelessness and to gather reliable statistics in order to develop a coherent and concerted approach to this issue’.³²⁸ South Africa signed the ICESCR in 1994 but only ratified it in 2015 therefore this jurisdiction has not been obliged to report on its SERs legacy to the Committee. Parliament failed in its oversight, namely to ensure that the most important treaty for SERs was ratified.³²⁹ The result of which is that this jurisdiction was not obliged to give to the Committee the statistical analyses of its homelessness during the 21 years.³³⁰

Furthermore, progressive realisation is not uniform or universal but rather specific to each state’s resources and development. Although the ‘appropriate’ measures to realise SERs are

³²³GC 3 para 9.

³²⁴CHR sixtieth session UN Doc E/CN.4/2004/WG.23/2 (17 November 2003) para 16 (hereafter CHR sixtieth session).

³²⁵CHR sixtieth session para 11.

³²⁶CHR sixtieth session para 12.

³²⁷ECOSOC Report of the UNHCHR Geneva 4–29 July 2011 UN Doc E/2011/90 (26 April 2011) para 23.

³²⁸ECOSOC Report UN Doc A/HRC/10/7/Add.3 para 100.

³²⁹ See chapter 3 for discussion on parliamentary oversight in South Africa.

³³⁰ See chapter 3 on how South Africa fared in delivering social housing.

incumbent on the states parties, the CESCR will be the final arbiter as to whether the measures employed were appropriate, or not. For instance, if there had been regression of SERs during a period of economic expediency, this would prima facie indicate that a state is not complying with its obligation in terms of progressive realisation of key rights within the maximum of available resources. Moreover, retrogression such as repetitive socio-economic disadvantage due to the accumulative effect of historic discrimination in the provision of housing should not be tolerated. The continued contemporary deprivation of basic shelter in South Africa is reminiscent of the deprivation of SERs during the apartheid era.

Progressive realisation should not be seen as being without content.³³¹ Rather it should be seen in the context of a necessary flexibility, reflecting the realities of the real world.³³² That is, resources do have a role to play when for instance basic shelter has to be realised at a minimum and progressively so, to attain adequate access, at large. That is why a decrease in budget allocation may indicate a failure to take steps towards the progressive realisation of a particular right.³³³ Moreover, the obligation of progressive achievement exists independently of the increase in resources but rather requires the use of the available resources effective.³³⁴

Sweden raised concerns to the CHR that the ICESCR was unclear on the principle of progressive realisation of SERs and the meaning of the words 'to the maximum of its available resources'.³³⁵ De Beco believes that human rights practitioners have difficulty in defining precisely what the obligation entails to 'progressively realise' SERs within a state's maximum available resources.³³⁶ The lack of definition to progressively realise SERs according to the available resources has negative consequences for their justiciability in that there is a reluctance to bring cases to court that challenge the state's choosing to give preference to certain rights.³³⁷ In essence, courts have been reluctant³³⁷ to determine concrete thresholds below which states may not fall when dealing with SERs.³³⁸

³³¹GC 3 para 9.

³³²GC 3 para 9.

³³³Also see Maastricht Guidelines paras 9, 10.

³³⁴Limburg Principles para 23. Also see Felner E 'Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realisation of Economic, Social and Cultural Rights' (2009)1 *Journal of Human Rights Practice* 403.

³³⁵CHR sixtieth session para 17.

³³⁶De Beco G 'The Interplay between Human Rights and Development the Other Way Round: The Emerging Use of Quantitative Tools for Measuring the Progressive Realisation of Economic Social and Cultural Rights' (2010) 4 *Hum.Rts. & Int'l Legal Discourse* 273.

³³⁷De Beco G (2010) 274.

³³⁸See chapter 4 for discussion on the Constitutional Court of South Africa and the reasonableness test.

As it is, progressive realisation is underpinned by timing and prioritisation. Thus it must be determined how the state should realise SERs and which SERs should take preference in lieu of core deliverables. In reality a state should prioritise, for example, homelessness and replace this with basic shelter as urgency and thereafter progressively take steps to improve this to adequate housing. Therefore, if the government continued to improve basic shelter into adequate housing for certain communities whilst homelessness remained at issue, this would not resonate with progressive realisation and neither with minimum core obligations.

2.6 The minimum core obligation: what does the concept feature?

In applying the available resources, a minimum of SERs must be realised. Therefore the backbone of the ICESCR is that there be a minimum core that each right contains, and which states are obliged to fulfil. To this effect the CESCR states that:

‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party... If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.’³³⁹

In anticipation of General Comment 3, the CHR suggested to ECOSOC, the use of indicators within the field of SERs that could contribute to realisation in a variety of ways.³⁴⁰ The CHR drew from the basic needs as spelt out by the World Employment Conference of the ILO in 1976 which defined basic needs as constituting two elements: ‘First, they include certain minimum requirements of a family for private consumption that link to adequate food, shelter and clothing, as well as certain household equipment and furniture. Secondly, they include essential services provided by and for the community at large, such as safe drinking water, sanitation, public transport, and health, educational and cultural facilities’.³⁴¹ The CHR also confirmed that the minimum content was conceived as ‘a group of fundamental rights when society is threatened with poverty or social exclusion and this minimum might bring them back into society with their heads held high, such minimum could be an instrument for

³³⁹ GC 3 para 10.

³⁴⁰ CHR forty-second session para 7.

³⁴¹ CHR forty-second session para 78.

promoting human rights'.³⁴² On the issue of indicators the CHR observed that instead of referring to the minimum content of human rights, one should rather speak of 'spring-board' rights.³⁴³ The dynamics of this is that 'spring-board' rights should be the driving forces of development and thereby form the basis for combating poverty. For example, basic shelter can be the launch of access to work or primary health care.³⁴⁴ Ultimately, this would start with guaranteed security for the family (a home) as a spring-board to access the larger freedoms of human rights. Moreover, if the minimum core did not start with access to basic shelter at least the right to food, health, education and dignity becomes quite meaningless. In applying the minimum core, the CHR confirms that this should not create spatial social segregation and belittle the aim of development of human dignity, to which it should contribute.³⁴⁵

The CESCR echoed the CHR and appealed to member states, that the minimum core concept should not belittle the aim of the development of human dignity.³⁴⁶ Therefore, to fulfil obligations under the ICESCR cognisance must be taken of General Comment 3, providing that the available resources that the state earmarks for SERs, must at least realise the minimum of SERs that allows a person to live in dignity. On the discourse on minimum obligations, Ssenyonjo agrees that the minimum standard entails a basic level of subsistence necessary to live in dignity, ie the base-line below which states must not fall and should endeavour to rise above.³⁴⁷ Young proffers that a determinable standard for the minimum core should be the minimum requirements for survival, ie the basic needs of the rights-holder.³⁴⁸ It stands to reason that whatever the budgetary allocations for SERs, there must be a minimum realisation of SERs. To this end General Comment 3 provides that as a start states parties must give due consideration to social groups living in unfavourable conditions.³⁴⁹

³⁴²CHR forty-second session para 205.

³⁴³CHR forty-second session para 206.

³⁴⁴In South Africa it is difficult to access social security or work or adult suffrage, without an address.

³⁴⁵CHR forty-second session para 203.

³⁴⁶CESCR fourth session UN Doc E/C12/1990/CRP.1/Add.10 para 206.

³⁴⁷Ssenyonjo M 'Economic, Social and Cultural Rights, in International Human Rights Law' (2010) in Mashood B & Manisuli S (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* 66-67. Also see Chapman A & Russell S *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (2002) who identifies the failure to fulfill the minimum core as violations by states in their obligations under the ICESCR.

³⁴⁸Young K (2008) 126. See *Francis Coralie v. Union Territory of Delhi* (AIR 1981, SC 746) in which the Indian Supreme Court stated that the right to life enshrined in art21 of the Indian Constitution includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing, and shelter. See Chapter 6 for a comparative study of South Africa with India on the interpretation of the judiciary of SERs and anti-corruption measures.

³⁴⁹GC 3 paras 11, 12.

Therefore, adequate use of the available resources must result in providing these groups with the ‘minimum essential levels of each right which requires the satisfaction of essential foodstuffs, essential primary health care, basic shelter and housing and basic education’.³⁵⁰

Furthermore, as a rule the available resources must cover the bare minimum of basic shelter as a core requirement to give credence to the core reason for the ICESCR. This means homelessness should not be tolerated. The CESCR was at pains in stressing that beyond Europe, thought must be spared for the appropriate thresholds applicable to developing countries, for subsistence minimal in a number of spheres, which entitles free minimum consumption of housing, energy and health care.³⁵¹ Not adhering to this bare essential, for a significant number of people, would prove prima facie failure under the ICESCR.³⁵² In monitoring state reports the CESCR can require states to show that adequate consideration has been given to apply the available resources to satisfy the minimum of SERs.

The CHR observed that in determining whether adequate measures had been taken, attention should be paid to equitable effective use of access to the available resources as espoused in the Limburg Principles.³⁵³ Thus, a state that does not sufficiently protect the available resources for SERs, against state abuse, makes itself liable for dereliction of its duties in realising minimum core obligations.³⁵⁴

During 2001 the CESCR confirmed that core obligations were non-derogable and therefore continued to exist in situations of conflict, emergency and natural disaster.³⁵⁵ On its austerity measures report the UNHCHR indicates that states will not have justification for the adoption of austerity or other measures that limit existing minimum levels of enjoyment of SERs.³⁵⁶ A joint NGO statement reiterated the view of the CESCR that the Covenant’s raison d’être was that the rights it promoted had a minimum core that should be realised.³⁵⁷ It must be noted that the minimum core obligation is an ‘absolute international minimum’ no matter the state’s

³⁵⁰ GC 3 para 10.

³⁵¹ CESCR fourth session UN Doc E/C12/1990/CRP.1/Add.10 para 201.

³⁵² GC 3 para 10.

³⁵³ CHR forty-second session para 78.

³⁵⁴ See chapter 5 for discussion on state abuse of available resources for housing.

³⁵⁵ CESCR ‘Poverty and the International Covenant on Economic, Social, and Cultural Rights’ U.N. Doc. E/C.12/2001/10 (10 May 2001) para 18.

³⁵⁶ UNHCHR ‘Report on Austerity Measures and Economic and Social Rights’ (2012) para 44 available at http://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf (accessed on 10 November 2014).

³⁵⁷ CHR sixtieth session para 18.

level of development and available resources.³⁵⁸ It boils down to the fact that states parties must make every effort to use what is at its disposal to attain minimum obligations, as a matter of priority.

The CESCR reaffirmed the maintenance of a minimum core content of the rights, especially for disadvantaged and marginalised groups no matter the resource constraint.³⁵⁹ The UNHCHR maintains that this can be achieved through the establishment of a 'social protection floor' to ensure protection of this core content at all times. Such a social protection floor ensures access to basic social services, shelter, food, health and empowerment and protection of the poor and vulnerable.³⁶⁰

The Committee expressed concern at the disproportionate curtailed enjoyment of rights by disadvantaged and marginalised groups.³⁶¹ The CESCR recommends that states parties ensure all austerity measures adopted must reflect the minimum core content of all the ICESCR rights. This means that all appropriate measures must be employed to protect the core content for disadvantaged and marginalised individuals and groups. Moreover, the Committee recommends that developed states parties redouble their efforts to increase official development assistance to at least 0.7 percent of GDP in line with the goals assumed at international level.³⁶²

2.7 Other UN Treaty Bodies' approach on the phrase 'available resources'

2.7.1 The United Nations Convention on the Rights of the Child

The importance of available resources also came under scrutiny of the Committee on Rights of Children (CRC). Following in the footsteps of the ICESCR, the UNCRC³⁶³ provides for the collective and individual obligation of states to realise the SERs of children, to the maximum of their available resources. In article 4 it states as follows:

³⁵⁸GC 3 paras 11, 12.

³⁵⁹CESCR forty-eighth session 'Concluding Observations of the Committee on Economic, Social and Cultural Rights' 30 April -18 May 2012 on the fifth report of Spain UN Doc E/C.12/ESP/CO/5 (6 June 2012) para C. (hereafter CESCR forty-eighth session).

³⁶⁰UNHCHR 'Report on the Impact of the Global Economic and Financial Crises on the Realization of all Human rights and on Possible Actions to Alleviate it' UN DOC A/HRC/13/38 (18 February 2010) paras 21 and 25.

³⁶¹CESCR forty-eighth session para C.

³⁶²CESCR forty-eighth session para 10.

³⁶³Signed by South Africa on 29 January 1993 and ratified on 16 June 1995.

‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.’³⁶⁴

In order to elaborate on how the available resources should meet the needs of children, the CRC drafted General Comment 5 which outlines the states parties’ obligations to develop ‘general measures of implementation’ in terms of article 4.³⁶⁵ In adding content to the requirement of article 4, General Comment 5 requires that:

‘[N]o State can tell whether it is fulfilling children’s economic, social and cultural rights “to the maximum extent of ... available resources”, as it is required to do under article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly. Some States have claimed it is not possible to analyse national budgets in this way. But others have done it and publish annual “children’s budgets”.’³⁶⁶

In this regard the Committee recommended that states parties clarify the amount of the budgetary allocations (for children) for social services and to ensure that these allocations are to the ‘maximum extent of ... available resources’, in accordance with article 4 of the UNCRC.³⁶⁷

In its concluding remarks the CRC observed that the overall standards of living of many children was very low in terms of access to housing, water, sanitation and education.³⁶⁸ Responding to state reports the Committee regretted that data lacked specificity regarding the amounts allocated to the children from the budget. The CRC further observed that some states

³⁶⁴ Article 4 is similar to art 2 of the ICCPR and art 2 of the ICESCR. See CRC thirty-first session 16 September-4 October 2002 UN Doc CRC/C/119 para 17 where the CRC expressed the wish to pursue the elaboration of general comments based on the various principles and provisions and principles of the UNCRC.

³⁶⁵ CRC thirty-fourth session 19 September-3 October 2003. General Comment No 5: General Measures on the Implementation of the Convention on the Rights of the Child UN Doc CRC/GC/2003/5 (27 November 2003) (hereafter CRC thirty-fourth session). Also see Rishmawi M A *Commentary on the United Nations Convention on the Rights of the Child: Article 4: The Nature of States Parties’ Obligations* (2006) 27.

³⁶⁶ CRC General Comment 5 paras 51-2.

³⁶⁷ CRC thirty-fourth session para 113 (Greece). Also see CRC ‘Reporting Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties’ para 35; UNCRC art 44 para 1(B) adopted by the CRC at its first session October 1991; AfCRWC art 43 and AfCHPR art 62.

³⁶⁸ CRC thirty-fourth session para 2.

devote too little of their budgets to primary needs in SERs.³⁶⁹ In this regards the Committee raised concern that insufficient attention was being paid to article 4 of the Convention. The Committee drew attention to the need to respect the provisions of article 4, which emphasise that SERs should be implemented to the maximum extent of the available resources, regardless of the economic model followed by the state,³⁷⁰ thus emulating General Comment 3.³⁷¹ Furthermore it expected states parties to describe the action taken in response to article 4 in its endeavours for progressive realisation of SERs for children and the resources thus employed.³⁷²

In light of article 4, General Comment 5 encourages the states parties to clearly identify their priorities in respect of child rights issues to ensure that funds are allocated ‘to the maximum extent of available resources where needed for the full implementation of SERs for children’.³⁷³ The CRC stressed that ‘even where the available resources are demonstrably inadequate, the obligation remains for a state party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ...’³⁷⁴ To this extent planning and decision-making, including budgetary decisions, are made within the best interests of children, focusing on the marginalised and disadvantaged being protected from adverse effects of economic policies or financial downturns.³⁷⁵

In essence, governments are to respect children’s’ rights to housing as an individual group and not in parallel with their parents. Moreover, the economic resources for children should enjoy special scrutiny in order to comply with international treaty obligations. The CRC called on states to show a willingness to prioritise politically the human rights of children.³⁷⁶ Despite, this in the developing, world budgets has not been prioritised to accommodate children.³⁷⁷ Exacerbating this situation is the fact that the CRC lacks effective enforcement mechanisms in holding state parties accountable for non-compliance. In addition, states

³⁶⁹CRC thirty-fourth session para 118 (Gabon), para 266 (Mozambique), para 338 (Chile), para 393 (Malawi).

³⁷⁰CRC thirty-fourth session para 14 (Indonesia) para 46 (Lebanon).

³⁷¹GC 3 paras 11, 12.

³⁷²CRC thirty-fourth session para 2. Also see Rishmawi M A *Commentary on the United Nations Convention on the Rights of the Child: Article 4: The nature of States Parties’ Obligations* (2006) 27.

³⁷³CRC thirty-fourth session para 393.

³⁷⁴CRC thirty-fourth session para 8.

³⁷⁵CRC GC 5 paras 8, 51. Also see GC 3 para 11.

³⁷⁶CRC GC 5 para 10.

³⁷⁷CRC GC 5 para 10.

parties are obligated by the Committee to raise funds for children's rights, but donor states have no such reciprocal legal obligation.³⁷⁸

Thus the obligation under the ICESCR to seek international funding when domestic resources are limited is not necessarily easily accessible. This does not bond well with the responsibility of the international community in fulfilling their treaty obligations, stemming from the ICESCR and various other instruments that specify that international funding should be applied to assist developing countries in fulfilling their minimum of their SERs.³⁷⁹

2.7.2 Convention on the Elimination of All Forms of Discrimination against Women

The CEDAW³⁸⁰ was drawn up to protect women in as much as they constitute a vulnerable group. The Committee on CEDAW adopted a plethora of general recommendations on implementation and states parties' obligations under this Convention.³⁸¹ At its 20th session this Committee made general recommendations as to the obligations of states as regards to women and health, in terms of the Convention.³⁸² Through these general recommendations for health the Committee obliges states to take all appropriate measures to ensure adequate living conditions, particularly housing, sanitation, electricity and water supply.³⁸³ Noted is that CEDAW³⁸⁴ makes this provision, concerning the housing problems rural women face in their role in the economic survival of their families. Senders maintains that female-headed households in rural areas experience problems more frequently as regards physical housing, equality and affordability than any other kind of household due to the economic constraints

³⁷⁸Sloth-Nielson J et al 'Available Resources: The African Context, An African Perspective' Committee on the Rights of Child General Day of Discussion on: Resources for the Rights of the Child: Responsibility of States 21 September 2007 para 24. Africa continues to be the continent with the highest proportion of children, with more than 50% of the population aged below the age of 18 years, para 9.

³⁷⁹ See GC 4 para 14 stating that international assistance is the responsibility of the international community at large. Also see the Vienna Declaration (1993) urging for this. See this chapter para 2.10 discussing international funding obligations.

³⁸⁰ The CEDAW adopted on 18 December 1979 entered into force on 3 September 1981. On 6 October 1999, the GA adopted an enforcement mechanism the Optional Protocol to the CEDAW entered into force on 22 December 2000. It is a stand-alone treaty that can be signed or ratified by countries that are not party to the main treaty.

³⁸¹ See General Recommendations made by the Committee on the CEDAW

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed on 23 October 2015).

³⁸² General Recommendation No 24 (20th session 1999) adopted by the Committee at its 24th meeting on 11 August 1983 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed on 23 October 2015). See CEDAW art14 (2) (h).

³⁸³ General Recommendation No 24 (20th session 1999).

³⁸⁴ Article 14.

they live under and diminished financial security.³⁸⁵ However, the provision of CEDAW falls short in that the provision for housing does not concern itself with urban women living in intolerable conditions.³⁸⁶

The Committee makes a recommendation on preferential or quota systems to advance women's integration into education, the economy, employment and politics.³⁸⁷ Unfortunately, none of the general recommendations reflect the duty of the states to provide available resources to realise housing for women in need, generally. Thus CEDAW promotes the advancement of women through a practice of non-discrimination, but this instrument missed a core objective in that it does not provide the international community with a platform that promotes housing holistically to this vulnerable group.

This is regrettable because the international community has over many decades seen that women remain the primary care giver to another vulnerable group, namely children. Thus, where women suffer intolerable living conditions without basic shelter there you will find children also sharing in this hardship. Therefore, the creation of an international instrument to protect women is notable, but essentially vacuous in not protecting women's interest by ring-fencing available resources for their public housing. The Committee's silence on the absence of provision for impoverished women in state budgets and government's application of the 'maximum of its available resources', to promote SERs for impoverished women, leaves a lacuna in treaty obligations.

Unlike the UNCRC following on to the ICESCR's General Comment on the importance of available resources to realise housing for children, specifically, the Committee on CEDAW missed this point as regards women in its various general recommendations. This means that to date, this Committee has not taken cognisance of General Comment no 7³⁸⁸ on forced eviction, for example. This General Comment protects women and provides that states ensure

³⁸⁵Senders M 'Women and the Right to Adequate Housing' (1998)16 *Neth. Q. Hum. Rts* 182.

³⁸⁶See 'Alternative Report for Consideration Regarding Israel's Fifth Periodic Report to the United Nations Committee on the Elimination of Discrimination Against Women' 17 January – 4 February 2011 available at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/WCLAC_for_the_session_ISRAEL_CEDAW48.pdf (accessed on 21 January 2015) where the Committee in Israel for the first time made explicit reference to women's right to adequate housing and to forced eviction and house demolitions negatively impacting on Palestinian and Israeli Arab women.

³⁸⁷General Recommendation No 5 (seventh session, 1988) recalling article 4.1 of the CEDAW available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (accessed on 23 October 2015).

³⁸⁸'The Right to Adequate Housing (art. 11(1) of the ICESCR): Forced Evictions' adopted by the CESCR at its sixteenth session on 14 May 1997 UN Doc. E/C.12/1997/4.

to the maximum of their available resources, adequate alternative housing, resettlement or access to productive land, be available. Neither has the Committee considered Comment no 3 obliging the state to apply the maximum of its available resources to realise progressively housing to vulnerable groups. The Committee is not in sync with the essence of the ICESCR in article 11 (2) and General Comment 3 paragraph 2 (1) which protects the right to housing and the allocation of the maximum available resources to realise the right. It would be prudent if the Committee could adopt general recommendations in this regard for impoverished women. This aim would be best served where the Committee on CEDAW were to give sufficient attention to the problems that women encounter in exercising their right to adequate housing and how the available resources of the state should be applied to accelerate access. This would assist NGOs and human rights institutions in their endeavours to hold the state accountable to house vulnerable women, as a priority.

South Africa lags behind in its application of paying special attention to impoverished women. This is crystallised by the vulnerability women continue to suffer from due to a lack of adequate shelter and having to live in shack-dwellings, in both the city and in rural areas.³⁸⁹ The knock-on effect is that children remain disadvantaged by not being able to access adequate shelter because their primary caregiver is also deprived. This was demonstrated by the *Grootboom* case.³⁹⁰

Furthermore due to the global financial crisis there has been a global dereliction in human rights standards. This has led to women being marginalised in all matter relating to housing programmes.³⁹¹ A sterling example of this is the cut made in the US of billions of dollars from its federal housing programmes which affected women-run households the hardest.³⁹² These points to gender inequality because of the scant attention paid to the effect of economic contraction on women in comparison to men. In addition the Limburg Principles³⁹³ echo that discrimination occurring as a result of unequal enjoyment of SERs should be brought to a speedy end.

³⁸⁹See chapter 3 for discussion on how the South African government has fared with access to housing.

³⁹⁰See para 2.9 below for details on this case.

³⁹¹Rolnik R'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'(2011) para 17 available at http://advocacyaid.com/images/stories/rrdownloads/UN_Report_Women_and%20housing_26122011_2012.pdf (accessed on 28 January 2015).

³⁹²Rolnik R (2011) para 13. The US cut US\$2.8 billion.

³⁹³Article 2.2 para 38.

There is a need to put more haste into prioritising the allocation of public housing for women who bear the brunt of income disparities and who are stymied by inaccessibility to financial resources. The absence of impoverished women's interest in the state budget can be remedied through political will and legal enforcement by adopting specific budgetary measures that favour such women. This means that women should be active participants in the budgeting process relating to all aspects of housing programmes. Rolnik argues that such gender-sensitive budgets will ensure better accountability of states in meeting their international obligations to realising gender equality and in directing the maximum of available resources towards advancing women's right to adequate housing.³⁹⁴

The CEDAW is described as a blunt instrument unable to further the rights of women.³⁹⁵ Added to this is that the Committee on CEDAW has been criticised in being unable to enforce its own pronouncements. A visible obstacle is sovereignty, which leaves compliance to the political will of state parties. The Committee on CEDAW should perhaps follow the UNCRC and remedy the shortcomings in housing by adopting a general comment that ring-fences a portion of state budgets for housing impoverished women.

2.8 Regional instruments relevant to Africa on 'available resources'

2.8.1 The African Charter on Human and Peoples' Rights

Annan states that human rights are African, Asian, European and American rights, they are not limited to a continent and belong to no government because they are fundamental to humankind itself.³⁹⁶ On the African continent, the African Charter on Human and Peoples' Rights (the African Charter) is the principal human rights instrument³⁹⁷ and it confirms in its preamble that 'fundamental human rights stem from the attributes of human beings'.

³⁹⁴Rolnik R (2011) para 61. 63(g).

³⁹⁵China and Saudi Arabia poses poor records as such see Schein V (2007) 'Women in Management: Reflections and Projections' (2007) 22 *Women in Management Review* 6 – 18.

³⁹⁶Annan K 'The opening of the 54th session of the UN Commission on Human Rights' *Geneva Press Release* (16 March 1998).

³⁹⁷African Charter on Human and Peoples' Rights, adopted by the Eighteenth Assembly of Heads of State and Government of the OAU, Nairobi July 1981 (entered into force 21 October 1986). All 53 members of the African Union (AU) out of 54 African States have ratified the Charter (Morocco withdrew from the AU in 1985). The rights of individuals have first been contained in the Charter of the OAU adopted on 23 May 1963 at Addis Ababa (entered into force 13 September 1963) see text in UN Treaty Series vol 479 No 6947. The AU,

Some of the Charter's provisions equate to the ICESCR but there are significant differences between these two instruments. As it is, the ICESCR defines SERs as being realisable through 'progressive realisation' and 'available resources,' but in contrast article 1 of the African Charter enjoins all state parties to adopt legislative and other measures to give effect to the rights it protects. There is no qualification of SERs through progressive realisation or within available resources. The framers intended that all categories of rights, that is civil, political and SERs are enforceable in the same manner. This means that the African Charter promotes the immediate realisation of SERs regardless of economic restraint.

Nonetheless, the African Charter must be interpreted by observing international instruments; therefore inspiration must be drawn from the ICESCR as far as SERs are concerned. Dugard commends South Africa on its diligence in subscribing to the norms and standards contained in the ICESCR through its ratification of the African Charter.³⁹⁸ Then again the African continent does not boast an exemplary record of realising SERs and critics are abound with criticism on the weak enforcement mechanisms because the African Charter relies on the African Commission instead of a court to promote its obligations. How the African Commission fares as custodian of the Charter is explored next.

2.8.2 The efficacy of the African Commission

The African Commission, a quasi-judicial organ, is charged with monitoring the implementation of the African Charter,³⁹⁹ the enforcement of SERs and hearing complaints regarding violations of human rights. In elaborating on the African Charter this Commission confirms that resources are needed to realise both SERs and civil and political rights. The Commission acknowledges that the rights and obligations in the Charter are immediate, thus

founded in July 2002, is the successor of the OAU. Modelled on the European Union (but currently with powers closer to the Commonwealth of Nations) its aims are to help promote democracy, human rights and development across Africa, especially by increasing foreign investment through the New Partnership for Africa's Development program available at http://archive.transparency.org/global_priorities/international_conventions/conventions_instruments/au_convention#sthash.SxGHU5RX.dpuf (accessed on 3 July 2013). For other regional treaties see White R & Ovey C (eds) *The European Convention on Human Rights* (2010) 5ed; Pasqualucci J *The Practice and Procedure of the Inter-American Court on Human Rights* (2013) 2ed.

³⁹⁸Dugard J 'The Future of International Law: A Human Rights Perspective – With Some Comments on the Leiden School of International Law (2007) 20 *Leiden Journal of International Law* 729. The African Charter was signed by South Africa on 9 June 1986 and ratified on 9 June 1996.

³⁹⁹Articles 47, 55, 56. For more elaboration on their role see Bello A 'The Mandate of the African Commission on Human and Peoples' Rights' (1988) *African Journal of International Law* 31.

they must be implemented instantly, irrespective of hostile economic conditions. This tie in with the provisions of the ICESCR.

The African Commission has established multiple special mechanisms to assist in protection and promotion of human rights.⁴⁰⁰ The Commission has been enhanced, in that since 2014 there are seven working groups, five Special Rapporteurships, a working group on SERs, two committees and one advisory committee. The mandate of the Commission is to consider cases alleging violations of the African Charter, known as ‘communications’. The Commission issues ‘recommendations’ on the appropriate remedies. The Commission takes a realistic approach in confirming that states can allege the lack of resources as a defence to non-compliance in the realisation of SERs.

In *Purohit and Moore v the Gambia*⁴⁰¹ the Commission pointed out that we cannot turn a blind eye to the scarcity of resources in Africa when defining the SERs in the Charter. However, the Commission read into article 16 the obligation on state parties to take concrete and targeted steps and when they do so they must take full advantage of their available resources ensuring the full realisation of the right to health, in this case.⁴⁰² This case clarifies the availability of resources being a relevant factor in determining the states’ violation of the right to health. It is noted that the case does not establish who must prove the availability of resources or the lack thereof. The Commission is known for its sound approach to housing rights as ordered in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*.⁴⁰³ In the latter case the Commission found that whilst the right to adequate housing was not explicit in the African Charter, this should be inferred from the other rights espoused in this Charter.⁴⁰⁴

⁴⁰⁰See article 45 of the African Charter.

⁴⁰¹Communication No. 241/2001, Sixteenth Activity report 2002-2003, Annex VII (hereafter *Purohit*) available at <https://www.escr-net.org/docs/i/401249> (accessed on 20 November 2014). In this case provisions of the Lunatic Detention Act of the Gambia and the manner in which mental patients were being treated amounted to a violation of various provisions of the African Charter articles 16 and 18(4).

⁴⁰²*Purohit* para 84.

⁴⁰³2002 (Communication No. 155/96) (hereafter *Serac* case) available at <https://www.escr-net.org/docs/i/404115> (accessed on 20 November 2014).

⁴⁰⁴It was noted that the combined effect of articles 14, 16 and 18 (1) reads into the right to housing.

Further reference to ‘available resources’ is found in the African Commission’s Principles and Guidelines⁴⁰⁵ which are similar to the UN treaty bodies’ general comments as regards promoting the principle of progressive realisation. These Guidelines spell out that progressive realisation dictates an ‘obligation to constantly move towards the full realisation of SERs, within the resources available to a state, including regional and international aid.’⁴⁰⁶ To this effect, the nature of the member states’ obligations must include the provision of protection and realisation of SERs through constitutional rights, institutions, legislation, policy and budgetary measures.⁴⁰⁷ In keeping with the international Convention, the Guidelines also prioritise appropriate services and resources for vulnerable and disadvantaged groups insofar as socio-economic development is concerned.⁴⁰⁸ The Guidelines also acknowledge that states need sufficient resources to realise SERs progressively.⁴⁰⁹

The Commission has a rich jurisprudence on SERs,⁴¹⁰ but the enforcement of its recommendations seems tenuous.⁴¹¹ Wachira and Ayinla maintain that decades after the inauguration of the African Commission, effective execution of its mandate is debateable.⁴¹² The authors, arguing from an insider’s perspective, having worked within the African Commission commends the strides made by the Commission⁴¹³ but warn that their recommendations have been largely ignored by states parties, with no consequences.⁴¹⁴ This

⁴⁰⁵African Commission on Human and Peoples’ Rights ‘Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights’ (hereafter African Commission Principles and Guidelines) para II art 2 available at http://www.achpr.org/files/instruments/economic-social_cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (accessed on 20 November 2015). This is in accordance with the African Charter articles 61-2.

⁴⁰⁶African Commission Principles and Guidelines Part III para 13.

⁴⁰⁷African Commission Principles and Guidelines para II para 2.

⁴⁰⁸African Commission Principles and Guidelines Part III paras 12, 14.

⁴⁰⁹African Commission Principles and Guidelines Part III para 15.

⁴¹⁰See Balogun V & Durojaye E ‘African Commission on Human and Peoples’ Rights and the Promotion and Protection of Sexual and Reproductive Rights’ (2011)11 AHRLJ 68

⁴¹¹See Murray R & Long D *The Implementation of the Findings of the African Commission on Human and Peoples’ Rights* (2015).

⁴¹²Wachira G M & Ayinla A ‘Twenty Years of Elusive Enforcement of the Recommendations of the African Commission on Human and Peoples’ Rights: A Possible Remedy’ (2006) 2 AHRLJ 465.

⁴¹³The few instances of compliance with the African Commission's recommendations would include *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1994); *Pagnouille (on behalf of Mazou) v Cameroon* (2000) AHRLR 57 (ACHPR 1997). Also see Dankwa V ‘The Promotional Role of the African Commission on Human and Peoples’ Rights’ in Evans M & Murray R (eds) *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000* (2002).

⁴¹⁴See OAU ‘Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach’ 24th ordinary session OAU DOC/OS/50b (XXIV) (1998) para 2 reprinted in Murray R & Evans M (eds) *Documents of the African Commission on Human and Peoples’ Rights, on Compliance of State Parties to Adopted Recommendations of the African Commission: A Legal Approach* (2001); Gutto S ‘The Compliance with Regional and International Agreements and Standards by African Governments with Particular Reference to the Rule of Law and Human and Peoples’ Rights’ in Anyang Nyong'o P et al (eds) *New Partnership*

has left victims of human rights violations without recourse to justice and sends a message that undermines the credibility of the Commission as an effective protector of the rights enshrined in the African Charter.⁴¹⁵ In other words the Commission does not live up to its treaty obligations. However, despite the lack of enforcement mechanism, states are obliged to comply under the *pacta sunt servanda* principle which binds parties to implement treaty obligations in good faith.⁴¹⁶

Although the African Charter⁴¹⁷ empowers the African Commission to make recommendations on state communications, the Commission's enthusiasm is stifled by the lack of political will of state parties to implement its recommendations, all of which is exacerbated by the lack of good governance.⁴¹⁸ The most debilitating is that the recommendations are non-binding and this in turn hampers enforcement.⁴¹⁹ Much of the 'disregard' of the Commission's recommendations are due to the fact that neither the African Charter nor the Rules of Procedure of the African Commission⁴²⁰ defines the status of the Commission's recommendations. Naldi argues that the recommendations of the Commission, despite being non-binding have persuasive powers akin to the opinions of the UNHRC.⁴²¹ In addition the work of the Commission is noted by the positive strides it made in considering communications and making recommendations that form important case law jurisprudence.⁴²²

for Africa's Development (NEPAD): A New Path? (2002); Viljoen F & Louw L 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48 *Journal of African Law* 2.

⁴¹⁵See generally Institute for Human Rights and Development *Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights: 1994-2001* (2002) 3-7. Despite the decision in *Serac* there are continued media reports of human rights violations in the Ogoni Region, leading to unrest, see the Niger-Delta Development Commission [http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission\(Establishment%20etc\)Act2000.htm](http://www.nigeria-law.org/Niger-DeltaDevelopmentCommission(Establishment%20etc)Act2000.htm) (accessed on 25 March 2016).

⁴¹⁶See *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 59-60.

⁴¹⁷Article 53. Also see Österdahl I 'Implementing Human Rights in Africa: The African Commission on Human and Peoples' Rights and Individual Communications' (2002) 15 *Swedish Institute of International Law Studies in International Law*.

⁴¹⁸Viljoen F & Louw L 'The Status of the Findings of the African Commission: From Moral persuasion to Legal Obligation' (2004) 48 *Journal of African Law* 9-10.

⁴¹⁹See Odinkalu C 'The Role of the Case and Complaints Procedures in the Reform of the African Regional Human Rights System' (2001) 1 *African Human Rights Law Journal* 225.

⁴²⁰Adopted at Second ordinary session Dakar 2-13 February 1988 revised during the 18th ordinary session held in Praia 2-11 October 1995 available at

http://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf

⁴²¹G Naldi 'Future Trends in Human Rights in Africa: The Increased Role of the OAU' in Evans M & Murray R (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (2002) 10.

⁴²²See C Heyns 'The African Regional Human Rights System: The African Charter' (2004) 108 *Pennsylvania State Law Review* 685-686;

In order to curb the violations of human rights, an African Court on Human and Peoples' Rights with binding judgements was sought.⁴²³ Recently, the Commission demonstrated a proactive stance by referring a case concerning gross human rights violations in Libya to the African Court.⁴²⁴ A further contentious issue in Africa is the plight of its children which is discussed below.

2.8.3 African Charter on the Rights and Welfare of the Child

Responding to the plight of children in Africa the AfCRWC⁴²⁵ is the only regional instrument focussing on the welfare of one of the most vulnerable groups in society. The Preamble notes with concern that:

‘the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances...’

It is the only regional instrument in the world that focuses on the welfare of children and it aims to incorporate the universalist outlook of the UNCRC in the African context.⁴²⁶ A monitoring body, the Committee of Experts was established in 2001 to navigate the implementation of this instrument and to examine state reports.⁴²⁷ There are four pillars that

⁴²³ Adopted by the Assembly of Heads of State and Government of the OAU in Ouagadougou, Burkina Faso, on 9 June 1998 OAU/LEG/MIN/AFCHPR/PROT (111), entered into force on 25 January 2004. However the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111). If this Court existed in 2001 the Ongoni people in Niger could have brought their *Serac* case under judicial scrutiny see ‘Nine things about the African Court of Justice and Human Rights 5 February 2015 available at <https://thehague-trials.co.ke/article/nine-things-about-african-court-justice-and-human-rights> (accessed on 25 March 2016).

⁴²⁴ African Court on Human Rights decision in *African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya* Application 004/2011 delivered on 25 March 2011.

⁴²⁵ Adopted by the OAU on 11 July 1990 and came into force on 29 November 1999 OAU Doc CAB/LEG/24.9/49. Signed by South Africa on 10 October 1997 and ratified on 7 January 2000. The South African's Children's Act also heralds this instrument in its preamble. Also see Getachew A ‘The Contribution of the African Children's Charter and its Monitoring Committee in the Advancement of Children's Rights in Africa: A Critical Reflection’ (2011). Also see Chirwa D ‘The Merits and Demerits of the African Charter on the Rights and Welfare of the Child’ (2002) *International Journal of Children's Rights* 131.

⁴²⁶ Also see Kaime T ‘The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective’ (2009) *PULP* 132; Lloyd A ‘The African Regional System for Protection of Children's Rights’ (2008) in Sloth-Nielsen J (ed) *Children's Rights in Africa: A Legal Perspective* 33.

⁴²⁷ AfCRWC art 32. See art 43 for time frames for state reports.

dominate the AfCRWC, most notably the best interest of the child⁴²⁸ and participation in state budgets.⁴²⁹

Similar to the UNCRC article 27 the AfCRWC⁴³⁰ points out that the primary responsibility for children lies with the parents and other persons caring for the child in providing a standard of living within their abilities and financial capacities. The AfCRWC⁴³¹ like the UNCRC obliges the state to assist parents in meeting their responsibilities, including the provision of material assistance and support programmes in terms of food, clothing and housing.⁴³² Van Bueren hails this as the most progressive of the treaties pertaining to the rights of the child.⁴³³ Gose submits the AfCRWC follows a more human-rights centred approach in conferring the rights directly upon the child.⁴³⁴

However, despite the rights contained in the AfCRWC being almost identical to the UNCRC, it does not contain the right of children to an adequate standard of living, for the child's development and neither the right of parents to social security necessary for maintaining the standard of living of the child. Another notable omission in this instrument is absence of direct protection of the right to a home for children, separate from parents, which the UNCRC cites.⁴³⁵ Instead, the instrument provides for a child's right to a family home.⁴³⁶ This means that children's access to a home is dependent on whether their parent has a home. This is disappointing, in light of the prevalence of displacement due to war on Africa's children.⁴³⁷

⁴²⁸ Article 4.

⁴²⁹ Article 7.

⁴³⁰ Article 20 (1).

⁴³¹ Article 20(1).

⁴³² UNCRC art 27 (2) and AfCRWC art 20(2). Also see Viljoen F 'The African Charter on the Rights and Welfare of the Child' in C Davel (ed) *Introduction to Child Law in South Africa* (2000).

⁴³³ Van Bueren G *The International Law on the Rights of the Child* (1995) 402. Also see Hodgkin R & Newell P 'Child's right to an Adequate Standard of Living' (1998) in Hodgkin R et al (eds) *An Implementation Handbook on the United Nations Convention on the Rights of the Child*.

⁴³⁴ Gose M 'The African Charter on the Rights and Welfare of the Child' (2002) 17-18.

⁴³⁵ See art 27. Also see Olowu D 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 127-136.

⁴³⁶ Article 10 provides 'No child shall be subject to arbitrary or unlawful interference with his privacy, family home.

⁴³⁷ See Machel G 'Impact of Armed Conflict on Children' stating that 'At least half of the estimated 57.4 million people displaced by war around the world are children, and millions of those children have been separated from their families, according to a new UN report. It calls for policies to be more sensitive to the specific needs of unaccompanied children in wartime' available at www.unicef.org/graca/alone.htm (accessed on 20 January 2015).

Further provisions are ‘to secure, within their abilities and financial capacities, conditions of living necessary to the child's development’.⁴³⁸ The provisions encompass primary health care through financial means and community resources.⁴³⁹ Most notably article 20(2) provides that ‘states parties to the present Charter shall in accordance with their means and national conditions take all appropriate measures,’ but the Charter stops short of qualifying that available resources be allocated to children’s SERs. The AfCRW⁴⁴⁰ instead provides for material assistance to parents and other persons responsible for the child, particularly with regard to nutrition, health, education, clothing and housing.

The UNCRC pertinently points out that ‘the maximum extent of their available resources’ should be extended to the child.⁴⁴¹ The AfCRWC which intended to espouse the rights contained in the UNCRC could have followed suit. Instead, it proffers that ‘states parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child and this will be the performance of duties on the part of everyone’.⁴⁴² By not conforming the child’s wellbeing to the ‘maximum available resources’ creates a void that does not complement the best interest of the child⁴⁴³ (one of the four pillars) and participation.⁴⁴⁴ This should arguably start with providing adequate resources to at least an individual right to basic shelter for children and their representation in budget allocations.

Sloth-Nielson et al maintain that governments, donors and civil society organisations should be held accountable in the allocation and utilisation of both internal and external resources in the best interest of children through universally established mechanisms.⁴⁴⁵ This resource allocation should be monitored and include participation by beneficiaries, especially children.⁴⁴⁶ Therefore the CRC is urged to lead in the development and adoption of a global

⁴³⁸ Article 20 (1) (b).

⁴³⁹ Article 14 (2) (j).

⁴⁴⁰ Article 20 (2) (a).

⁴⁴¹ Article 4. Also see art 20 (2) provides that ‘States Parties to the present Charter shall in accordance with their means and national conditions take the all appropriate measures.’

⁴⁴² Article 2 and preamble.

⁴⁴³ Article 4.

⁴⁴⁴ Article 7.

⁴⁴⁵ Sloth-Nielson J et al (2007) para 5. Also see Sloth-Nielsen J & Mezemur B ‘A Dutiful Child: The Implications of Article 31 of the African Children’s Charter’ (2008) *Journal of African Law* 166.

⁴⁴⁶ Sloth-Nielson J et al (2007) para 5.

measurement framework for available resource allocation for children and to monitor and evaluate progress in the delivery of children's SERs.⁴⁴⁷

Presently in South Africa, the Children's Act⁴⁴⁸ is the primary legislative measure giving effect to the constitutional imperatives on children. The Constitution⁴⁴⁹ provides children with a right to shelter, unconditionally. That is, without qualifying that the right is subject to the available resources of the state. According to the Children's Institute, although the Constitution contains clear rights for children to shelter, there is still uncertainty as to how these rights should be interpreted, what the context of each right is and what the nature and obligations of government are, to translate the same into practical delivery.⁴⁵⁰

The most recent reports (2015) from member states to the CRC cover all the vulnerabilities that children in Africa and the world experience, but does not address any concerns as to access to adequate basic housing and the resources thereto.⁴⁵¹ This is worrisome because all the other aspects of vulnerability points to education, health, welfare, sanitation and water which are underpinned by a child's access to basic shelter. Moreover, African countries, despite their wealth in minerals and other resources, have not employed these benefits to children in them being particularly vulnerable.⁴⁵² It is clear that the AfCRWC recognises the importance of economic resources to realise SERs, but neglects to ensure that the 'maximum of available resources', be earmarked for realising children's rights. Not confining the development of the child to the necessary economic resources leaves these rights dormant.

2.8.4 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Protocol)

⁴⁴⁷Sloth-Nielson J et al (2007) para 16.

⁴⁴⁸ Act 38 of 2005.

⁴⁴⁹Section 28 (1) Every child has the right- (*e*) to basic nutrition, shelter, basic health care services and social services.

⁴⁵⁰See Rosa S & Dutschke M 'Child Rights at the Core: A Commentary on the use of International Law in South African Court Cases on Children's Socio-economic Rights' (2006) A Project 28 Working Paper Cape Town: Children's Institute, University of Cape Town.

⁴⁵¹CRC 'Examines Reports of the Gambia, Tanzania, Sweden' January 2015 see more at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15491&LangID=E#sthash.VpR2ysxR.dpuf><http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15491&LangID=E> (accessed on 15 January 2015).

⁴⁵²Sloth-Nielson J et al (2007) para 14. Also see African Child Policy Forum, (2006) 'Discussion Paper: Economic Policy and Child Rights'.

The reason for this Protocol⁴⁵³ is that the African Charter was fell short in its protection of the rights for women in Africa. This Protocol expresses the determination of the AU member states ‘to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all [of] their human rights’.⁴⁵⁴ In parallel with international instruments, the Protocol affirms women’s rights as being integral to human rights and confirms the inalienability thereof and indivisibility in accordance with other international and regional human rights instruments.⁴⁵⁵ With regards to the right to adequate housing the Protocol proffers:

‘Women shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, States Parties shall grant to women, whatever their marital status, access to adequate housing.’⁴⁵⁶

Furthermore article 26 (2) of the Protocol pertinently provides for states parties having to adopt all the necessary measures and in particular ‘shall provide budgetary and other resources for the full and effective implementation of the rights herein recognised’.

In reality the other rights in the Protocol would be very difficult to achieve if women were not able to access at least basic shelter.⁴⁵⁷ Article 22 gives further protection to elderly women, which is unique but again without pertinently giving them preference to housing and available resources to realise this, thus leaving this very vulnerable group exposed to the elements in poverty stricken Africa. So yes, this Protocol protects women on paper, but what does it really do?⁴⁵⁸ The UNHCHR echoes this concern by submitting that, despite the ratification of

⁴⁵³ Adopted by the Assembly of African Heads of State and Government in Maputo, Mozambique 11 July 2003, entered into force 25 November 2005. Signed by South Africa 17 December 2004 and deposited with the Secretariat of the African Union on 14 January 2005.

⁴⁵⁴ See Preamble.

⁴⁵⁵ See Preamble. Also see art 9(2) ‘States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.’

⁴⁵⁶ Article 16.

⁴⁵⁷ For more on women’s rights see Mujuzi J ‘The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: South Africa’s Reservations and Interpretative Declarations’ (2007) *Law, Democracy & Development* 133. Also see Mashood B & Manisuli S (2010) ‘Development of International Human Rights Law before and after the UDHR’ (2010) in Mashood B & Manisuli S (eds) *International Human Rights Law: Six Decades after the UDHR and Beyond* 3-27.

⁴⁵⁸ Also see Baderin M ‘Recent Developments in the African Regional Human Rights System’ (2005) 5 *Human Rights Law Review* 117.

the African Charter and other international human rights instruments, women in Africa still continue to be victims of discrimination and harmful practices.⁴⁵⁹

2.9 The South African courts' interpretation of the available resources

The ICESCR⁴⁶⁰ guarantees 'the right of everyone to ... adequate housing and uses the qualifier 'appropriate' when describing the means that must be taken to achieve SERs.⁴⁶¹ Measures considered 'appropriate' include, inter alia, administrative, financial, educational and social.⁴⁶² The CESCR reaffirms though that the rights recognised in the ICESCR are realisable within the context of a wide variety of economic and political systems.⁴⁶³ Therefore account must be taken of the resource constraints within the country concerned, when observing whether the state has discharged its minimum core obligations.⁴⁶⁴

The Constitution of South Africa⁴⁶⁵ guarantees everyone the right to access adequate housing and synonymously to the ICESCR, qualifies the obligation of the state in that it 'must take reasonable legislative and other measures, *within its available resources*, to achieve the *progressive* realisation of this right.'

In its General Comment 3⁴⁶⁶ the CESCR considers SERs to be justiciable. The CC⁴⁶⁷ has proven that these rights are indeed so, but in its adjudication of SERs the CC has used the reasonableness⁴⁶⁸ of the government's programme in this regard and not the minimum-core-obligations approach. In using the reasonableness approach the issue of available resources is not explored as a rule. There have been several cases before the CC, the most prominent of which being in the field of SERs will be used to explain how the available resources in terms of SERs, are interpreted.

⁴⁵⁹Office of the UNHCR available at http://www2.ohchr.org/english/law/compilation_democracy/protchart.htm (accessed on 20 November 2014).

⁴⁶⁰Signed by South Africa on 3 October 1994 ratified on 12 January 2015.

⁴⁶¹ICESCR arts 2(1) and 11.

⁴⁶²GC 3 para 7.

⁴⁶³GC 3 para 8.

⁴⁶⁴GC 3 para 10.

⁴⁶⁵Section 26(1) and (2) emphasis added. Several constitutions explicitly refer to the right to adequate housing, Belgium, Seychelles, Uruguay. See also the constitutions of Ecuador, Haiti, Mali, Mexico, Nicaragua, Panama, Peru, Portugal, Russian Federation, and Sao Tome and Principe.

⁴⁶⁶Paragraph 5.

⁴⁶⁷See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁴⁶⁸See chapter 4 on this approach by the CC.

Starting with *Soobramoney v Minister of Health, KwaZulu-Natal*,⁴⁶⁹ this applicant suffered from a fatal kidney disease and needed daily dialysis to stay alive. The provincial government on health refused to give him this treatment due to resource constraints in the public health system. The applicant asked for this medical assistance in that the Constitution provides that ‘no one may be refused emergency medical treatment.’⁴⁷⁰ The Court felt that emergency medical care did not extend to prolonging the life of somebody with a fatal disease as this would prejudice the needs of others.⁴⁷¹ The CC scrutinised the budgetary priorities of the government and due to the latter’s limited resources the Court did not want to interfere with their ‘rational’ decision in how this should be done.⁴⁷² This approach of the CC begs the question, namely how does this decision blend with dignity and substantive equality whereby we look at the circumstances of the individual and his historic past of deprivation of economic wellbeing?⁴⁷³ At the end of the day, the lack of money cannot hold as an argument to end life. If so, those with money have the right to prolong life and those without could die an early death. *Soobramoney* suffered the fate of neglect during apartheid which had deprived him of economic access; therefore who knows if he might have had the economic means, he could have prolonged his life. The state should protect the dignity of each individual and letting a person perish due to resource constraints cannot be viewed as good governance. Again, good governance dictates that the South African government make the necessary contingency plans regarding economic resources to avoid failing in its minimum obligations of providing adequate shelter to those in desperate need or medical attention for that matter. The same principle applies whether medical attention or housing is at issue.

In *Grootboom and Others v Oostenberg Municipality and Others*⁴⁷⁴ the applicants were living in intolerable conditions on a sports field in makeshift shelles. These applicants approached the court to compel government to provide them with basic shelter. The High Court (HC) found that the government’s plan for public housing was reasonable, but stymied by inadequate economic resources.⁴⁷⁵ It needs to be said that a plan that does not cater for

⁴⁶⁹1998 (1) SA 765 (CC) (hereafter *Soobramoney*).

⁴⁷⁰Section 27 (3).

⁴⁷¹*Soobramoney* para 28.

⁴⁷²*Soobramoney* para 29.

⁴⁷³In *Grootboom* CC para 22 the Court observed that ‘rights also had to be understood in their social and historical context’. Also see Liebenberg S ‘The Value of Human Dignity in Interpreting Socio-economic Rights (2005) 25 *Journal on Human Rights* 517-545.

⁴⁷⁴2000 (3) BCLR 277 (C). See Chapter 3 for a detailed discussion on this case in explaining why South African courts use the reasonableness test.

⁴⁷⁵*Grootboom* paras 286 H-I.

those who are basically homeless cannot be deemed reasonable if a resource void is given as a reason for non-compliance with the minimum core obliged by the ICESCR.

The HC in *Grootboom* quite rightly pointed out that the parents had been ravaged by unequal economic access that prevailed during apartheid. This prevented them from providing adequate shelter for their children.⁴⁷⁶ This Court undertook a supervisory jurisdiction by ordering government to bring relief by means of temporary accommodation and report back to it on the implementation of the order.⁴⁷⁷ But this was not to be. On appeal by government the CC overturned the court a quo's decision, giving a declaratory order finding the housing plan unreasonable for not catering for those living in extreme conditions of poverty, homelessness or intolerable housing.⁴⁷⁸ The CC referred the case back to the government to devise a reasonable plan which included these groups of vulnerable people.⁴⁷⁹ This obligation was to devise and implement a coherent and co-ordinated programme, designed to provide access to housing, healthcare, sufficient food and water and social security to those unable to support themselves and their dependants. The result of which was that the status quo remained for the overwhelming part of this community, in that basic shelter was lacking and so too the minimum core obligations. This, despite the argument put forward by the Amicus that the minimum core provides a level of minimum compliance to which resources have to be allocated as a priority.⁴⁸⁰

The CC did confirm that the foundational values of dignity, equality and freedom had been denied to those who lacked access to SERs which stunted the achievement of their full potential.⁴⁸¹ However, the CC did not want to impose a minimum core due to the variation in application of fulfilling SERs.⁴⁸² The Court acknowledged that available resources were an

⁴⁷⁶ *Grootboom* paras 289 C-D.

⁴⁷⁷ *Grootboom* para 293 A.

⁴⁷⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (hereafter *Grootboom* (CC) para 24.

⁴⁷⁹ See chapter 3 discussing the implementation of legislation that includes these groups as a result of *Grootboom*.

⁴⁸⁰ Heads of Argument on behalf of the Amicus 10 September 2002 para 27 available at <http://communitylawcentre.org.za/court-interventions/minister-of-health-v-treatment-action-campaign> (accessed on 20 November 2014).

⁴⁸¹ *Grootboom* CC para 23.

⁴⁸² *Grootboom* CC paras 32,33 the Court could not determine the minimum core content in this case because it maintained that it did not have the comparable information, income, unemployment, availability of land, poverty, difference between city and rural communities, economic and social circumstance and history. See more on this in chapter 3 discussing why SA courts use reasonableness and not the minimum core.

important factor in determining reasonableness⁴⁸³ and that effective implementation required budgetary support by the national branch of government.⁴⁸⁴ However, the Court did not want to venture into the allocation of resources for housing, maintaining that it would require complex calculations. Liebenberg criticises the CC's justification for having rejecting the minimum core obligations on the spurious basis of complexity.⁴⁸⁵ According to the author, accepting the minimum core obligations did not require the court to define the precise basket of goods and services to be provided.⁴⁸⁶ A better approach would be to define the general principles underlying the concept of minimum core obligations in relation to SERs and apply these contextually, case-by-case.⁴⁸⁷ There should be no reason why the CC cannot in future compel government to deliver housing to the most desperate, community by community and if not, report to the court how much of its available resources have been spent appropriately.⁴⁸⁸ Thereby, the court can make an assessment as to whether the maximum of available resources have been spend to house the most desperate (as a priority) against what has been spend on other housing requirements. Furthermore progressive realisation promotes the idea that the state minimise all hurdles, including financial, over time. Despite progressive legislative and policy measures,⁴⁸⁹ homelessness and inadequate shelter still loom large in this jurisdiction.

The CC took a 'different' approach' in *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*⁴⁹⁰ where the applicants were pushing for drugs to be provided to pregnant HIV positive females in order to combat mother-to-child infection. The CC ordered the government to roll out this programme to all females that fit this description, despite the state crying woe on its limited economic resources. This said, the CC clarified that it is 'impossible to give everyone access even to a "core" service immediately'⁴⁹¹ instead the CC again brought the purview of reasonableness to the fore and on that basis allowed the extension of the programme to all impoverished women.⁴⁹² The Amicus in the case argued, that denying access to the drugs, to those who are too poor to afford it would be a failure to

⁴⁸³ *Grootboom* CC para 46.

⁴⁸⁴ Paragraphs 66-69.

⁴⁸⁵ Liebenberg S 'South Africa's Evolving Jurisprudence on Socio-economic Rights: An Effective Tool in Challenging Poverty?' (2009) *Law Democracy & Development* 172.

⁴⁸⁶ Liebenberg S (2009) 174.

⁴⁸⁷ Liebenberg S (2009) 174.

⁴⁸⁸ See chapter 5 on the progressive approach of the judiciary in India in interpreting SERs.

⁴⁸⁹ See chapter 3 for these measures.

⁴⁹⁰ 2002 (5) SA 721 (CC) (hereafter *TAC*).

⁴⁹¹ *TAC* para 35.

⁴⁹² *TAC* para 73.

respect their dignity and intrinsic worth as human beings but the CC again did not want to be drawn into the question of allocation of resources by government.⁴⁹³

The CC progressed on this attitude in its approach in *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*.⁴⁹⁴ Here the Court urged that the available resources had to be extended to include these applicants as recipients of social security because their exclusion was unreasonable in that the denial to them of child grant infringed on the rights of children.⁴⁹⁵ The CC took this stance in spite of the government's argument as to how this will strain the public purse. The CC again took the 'reasonable approach' and did not want to be drawn into the question of available resources in terms of the minimum core obligations.

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers Saratoga Avenue and Another*⁴⁹⁶ the HC, Supreme Court of Appeals (SCA) and the CC took a more progressive stance on how the government (the City) should budget and plan in relation to the right to housing. This case concerns the conflict between the constitutional right to adequate housing and an owner's right to develop private property. The owner sued to evict illegal occupants who argued that the city had an obligation to provide them with temporary housing before eviction, citing the Constitution⁴⁹⁷ and the Prevention of Illegal Eviction and Unlawful Occupation of, Land Act.⁴⁹⁸ The HC granted the eviction and ordered the City to provide the occupants with adequate alternate housing. In the meantime, the City had to pay to the Applicant an amount equivalent to the fair and reasonable monthly rental of the said premises, until eviction.⁴⁹⁹ The importance of NGO assistance in realising SERs is noted in this case in that COHRE conducted a study determining the approximate cost per month for a basic room.⁵⁰⁰ This no

⁴⁹³ TAC para 60.

⁴⁹⁴ 2004 (6) SA 505 (CC) (hereafter *Khosa*) The applicant were permanent residents in South Africa but national of Mozambique who challenged provisions of the Social Assistance Act that reserved the child support grant for South Africans citizens only, thus excluding permanent residents with children born in South Africa. The applicants based their argument on the Constitution s27 (1) (c) 'everyone' has the right to have access to social security.

⁴⁹⁵ *Khosa* paras 56, 86. For a comprehensive review on social security in South Africa see Dawson H 'Monitoring the Right to Social Security in South Africa An Analysis of the Policy Gaps, Resource Allocation and Enjoyment of the Right' (2013) *Monitoring Progressive Realisation of Socio- Economic Rights Project* available at http://spii.org.za/wp-content/uploads/2014/02/Policy-brief-1_Monitoring-rights_Social-Security.pdf (accessed on 20 December 2014).

⁴⁹⁶ 2009 (1) SA 470 (W) (hereafter *Blue Moonlight* HC).

⁴⁹⁷ Section 26.

⁴⁹⁸ Act 19 of 1998.

⁴⁹⁹ *Blue Moonlight* HC para 196.

⁵⁰⁰ *Blue Moonlight* HC para 14

doubt made it easier for the Court to make a determination as to how much economic resources the City would need to house the occupiers.

The City submitted that it did not provide accommodation to indigent people living on private land and facing eviction.⁵⁰¹ This is so because the City maintains it only had funds to provide emergency and temporary accommodation to those threatened with eviction from government land as oppose to private land.⁵⁰² The City made this submission in spite of the fact that the National Housing Act⁵⁰³ makes provisions for emergencies similar to what the occupiers faced. Moreover, local government has a primary responsibility to manage its administration and budget to give priority to the basic needs of the community, to promote social and economic development.⁵⁰⁴

The Court rejected the City's argument that it did not have adequate financial resources to provide the alternate housing. The City was not at ease with this and appealed to the SCA in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*⁵⁰⁵ against the order, in terms of which it was required to accommodate the occupiers and the associated monetary orders. The SCA confirmed the order of the HC and directed the City to provide temporary emergency accommodation. After another forum challenge in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*⁵⁰⁶ the CC confirmed the SCA holding that municipalities had an independent obligation to plan and budget for the emergency accommodation needs of people evicted from private property. This means the City is obliged to budget for minimum core provisions, when faced with an emergency that harbours the threat of homelessness. Bearing in mind that this temporary accommodation should give access to adequate housing on a progressive basis.⁵⁰⁷ Therefore once people are temporarily housed the government cannot release those people back onto the street. Progressive realisation demands that government move them to permanent basic shelter, at least.

⁵⁰¹*Blue Moonlight* HC para 4.

⁵⁰²*Blue Moonlight* HC para 32.4.

⁵⁰³Section 12. See chapter 3 for discussion on this legislation.

⁵⁰⁴Constitution s153. Also see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (2009 (9) BCLR 847 (CC) paras 348-350.

⁵⁰⁵(2011 (4) SA 337 (SCA) (hereafter *Blue Moonlight* SCA).

⁵⁰⁶2012 (2) BCLR 150 (CC) (hereafter *Blue Moonlight* CC).

⁵⁰⁷*Blue Moonlight* HC paras 23 and 30-31.

The SCA rejected the City's submission which cited lack of resources and noted that the City's record showed that it had been operating in a financial surplus for the previous year.⁵⁰⁸ The City's defense did not comply with the international instruments which are at pains to urge states to use the maximum of its available resources to realise SERs. The SCA was not convinced by the City's explanation of its budgetary constraints and labelled it as vague.⁵⁰⁹ In fact most of the affidavits the City deposed were devoted to the cost of providing permanent housing.⁵¹⁰ Thus the City was not following a progressive plan that sees to the plight of the most desperate first, as was the order in *Grootboom*. The Court was at odds with this, citing that it is clear that the City could have adopted a long-term strategy which included financial planning dealing with such exigencies.⁵¹¹ This meant the City lacked good governance which resulted in its unpreparedness to deal with these occupiers.⁵¹²

Ironically, the City argued that it is not obliged to go beyond its available budgeted resources to secure housing for the homeless in that this would amount to unauthorised expenditure.⁵¹³ By using the reasonableness purview the CC determined that measures within available resources could not be restricted by budgetary and other decisions that resulted from a mistaken understanding of constitutional or statutory obligations.⁵¹⁴ In other words the CC made it clear that not budgeting for something was not reason enough for not meeting its obligations in that it should have planned and budgeted for the fulfillment of its obligations.⁵¹⁵

The SCA held that proportionality is key when dealing with the limits of judicial intrusion and the reality of the available resources, if balanced against the assertion of SERs a court's role can be rightly described as 'the art of the possible'.⁵¹⁶ In taking this approach perhaps the CC will in future be more open to inquire into how the available resources are applied when faced with desperate applicants in need of basic shelter. This would bring the Court closer to giving content to the minimum core obligations spelt out by the various General

⁵⁰⁸*Blue Moonlight* SCA para 53.

⁵⁰⁹*Blue Moonlight* SCA para 53.

⁵¹⁰*Blue Moonlight* SCA para 50.

⁵¹¹*Blue Moonlight* SCA para 51.

⁵¹²*Blue Moonlight* SCA para 52.

⁵¹³*Blue Moonlight* CC para 72.

⁵¹⁴*Blue Moonlight* CC para 74.

⁵¹⁵*Blue Moonlight* CC para 74.

⁵¹⁶*Blue Moonlight* SCA para 54.

Comments. Perhaps in the wake of South Africa's ratification of the ICESCR (in 2015) the CC will use this international instrument more effectively in domestic statutory and policy obligations in its interpretation of SERs.

Although there have been other more recent cases where SERs were adjudicated by the court, the legal precedent that these cases provided has been followed and thus there is yet to be a case in which the CC will read into SERs the minimum core obligations as spelt out by General Comment 3. Viljoen asserts that if the justiciability of SERs is used effectively it would go as far as exposing the distortion in state budgetary priorities.⁵¹⁷ This is particularly important where a state does not allocate the maximum of its available resources in an adequate and progressive manner to SERs. Following international treaty obligations and particularly the 'raison d'être' for the ICESCR, the CC is under pressure to look at how the available resources have been applied to provide the minimum core obligations in the realisation of SERs.⁵¹⁸

This study recognises that the balancing of rights is a challenge, but the management of the available resources to realise SERs should equally be scrutinised by the courts and human rights bodies. This is necessary to ensure that the funds for realising SERs are appropriated as such and not subject to abuse by public officials and thereby stunt realisation.

2.9.1 Consideration of international law in adjudicating SERs

The ICESCR⁵¹⁹ coaxes states to use international law when interpreting SERs and the CC in *S v Makwanyane and Another* said that:

'Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts to do so is incompatible with the principle of the rule of law.'⁵²⁰

⁵¹⁷ Viljoen F *International Human Rights Law in Africa* (2007) 570.

⁵¹⁸ See chapter 4 discussing transformative judiciary.

⁵¹⁹ See General Comment 9: The Domestic Application of the Covenant (1998) para 14

⁵²⁰ 1995 (3) SA 391 (CC) paras 33-35.

This holding by the CC elaborates on the Constitution⁵²¹ which provides that, when interpreting law the courts should refer to international instruments where necessary. Furthermore, South Africa has ratified the UNCRC and the ICESCR thus it must give effect to the provisions of these treaties.⁵²² The CC noted international treaty law in *Grootboom*,⁵²³ but paid scant attention to the use of the UNCRC and ignored the regional instrument, the AfCRWC, despite the fact that the applicants included a number of children.⁵²⁴ The better approach would have been to use all the relevant instruments such as the ICESCR, UNCRC and AfCRWC in reaching a conclusion. Bilchitz says that the CC erred by not considering these key international instruments which were relevant to the case.⁵²⁵ The obligations to uphold international human rights should be incumbent upon the judiciary in South Africa and in doing so they should consistently take into account international treaty obligations together with domestic law, when interpreting law.

In *Khosa* the court simply ignored the existence of international law. In this regard the Court ignored the best interest of the child as promoted by the UNCRC.⁵²⁶ The UNCRC⁵²⁷ recognises the right of every child to benefit from social security and the AfCRWC⁵²⁸ obliges the state to assist the family. All in all, the UNCRC and the AfCRWC address all the rights of children holistically, ie SERs and civil and political rights.⁵²⁹ Therefore South African courts would enrich their jurisprudence in using these instruments when interpreting SERs for this vulnerable group.

In using the minimum core approach that the ICESCR provides, the applicant merely has to prove the lack of access to basic subsistence requirements which are neither physically or economically accessible.⁵³⁰ This means the government has to prove that every effort has

⁵²¹Section 233 Application of International Law; S39 Interpretation of Bill of Rights.

⁵²²See s231 International agreements: Also see Dugard J *International Law: A South African Perspective* (2000) 53.

⁵²³Yacoob J in *Grootboom* CC para 26.

⁵²⁴See *Grootboom* CC para 75.

⁵²⁵Bilchitz D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 2.

⁵²⁶UNCRC art 3(1) and CRC GC 5 para 12. See CRC GC 5 paras 53-5 in determining what is in the best interests of the child, the views of the child should be considered where this is possible when policies and programmes are designed.

⁵²⁷Article 26.

⁵²⁸Article 18(2).

⁵²⁹See also Liefwaard T & Doek J E (Eds) *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (2015).

⁵³⁰Liebenberg S (2009) 177. Also see Mc Murray I & Jansen van Rensburg L 'Legislative and Other Measures Taken by Government to Realise the Right of Children to Shelter' (2004) 7 *PELJ* 54-69.

been made to use all its available resources to satisfy the minimum socio-economic need as a matter of priority. Enriching this is General Comment 14⁵³¹ providing that the function of the minimum core concept is to assist in the adjudication of SERs in domestic and supranational tribunals, by direct reference to the Covenant.

2.10 International obligations towards available resources for SERs

In its concluding observations on state reports, the CESCR said that the term ‘available resources’ was intended by the drafters to refer to both the resources existing within states and those available through the international community by international co-operation and assistance.⁵³² During the fifth session of the CESCR, Jordan and Ecuador stated their concern for a lack of available resources to provide fully the rights envisaged, in particular education and housing.⁵³³ Ecuador argued that international co-operation was miniscule in relation to their current reserve of resources, thus there is a need for improved transfer of resources.⁵³⁴

The ECOSOC submitted that growth would be linked to the availability of finance and stressed that a durable solution to debt crisis was required.⁵³⁵ Therefore, it warned that there was a need for international action to stimulate growth. Concern was raised that current levels of official development assistance might not be adequate for developing countries. The ECOSOC sought renewed commitment from the international community to support Africa and refocus world attention on the socio-economic difficulties the continent faces.⁵³⁶ Notwithstanding this, the UN New Agenda for the Development of Africa reflects a mutuality of commitment and accountability on the part of Africa and the international community.⁵³⁷ Furthermore, the Vienna Declaration clarifies that least developed countries committed to the process of democratisation and economic reforms in Africa, should be supported by the international community so as to succeed in this reform.⁵³⁸ Thereby the international

⁵³¹General Comment No 14 Right to Health paras 10, 60.

⁵³²CESCR fifth session 21 November – 14 December 1990 UN Doc E/1991/23 Annexure III para 12 (hereafter CESCR fifth session).

⁵³³CESCR fifth session para 131.

⁵³⁴CESCR fifth session para 131.

⁵³⁵ECOSOC substantive session 29 June-31 July 1992 ‘African Economic Recovery and Development’ UN Doc E/1992/11 (1 April 1992) para 2 (hereafter ECOSOC substantive session). Also see ECOSOC Progress Report on the Implementation of the System-wide Plan of Action for African Economic Recovery and Development UN Doc E/AC.51/1996/6 (15 May 1996).

⁵³⁶ECOSOC Substantive session para 12.

⁵³⁷ECOSOC Substantive session para 13. See annex of GA resolution 46/151.

⁵³⁸Vienna Declaration (1993) para 9.

community is urged to make every effort to help alleviate the external debt burden of developing countries in order for those countries to attain the full realisation of SERs for their people.⁵³⁹ Moreover, governments, the UN and other multilateral organisations are called upon to increase their contributions through larger allocations from the UN regular budget and through voluntary contributions.⁵⁴⁰

Decades later the plight of impoverished Africa in delivering on housing for the most desperate remains stark. It is argued that in its struggle for economic liberation, the obligation of international co-operation has mostly been philanthropic.⁵⁴¹ Africa continues to be seen as the object of charity and therefore humanitarian relief is bestowed on her at will rather than as a partner in a developmental programme sanctioned and defined by international legal obligations.⁵⁴² Important to this is that the GA in 2003 identified the allocation of 0, 7 percent of the GDP to overseas development aid as a target for international aid, provided for in art 2 (1) of the ICESCR.⁵⁴³ In 2007 for instance, the CESCR recommended that Belgium raise its budget for development co-operation in order to meet the 0, 7 percent target set by the GA and reaffirmed in section 42 of the Monterrey Consensus.⁵⁴⁴ The Committee stressed that the increase must be real. As it is, the debt relief afforded to the Congo by Belgium did not in reality include any further development funding.⁵⁴⁵

The majority of African governments lack sufficient available resources to implement SERs programmes, therefore the multinationals, donors and international agencies continue to be key in ensuring available resources. To complement this, ethical behaviour in the public service is pivotal in overseeing the available resources. Needless to say, a state party that allows its economic resources to be eroded through corruption instead of earmarking resources to realise public housing, would find it difficult to look to the international community for assistance.

⁵³⁹Vienna Declaration (1993) para 12.

⁵⁴⁰Vienna Declaration (1993) para 34.

⁵⁴¹Sloth-Nielson J et al (2007) para 3. Also see Murray R *The African Commission on Humans and Peoples' Rights and International Law* (2000) 10.

⁵⁴²Sloth-Nielson J et al (2007) para 3.

⁵⁴³CHR sixtieth session para 22.

⁵⁴⁴CESCR thirty-ninth session (5-23 November 2007) 'Implementation of the International Covenant on Economic Social and Cultural Rights' UN Doc E/C.12/BEL/NGO/3 (23 November 2007) para 48 (hereafter CESCR thirty-ninth session).

⁵⁴⁵CESCR thirty-ninth session para 48.

2.11 Conclusion

The UDHR sets the tone on the importance of an adequate standard of living for all. The subsequent international treaties are aimed at elaborating on what this standard of living entails. To this extent the history on the making of the covenant for SERs shows that member states were cognisant that these rights would need economic resources for realisation. The ICESCR confirmed the importance of available resources to realise SERs rights and this phrase is given ample coverage by the human rights treaty bodies and through general comments.

The idea of applying available resources to realise minimum core obligations is to get closer to realising a happy and dignified life for all. What it boils down to is that in taking steps, states should bring more to the table than legislating on SERs, by making vulnerable groups visible in state budgets. This goal would be served by those living in intolerable conditions being represented when procurement of contractors are secured to build their homes. This representation should oversee the project from beginning to end. The importance of the available resources in ensuring core deliverables, calls for this kind of oversight in order to ensure delivery to the just recipients in a progressive manner.

As seen from the South African CCs point of view, the court is reluctant to be drawn in on how the state should apply its available resources in that it deems (albeit erroneously) that the government is in a better position to make that call. Therefore the onus is on a diligent government, respecting and understanding constitutional obligations, acting accountably by prudently using the available resources budgeted for SERs.

The importance of treaties is that it binds states through the force of their ratification, accession processes and customary international law, to certain standards and duties. An exemplary public servant will follow treaty obligations, domestic legislation, codes of conduct, policy and legislative measures that are in place, in order to realise the rights under his or her watch. Furthermore, the obligation of progressive realisation requires expeditious, constant and efficient supervision and action to realise the minimum of SERs rights. Such minimum core obligations should make provision for resources to house the homeless as soon as possible. The next chapter will explore how the government of South Africa has fared in realising social housing to the impoverished.

Chapter 3

How the Executive and Legislature fare in the realisation of Housing

3.1 Introduction

Hay states that:

‘In the happiness of the subjects lies the happiness of the king; in their welfare, his own welfare. The welfare of the king does not lie in the fulfilment of what is dear to him; whatever is dear to the subjects constitutes his welfare.’⁵⁴⁶

Therefore only true philosophers who are fully proficient in dialect and painter of constitutions can bring about a virtuous city.⁵⁴⁷ Moreover it is not the consciousness of man that determines his existence; rather it is his social existence that determines his consciousness.⁵⁴⁸ Thus the state should endeavour to make its people both virtuous and happy.⁵⁴⁹

The post-apartheid dream of the indigent was to be ushered into a world where access to SERs would realise into a decent home as a start to a better life. However, South Africa’s second decade into democracy has seen its citizens increasingly disillusioned by not only the lack of access to adequate housing, but more so, access to at least basic shelter and services such as sanitation and water.⁵⁵⁰ The access gained by a few cannot disguise the fact that poverty and inequality are on the rise and continue to plague the majority of the population. This parlous situation prevails despite the fact that the Constitution⁵⁵¹ of South Africa was drafted to assist in combating poverty and inequality by including SERs as one of its most

⁵⁴⁶Popper Karl R *The Open Society and its Enemies Complete: Volumes I and II* (1962) 47, 92 available at <http://www.inf.fu-berlin.de/lehre/WS06/pmo/eng/Popper-OpenSociety.pdf> (accessed on 10 July 2014).

⁵⁴⁷Popper Karl R (1962) 47, 92.

⁵⁴⁸Lippman W *The Good Society* (1944) 290.

⁵⁴⁹Popper Karl R (1962) 92.

⁵⁵⁰See poor service delivery cases such as *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (hereafter *Mazibuko*); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) (hereafter *Nokotyana*). Also see E-News Channel Africa (ENCA) ‘Protest Nation’ available at <http://www.enca.com/coverage/spotlight-service-delivery-protests> (accessed on 30 September 2014). *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) (hereafter *Joe Slovo*); *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd* 2001 1 SA 500 (CC).

⁵⁵¹The Constitution provides for SERs in s24 right to safe environment, s25 (5) right to access land, s26 right to access housing, s27 right to access health care, food, water and social assistance and security, s28 (1) (c) children’s right to shelter, basic nutrition, social services, health care services, s29 right to basic nutrition and education, s35 (2) (e) rights of detained persons to nutrition, accommodation, medical care.

notable features in its BoR. Moreover, the Constitution provides the state with clear instructions on how to conduct itself in its duty to realise SERs.

Furthermore, there is a broad acceptance that, under a democratically representative government, the legislature has the role of creating the law, the executive implements it and the judiciary adjudicates/interprets the existing law.⁵⁵² This places collective responsibility on the three branches of government in the realisation, interpretation and development of SERs. The relative failure by government to deliver housing has borne a negative effect on the most desperate such as the homeless and those living in intolerable conditions. Their plight has not been progressively relieved. The partial success of delivering homes to some people pales into insignificance because the most impoverished still bear the brunt of pre-apartheid living conditions. The reason for this delay is perhaps polycentric, but the proper application of laws and economic resources should form the basis for success in the public housing programme. The application by government of the available resources for housing development is questionable in that delivery has fallen far short of capacity.

The responsibility of the executive and Parliament regarding their obligations and duties to realise public housing will be examined in this chapter. This is to crystallise how these branches of government are delivering on their constitutional duties regarding the right to housing. This chapter will commence with the constitutional jurisprudence in the context of how the right to housing should be realised and government's role in this regard. Thereafter, this chapter will dissect the role of the executive and the legislature in executing the constitutional demands regarding housing. This analysis will include how the government uses its available resources to realise housing to those in need.

3.2 The Constitution: pioneer to the right to housing

Due to South Africa's dolorous past it was crucial that the Constitution usher in rights that would transform the everyday lives of those who suffered exclusion from accessing rights. In the preamble to the Constitution the country as a whole promises to:

⁵⁵²See chapter 4 for discussion on the South African judiciary interpreting the right to housing. Also see chapter 6 for discussion on the Indian judiciary lessons for South Africa in holding the executive accountable.

‘[h]eal the divisions of the past and establish a society based on democratic values, social justice, fundamental human rights and to improve the quality of life of all citizens...’

In pursuit of a quality life for all, the final Constitution of 1996 places a duty upon the state to realise the right to housing.

To this effect the Constitution provides in section 26:

‘(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.’

Section 26 rights are qualified SERs, in that the rights are fettered with commands on how to achieve them. In this regard they impose both positive and negative duties on the state to provide access by ‘taking reasonable steps, within available resources, progressively’.⁵⁵³ Thus it can be said that the constitutional SERs create direct entitlements to the material conditions for human welfare.⁵⁵⁴ These rights are pertinent to food, water, health care services and shelter, as distinct from rights to vote, or freedom of expression. In society SERs enjoy relevance as the talisman to eradicate poverty; therefore government should provide access to basic housing and services as a prelude to its duties. Notwithstanding this, access to housing occurs not on demand but rather at the state’s pace, depending on its economic resources.

The inclusion of SERs in the Constitution was not without contestation because parties differed on whether SERs should be included in the BoR and this resulted in the interim Constitution 1993 only including civil and political rights.⁵⁵⁵ Objection was raised on the inclusion of SERs because they were not considered as universally accepted fundamental rights. Moreover, there was fear that the inclusion of SERs would lead to an overlap in the separation of powers⁵⁵⁶ because the judiciary will have to encroach upon the terrain of the legislature and the executive which, in turn, might result in the court dictating to the

⁵⁵³Other qualified SERs are in s27, s24, s25 (5) and s29 (1) (b). Unqualified SERs which are not formulated through access or qualified through reasonableness, available resources and progressive realisation are: s29 (1) (a), s 28(1) (c).

⁵⁵⁴Brand J Courts, *Socio-Economic Rights and Transformative Politics* (LLD Thesis, Stellenbosch University 2009) 78.

⁵⁵⁵Also see Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31; Davis D M ‘The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles’ (1992) 8 *SAJHR* 475. See chapter 6 for discussion on the Constitution of India including Directive Principles in their Constitution.

⁵⁵⁶See chapter 4 on separation of powers.

government how to allocate public resources.⁵⁵⁷ The CC put paid to the argument and SERs were thus included in the final Constitution and confirmed to be justiciable in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*.⁵⁵⁸ The result of this is that South Africa boasts a Constitution second to none which embraces SERs and which is in line with international human rights law.⁵⁵⁹

3.2.1 Section 26: understanding the meaning of ‘within available resources’ in the South African Context

The constitutional right to housing is not enforceable in the self-executing way other rights are. This right is expressly qualified by resource constraints in that the state must realise the right within its available resources. However, the CC noted in the *Certification* case that the need for economic resources to enforce civil and political rights was no different from the resources needed to enforce SERs.⁵⁶⁰ Moreover, the Constitution demands a sound public administration governed by democratic values and principles which include efficient and effective use of economic resources.⁵⁶¹

The ICESCR recognises the right to SERs insofar as family, housing, food and clothing,⁵⁶² must be complemented by measures that have to be put in place to the extent of a state’s maximum available resources.⁵⁶³ It is noted that the right in section 26 (1) extends to ‘access to adequate housing’ which is distinct from the ‘right to adequate housing’ as provided by the Covenant. Moreover, the Constitution obliges the South African government to take reasonable legislative and other measures whereas the Covenant obliges states parties to take appropriate steps which must include legislation. Thus the word reasonable is not included in

⁵⁵⁷See Curtis C ‘Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability’ (2008) *ICJ* 15.

⁵⁵⁸1996 (10) BCLR 1253 (CC) (hereafter *Certification case*) para 78 the CC said the fact that SERs will almost inevitably give rise to budgetary implications does not seem to be a bar to their justiciability. At the very minimum, SERs can be negatively protected from improper invasion. Also see De Villiers B ‘Social and Economic Rights’ in van Wyk D Dugard J & De Villiers B (eds) *Rights and Constitutionalism: the New South African Legal Order* (1994).

⁵⁵⁹The Constitution promotes the right to housing as espoused in the ICESCR.

⁵⁶⁰Paragraph 77.

⁵⁶¹Constitution s195 (b).

⁵⁶²Article 11.1.

⁵⁶³Article 2.1. See chapter 2 for detailed discussion on the ‘available resources’.

the ICESCR.⁵⁶⁴ The UNDP clarifies that economic and social rights cannot be fulfilled without higher and more equitable budgetary allocations for basic social services.⁵⁶⁵ In addition litigation in various states in the US ordered the state's legislatures to redesign budgetary allocations to fund public education.⁵⁶⁶ This action did not limit the separation of powers doctrine.

Over the years the South African government has cited constraint on the available resources as the primary reason for its inability to meet the SERs needs of the poor. However, the positive economic growth that South Africa experienced over the years has not translated into faster delivery of housing.⁵⁶⁷ In fact, delivery has slowed down judging from the Universal Periodic Reports (UPR) of South Africa.⁵⁶⁸ This is not in line with the optimal use of available resources which should be applied in prioritising the housing needs of the most desperate and poorest.

Constitutional⁵⁶⁹ duties demand that national, provincial and local government co-operate and use resources optimally to collectively provide access to social housing for the poor. Moreover constitutional duties would be undermined if the available resources were not guarded against mismanagement.⁵⁷⁰ Therefore 'national, provincial and municipal budgets and budgetary processes must promote transparency, accountability and effective financial management of the economy, debt and the public sector'.⁵⁷¹ Moreover, the obligation of progressive achievements exists independently of the increase in resources and rather requires effective use of the available resources, in terms of the Limburg Principles.⁵⁷²

Efficacy is thus key in that budgets on each level of government must provide the sources of revenue and consequently the manner in which the proposed expenditure complies with national legislation must be monitored.⁵⁷³ To oversee the financial control of state resources the National Treasury must enforce compliance measures on state expenditure and has the

⁵⁶⁴ See chapter 4 for discussion on reasonableness.

⁵⁶⁵ UNDP 2000b *Human Development Report* (2000) 79.

⁵⁶⁶ See Reed D S 'Twenty-Five Years after Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism (1998) 17 *Law and Society Review*'; Banks J 'State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?' (1992) 45 *Vanderbilt Law Review* 129.

⁵⁶⁷ See para 3.3.1 on how the executive have delivered on housing.

⁵⁶⁸ See para 3.3.5 for a discussion on South Africa's UPR reports to the UN.

⁵⁶⁹ Chapter 3 Co-Operative Government.

⁵⁷⁰ See chapter 5 on mismanagement by government of resources for housing.

⁵⁷¹ Constitution s215. See chapter 5 for discussion on the Public Finance Management Act (PFMA) which governs all expenditure in the national and provincial public sector. See para 3.3 for discussion on this.

⁵⁷² Paragraph 2.3

⁵⁷³ Constitution s215 (c).

power to stop the transfer of funds to any organ of state that commits serious or persistent material breach of those measures.⁵⁷⁴

McLean argues that the obligation to realise housing relates to the means of realising the right, the rate of realisation and budgetary restrictions.⁵⁷⁵ Thus, when determining what the available resources are it is important for the court to assess whether the state made a suitable budgetary allocation to realise the right in question.⁵⁷⁶ However, in deciding whether the government's measures are reasonable the court may take into account the available resources of the government. Thus budgetary limitations can play a mitigating role in the states duty, for instance acts of God or war, the war ravaged DRC being a case in point.⁵⁷⁷ Nonetheless, where budgetary allocations for SERs are diminished, the court is well placed to enquire into the states' budgetary allocation.⁵⁷⁸ In this regard the court has the power to enquire whether the allocated funds for housing have been optimally used.⁵⁷⁹ Although the available resources was not necessarily in issue, *Grootboom* demonstrates that the government did not use its available resources optimally to include those in immediate and desperate need such as the homeless and those living in intolerable conditions.⁵⁸⁰ This point to prima facie evidence of the government not fulfilling its obligations under the ICESCR.⁵⁸¹

Intergovernmental fiscal relations on housing

The co-operative nature of governance makes it necessary for fiscal policies to embrace economic growth which in turn advances opportunities for the indigent to participate meaningfully in the economy. These policies should promote the availability of resources for the realisation of SERs. This is best served by adequate resources being progressively increase so as to access these rights.

⁵⁷⁴Constitution s216.

⁵⁷⁵McLean K 'Constitutional Deference, Courts and Socio-economic Rights in South Africa' (2009)195.

⁵⁷⁶ McLean K (2009)195.

⁵⁷⁷See chapter 2 for discussion on the African Commission confirming that budgetary constraints may be used as a reason for delay in delivery of SERs.

⁵⁷⁸See para 3.3.1 on budgetary considerations for housing by the executive. See chapter 5 for discussion on the abuse of funds earmarked for the delivery of housing.

⁵⁷⁹ See chapter 6 for discussion on the judiciary of India's response to the realisation of SERs.

⁵⁸⁰ See chapter 2 for discussion on the CC's approach to the 'available resources'.

⁵⁸¹ See chapter 2 for discussion on this instrument.

In government, fiscal policy determines how resources are appraised.⁵⁸² A reasonable housing programme must have an intra-governmental fiscal relationship which allocates responsibilities and tasks to different spheres of government and ensures that the appropriate financial and human resources are available.⁵⁸³ The Division of Revenue Act (DORA) is enacted annually to set out the revenue allocations for each sphere of government.⁵⁸⁴ This is a consultative process which includes consultation with the Financial and Fiscal Commission (FFC)⁵⁸⁵ and the South African Local Government Association (SALGA).

The Constitution⁵⁸⁶ provides that budgetary allocations may be enacted only after considering and taking into account national interest, economic disparities within and among the provinces and ensuring provincial and local government are able to provide services and functions. According to the South African Human Rights Commission (SAHRC) this is best served by the government devising sound macroeconomic, fiscal and monetary policies.⁵⁸⁷ This would lead to maximising the revenue pool earmarked for the delivery of SERs and manage public finance in an efficient and accountable manner.⁵⁸⁸

The National Treasury maintains it has strengthened the monitoring of expenditure patterns and financial management by introducing a centralised electronic system producing accounts and the management of procurement of goods.⁵⁸⁹ This includes a new information system developed to facilitate better financial management.⁵⁹⁰ In essence these measures are well and good but why are these measures not reaping the desired results, whereby housing budgets are used effectively and delivery is on time? Indicative of the fact that financial management systems are still found wanting are incidents where resources were allocated for housing and

⁵⁸² Since 1994 three phases characterise economic and fiscal policy in South Africa: The Reconstruction and Development Programme (RDP) phase; the Growth, Employment and Redistribution Programme (GEAR) phase; and currently for the next 30 year the National Development Plan (NDP).

⁵⁸³ *Grootboom* para 39. See chapter 4 for detailed discussion on this case.

⁵⁸⁴ Sections 214 and 227(I) of the Constitution require an Act of Parliament to provide for the equitable division of nationally raised revenue among national, provincial and local governments.

⁵⁸⁵ The FFC is an independent commission appointed by the State President to advice on overall fiscal relations.

⁵⁸⁶ Section 214(2).

⁵⁸⁷ SAHRC 'Annual Economic and Social Rights Report: 2000 – 2002' 416 (hereafter SAHRC Report) available at www.sahrc.org.za/home/21/files/Reports/4th_esr_exe_summary.pdf (accessed 20 November 2015).

⁵⁸⁸ SAHRC Report (2000) 416.

⁵⁸⁹ The centralised systems are Basic Accounting Systems (BAS), PERSAL (a payroll system) and LOGIS (a procurement system). See chapter 5 for discussion on public procurement and its ill insofar as delivery on social housing.

⁵⁹⁰ The new system Vulendela provides management with key financial information to assist with making financial decisions.

contractors paid in full but no, or partial delivery of housing took place.⁵⁹¹ Thus constitutional obligations are not receiving optimal implementation, leaving the rights holder at risk of not enjoying the right to housing.

3.3 Constitutional obligations on the government in realising the right to housing

Further to realising housing rights as demanded by section 26, the founding provisions of the Constitution dictate that the obligations imposed by it must be fulfilled diligently and without delay.⁵⁹² This should require the government to have the realisation of housing at the vanguard of its progressive plans which should tie in with the other SERs. The Limburg Principles demand that the obligation for progressive realisation of SERs by the state must move as expeditiously as possible.⁵⁹³ Moreover, the state cannot unreasonably delay housing due to lack of available resources without ensuring that those resources are adequately protected against mischief by public officials. Thereby protecting the lofty ideals promoted by the Constitution.

The Constitution promotes the BoR as the cornerstone of South Africa's democracy and compels the state to respect, protect, promote and fulfil these rights.⁵⁹⁴ In addition the BoR binds the three branches of government namely, legislature, executive, judiciary and all organs of state.⁵⁹⁵ When it comes to the realisation of social housing, the Constitution⁵⁹⁶ allocates powers and functions amongst the three levels of government, namely national, provincial and local, emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. Thus, a co-ordinated state housing programme must be a comprehensive one determined by the three levels of government in consultation with each other. The duties of the state must be bolstered by an administration that develops human resources with the necessary skills, to be accountable, transparent and development-oriented.⁵⁹⁷ Notwithstanding this, at the coalface of housing delivery is local government which has the obligation to ensure that services are provided in a sustainable manner to the

⁵⁹¹ See chapter 5 for SIU Report on investigations into corruption in public housing.

⁵⁹² Constitution s2, s237.

⁵⁹³ Limburg Principles 2.1. See chapter 2 for discussion on these Principles.

⁵⁹⁴ Constitution s7 (1)-(2).

⁵⁹⁵ Constitution s8 (1).

⁵⁹⁶ See Constitution schedule 4.

⁵⁹⁷ Constitution s195.

communities they govern.⁵⁹⁸ This requires full co-operation between the three levels of government for optimal delivery in housing.

The White Paper on Local Government (1998)⁵⁹⁹ proposes a variety of ways to accomplish service delivery that is accessible, affordable, of high quality and accountable. This White Paper sets the pace for developmental local government and supports the local economic development mandate which advocates community interaction. This means, local government must pursue expanded involvement with the local community which includes consultation about the type of municipal service such as services in respect of water, sanitation and electricity and who is to provide the said services.⁶⁰⁰

The Housing Act⁶⁰¹ and the National Housing Code⁶⁰² fulfil the constitutional demands for national legislation governing national housing in general. This legislation is further enhanced by promoting the upgrade of informal settlements⁶⁰³ and emergency housing.⁶⁰⁴ The Housing Act⁶⁰⁵ legally entrenches the principles outlined in the White Paper of 1994⁶⁰⁶ and aims to eliminate and prevent slums and slums conditions. In the wake of *Grootboom* the Court unanimously agreed that the legislative and other measures webbing the state's housing programme, failed to provide for those people in desperate and crisis situations.⁶⁰⁷ This was due to the existing programme not meeting a coherent, co-ordinated plan that adhered to its section 26 obligations by looking at the most desperate, first.⁶⁰⁸ This Housing Act is silent on groups living in intolerable conditions and on the homeless. These are the groups that

⁵⁹⁸Constitution s152 (1) (b), read with s152 (2) and s153 (a).

⁵⁹⁹ White Paper on Local Government - South Africa (1998) available at www.gov.za/sites/www.gov.za/files/whitepaper_0.pdf (accessed on 20 November 2015).

⁶⁰⁰Housing Code para 13.7.1, Housing Act s9 (1). See Municipal Systems Act 32 of 2000; Municipal Structures Act 117 of 1998 and Municipal Demarcations Act 27 of 1998.

⁶⁰¹Also see National Division of Housing (NDoH), Breaking New Ground (BNG): A Comprehensive Plan for the Development of Sustainable Human Settlements (September 2004) available at www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed on 20 March 2014). For more on the Housing Act and Breaking New Ground, see SERI 'A Resource Guide to Housing' available at http://www.urbanlandmark.org.za/downloads/SERI_Housing_Resource_Guide_Feb11.pdf (accessed on 25 March 2014). Also see Western Cape Housing Development Act, 1999.

⁶⁰²Published in 2000 pursuant to section 4 of the Housing Act and amended in 2009. See NDoH, National Housing Code (2000 revised in 2009).

⁶⁰³National Housing Code: chap 13. Informal settlements typically can be identified on the basis of the following characteristics: Illegality and informality; Inappropriate locations; Restricted public and private sector investment; Poverty and vulnerability; and Social stress.

⁶⁰⁴ National Housing Code: chap 12.

⁶⁰⁵Section 1 (e) (iii).

⁶⁰⁶ White Paper: A New Housing Policy and Strategy for South Africa (1994).

⁶⁰⁷ *Grootboom* CC paras 51, 61-65.

⁶⁰⁸ *Grootboom* CC paras 91, 95.

Grootboom ordered must be housed soonest. Informal settlements and emergency housing that the Act protects, do not pertinently refer to these desperate groups. This is a shortcoming in the housing legislation.

The Housing Act⁶⁰⁹ urges government on all levels to give priority to the needs of the poor through meaningful engagement in respect of housing development. Furthermore, the three levels of government are to work towards the common constitutional goal of providing access to adequate housing.⁶¹⁰ In this regard local government, through its municipalities, is tasked with the planning and implementation of the national housing programme.⁶¹¹ Despite local government⁶¹² being at the coalface of the delivery of housing and its related services there should be collaboration with provincial and national government when faced with service delivery problems. To this end all three levels of government bear responsibility insofar as upholding the BoR is concerned and thereby ensuring the realisation of housing.

To keep the public service in check the Public Service Commission (PSC) is required to promote ethics and act as a watchdog for effective and efficient performance within the public service.⁶¹³ Central to the promotion of a sound public administration is that the PSC should exert oversight on the performance by public officials in the housing programme.⁶¹⁴ Such diligence demands that the PSC monitor large housing projects. The lack of proper oversight by senior public officials sees housing projects delayed or not executed due to procurement irregularities and malfeasance.⁶¹⁵ Therefore, the PSC enjoys a collective duty to ensure that the available resources and the progressive plans of government deliver the much needed housing.

The financial management of state funds in the national and provincial sphere is governed by the Public Finance Management Act (PFMA)⁶¹⁶ giving effect to the Constitution⁶¹⁷ and

⁶⁰⁹Section 2 (1) (a), (b).

⁶¹⁰Section 7.

⁶¹¹Constitution s156 (4). Housing Act s10.

⁶¹²See Housing Act s9 (1) for role of municipalities in delivery of housing.

⁶¹³Constitution s197 (1) 'within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.'

⁶¹⁴See para 3.5 for a discussion on parliamentary oversight in housing.

⁶¹⁵See chapter 5 for SIU uncovering corruption in the social housing programme in all provinces, through procurement violations.

⁶¹⁶Act 1 of 1999 as amended by Act 29 of 1999. The Municipal Finance Management Act 56 of 2003 (MFMA) covers financial transactions in the sphere of local government.

requires national legislation to ‘establish a National Treasury and prescribes measures to ensure transparency and expenditure control in each sphere of government.’ This legislation defines financial misconduct and the procedures for disciplining those public officials guilty of financial misconduct, including a provision for criminal prosecution where there is gross financial misconduct.⁶¹⁸ Although the PFMA covers all the bases insofar as how public funds should be spent, many public officials by-pass these measures.⁶¹⁹ They violate public procurement processes that are in place by allocating contracts for the construction of housing, without following protocol.⁶²⁰ As such they make payments to contractors without following the PFMA or MFMA. The result of this is non-delivery, partial delivery and shoddy workmanship.⁶²¹

Furthermore the delivery of housing must resonate with sound administrative action⁶²² by government underwritten by the Promotion of Administrative Justice Act (PAJA).⁶²³ As a matter of fact, PAJA forms the basis for review of administrative action in that it creates procedures for people to follow when their rights are directly or indirectly affected by decision taken by government.⁶²⁴ This legislation dictates that government action towards its citizens should be lawful, reasonable, and procedurally fair and that citizens have a right to be given written reasons for administrative action.⁶²⁵ The aim of PAJA is to promote and encourage the culture of accountability and transparency when exercising public power such as realising state housing.

⁶¹⁷Section 216(1).

⁶¹⁸See PFMA ch 10. See Chapter 4 for a discussion on malfeasance in the housing programme.

⁶¹⁹ See chapter 5 for discussion on how public officials abuse procurement laws for personal enrichment.

⁶²⁰ See chapter 5 for discussion on procurement processes.

⁶²¹ See para 3.3.1 for discussion on the rectification programme for housing. See chapter 5 for SIU Report on corruption in public housing.

⁶²²Administrative action is when a department or body takes or does not take a decision that negatively affects your socio-economic rights.

⁶²³Act 3 of 2000. Also see Hoexter C *Administrative Law in South Africa* (2007).

⁶²⁴Also see De Villiers N ‘Social Grants and the Promotion of Administrative Justice Act’ (2002) 18 *SAJHR* 320.

⁶²⁵See cases involving access to housing and water respectively that were in part decided on the basis of administrative justice rights: *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC)(here after *Olivia Road*) (held that a decision to evict was an administrative decision and so subject to the PAJA and if that the decision was taken without considering relevant circumstances, it could be set aside) and *Mazibuko* decision of local authority to install pay-per-use water meters set aside on procedural fairness grounds; *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 6 SA 417 (SCA). Also see Quinot G ‘An Administrative Law Perspective on “Bad Building” Evictions in the Johannesburg Inner City’ (2007) 8 *ESR Review* 25.

Government had its task made easy by a Constitution and legislation which clearly spelt out its duties. The legislative demands of the Constitution insofar as housing is concerned have been implemented, but proof of the success of this feat is dependent upon the levels of government to deliver on their obligations or risk being in breach of constitutional duties.

3.3.1 The executive: realising the right to housing

In 1994 the newly elected democratic government was tasked with addressing a housing backlog of 1.5 million and this was estimated to increase by 178 000 households per year.⁶²⁶ Although more than 3 million housing units have been provided, the housing backlog is now bigger than in 1994.⁶²⁷ This is on the back of government spending R125 billion over 20 years on public housing.⁶²⁸

The zealous implementation of legislation for housing has not translated into equally zealous access to housing for the most desperate. Inadequate shelter/housing is still one of the hallmarks of pervasive poverty and inequality in South Africa. Researching the current backlog on housing reveals that the need for adequate housing remains great. The 1996 national census revealed that the number of shack/informal dwellings stood at 1.4million.⁶²⁹ This figure increased in the 2011 census confirming 1.9 million inadequate dwellings for those vulnerable groups.⁶³⁰ The SA Institute of Race Relations shows that the number of households living in shacks grew by 41, 6% to 2million between 1996 and 2013; that includes informal settlements that have expanded from 300 to 2 225.⁶³¹ Tomlinson argues that the backlog in statistics are not systematically compiled and not located in a single place, thus opening it to varying interpretations.⁶³² The Socio-Economic Rights Institute of South Africa

⁶²⁶Department of Housing 'White Paper on a New Housing Policy and Strategy for South Africa' (1994) GN 354 in GG 16178 of 23 December 1994. See Cohen T 'Land and Housing' (1995) SAHR. Y. B 131, summing up the Reconstruction and Development Document in GG 16085 of 23 November 1994.

⁶²⁷Tomlinson M 'South Africa's Housing Conundrum' (2015) 4 @Liberty International Race Relations 6.

⁶²⁸ Tomlinson M (2015) 6.

⁶²⁹ See Census 1996 available at <http://www.statssa.gov.za/publications/Report-03-02-16/Report-03-02-16.pdf> (accessed on 10 April 2016). Wilkinson K 'Factsheet: The housing situation in South Africa' (2014) available at <https://africacheck.org/factsheets/factsheet-the-housing-situation-in-south-africa/#sthash.jZUIZTgR.dpuf> (accessed on 10 April 2016).

⁶³⁰See Census 2011 available at www.statssa.gov.za/publications/P03014/P030142011.pdf (accessed on 10 April 2016). Also see Eastern Cape Socio-Economic Consultative Council District Demographic and Socio-Economic Indicators: Census 1996; 2001; 2011 available at http://www.ecsecc.org/files/library/documents/ECSECC_Census.pdf (accessed on 10 April 2015)

⁶³¹Tomlinson M (2015) 6.

⁶³²Tomlinson M (2015) 6.

(SERI) also pointed out that the housing figures from different government sources were often contradictory.⁶³³

In its State's Vision 2030 Strategy, provision for housing, the government and human settlement stakeholders have committed to deliver 1.5 million housing opportunities by 2019.⁶³⁴ This commitment is detailed in the Social Contract for the Development of Sustainable Human Settlements.⁶³⁵ Housing the poor where the bulk of the housing backlog exists is the foremost plan of the State's Vision 2030 Strategy in its 'bottom-most' approach.⁶³⁶ The government confirmed that it would cost approximately R800 billion to eradicate the housing backlog by 2020.⁶³⁷

These plans seem ambitious in that it would require the building of 375 000 houses in each of the next four years. As it is, the state has only built the maximum of 235 600 in a single year when it was delivering at its best.⁶³⁸ Significantly the most recent official statistics on public housing construction show an average of 118 200 houses per year.⁶³⁹ This was confirmed by the minister of Human Settlements in 2015 that delivery of housing has slowed down in that over the last six years, government had delivered almost half of the number of houses they delivered at the height of delivery.⁶⁴⁰ Needless to say, this went against the grain of

⁶³³ SERI Report 2013 available at <http://www.seri-sa.org/index.php/research-7/research-reports> (accessed on 10 April 2016). Also see Tissington K 'A Review of Housing Policy and Development in South Africa since 1994' SERI September 2010 available at <http://spii.org.za/wp-content/uploads/2013/12/review-of-the-right-to-housing.pdf> (accessed on 10 April 2016).

⁶³⁴ South African Government 'Human Settlements Vision 2030' available at <http://www.gov.za/about-sa/housing> (accessed on 10 April 2016).

⁶³⁵ Signed at National Human Settlements Indaba and Exhibition held at the Sandton Convention from 16 to 17 October 2014. See 'Stakeholders Recommit to Sustainable Human Developments' available at www.sanews.gov.za/.../stakeholders-recommit-sustainable-human-develo (accessed on 12 April 2016).

⁶³⁶ See Pocket Guide to South Africa Human Settlement 2014/15 available at <http://www.gcis.gov.za/sites/www.gcis.gov.za/files/docs/resourcecentre/pocketguide/PocketGuide-house.pdf>

⁶³⁷ Du Toit C 'ANC Accedes Land, Housing Challenges: Sets out its Action Plan' SABC News 9 October 2015 available at <http://www.sabc.co.za/news/a/afacc7004a24d83da31ceba53d9712f0/ANC-accedes-land,-housing-challenges;-sets-out-its-action-plan-20150910> (accessed on 10 April 2016).

⁶³⁸ Tomlinson M (2015) 10.

⁶³⁹ Tomlinson M (2015) 10.

⁶⁴⁰ Minister Sisulu: Annual Govan Mbeki Award South African Government 13 Aug 2015 available at <http://www.gov.za/speeches/minister-lindiwe-sisulu-annual-govan-mbeki-award-13-aug-2015-0000> (accessed on 11 April 2016). Also see COHRE (Centre on Housing Rights and Evictions) 'Business as Usual? Housing Rights and Slum Eradication in Durban, South Africa' (2008) 104 available at http://www.cohre.org/sites/default/files/south_africa_-_business_as_usual_-_housing_rights_and_slum_eradication_in_durban_sept_2008.pdf (accessed on 10 April 2016) estimates that: 'between June and December 2006 the Municipality was only able to build 4 402 houses – indicating a slow down to a rate of around 8 000 houses a year.' See also Goldstone 'Building 2.4m units by 2014 will need a miracle' *The Mercury* 6 March 2007.

progressive realisation in that this action resonated with retrogressive measures which compromised the continuous delivery of minimum core obligations.⁶⁴¹

Amidst all the ‘successes’ in delivering millions of much needed housing, the Department of Human Settlements (DoHS) submitted to Parliament that they embarked on a National Housing Rectification Programme (NRP).⁶⁴² The NRP is aimed at correcting the defects of subsidised public housing resulting from poor workmanship not meeting the technical requirements specified by the South African National Standards (SANS) and the National Home Builder Registration Council (NHBRC),⁶⁴³ as applicable at the time of construction.⁶⁴⁴ Major structural defects led to demolitions and rebuilds at an estimated cost of R85 468 per house. The parliamentary committee warned that the DoHS omitted to provide a plan on compliance and consequences for non-compliant contractors, non-performing officials and preventing recurrence of these defects.⁶⁴⁵ Important to this is that public officials have been found to flout legislation and policies, particularly in procurement processes for public housing development, thereby, squandering from the fiscus large sums of money on fraudulent housing programmes, resulting in poor delivery from unfavourable contractors.⁶⁴⁶

The DoHS submitted that they were working with the National Treasury and the SIU to start blacklisting companies found to be involved in corrupt practices and the delivery of poor quality work.⁶⁴⁷ It is regrettable that the DoHS did not provide any explanation as to what measures are employed to relieve the department from public officials found working with these ‘ill-suited’ companies. The DoHS confirmed to Parliament in 2011 that the rectification costs stood at R58 million.⁶⁴⁸ The NRP has spent more than R2bn on fixing badly built public

⁶⁴¹ See chapter 2 for discussion on progressive realisation and minimum core obligations.

⁶⁴² See Parliamentary Monitoring Group (PMG) ‘National Housing Rectification Programme: Briefing by National Department of Human Settlements’ 11 September 2012 (hereafter PMG ‘National Housing Rectification Programme’) available at <https://pmg.org.za/committee-meeting/14832/> (accessed on 10 April 2016).

⁶⁴³ See chapter 5 for discussion on how public officials breach this legislation.

⁶⁴⁴ The factors which contributed to the defects included, but were not limited to: poor workmanship, the use of inferior and inappropriate material, deviation from specifications, poor project management, lack of supervision and unscrupulous contractors.

⁶⁴⁵ PMG ‘National Housing Rectification Programme’ 2012.

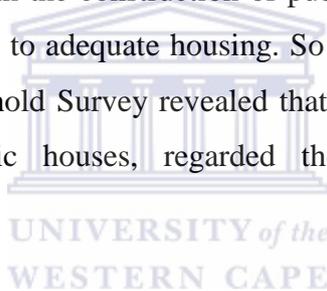
⁶⁴⁶ See chapter 5 discussing the SIU Report which found public officials engaging in this manner.

⁶⁴⁷ See chapter 5 analysing the SIU reports which have not been implemented since 2014. Also see chapter 5 for discussion on the Tender Register for defaulters, which has no names listed, currently.

⁶⁴⁸ PMG ‘National Housing Rectification Programme (2012). The number of units covered by the rectification programme for 2012/13 was: Eastern Cape had 5 700, Free State 1 076, Gauteng 20 004, KwaZulu Natal 3 249, Limpopo 881, Mpumalanga 120, Northern Cape 180, North West 1 285 and the Western Cape 1 734. The total number of units were 34 229 with a total budget allocation of R929 750 000. This total amount was 6% of the Human Settlements Development Grant.

housing by 2015.⁶⁴⁹ This is a searing indictment of government's performance in this regard. Parliament lamented that the DoHS was negligent in that it failed to monitor the housing programmes thereby burdening the government with spending billions on a rectification programme.⁶⁵⁰ However, Parliament in its oversight capacity did not compel the DoHS to give direction on how this would be prevented in the future or how the public officials responsible would be sanctioned. Thus Parliament also failed in its oversight duty as representative of those citizens in need.

This programme was terminated in 2015 obliging beneficiaries of public housing to fix their own houses as part of their maintenance obligation.⁶⁵¹ This is despite the fact that much more rectification still remains to be done and many of the problems lie beyond the capacity of beneficiaries to address.⁶⁵² Again, the government is not adhering to the constitutional obligations in ensuring adequate housing for the poor in a progressive manner. Government is not exerting sufficient oversight in the construction of public housing; instead it is allowing substandard work to delay access to adequate housing. So much so, between 2002 and 2009 the Statistics SA General Household Survey revealed that 31 percent of 1.8 million people, who received subsidised public houses, regarded their houses as substandard and uninhabitable.⁶⁵³



This situation exists in spite of the Breaking New Ground Policy (BNG)⁶⁵⁴ which aimed to eradicate informal settlements by 2014.⁶⁵⁵ This BNG was introduced to 'fast track' housing delivery by introducing more effective and responsive housing programmes. To realise this, the BNG focuses on the quality of housing products and development of sustainable human settlements. It is problematic that the BNG has not brought any relief on substandard work and the contracting of ill-suited contractors.

⁶⁴⁹Makatile D 'Poor workmanship halts housing delivery *IOL News* 17 May 2015 available at <http://www.iol.co.za/news/politics/poor-workmanship-halts-housing-delivery-1859513> (accessed on 12 April 2016).

⁶⁵⁰PMG 'National Housing Rectification Programme' 2012.

⁶⁵¹Makatile D (2012).

⁶⁵²Makatile D (2012).

⁶⁵³Statistics SA General Household Survey 2009 available at <http://www.statssa.gov.za/publications/P0318/P03182009.pdf> (accessed on 12 April 2016).

⁶⁵⁴Breaking New Ground 2004 - Housing Development Agency available at http://www.thehda.co.za/uploads/files/BREAKING_NEW_GROUND_DOC_copy-2_1.pdf (accessed on 11 April 2016). Most important is that the housing subsidy through the BNG increased from R12 500 per household to R160 500 per household.

⁶⁵⁵South Africa is also a signatory to the United Nation's Millennium Development Goals which targeted 'slum-free' cities by 2014.

This is not the action of a diligent government set on delivering housing for the poor. Instead this is the action of an uncaring government not upholding international treaty obligations by not prudently using the maximum of available resources to realise housing. In this way government is acting irresponsibly. The government rather throws good money after bad by having to reinvest money in already budgeted SERs projects, due to lack of proper oversight and malfeasance. The failure by the DoHS to monitor compliance through the NHBRC and SANS has left the available resources vulnerable to abuse which flies in the face of good governance.

The Minister of Finance⁶⁵⁶ announced in 2015 that the estimated housing development budget will continue to grow by an average of 8.5% over the next three years, reaching R201, 58m by 2018. However, government's increased spending on uplifting informal settlements has yet to make a marked dent in the housing backlogs.⁶⁵⁷ Moreover, these funds remain vulnerable to abuse by public servants, something which has not been dealt with decisively.⁶⁵⁸

The steady decline of housing expenditure by the state over the years is a bone of contention which needs urgent attention in order to honour constitutional rights and treaty obligations.⁶⁵⁹ Chetty warns that the cuts in housing expenditure are retrogressive and that the state is in breach of meeting its obligations in terms of section 26(2) of the Constitution.⁶⁶⁰ To this end economic resources for housing should increase and not decrease, at least until all those indigent people, unable to house themselves are in basic shelter.

3.3.2 Minister of Human Settlements: how progressive are the plans for housing?

⁶⁵⁶Budget Speech 2015 - Parliament available at www.parliament.gov.za/content/speech~11.pdf (accessed on 12 April 2016).

⁶⁵⁷See Muller J 'Human Settlements: New Plans to Dent Housing Backlog' *Financial Mail* 27 February 2015 available at <http://www.financialmail.co.za/specialreports/budget2015/2015/02/27/human-settlements-new-plans-to-dent-housing-backlog> (accessed on 10 April 2016); Wertman A 'There's No Place like Home: Access to Housing for all South Africans (2014) 40 *Brook.J.IntlL* 719.

⁶⁵⁸See chapter 5 on public abuse of social housing allocated budgets.

⁶⁵⁹National Treasury Report (2001) 347 states that housing expenditure declined from R4.5 billion in 1997/8 to 3.7 in 98/99 to R3.5 in 1999/2000 to R3.4 in 2000/01 to 3.7 in 2001/2 to 3.9 in 2002/3 to R4 billion in 2003/4. See chapter 2 for discussion on the international treaty obligations regarding retrogressive measures.

⁶⁶⁰Chetty K 'The Public Finance Implications of Recent Socio-economic Rights Judgments (2009) *Law, Democracy & Development* 246.

Currently the national competency of public housing rests with the minister of Human Settlements who aims to meet government's obligation in ensuring that every South African has access to permanent housing, providing secure tenure, privacy, protection from the elements and access to basic services.⁶⁶¹ In terms of the Housing Act the DoHS has the responsibility to monitor and verify the implementation and performance of human settlements programmes and projects country-wide. In tandem with this is the Housing Consumers Protection Measures Act⁶⁶² which provides that all new homes must be enrolled for inspection 15 days prior to construction. The reason for this being that a minimum of four inspections on houses so enrolled is conducted by the NHBRC.⁶⁶³ Thus all subsidised public housing units countrywide should be inspected by the NHBRC in order to mitigate the risk of possible future rectification by government. In this respect a total of 179 930 inspections were conducted by the NHBRC for the year 2012/2013.⁶⁶⁴ This should be seen in the context that a total of 6 801 units were produced in 2012/13 financial year.⁶⁶⁵ Despite these inspections the DoHS's NRP⁶⁶⁶ has spent billions on repairing public housing due to poor workmanship and thereby exploiting the Human Settlement Development Grant⁶⁶⁷ the funds of which is earmarked for building new housing.⁶⁶⁸ This is not a progressive plan that is reasonable because due to lack of proper oversight economic resources are spent on substandard work and thereby delay others access to housing.⁶⁶⁹ In effect this is a remedial plan.

⁶⁶¹Strategic Statement of the Department of Housing available at <http://www.dhs.gov.za/Content/The%20Department/Strategic%20Statement.htm> (accessed on 20 April 2014)

⁶⁶²Act 95 of 1998. This Act makes provision for the protection of housing consumers and to provide for the establishment and functions of the National Home Build.

⁶⁶³ NHBRC s14.

⁶⁶⁴Department of Human Settlements (DoHS) Annual 2012/2013 Report 83 (hereafter DoHS Annual 2012/2013 Report) available at <http://www.gov.za/documents/department-human-settlements-annual-report-20122013> (accessed on 28 September 2014).

⁶⁶⁵DoHS Annual 2012/2013 Report 47 confirms the following units: 1 628 in KwaZulu-Natal, 673 in Gauteng, 450 in North West, 2 750 in Mpumalanga and 1 300 in the Western Cape.

⁶⁶⁶See the DoHS National Rectification Programme 2013 available at www.pmg.org.za/files/docs/120911nrpimplement_0.doc (accessed on 28 September 2014).

⁶⁶⁷See Human Settlements Development Grant 1st quarter 2013 spending: National Treasury & Department Human Settlements briefings September 2014 available at <http://www.pmg.org.za/report/20130910-human-settlements-development-grant-1st-quarter-2013-spending-national-treasury-department-human-settlements> (accessed on 30 September 2014).

⁶⁶⁸Democratic Alliance 'R2.129 billion spent on repairing defective RDP Houses' available at <http://www.da.org.za/2014/08/r2-129-billion-spent-on-repairing-defective-rdp-houses/> (accessed on 30 September 2014). Also see South African Government News Agency 'R1.3bil to be spent on rectifying poorly-built houses' (2013) available at <http://www.sanews.gov.za/south-africa/r13bil-be-spent-rectifying-poorly-built-houses> (accessed on 29 September 2014).

⁶⁶⁹See chapter 4 for the judiciary's reasonableness approach to SERs adjudication.

Additional oversight at the DoHS is ostensibly provided by a Risk Management Committee charged with assisting the accounting officer in addressing accountability and risk management.⁶⁷⁰ This is done by the Committee evaluating and monitoring the institution's enterprise risk management objectives, strategy and policy at management and operational levels. This important Committee has not been optimally functional due to a lack of participation from the risk owners (government). Moreover, the fraud risk assessment on the DoHS for 2012/2013 has yet to be done.⁶⁷¹ Notwithstanding this, since 2007 the SIU has been investigating fraud, corruption and maladministration in respect of the development and delivery of public housing in South Africa, by national and provincial departments, local authorities (and agents) and Housing Development Boards.⁶⁷² The SIU investigations also seek to civilly prosecute and recover monies lost by government as a result of fraudulent allocation and accommodation of social housing by government officials who are ineligible to receive social housing.⁶⁷³ The ongoing investigations into criminality on completed housing contracts has not prevented this practice because there is still lack of project application and appropriate contractual agreements in compliance with the Housing Act and Housing Code, including the progress of payments and tranche payment regimes.⁶⁷⁴

Further transgressions include non-compliance with the prescripts relevant to subsidy instrument utilisation; irregular awarding of tenders to service providers; contractual non-compliance and inadequate monitoring of contractual terms.⁶⁷⁵ The DoHS Annual 2012/2013 report also exposes inadequate fiscal control by government, which has a negative impact on the use of the available resources. This has a knock-on effect on the delivery of housing, in that it stunts progressive realisation to the most desperate and thereby depriving them the enjoyment of this right.

3.3.3 How soon will the most desperate be adequately housed?

⁶⁷⁰DoHS Annual 2012/2013 Report 96. Interesting is that this report makes no provisions to minimise conflict of interest.

⁶⁷¹ DoHS Annual 2012/2013 Report 96.

⁶⁷²In terms of Presidential Proclamation R.7 of 2007, which was extended by Proclamation R.35 of 2010 and R.15 of 2012? See Chapter 5 for an analysis on the SIU Report into housing.

⁶⁷³ DoHS Annual 2012/2013 Report 96.

⁶⁷⁴ DoHS Annual 2012/2013 Report 97. See chapter 5 exposing such payments in breach of this legislation.

⁶⁷⁵ DoHS Annual 2012/2013 Report 97.

Since 1994 the government, through its National Housing Subsidy Scheme, has delivered more than 2 million social houses.⁶⁷⁶ Despite making strides in the delivery of housing to the poor there is still a substantial 'housing backlog' which has been a bone of contention amongst those in desperate need of adequate housing. According to Tissington et al although we are made to believe by government that there is a waiting list and people must wait patiently for their names to come up in order to get access to a home, this waiting list is a façade.⁶⁷⁷ The reality is that there is not a single queue or waiting list, it simply does not exist. There are rather a range of different policies and systems in place responding to different housing needs. This includes housing-demand databases and the National Housing Need Register which allocate housing to qualifying beneficiaries by arbitrarily.⁶⁷⁸

The facts are that there are numerous entry points for getting state-subsidised housing including: informal settlement upgrading; the emergency housing programme which sees to housing crises due to eviction or natural disaster; partially state-subsidised rental housing; social housing and public rental housing. Moreover, none of these policies consider the length of time someone has been on a waiting list. The upgrading of informal settlements and emergency housing programmes cater for people irrespective of how long they have been registered for a housing subsidy or if they are registered at all.

The public housing projects do not prioritise the poorest and in some instances it depends on beneficiaries demonstrating stable employment and income, there is no registration needed for this. A serious negative is that a large percentage of people, who received state-subsidised housing, either rent or sell their houses for cash and move back to backyard dwellings or informal settlements closer to economic and social opportunities. A 2013 investigation pointed to shortcomings in the DoHS's progressive plan to housing.⁶⁷⁹ This included the lack of clear policy directives between the tiers of government; the lack of systems for early detection of public officials doing business with government; the dysfunction of the ward

⁶⁷⁶Tissington K, Munshi N, Mirugi-Mukundi G & Durojaye E 'Jumping the Queue, Waiting Lists and other Myths Perceptions and Practices Around Housing Demand and Allocation in South Africa' *Centre for Affordable Housing Finance in Africa* July 2013 available at <http://www.housingfinanceafrica.org/document/jumping-the-queue-waiting-lists-and-other-myths-perceptions-and-practice-around-housing-demand-and-allocation-in-south-africa/> (accessed on 28 October 2015).

⁶⁷⁷Tissington K et al (2013).

⁶⁷⁸Tissington K et al (2013).

⁶⁷⁹Business of Parliament News 'Policy Gaps Impact Negatively on Human Settlements Delivery' (hereafter Policy Gaps in Human Settlements) August 2013 available at http://www.parliament.gov.za/live/content.php?Item_ID=3836 (accessed on 29 September 2014).

committee system which is key to public participation; and most notable the flawed resource utilisation remains a serious obstacle.⁶⁸⁰ These actions go against the grain of co-operative governance.

Most disturbing is that corruption plagues the housing programme due to public servants allocating to themselves, state-subsidised housing intended for people in desperate need.⁶⁸¹ This also includes political inspired ‘invasions’ of housing and the payments of bribes to access housing.⁶⁸² The perception of corruption also includes opacity, confusion and capriciousness that exist within the programme.⁶⁸³

3.3.4 South Africa’s Universal Periodic Review on Socio-economic Rights to the UNHRC

South Africa is now obliged to report on its progressive realisation of housing to the CESCR since ratifying the ICESCR in 2015.⁶⁸⁴ However, since the introduction of the UPR, South Africa, under the auspices of being a UN member, has been compelled to report on how it is faring in its human rights obligations. At its first appearance before the UNHRC in 2008 the government boasted an impeccable track record on their progressive plan and the use of its available resources in realising SERs.⁶⁸⁵ The government was proud to announce that since 1994, the national housing programme delivered 2.8 million new housing units⁶⁸⁶ (which translates to 200 000 units per year until 2008). Noted is that over the last four years (2008 to 2012) there were only 400 000 new housing units built thus ‘progressive realisation’ slowed down.⁶⁸⁷

In response to the government’s report, the UNHRC and various NGOs submitted criticism on the delivery of SERs; in particular housing and related services came under sharp

⁶⁸⁰Policy Gaps in Human Settlements (August 2013).

⁶⁸¹Tissington K et al (2013).

⁶⁸²Tissington K et al (2013).

⁶⁸³See chapter 6 for discussion on how the judiciary in India responds to public corruption.

⁶⁸⁴See Chapter 2 for discussion on this instrument.

⁶⁸⁵South Africa’s Country Report to the Human Rights Council’s Universal Periodic Review Mechanism: 15 April 2008 (hereafter SA UPR Report 2008)available at

http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/ZA/A_HRC_WG6_1_ZAF_1_E.pdf (accessed on 18 May 2013).

⁶⁸⁶South Africa UPR Report 2008.

⁶⁸⁷South Africa UPR Report 2012 available at <http://www.lhr.org.za/publications/universal-periodic-review-south-africa-31-may-2012> (accessed on 18 May 2013).

scrutiny.⁶⁸⁸ UN-Habitat pointed out that although millions of people had been housed with access to water, millions remaining in informal settlements are angered and are protesting against the long wait for service delivery.⁶⁸⁹ According to Holness this radical participation is the only remaining option of a frustrated and disappointed electorate.⁶⁹⁰ Furthermore UN-Habitat submitted that over 5,279 rural land restitution claims are still outstanding, many of them community claims involving thousands of residents.⁶⁹¹ They reported a failure at all levels of government to provide adequate post-settlement support for new settlements which lack the most basic supports services such as proper sanitation, water, access to schools, and access to livelihood options.⁶⁹²

The Special Rapporteur on adequate housing acknowledges the efforts made by South Africa to deliver some 30 percent of housing to women-headed households. But the lack of affordable housing, lack of timely access to public housing and the inadequate government provisions for long-term safe and secure housing remains stark.⁶⁹³ It was noted that too few mechanisms were in place to ensure that policies were implemented therefore large numbers of people lived in inadequate conditions. In addition there is insufficient support in access to housing and related services for the most vulnerable groups (including the homeless, persons with disabilities, those living with HIV/AIDS, women, orphans and older people).⁶⁹⁴ In summation the SAHRC⁶⁹⁵ pointed out that it was deeply troubled by reports of government corruption because it ‘substantially interfered with the exercise of SERs and also contributed

⁶⁸⁸Human Rights Council Report: Working Group on the Universal Periodic Review South Africa Eighth Session Agenda Item 6 (23 May 2008) para 1 available at <http://www.upr-info.org/en/review/South-Africa/Session-01---April-2008/Review-in-the-Plenary-session> (accessed on 12 May 2013).

⁶⁸⁹UN-Habitat Submission to UPR (2008) available at http://lib.ohchr.org/HRBodies/UPR/Documents/session9/US/UN-HABITAT_HumanSettlementsProgramme.pdf (accessed on 18 May 2013). Also see UN-Habitat ‘Global Report on Human Settlements 2007: Enhancing Urban Safety and Security’ 20 (hereafter UN-Habitat Global Report 2007) available at http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf (accessed on 4 June 2013).

⁶⁹⁰Holness W A ‘Equality of the Graveyard: Participatory Democracy in the Context of Housing Delivery: *Grootboom*’ (2011) 26 *SAPL* 5.

⁶⁹¹UN-Habitat submission to UPR (2008).

⁶⁹² UN-Habitat submission to UPR (2008).

⁶⁹³Human Rights Council: Working Group UPR First Session (2008) para 6 available at http://www.humanrightsinitiative.org/cwhra/docs/reviewing_the_universal_periodic_review_mechanism.pdf (accessed on 4 June 2013). Also see Durojaye E ‘Interview with the United Nations Special Rapporteur on Extreme Poverty and Human Rights’ Magdalena Sepulveda Carmona : Community Law Centre, University of Western Cape (2012) 13 *ESR Review* : Economic and Social Rights in South Africa 12.

⁶⁹⁴Human Rights Council: Working Group UPR First Session (2008) para 6.

⁶⁹⁵South African Human Rights Commission: UPR Submission (November 2007) para 17 available at www.gov.za/documents/download.php?f=150591 (accessed on 13 May 2013).

to the poor and the vulnerable being unable to access government services.’⁶⁹⁶ The result of this is the right to housing is delayed to these groups.

On 31 May 2012 South Africa returned for its second session under the UPR which was met with states and NGOs, alike, expressing concern about South Africa’s lack of commitment to the UPR.⁶⁹⁷ Recommendations generated by states at the second UPR related to: ‘[e]mpowerment and protection of vulnerable groups; promotion, protection and fulfilment of SERs; guarantee universal access to clean drinking water and sanitation; marginalisation, social exclusion and economic disparities; attainment of social cohesion and social transformation.’⁶⁹⁸ In reply, the South African government submitted that most of the rights to be attained were in the rubric of SERs and therefore required the availability of adequate resources, which are limited and that therefore these rights would be realised progressively in accordance with constitutional imperatives.⁶⁹⁹ Although infrastructure development is earmarked to grow the economy,⁷⁰⁰ there are no pertinent references as to how slowness in delivery of housing and related services is to be eliminated. There is also no commitment as to how to deal with corruption in the housing programme. This is evident by the delayed response by government to the SIU findings on corruption in housing.⁷⁰¹ A stark reality of state abuse is the current debacle whereby the President abused state resources to fund non-security features at his private residence, Nkandla.⁷⁰²

Notwithstanding international scrutiny under the UPR, the legislature has a constitutional obligation of oversight over the executive which is next explored.

⁶⁹⁶See Wilson ‘Officials took housing for the poor’ in *Business Day* 23 April 2008 reports that 31 000 government employees were being investigated nationally for fraudulent acquisition of government houses.

⁶⁹⁷South Africa UPR Report 2012 available at <http://www.lhr.org.za/publications/universal-periodic-review-south-africa-31-may-2012> (accessed on 12 May 2013).

⁶⁹⁸See Human Rights Council Working Group Report on South Africa (2012) available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session21/Pages/ListReports.aspx> (accessed on 12 May 2013).

⁶⁹⁹Human Rights Council Working Group Report on South Africa 2012 para 6.

⁷⁰⁰See State of the Nation Address 2009 available at <http://www.gov.za/speeches/son/index.html> (accessed on 30 May 2014); National Development Plan vision for 2030 available at <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed on 20 June 2014).

⁷⁰¹See chapter 5.

⁷⁰²See chapter 5 for detailed discussion on the ‘Nkandla’ case.

3.4 The Legislature (Parliament): oversight and accountability in public housing and available resources

‘Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.’⁷⁰³

The vision of South Africa’s Parliament is:

‘To build an effective people’s Parliament that is responsive to the needs of the people and that is driven by the ideal of realising a better quality of life for all the people of South Africa.’⁷⁰⁴

In *Carmichele v Minister of Safety and Security*⁷⁰⁵ the CC confirmed that it accepted that ‘the major engine for law reform should be the legislature and not the judiciary’.⁷⁰⁶ Parliament⁷⁰⁷ is empowered to legislate and ensure that all national organs of state and the executive are accountable for the exercise of their powers and the performance of their functions.⁷⁰⁸ This is done by Parliament ensuring government develop strategic objectives that translate into programmes with set timelines, objectives and outcomes and the allocation of sufficient resources to achieve the outcomes.⁷⁰⁹

Needless to say members of Parliament (MPs) should be familiar with the immediate needs of their constituencies and thereby be able to pursue policies and programmes specific to the needs and interests of the people. Through its oversight role, Parliament has an important function in bringing public participation closer to communities through outreach programmes.

⁷⁰³This statement was adopted by the ICJ Congress in Delhi 1959. See chapter 6 for discussion on the judiciary in India.

⁷⁰⁴Parliament of the Republic of South Africa ‘Our Vision’ Cape Town 2010 available at http://www.parliament.gov.za/live/content.php?Category_ID=12 (accessed on 30 September 2014)

⁷⁰⁵2001 (4) SA 938 (CC) para 36.

⁷⁰⁶Noted is that before 1994, accountability of government departments and public access to parliament were as good as non-existent.

⁷⁰⁷The South African Parliament currently follows the Westminster model and is bicameral at a national level, consisting of the National Assembly (NA) the lower house of Parliament. The National Council of Provinces (NCOP) the upper house. See Constitution s42 for primary functions of these two houses.

⁷⁰⁸Constitution s55, s92. The Constitution ch4 gives both the NA and the NCOP the power to consider, pass and reject legislation and hold the executive accountable.

⁷⁰⁹See Whiting S A & Salmon A ‘Parliament’s Role in Overcoming Inequality and Structural Poverty in South Africa Conference Paper Johannesburg 20 September 2010 available at <http://www.plaas.org.za/sites/default/files/publications-pdf/whiting%20%26%20salmon.pdf> (accessed on 30 September 2014).

Thus rural and urban communities must be engaged by Parliament on a regular basis to assist with the participation of the indigent in legislation, policies and other processes that affect their lives. In *Doctors for Life International v Speaker of the National Assembly and Others*⁷¹⁰ and in *Matatiele Municipality and Others v President of the RSA and Others*,⁷¹¹ the court found that Parliament had an obligation to facilitate public participation in its legislative processes.

Despite public participation being a fundamental attribute that Parliament (provincial and local government) must ensure, this is not always the case and often laws are passed without adequate public participation. In fact public participation is one of the key ingredients for the realisation of housing but government is often found lacking in this regard. The CC concurs that the government does not fare well in engaging the communities in the planning of their homes.⁷¹² The stark reality in practice is that policies do not provide for satisfactory implementation in terms of aims and objectives to be met and timelines.⁷¹³

The National Council of Provinces, since 2002 embarked on a programme called 'Taking Parliament to the People' (TPTTP) where communities enlist on issues relating to access to water, sanitation, housing and electricity. This programme invokes criticism from communities as to the lack of follow-up visits to sites visited by MPs, after TPTTP events.⁷¹⁴ In addition, Parliament is busy establishing Parliamentary Democracy Offices (PDOs) in all nine provinces.⁷¹⁵ These offices aim to realise the public participation objectives of Parliament, create immediate parliamentary presence in all provinces, create efficiency in accessing communities, as well as providing ground support for parliamentary programmes.

For this to happen Parliament must encourage and aid the public in tabling public participation and public petitions on issues that affect people's lives negatively such as lack

⁷¹⁰2006 (6) SA 416 (CC).

⁷¹¹2006 (5) SA 47 (CC).

⁷¹²See *Joe Slovo; P E Municipality; Olivia Road*.

⁷¹³Centre for Development and Enterprise and Studies in Poverty and Inequality Institute 'Can Government Policies Be Said to Be Pro-poor? An Exploration of Policy' (2010) Working Paper No. 4. Poverty Audit Project available at http://www.spii.org.za/agentfiles/434/file/Documents/Poverty%20Audit_final.pdf. (accessed on 28 September 2014).

⁷¹⁴See Leibrandt-Loxton N 'Reflections on the State of the Nation Address' (2010) Cape Town: Research Unit Parliament of South Africa; Saptoe E 'Watching the Watchdogs: Parliaments and Accountability Information Services Section (2007) Cape Town: Research Unit Parliament of South Africa.

⁷¹⁵The 13 PDOs in 2009 are: Limpopo, Northern Cape and North West. Phase two will focus on the establishment of the last six PDO's (Parliament 2009).

of shelter. To this end the executive must provide Parliament with full and regular reports concerning matters under their (the executive) control. Thus the minister of Human Settlements should be keeping Parliament informed as to the progressive realisation of housing and how they are faring in delivery.⁷¹⁶ Cognisance should be taken of the fact that the legislature has yet to question the adequacy of the government's progressive plans for housing, despite the many protests against slow delivery of housing and poor service delivery. This point to a failure of oversight.

3.4.1 Parliamentary control over the executive's spending of public funds

The central question to consider is how far Parliament contributes to a system of 'representative and responsible' government.⁷¹⁷ Tomkins argues that we should abandon the notion that Parliament is principally a legislator and instead see it as a scrutiniser or as regulator of government.⁷¹⁸

Parliamentary control over the executive's spending of public funds has remained a central feature of the constitutional dispensation in South Africa over decades. This is the function of the Standing Committee on Public Accounts (SCOPA). This is fashioned on the British constitutional law, the Bill of Rights of 1688 which not only ensures that the executive is subject to the rule of law, but also limits the crown's prerogative to raise and spend public funds without having to account to anyone.⁷¹⁹ To this extent Parliament and the provincial legislatures exercised control over the expenditure of money by their respective executives since the Union of South Africa in 1910. Moreover, when South Africa became a democracy these provisions were enacted in the Constitution.⁷²⁰ Notwithstanding this, Parliament has no relationship of financial control regarding local government contracts.⁷²¹ Although the rule of

⁷¹⁶See Department of Human Settlements Annual 2012/2013 Report. Also see Human Settlements Budget 2014 available at

<http://www.treasury.gov.za/documents/national%20budget/2014/enebooklets/Vote%2031%20Human%20Settlements.pdf> (accessed on 28 September 2014); Legacy Report of the Portfolio Committee on Human Settlements on its activities undertaken during the 4th Parliament (May 2009 – March 2014) 13 March 2014 available at <http://www.pmg.org.za/legacy-report-portfolio-committee-human-settlements-its-activities-undertaken-during-4th-parliament-may-2009-march-2014-dated-13> (accessed on 28 September 2014).

⁷¹⁷Leyland P *The Constitution of the United Kingdom: A Contextual Analysis* (2012) ch5 para v.

⁷¹⁸Tomkins A 'What is Parliament for' in Bamforth N & Leyland P *Public Law in a Multilayered Constitution* (2003) 55.

⁷¹⁹See *Auckland Harbour Board v The King* [1924] AC 318 326-327; also see Hogg P W *Constitutional Law of Canada*, (Student ed) (1997) 1253.

⁷²⁰Sections 60, 159(2) and 185(2) of the Constitution of the Republic of South Africa 200 of 1993. Also see Currie & De Waal (eds) *The New Constitutional and Administrative Law* vol 1 (2001) 159.

⁷²¹The MFMA dominates local government spending.

parliamentary control of public funds has been restated in both post 1994 constitutions, the PFMA⁷²² is the statutory provision for the appropriation of payments of all contractual debts in national and provincial government.

As it stands, parliamentary scrutiny mainly focuses on the executive's broad strategy for public expenditure and it very seldom scrutinises the individual items of departmental expenditure.⁷²³ Therefore the effectiveness of parliamentary control is also in doubt because it is very difficult to prove that adequate funds are not appropriated because of the fact that appropriations are voted for under broad heads.⁷²⁴ There is a need for Parliament to pay closer scrutiny to the obligations of the executive in its duties to realise housing. The MPs are accountable to their constituents and should have their best interests at heart insofar as access to housing. In this regard Parliament has the power to call the executive to account on their deliverables. This power should be effectively used to enquire into national government's progressive plans for housing, particularly due to the fact that housing delivery is lagging.

McLean argues that the dominance of the executive in national government undermines Parliament as merely rubber stamping executive policy by enacting legislation.⁷²⁵ Floyd concurs that the effectiveness of parliamentary financial control is particularly questionable when the executive has the support of the majority in the legislature.⁷²⁶ Moreover, due to its one-party majority, Parliament and the executive branch is never in conflict and contested laws by opposition parties fail, leaving democratic processes vulnerable to neglect of proper oversight by Parliament.

Most notably, the requirement of parliamentary appropriation of funds provides a large measure of protection for public funds and is in the public interest.⁷²⁷ In this regard parliamentary financial control is still the most important form of control over the executive in many modern democracies.⁷²⁸ This means Parliament retains control over the executive and is free to refuse to appropriate funds for a specific contract. Arrowsmith argues that

⁷²² Section 38(1) (f).

⁷²³ Turpin C *Government Contracts* (1972) 38. Also see Turpin C *Government Procurement and Contracts* (1989); Mc Eldowney J 'The Control of Public Expenditure' in Jowell J & Oliver D (eds) *The Changing Constitution* (2004) 379-380.

⁷²⁴ Floyd T 'Appropriation of Funds as a Requirement for the Validity of Government Contracts Involving the Spending of Public Funds' (2006) 21 *SAPL* 173.

⁷²⁵ McLean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) 208.

⁷²⁶ Floyd T (2006) 172.

⁷²⁷ Floyd T (2006) 172.

⁷²⁸ Floyd T (2006) 173.

parliamentary appropriation should include all processes which pursue government procurement.⁷²⁹ This oversight will go far in procurement of contracts to build public housing which often is the subject of irregular payments.⁷³⁰ Crucial would be parliamentary monitoring and evaluating of development, spending and the implementation policies and programmes on SERs, over a long time. This would be a Parliament living up to its constitutional obligations.

3.5 Conclusion

The positive strides that government has made in the delivery of housing cannot be disputed. Nonetheless the zealous delivery of housing at the start of democracy has dwindled into lack of cohesion between the levels of government, whether in policy or available resources. The three levels of government have to constantly strive to realise SERs and there can never be a moment where the state can be passive bystanders, let alone direct beneficiaries of the public purse.

Most national housing programmes take the integrated residential development programme approach, which comprises of planning, services and upgrading informal settlement. There is no sharp focus to particularly house the most desperate first, as such their plight remains prolonged. There is a definite need to change focus on the progressive plan by providing basic shelter soonest for those living in intolerable conditions. The lack of available resources cannot serve as a reason for delaying core-minimums, especially in light of the rampant abuse of public funds. As it is, there are sufficient economic resources which are abused in the sense that government has spent billions on rectifying poor workmanship. This situation prevails because the government fails to exert proper oversight through its own mechanisms put in place for this very reason such as, the NHBRC and the SANS.

The evolution of SERs should be monitored on an ongoing basis by institutions such as the SAHRC in order to evaluate the state's continuous performance in the implementation. Such monitoring should be spearheaded by Parliament in its oversight role as representative of the people. Therefore public participation in the planning and development of housing should be encouraged and monitored as an integral part of the progressive realisation of housing. As

⁷²⁹ Arrowsmith S *Government Procurement and Judicial Review* (1988) 50.

⁷³⁰ See Chapter 5 for a discussion on malfeasance in the procurement of public housing contracts.

things stand now Parliament in effect is playing a more reactive role as oppose to a supervisory or proactive role.

Such a proactive role will include a more serious look at ethics and conflict of interests which is an albatross around the neck of social progress in the housing programme and should be at the forefront of parliamentary inquiry. In this regard Parliament should be executing passionate oversight over the available resources for SERs to keep the progressive realisation of housing on track and thereby keep their constituents happy. In a constitutional democracy this oversight should be without fear or favour of political affiliation and be in line with constitutional obligations. The people deserve no less than a Parliament that represents the realisation of their constitutional rights and what could be more dignifying than a home when there is none.

How the judiciary, the third branch of government is faring in interpreting the right to housing, is discussed next.



Chapter 4

The Judiciary: Conservative or Progressive Interpreter of the Right to Housing

4.1 Introduction

State institutions must be strengthened to prevent the state from illegitimately gaining economic power which may lead to an increase in state power and thereby arbitrariness of the state in performance of its duties. In order to combat such arbitrariness the progressive realisation of housing is ideally collective effort by the three branches of government. Following on from chapter three, the role of the executive and Parliament in their duties to effect the right to housing, this chapter aims to analyse how the judiciary has interpreted the state's duty towards the realisation of the right. This would entail looking at the transformation that the Constitution envisages for South Africa. Thereafter this chapter will explore whether the judiciary is embracing the constitutional obligations in transforming its approach towards the interpretation of SERs and more particularly the right to housing. In this endeavour the constitutional obligations of the judiciary are explored.

The judiciary has been commended around the world for its liberal approach in the justiciability of SERs generally and specifically in housing through the landmark *Grootboom* judgement. This has opened the door to various court challenges in the realisation of housing, endowing the court with rich jurisprudence on the interpretation of the right. Despite this tapestry the challenge that needs to be met is the fact that the realisation of housing the most desperate remains elusive, although the court has compelled government to implement certain aspects of housing soonest to vulnerable groups. The aim is to establish whether the judiciary has used its prowess as a voice for the indigent and vulnerable to keep government in check on its promised progression in delivering social housing.

The discourse on how the judiciary interprets SERs is contested by those who argue that more could be done to give content to, for example the right to housing. This chapter aims to elaborate on how the judiciary has interpreted the right to housing through the reasonableness test. The idea is to see whether the court's approach could be widened to embrace a more flexible approach to the interpretation of the right to housing that would accelerate the tardy

response by government in its delivery. This would also assist in bringing the judiciary in line with the vision of transformation as espoused in the Constitution.

Further scrutiny will be given to the role of the court in curbing public sector corruption in order to protect the available resources for SERs, from graft in government. To give clarity to this the Public Protector's report investigating the abuse of state resources by the President, also receives scrutiny. To complement this, attention is given to the subsequent CC challenge to compel the President to comply with the findings of the Public Protector (PP) depicting the unlawful enrichment of the President through undue benefits derived from the state's economic resources, for personal gain.

Light will also be shed on judicial scrutiny as regards the way in which the government response to court orders and particular with regard to housing. Whilst on this topic the NPA's reaction to judicial process into corruption charges of the President is also elucidated in order to highlight the prosecution's tardiness on tackling public office corruption, in a quest to protect the available resources for SERS.

4.2 Transformative constitutionalism

The South African government has transformed from parliamentary sovereignty with a mostly positivist judiciary applying discriminatory apartheid laws prior to 1994, to a more natural-law approach judiciary informed by a transformative Constitution. Therefore, at the heart of the Constitution is the dismantling of systemic discrimination aimed at social and economic disadvantage of the majority, which had maimed equality and dignity as set out in the Constitution.⁷³¹ Due to this discriminatory legacy the Constitution aims at transforming the lives of the majority in order to restore equilibrium and thereby attempt to heal the divisions of the past. This makes the Constitution a bridge from an authoritarian past to a democratic future which must lead to a culture in which every exercise of power is expected to give account of itself.⁷³² De Vos argues that the constitutional text itself in particular the sections dealing with rights, points to the transformative nature of the obligations imposed by

⁷³¹See *Grootboom* para 25 where the Court found that the 'right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.' Also see Preamble of Constitution; Sunstein C *Designing Democracy: What Constitutions Do* (2001).

⁷³²Mureinik E 'A Bridge to Where? Introducing the interim Bill of Rights' (1994)10 *SAJHR* 31-2.

the Constitution's various provisions.⁷³³ This vision of a transformative nation should be seen in the light of a political remodelling that envisages facilitating and enhancing the country's social and economic dialogue.

Du Plessis presents redress and transformation in two approaches, namely monumental and memorial constitutionalism.⁷³⁴ Monumental constitutionalism ties in with the preamble of the Constitution by invoking the past but recognises the limits of law and constitutionalism.⁷³⁵ The monumental approach views transformation and redress as a procedural process and focuses exclusively on material needs.⁷³⁶ This approach is instrumental and functionalist and concerned with implementing policies, programmes and legal rules designed to eradicate racialised inequality, discrimination and injustice.⁷³⁷ This approach points more to formal equality and does not embrace the effect that the past policies and laws still have on the indigent. A memorial approach is open to multiple directions and movements, and recognises both the material and non-material needs of people.⁷³⁸ This approach resonates with victims of gross human rights violations, socio-economic inequalities and injustices in their daily lives. This approach is in parallel with substantive equality which recognises the existence of past inequalities as indicated by the Constitution in the equality clause.⁷³⁹ It is with this historical approach in mind that the Constitution should be applied and in doing so the judiciary must promote substantive equality. The Constitution facilitates transformation through the memorial approach and thus operates in the historical context of South African society and thereby places a duty on the state to hasten this transformation.⁷⁴⁰

In order for all to live in dignity the Constitution should be the blueprint for poverty eradication and economic transformation. Section 7 (2) is part of the transformative ethos of the Constitution which demands that the state respect, protect, promote and fulfil those

⁷³³De Vos (2001) 261. See Equality Clause s9 (2), Property Clause s25 (6), (7), (8); Education s29(c).

⁷³⁴Du Plessis L 'The South African Constitution as Memory and Promise' (2000) *Stell LR* 385; Also see Snyman 'Interpretation and the Politics of Memory' in Bradfield G & Van der Merwe D (eds) *Meaning' in Legal Interpretation* (1998) 312.

⁷³⁵Modiri J M 'Towards a (post-) apartheid Critical Race Jurisprudence: Divining our Racial Themes' (2012) 27 *SAPL* 249.

⁷³⁶Modiri (2012) 249.

⁷³⁷Modiri (2012) 249

⁷³⁸Van Marle K 'The Spectacle of Post-apartheid Constitutionalism' (2007) *Griffith LR* 419.

⁷³⁹Section9(2).

⁷⁴⁰De Vos (2001) 261. For a short review of contextual interpretation by the CC see De Waal J Currie I & Erasmus G *The Bill of Rights Handbook* 3ed (2000).

rights in the Bill of Rights (BoR).⁷⁴¹ This point to the fact that all laws must answer to the BoR whereby the prevailing laws must produce constitutionally accepted distribution of basic, life-sustaining goods.⁷⁴² Should the state violate the Constitution, it should undertake to rearrange the background rules in order to yield a constitutionally adequate level of access to the minimum components of human welfare.⁷⁴³ Thus, a transformative government committed to social change.

Van Marle's view on transformative constitutionalism, which is compared to Brazil's reconstructive attempts, shows the tension between the ideal, dream and reality.⁷⁴⁴ The author draws attention to the constitutional promise of Brazil which envisaged the development of a new urbanism, promoting collective consciousness in pursuit of detaching from the inegalitarian past. However this utopia failed to be achieved because social integration failed.⁷⁴⁵ Despite the ethical limitations and complexities of law, transformative constitutionalism dictates that the law should be broadened by interpretation and thereby promotes a natural-law approach which embraces law and morality as one.⁷⁴⁶ In promotion of substantive equality the law must be developed to advance equality through access to SERs, in order for the divide between rich and poor to wane. This is the core reason why the Constitution has to be underscored with historical interpretation to accentuate those past injustices. Quintessentially, the judiciary is the custodian of this transformative constitution and possesses the prowess to hold government accountable on its implementation.

4.3 Transformative judiciary

Budlender maintains a key theme of the Constitution is that the transformation is yet to come.⁷⁴⁷ Therefore, for transformation to happen judges are compelled to facilitate the

⁷⁴¹ For discussion on these duties see *Grootboom* paras 20 and 34 on negative rights and para 38 on positive rights.

⁷⁴² Peller G & Tushnet M 'State Action & A New Birth of Freedom' (2004) 92 *Georgetown LJ* 779.

⁷⁴³ Peller G & Tushnet (2004) 779.

⁷⁴⁴ Van Marle K 'Transformative Constitutionalism as/and Critique (2009) 20 *Stell LR* 291.

⁷⁴⁵ Philippopoulos-Mihalopoulos 'Brasilia. Utopia Postponed' in Philippopoulos-Mihalopoulos (ed) *Law and the City* (2007) 239.

⁷⁴⁶ See chapter 6 on how the Indian judiciary has widened the rules of standing and evidentiary rules to allow for social action litigation.

⁷⁴⁷ Budlender G 'Transforming the Judiciary: The Politics of the Judiciary in a Democratic South Africa' (2005) 4 *SALJ* 715.

creation of the kind of society that the Constitution envisages.⁷⁴⁸ Needless to say such a society would embrace access to all human rights. Therefore the interpretation of the Constitution must accelerate transformation envisaged to bring about economic and social liberties so as to invoke social justice.

During apartheid, the judiciary generally applied the law mechanically and thereby perpetuated the discriminatory laws which manifested the social inequalities still prevalent today. According to Dugard, historically the judiciary adopted an excessively 'positivistic' or 'literal' approach towards interpretation of statutes.⁷⁴⁹ Contemporary South Africa boasts a judiciary unfettered by parliamentary influence and strengthened by the supreme law of the Constitution. Thus the judiciary should embrace the transformative Constitution and thereby dispense with a positivistic approach which does not bode well with substantive equality. The Constitution invites a new imagination about legal method, analysis and reasoning.⁷⁵⁰ Davis and Klare decry that jurists continue to deploy traditional methods of legal analysis despite the existence of a transformative Constitution accentuated by social independence⁷⁵¹ and substantive equality.

In contrast to Klare's view, Roux reasons that transformative constitutionalism is but one type of interpretation of the Constitution amongst other plausible reading strategies.⁷⁵² This author believes that transformative constitutionalism is highlighted by politically engaged and transparent methods of constitutional interpretation.⁷⁵³ This means that judges will have to consider post-liberal readings as an ideological project and which they have a duty to promote through the process of adjudication.⁷⁵⁴ Modiri on the other hand, has a distrust of formal legal reform and its capacity to effect real and substantive change because there remains a racial underclass in the most progressive of constitutional democracies.⁷⁵⁵

⁷⁴⁸Wesson M & Du Plessis M *The Transformation of the Judiciary Fifteen Year Policy Review, South African Presidency* (2008) 12. Also see Cottrell J & Ghai Y 'The Role of the Courts in the Protection of Economic, Social and Cultural Rights' in Ghai Y & Cottrell J (eds) *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (2004) 65.

⁷⁴⁹Dugard J *Human Rights and the South African Legal Order* (1978) 369.

⁷⁵⁰Klare K 'Legal Culture and Transformative Constitutionalism' 1998 *SAJHR* 156. See chapter 6 on the Indian judiciary's liberal response to SERs through social action litigation.

⁷⁵¹Davis D M & Klare K 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 403.

⁷⁵²Roux T 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?' (2009) 2 *Stell LR* 266. Also see Botha H Van der Walt A J & Van der Walt J W G (eds) *Rights and Democracy in a Transformative Constitution* (2005).

⁷⁵³Roux T (2009) 266.

⁷⁵⁴Roux T (2009) 266.

⁷⁵⁵Modiri J M (2012) 237.

Waldron argues that judges have to be concerned about the courts' legitimacy in settling disputes over complex moral issues.⁷⁵⁶ Therefore, judges make their decisions based on theories of interpretation rather than direct argument involving moral issues. In saying this, cognisance should be taken of the fact that it is more difficult for judges to defend their legitimacy because unlike elected legislators,⁷⁵⁷ judges do not hold their positions through adult suffrage. Therefore a single meaning cannot be attuned to transformation. Rather it is a process which includes the appointment of judges, diversification of the judiciary, changing attitudes of the judiciary and the need to foster greater judicial accountability.⁷⁵⁸

Transformation means there must be an improvement from the state of affairs that had existed previously under apartheid. The need is for a judiciary that not only sympathises with the plight of the poor, but holds government to account for their promises of delivery. Progressive realisation insists on a judiciary that interrogates the delayed delivery of social housing.⁷⁵⁹

Unlike before, the appointment of judges is subject to constitutional prescripts whereby the Judicial Service Commission advises the President, who in turn makes appointments on these recommendations.⁷⁶⁰ The transformation of judicial attitudes has on the whole been positive. This is apparent in the judiciary morphing from not effectively curbing abuses of power by branches of government prior to 1994, to a judiciary that treasures its institutional independence and uses its power to test government conduct and legislation against the Constitution. Notwithstanding this, the judiciary has been urged by various authors to transform from a legal culture of conservatism to transformative constitutionalism.⁷⁶¹ The contention is that conventional legal culture has the potential to constrain the transformative project.⁷⁶²

Klare sees the South African legal culture as conservative, not in a political sense but in terms of 'traditions of analyses.'⁷⁶³ This legal culture is steeped in the common law and Roman-

⁷⁵⁶Waldron J 'The Core of the Case Against Judicial Review' (2005-2006) 115 *Yale Law Journal* 1346.

⁷⁵⁷Waldron J (2005-2006) 1346.

⁷⁵⁸Wesson M & du Plessis M (2008) 2. See chapter 6 for discussion on the transformed Indian judiciary.

⁷⁵⁹See chapter 6 for discussion on the liberal approach of the judiciary in India.

⁷⁶⁰Constitution s174 (6).

⁷⁶¹See Van Marle K (2003); Klare K (1998); De Vos P (2001); Davis M D (2010).

⁷⁶²Davis M D & Klare K (2010) 405. Also see Van der Walt A 'Transformative Constitutionalism and the Development of South African Property Law' part 1 (2005) 4 *TSAR* 655 & part 2 (2006) *TSAR* 1.

⁷⁶³Klare K 'Legal Culture and Transformative Constitutionalism' 1998 *SAJHR* 146.

Dutch traditions influenced by decades of apartheid-rule.⁷⁶⁴ The common law prior to 1994 was developed under a regime tainted with apartheid laws. Now the common law should be developed by the court in a substantive manner, thereby creating access to rights previously deprived from certain population groups.⁷⁶⁵ Moreover the CC declared that the common law should not be trapped in the past, but rather be ‘revisited and revitalised’ in full regard for the purport and objects of the BoR.⁷⁶⁶ this attitude will feed into the creation of realistic equality. In order to create realistic equality, the delivery of social housing to the most desperate must receive priority and the tardy realisation of government in this regard should fall under judicial scrutiny.⁷⁶⁷

Moreover, oversight over the available resources for housing should not be left solely to Parliament and the executive which have not only exercised grotesquely poor management but have also shown disregard for legislative prescripts. This is all the more damaging in light of the fact that the legal prescripts were formulated post-1994 by legislators which include member of the ruling party. Therefore a more transformed judiciary should adopt new and innovative ways to hold government to its obligations to protect the available resources against malfeasance on the part of the state. This is a task the judiciary is obliged to take on if it is to assist in the realisation of the constitutional obligations to housing, fully, and thereby subscribe to the transformative nature of the Constitution. Moreover in light of the poor performance of the executive the role of the judiciary is all the more vital.

Regrettably the judiciary in lower courts is not seen as being sufficiently assertive in ‘pushing the transformation envelope’ in particular in bringing about a more equitable distribution of resource.⁷⁶⁸ The judiciary is obliged to give meaning to the right to housing and when faced with such a challenge it should evaluate how the government complies with its duties insofar as reasonable legislative measures and progressive realisation are concerned. In this evaluation it is incumbent upon the judiciary to enquire into the time delays in delivery and other underlying factors that retard for instance the delivery of social housing. This would lead to decisions that are rooted in the constitution, as opposed to being rooted in personal

⁷⁶⁴Davis M D & Klare K (2010) 406.

⁷⁶⁵Section 39(2) provides that ‘when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bills of Rights. *Also see Dyzenhaus* D ‘The Past and Future of the Rule of Law in South Africa’ 2007 *SALJ* 740.

⁷⁶⁶ *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 86.

⁷⁶⁷ See chapter 6 for discussion how the judiciary in India does this.

⁷⁶⁸ Davis M D & Klare K (2010) 414.

benefits as displayed by members of government. Such decisions must translate into achieving sustainable development of living conditions and the overall quality of life to ensure the happiness of the human family.⁷⁶⁹ All in all, we seek a judiciary that adopts a progressive approach to achieve goals that the Constitution promotes. Moreover, interpretation of the Constitution should embrace a transformative approach and thereby guard against a mere inclusionary approach.⁷⁷⁰ It therefore makes sense that decision making through the judicial branch should incorporate international legal rules.

Dugard argues that the judiciary ‘remains institutionally unresponsive to the problems of the poor and it fails to advance transformative justice’.⁷⁷¹ This sentiment is further given prominence by Bilchitz who notes that the court’s analysis is often at a level of abstraction far removed from the actual suffering of individuals, which leads to a jurisprudence that places deference to the government above vulnerability of individuals.⁷⁷² Where the state fails to perform its legislative and constitutional duties towards realising SERs, the court should be petitioned to intervene and strike a balance between its own sphere of influence and its duty to keep the state accountable and answerable.⁷⁷³ Transformation demands that the courts do more than deference, by supervising implementation of its orders. For the sake of continuity the progressive realisation of SERs should be monitored by the courts over a long period of time. Davis maintains that the Court engages in old style legal methodology and the more radical transformative possibilities of SERs are placed upon the jurisprudential backburner.⁷⁷⁴ To this end the broader historical lessons informing the reason for social change were hampered and transformation slowed down.

⁷⁶⁹Segger M C & Weeramantry C G ‘Introduction to Sustainable Justice’ in Segger M C & Weeramantry C G (eds) *Sustainable Justice : Reconciling Economic Social and Environmental Law*(2005) 2.

⁷⁷⁰In *President of the RSA v Hugo* 1997 (4) SA 1 (CC) the court was criticised for protecting the stereo typical gender role of women as primary care-giver thereby excluding male minorities who also performed this duty and in *Masiya v Director of Public Prosecutions Pretoria and Another* 2007 (5) SA 30 (CC) the definition of rape was extended to include anal penetration for women, the minority judgement by Langa CJ (Sachs J concurring) paras 75-93 lend the definition to extend to males also. These cases did not embrace the spirit of transformation but rather seek an inclusionary approach which entrenched women in their stereotypical roles and that is not what substantive equality seeks.

⁷⁷¹ Dugard J ‘Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice’ (2008) *SAJHR* 215.

⁷⁷² Bilchitz D ‘Giving Socio-economic Rights Teeth: The Minimum Core and its Importance’ (2002) 119 *SALJ* 484, 487-8; Also see *TD v Minister for Education* (2001) 4 IR para 159 noting that the judiciary must be mindful of the separation of powers but the duty to protect and guarantee fundamental rights should not be ‘shirked or abdicated’.

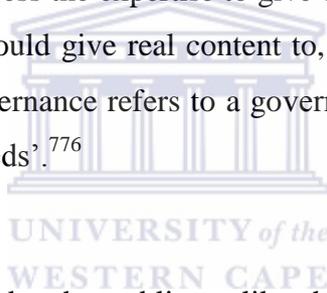
⁷⁷³ See chapter 6 on how the Indian judiciary does this.

⁷⁷⁴ Davis D M (2010) 97.

Although the judiciary is not the panacea for the realisation of SERs, it is the only forum that can truly sanction the government for dereliction of its constitutional obligations and duties. The conservative rule-bound approach of the judiciary of the past should be energised by a judiciary that observes the rules but also cares that the past imbalances be equalised. This would complement the transformation envisaged by the Constitution. In these endeavours it is naturally important to preserve the sanctity of the separation of powers.

4.3.1 Is separation of powers threatened by a transformative judiciary?

One of the cornerstones of democracy is the separation of powers doctrine which sees government's power spread over the legislative, executive and judicial branches of government. According to Locke this doctrine combats the over concentration of state power in that it promotes that none of the three institutions of government is paramount.⁷⁷⁵ In essence the executive should possess the expertise to give effect to the rights espoused by the Constitution and the judiciary should give real content to, for instance, the right to housing. Burns argues that responsive governance refers to a government that 'is alert to the needs of its people and addresses those needs'.⁷⁷⁶



Although judges are not elected by the public, unlike the members to the legislature, the judiciary is the interpreter of the Constitution and thereby ideally should function as the voice of the poor. It thus stands to reason that we should not let separation of powers stunt the ability of the judiciary to protect those in desperate need of housing, due to inadequate governance. In *TAC* the CC stated that the observance of respect for the branches of government did not mean that the courts cannot and should not make orders that have an impact on policy.⁷⁷⁷ The best way to do this is where there is a dereliction of constitutional duties in terms of SERs; the court has to do more than deferring to the executive. They can do this by compelling report backs on progress of implementation of court orders concerning SERs.⁷⁷⁸

⁷⁷⁵See Kurland P B 'The Rise and Fall of the "Doctrine" of Separation of Powers' (1986) 85 *Michigan LR* 600; *O'Reilly v Limerick Corporation* (1989) *I.L.R.M.* 181.

⁷⁷⁶ Burns 'A Rights-Based Philosophy of Administrative Law and a Culture of Justification' (2002) 17 *SAPL* 289.

⁷⁷⁷*TAC* para 98.

⁷⁷⁸ See para 4.4.1 for discussion on the response to court orders.

There are a number of cases that indicate that the separation of powers is not absolute.⁷⁷⁹ If the state neglects its constitutional obligations, the judiciary is mandated by the Constitution to intrude for effective relief that may affect policy and legislation, thus meaning it is not limited to a declaratory order,⁷⁸⁰ as in *Grootboom*. A typical example where the judiciary should provide guidance to the executive is where there is misuse of authority and abuse of available resources which consequently lead to delay in access to housing. Such guidance should lead to an attitude in favour of protecting public resources and of obeying constitutional obligations. Failure to do this renders judicial review of public administration, meek and does not bode well for the aspirations of transformative constitutionalism which South Africa seeks. Moreover, separation of powers is not threatened by a transformative judiciary because the court is not asked to second guess the state. When tasked with the adjudication of the violation of the right to housing, the court is there to assess the time-frames that have lapsed and how 'reasonable' the progressive plan is.⁷⁸¹ Should this inquiry not happen then the many waiting for social housing are at the mercy of the government's time-frames which is shameful, judging from the large numbers that are still living in intolerable and desperate situations despite the court orders in *Grootboom*.⁷⁸²

The Supreme Court of Appeal (SCA) held that a court of law must interfere in appropriate cases when an organ of state is consistently failing in its functions and obligations, particularly, insofar as it affects the plight of poor.⁷⁸³ An example of this is where public officials launched an unnecessary appeal against a case that they did not have sufficient evidence for.⁷⁸⁴ The SCA lamented the abuse of state funds and made a *de bonis propriis* cost order against the said officials. However, the CC was not in agreement with this order on a technicality and thereby did not deem it correct to personally hold the abusive public officials accountable for costs.

⁷⁷⁹ *Certification* case para 111; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 53-59; *President of the Republic of South Africa v South African Football Union* 2000 1 SA 1 (CC) paras 240-245; *In re Constitutionality of the Mpumalanga Petitions Bill* 2002 1 SA 447 (CC) para 26; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC).

⁷⁸⁰ TAC para 99.

⁷⁸¹ See para 4.3.2 on the judiciary and the reasonableness test inquiry.

⁷⁸² See chapter 3 for discussion on the statistics for social housing needs.

⁷⁸³ *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) paras 13-14 (hereafter *Ekurhuleni*).

⁷⁸⁴ See *Member of the Executive Council for Health, Gauteng v Lushaba* 2016 (8) BCLR 1069 (CC).

Nonetheless, where the indigent is failed by the executive due to undue delays of access to basic SERs, a court must come to their assistance.⁷⁸⁵ This would be well served by mandatory or supervisory orders to force government to respond speedily to provide a plan of action with time-frames in compliance with the court order. To achieve this, the court should prescribe the consequences for state omissions and cases of non-implementation. As such, the court should direct compliance to government and monitor the implementation of those directions. Such monitoring is best suited to the SAHRC which is empowered by the Constitutions in terms of chapter nine to do just that. Moreover the doctrine of separation of powers would not protect the executive where there had been a clear dereliction of its constitutional powers and duties which warrants a mandatory order.⁷⁸⁶ The flagrant disregard on the part of government of constitutional obligations demands a more proactive involvement of the courts. In essence the court should act decisively to protect the rights of those affected by such disregard or breach of duty.

4.3.2 The Constitutional Court jurisprudence on SERs: the reasonableness test

Generally the courts control the lawful application of political power and the protection of individual and minority rights as provided by the Constitution or other legislation. In the adjudication of SERs, judges generally assess government's compliance in measuring it against constitutional or statutory standards which include reasonableness, adequateness, proportionality, rationality, equality and non-retrogression. Reasonableness is a requisite of section 26 (2) which requires the state to take 'reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of this right'. Section 26 (2) requires the state's positive duty to be reasonable and a reasonable housing policy should target those who can afford to pay for affordable housing and those who cannot.

Roux's view is that the CC has 'managed its role with the Legislature and the Executive by sometimes compromising on legal principle in the long-term interest of the constitutional project'.⁷⁸⁷ The CC in its reasonableness approach rather focuses on procedure instead of substance by pointing to administrative law, in the few adjudicated SERs cases. The South African courts contend that they employ a sui generis concept of reasonableness, best for the

⁷⁸⁵ *Ekhurhuleni* paras 13-14.

⁷⁸⁶ See *Murphy v. Corporation of Dublin (1972)* I.R. para 215.

⁷⁸⁷ Roux T 'Principle and Pragmatism on the Constitutional Court of South Africa'(2009) 7(1) *International Journal of Constitutional Law* 138.

adjudication of SERs with emphasis being on human dignity and equality.⁷⁸⁸ However, criticism is aimed at how easily reasonableness descends into mere deference to the executive.⁷⁸⁹ This tendency to defer to the executive has exacerbated the stark inequality relating to SERs amongst the citizenry.

In South Africa the judicial discourse on SERs started through four different judgements.⁷⁹⁰ First, the *Certification* case where the Court affirmed the inclusion and the justiciability of SERs.⁷⁹¹ Second, in *Soobramoney* the question of reasonableness reared its head in challenging a SER relating to health. This was the first major case where access to SERs was contested in the CC. The Court used the reasonableness test and found that the state's refusal to give daily dialysis was not a limitation on the right to health but should rather have been seen as a case of equal access being given to everyone due to the ration on access to resources. Hence the Court found the health policy to be reasonable.⁷⁹² The Court did not want to substitute its view with that of the medical staff who is in a better position to judge who needs medical care and when. Basically the CC adopted a rational approach which deferred to government, thereby sending the problem back to government who created the void in resources in the first place. Instead of providing a formula that enabled the government to renege on its responsibilities, human rights activists and NGOs expected the Court to pressurise the government to progressively realise SERs.

Third, *Grootboom* is the first case contesting the right to housing, for a community of 900 shack-dwellers which included an overwhelming amount of children.⁷⁹³ The claim to the court rested on two provisions of the Constitution. First, section 26 which provides for access

⁷⁸⁸Steinberg C 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *SALJ* 265, 277.

⁷⁸⁹See Liebenberg S 'Basic Rights Claims: How Responsive is the Reasonableness Review?' (2003) 5 *ESR Review* 9-10; Fredman S 'Human Rights Transformed: Positive Duties and Positive Rights' (2006) *Public Law Journal* 515.

⁷⁹⁰Also see Yamin A & Parra-Vera O 'Judicial Protection of the Right to Health in Colombia: From Social Demands to Individual Claims to Public Debates' (2010) 33 *Hastings Int'l & Comp. L. Rev* 102 where the Colombian Constitutional Court is believed to have developed some of the most progressive jurisprudence in the world in respect of SERs, despite 55 years of civil conflict. According to the Human Rights Ombudsman Office of Colombia between 1999 and 2008 an astonishing 674,612 health rights issues has been raised in courts of which more than 1000 were in the Constitutional Court. Some of these judicial interventions were in terms of equity, financial and policy impact.

⁷⁹¹Also see Davis D 'The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles' (1992) 8 *SAJHR* 475.

⁷⁹²*Soobramoney* para 25. Also see Scott C & Alston P 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206.

⁷⁹³See chapter 3 for more details on this case.

to housing for everyone, thereby placing a positive obligation upon the state. Secondly, section 28(1) (c) which provides for children to have the right to shelter, unconditionally. The CC set out that a government plan for housing had to be reasonable in both design and implementation; should not exclude a significant segment of the population; it had to be coherent, setting out clear tasks for the three levels of government; and had to ensure the required human and financial resources being made available to implement the programme.⁷⁹⁴ Using the reasonableness test as a barometer, the Court found the housing plan including the legislative measures of government to be unreasonable.⁷⁹⁵ The Court found that the legislative demands of s26 (2) were not met because the Housing Act⁷⁹⁶ made no express provision to facilitate access to temporary relief for those in desperate need, namely those with no access to land, no roof over their heads and living in crisis conditions due to natural disasters. Because of the absence of appropriate legislative measures this group's immediate crisis was not dealt with because housing authorities could not state when adequate housing would become available to this community.

The reasonableness test makes a number of enquiries on progressive realisation by looking at the comprehensiveness of the measures the government has put in place. This includes the financial prudence, time-lines for completion of plans and flexibility measures which respond to short-term crises and changes.⁷⁹⁷ When enforcing the right to housing the court is required to look at the state's positive action first to determine the steps that have been taken and if those were the appropriate steps. The reasonableness of the steps and how they will be implemented is the primary enquiry of the court. Therefore, the CC pointed out in *Grootboom* that the housing programme would require continuous review because conditions do not remain static.⁷⁹⁸ Nonetheless, after using the reasonableness test and thereby deferring the *Grootboom* community to the government, the CC had not lived up to its own recommendations namely, continuous review of the housing programme.

⁷⁹⁴*Grootboom* paras 39-45.

⁷⁹⁵This 'reasonableness' standard has found its way into the South African jurisprudence of law through the *Doctors for Life* majority judgment. Discussions of review for unreasonableness in English law tend to begin with the dicta laid down by Lord Greene M R in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.

⁷⁹⁶Act 107 of 1997.

⁷⁹⁷*Grootboom* (2000) paras 39, 42, 43.

⁷⁹⁸*Grootboom* (2000) para 43.

The outcome of *Grootboom* frustrated the attainment of progressive realisation of the nationwide housing programme. The Court was criticised for giving a declaratory instead of a supervisory order, thereby leaving the state to remedy its own shortcomings.⁷⁹⁹ Notwithstanding this, shortcomings such as homelessness and inadequate basic shelter test the desperate and vulnerable to date. This shows that although government updated the legislation to housing to include prioritising housing for these groups, their programme for delivery is still not reasonable as it lacks time-frames as to when it will house the most desperate.⁸⁰⁰ Thus the reasonableness test does not suffice.

Fourth was the *TAC* case which contested access to health in the form of anti-retroviral drugs in order to prevent mother to child infection of HIV/AIDS. The Court used various aspects of reasonableness to reject the government's justifications and found that the policy was not reasonable because it was inflexible and did not take into account a significant segment of society.⁸⁰¹ This progressive approach the Court took was welcomed as it directed the government to roll-out these drugs to all in such need, despite monetary constraints. However, the CC stood steadfast on its reasonableness approach and did not consider that their order pointed to a minimum that the government must do for this group.⁸⁰² A better reasoning for the Court would have been to use the minimum core approach which would have indicated that at least pregnant women should be afforded the drugs that prevented mother-to-child infection of HIV.

Davis observes that the influence of legal cultures is pivotal to the jurisprudential process.⁸⁰³ It is a conservative legal culture that led to the court opting for the traditional reasonableness approach in SERs cases, which favours deferment to the executive and legislature and thereby setting innocuous precedent. In this light it can be said that a conservative legal culture has brought about marginal change, instead of reconstructive change to the entire legal system in South Africa.

⁷⁹⁹ A discussion of supervisory jurisdiction and other remedies is beyond the scope of this thesis. See Pillay K 'Implementing *Grootboom*: Supervision Needed' (2002) 3 *ESR Review* 11; Davis D 'Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5(5) *ESR Review* 3.

⁸⁰⁰ See chapter 3 for discussion on the myth of a waiting list for housing for the impoverished.

⁸⁰¹ *TAC* paras 78, 114.

⁸⁰² Also see Rajab-Budlender N & Budlender S (eds) *Judges in Conversation: Landmark Human Rights Cases of the Twentieth Century* (2009).

⁸⁰³ Davis D M 'Transformation: the Constitutional Promise and Reality' (2010) 26 *SAJHR* 97.

McLean notes that the reasonableness test has permitted courts largely to avoid substantive engagement with the content of the right and rather to focus on the reasonableness of the state's action in fulfilling the right.⁸⁰⁴ The immediate consequences thereof are delayed delivery and the perpetuation of undignified housing conditions. In other words the court effectively diminished its own social role which in turn is detrimental to the poor in South Africa.⁸⁰⁵ This can be seen in the effect of deference to government which the reasonableness test provoked and which was employed in adjudicating *Grootboom*. This would not have been the case if the CC had used the jurisprudence derived from international precedent as regards the minimum core, instead of the reasonableness test.⁸⁰⁶

4.3.3 The appropriateness of the reasonableness test (as opposed to the minimum core)

Davis maintains there should be a far more rigorous deconstruction of all legal principles which entails a more critical promise of social and economic transformation as contained in the constitutional text.⁸⁰⁷ According to Pieterse, judicially enforcing SERs is difficult but if tensions are approached pragmatically, the courts would be able to strike an appropriate balance between vigilance and deference.⁸⁰⁸ To achieve this court were to consider the historically induced deprivation of housing in the context of which minimums should be delivered soonest. This would echo the natural law character of the Constitution.

Notwithstanding this the reasonableness test as applied by the court has not brought about prudence by government when it comes to housing the homeless and those living in intolerable situations. Government is lagging behind on housing the neediest and therein lies the criticism of the court for not having looked at the minimum social needs of the impoverished.⁸⁰⁹ The result of this is that the court has not given content to SERs because no minimum requisite was earmarked to house homeless and desperate people. This is despite that the ICESCR⁸¹⁰ protects the minimum core as its *raison d'être*.

⁸⁰⁴Mclean K Constitutional Deference, Courts and Socio-Economic Rights in South Africa (2009) 211.

⁸⁰⁵Mclean K (2009) 211.

⁸⁰⁶ See chapter 2 for discussion on the minimum core as the reason d'être of the ICESCR.

⁸⁰⁷ Davis D M (2010) 110.

⁸⁰⁸ Pieterse M 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights' (2004) 20 SAJHR 417.

⁸⁰⁹ See chapter 2 for discussion on the minimum core.

⁸¹⁰ See chapter 2 for discussion on this Convention.

The term ‘minimum core content’ is considered as the intrinsic value of SERs in that it is the essential element that gives the rights their substance. For example for an illustration on the right to the highest attainable standard of health, the following constitute core obligations: ‘to ensure access to basic shelter, housing including sanitation, and an adequate supply of safe and portable water’.⁸¹¹ This minimum core is the floor beneath which the conduct of the state must not drop in compliance with its obligation towards each right. This means that in the right to housing the state should at least ensure that access to the indigent without homes or those in intolerable circumstances are prioritised within the resources available for housing. Doing so will speak to the minimum core approach.

To this end where any significant number of individuals is deprived of basic shelter, which is the current situation in South Africa, the state is prima facie failing in its obligations under the ICESCR.⁸¹² Moreover a state party failing to meet its minimum obligations must demonstrate that every effort has been made to use all resources that are available, optimally.⁸¹³ South Africa’s government is not faring well in this endeavour because it has not used its resources optimally: the social housing programme is tainted with corruption in the public service, by the very people entrusted to manage the resources.⁸¹⁴

Sepulveda and Nyst argue for a social protection floor limit in that this can assist states in fulfilling their human rights obligations under international and regional human rights instruments in ensuring the enjoyment of minimum levels of SERs.⁸¹⁵ The reasonableness test does not allow for such a floor limit in the fulfilment of rights. The promotion of a minimum social protection is to extend the rights so as to guarantee effective access to goods and services for all throughout their life cycle.⁸¹⁶ This follows, because a social protection has the potential to assist in realising the right to an adequate standard of living, including rights to adequate food and shelter.

⁸¹¹CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (2000) para 43.

⁸¹²GC no 3 (1990) para 10.

⁸¹³GC no 3 (1990) para 10. See below at para 4.4.1 for discussion on how the President failed in this endeavour.

⁸¹⁴See chapter 5 for a discussion on the SIU investigations into corruption in housing.

⁸¹⁵See Sepulveda M & Nyst C *The Human Rights Approach to Social Protection* (2012).

⁸¹⁶See Social Protection Floor for a Fair and Inclusive Globalization (2011) ILO. In 2012 the ILO Conference adopted a recommendation (No. 202) for nationally defined minimum levels of income security in the form of various social transfers which include universal, affordable access to essential social services. Also note the UN adopted a Global Initiative, the Social Protection Floor Programmes (SPFs) in 2009 which envisaged the eradication of poverty as its main goal and six targets for social upliftment, namely food security, housing, health care, education, social security, water and sanitation. The UN Guiding Principles on Extreme Poverty recommends the adoption of SPFs in all countries for sustainable development.

In the Southern African context, the minimum social protection floor should be defined as a basic floor of social protection beneath which no one falls. For instance the *Grootboom* community was a case in point where impoverished people were rendered beneath the minimum social protection by losing their humble inadequate shelter. The advantage of applying the minimum core obligation ensures satisfaction of at least the very minimum essential levels of each right incumbent upon every state party to provide.

Another disappointing judgement was the recent court quest *Nokotyana* where the inhabitants of an informal settlement asked over many years for basic sanitation. Most significant, is that the court found the community to be living in ‘no-man’s land’ and therefore they could not lay claim to basic services. This is in spite of the fact that the Housing Act promotes the upgrading of informal settlements, as per the dictates of *Grootboom*. In addition, to proliferate basic sanitation to all the Water Services Act⁸¹⁷ provides for national standards for basic sanitation. Thus the CC again avoided in giving real content to the right to housing which should include basic sanitation and thereby the Court ignored the bare minimum needs of the community. In the light of *Nokotyana* the court failed to use the opportunity to uplift the poor by not even ordering the minimum in basic sanitation. The court did not want to pronounce on the insufficiency of one pit latrine for 10 families. The minimum need of this community was simply one toilet per five families, a minimum requirement to uphold their inherent dignity. This approach of the court does not blend well with the makings of a transformative judiciary. In its reasonableness approach judges have been criticised for placing deference to the government above the vulnerability of individuals.⁸¹⁸ In *Mazibuko*⁸¹⁹ the CC again rejected the minimum core obligations stating that ‘it must fail for the same reasons that the minimum core argument failed in *Grootboom* and *TAC*’.⁸²⁰

The CC held that as a general rule it would be difficult for an applicant to challenge the reasonableness of a government policy based on a particular minimum standard if the

⁸¹⁷Act 108 of 1997.

⁸¹⁸See Bilchitz D *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights* (2007) 160, 162; Steinberg C ‘Can Reasonableness Protect the Poor? A Review of South Africa’s Socio-Economic Rights Jurisprudence’ (2006) 123 *SALJ* 264; Young K ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale J Int’L* 50.

⁸¹⁹Paragraph 56. This was the first case in South Africa dealing with the right to have access to sufficient water, protected in section 27(1) (b) of the Constitution. The CC found the government’s allocation of water to be reasonable.

⁸²⁰*Mazibuko* para 56.

reasonableness of that minimum standard were not questioned.⁸²¹ Lest we forget that the delay over 22 years to house the homeless and destitute does not tie in with a plan that is deemed 'reasonable'. These groups live in hope of a minimum requirement for housing, a basic shelter.

The CC has been criticised for failing to use the minimum core and seeking refuge instead in the reasonableness test and thereby not placing the needs of citizens at the centre of its enquiry.⁸²² This is so because the state is unduly concentrating on constructing permanent houses for as many people as possible over time, instead of adopting a polycentric approach which sees to basic shelter for the desperate first, whilst planning ahead for more permanent housing. Wesson criticise the CC's use of administrative law - instead of the minimum core approach as promoted by international human rights instruments.⁸²³ The author argues that the current status of court proceedings begs that if the matter is brought back to court the standard would again be that of reasonableness whereby the government would have to explain its programme and be subjected to evaluation by the court.⁸²⁴ The problem with this procedural approach is that time-frames are left solely to the whims of the government which, as mentioned, lacks good track record in delivering of shelter to the most needy timeously, thus exacerbating inequality.

The contention that the minimum core is too onerous and needs too much information to enforce⁸²⁵ is dispelled by that fact that the CC had in fact established the minimum that should have been done in the *TAC* case in that a single dose of drugs had to be given to potential mothers in order to prevent mother-to-child infection. This occurred despite the resource constraint of the state. This indicates that the CC may perhaps consider the minimum core in future cases should sufficient background information be provided to make an accurate assumption of the minimum essential level needed, in the context of the Constitution.⁸²⁶ However by continuing to use the reasonableness test the CC is placing the

⁸²¹*Mazibuko* para 76.

⁸²²See Bilchitz D 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *SAJHR* 1, 8, 10.

⁸²³Wesson M 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284. Also see Hoexter C 'Judicial Policy Revisited: Transformative Adjudication in Administrative Law' (2008) 24 *SAJHR* 281.

⁸²⁴Wesson M (2004) 284.

⁸²⁵*Grootboom* para 32.

⁸²⁶*Grootboom* para 33.

burden of proof on the claimant. Should the CC use the general limitations clause in section 36 of the Constitution, this will place the burden of proof of justification on the government.

The unintended consequence of the reasonableness test is that it mostly perpetuates hardship. The CC is criticised for ignoring what is the most basic need in each community and thereby not assisting in reaching at least an equal minimum for basic shelter.⁸²⁷ Moreover the provision of a minimum core obligation is not an end-point but a starting point for progressive realisation.⁸²⁸ As such, the reasonableness notion leaves us without any clear guidance as to how to prioritise needs that are of particular urgency because the court hitherto has been unable to pronounce on what constitutes a sufficient amount in terms of core minimum requirements.

Failing to establish a minimum protection for the poor is chasing a goalpost for the realisation of SERs that will never see the poor reaching at least an equal standard amongst each other. Such equality would be attained when everybody in intolerable, desperate situations were to gain access to basic shelter. By the government not providing basic shelter to those so desperate, it relegates those people to perpetual unfair treatment and disparity whereas those who enjoy at least basic shelter are better off.

Thus the call for a minimum core is a call for at least adequate basic shelter from the elements. This is a balancing act between whether some should be given adequate housing leaving others in the cold and whether everyone should be given temporary shelter pending the development of adequate housing for everyone. The CC touched on this, by reasoning that in most circumstances it will be reasonable for municipalities and provinces to strive first to achieve the prescribed minimum standard before being required to go beyond that minimum standard for those to whom the minimum has already being supplied.⁸²⁹ However, essentially the court by-passes the minimum core approach, by using reasonableness and thereby gives the state the last say on the minimum housing needs.

⁸²⁷See chapter 6 discussing the liberal approach of the apex court in India, meru moto raising issues on deprivation of SERs.

⁸²⁸Bilchitz D ‘what is reasonable to the court is unfair to the poor *BDLive* 6 August 2012 available at <http://www.bdlive.co.za/articles/2010/03/16/david-bilchitz-what-is-reasonable-to-the-court-is-unfair-to-the-poor;jsessionid=08D1907847D598F4D1672746FAC9D87C.present1.bdfm> (accessed 6 May 2014).

⁸²⁹*Mazibuko* para 76.

In order for the state to meet its constitutional obligations insofar as transformation is concerned, it has to change its current plans to cater for the most desperate insofar as basic shelter, even if this means delaying the construction of permanent housing for others that are not in such a desperate situation. If they fail to meet the needs of the most desperate they are acting contrary to ‘the poor [were] particularly vulnerable and their needs require[d] special attention’.⁸³⁰ South Africa is obliged to observe the influence of the ICESCR after its recent ratification. As it is, the Constitution recognises the importance of international law, therefore the minimum core as espoused as the ‘raison d’être’ for the ICESCR should put pressure on the judiciary to give closer scrutiny to the bare necessities of realising housing.

Courtis notes that different constitutional constructions have conceived the minimum core as a vital minimum⁸³¹ or ‘survival kit’ which is not static and which will evolve with time.⁸³² The German Federal Constitutional Court has developed the doctrine of the ‘vital minimum’ or ‘minimum level of existence’ which is ‘the State’s duty to secure the minimum existential conditions that make a dignified existence possible’.⁸³³ The Swiss Federal Court has found that Swiss courts can enforce an implied constitutional right to a ‘minimum level of subsistence’ both for Swiss nationals and foreigners.⁸³⁴ Similarly, the Supreme Court of Israel ordered that the government arrange its budgetary provisions to accommodate in addition the right to free education for children with disabilities in an integrated setting.⁸³⁵ Significantly, the European Court of Human Rights, whilst having a limited basis to adjudicate directly on SERs has applied tests of necessity and proportionality when upholding the protection of SERs.⁸³⁶ In this regard, there is a test judges use to assess whether legislation or regulations comply or fail with the core content or minimum core duties.⁸³⁷ Brazilian courts have followed the Europeans in minimum core obligations whereby the state is obliged to ensure day care access for children under six as being part of the right to education.⁸³⁸

⁸³⁰*Grootboom* para 36.

⁸³¹Vital minimum comprises access to food, housing and social assistance to persons in need.

⁸³²Courtis C (2008) 23.

⁸³³German Federal Constitutional Court (*BVerfG*) and German Federal Administrative Court (*BVerwG*), *BVerfGE*. Also see Article 20 of the German Constitution on vital minimum.

⁸³⁴See Swiss Federal Court *V. v. Einwohnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121I, 367 October 27, 1995.

⁸³⁵See Supreme Court of Israel *Yated and Others v the Ministry of Education* HCJ 2599/00 August 14, 2002.

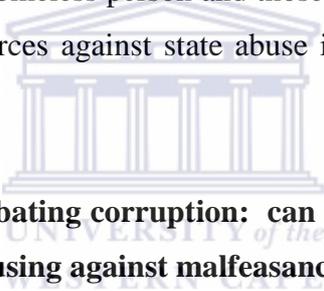
⁸³⁶See *Spadea and Scalabrino v. Italy* September 28, 1995 (protection from eviction for vulnerable groups are a legitimate goal to restrict property rights).

⁸³⁷Courtis C (2008) 33.

⁸³⁸See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*) RE 436996/SP (opinion written by Judge Celso de Mello) October 26, 2005.

A number of US judgments in SERs have been decided with regard to the government's duty to ensure a minimum quality. The Supreme Court of New York and the Appellate Division found that the state funding for education did not meet the minimum constitutional requirements to meet sound basic education.⁸³⁹ The African Commission also joins the international chorus on the minimum core obligations as being the guaranteed minimum level for the enjoyment of SERs but stops short of defining the core content of the right.⁸⁴⁰ Notwithstanding, that the CC in South Africa had suggested that there are certain minimum levels of social welfare to which every individual is entitled.⁸⁴¹ However this view links to the protection of dignity instead of to the notion of the minimum core obligations. Evidence suggests the reasonableness argument is tantamount to an escape hatch to not deliver on the minimum core obligations and thereby failing to give content to SERs.

In pursuit of relieving the impoverished from an undignified existence by providing the minimum of basic shelter to the homeless person and those living in informal settlements, the protection of the economic resources against state abuse is imperative and enjoys attention next.



4.4 Role of the judiciary in combating corruption: can the court assist in protecting the available resources for housing against malfeasance in the state?

As a democracy South Africa's government has put various legislative and institutional measures in action to combat malfeasance in government.⁸⁴² Despite these measures the state of social housing has been tainted with corruption in all provinces according to the SIU.⁸⁴³ Furthermore the PSC Reports highlight financial misconduct by public officials.⁸⁴⁴ The PSC reports that failure in recovering monies illegally diverted from the state, peaks at over 90

⁸³⁹See State Supreme Court of New York *Campaign For Fiscal Equity v State of New York et al* 710 N.Y.S. 2d 475, January 9, 2001; New York Court of Appeals *Campaign For Fiscal Equity v State of New York et al* 100 N. Y. 2d 893 June 26, 2003; New York Appellate Division, First Department *Campaign for Fiscal Equity, Inc. v. State of New York* 2006 NYSlipOp 02284 March 23, 2006.

⁸⁴⁰See African Commission on Human and Peoples Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights. See chapter 2 for discussion on the African Commission.

⁸⁴¹*Khosa* para 52; *P E Municipality* para 29.

⁸⁴²See chapter 1 for discussion on the Corruption Act, the main anti-corruption legislation. Also see chapter 5 for discussion on anti-corruption measures to combat procurement fraud in particular.

⁸⁴³See chapter 5 for an analysis of the SIU investigations into corruption in social housing.

⁸⁴⁴Public Service Commission 2005, 2006, 2007, 2008, and 2009: State of the Public Service; Public Service Commission 2010- 2011: Report on Financial Misconduct (hereafter PSC Reports 2005-2011). See chapter 3 discussing oversight by the PSC.

percent. The Auditor-General (AG) reports that irregular expenditure at national and provincial levels has increased ten-fold between 2008 and 2011.⁸⁴⁵ Furthermore, the 2015/2016 Audit Report stated that R46 billion has been lost to irregular, wasteful and fruitless expenditure mostly incurred in the procurement of goods and services due to failing to adhere to prescribed processes.⁸⁴⁶ This culture of maladministration was underscored by inadequate consequences or no consequences within the public service for this behaviour.⁸⁴⁷

The result of which myriad corruption taking place in the social housing programme which has delayed housing to, especially the most desperate. Abetting in the mischief is the non-disclosure of financial interest by senior managers.⁸⁴⁸ The PSC observes that the perpetrators of corruption are increasingly more at senior level, engaging in business with the state in their own departments.⁸⁴⁹ Thus ethical leadership is compromised by the very custodians that need to exert oversight and responsibility in detecting and preventing corruption in their own departments. Moreover, in local government, which is at the coalface of service delivery including housing, well-paid managers are not necessarily less opportunistic or show greater levels of integrity and restraint.⁸⁵⁰ Van Vuuren argues that South Africa is a state that functions but with elements of political elite that have anti-democratic tendencies seeking to undermine democratic institutions.⁸⁵¹ This is done by the rule of law being applied inconsistently and by poor financial management underpinned by unaccountable governance.

Civil society has actively criticised corruption through court action and protest marches, which have brought them into direct conflict with state security forces.⁸⁵² In India, by contrast

⁸⁴⁵ AG General Report on National Audit Outcomes, 2008-09/2009-10/2010-11.

⁸⁴⁶ Auditor General Report 2015/2016 available at [https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20\(MFMA%202016\)%20FN.pdf](https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20(MFMA%202016)%20FN.pdf) (accessed on 18 November 2016)

See chapter 5 for discussion on the laws governing public procurement.

⁸⁴⁷ Also see Open Society Foundation for South Africa 'The Cost of Public Corruption in a Democratic South Africa: Money and Politics Project Policy Brief OSF-SA December 2011 available at <http://cspri.org.za/publications/research-reports/understanding-impunity-in-the-south-african-law-enforcement-agencies> (accessed on 20 April 2016)

⁸⁴⁸ See Van der Merwe J 'How SA's servants bend the rules' *City Press* 2 December 2012. According to the City Press in 2011, 3 726 managers (of a total of 12 405) at both national and provincial levels did not submit financial disclosure form.

⁸⁴⁹ PSC Reports 2005-2011.

⁸⁵⁰ Van Vuuren H 'South Africa: Democracy, Corruption and Conflict Management' Democracy Works Conference Paper 2014 *Centre for Development and Enterprise* 8. See chapter 5 discussing the SIU findings which include municipal managers benefiting from corruption in social housing delivery.

⁸⁵¹ Van Vuuren H (2014) 2.

⁸⁵² See Saba A & Van der Merwe J 'Revealed—the true Scale of SA Service Delivery Protests (with original official data)' *Media24 Investigations* 22 January 2013 record 3 288 service delivery protests during 2009 to

the robust activism of civil society has assisted the judiciary in its progressive approach to social action litigation (SAL).⁸⁵³ This action has seen the judiciary inquire into the tardiness of anti-corruption agencies and ordering these institutions to investigate the allegations of corruption against politicians and senior state bureaucrats.⁸⁵⁴

Because of South Africa's history of legislated deprivation, there is a greater urgency in the obligation of the judiciary to protect the vulnerable and marginalised against state repression.⁸⁵⁵ Therefore the Constitution⁸⁵⁶ enjoins the judiciary with the other organs of state to ensure that the rights of this supreme statute are enforced. Thus the judiciary is in the invidious position of not only having to hold the state accountable in its delivery of public housing but also in ensuring that the available resources as spelt out by the Constitution in section 26, are protected against state abuse. Moreover, the court is empowered to adjudicate on any dispute that can be resolved through application of law and thereby affords the court with broad remedial powers for appropriate relief insofar as infringement or violation of a right is concerned.⁸⁵⁷ This point to the fact that the courts have extensive powers to enforce the realisation of SERs. Pieterse argues that rights-holders have the option to insist on the fulfilment of the rights through the judicial process.⁸⁵⁸ The academic discourse acknowledges that the CCs SERs jurisprudence is far from ideal and exacerbating this is the fact that the country has to grapple with measures to counter corruption generally but also in the public housing programme in particular.⁸⁵⁹

The link between human rights and corruption cannot be overstated.⁸⁶⁰ South Africa should recognise that corruption violates the right to housing in that it erodes the funds that ought to

2012 at almost 22 protests every week across the country; Vally N 'National Trends Around Protest action: Mapping Protest Action in South Africa, Study by the *CSR and the Freedom of Expression Institute 2009*. Also see chapter 6 on the role of civil society in combating corruption.

⁸⁵³ Cumming S & Rhodes D 'Public Interest Litigation: Insights from Theory and Practice' (2009) 36 *Fordham Urban Law Journal* 612. See chapter 6 for in-depth discussion on public interest litigation

⁸⁵⁴ See chapter 6 for an analysis of the role of the Indian judiciary in protecting SERs and combating corruption.

⁸⁵⁵ Also see Adeleke F A R Olayanju O F 'Role of the Judiciary in Combating Corruption: Aiding and Inhibiting Factors in Nigeria' (2014) 40 *Commw. L. Bull* 589.

⁸⁵⁶ Section s8 (1).

⁸⁵⁷ Constitution ss 34, 38.

⁸⁵⁸ Pieterse M 'Legislative and Executive Translation of the Right to have Access to Health Care Services' (2010) 14 *Law, Democracy and Development* 3.

⁸⁵⁹ See Cameron E 'What You Can Do with Rights' (2012) Fourth Leslie Scarman Lecture, London 9; Christiansen E 'Transformative Constitutionalism in South Africa: Creative uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 594. Also see Gloppen S 'Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health' (2008) 10 *Health and Human Rights Journal* 22.

⁸⁶⁰ See chapter 1 for this analysis.

realise potential housing.⁸⁶¹ Kumar argues that the judiciary and human rights commissions are best suited in dealing with corruption as a violation of human rights.⁸⁶² This may be a long and arduous struggle but it would be worthwhile if human rights were to be protected and many people thus dignified in the long run. Amongst the developing countries, India has been most progressive where the judiciary, together with civil society, the human rights commission and the media have held government to account by taking a maverick approach in relaxing standing in its endeavours to root out corruption in government.⁸⁶³

South Africa labours under paucity on the discourse of judicial invention into public sector corruption. The doctrine of separation of powers leads to the judiciary being reluctant to advise the government on how their economic resources should be applied and protected. However rampant corruption in the public sector which is highlighted by the media, civil society and the public service itself, is of concern and needs a different approach, since the anti-corruption measures in place have not brought about the desired results.⁸⁶⁴

There has been very little prosecution under the Corruption Act for offenders in public office.⁸⁶⁵ A large part of this is a result of the government turning a blind eye to the gross irregularities perpetrated by senior public officers, in the procurement for public housing. This is noted in the cases of corruption in public housing referred to the NPA for prosecution, but these investigations remain just that.⁸⁶⁶ Although the Corruption Act⁸⁶⁷ is geared towards deterring public office abuse in public procurement, senior management and accounting officers found in dereliction of procurement laws, escape the wrath of this Act. These perpetrators are not necessarily brought to book through the NPA as the case should be in order for them to have the court and thereby the law determine their fate. This is despite the PSC highlighting on a regular basis to Parliament the disturbing figures of financial misconduct by public officials.⁸⁶⁸

⁸⁶¹ See chapter 1 discussing the link between human rights and corruption.

⁸⁶² Kumar C Raj 'Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia' (2008) 16 *Mich. St. J. Int'l L* 570. See chapter 1 for discussion on the link between human rights and corruption.

⁸⁶³ See chapter 6 on the Indian judiciary lessons for South Africa.

⁸⁶⁴ See chapter 5 for elaboration on the anti-corruption measures and agencies.

⁸⁶⁵ See chapter 1 and chapter 5.

⁸⁶⁶ See chapter 5 where the SIU refers such matters to the NPA.

⁸⁶⁷ Section 13.

⁸⁶⁸ See Van Vuuren H (2014) unpacking the PSC Reports highlighting that over a ten year period the number of reported cases of financial misconduct has almost doubled from 434 in 2001-02 to 1,035 in 2010-2011. The

There is no silver bullet to stunt corruption in the state, but the judiciary can certainly assist in holding government accountable by playing more of a watchdog role in how government is faring with corruption investigations in the state. Combating corruption could be served through the judiciary inquiring into incidents where the state machinery is reluctant to hold the perpetrators of corruption in the state accountable.⁸⁶⁹ To combat corruption the judiciary does not have to compromise on the separation of powers doctrine. It can simply follow the Indian example and enquire into the implementation of the SIU recommendations as to those perpetrators of corruption in public housing delivery.⁸⁷⁰ This way the judiciary is observing its constitutional duty by inquiring into the retardation of a right because corruption.

The judiciary is well aware of the omnipresence of corruption in the public service. The robust media and civil society make it difficult to ignore the exposure of political corruption.⁸⁷¹ An unintended consequence of the judiciary's observance of a strict separation of powers rule has left the poor vulnerable in that the monetary resources that must realise their right to housing is being corrupted and they are unable to do anything about it.

Perhaps the most prominent politician prosecuted in South Africa was the Chief Whip of the ruling party in *S v Yengeni*.⁸⁷² This was one of the few cases where the accused was charged and prosecuted as having violated the Corruption Act of 1992,⁸⁷³ resulting in the accused being imprisoned for the crime of corruption for having received a benefit in contravention of the Act. Although very high profile, this case hardly deterred public sector corruption.⁸⁷⁴

amount of money involved hit a high point of almost R1 billion in 2010-11. The previous highest figure was approximately one third of that amount, R331.2 million, and recorded nearly ten years ago.

⁸⁶⁹ See chapter 6 for discussion on the Indian judiciary's approach to political corruption.

⁸⁷⁰ See chapter 6 for the Indian example lessons for South Africa.

⁸⁷¹ See chapter 6 for discussion on the robust civil society interaction with the judiciary in India.

⁸⁷² (A1079/03) (2005) ZAGPHC 117 (11 November 2005). He was sentenced to four years but served only four months before being placed under correctional supervision at home.

⁸⁷³ Section 1(1) (b) (i). See chapter 1 for explanation of Corruption Act

⁸⁷⁴ See *National Director of Public Prosecutions v Scholtz and Others* (2027/2012) [2013] ZANHC 48(13 December 2013) where another a senior politician John Block was convicted for corruption and money-laundering for circumventing supply chain processes in order to secure grossly inflated lease agreements for office space for government. Although this behaviour resonates with sanctions under the Corruption Act which specifically refers to procurement corruption by public officials, he was charged under the Prevention of Organized Crime Act 121 of 1998 ss25, 26.

Van Vuuren argues that the fundamental weakness to tackle corruption lies with the elite crime-fighting unit the Directorate for Priority Crime Investigation, known as the Hawks.⁸⁷⁵ The reason being that it lacks the investigative and prosecutorial independence enjoyed by its predecessor that is crucial to fighting high level political corruption.⁸⁷⁶ However, despite its failings these units represent the democratic notions that single anti-corruption agencies are more vulnerable to political interference than this ‘multi-headed beast’.⁸⁷⁷

High-profile cases of corruption in the public service do not generally end up on the prosecution’s list in South Africa but the same goes for the African continent. Further afield in Nigeria, the most populous nation in Africa, corruption has permeated the fabric of the Nigerian nation.⁸⁷⁸ Although boasting a robust and adequate legal framework on corruption, Nigeria is tested by rampant political corruption.⁸⁷⁹ Noteworthy is that the Economic and Financial Crimes Commission of that country secured convictions of a handful of senior government officials, but regrettably this Commission has been used as a weapon to destroy political rivals.⁸⁸⁰

In Kenya, the Ethics and Anti-Corruption Commission (EACC) presented to the National Assembly that, of the 315 cases investigated only 26 landed up in court.⁸⁸¹ Amongst cases of corruption are five Cabinet Secretaries suspected of corruption, who had to relinquish their positions, but no formal charges had been lodged.⁸⁸² This includes the former Investment Secretary who is alleged to have used her office to deprive former employees of the Kenya Railways Corporation of houses set aside for them to buy under a tenant-purchase scheme.⁸⁸³ The Kenyan government has yet to hand over the Minister of Energy and the managing director of the Kenya Power Company, despite arrest warrants in connection with money-laundering, from a UK court in 2011. They have not been charged in Kenya even though the

⁸⁷⁵ Van Vuuren H (2014) 13.

⁸⁷⁶ See *Glenister* case in chapter 1.

⁸⁷⁷ Van Vuuren H (2014) 13.

⁸⁷⁸ Osipitan T & Odusote A ‘Nigeria: Challenges of Defence Counsel in Corruption Prosecution’ 2014 *Acta U. Danubius Jur* 68. Nigerian officials had stolen or wasted more than \$440 billion.

⁸⁷⁹ Osipitan T & Odusote A (2013) 73.

⁸⁸⁰ Osipitan T & Odusote A (2013) 73.

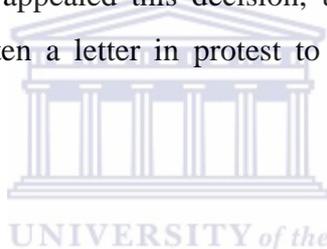
⁸⁸¹ See Africare View ‘Only 26 graft cases in Kenya have made it to the courts’ 30 July 2015 available at <http://www.africareview.com/news/Few-graft-cases-in-Kenya-have-made-it-to-the-courts/-/979180/2813762/-/weio3x/-/index.html> (accessed on 24 April 2016) The current system in Kenya is that investigations are carried out by the EACC but prosecutions must be brought by the Director of Public Prosecutions .

⁸⁸² ‘Corruption and its Consequences in Kenya’ Institute for Study of African Realities November 2013 available at <http://concordis.international/wp-content/uploads/2013/02/Corruption-and-its-Consequences-in-Kenya-Nov-2013.pdf> (accessed on 24 April 2016).

⁸⁸³ ‘Corruption and its Consequences in Kenya’ Institute for Study of African Realities November 2013.

Royal Court of Jersey prosecuted and found them guilty of crimes on solid evidence collected over years.⁸⁸⁴

Recently the most high profile case is that of a political party leader/businessman who was criminally charged with a multiplicity of cases relating to conspiracy to steal and defraud billions of shillings⁸⁸⁵ from the Kenyan government contrary to section 393 of the Penal Code. This is pursuant to an investigation of corruption and fraud whereby the Bosire Report found him together with others responsible for such acts and omissions, recommending criminal or civil sanction.⁸⁸⁶ From 1993 until 2013 the perpetrators escaped prosecution, thus for 20 years this political party leader⁸⁸⁷ escaped prosecution. In 2013 on application by him, the court rendered further prosecution of the cases as unconstitutional; citing the threshold for a fair trial and the principle of equality was not met.⁸⁸⁸ The court found the applicant's fundamental rights and freedoms guaranteed by the Constitution had been violated by the state. An aggrieved prosecution appealed this decision, unsuccessfully.⁸⁸⁹ In this vein the Law Society of Kenya has written a letter in protest to the Judicial Service Commission



⁸⁸⁴Herbling D 'UK now moves to seize Gichuru and Okemo hidden cash (Kenya) *Business Daily Kenya* 13 February 2016 available at <https://asokoinsight.com/news/uk-now-moves-to-seize-gichuru-and-okemo-hidden-cash/> (accessed on 24 April 2016) submits that 'a court in Jersey issued a warrant for the arrest for Mr Gichuru and Mr Okemo on 20 April 2011 – but the duo has challenged the move through multiple legal suits in Kenyan courts. The Jersey confiscation proceedings make it the third time this year that Kenyan authorities are being shamed for inaction in international corruption cases. 'Also see Kamau J 'Why Moi era billionaire won't rest easy *Daily Nation* 3 January 2016 available at <http://www.nation.co.ke/oped/Opinion/Why-Moi-era-billionaire-will-not-rest-easy/-/440808/3019382/-/13v5u02/-/index.html> (accessed on 24 April 2016); Editorial: 'It's time Kenya moved to prosecute Gichuru, Okemo' *Business Daily Africa* 17 March 2016 <http://www.businessdailyafrica.com/Opinion-and-Analysis/-/539548/3121662/-/pa9jk5z/-/index.html> (accessed on 24 April 2016).

⁸⁸⁵Totalling to Shs.5, 782, 655,311.00.

⁸⁸⁶Report of the Judicial Commission of Inquiry into the Goldenberg Affair October 2005 available at <http://fimbo.s3.amazonaws.com/Goldenberg%20report.pdf> (accessed on 24 April 2016)

⁸⁸⁷Kamlesh Pattni became chairperson of the Kenya National Democratic Alliance in 2006 but has not been successful to enter political office.

⁸⁸⁸*Republic v Attorney General & 3 Others Ex parte Kamlesh Mansukhlal Damji Pattni* [2013] eKLR paras 87-9. Also see Editorial 'How corruption suspects use courts to derail and stop prosecution' *Daily Nation* 19 December 2015 available at <http://www.nation.co.ke/news/derail-and-stop-prosecution/-/1056/3003304/-/11jwr6mz/-/index.html> (accessed on 24 April 2016) states that 'twenty-five years after the money was stolen the case is stuck, halted permanently by the courts. Kamlesh Mansukhlal Damji Pattni, the chief architect of the scandal who a Commission of Inquiry concluded was a "perjurer, a forger, a fraudster and a thief," remains a free man.'

⁸⁸⁹See Nairobi Civil Application no 105 of 2013 and Civil Application no 168 'A' of 2013 Between *Kamlesh Mansukhlal Damji Pattni and Director of Public Prosecutions*; 'How Kamlesh Pattni has beaten Kenya's criminal justice system for 20 years' *Nation* 27 April 2013 available at <http://www.nation.co.ke/News/How-Kamlesh-Pattni-has-beaten-Kenyas-criminal-justice-system/-/1056/1760390/-/i4esx2/-/index.html> (accessed on 20 April 2016)

asking ‘how yet another Pattni case ended up before Justice Mutava given the Society’s earlier complaint to the Commission about his handling of past Pattni cases’.⁸⁹⁰

The track record of the judiciary in South Africa in holding the government accountable regarding public sector corruption is stifled by the lack of prosecutions pursued by those responsible for prosecuting. The inconsistent application of laws and policies creates an imbalance in government which undermines sound corporate governance, necessary to tackle corruption. South Africa’s government needs collective effort to keep the available resources for housing in check and away from mischief in the government. Due to its liberal approach, India’s judiciary is riding a wave of positive public sentiment derived from its role in fighting public sector corruption.⁸⁹¹

To live up to this challenge the South African judiciary should not remain passive in the knowledge of the presence of corruption testing the delivery of housing, if they remain passive, ‘we have a recipe for a constitutional crisis of great magnitude’.⁸⁹² The constitutional promise of a better life for all is at risk if the judiciary does not look out for the poor and hold the government accountable by working with the SAHRC, in keeping a watchful eye on how the billions of rand for housing are applied. Importantly, the court holds duty to dispense with corruption in the public service.

Current alternative dispute resolution forums other than the courts have not reaped the desired results when engaging with government on social justice. An example of this is the flagrant disregard of the PP’s recommendations and remedial action that the President pay back to the fiscus, some of the states available resources which were abused for his private gain on the security upgrades at his private home, discussed next.

4.4.1 The independent Public Protector being dependent on the judiciary

The PP is constitutionally empowered by chapter 9⁸⁹³ to investigate irregularities and corrupt conduct in all spheres of government and take appropriate remedial action.⁸⁹⁴ This

⁸⁹⁰How Kamlesh Pattni has beaten Kenya’s criminal justice system for 20 years’ *Nation* 27 April 2013.

⁸⁹¹See chapter 6.

⁸⁹²*Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* 2008 (5) SA 94 (CC) para 80.

⁸⁹³The history of the office of the Public Protector, and the evolution of its powers over the years were dealt with in two judgments of the SCA *see South African Broadcasting Corporation Soc Ltd and Others v Democratic*

office derives power also from the subsequent national legislation, the Public Protectors Act⁸⁹⁵ that regulates the PP's powers. Furthermore the Act⁸⁹⁶ provides guidelines on how the power is to be exercised. The power of the PP is in its protection of the public against any state conduct that may result in impropriety or prejudice.⁸⁹⁷ This office has been very active in investigating corruption in the public housing programme but nowhere as 'successfully' as the SIU in its uncovering of malfeasance in the deliverance of social housing projects.⁸⁹⁸ The powers of the PP are wide and which include power over the highest chambers of state power, including the presidency.⁸⁹⁹ Therefore in execution of duties this office is not to be inhibited, undermined or sabotaged.⁹⁰⁰ For this reason non-compliance with remedial action issued by this office is not an option because it exists as a critical and indispensable power in facilitating good governance.⁹⁰¹

The PP trumps the SIU investigations in that it has power to take remedial action whereas the SIU reports its findings to the President and Parliament and refers to the NPA for sanction of the said perpetrators of corruption.⁹⁰² Although the PP has wide power to take remedial action, this power is not unfettered in that the power is not inflexible but rather situational in application and informed by the subject-matter.⁹⁰³ This means that the remedial action taken cannot be ignored without there being legal consequences.⁹⁰⁴ According to the CC this is so because no decision grounded in the Constitution or law may be disregarded without recourse to a court.⁹⁰⁵ Consequently, the PP does not have the same status as a judicial officer but the remedial action to be taken is binding.⁹⁰⁶

Alliance and Others 2015 (4) All SA 719 (SCA) para 31 and *The Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) para 5.

⁸⁹⁴ *Nkandla* case para 58.

⁸⁹⁵ Act 23 of 1994 as amended by Public Service Laws Amendment Act 47 of 1997; Public Protector Amendment Act 113 of 1998; Public Protector Amendment Act 22 of 2003

⁸⁹⁶ See s6 where all the powers accord and coexist with s182 of the Constitution.

⁸⁹⁷ *Nkandla* case para 51.

⁸⁹⁸ Discussed in chapter 5.

⁸⁹⁹ *Nkandla* case para 55.

⁹⁰⁰ *Nkandla* case para 54.

⁹⁰¹ *Nkandla* case para 56.

⁹⁰² See chapter 5 for the composition of the SIU and its 'powers'.

⁹⁰³ *Nkandla* case para 71.

⁹⁰⁴ *Nkandla* case para 72.

⁹⁰⁵ *Nkandla case* para 74.

⁹⁰⁶ See *Nkandla case*

The importance of the available resources of the state was put in the spotlight when the PP caused an investigation into the costs of the security upgrades by the government at the President's private home 'Nkandla'.⁹⁰⁷ These upgrades became a subject of investigation by the PP due to public pressure stating that the costs to the upgrades were excessive.⁹⁰⁸ It is important to note that the available resources of the state were put under pressure with costs to the upgrades steeping to R246 million.⁹⁰⁹ The long and short of the investigation was that non-security upgrades amounted to undue benefit and unlawful enrichment of the President.⁹¹⁰ The PP found improper procurement processes to have taken place in violation of the prescribed supply chain management framework which resulted in excessive amounts of public money being spent, unnecessarily and therefore unlawfully.⁹¹¹ This action violates the principle of using the maximum of available resources to realise SERs as espoused in international treaty obligations.⁹¹²

The result of this investigation was that the costs of the alleged security upgrades were excessive and included non-security features such as the visitors' centre, amphitheatre, cattle kraal, chicken run and the swimming pool. Therefore the PP found that the President unlawfully benefited from the non-security installations. The PP's Report criticised the President for excessive use of the state's available resources in a country grappling with poverty and the lack of adequate housing.⁹¹³ The PP found the President to have violated provisions of the Executive Members' Ethics Act and the Executive Ethics Code as espoused by the Constitution.⁹¹⁴ The PP found the breach to be in terms of constitutional obligations

⁹⁰⁷See Public Protector of South Africa 'Secure in Comfort' Report no: 25 of 2013/2014 (hereafter Secure in Comfort) on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu- Natal province. The total cost to conclude the project was conservatively estimated at R246 million. The investigation was conducted in terms of section 182 of the Constitution 1996, which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate remedial action. Part of the investigation was also conducted in terms of the Executive Members' Ethics Act 82 of 1998, which confers on the Public Protector the power to investigate alleged violations of the Executive Ethics Code, at the request of Members of National and Provincial Legislatures, the President and Premiers.

⁹⁰⁸See Public Protector of South Africa 'Secure in Comfort' Report no:25 of 2013/2014

⁹⁰⁹'Secure in Comfort' (2013/2014) 30.

⁹¹⁰See 'Secure in Comfort' (2013/2014).

⁹¹¹'Secure in Comfort' (2013/2014) 30. See chapter 5 for discussion on the procurement laws.

⁹¹²See chapter 2 for discussion on these treaties.

⁹¹³See 'Secure in Comfort' (2013/2014).

⁹¹⁴Section 96(1).

which provide for the ‘Conduct of Cabinet Members and Deputy Ministers’.⁹¹⁵ The President and the executive, including deputy ministers, are bound by an oath of office to uphold the Constitution.⁹¹⁶ The PP made recommendations and suggested remedial action to the effect that the President had to carry the costs which were abused for non-security features.

The PP took remedial action against the President in terms of the Constitution section 182(1)(c) and stated that the President had to:

- ‘Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW [Department of Public Works] at his private residence that do not relate to security, and which include [the] visitors’ centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.
- Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document. Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.
- Report to the National Assembly on his comments and actions on this report within 14 days.’⁹¹⁷

The President refused to comply with the remedial action as set out by the PP. Moreover Parliament in its oversight capacity, by its own findings did not deem that the available resources of the state were abused in anyway by the President and therefore there was no need to implement the remedial action by the PP. Almost two years after the PP findings the two biggest opposition political parties took the matter to court to confirm the powers of the PP in:

⁹¹⁵Section 96(1), (2) (b) and (c) (1) provides: Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation. (2) Members of the Cabinet and Deputy Ministers may not— . . . (b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or (c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.

⁹¹⁶Section 95.

⁹¹⁷Secure in Comfort (2013/2014) para 11.

4.4.2 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 ZACC 11⁹¹⁸

The facts of this case boil down to the investigation of the PP into the financially excessive security upgrades at the President's private home. Noteworthy is that a week before the CC challenge, the President tried to settle the matter by offering to pay for the undue benefits he gained from the upgrades. However, the applicants refused a settlement in that they wanted the powers of the PP to be reaffirmed and have the findings made binding by the CC. Therefore, the most burning issue in this case was whether the PP's recommendations and remedial action had binding powers. The CC responded in the affirmative that the PP's remedial action was binding hence the action taken against the President had a binding effect.⁹¹⁹ The CC crystallised the fact that the PP acted against the President himself and not the executive or organs of state. Therefore compliance was required by the President.⁹²⁰ The Court explained that the President had knowledge of the non-security upgrades and did not attempt to stop this as his fiduciary duties require.⁹²¹ In this action the President did not uphold his constitutional duty in ensuring that nobody profited unduly from state resources.⁹²² Notwithstanding that, the President together with those who deliver public services was charged with the duty to ensure that the state resources were only used for the common good of all.⁹²³

The importance of state resources was spelt out by the CC as resources that belonged to the public and as such should be used for the greater good and benefit of the public.⁹²⁴ Therefore, the President's constitutional obligations are pertinently expressed in the Constitution.⁹²⁵ The CC clarified that as head of state and the national executive, the President was uniquely positioned to do more than other public office bearers.⁹²⁶ For this reason he is a 'constitutional being' and the Constitution⁹²⁷ bears on his office to uphold, defend and respect

⁹¹⁸ Hereafter *Nkandla* case.

⁹¹⁹ *Nkandla* case para 76.

⁹²⁰ *Nkandla* case para 35.

⁹²¹ *Nkandla* case para 35

⁹²² *Nkandla* case para 35

⁹²³ *Glenister* para 176.

⁹²⁴ *Nkandla* case para 53. See chapter 2 for discussion on the importance of available resources in realising SERs.

⁹²⁵ Sections 83 (b). see Constitution chapter 5 for other presidential powers

⁹²⁶ *Nkandla* case para 26.

⁹²⁷ Section 83(b).

his obligations in this regard.⁹²⁸ The Court submitted that in uniting the nation, bearing in mind the painful past divisions, the President was required to do all to ensure that South Africa's constitutional democracy thrived.⁹²⁹ The CC found that the President's action was in contradiction of the Constitution section 96⁹³⁰ which clearly provides that '[m]embers of the Cabinet and Deputy Ministers may not use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person'. The CC reiterated the President's duty to ensure that the state resources were used for the advancement of state interest.⁹³¹ Therefore, if risks ensue whereby the President closes his eyes to possible waste and thereby derive personal benefit from the indifference; this would violate the Constitution section 96.⁹³² Thus the first citizen was in breach of the Constitution. The CC made it clear that as first citizen the President was obligated to lead by example as underpinned by constitutional obligations and thereby his irrevocable commitment to serve the people.⁹³³ The CC⁹³⁴ elucidated that the power of the PP was to ensure that the 'efficient, economic and effective use of resources [is] promoted,⁹³⁵ that accountability finds expression, but also that high standards of professional ethics are promoted and maintained.'⁹³⁶ The point is that complaints are lodged with the PP in order to cure or contain, amongst others, unlawful enrichment or corruption in government circles.⁹³⁷ In this regard the office of the PP cannot realise its constitutional purpose if organs of state may second-guess its findings and thereby ignore recommendations.⁹³⁸ Hence the Constitution⁹³⁹ spells out those remedial powers.

The CC held that the President was the primary benefactor of the non-security upgrades.⁹⁴⁰ The Court directed that the President determine the reasonable costs expended on the non-security features in order to pay back the available resources irregularly spent.⁹⁴¹ The CC give clear orders as to the time-frames of the order whereby the National Treasury had to report

⁹²⁸*Nkandla* case paras 26, 31.

⁹²⁹*Nkandla* case para 26.

⁹³⁰Section 96(2) (c).

⁹³¹*Nkandla* case para 7.

⁹³²*Nkandla* case para 9.

⁹³³*Nkandla* case paras 20-1.

⁹³⁴*Nkandla* case para 65.

⁹³⁵Constitution s195 (1) (b).

⁹³⁶Constitution s195 (1) (a).

⁹³⁷*Nkandla* case para 65.

⁹³⁸*South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2016 (2) SA 522 (SCA) para 52.

⁹³⁹Section 182(1) (c).

⁹⁴⁰*Nkandla* case para 35.

⁹⁴¹*Nkandla case* para 76. The President was required to provide the NA with his comments and the actions he was to take on the Public Protector's report within 14 days of receipt of that report.

back to the CC on the reasonable costs, within 60 days and the President, personally, was to pay back the abused resources within 45 days of the approval of the report.⁹⁴²

The result of this was that the President has the opportunity to reimburse the state for the non-security features. Moreover the President must reprimand the executive (the ministers involved) for the misappropriation of state resources under their watch.⁹⁴³ Thus the very custodians that were to maintain oversight in their senior capacity, allowed the economic resources of the state to be abused. The first citizen's disregard for abuse of the available resources of the state was a pattern that is perpetuated by senior public officials at local government level in the delivery of social housing, where they diverted funds for payment to contractors that did not complete the services if embarked upon at all.⁹⁴⁴

The CC lauded the PP as the most invaluable of constitutional gifts for the betterment of governance, a gift to the nation in the fight against corruption and unlawful enrichment in state affairs.⁹⁴⁵ Moreover, the PP's office is an alternative dispute resolution enclave which the public can approach at no costs, unlike the court. This is all good and well but the fact that the PP has to refer to the court for implementation of remedial action against a recalcitrant President and Parliament, makes this entity dependent on the judiciary. The apex Court confirmed that only the judiciary can set aside the findings and remedial action taken by the PP and only then can the President disregard the PP's report.⁹⁴⁶ If this chapter nine institution had its powers elevated to where it gives orders that must be implemented to the same extent as court orders, this would serve as a stronger deterrent to state abuse of resources or powers. India boasts an anti-corruption ombudsman that can give orders akin to those of the judiciary.⁹⁴⁷ If the PP's office is not given this power the ultimate guardian of the Constitution and its values, the CC, is the only hope for the impoverished to ease their plight timeously in accessing their right to housing. This requires a judiciary that holds the government to its goals in a proactive manner by mero motu raising socio-economic issues of public concern,

⁹⁴²*Nkandla* case paras 5-8. Zuma paid back R7.8 million available at <http://mg.co.za/article/2016-09-12-zuma-pays-back-the-money-but-where-did-he-get-the-r78-million/> (accessed 18 November 2016).

⁹⁴³ *Nkandla* case para 76.

⁹⁴⁴ See chapter 5 for discussion on the SIU Report on corruption in public housing.

⁹⁴⁵ *Nkandla* case para 52.

⁹⁴⁶ *Nkandla* case para 81.

⁹⁴⁷ See chapter 6 for discussion on the Lokpal ombudsman in India having this power to combat corruption.

including investigations into corruption which threatens the funds to realise SERs.⁹⁴⁸ This action would meet with the constitutional requirement of courts ‘to ensure that all branches of government act within the law’ and would fulfil their constitutional obligations.

Notwithstanding the fact that the CC has exclusive jurisdiction⁹⁴⁹ to inquire into the conduct of the President and Parliament, the issue of standing was explained at lengths in the *Nkandla* case.⁹⁵⁰ The gravitas of the abuse of state resources should have urged the judiciary to relax rules and get into the arena to ensure the government follow its constitutional mandate, particularly where Parliament is found lacking in its duty of oversight.⁹⁵¹ Granting standing in only exceptional cases and whether it be in the interest of justice is good and well. However, where the state’s resources are being eroded in a country grappling with housing its impoverished, there should be an urgency with which the judiciary approaches such flagrant abuse. This would not only be in the interest of justice, but more importantly in public interest. If the judiciary does not take this *paterfamilias* approach on the abuse of state funds, recourse for the impoverished in this regard is limited to ineffectual awareness campaigns and citizen’s protests which have not had the desired responses from government.

4.4.3 What are the implications of the *Nkandla* judgement on public office corruption?

The endorsement by the CC of the PP’s recommendations that the President unduly benefited and had to repay the money to the fiscus, is an endorsement of the notion that public office abuse will not be tolerated. Not even the highest office, the President, head of the executive is above the law but accountable to the Constitution. The implication of the findings of the PP and the CC’s concurrence is a powerful message to effect that public office holders cannot behave as they want, but are bound by the Constitution and their excesses can be curtailed by the judiciary.

The action of the President is explained by the PP and the CC as amounting to undue enrichment and receiving benefit for personal gain. This is pretty much in line with offences

⁹⁴⁸ See chapter 6 on how the Indian judiciary do this.

⁹⁴⁹ Section 167(4) (e).

⁹⁵⁰ *Nkandla* case paras 18-19.

⁹⁵¹ See chapter 3 for discussion on parliamentary oversight. Also see para 4.4.2 in how Parliament failed in oversight of the President.

that the Corruption Act⁹⁵² condemns in that it prohibits ‘gratification’ which includes money, whether cash or otherwise as well as any forbearance to demand any money or money's worth or valuable thing. Moreover the Corruption Act⁹⁵³ includes ‘a reference in this Act to accept or agree or offer to accept any gratification includes demand, ask for, seek, request, solicit, receive or obtain’. The President had knowledge of the non-security nature of the upgrades and did not attempt to stop this as his fiduciary duties require.⁹⁵⁴ This means the President went against the Constitution⁹⁵⁵ which prohibits the executive and deputy ministers to ‘enrich themselves or improperly benefit any other person’. Furthermore, the general offence of corruption as espoused by the Corruption Act also finds application in that:

- ‘any person who, directly or indirectly accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person’.⁹⁵⁶

This resonates with the President having accepted undue benefits paid by the state for the non-security upgrades.

- ‘in order to act, personally or by influencing another person so to act, in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased’.⁹⁵⁷

The President influenced ministers of his cabinet to agree to his undue benefits in terms of the upgrades.

- ‘in order to act, personally or by influencing another person so to act, in a manner that amounts to the abuse of a position of authority; a breach of trust; or the violation of a legal duty or a set of rules, designed to achieve an unjustified result’.⁹⁵⁸

The highest office abused position by indulging in undue gratification.

South Africa is a signatory to the UNCAC and thereby is obligated to recognise and take charge of corruption in public office, which is the key focus of this treaty.⁹⁵⁹ Moreover, the

⁹⁵²S1 (a), (f), (j).

⁹⁵³Section 2(3) (a) (i).

⁹⁵⁴ *Nkandla* case para 35.

⁹⁵⁵ Section 96(2) (c).

⁹⁵⁶ Section 3 (a).

⁹⁵⁷ Section 3(i) (aa).

⁹⁵⁸ Sections 3(ii) (aa), (bb), (cc) and 3(iii).

⁹⁵⁹ See chapter 1 for discussion on this treaty.

UNCAC criminalises illicit enrichment, bribery and embezzlement in the public service.⁹⁶⁰ Regionally the AUCPCC also recognises the threat of public office corruption and promotes the repatriation of stolen assets or money. The President of South Africa violated these treaty obligations as well, obligations, which seek to stunt the proliferation of corruption, worldwide.

It is worth noting although the *Nkandla* issue was very widely publicised by various sections of civil society and the media, but the judiciary did not deem it within their powers to inquire into the allegations.⁹⁶¹ Despite that the state's economic resources were under threat by abuse of the highest public office, the CC kept it distance in terms of separation of powers. A transformative judiciary would be open to new ways in holding government accountable on its duty of care concerning the available resources for housing and other SERs.⁹⁶²

The *Nkandla* judgement should deter future disregard for the PP's remedial action and thereby deter public office corruption.

4.4.4 How does the Constitutional Court view Parliament's role in oversight of the President (the executive)?

In its oversight role it was expected that Parliament would assist the PP in protecting the available resources of the state against abuse. The PP submitted the report to the President and the National Assembly/ Parliament in line with the PP's obligation 'to report on that conduct' which means to report primarily to the National Assembly (NA).⁹⁶³ This was in misguided anticipation that Parliament would provide the necessary oversight as obligated by the Constitution and hold the President accountable as head of the executive.⁹⁶⁴ Regrettably this was not to be because neither the President nor Parliament complied with the remedial action recommended from 2014 until the CC action in 2016.⁹⁶⁵ Parliament owed it to the

⁹⁶⁰ Articles 15, 17, 20-1.

⁹⁶¹ See chapter 6 discussing the liberal approach of the judiciary in India toward corruption.

⁹⁶² See chapter 6 explaining how the judiciary keep government in check on public corruption.

⁹⁶³ *Nkandla* case para 43. Also see Constitution s 182(1) (b).

⁹⁶⁴ See s55 for powers of Parliament. Also see s42 (3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action. Also see chapter 3 for discussion on parliamentary oversight in the realisation of housing.

⁹⁶⁵ See *Nkandla* case.

people to have seen that the President comply with the remedial action and not attempt to absolve the President as it did through its own investigation which amounted to second-guessing the PP.

The CC in *Nkandla* confirmed that Parliament had to ‘act in accordance with and within the limits of, the Constitution, and the supremacy of the Constitution⁹⁶⁶ which required that the obligations imposed by it must be fulfilled’.⁹⁶⁷ Therefore the CC posits that the constitutional obligations of the NA binds it to hold the President to account by facilitating and ensuring compliance with the decision of the PP.⁹⁶⁸ According to the Public Protector Act⁹⁶⁹ the report was a high priority matter that required the urgent attention of, or an intervention by the NA. Moreover, the CC confirmed that holding the executive accountable was a primary and undefined obligation imposed on the NA.⁹⁷⁰ In essence Parliament is constitutionally obliged to scrutinise and oversee executive action and hold the President accountable.⁹⁷¹ In this regard the NA was duty-bound to hold the President accountable in facilitating and ensuring compliance with the PP’s decision.⁹⁷² In its failure of this oversight, Parliament acted inconsistent with the Constitution and unlawfully.⁹⁷³ The CC found that Parliament floundered in its oversight role because it did not give urgent attention to the findings and remedial action suggested in the PP’s Report, in an appropriate manner.⁹⁷⁴ Lest we forget, the people rely on Parliament in its oversight capacity to ensure that their, the people’s interests, are protected by keeping the executive in check. In this regard Parliament failed the people by not upholding its constitutional obligations as representative of those who had mandated oversight through adult suffrage. Furthermore this action by Parliament does not blend with a government set on making a decisive break from the unchecked abuse of state power and resources during the period of parliamentary sovereignty. For this reason the CC is clear in the promotion of constitutionalism, accountability and the rule of law which constitute ‘the

⁹⁶⁶ Section 2.

⁹⁶⁷ *Nkandla* case para 97.

⁹⁶⁸ *Nkandla* case para 97.

⁹⁶⁹ Section 8(2) (b) (iii). This should be read with the constitutional obligation imposed on the PP by s182 (1) (b) and (c).

⁹⁷⁰ *Nkandla* case para 43.

⁹⁷¹ Constitution s42 (3) and s55 (2).

⁹⁷² *Nkandla case* para 97.

⁹⁷³ *Nkandla case* para 99.

⁹⁷⁴ *Nkandla case* para 81.

sharp and mighty sword that stands ready to chop off the ugly head of impunity off its stiffened neck'.⁹⁷⁵

Section 167(4) (e) of the Constitution entrusts the unelected judiciary with the power to ensure that Parliament fulfils its constitutional obligations.⁹⁷⁶ It is this muscle that the CC can flex and inquire to Parliament as to its constitutional obligations insofar as holding the executive to account in its delivery of social housing. More pertinently the Court can ask Parliament on the progress of the SIU Report into corruption in the public housing programme.

The blight on government as recalcitrant and reluctant to implement orders that do not favour them, is explored next.⁹⁷⁷

4.5 Non-compliance by branches and institutions of the state with judicial orders

The CC maintains that:

'In a government of laws, existence of government will be imperilled if it fails to observe the law scrupulously... government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example... if the government becomes the law-breaker, it breeds contempt for the law; it invites every man to become a law unto him; it invites anarchy.'⁹⁷⁸

The separation of powers can only be truly respected if court orders are complied with by government in that judicial orders are precluded to the judiciary's independence and its function as interpreter of rights. Ebrahim J opines that 'if the rights of successful litigants cannot be enforced then the process of taking disputes to court for adjudication would be rendered meaningless.'⁹⁷⁹

⁹⁷⁵*Nkandla case* para 1.

⁹⁷⁶See Constitution s55 'Powers of National Assembly'.

⁹⁷⁷Another case pending before the CC concerning the PP's remit, is the PP's Report '*When Governance and Ethics Fail*' Report No 23 of 2013/2014 dealing with allegations of maladministration and abuse of power at the state broadcaster the SABC.

⁹⁷⁸*Mohamed and Another v the President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) para 68.

⁹⁷⁹*East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health and Others* 2000 (4) All SA 443 (Ck) para 449g.

The court, when deciding an issue, has the power to make any order which is just and equitable,⁹⁸⁰ and order the appropriate relief. Moreover, the Constitution⁹⁸¹ states that ‘an order or decision issued by a court binds all persons to whom and organs of state to which, it applies.’ Furthermore the CC in *Nyathi v MEC for Department of Health Gauteng*⁹⁸² made it clear that ‘[d]eliberate non-compliance with or disobedience of a court order by the state detracts from the ‘dignity, accessibility and effectiveness of the Courts.’⁹⁸³ Moreover, contempt of court orders invokes criminal sanction for a civil proceeding.⁹⁸⁴ This said, the way the common law has developed, the contempt must be deliberate and there must be mala fide.⁹⁸⁵ Therefore disdainful behaviour by public officials against court orders should be appropriately sanctioned in order to deter disregard for independent judicial decisions which pairs with constitutional violation.⁹⁸⁶

Judicial oversight should comfort the public that their SERs are protected in the same way as any other rights-challenge that comes before the court. Despite the risk of criminal sanction, there is a spectre of executive officers refusing to obey court orders because they think it was wrongly granted.⁹⁸⁷ The SCA stressed that ‘wholesale non-compliance with court orders is a distressing phenomenon in the Eastern Cape’.⁹⁸⁸ Due to the state’s poor management of enforceability of court orders, the CC submitted that it had become necessary for this court to oversee the process of compliance with court orders and to ensure ultimately that such compliance was lasting and effective.⁹⁸⁹ Significantly, the judiciary in India keeps government in check on court orders by commissioning people from various credible sectors

⁹⁸⁰Constitution s172 (1) (b).

⁹⁸¹Section 165(5).

⁹⁸²2008 (5) SA 94 (CC) (hereafter *Nyathi* CC)

⁹⁸³*Nyathi* CC (2008) para 44.

⁹⁸⁴See Van Winsen L Cilliers A & Loots C in Herbstein J and Van Winsen L (eds) *The Civil Practice of the Superior Courts in South Africa* 4 ed (1997) for more on these procedures.

⁹⁸⁵*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 8. Applicant failed to establish that AG acted wilfully or mala fide in failing to comply with a court order.

⁹⁸⁶Also see Lawyers and Jurists ‘Judicial Enforcement of Social Economic Cultural Rights (2010) available at <http://www.lawyersjurists.com/articles-reports-journals/law-and-ethics/judicial-enforcement-of-social-economic-cultural-rights/#102> (accessed on 20 April 2014)

⁹⁸⁷*S v Mamabolo (ETV and Others Intervening)* 2001 (3) SA 409 (CC) para 65.

⁹⁸⁸*Jayiya v Member of the Executive Council for Welfare, Eastern Cape & Another* 2004 (2) SA 611 (SCA) para 17 in this case the payment of a social grant was ordered by the court but the provincial government failed to oblige. Also see *City of Cape Town v Rudoph and Others* 2004 (5) SA 39 (C) where the state also failed with court orders.

⁹⁸⁹*Nyathi* CC para 83. The minister was ordered to provide the CC with a list of all unsatisfied court orders against all national and provincial state departments by no later than 31 July 2008. The minister was also required to provide the CC with a plan of the steps Government would take to ensure speedy settlement of unsatisfied court orders by no later than 31 July 2008.

in society to oversee implementation or to investigate the veracity of claims of abuse of SERs on the part of public officials.⁹⁹⁰

The PFMA (and its Regulations) contains provisions for internal disciplinary proceedings being instituted against public officials and for criminal offences in this regard.⁹⁹¹ The CC found these procedures to be of no assistance in light of the ‘persistent inefficiency within state departments’.⁹⁹² Therefore the CC bemoans ‘the failure of the state to edify its functionaries about the very legislation which governs their duties as unacceptable’.⁹⁹³

The sporadic nature of disciplinary action against defaulting public officials aggravates continued ineffective and inefficient administration. Moreover, the PFMA do not deal effectively with accounting authorities who disobey court orders.⁹⁹⁴ Non-compliance with court orders amounts to a breach of constitutional duty and has the unintended consequences of threatening the legitimacy of the BoR as a whole and also the integrity of the judiciary.⁹⁹⁵

Socio-economic rights cases have suffered a fair share of government disobedience when it comes to judicial orders. Although the government respected the order in *TAC* by supplying anti-retroviral drugs to pregnant women, there was real fear that the order would not be respected. This was because the minister of health had submitted on national television that the courts and the judiciary must also listen to the authorities.⁹⁹⁶ Nonetheless the CC showed its respect for the separation of powers by declining to exercise supervisory jurisdiction on the basis that ‘[t]he government has always respected and executed orders of this Court, therefore there is no reason to believe that it will not do so in the present case’.⁹⁹⁷ The CC generously gave the government the benefit of the doubt despite the latter’s track record on delay or non-compliance with court orders.

⁹⁹⁰See chapter 6 for discussion on the Indian judiciary’s liberal approach in conserving SERs.

⁹⁹¹See chapter 5 for discussion on this legislation that overarches public spending in National and Provincial government.

⁹⁹²*Nyathi* CC (2008) para 72.

⁹⁹³*Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) para 452 H (Hereafter *Mjeni*).

⁹⁹⁴*Nyathi* CC (2008) paras 70-4. It is not clear whether financial misconduct (as provided for in the PFMA and its Regulations) includes failure to pay judgment debts.

⁹⁹⁵*Mjeni* para 452 H.

⁹⁹⁶SABC available at <http://www.journaids.org/politics/hiv.php#pmtctpolitics> (accessed on 1 September 2014) the minister was quickly made to retract the statement. Also see T Roux ‘Principle and Pragmatism on the Constitutional Court of South Africa’ (2009) 7(1) *International Journal of Constitutional Law* 124.

⁹⁹⁷See *TAC* paras 107-13 for discussion on the use of structural interdicts in SERs judgments.

In contrast, it remains true that the orders issued in the earlier *Grootboom* to house the most desperate first, were not been met and people continue to live in the same intolerable conditions.⁹⁹⁸ The lack of judicial oversight has in effect left the government complacent in delivering basic shelter to the most desperate, 16 years since *Grootboom*. A further example, more recently in September 2012 (pursuant to a 2009 order) the HC⁹⁹⁹ granted an order which required a mayor, city manager and director of housing to take all the necessary steps within three months to provide permanent housing for 37 families. This judgement came in the wake of an order granted by the same court on 6 March 2009 to relocate the said families to a transit camp, due to road construction, for a period of one year, but two years later the families were still living in intolerable conditions. The Court warned that the respondents (the government) were ‘constitutionally and statutorily obliged to take all necessary steps’ to comply with the 2009 order.¹⁰⁰⁰ Thus the government were in contempt of court for not implementing the courts order to move the families back to their original habitat in 2010.

In 2013 the City of Johannesburg’s failure to comply with a court order to house a group of people facing eviction from private property, led to the CC issuing a complex order.¹⁰⁰¹ This order attempted to deal with root causes in the general inability of the government to fulfil its obligations under section 26. The Court expressed regret over the City’s repeated failures to accommodate the occupants who in turn demonstrated a broader failure to implement the planning, budget and policy requirements for housing as nuanced in *Blue Moonlight*.¹⁰⁰²

A further example where the court was at odds with government for not obeying its order occurred in 2006 when the court stated that the government’s failure to comply with court orders seriously undermined the role of courts and threaten to bring about a ‘grave

⁹⁹⁸*Grootboom*, para 97. In *Grootboom* the CC made an obiter remark that the SAHRC (which appeared as amicus curiae in the case) should ‘monitor and report’ on the state’s progress in complying with this judgment. However, the Court did not incorporate any oversight measures in its order and as a consequence, when the Commission attempted to report back to the Court on the ongoing intolerable conditions still prevailing in the claimant community, the Court refused to engage with it.

⁹⁹⁹*Mchunu and Others v the Executive Mayor, Ethekwini Municipality and Others* 2013 (1) SA 555 (KZD) para 21 (hereafter *Mchunu*).

¹⁰⁰⁰*Mchunu* (2012) para 21.

¹⁰⁰¹*Hlophé and Others v City of Johannesburg Metropolitan Municipality and Others* 2013 (4) SA 212 (GSJ) para 27. This case was one of the first applying the CC’s holding that the government must budget for those in destitute situations, as in *Blue Moonlight*. See chapter 2 for discussion on *Blue Moonlight*.

¹⁰⁰²The CC held that municipalities have an independent obligation to plan and budget for the emergency accommodation needs of people evicted from private property (this was already clarified in *Grootboom*).

constitutional crisis'.¹⁰⁰³ According to the Court, unless section 3 of the State Liability Act¹⁰⁰⁴ was to be declared unconstitutional, there would be no mechanism to imprison public officials for having failed to enforce court orders.¹⁰⁰⁵ Felicitously, this desire of the court was met in *Nyathi*¹⁰⁰⁶ where the High Court declared section 3 of the Act to be inconsistent with the Constitution and hence invalid. The following portion of section 3 of the Act was declared invalid: 'no execution, attachment or like process shall be issued against a defendant or a respondent in any such action or proceedings or against the property of the State.'¹⁰⁰⁷ The State Liability Act was in need of amendment due to the fact that section 3 effectively placed the state above the law. The amendment was necessary because the CC concluded that the government and its officials often failed to honour their constitutional and moral obligations by their non-compliance with court orders.¹⁰⁰⁸ Moreover section 3 limited the rights contained in sections 9(1), 10 and 34 of the Constitution.¹⁰⁰⁹

In satisfaction of the judgement, final court orders sounding in money, the substitution of section 3 of the principle Act 20 of 57 was amended as follow:

'An accounting officer of a department who fails to comply with any provision of this section, or any applicable regulation, instruction, circular, guideline, reporting rule or directive made or issued by the relevant treasury in order to ensure the satisfaction of final

¹⁰⁰³*EN and Others v The Government of South Africa and Others* (2006) Durban and Coast Local Division, case no. 4578/06 (unreported) para 33 (*hereafter EN and Others*).

¹⁰⁰⁴Act 20 of 1957 ss 3(3) (b) (ii) to (16) apply in respect of a final court order sounding in money against a department, the amendment is aimed at regulating the manner in which a final court order sounding in money against the State must be satisfied.

¹⁰⁰⁵*EN and Others* (2006) para 32.

¹⁰⁰⁶*Nyathi* CC (2008) paras 16, 23, 59-63. Mr Nyathi was offered compensation by the court due to negligence in a state hospital, leaving him totally and permanently disabled and unable to care for his family. The court ordered compensation of R1 496 000 but this relief was not forthcoming from the state. Nyathi sought an order (a) declaring section 3 of the Act unconstitutional; (b) compelling the MEC to comply with the court order within three days of said order. The HC found that reasons for not instituting the court order include pure negligence, incompetence or laziness paras 13-15. The CC found the state's conduct was a 'negligent' disregard of an existing court order.

¹⁰⁰⁷*Nyathi* HC para 30.

¹⁰⁰⁸*Nyathi* CC (2008) para 44.

¹⁰⁰⁹*Nyathi* CC (2008) paras 46 -7, 91; Also see *Minister for Justice and Constitutional Development v Nyathi* 2010 (4) SA 567 (CC) where the minister applied to the CC for an extension of the period of suspension of the CC order of constitutional invalidity. The CC in the 2010 case extended the period of suspension of invalidity from the initial 31 August 2009 to 31 August 2011. This implied that the necessary national legislation that would give effect to the decision in the 2008 CC case had to be enacted, assented to and commence by not later than 31 August 2011. Within this context, the State Liability Amendment Bill, 2011 was introduced to the Portfolio Committee concerned on 4 February 2011 available at <http://www.pmg.org.za/billsstatus/proceedings> (accessed on 4 September 2014) also see Memorandum on the Objects of the State Liability Amendment Bill, 2011 par 3.2 available at <http://www.pmg.org.za/report/20110622-committee-deliberations-state-liability-amendment-bill-b2b-2011> (accessed on 4 September 2014).

court orders and adherence to this section, constitutes financial misconduct as referred to in the PFMA, and is guilty of an offence provided for in that Act. In addition, the accounting officer is explicitly prohibited from assigning to any other departmental official, his or her duty to ensure the timeous satisfaction of final court order. The accounting officer retains full responsibility, accountability and liability as contemplated in the PFMA – also in respect of financial misconduct as provided for in clause 16 of the State Liability Amendment Act.¹⁰¹⁰

Updating legislation in an effort to make government compliant with court orders is commendable. Nonetheless, the issuance of contempt of court orders has the potential to ensure compliance with court orders. Contempt orders will be valuable in ensuring compliance with SERs but will only be useful if the court actually issues such orders.¹⁰¹¹ Constitutionally the government fails in its obligations when it finds itself in contempt of court orders and consequences should bear on them for their recalcitrance.

English courts are of the view that the executive can be held accountable for failure to comply if it does not follow through with the steps it has taken and promises it made insofar as realising SERs for specific groups is concerned.¹⁰¹² Thus, instead of ignoring the fact that their orders in *Grootboom* were not met, the judiciary in South Africa could have taken a more progressive and pro-active stance in hold the executive to account.¹⁰¹³ This means, instead of having to waiting for civil society to raise the issue of non-compliance the CC could mero motu raise a contempt of court order compelling the executive to report on the progression of housing for those living in intolerable conditions and thereby hold government to its constitutional promises of improving the quality of life for all.¹⁰¹⁴

More specifically, the CC should hold government accountable for not progressively easing the plight of the most impoverished as held in *Grootboom*. Courtis argues that clearly defined acts or omissions that are required by a duty, allow for clear judicial remedies without the need to consider a variety of policy choices.¹⁰¹⁵ Furthermore in *Nyathi* the CC stated the fact

¹⁰¹⁰State Liability Amendment Act 14 of 2011 in GG no 34545 22 of 22 August 2011. Also see Olivier N J & Williams C 'State Liability for Final Court Orders Sounding in Money: at Long Last Alignment with the Constitution (2011) 32 *Obiter* 489.

¹⁰¹¹ See chapter 6 discussing how the judiciary in India has imprisoned a senior minister and public officials for contempt of court orders

¹⁰¹² Courtis (2008) 21.

¹⁰¹³ See chapter 6 on the judiciary in India's approach to government's mischief.

¹⁰¹⁴ See Constitution preamble. See chapter 6 how the judiciary in India does this.

¹⁰¹⁵ Courtis (2008) 84.

that ‘some officials do not know what their responsibilities are and legal representatives do not know who the responsible functionaries are, does not justify non-compliance.’¹⁰¹⁶ Continued disregard of court orders for improvement on SERs is retrogressive and points to a failure in good governance.¹⁰¹⁷

4.5 The National Prosecuting Authority (NPA) and judicial orders

The disobedience of government regarding court orders is not the only thing that this jurisdiction grapples with. Malfeasance in the public service is rampant thus leaves the state’s economic resources exposed to abuse and impedes access to much needed housing.¹⁰¹⁸ The NPA is also under scrutiny for its bias towards the current President in that it has no appetite to prosecute him on the 783 charges of fraud, corruption and racketeering. In addition to the first citizen being found to have abused the available resources of the state for personal gain, he is also beleaguered with these charges in a separate protracted legal battle. President Zuma was indicted and the charges served on him on 28 December 2007.¹⁰¹⁹

4.5.1 Protracted time-line of the NPA keeping the President from answering to criminal charges.

This protracted litigation stems from the relationship that Zuma cultivated with Shaik who between 1995 and 2002 made numerous payments of money to or on behalf of Zuma.¹⁰²⁰ Shaik was charged, trailed and convicted for this ‘unholy’ relationship. Shortly after this conviction the NPA announced that it decided to prosecute Zuma and the indictment mirrored counts one to three of the charges on which Shaik was convicted in contravening the Corruption Act of 1992.¹⁰²¹ For the sake of cogency the time-line in attempting to get the NPA to prosecute Zuma is narrated as follow:

¹⁰¹⁶Nyathi CC (2008) paras 79-82

¹⁰¹⁷Also see *South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others* 2015 (4) All SA 719 (SCA). Where the court confirmed that the chief operating officer’ appointment was irrational and should be set aside but he remains in office.

¹⁰¹⁸See chapter 5 for discussion on this behaviour in government.

¹⁰¹⁹The President faced charges of fraud, racketeering and corruption relating to an investigation started in 2001 into to payments Zuma received from Shabir Shaik, allegedly related to the arms deal, where he allegedly allowed his name to be used for business deals and agreed to protect one of the companies involved.

¹⁰²⁰See *S v Shaik* 2007 (1) SACR 142 (D); *S v Shaik* 2007 2007 (2) All SA 9 (SCA) and *S v Shaik* 2008 (2) SA 208 (CC).

¹⁰²¹Section 1(1) (a) (i) and (ii).

20 September 2006: *S v Zuma and Others* (CC358/05) [2006] ZAKZHC 22 (charges struck from the roll)

Zuma was indicted on 29 June 2005 on contravening sections of the Corruption Act 12 of 2004 and Prevention of Organised Crime Act 121 of 1998.¹⁰²² However, in the above case Msimang J refused the postponement of the prosecution's case because the state was not ready to proceed to trial and therefore the matter was struck from the roll, but the charges were not dismissed.¹⁰²³ The HC struck the matter off the roll in terms of section 342A of the Criminal Procedure Act¹⁰²⁴ and imposed conditions relating to the reinstatement of the prosecution.¹⁰²⁵ The Court said that the NPA was at liberty to re-file the charges at anytime, when ready.¹⁰²⁶

27 December 2007: Zuma re-charged

Zuma was re-charged in accordance with charges contained in an indictment of 27 December 2007 which was served on him on 28 December 2007.¹⁰²⁷

12 September 2008: *Zuma v National Director of Public Prosecutions* (2008) ZAKZHC (charges 'dismissed')

Zuma launched a review application in the HC against the decision to prosecute him in terms of the Constitution¹⁷⁹ (5) (d) which allowed for representations to the NPA by the accused.¹⁰²⁸ Nicholson J ruled in favour of Zuma to have corruption charges dismissed and

¹⁰²²Also see Bhardwaj V 'Zuma's corruption charges: A journey through court judgments in Africa Check 31 May 2005 available at <https://africacheck.org/how-to-fact-check/factsheets-and-guides/zumas-corruption-charges-a-journey-through-court-judgments/> (accessed on 18 November 2016)

¹⁰²³Page 25.

¹⁰²⁴Act 51 of 1977.

¹⁰²⁵Page 3.

¹⁰²⁶Page 3. Also see *Jacob Gedleyihlekisa Zuma versus the National Director of Public Prosecutions* 2008 ZACC 14 (CCT 92/07) paras 41, 75.

¹⁰²⁷According to the Court in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) para 1 'In essence, Mr Zuma is said to have been accused of providing political patronage and protection in exchange for financial reward'. The indictment was served on Zuma shortly after he had been elected President of the ANC in 2007.

¹⁰²⁸Section 179(5)(d) which provides as follow: 'The National Director of Public Prosecutions—(d) may review a decision to prosecute or not to prosecute, after consulting the relevant Director of Public Prosecutions and after taking representations within a period specified by the National Director of Public Prosecutions, from the following:(i)The accused person;(ii)The complainant;(iii)Any other person or party whom the National Director

agreed there were signs of a conspiracy.¹⁰²⁹ The Court declared that ‘the decision taken by the NPA during 28 December 2007 to prosecute Zuma is invalid and is set aside’.¹⁰³⁰ The Court held that this application dealt with a procedural point relating to the right of Zuma to make representations before being charged. Thus Nicholson J set aside the NPA’s decision to charge Zuma as invalid in order for him (Zuma) to make representations to the NPA. It is important to note that the HC stated that once these matters were cured the NPA has the freedom to proceed against Zuma.¹⁰³¹

12 January 2009: *National Director of Public Prosecutions v Zuma* 2009 (1) SACR 361 (SCA) (charges not dismissed)

On appeal against the HC decision to have the prosecution set aside, the SCA held that the reliance of Zuma on section 179 (5) (d) was misplaced and the court below relied on incorrect principles by having its facts wrong.¹⁰³² The SCA purported that most of the allegations were irrelevant and based on suspicion and not on fact.¹⁰³³ The SCA overturned Nicholson’s judgment and held that the decision not to prosecute is reviewable on the basis of the principle of legality.¹⁰³⁴ Thus effectively the charges were never dropped because the case went to the SCA which found different from the HC. In essence, whilst the end of the appeal was pending the order of the HC was ‘suspended’ awaiting the outcome of the appeal. When the SCA found that the HC had erred, the ‘suspended’ order of the HC was dismissed and superseded by the SCA findings. Thus the charges were not dismissed because the Nicholson J order could never be implemented. Subsequent to this the NPA took the liberty to drop the charges against Zuma.

1 April 2009: discontinuation of prosecution of Zuma

considers to be relevant.’ Important is that this section does not deal with the rights of an accused which is covered in s35 of the BoR.

¹⁰²⁹ Paragraph 191.

¹⁰³⁰ Paragraph 247.

¹⁰³¹ Paragraph 246.

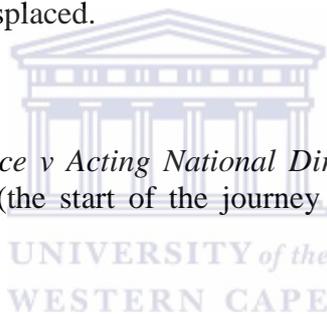
¹⁰³² Paragraphs 75, 82.

¹⁰³³ Paragraph 81.

¹⁰³⁴ Paragraphs 36-38. Also see *Freedom Under Law v National Director of Public Prosecutions and Other* 2014(4) SA 298 (SCA). It is important to note that Zuma was in the running for the national and provincial elections which were scheduled to take place on 22 March 2009 and the inauguration of the President of the Republic of South Africa would take place on 9 May 2009.

The NPA took a decision to discontinue the prosecution against Zuma and announced it publicly on 6 April 2009.¹⁰³⁵ The NPA's objective in discontinuing the prosecution was underpinned by the abuse of power doctrine and in protection of the integrity of the NPA and its processes.¹⁰³⁶ It should be noted that, the NPA relied on the powers they derive to prosecute from section 179 of the Constitution read with the national legislation enacted in terms of section 179(7) of the NPA Act.¹⁰³⁷

It is important to pause here to note that subsequently in 2016 the Court maintained that the NPA made a half-hearted attempt at investigating and verifying the allegations before having taken the decision not to prosecute Zuma.¹⁰³⁸ The Court said this was exacerbated by the NPA having breached the audi alteram partem rule by not having heard the other side's view before making an intervention to drop the charges.¹⁰³⁹ The SCA¹⁰⁴⁰ explained the powers of the NPA in reviewing a decision to prosecute and held that section 179 (5) had no application and Zuma's reliance on it was misplaced.



7 April 2009 *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 (2) SACR 1 (GP) (the start of the journey to the main judgement discussed below)

The decision to discontinue the prosecution on 6 April 2009 triggered the above application in an attempt to review, correct and set aside the decision taken by the NPA to discontinue the criminal prosecution of Zuma. The challenge was to get the President to answer questions of law relating to the 783 criminal charges. Both the NPA and the 'accused' Zuma (President) opposed this application. On the seven year journey of this case the following action took place:

¹⁰³⁵See main judgement below para 39 for reasons to discontinue the prosecution. Mr Zuma was sworn in as President on 9 May 2009, the month after the decision to discontinue the charges was taken.

¹⁰³⁶See *National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)* (hereafter *NDPP v Zuma* (2009) SCA) for the manner in which the NPA must approach allegations of abuse of process doctrine. Paragraph 37 states 'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, **something not alleged by Mr Zuma and which in any event can only be determined once criminal proceedings have been concluded...**' (Court emphasis)

¹⁰³⁷Act 32 of 1998, part 5 deals with withdrawal of cases and stopping of prosecutions.

¹⁰³⁸See *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 (2) SACR 1 (GP) (hereafter *DA v Zuma and NPA* (2016) GP) para 53.

¹⁰³⁹See *DA v Zuma and NPA* (2016) GP para 53. In light of the President making representations to the NPA, the DA also asked the NPA for an opportunity to make presentation but was refused.

¹⁰⁴⁰*NDPP v Zuma* (2009) SCA paras 70, 71, 75.

8 April 2009: charges against Zuma withdrawn

Whilst the review application was pending the NPA, after announcing that they are dropping the charges against Zuma, applied to the Kwa Zulu Natal High Court to have the charges formally withdrawn. As such there was no pending litigation before court against Zuma at this stage.

20 March 2012: *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA)¹⁰⁴¹

In further attempts to keep criminal prosecution at bay for Zuma, the NPA questioned the standing of the applicants in bringing a review application against the dropping of charges of Zuma. The SCA had to be approached to clarify that the applicants did indeed have the locus standi. The Court referred to the litigation history between the NPA and Zuma as ‘long and troubled’ inasmuch as the law reports were replete with judgements in this regard.¹⁰⁴² The SCA reiterated that the reviewability to discontinue the prosecution was considered and dealt with.¹⁰⁴³ The SCA had by then already concluded that the discontinuing of a prosecution was reviewable on grounds of legality and irrationality.¹⁰⁴⁴

29 April 2016: *Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 (2) SACR 1 (GP) (**main judgment**)

The thrust of the main judgment clarified that the acting head of the NPA, in not referring the complaint of abuse of process and related allegations to court, rendered the decision to drop the charges against Zuma, irrational.¹⁰⁴⁵ This was exacerbated by him taking the decision on his own (on 6 April 2009) and not engaging in discussions with senior members of the NPA

¹⁰⁴¹ Hereafter *DA v Acting NDPP and Another* (2012) SCA, on appeal from: North Gauteng High Court (Pretoria) (Ranchod J sitting as court of first instance).

¹⁰⁴² *DA v Acting NDPP and Another* (2012) SCA para 2. See paras 3-7 for a brief summary and a description of the NPA’s initial decision to indict Zuma in 2007.

¹⁰⁴³ *DA v Acting NDPP and Another* (2012) SCA paras 23-30.

¹⁰⁴⁴ For history of reviewability see *Pharmaceutical Manufacturers Association of South Africa and Another In Re: Ex Parte the President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) and *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC). Also more recently in *The NDPP v Freedom under Law* 2014 (4) SA 298 (SCA) para 29.

¹⁰⁴⁵ Paragraph 83.

in order to obtain their views on this subject.¹⁰⁴⁶ This action caused there to be no rational connection between the need to protect the integrity of the NPA and the suspension of the prosecution against Zuma.¹⁰⁴⁷ The Court held that the decision to stop the prosecution was not to be made by the NPA but rather fell in the ambit of a court of law in determination of the principles of abuse of process.¹⁰⁴⁸ The action of the NPA in dropping the charges against Zuma was disingenuous because it failed to protect the public from serious crime.¹⁰⁴⁹ Thus instead of prosecuting without fear or favour as expected from the NPA, they sought to shield the President from prosecution.

The Court stated that the acting head of the NPA did not allow himself enough time to consider the question whether the decision he was about to take, could be seen by others facing similar charges in South Africa, 'as a breach of the principles of equality before the law'.¹⁰⁵⁰ Moreover, the Court said that 'it will be an abuse of process to discontinue charges against people of high profile or standing in the community'.¹⁰⁵¹ The Court found the NPA to have acted under pressure and thereby the decision to stay the prosecution of Zuma had been an irrational decision. In making this decision the acting head found himself to be in breach of the oath of office which demanded that he acts independently, without fear or favour.¹⁰⁵²

For these reasons the Court found that Zuma should face the charges as outlined in the indictment.¹⁰⁵³ In summation the Court found that the decision taken on 6 April 2009 by the acting head of the NPA to discontinue the prosecution against Zuma, should be reviewed and set aside.¹⁰⁵⁴ The Court crystallised that the NPA's decision to terminate the process due to the alleged abuse or manipulation of the prosecution process was irrational.¹⁰⁵⁵ This boiled down to the fact that the 783 charges of inter alia corruption, racketeering and fraud against Zuma remained and can only be set aside by the court. However the NPA was steadfast in their protection of Zuma against prosecution and thereby appealed the decision.

¹⁰⁴⁶ Paragraph 83.

¹⁰⁴⁷ Paragraph 88.

¹⁰⁴⁸ Paragraph 65.

¹⁰⁴⁹ Paragraph 66.

¹⁰⁵⁰ Paragraph 90.

¹⁰⁵¹ Paragraph 90.

¹⁰⁵² Paragraph 92. See s32 of the NPA Act for the full text of the oath.

¹⁰⁵³ Paragraph 94.

¹⁰⁵⁴ Paragraph 92. Also see *DA v Acting NDPP and Another* (2012) SCA from para 23 where the reviewability of a decision to discontinue a prosecution was considered and dealt with.

¹⁰⁵⁵ Paragraph 21.

24 June 2016: *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (2016) ZAGPPHC

The NPA continued to collude with the President and appealed against the main judgement, which failed in the above case on 24 June 2016 where the Court¹⁰⁵⁶ reconfirmed:

‘The setting-aside of the withdrawal of criminal charges and the disciplinary proceedings has the effect that the charges and the proceedings are automatically reinstated, and it is for the executive authorities to deal with them...’¹⁰⁵⁷

The Pretoria High Court ruled that the decision to withdraw the 783 criminal charges against the President was not justified. Thus when the North Gauteng High Court in 2012¹⁰⁵⁸ declared invalid the decision of the NPA to discontinue the prosecution of the President, the original decision to charge him for corruption, racketeering and fraud was reinstated. Therefore, unless the case is appealed, the NPA is now legally obliged to prosecute the President for various criminal offences.¹⁰⁵⁹ In appealing this case, the NPA will in essence confirm that 873 charges do not suffice as sufficient evidence to prosecute. This action by the NPA would make a mockery of the use of prima facie evidence which is used to arrest a suspect of crime.

In this case an anomalous situation exist whereby the NPA did not work with the court and follow through with the prosecution of Zuma as expected, but rather looked into the discontinuing thereof. This is a rather bizarre situation in that the mandate of a national prosecuting authority would conventionally be to prosecute in light of so many serious charges. This is also irregular as the NPA chose to ignore the findings of the SCA stating that the charges stood. This, over and above the fact that judicial powers are to be respected by the orders they issue.

Needless to say, South Africa now has a sitting President with 783 criminal charges to

¹⁰⁵⁶Paragraph 31.

¹⁰⁵⁷The HC quoted from the *NDPP v Freedom Under Law* 2014 (4) SA 298 (SCA) para 51.

¹⁰⁵⁸*DA v acting NDPP and Another* (2012) SCA.

¹⁰⁵⁹The President has the option to approach the SCA and/or the CC in appeal. The chances of another court finding different, is slim. Also see De Vos P blogging under ‘Constitutionally Speaking’.

answer for. Whether the NPA will do the right thing and take heed of what the Court ordered is difficult to gauge because their quest to prosecute offenders seems to not include the President. This rings true by the recognition of the arbitrary and irrational decision in the first place to drop the 783 charges. It will indeed be a watershed moment to see if the NPA will have the appetite to prosecute the first citizen under the Corruption Act of 2004¹⁰⁶⁰ which makes specific reference to dishonest behaviour by public officers.¹⁰⁶¹

An institution of democracy such as the ‘independent’ NPA is being compromised by effectively preventing the prosecution of an accused person with 783 charges. It is not the role of the NPA to aid and abet alleged malfeasance. On the contrary.

4.6 Conclusion

The judiciary should embrace a more progressive stance as protector of the right to housing in particular and SERs in general. Whilst the constitutional demands for a transformative society are clear, the judiciary has not embraced this vision to its fullest. This is evident in the fact that despite the CCs robust orders in *Grootboom* to house the most desperate first, government has not delivered on this order. A judiciary set on transforming deprivation regarding the right to housing, should actively seek government to report on its progress in this regard.

Contemporary jurisprudence has shown that the reasonableness test shies away from pointing out the minimum requirement for a happy life. It is time for the CC to shed its conservative approach and challenge government on its tardiness in the progressive realisation of housing, to deliver the minimum in basic housing. The approach of the judiciary must be influenced by the recently ratified ICESCR which is underpinned by the minimum core approach.

As seen from the PP’s Report and the *Nkandla* case even the first citizen has managed to elevate his private needs above that of the impoverished, by abusing the available resources of the state for personal benefit, when desperation for adequate basic shelter still runs high. This behaviour shows that the leadership does not necessarily conform to constitutional

¹⁰⁶⁰Section 4 relating to offences in respect of corrupt activities relating to public officers. This section resonates with the Corruption Act 94 of 1992 section 1(1) (a) (i) and (ii) which is the original count one charge on Shaik’s indictment.

¹⁰⁶¹ See chapter 1 discussing how sporadic this Act has been used against public officers.

obligations or international treaty prescripts. However the CCs response on the binding remedial powers of the PP, puts the spotlight on public office abuse and if enacted would surely act as a deterrent. The judiciary's intolerance of public office corruption was crystallised in the *Nkandla* case. The message to the public service was clear to the effect that the abuse of the state's available resources was unconstitutional and perpetrators would be sanctioned.

This response by the CC on public office abuse shows that the Court can reprimand the other branches of government on its abuse of the available resources for housing. This is the oversight required from a transformative judiciary, which is proactive in protecting the available resources for housing against malfeasance. The role of the judiciary is all the more crucial in light of the view that Parliament is failing in its oversight and there is no other impediment to malfeasance on the part of the executive, the President and public officials

Falling short on the court's recommendations should not be dealt with lightly because this indicates a judiciary that is complacent in its dealings with branches of government that disregard its independence and its custodianship of a transformative Constitution. As it is, there are no consequences for the flagrant disregard of court orders and this reveals a judiciary that tolerates government's lax time-frames when it comes to housing the indigent. Moreover, the institutions of democracy are under severe threat by the disregard for court orders something to which the judiciary response feebly. This is particularly so in light of the fact as evidence suggest that the other two branches of government, the executive, including the highest office, the President and the Legislature cannot be trusted to uphold the Constitution.

The public perception that corruption goes unpunished feeds into the inaction of the NPA to prosecute the President. This leaves a public perception that not only is the NPA reluctant to prosecute the first citizen but more seriously that the latter is in cahoots with the NPA and thereby above the law. This leads to a crippling cynicism with regard to the state and its obligations. The NPA cannot ignore the omnipresence of corruption in government, testing the country and particularly the public housing programme. Thus the NPA is expected to be proactive in rooting out corruption that has the effect of retarding the delivery of SERs. This feat should start by the highest office in the land leading by example and if not, public morality suffers.

Furthermore the CC cannot simply ignore the omnipresence of malfeasance in government's housing programme and the reluctance of the government to act on confirmed cases of mischief, as is explored next.



Chapter 5

Malfeasance in the Public-sector (housing): South Africa's Response to Legislative and Administrative Measures

5.1 Introduction

Aristotle submits:

'For where the laws do not rule there is no regime.'¹⁰⁶² Thus in well-blended regimes, one should watch out to ensure there are no transgressions of the laws, and above all be on guard against small ones... to have the laws and management of the rest arranged in such a way that it is impossible to profit from the offices...'.¹⁰⁶³ Therefore whatever regime is in power should allow the laws to rule because ruling in accordance with ones wishes is one of the hallmarks of tyranny (it is the same way masters rule over their slaves).¹⁰⁶⁴

The importance of economic resources to the realisation of housing makes it necessary to explore how the government applies laws that should protect this important component against state abuse. It is incumbent on government to protect the resources for public spending, through a process of public procurement prescribed by legislation.¹⁰⁶⁵ Hence government should provide checks and balances on how the economic resources are dispersed for housing, for example. As it stands, when a housing project is identified, a procurement process is used to secure the service provider who best fits the profile to deliver on specifics. This process of procurement is underscored by laws and regulations.¹⁰⁶⁶

These procurement processes for housing have been tainted by 'irregularities' that have seen public officials falling prey to non-compliance of the laws and the policies in place. The result of this has led to economic resources unlawfully being paid for housing projects that do not meet the criteria for payment. The aim of this chapter is to highlight the measures in place to combat malfeasance, particularly in public procurement (for housing), in order to crystallise how public officials fare in the application of these measures. In the pursuit of this

¹⁰⁶²Clayton E *The Politics: Book III 'Who Should Rule'* para 9(c) (no date).

¹⁰⁶³Clayton E *The Politics: Book V 'How to Preserve Regimes'* para 11(b) (no date).

¹⁰⁶⁴Clayton E *The Politics: Book V 'How to Preserve Regimes'* para 11(b).

¹⁰⁶⁵The state spends up to R500 billion on goods and services each year through public procurement.

¹⁰⁶⁶See para 5.3 for these laws.

the present chapter will outline the procurement laws and the code of ethics that public officials are supposed to follow in order to keep the public service honourable.

Furthermore, allegations of malfeasance in the public housing programme have prompted the President to call on the Special Investigating Unit (SIU) to investigate and report to Parliament on this situation. This chapter will provide a profile of the SIU, the most notable administrative measure used to investigate corruption in public housing. In addition, this chapter also attempts to analyse the comprehensive, preliminary reports of the SIU in order to highlight the completed findings thus far on these allegations. The ultimate aim is to demonstrate that errant behaviour by public officials has led to delay in the delivery of housing and thereby suppressed the just recipient's fulfilment of this human right.

This chapter also examine South Africa's response to implementation of international obligations. Therefore the present chapter touches on how international measures influence the prevention and combating of corruption in public procurement. Keeping the international comparison in mind, the main anti-corruption legislation and other measures employed by India are discussed in an effort to enrich South Africa's jurisprudence in this regard. The discussion on India is a prelude to chapter six that provides an in-depth comparative analysis of how the Indian judiciary approaches the enforcement of SERs and the combating of corruption in the public sector.

5.2 Good governance and accountability on economic resources

Good governance is broadly defined as the responsible use of political authority to manage a nation's affairs.¹⁰⁶⁷ This includes rule of law in compliance with a constitution, maintaining efficiency and accountability, creating awareness in the prevention of corruption in the public sector, socio-economic progress and protecting human rights. Furthermore, in South Africa good governance should be underpinned by social justice which lends attention to the realisation of SERs.

¹⁰⁶⁷Reif L C 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) *Harvard Human Rights Journal* 16. Also see Reagan O R 'NEPAD and Good Governance' 2002 *SAJ Int'l Aff* 189.

The Parliament of South Africa is tasked with an oversight role over the executive and thereby Parliament is the main force behind keeping the social justice project alive and forward moving.¹⁰⁶⁸ In this endeavour Parliament should ensure that the executive fulfil their SERs obligations by delivering social housing timeously. Moreover the available resources earmarked to realise housing should be protected against malfeasance in the public service. Although the SIU Reports were presented to Parliament, in 2011, 2012 and 2013,¹⁰⁶⁹ to date this branch of government has not called the SIU to account on the implementation of its findings or finalisation of its investigations. The government's slow response to the realisation of housing the most desperate could be improved if there had been a sharper focus by government on how public officials attended to the distribution of budgeted resources. The importance of accountability and transparency underlined the latest CC ruling in *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*¹⁰⁷⁰ where the court stated that:

‘The founding values of our Constitution¹⁰⁷¹ include a democratic government based on the principles of accountability, responsiveness and openness thus the public administration must be accountable.¹⁰⁷² Accountability is ensured by financial compliance with the Public Finance Management Act and general ministerial oversight.’¹⁰⁷³

Furthermore, the importance of accountability has been highlighted by the Institute for Security Studies (ISS), illuminating the fact that corruption remains an ongoing obstacle to good governance.¹⁰⁷⁴ Embellishing this are reports on documented fraud and malfeasance

¹⁰⁶⁸ See chapter 3 on parliamentary oversight.

¹⁰⁶⁹ See para 5.4.3

¹⁰⁷⁰ (No 2) 2014 (1) SA 604 (CC) para 50, 65 (hereafter *Allpay* no 2). This case considered irregularities in the competitiveness and cost-effectiveness of the tender process in a bid to outsource the payment of social security grants on behalf of the South African Social Security Agency. Due to the importance of settling the law on procurement irregularities, this case appeared three times before the CC.

¹⁰⁷¹ Section 7.

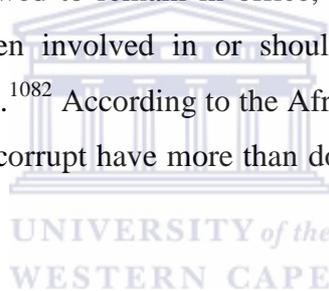
¹⁰⁷² Also see Constitution s195 (1) (f).

¹⁰⁷³ The PMFA 1 of 1999 seeks to regulate financial management in national and provincial government; The Municipal Finance Management Act 56 of 2003 (MFMA) functions in the local government sphere. See chapter 3 for discussion on the PFMA and MFMA. Also see Mubangizi J ‘South African Public Protector, the Ugandan Inspector-General of Government and the Namibian Ombudsman: A Comparative Review of Their Roles in Good Governance and Human Rights Protection’ (2012) 45 *Comp. & Int'l L.J. S. Afr.* 304.

¹⁰⁷⁴ Newham G ‘Why is Corruption Getting Worse in South Africa?’ 13 December 2013 ISS: Crime and Justice Division available at <http://issafrica.org/iss-today/why-is-corruption-getting-worse-in-south-africa> (accessed on 3 March 2015) a report by law firm Edward Nathan Sonnenbergs. Also see Tamukamoyo H ‘No Accurate Stats for Corruption in South Africa ISS 3 November 2014 available at <http://www.issafrica.org/iss-today/no-accurate-stats-for-corruption-in-south-africa> (accessed on 8 April 2015) contends that the 2012/2013 national crime statistics showed that reported commercial crime cases, which include crimes such as corruption, fraud

cases presented to Parliament the amounts involved of which increased from R130 million in 2006/07 to over R1 billion in 2011/2012.¹⁰⁷⁵ Analysts have warned that corruption is the single biggest threat to the RDP.¹⁰⁷⁶ It is through this programme that government envisaged the realisation of the much needed SERs to the population at large.¹⁰⁷⁷

Although corruption in the public service dates back to the apartheid era,¹⁰⁷⁸ the current government continues to be tested by persistent dearth of accountability in the public administration.¹⁰⁷⁹ Corruption Watch contends that this problem starts in the highest echelons of state office which in turn frustrates various efforts by the government to tackle corruption.¹⁰⁸⁰ The actions of government to curb corruption are countered by continual impunity of those who are politically and financially powerful.¹⁰⁸¹ As a matter of fact, reforms of the political system regarding accountability tend to overlook those at the top and focuses only on the lower ambit of public office and public service. In some instances senior officials and ministers were allowed to remain in office, even with substantial evidence of irregularities that they have been involved in or should have been aware of had they adequately performed their duties.¹⁰⁸² According to the Afrobarometer Survey, perceptions of the office of the President being corrupt have more than doubled from a low 13% in 2002 to



and theft, increased by 4% from the previous year to a total of 91 569 incidents. Between 2012/2013 and 2013/2014 commercial crime incidents decreased by 13.6% (a reduction of 12,460 cases) to a total of 79,109 incidents. The nature of commercial crimes behind this decrease is unknown.

¹⁰⁷⁵ Newham G (2013). See chapter 3 on parliamentary oversight.

¹⁰⁷⁶ The RDP is an integrated, coherent socio-economic policy framework. It seeks to mobilise all South Africa's people and the country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future available at <http://www.anc.org.za/show.php?id=234> (accessed on 10 April 2015).

¹⁰⁷⁷ See Camerer L 'Poverty and Corruption in South Africa: Government Corruption in Poverty Alleviation Programmes (1997) World Bank/UNDP *Study on Poverty and Inequality in South Africa* available at <http://www.info.gov.za/otherdocs/1998/poverty/corruption.pdf> (accessed 10 March 2015); Rose-Ackerman S *Corruption and Government: Causes, Consequences and Reform 1999*.

¹⁰⁷⁸ For a discussion on pre 1994 corruption see Hyslop J *Political Corruption in South Africa: Before and After Apartheid* (2005) 31 *Journal of Southern African Studies* 773. Also see Posel D 'Labour Relations and the Politics of Patronage: A Case Study of the Apartheid Civil Service' in Adler G (ed.) *Public Service Labour Relations in a Democratic South Africa* (2000) which elaborates on the same pattern of ill accountability during the apartheid regime.

¹⁰⁷⁹ See Kamp M (ed) *Concepts and Principles of Democratic Governance and Accountability* (2011).

¹⁰⁸⁰ Newham G (2013).

¹⁰⁸¹ Newham G (2013). Also see Transparency International *Handbook on Curbing Corruption in Public Procurement* 2006.

¹⁰⁸² See Ramphela M in Lock M Das V Kleinman A & Reynolds P (eds) *Remarking a World: Violence, Social Suffering and Recovery* (2001) 3. Also see chapter 6 on how the judiciary in India approach corruption in government.

35% in 2011.¹⁰⁸³ The Institute for Justice and Reconciliation reflects that citizens in South Africa are less trusting of their national leaders.¹⁰⁸⁴

The AG painted a bleak picture in the 2015/2016 Audit, reporting that government entities racked up billions of rands in wasteful, fruitless and irregular expenditure.¹⁰⁸⁵ Most of the irregular expenditure was the result of departments behaving unethically by failing to adhere to the laws and policies governing procurement processes.¹⁰⁸⁶ The relative failure by government to better bookkeeping is attributed to ‘many officials including finance managers and chief financial officers, working in the finance and audit units of government departments had not achieved minimum competency levels’.¹⁰⁸⁷ This chapter nine institution reports that these billions are lost to the fiscus through mismanagement, corruption, indolence and indifference which is exacerbated by poor financial oversight in major procurement processes. The AG described that there is a blatant disregard for section 217 the procurement clause of the Constitution. It is significant that public officials receive public service training, with integrated ethics training in all their training programmes.¹⁰⁸⁸ Despite this, statistics from the Public Service Commission show that public sector fraud has increased to R1 billion rand in 2011/2012 from an estimated R130.6 million in 2006/2007.¹⁰⁸⁹

5.2.1 Government’s response in protecting economic resources from abuse by public office

¹⁰⁸³Newham G (2013). Also see chapter 4 on the *Nkandla* case exposing irregular expenditure by the President.

¹⁰⁸⁴Newham G (2013). This survey revealed that since 2012 there has been a 10, 8% decrease in citizens' confidence in national government.

¹⁰⁸⁵Auditor General Report 2015/2016 available at [https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20\(MFMA%202016\)%20FN.pdf](https://www.agsa.co.za/Portals/0/MFMA%202014-15/Section%201-9%20MFMA%202014-2015/FINAL%20MEDIA%20RELEASE%20(MFMA%202016)%20FN.pdf) (accessed on 18 November 2016).

Also see chapter 4.

¹⁰⁸⁶See para 5.3 for discussion on the laws governing public procurement.

¹⁰⁸⁷The AG told Parliament’s Watchdog on Public Accounts Committee, Standing Committee on Public Accounts (Scopa) available at <http://www.timeslive.co.za/thetimes/2014/02/06/our-bean-counters-are-Public-hopeles> (accessed on 20 March 2015). Also see Legal brief Today – ‘Government Accountants Incompetent - Auditor-General’ 6 Feb 2014; International Organisation of Supreme Audit Institutions 2001: Internal Control: Providing a Foundation for Accountability in Government available at www.intosai.org (accessed on 20 March 2015); Sapa ‘Government bodies wasted R2bn last year, says AG in *Mail&Guardian* 05 Feb 2014 available at <http://mg.co.za/article/2014-02-05-government-bodies-wasted-r2bn-last-year> (accessed 10 September 2014).

¹⁰⁸⁸The South African Management Development Institute is responsible for public service training.

¹⁰⁸⁹Public Commission Report to Citizens for 2011/2012.

It is the responsibility of government through legislative and executive means to take the lead in the preventing and combating of corruption in the public service.¹⁰⁹⁰ To assist in this regard there are various institutions that scrutinise accountability, including chapter nine institutions which are constitutional¹⁰⁹¹ mechanisms such as the AG, Public Protector and Public Service Commission.

In addition to the Corruption Act,¹⁰⁹² South Africa has adopted comprehensive anti-corruption measures in its fight against corruption in the state. In this regard the government adopted the Public Service Anti-Corruption Strategy in 2002¹⁰⁹³ which gave rise to the Public Service Special Anti-Corruption Unit. To further tighten the laws on ethical behaviour in government, the new Public Administration Management Act¹⁰⁹⁴ is aimed at building a clean and effective public service. This would be given effect by prohibiting public officials from conducting business with the state. Thereby, government purports to eliminate incentives and opportunities for corruption and unethical conduct.¹⁰⁹⁵ To strengthen this endeavour, the Act¹⁰⁹⁶ demands that state employees declare any business interest in order to prevent and eliminate corruption. Failure to comply with this is an offence which attracts liability to a fine or imprisonment of up to five years, or both, or may lead to serious misconduct findings resulting in termination of employment.¹⁰⁹⁷ Significantly, similar sanctions are also found in the Corruption Act.¹⁰⁹⁸ The plethora of laws creates the impression that the government is doing something about corruption when in fact the lack of political will to fight corruption seems to render the promulgation of all these laws an act of futility. Thus the laws are rather in effect a cosmetic device to mask the underlying abuse of public office.

¹⁰⁹⁰ Also see Brinkerhoff D 'Assessing Political Will for Anti-corruption Efforts: An Analytic Framework' (2000) 20 *Public Administration and Development* 239; Riley S 'The Political Economy of Anti-corruption Strategies in Africa (1998) 10 *The European Journal of Development Research* 129; The National Crime Prevention Strategy Department of Safety and Security 22 May 1996. The Southern African Development Community Protocol against Corruption is the first sub-regional anti-corruption treaty in Africa see chapter 1 for discussion on this.

¹⁰⁹¹ See Constitution chap 9.

¹⁰⁹² See chapter 1 for discussion on this legislation.

¹⁰⁹³ Available at www.dpsa.gov.za (accessed on 10 March 2015).

¹⁰⁹⁴ Act 11 of 2014. Signed into law on 19 December 2014. The Act will be effective on a date still to be proclaimed by the President in the *Government Gazette*.

¹⁰⁹⁵ Section 15 provides for a Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit.

¹⁰⁹⁶ Sections 8, 9. This is in parallel with the UNCAC arts 7, 8.

¹⁰⁹⁷ Section 8 (3).

¹⁰⁹⁸ Section 26. See chapter 1 for discussion on this Act.

As it stands the abuse of authority and the violation of a legal duty or a set of rules as provided by the Corruption Act,¹⁰⁹⁹ do not serve as a deterrent for those officials abusing the procurement and supply chain management (SCM) systems. This is so despite the fact that National Treasury claims to ‘value[s] the strategic importance of SCM to service delivery, value creation, socio-economic transformation and fiscal prudence’.¹¹⁰⁰ As it is, although being in place since 1994, the Corruption Act resulted in almost no prosecutions or fines for non-compliance or for the abuse of the public procurement system. This is regardless of the fact that the National Treasury established the oversight of the Office of the Chief Procurement Officer (OCPO)¹¹⁰¹ ‘to ensure that government gets value for money in its contracts and to reflect government’s commitment to quality service delivery at the right place and time’.¹¹⁰² According to the National Treasury this Unit is central to government’s plan of realising efficiencies in spending and curbing corruption.¹¹⁰³ It must be noted that there is no empirical evidence as to the success reaped in reducing corruption in public procurement or whether fiscal prudence ensued since the inception of the OCPO.

A number of other institutions exist to combat corruption, including the *Independent Police Investigative Directorate*, South African Revenue Services (SARS), South African Police Service (SAPS), NPA (specifically the Directorate of Special Operations and the Asset Forfeiture Unit), the SIU and the National Intelligence Agency (NIA).¹¹⁰⁴ To further assist in combating corruption, the National Anti-Corruption Task Team (NATT) was established to coordinate functions across the anti-corruption agencies. Recorded success of the NATT is where lower ranking public officials have been convicted on fraud and corruption and named by the department of Justice and Constitutional Development (DoJCD).¹¹⁰⁵ However these charges are not likely to fall under the Corruption Act.¹¹⁰⁶

¹⁰⁹⁹ Sections 4(ii) (aa), (cc), 12(1).

¹¹⁰⁰ National Treasury ‘2015 Public Sector Supply Chain Management Review’.

¹¹⁰¹ Established February 2013.

¹¹⁰² National Treasury ‘2015 Public Sector Supply Chain Management Review’.

¹¹⁰³ Creamer T Treasury’s procurement chief outlines far-reaching reform agenda *Polity* 31 January 2014 available at <http://www.polity.org.za/article/treasurys-procurement-chief-outlines-far-reaching-reform-agenda-2014-01-31> (accessed on 4 May 2016).

¹¹⁰⁴ See Department of Public Service and Administration Report (2003)134-145; Public Service Commission Report (2001) 2-5.

¹¹⁰⁵ South Africa Info ‘SA names, shames corrupt officials’ 10 June 2013 available at <http://www.southafrica.info/about/government/corruption-100613.htm#.V5aTOtyUdMs> (accessed on 9 April 2015) according to the DoJCD 42 people have been named of conviction of fraud and corruption and the names of a further 3000 also so convicted is to be released later. Also see National Treasury ‘Duty to Report Known or Suspected Corrupt Transactions’ 6 September 2011 available at

Although the government established the Anti-Corruption Co-ordinating Committee (ACCC),¹¹⁰⁷ major weaknesses in myriad anti-corruption measures are the absence of co-ordination amongst these agencies and no proper delineation of responsibilities. This results in the overlapping of the mandates of these agencies which appear not to approach corruption with complementary preventative and investigative measures.¹¹⁰⁸ Most noteworthy is that the Comprehensive Plan for the Development of Sustainable Human Settlements, known as BNG,¹¹⁰⁹ requires the National Department of Human Settlements (NDoHS) to establish a special investigative unit to deal with fraud and corruption in respect of the implementation of the National Housing Programme. However the BNG has not assisted in prudent fiscal spending in the delivery of housing, which should lend itself to public procurement that is both competitive and cost effective.

5.3 Corruption and public procurement in housing: legislative and other measures

South Africa engages a preferential public procurement policy which promotes socio-economic objectives that work in tandem with the immediate objectives of the procurement policy itself.¹¹¹⁰ It is through these procurement processes that the awarding of contracts for the construction of public housing takes place. By regulating procurement, government at least tries to ensure that it obtains goods or services at the most economical price through a process that is transparent, fair and competitive.

Analogous to this, is that the Constitution¹¹¹¹ promotes a transparent, fair, equitable, cost-effective and competitive process for public procurement. According to Bolton a primary reason for these five principles is to safeguard the integrity of the government procurement process, thereby ensuring prudent use of public resources and to prevent corruption.¹¹¹² Williams and Quinot argue that transparency has anti-corruption implications in that the rules that define the procurement process are to be clear and the opportunities for contracting are

<http://www.treasury.gov.za/legislation/pfma/circulars/Duty%20to%20Report%20Corrupt%20Transactions.pdf> (accessed on 10 March 2015).

¹¹⁰⁶ See chapter 1 for discussion on the Corruption Act and the few prosecutions under this legislation.

¹¹⁰⁷ See Public Service Commission: Audit of Anti-Corruption Capabilities of Departments (2003A).

¹¹⁰⁸ Public Service Commission Report (2001) 3-5.

¹¹⁰⁹ See chapter 3 for discussion on the BNG.

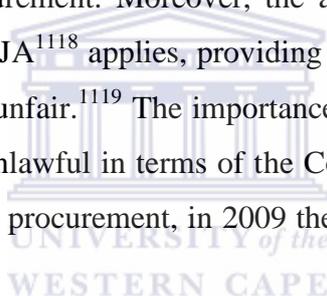
¹¹¹⁰ Also see the Broad-Based Black Economic Empowerment Act 53 of 2003.

¹¹¹¹ Section 217.

¹¹¹² Bolton P *The Law of Government Procurement in South Africa* (2007) 57.

publicly available, making it difficult to conceal improper practices.¹¹¹³ Moreover, these procurement processes are aimed at contracting the supplier with the right credentials as spelled out in the procurement specifications in order to save money and time and to gain optimal benefit.

To combat corruption the procurement of goods and services in government is underpinned by a stringent SCM process as set out in the Preferential Procurement Policy Framework Act (PPPFA).¹¹¹⁴ This is in collaboration with public officers following the financial guidance of the PFMA¹¹¹⁵ for the maintenance of an appropriate procurement system in compliance with all commitments required by legislation. When it comes to the realisation of housing, the National Housing Act (NHA) and National Housing Code (NHC) also come into play.¹¹¹⁶ The Treasury Regulations¹¹¹⁷ require the development and implementation of an effective and efficient SCM system for the acquisition of goods and services in parallel with the constitutional demands for procurement. Moreover, the awarding of a contract constitutes administrative action thus the PAJA¹¹¹⁸ applies, providing for a just and equitable remedy, if a procurement process had been unfair.¹¹¹⁹ The importance of review under PAJA¹¹²⁰ arises when a procurement process is unlawful in terms of the Constitution.¹¹²¹ In addition to these measures to combat corruption in procurement, in 2009 the Minister of Finance established a



¹¹¹³Williams S & Quinot G Public Procurement and Corruption: The South African Response (2007) *SALJ* 345. Also see Arrowsmith S 'Towards a Multilateral Agreement on Transparency in Government Procurement' (1998) *International and Comparative LQ* 796. Kelman S *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (1990).

¹¹¹⁴Act 5 of 2000. Also see Preferential Procurement Regulations 2011; National Treasury '2015 Public Sector Supply Chain Management Review' available at <http://www.treasury.gov.za/publications/other/SCMR%20REPORT%202015.pdf> (accessed 3 May 2016). National Treasury 'Supply Chain Management: A Guide for Accounting Officers/Authorities' available at <http://www.treasury.gov.za/divisions/ocpo/sc/Guidelines/SCM%20Jan900-Guidelines.pdf> (accessed on 3 May 2016).

¹¹¹⁵Section 38(1) (a) (iii), (e).

¹¹¹⁶See chapter 3 for discussion on this legislation that dominates the realisation of social housing.

¹¹¹⁷Published in *GG 27388 GN R225 of 15 March 2005*. Treasury Regulations 16A9.1(b) states that an accounting officer must 'investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system, and when justified— (i) take steps against such an official or other role player and inform the relevant treasury of such steps; (ii) report any conduct that may constitute an offence to the South African Police Service.' Also see Regulations in terms of the Public Finance Management Act: Framework for Supply Chain Management in *GG 25767 of 5 December 2003* reg 9 stipulates the same measures.

¹¹¹⁸Act 3 of 2000 s6 (2) (e) (iii). Section 3(1) of PAJA provides 'Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.' Also see Quinot G 'Administrative Law' (2010) *Annual Survey of South African Law* 41.

¹¹¹⁹*AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* (no 1) (2013) CC para31 (hereafter *Allpay no 1*).

¹¹²⁰Section 8 providing for a 'just and equitable' remedy.

¹¹²¹*AllPay* (no 1) para 25. Also see Constitution s172 (1) (a).

Multi-Agency Working Group to deal specifically with corruption and irregularities within government's procurement system.¹¹²²

Notwithstanding these measures, the AG bemoans the fact that the current deviations from SCM processes are a reflection of a lack of proper and strong internal controls.¹¹²³ He laments the fact that committing corruption through irregular expenditure too often goes unpunished and this is a major problem. According to the AG of the 80 percent cases that are investigated for maladministration only 20 percent result in disciplinary hearings.¹¹²⁴

In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v CEO of the South African Social Security Agency and Others*¹¹²⁵ the SCA stated that, public interest dictates that a procurement process should not be invalidated for minor, inconsequential flaws. However the apex court, the CC¹¹²⁶ disagreed with this finding and observed that such an approach to irregularities seemed detrimental to important aspects of the procurement process. First, it undermined the role of procedural requirements that ensured even treatment of all bidders; secondly, it overlooked the purpose of a fair process ensuring the best outcome.¹¹²⁷ This court also pointed out that the primacy of public interest in procurement matters had to be taken into account when the rights of affected persons were assessed.¹¹²⁸ Thus due care and diligence by public officials are expected when overseeing procurement processes and disbursements insofar as public housing projects are concerned the lack of such due care and diligence does affect the enjoyment of the right to housing.

The CC found that the procurement process in *Allpay*, was not tainted by corruption but by the lack of a proper procurement process which too often deviates from a fair process and has

¹¹²²Presidency News 'The Anti-Corruption Task Team is fully operational' 27 January 2015 (hereafter Presidency News) available at <http://www.thepresidency.gov.za/pebble.asp?relid=18876> (accessed on 20 March 2015).

¹¹²³Sapa 'Corruption goes unpunished too often: AG' 10 February 2014 available at <http://www.timeslive.co.za/local/2014/02/10/corruption-goes-unpunished-too-often-ag> (accessed on 6 March 2015). Also see Corruption: Chicago turns the screws on contractors to report wrongdoing available at [Full Chicago Sun-Times.com report](http://www.chicagosuntimes.com/report) (accessed on 6 March 2015) reports that Chicago would become one of the first big US cities to require its contractors to report 'corrupt activity' by their employees – or be stripped of city business.

¹¹²⁴Auditor General Report 2015/2016.

¹¹²⁵2013 (4) SA 557 (SCA) paras 21, 96.

¹¹²⁶*AllPay no 1* para 24.

¹¹²⁷*AllPay no 1* para 24.

¹¹²⁸*AllPay no 1* para 33.

symptoms of corruption in a deliberately skewed process.¹¹²⁹ This case is most important in highlighting the scant attention that government pays to procurement irregularities. Moreover, due to housing contracts involving private sector actors, such contractors have a negative responsibility to protect SERs. Breach of this obligation occurs when there is a failure to respect rights or when there is a failure to prevent direct infringement by taking measures that diminish that protection.¹¹³⁰ Thus public officials and contractors that benefit from economic gains in housing contracts and do not deliver the services required in terms of such contracts, are inflicting harm on the beneficiary's right to housing. This behaviour retards the enjoyment of a human right through malfeasance.

Regardless of all the measures in place, public procurement is an area of pervasive abuse by public officials.¹¹³¹ Procurement processes have been tarnished by public officials in charge of such processes, taking procurement decisions that affect the credibility of the process, and by favouring suppliers that do not sport the correct credentials. The benefit to such an official could be in a bribe or perhaps a contract with a company in which he bears a financial interest.¹¹³² The former head of the SIU reported to Parliament in 2011 that between R25-R30 billion was lost to the government procurement budget per year through fraud.¹¹³³ Corruption Watch submits that they received reports from individuals employed in the public sector, stating that there was a predominance of procurement related corruption.¹¹³⁴ Sadly, 53% of those assessed in these reports said that although they had reported their cases to

¹¹²⁹ *AllPay* no 1 para 71, the Court declared the contract invalid but sustained until a fresh tender process finds an eligible bidder. Also see *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA); *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA).

¹¹³⁰ *Allpay* (no1) para 58

¹¹³¹ See para 5.3.3.2 on the SIU investigations. Also see Magoro M J & Brynard P A 'Difficulties Associated with the Implementation of the Preferential Procurement Policy in Conjunction with a Low-cost Housing Programme: A South African Contextualisation' (2010) 29 *Politeia* 4.

¹¹³² See Schooner S 'The Paper Tiger Stirs: Rethinking Exclusion and Debarment' (2004) 13 *Public Procurement LR* 212; Yukins C 'Suspension and debarment: Re-thinking the process' (2004) 13 *Public Procurement LR* 256; Williams S 'The Debarment of Corrupt Contractors from World Bank-Financed Contractors' (2007) 36 *Public Contract Law Journal* 305 argues that the World Bank's rejection and debarment measures represent a watershed in corruption control by a development institution.

¹¹³³ Corruption Watch available at <http://www.corruptionwatch.org.za/content/economic-implications> (accessed on 10 April 2015). Also see Staff Reporter 'Fraud probe looks at thousands of govt officials' 19 September 2007; Underhill G 'Department of irregular expenditure' 4 November 2011; Sapa 'SIU uncover massive corruption in E Cape Health department 15 May 2012; Zwane T & Mukhuthu Z 'Contractor under R60m housing cloud gets top state job' 27 June 2014 all available at <http://mg.co.za/tag/siu> (accessed on 10 April 2015).

¹¹³⁴ Rauch J & Johannes L 'Citizens Reporting Corruption in South Africa: Reports Received by Corruption Watch (2014) available at <http://www.corruptionwatch.org.za/sites/default/files/citizens%20reporting%20corruption%20in%20south%20africa%20%282%29.pdf> (accessed on 9 April 2015). Also see Kaufmann D 'Six Questions on The Cost of Corruption, (2004) available at www.worldbank.org (accessed 8 April 2015).

national and provincial government, the police and other relevant institutions, they had not received the assistance they expected.¹¹³⁵

5.3.1 The influence of international measures on the combating of corruption in South Africa

Due to the large budgets governments dispose of through public procurement the UNCAC¹¹³⁶ requires the maintenance of an efficient public procurement system to combat corruption in this system. The UNCAC¹¹³⁷ notes that there is a link between corruption and recruitment, promotion and retirement of civil servants. Therefore ‘systems for the recruitment, hiring, retention, promotion and retirement of civil servants and where appropriate, other non-elected public officials, should be based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude’.¹¹³⁸ The UNCAC requires states to promote ‘integrity, honesty and responsibility among its public officials’ and in doing so it must establish measures facilitating ‘the reporting by public officials of acts of corruption to appropriate authorities’.¹¹³⁹ Furthermore ‘public officials are to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials’.¹¹⁴⁰ States are also obliged to periodically review and evaluate their policies and measures against corruption in order to ensure consistent practices.¹¹⁴¹ South Africa, as a party to UNCAC, has thus a clear direction as to how its public officials should conduct themselves and what is more the Corruption Act resonates with UNCAC.

The importance of international obligations in combating corruption was spelt out in *Glenister*. The CC held that the state was required to take account of its international obligations in order to curb corruption in society and hence to ensure the creation of an

¹¹³⁵ Rauch J & Johannes L (2014) ‘Also see Kaufmann D ‘Six Questions On the Cost of Corruption, (2004) available at www.worldbank.org (accessed 8 April 2015).

¹¹³⁶ Articles 9, 10. See chapter 1 for discussion on this instrument. Also see Yukins C ‘Integrating Integrity and Procurement: The United Nations Convention against Corruption and the UNICTRAL Model Procurement Law’ (2007) 36 *Public Contract Law Journal* 3.

¹¹³⁷ Article 7.

¹¹³⁸ Article 7.

¹¹³⁹ Article 8.

¹¹⁴⁰ Article 8.

¹¹⁴¹ Article 5.

independent entity which would combat corruption.¹¹⁴² The CC said the duty to ‘respect, protect, promote and fulfil’ the rights in the BoR¹¹⁴³ read with, ‘that all branches of government is bound by the rights’ in the BoR,¹¹⁴⁴ placed an obligation on the state to create an independent corruption -fighting unit.¹¹⁴⁵ The CC observed that this was in line with the state’s obligation in relation to SERs, particularly those in sections 26 and 27,¹¹⁴⁶ ‘to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights’. Thus, combating the scourge of corruption is part of the progressive realisation of housing.

The trend to curb corruption in government is followed by various jurisdictions around the world including the very populous India which is also a party to the UNCAC.¹¹⁴⁷ Similar to South Africa, there is a plethora of legal and administrative measures dealing with errant public officials in India.¹¹⁴⁸ A significant addition to the combating of corruption is the updated Prevention of Corruption Act¹¹⁴⁹ which criminalises the possession of wealth disproportionate to the income of a public servant, in India. This is the main anti-corruption legislation dealing with sanction for public officials. This legislation is much like the Corruption Act of South Africa, but without the ‘disproportion of wealth’ section. Currently, South Africa attempts to achieve clean governance through the new Public Administration Management Act.

The Indian Prevention of Corruption Act, which criminalises disproportionate wealth held by politicians, public officials and their families, could if applied to the South African situation also act as a deterrent and would serve the anti-corruption measures in a positive way. This will be a positive enhancement to the South African Corruption Act which criminalises errant

¹¹⁴² *Glenister* para 54.

¹¹⁴³ Section 7 (2).

¹¹⁴⁴ Section 8(1).

¹¹⁴⁵ *Glenister* para 54. Also see United Nations Office on Drugs and Crime, Legislative Guide for the Implementation of the United Nations Convention against Corruption (2006).

¹¹⁴⁶ *Glenister* para 107. See Constitution s 26(2) right of access to adequate housing and s27 (2) right of access to health care, food, water and social security.

¹¹⁴⁷ India signed UNCAC in May 2011. See chapter 6 for discussion on judicial activism in India, holding government to account for SERs and corruption.

¹¹⁴⁸ For history of corruption and a long list of statutes dealing with it in India, see Montiero J B *Corruption: Control of Maladministration* (1966); Chakravarthy N S ‘Management and Administration in India– Impact of Vigilance Machinery ’(1990) 4 *Indian Journal of Public Administration.*; Ramakrishna P V *Anti-Corruption Laws in India* (1998); Kumar C Raj ‘Corruption and Human Rights in India: Comparative Perspectives on Transparency Governance and Good Governance (2011) for a analysis of anti-corruption initiatives in India in a comparative perspective.

¹¹⁴⁹ Act 49 of 1988 chap III s13.

behaviour and sanctions imprisonment for public officials, but has not been used in an effective way to convict senior public officials found engaging in corrupt activities.¹¹⁵⁰ Thus this South African provision does not act as a deterrent and is thereby ineffective. Other examples that could be useful to South Africa is that of the Prevention of Corruption Act (India)¹¹⁵¹ which lists (a) abuse of authority by favouring or harming someone, (b) obstruction or perversion of justice by unduly influencing law enforcement and (c) squandering public money. The criminalisation of the squandering of public money in South Africa could prove valuable in protecting the available resources for housing against abuse by public officials. Furthermore, article 102 of the Constitution of India provides that any parliamentarian can be disqualified for holding any office of profit. According to Sondhi there have been occasions when a member of parliament was expelled for holding a position of profit.¹¹⁵² The Indian system thus promotes a political culture which is seen as a vocation and not a mechanism for self-enrichment process.

South Africa has started to implement legislation that discourages public officials from doing business with the state.¹¹⁵³ This legislation is pending implementation and whilst it is welcomed it must be pointed out that its effectiveness will be proved by politicians and public officials declaring their business interest and relinquishing such interest while in government. As it is in South Africa, those holding public office often fail to declare their interest whilst robustly do business with the state.¹¹⁵⁴ Whether this new legislation is going to deter this behaviour remains to be seen.

5.3.2 The State accountability in socio-economic rights an accompaniment of anti-corruption measures in India

¹¹⁵⁰See chapter 4 for discussion on this.

¹¹⁵¹See chapter 6 for discussion on the activist approach of the judiciary in India in relation to SERs and political corruption.

¹¹⁵²Sondhi S 'Combating Corruption in India: the Role of Civil Society' (2000) *Reader in Political Science University of Delhi* 45.

¹¹⁵³Public Administration Management Act 2014.

¹¹⁵⁴See Public Sector Integrity Management Framework available at <http://www.dpsa.gov.za/dpsa2g/documents/misc/Integrity%20Management%20Framework.pdf> (accessed on 28 September 2015); Code of Conduct Parliament South Africa available at http://www.parliament.gov.za/live/content.php?Category_ID=83 (accessed on 28 September 2015).

The heightened judicial assertiveness in India post-1990 included not only an oversight function of SERs but also of corruption.¹¹⁵⁵ The SCI wanted to dilute the omnipotence of the power and influence of politicians and prevent them from exercising single-minded excesses of power.¹¹⁵⁶ Activist judges of the SCI imposed a positive obligation on the state to take steps in ensuring for the individual a better enjoyment of life and dignity. Sondhi argues that this action is necessary because there is a general lack of accountability in the administration at all levels of government in India and almost everyone considers themselves above the law.¹¹⁵⁷

The A D Gorwala Report in 1951 is one of the earliest official documents that laid bare the problem of malfeasance in the Indian administration.¹¹⁵⁸ This report clarifies that for the public to have confidence that moral standards prevail in high places in government, it would mean that no one should be immune from enquiry if allegations are made by responsible parties and when a prima facie case exists.¹¹⁵⁹ Thus there should be no hushing-up for personal or political reasons. Administrative reforms and punitive measures against higher officials should top the list in the quest for reform against corruption in government.¹¹⁶⁰ Furthermore, the Shah Commission of Enquiry bemoaned the role of political leadership in aiding and abetting the spread of corruption in India.¹¹⁶¹ The South African government has not demonstrated an appetite to take punitive measures against high ranking officials, although the Corruption Act makes provisions for punitive measures against public-office abuse offenses.¹¹⁶²

¹¹⁵⁵See chapter 6 for discussion on the Indian judiciary's response to addressing corruption and accountability in realising SERs.

¹¹⁵⁶See Trubek D M 'Public Policy Advocacy: Administrative Government and Representation of Diffuse Interests' in Cappelletti M & Garth B (eds) *III Access to Justice* (1979).

¹¹⁵⁷Sondhi S 'Combating Corruption in India: the Role of Civil Society' (2000) *Reader in Political Science University of Delhi* 20.

¹¹⁵⁸See A D Gorwala Report on Public Administration, 1951 in Sabharwal M & Berman E M (eds) *Public Administration in South Asia: India, Bangladesh, and Pakistan* 2013; Government of India, Action Plan for Effective and Responsive Government: The Conference of Chief Ministers 24 May 1997 New Delhi, Department of Administrative Reforms and Personnel Grievances 1997 available at .

<http://www.performance.gov.in/?q=grm> (accessed on 30 September 2015).

¹¹⁵⁹A D Gorwala Report (1951). Also see Shiv V & Sethi H (eds) *Foul Play: Chronicles of Corruption 1947-97* Business India: New Delhi 1997.

¹¹⁶⁰A D Gorwala Report (1951).

¹¹⁶¹Shah J C *Shah Commission of Enquiry Report* (1978) available at

<https://archive.org/details/ShahCommissionOfInquiryInterimReportII> (accessed on 14 October 2015)

Constituted to inquire into corruption during the period of Emergency (1975-77) Justice Shah reserved his most damning observations for the role that Sanjay Gandhi, son of Indira Gandhi, played subverting rule of law in the country.

¹¹⁶²See chapter 1 discussing the rare prosecutions under the Corruption Act in this jurisdiction.

Accountability in South Africa regarding social housing remains compromised in that the SIU Reports on corruption in this matter have not been acted on, despite the occurrence of serious abuse of state funds, the relevant officials remain in office. Moreover, no senior accounting officer has taken responsibility for the lack of effective oversight. This situation prevails despite Parliament and the President bearing conclusive knowledge of the corruption in social housing.¹¹⁶³ India, in its drive to entrench accountability, has gone as far as listing the names of administrative and police service officials on the internet, despite the fact that corruption charges are still only pending against them.¹¹⁶⁴ This action has been introduced to instil a sense of responsibility and accountability amongst officials. In South Africa a similar practice would go a long way in the fight against corruption, where politicians stay in office despite being on trial for corruption, because of the constitutional rule ‘innocent until proven guilty’.¹¹⁶⁵

In modern India poverty is slowly giving way to a confident and inclusively empowered India.¹¹⁶⁶ This is evident in Transparency International’s Corruption Index where India’s position has improved significantly and according to the Administrative Reform Committee (ARC) the vigilance of its enlightened people will ensure continued improvement.¹¹⁶⁷ South Africa by contrast continues to show a rise in corruption on the TI index.¹¹⁶⁸

Institutional/administrative measures against corruption

¹¹⁶³ See chapter 3 for discussion on parliamentary oversight.

¹¹⁶⁴ Sondhi S (2000) 20.

¹¹⁶⁵ See Kwon Hoo S ‘Block took bribes from Trifecta: Judge’ *IOL* 14 October 2015. Block remaining in office during his trial for tender fraud whilst he served as a provincial minister available at <http://www.iol.co.za/news/crime-courts/block-took-bribes-from-trifecta-judge-1.1930110> (accessed on 14 October 2015). Cheryl Cwele (director in local government) stayed in office despite being convicted available at <http://www.nortonrosefulbright.com/knowledge/publications/60496/employment-and-labour-december-2011> (accessed on 20 September 2015). At its 2015 National General Council (NGC) meeting the ruling party the ANC confirmed that corruption is a problem in the public service and bemoaned the fact that public officials belonging to the party do not step down voluntarily when tainted by corruption, see [NGC 2015 Discussion Documents - African National Congress](#) available at www.anc.org.za/docs/umrabulo/2015/ngc_disc_docsy.pdf (accessed on 10 October 2015); Grootes S ‘ANC NGC, Day Two: A different story to tell’ *Daily Maverick* 10 October 2015 available at <http://www.dailymaverick.co.za/article/2015-10-10-anc-ngc-day-two-a-different-story-to-tell/> (accessed on 10 October 2015)

¹¹⁶⁶ The Second Administrative Reforms Commission (ARC-2) appointed by the President of India in 2005, Fourth Report: Ethics in Governance (January 2007) paras 1.3, 3.2.5.1 available at arc.gov.in/4threport.pdf (accessed on 30 September 2015).

¹¹⁶⁷ ARC-2 para 1.3.

¹¹⁶⁸ See chapter 1 for discussion this.

In India the Administrative Vigilance Commission (AVC) was created in 1955 in order to provide direction and co-ordinate the various efforts of the ministries dealing with corruption. This was enhanced by the CVC in 1964, which is independent from the executive, to inquire into the conduct of public officials including, the executive.¹¹⁶⁹ An important development was the creation of the Central Bureau of Investigation (CBI) in 1963 as the country's investigation and anti-corruption division.¹¹⁷⁰ The CBI is the principal investigative agency of the central government in all anti-corruption matters. The CVC advises the Government of India on all matters pertaining to the maintenance of integrity in administration, and supervises the CBI and other vigilance administration agencies. Thus they have an integrated approach in combating corruption.

Alongside its legislation and anti-corruption agencies, the South African setting favours setting up ad-hoc commissions or proclamations for the SIU to inquire into allegations of state malfeasance. The most prominent was the commission inquiring into allegations of corruption into arms acquisition.¹¹⁷¹ Nonetheless, South Africa still battles against the pros and cons of a single entity to fight corruption. Having an independent agency keeping an eye on the conduct of public officials including the executive may reduce the proliferation of corruption before it reaches a critical stage, where the realisation of SERs suffers. As it is, early detection of corruption may create prevention of hardship to the rights-holder thus affected. Therefore, exposing senior management and politicians found breaking procurement laws, in order to corrupt the housing programme, should serve as a deterrent. This approach favours the promoting of ethical behaviour among lower ranking officials. However this action needs political will. Regrettably, the current measures do not seem to act as a deterrent to errant public officials. Examples of this errant behaviour are expounded in the SIU Reports, below.

5.3.3 The Special Investigations Unit

¹¹⁶⁹The CVC launched a new portal, VIGEYE (Vigilance Eye), a platform to share information between the public government agencies and the vigilance commission. Registered users could upload videos on acts of corruption. The Committee on Prevention of Corruption known as the Santhanam Committee recommended the set up of the CVC.

¹¹⁷⁰ See Gill S *The Pathology of Corruption* (1998).

¹¹⁷¹ Many man hours of examining politicians and public officials proved that nobody acted corrupt. See <http://www.corruptionwatch.org.za/the-arms-deal-what-you-need-to-know-2/> (accessed on 19 November 2016)

5.3.3.1 Composition and objectives

The Special Investigating Units and Special Tribunals were established in 1996 by the President in terms of the Special Investigating Units and Special Tribunals Act.¹¹⁷² The President may by proclamation in the Government Gazette, establish a SIU to investigate matters such as corruption in the public housing programme.¹¹⁷³ Needless to say, that the head of such a SIU must be South African, experienced, fit and proper. The primary purpose of the SIU is to recover money which has been lost to the state through unlawful or corrupt action. Its multidisciplinary forensic capabilities consist of forensic investigators, lawyers, forensic accountants, cyber forensics experts, data analysts and project management professionals. In addition to selected members, officers in the public service may be seconded to a Unit. The SIUs are deemed anti-corruption agencies and remunerated from public funds.¹¹⁷⁴ Only the President may appoint and at any time remove the head of the SIU from office.¹¹⁷⁵ The SIU has been without a head from 2011 until 2015.¹¹⁷⁶ The SIU is criticised for lack of independence because it cannot take up cases unless mandated by the President.

Nonetheless, the SIU is an independent body that is accountable to the President and to Parliament in terms of its activities. The purpose of these special investigating units is to look into serious malpractices or maladministration in connection with the state institutions, state assets, public money and any conduct that seriously harms public interests. The SIU collects and presents evidence in front of a tribunal or court. This Unit is also obliged to report to Parliament twice per year on its investigations.¹¹⁷⁷ At intervals it must report to the President on the progress made regarding investigations and on conclusion submit a report to this effect. Following the issuing of a presidential proclamation, the SIU has powers to subpoena, search, seize and interrogate witnesses. Thus as a public entity the SIU can give notice to

¹¹⁷²Act 74 of 1996. This Act has a laudable aim which broadly speaking seeks to address the problem of maladministration and corruption in the public or state administration see s 2(2) (a)–(g).

¹¹⁷³SUI Act s2 (1).

¹¹⁷⁴Also see SIU website available at <http://www.siu.org.za/who-we-are> (accessed on 20 April 2015).

¹¹⁷⁵SIU Act s4 (d). See Sapa ‘Hofmeyr’s removal as SIU head’ *The Star* 29 November 2011 available at <http://www.iol.co.za/the-star/shock-over-hofmeyr-s-removal-as-siu-head-1.1188927#.VnBETdIrLIU>

¹¹⁷⁶Monama T ‘New SIU head: I’m not scared in IOL 5 March 2015 available at <http://www.iol.co.za/news/crime-courts/new-siu-head-i-m-not-scared-1.1827412#.VnBHf9IrLIU> (accessed on 15 December 2015).

¹¹⁷⁷SIU Act s4.

anybody to appear before it, under oath.¹¹⁷⁸ Its powers cover investigation and civil litigation in that it can take civil action to correct any wrongdoing it uncovers in its investigations.

To institute and conduct civil proceedings the SIU Act provides for the establishment of Special Tribunals to adjudicate upon civil matters that emanate from investigations by the various special investigating units.¹¹⁷⁹ Thus the SIU can refer its civil cases to a Special Tribunal or any court of law for any relief to which a state institution is entitled.¹¹⁸⁰ A Special Tribunal is empowered to issue suspension, interlocutory orders or interdicts on application by the SIU and make any order it deems appropriate including cost orders, similar to the HC.¹¹⁸¹ However although the Special Tribunal performs judicial functions it is not established as a court of law with judicial authority in terms of the Constitution.¹¹⁸² The presiding members are not appointed in terms of the Constitution as is with the judiciary.¹¹⁸³ Thus it cannot set precedent and it cannot add to the body of law.

Notably the SIU does not have the power to arrest or prosecute offenders where criminal conduct is uncovered; it rather refers evidence regarding a criminal offence to the relevant prosecuting authority such as the Directorate for Priority Crime Investigation, as well as to the NPA.¹¹⁸⁴ The SIU also works closely with the Asset Forfeiture Unit (AFU) in the NPA, where its powers are more appropriate or effective in recovering the proceeds of crime. The SIU assists departments concerned with cancellation of contracts where the proper procurement procedures were not followed and to stop transactions or other actions that were not properly authorised.

The SIU is mandated to recover losses suffered by government resultant of maladministration and corruption, and to institute civil, criminal and disciplinary action. The Unit's effectiveness in this regard is explored next.

¹¹⁷⁸ SIU Act s5 (2) (b), (c).

¹¹⁷⁹ SIU Act s8 (2).

¹¹⁸⁰ SIU Act s4 (c).

¹¹⁸¹ SIU Act s8 (2) (a-c), s9 (7).

¹¹⁸² SIU Act s 2(1) (b) of the Act; Also see Constitution of SA s165 (1) and s166 on judicial powers.

¹¹⁸³ The Constitution s7 and s174.

¹¹⁸⁴ SIU Act s4 (1) (d). Also see The Constitution s179.

5.3.3.2 The Special Investigations Unit: efficacy in addressing corruption in the Department of Human Settlements

The SIU investigation into public housing was first proclaimed in 2007 and the original focus was on low-income housing subsidies.¹¹⁸⁵ The investigations have since changed their focus to public housing building contracts. The objectives of the investigations are to investigate any fraud, corruption and maladministration in respect of the development and delivery of social housing within national and provincial departments, local authorities (and agents) and former Housing Development Boards.¹¹⁸⁶

Since the inception of these investigations, this SIU presented preliminary reports to Parliament in 2011, 2012 and 2013 on malfeasance in the public housing programme.¹¹⁸⁷ These reports have also been presented to the President. The preliminary findings found that billions of rands of resources earmarked for public housing have been misappropriated by public officials.¹¹⁸⁸ This practice ensued through by-passing procurement processes and the making of irregular payments without following public procurement and PFMA laws. Payments were made to contractors that had either not completed the said housing projects or had not delivered at all. Thus the mischief amongst public officials extends to a flagrant disregard of notable legislation (PFMA, PPPFA, and Treasury Regulations) including section 217, the procurement clause in Constitution.

The following findings have been presented to the oversight branch of government, Parliament and the President (executive):

Irregularities found in awarding of contracts

¹¹⁸⁵SIU Annual Report (2012 -2013) 22 available at <http://www.siu.org.za/sites/default/files/documents/SIU%20Contents%20annual%20report%20sml.pdf> (accessed on 13 March 2015)

¹¹⁸⁶SIU Annual Report (2012 -2013) 22.

¹¹⁸⁷Also see Heath W Findings of Heath Special Investigating Unit 'Human Beings are Greedy by Nature' (1998) 18 *Local Government Digest* 2-3 observing that 'corruption in a developing democracy such as South Africa constitutes a violation of the most basic of human rights. Corruption deprives people of housing, education, medical treatment and their basic human needs.' See chapter 3 for discussion on the oversight role of Parliament.

¹¹⁸⁸See 'Minister Sisulu must release full SIU report on R20 Billion in fraudulent housing projects' available at <http://www.da.org.za/2014/09/minister-sisulu-must-release-full-siu-report-r20-billion-fraudulent-housing-projects/> (accessed on 20 November 2014).

Between 2011 and 2013 the SIU presented reports to Parliament on gross irregularities regarding the awarding of housing contracts. These unsavoury acts include mischief in various housing projects in provinces of the Western Cape, North West, Northern Cape, Free State and Eastern Cape.

Western Cape

In the Western Cape, senior public officials holding municipal manager positions were found to be abusing the available resources for housing, by making irregular payments and not following the MFMA.¹¹⁸⁹ Amongst these practices, duplicate payments were made to service providers.¹¹⁹⁰ Fraud also ensued through land grants amounting to millions of rands.¹¹⁹¹ Pertinent evidence was found relating to inadequate project monitoring, reporting mechanisms and non-compliance with contractual obligations by service providers. Public officials certificated housing projects as being complete when in fact it was not performed at all.¹¹⁹² Thus the proper checks and balances which are in place in government were overlooked.

Exacerbating this trend, in Oudtshoorn municipality managers deliberately and in gross negligence failed to take all reasonable steps to prevent irregular expenditure in authorising payments amounting to R7 million to a construction company.¹¹⁹³ This included expenditure in authorising a duplicate payment of over R378 000 to the construction company concerned which paid for a municipal manager's daughter's tuition fees. This points to the contravention of the Corruption Act¹¹⁹⁴ and this matter has been reported to the NPA but no prosecution has ensued to date.

Notwithstanding the bleak picture of housing the most desperate, provincial officials did not adhere to the Emergency Housing Programme policy whereby in 167 instances, work was

¹¹⁸⁹This amounted to R1.7 million see SIU Interim Report April to September 2011 (hereafter SIU Report 2011) Proclamation R7 of 2007, published on 25 April (2007) 11 the SIU found that their conduct justifies the referral of the matter to the NPA (via the SAPS), as the evidence points to contravention of section 173 of the MFMA. available at <http://www.siu.org.za/sites/default/files/documents/SIU%20INTERIM%20REPORT%201June%202012.pdf> (accessed on 113 March 2015).

¹¹⁹⁰ SIU Report (2011)13.

¹¹⁹¹ SIU Report (2011) 12.

¹¹⁹² SIU Report (2011) 19.

¹¹⁹³ In addition, their conduct exposed the municipality to a R2.7 million civil claim (SIU Report 2011).

¹¹⁹⁴ Section 9.

performed on houses where no immediate threat to life, health and safety of the occupants existed.¹¹⁹⁵ In these instances government has not observed progressive realisation which sees to the most desperate first, as confirmed in *Grootboom*.

North West Province

In the North West province housing projects were tainted by non-delivery by contractors, already paid, causing losses of millions to the provincial housing department.¹¹⁹⁶ The documentation submitted by the contractor was false and misleading and could not be reconciled with the actual project costs. This, despite the stringent documentation verification required by the public procurement processes. This amounts to flagrant contravention of the main legislation dominating the realisation of housing, the NHA, NHC and PFMA.¹¹⁹⁷

Northern Cape

In the Northern Cape the SIU also found breach of the NHC and NHA whereby formal processes requiring a formal project proposal or signed agreement for bulk allocation of subsidies for social housing were not met.¹¹⁹⁸ More transgressions to the NHC came to light in projects reflected as 'completed' where only 67 houses were constructed and 433 still had to be constructed, but payment of R7.9 million was effected for the full project as if it had been completed.¹¹⁹⁹ The department also paid out R3.7 million for this project with no beneficiaries identified in 204 sites and 137 where no sites were identified.¹²⁰⁰ In addition there were over-payments of R3.5 million to service providers without the necessary paper trail and fruitless, wasteful expenditure amounting to R8.4 million. This behaviour by public officials clearly does not depict the government's duty to use the maximum of its available resources to realise the minimum obligations in the delivery of housing as required by the ICESCR.¹²⁰¹

¹¹⁹⁵ SIU Report (2011)20.

¹¹⁹⁶ SIU Report (2011)19. The loss amounted to R7.5 million.

¹¹⁹⁷ SIU Report (2011)19.

¹¹⁹⁸ SIU Report (2011)20.

¹¹⁹⁹ SIU Report (2011)20.

¹²⁰⁰ SIU Report (2011)20.

¹²⁰¹ See chapter 2 for discussion on the ICESCR.

Free State Province

In the Free State province, incorrect procurement procedures were followed in the appointment of construction companies for the construction of 300 low-income housing units.¹²⁰² In this regard the NHC and PFMA¹²⁰³ were flouted by by-passing legitimate application procedures which led to advance payments in the millions for incomplete work.¹²⁰⁴ Evidence proved that the accounting officer wilfully, in a grossly negligent way, failed to comply with the provisions of the PFMA¹²⁰⁵ by permitting these payments. Furthermore, economic resources were applied and wasted by allocating funds for 71 foundations and surface beds which were not laid. This action again amounted to the stifling of progressive realisation.

Eastern Cape

The waste of millions continues in the Eastern Cape where the DoHS concluded an agreement for the development of 1 211 housing units and incurred irregular expenses detrimental to the housing project amounting to R74 million.¹²⁰⁶ Fraudulent activities led to incomplete housing projects in this province due to the lack of documents to verify contractual activities.¹²⁰⁷ Significantly, no action could be taken in some of these instances as these officials have left the employment of government. A visible lack in the Corruption Act is that criminalisation does not extend to imposing restrictions on public officials joining the private sector where their employment relates to conflict of interest directly linked to functions held during their tenure in government, as expressed by the UNCAC.¹²⁰⁸

Systemic findings

These SIU interim reports stipulate the same pattern of corruption in the delivery of housing which has also been highlighted by the AG and private forensic consulting firms.¹²⁰⁹ In the

¹²⁰² SIU Annual Report (2012 -2013) 22.

¹²⁰³ Section 1.

¹²⁰⁴ Advance payments amounting to R4.9 million and irregular payments to the tune of R12 million.

¹²⁰⁵ Section 38.

¹²⁰⁶ SIU Annual Report (2012 -2013) 23-4.

¹²⁰⁷ SIU Report (2011) 19. R3 million paid for incomplete projects and R26 million was unaccounted, lacking documents.

¹²⁰⁸ Article 12(2) (e).

¹²⁰⁹ SIU Interim Report April – September 2012 Proclamation R7 of 2007, published on 25 April 2007 Extended by Proclamation R35 of 2010, published on 30 July 2010 Extended by Proclamation R15 of 2012, published on

main, systemic findings point to the irregular awarding of tenders to service providers. This includes contractual non-compliance, inadequate monitoring of contractual terms and inadequate project-monitoring management. The SIU reports noted that these transgressions took place despite that the NHBRC is tasked with overseeing the construction of housing.¹²¹⁰ That is the poor workmanship in the construction of social housing should have been detected by NHBRC in the compulsory oversight which underpins its work. Effective use of its oversight powers into the construction of housing should have prevented the billions that had been spent on the NRP which was aimed at correcting the defects resulting from poor workmanship.¹²¹¹

The most pervasive practices involve corrupt activities amounting to gross mismanagement of economic resources, identified in instances of non-delivery of housing projects as a result of negligence, fraud, corruption and /or other misconduct.¹²¹² Findings were also related to: fruitless and wasteful expenditure incurred amounting to R615 million (three matters); potential losses to the respective provincial departments regarding expenditure incurred versus value created on the ground amounting to R37 million (one matter); irregular expenditure incurred amounting to R292 million (five matters). These are amounts that cover only the matters referred to; there are many others.

The reports reveal that systemic problems are infused with senior accounting officers abusing their power by not following the laws in place to safeguard the economic resources. This is underscored by irregular payment to illegally appointed contractors. Despite the starting threshold for public procurement being R30 000,¹²¹³ housing contracts amounting to millions are awarded without following the legislative prescripts of the various measures in place for SCM, including the PPPFA and PFMA. Exacerbating this is the contravention of the PFMA section 86(1)¹²¹⁴ relating to criminal activities. Most unfortunate is that these contraventions

5 March (2012) 9 available at

<http://www.siu.org.za/sites/default/files/documents/INTERIM%20REPORT%20APRIL%20-%20SEPTEMBER%202012.pdf> (accessed on 13 March 2015).

¹²¹⁰ See chapter 3 for discussion on the NHBRC.

¹²¹¹ See chapter 3 for discussion on the NRP spending millions to rectify shoddy workmanship in social housing.

¹²¹² SIU Interim Report April – September 2012.

¹²¹³ Preferential Procurement Regulations 2011 s5. Also see Draft Preferential Procurement Policy Framework Act 2000: Preferential Procurement Regulations 2015 which changes the minimum to R10 million. It should be noted that when government purchases goods and services for more than R200 000 it must still follow a public procurement process through the SCM process (and not the PPPFA).

¹²¹⁴ This section deals with offences and penalties.

are mostly made by senior accounting officers such as municipal managers and heads of departments, who should be guarding the available resources against this kind of abuse.

Further systemic findings are non-compliance with the project payment system in terms of the provisions of the NHA and NHC non-adherence to the provisions of section 40(1) (a) of the PFMA regarding the retention of documentation and safeguarding of departmental assets.

According to the SIU these matters have resulted in substantial losses which have brought reputational damage to the DoHS.¹²¹⁵

It should be pointed out that payments that fail to comply with the PFMA should lead to sanctions for public officials under the Corruption Act, but these errant officials have not felt the wrath of this law as such. This leaves the housing programme currently vulnerable to abuse of the available economic resources and this does not blend at all with the obligation to fulfil SERs.

Report on civil cases

The SIU reported that the following number of civil cases was established against public officials in the municipalities in these interim reports: 4 829 (2006/7), 9 696 (2007/8), 11 177 (2008/09), 9 843 (2009/10), 7 654 (2010/11), 6 412(2011/12) and 3 570(2012/13).¹²¹⁶ It should be noted that civil litigation has not been enacted against these perpetrators because the SUI did not have the power to do so. The Civil Litigation Unit in the SIU had only been established for the 2013/2014 financial year.

Report on criminal cases

The SIU reported that the following number of criminal cases have been reported to the NPA: 3 302 (2006/07), 4 495(2007/08), 5 545(2008/09), 5 350(2009/10), 4 179(2010/11), 2 499 (2011/12) and 997 (2012/13).¹²¹⁷ It is important to note that these are criminal cases reported but not necessarily prosecuted as evidenced by the fact that very few arrests were noted in the SIU report.

¹²¹⁵ SIU Interim Report April – September 2012.

¹²¹⁶ SIU Annual Report (2012 -2013) para 2.2.

¹²¹⁷ SIU Annual Report (2012 -2013) para 2.2.

Actual arrests: 0 (2006 – 2011), 15 (2011/2012) and 38 (2012/2013).¹²¹⁸ According to the SIU ‘the achievement of these targets show that the SIU is making a significant contribution in the fight against corruption, based on the number of arrests that have been made from SIU referrals to the NATT.’¹²¹⁹ In addition to the SIU report, the DoHS maintain that over 1000 public servants have been convicted and over R17 million has been recovered.¹²²⁰ Those public officials bearing the brunt of the law do not necessarily include senior management misdemeanours as uncovered through the SIU investigations.

The investigations of the SIU end up with recommendations to management in government to institute disciplinary action while criminal cases are passed on to the NPA for prosecution. After recommendations from the SIU these cases should be dealt with accordingly. However, ever since the SIU reported on these cases its recommendations have been left in limbo. A key reason for this is that the SIU has not as yet finalise the proclamation on housing mandate and this provided a reason for management and the NPA to not implement the recommendations. Moreover the Unit’s good work has been hampered by the lack of permanent leadership. Between 2009 and 2015 there have been five acting heads trying to get the Unit up to speed. The leadership woes ended with a permanent head being appointed in May 2016. It remains to be seen whether Parliament is going to hold the SIU to account on its finalisation of the investigations into social housing corruption now that there is stability in leadership.

Report on disciplinary hearings

The number of files prepared by the SIU for disciplinary actions against public officials is: 7 551 (2006/07), 8 627(2007/08), 4 750 (2008/09), 3 870 (2009/10), 2 814 (2010/11), 2 731

¹²¹⁸ SIU Annual Report (2012 -2013) para 2.2.

¹²¹⁹ SIU Annual Report (2012 -2013) para 2.2.

¹²²⁰ See SA News ‘Dept clamps down on govt housing programme fraud’ 21 February 2013 available at <http://www.sanews.gov.za/south-africa/dept-clamps-down-govt-housing-programme-fraud> (accessed on 9 April 2015) the DoHS says ‘1 061 public servants from various national, provincial and local municipalities who fraudulently benefited from government housing programme were prosecuted between the 2010/11 and 2011/12 financial years’. The department’s Director General told the Parliamentary Portfolio Committee on Human Settlements that ‘a total of 1 002 of these officials were convicted and R17.9 million was recovered. The SIU is currently conducting 13 criminal investigations on this matter. It said that potential public funds recoverable in this category of an investigation amount to R101 million’; Housing corruption: millions recovered 18 August 2010 available at <http://www.southafrica.info/services/government/corruption-180810.htm#.VQONzz2hf0Q> (accessed on 20 November 2014) reports that a national audit task team appointed by South Africa's DoHS has recovered R44-million and arrested 1 910 government officials who were illegally benefiting from housing subsidies.

(2011/12) and 850 (2012/13).¹²²¹ According to the Unit the number of disciplinary action files drops as the SIU moves their focus away from high yielding processes and hence public officials continue with their nefarious business as usual.

Whilst the SIU has made some cash recoveries for social security, their annual report is silent on similar recoveries in the public housing programme.¹²²² The most notable disappointment is that the final report of this SIU is still outstanding and has been overdue since April 2014. In the meantime action against the perpetrators of criminal activities in the housing programme is evasive and public officials are left to continue retaining power over available resources that in all likelihood will not bear the desired fruit. Whilst the SIU investigation into public housing corruption is ongoing, in 2012 the Gauteng provincial standing committee on public accounts reported gross irregularities in the provincial housing department and that corruption and fraud were rife in the allocation of housing.¹²²³ Moreover the PP revealed that its office received almost 2000 reports directly related to maladministration in the public housing programme.¹²²⁴

5.4 Government's response to the SIU investigations

In a statement in 2014 the minister of Human Settlements gave a rendition of the government's progress in dealing with corruption but made no mention as to when the delayed report from the SIU (due in April 2014) on corruption into public housing would be finalised.¹²²⁵ To a question on this in Parliament in 2014 the minister replied that the SIU had completed an investigation into 59 fraudulent housing projects worth R20 billion.¹²²⁶

¹²²¹SIU Annual Report (2012 -2013) para 2.2.

¹²²²Housing: Minister of Human Settlements Budget Speech 2009 available at <https://pmg.org.za/briefing/18736/> (accessed on 17 February 2013) during this speech it was reported that a total of 772 public servant have been charged, of whom 554 have been convicted. More than 1 600 acknowledgments of debt have been signed in respect of non-qualifying government employees with a total value of R19.8m and millions have already been collected by the SIU from non-qualifying illegal beneficiaries.

¹²²³Corruption Watch 'Low income housing-more transparency needed' 28 August 2013 available at <http://www.corruptionwatch.org.za/low-income-housing-more-transparency-needed/> (accessed on 20 April 2015).

¹²²⁴Corruption Watch 'Low income housing-more transparency needed' 28 August 2013.

¹²²⁵See media statement available at http://www.gcis.gov.za/content/newsroom/media-releases/media-statements/Inter-Ministerial%20Committee_10_Sep_2014 (accessed on 15 December 2015).

¹²²⁶'Minister Sisulu must release full SIU report on R20 Billion in fraudulent housing projects' August 2014. Also see South African Government media statement 2 Aug 2012 available at <http://www.gov.za/public-protector-advocate-thuli-madonsela-engages-north-west-communities>(accessed 20 November 2014) community members in North West brought several allegations of fraud and corruption regarding the procurement of RDP houses to the Public Protector. A former Councillor, who was now a Member of the Mayoral Council, was

Notwithstanding this lackadaisical approach from the executive, Parliament in its oversight role has not called on the SIU to report on its delay in finalising this investigation, neither has it enquired into the remedial action on any of the conclusive findings of corruption in the housing programme.¹²²⁷

In questions¹²²⁸ to the President in 2014 it was asked what action had been taken by the SIU regarding the investigation into alleged corruption in the allocation of housing in Esselen Park.¹²²⁹ Although this matter refers back to 2007, the President replied in 2014 that the SIU did not have a proclamation that authorises them to investigate these allegations and therefore the pre-investigation was stopped and referred to the department, as any such investigation would have been ultra of the provision of the SIU Act. Without a presidential proclamation to date, nothing further has been done regarding allegations of corruption in the housing programme in Esselen Park.

Judging from the preliminary reports submitted the SIU has done a sterling job of forensic investigations in uncovering corruption in the social housing programme. A serious damper on their work is that finalisation is still pending since, 2014. The Unit also uncovered corruption in procurement and services at the Department of Correctional Services and has reported on this to Parliament.¹²³⁰ There have been recommendations for prosecutions and disciplinary action which are to still be pending even though the investigations have been finalised.

The presidency acknowledges in the Medium Term Strategic Framework (MTSF) 2014-2019 that the country faces intolerably high levels of corruption within the public and private sectors and that corruption undermines the rule of law and impedes government's efforts to

alleged to have been involved in an RDP house-selling scheme, which community members' claim resulted in double allocation of houses.

¹²²⁷See chapter 6 discussing the Indian judiciary's maverick stance in holding government to account in this regard.

¹²²⁸Motau S C (DA) asked the President of the Republic: the President's replies to Parliamentary Questions for written reply, in the National Assembly 7 Oct 2014 available at <http://www.gov.za/presidents-replies-parliamentary-questions-written-reply-national-assembly-0> (accessed on 10 April 2015).

¹²²⁹This is a low-cost housing suburb in Gauteng. Prior to 2007, the SIU carried out a pre-investigation scoping exercise to ascertain the facts regarding to certain complaints by the residents of Esselen Park relating to the incorrect allocation of public housing.

¹²³⁰For further successes see 'Special Investigations Unit findings on investigation into the Department of Correctional Services' available at <https://pmg.org.za/committee-meeting/11105/> (accessed on 24 August 2016).

achieve its socio-economic development and service delivery objectives.¹²³¹ Despite this statement, the President confirmed that the NATT has scored visible successes and government looked up to it to work even harder to assist in rooting out corruption.¹²³² Regrettably, despite these very innovative measures, the scope of malfeasance that was allowed to take place in the public housing programmes as per the SIU reports negates real measures of success in the application of anti-corruption measures.

Furthermore, cognisance should be taken of the fact that the Public Service Special Anti-Corruption Unit, was established to enhance and consolidate the fight against corruption in the public service and to fast-track the processing of the disciplinary cases within the public service. In essence, the pending disciplinary hearings that the SIU recommended should receive the scrutiny of this anti-corruption Unit. Needless to say that the success in stunting or reducing corruption is not an attribute that can easily be earned by the SIU, due to it being dependent on a presidential proclamation to provide any meaningful contribution.

5.5 Conclusion

Society should remain conscious of its responsibility towards realising human rights and governments should take the lead in morality in pursuit of delivering human rights. The effort that is spent on anti-corruption measures indicates that government has the moral consciousness to deal with the scourge. However, admittedly the concealed nature of corruption makes it difficult for the anti-corruption agencies to perform at their best. But in effect all too often the plethora of laws and instruments employed to deal with corruption serve to mask corruption rather than giving any clout to the anti-corruption measures. The SIU Reports show pertinent evidence relating to inadequate project monitoring, reporting mechanisms and non-compliance with contractual obligations by service providers. This is symptomatic of the lack of accountability and oversight insofar as economic resources in the realisation of social housing is concerned.

Although pertinent evidence of non-compliance and malfeasance was reported to Parliament, this has not prompted the institution to inquire into the status of the sanctions recommended by the SIU. Therefore Parliament is lacking in its role as representative of the people by

¹²³¹ Presidency News 2015.

¹²³² Presidency News 2015.

tolerating the abuse of economic resources reserved to realise housing to impoverished communities.

According to the SIU preliminary reports, it can be deduced that corruption is a grave problem in the public housing programme that threatens its vitality and international credibility. The by-passing of procurement and PFMA laws is reprehensible and recourse on this can only include sanctions under the various statutory measures, chiefly the Corruption Act. Whether it is called fruitless, wasteful or irregular expenditure, it all boils down to the fact that these are state funds that have been earmarked for specific public housing projects which did not materialise thereby leaving the rights-holders at a loss. The oversight role of the OCPO leaves much to be desired in that procurement irregularities are happening on its watch and there are no recorded 'victories' which shows its usefulness.

The problem lies with many unconscionable public officials tasked with handling public resources. On account of weak enforcement of legislative measures in government these officials are able to by-pass lawful measures and thereby abuse state resources. Despite the democratic processes in place on how to mind public spending, some public officials exercise their power in an authoritarian and avaricious manner instead of following the laws and processes in place. Therefore the good efforts made by the government on the anti-corruption front are dwarfed by those who act unethically.

Nonetheless government should apply the anti-corruption measures more rigorously against public officials, despite their rank, in the hope to create a deterrent to those hoping to engage in corruption. To succeed in this, independent anti-corruption machinery must be sourced, to effectively bring relief against the scourge. The victories of the SIU in uncovering corruption in housing is commendable but a damper on the powers of the SIU is that it is doing investigations and producing reports but without tangible legal outcomes. In essence the Unit is unable to institute any investigation without a proclamation by the President and this leaves this Unit with no liberty to act on corruption as they see fit. The Esselen Park investigation is a case in point.

The unwillingness of government to curb corruption has needlessly (criminally) delayed access to housing. As such South Africa lags in its obligations under the UNCAC to measure and fight corruption generally, but particularly so in public procurement. The next chapter

explores the judicial and other measures employed by India to enrich SERs and combat corruption in government.



Chapter 6

The Role of the Court and Other Stakeholders in Addressing Corruption and Ensuring Accountability in Realising Socio-Economic Rights: the Indian Experience Lessons for South Africa

6.1 Introduction

The means and methods of keeping governments in check and accountable for their decisions continue to be an on-going concern. Violations of fundamental rights occur in the exercise of state power, either by commission or omission. Therefore, combating repression of the people and government's disregard of statutory duties should be minimised at least and eradicated at best. As depicted in the previous chapters, South Africa is grappling with housing the impoverished on the one hand and curbing corruption in public housing, on the other. The link between corruption and human rights shows that the omnipresence of corruption deprives the rights holder from much needed housing. It is for this reason that this chapter delves into the jurisdiction of India to explore how this populous nation copes with the realisation of SERs and state accountability in keeping the economic resources of the state, safe from malfeasance.¹²³³

Why compare India and South Africa?¹²³⁴ Historically, India and South Africa have much in common insofar as discrimination and deprivation of economic power are concerned, leading to both jurisdictions seeking to ease poverty and realise housing and SERs in general. Being one of the older well-established democracies a comparative study with India can prove useful because India has gained valuable experience over decades spanning from 1947 when India became independent from British rule. Both countries boast Constitutions as their supreme law that recognise traditional diversity and SERs. The Constitution of India is a product of the post-World War II era dating back to 1950 when the development of human

¹²³³India is the seventh largest and the second most populous country in the world after China. India is a multiparty federal, parliamentary democracy with a bicameral parliament and a population of approximately 1.2 billion. India is a federal state with central powers at federal level and decentralised constitutional units called states, similar to provinces as in South Africa with a similar co-operative governance structure.

¹²³⁴Also see Risbud N 'Urban Slums Reports: The Case of Mumbai, India Case Studies for the Global Report on Human Settlements' 2003 available at http://www.ucl.ac.uk/dpu-projects/Global_Report/pdfs/Mumbai.pdf (accessed on 20 August 2015). Singh R 'India and the Universal Periodic Review 2012' (2013) 1 J. Nat'l L. U. Delhi 135.

rights was in sharp focus. India is one of the oldest democracies occupied with realising housing and has been challenged to curb corruption in its massive public service since the 14th century.

It is significant that the Supreme Court of India (SCI) the apex court has been pro-active in a progressive manner in nudging the government to deliver on SERs. It is this progressive attitude of the court that this chapter will highlight as well as the strides taken by this progressive approach in realising SERs. This chapter will draw from the Indian experience of judicial activism¹²³⁵ by examining social action litigation (SAL) so as to highlight the different approach of the SCI in the adjudication of SERs and in keeping government in check on anti-corruption measures. To give credence to this there is a comparison of the judicial approaches in India and South Africa.

The importance of the available economic resources in the realisation of SERs is indisputable and therefore government should be pro-active in its duty to provide feasible anti-corruption measures to protect the resources against abuse by public officials.¹²³⁶ Due to its enormous economically active population the economic resources available for public spending in India are larger than most developing countries, including South Africa. Political corruption in India is a perennial problem and judicial activism attempts to stymie the scourge. In keeping with this, this chapter narrates the way the SCI holds the anti-corruption agencies to its duties in the fight against corruption in the public service. Furthermore, the rich culture of civil society activism through NGOs and the media collaborating with the judiciary in SAL are explored. The role of this active citizenry is examined to illuminate how the pro-active civil society in India has assisted the judiciary in the realisation of SERs whilst playing watchdog in keeping corruption in check in the public sector. This role of civil society was formalised and gave rise to the Lokpal ombudsman.

¹²³⁵Judicial activism involves enunciation of new ideas and techniques perhaps not even urged at the Bar, which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law.

¹²³⁶The argument that corruption in India is more endemic and different from the rest of the world is fiercely contested by authors on the subject who also refute that corruption in India is in context with its culture and religion. See 'Real Drivers of Corruption in India and the Rest of the World' *Knowledge @ Wharton University of Pennsylvania* 23 Mar 2012 available at <http://knowledge.wharton.upenn.edu/article/real-drivers-of-corruption-in-india-and-the-rest-of-the-world/> (accessed on 10 August 2015).

6.2 Constitution of India and socio-economic rights

As was the case in the South African constitutional drafting process, the architects of the Indian Constitution were very aware of the vast inequalities that existed in wealth, education, health care, access to land and housing in Indian society.¹²³⁷ Both jurisdictions have adopted written constitutions that embrace dignity and equality. The Constitution of India was adopted by the Constituent Assembly on 26th November, 1949 and came into force on 26 January, 1950.

The Constitution of India provides the legal framework for the guarantee of human rights through the Fundamental Rights Chapter¹²³⁸ consisting of civil and political rights and the Directive Principles¹²³⁹ which include the SERs. Through it, the Directive Principles, the Constitution¹²⁴⁰ of India indirectly protects SERs which include shelter, education and health. The constitution-drafters were of the view that these Directive Principles placed specific duties on the legislature and the executive and therefore the judicial branch was not directed to enforce them.¹²⁴¹ These Principles are more expansive than the SERs provisions in the Constitution of SA in that they set out a wide-ranging SERs programme for the state.¹²⁴² Whereas the enumerated BoR¹²⁴³ that the Constitution of SA boasts of, directly protect SERs but the implementation programme is separately legislated as it is with housing.¹²⁴⁴

The Constitution of SA gives a more holistic approach that guarantees the right to access housing and not just a right to adequate housing as is the case in India.¹²⁴⁵ In India the enforceability of the right to housing has been made through cumulative use of the

¹²³⁷ See Reddy O *The Court and the Constitution of India: Summits and Shallows* (2008) for a summary of the Constitutional drafting process.

¹²³⁸ Part III

¹²³⁹ Part IV. This includes art 21 the right to life and art 14 the right to equality. Noted is that India did not have a charter of enforceable rights under the colonial constitutional structure.

¹²⁴⁰ Article 38(1) 'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'

¹²⁴¹ Article 37 of the Constitution provides that the Directive Principles shall not be enforceable by any court, though they are fundamental in the governance of the country. See Austin G *The Indian Constitution: Cornerstone of a Nation* (1966) on the drafting history and background to the fundamental rights and Directive Principles for a summary of the Constitutional drafting process.

¹²⁴² De Villiers B 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 *SAJHR* 32-3.

¹²⁴³ Sections 7-39.

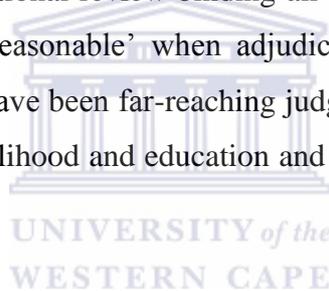
¹²⁴⁴ See Housing Act and National Housing Code discussed in chapter 3.

¹²⁴⁵ See Vijayashri S 'Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective' (2007) 16 *Tul. J. Int'l & Comp. L* 49.

Fundamental Rights, the Directive Principles and International Law.¹²⁴⁶ Moreover the unenforceability of the Directive Principles has been progressively diluted by a judicial restatement of the right to life under article 21 of the Indian Constitution.¹²⁴⁷ It is therefore trite law that the provisions of the Constitution of India must be read to give meaning to a variety of rights including SERs (housing), in order to constitute the meaning to the right to life. Robinson aptly summarises that although the Constitution did not provide the SCI a mandate to enforce SERs through the Directive Principles, the Court gradually interpreted this to be its role.¹²⁴⁸ There is no doubt that courts worldwide have a vital role to play in mandating the observance of human rights in an economic, social and cultural context.¹²⁴⁹

6.3 The Supreme Court of India the practice of judicial activism

The SCI is the highest judicial forum, the final court of appeal and the highest constitutional court, with the power of constitutional review binding all courts in India.¹²⁵⁰ The SCI uses the standard of 'fair, just and reasonable' when adjudicating on SERs, much like South Africa's CC does. In India there have been far-reaching judgements in enforceability of SERs, in respect to housing, health, livelihood and education and thereby the SCI enjoys significant public support.



In *Golaknath v. State of Punjab*¹²⁵¹ the SCI clarified that constitutional amendments by Parliament are subject to fundamental rights review.¹²⁵² However, in retrospect of this review the powers of the SCI were severely hindered during the Indian State of Emergency (1975-1977)¹²⁵³ insofar as the *Habeas Corpus* case.¹²⁵⁴ In this case the SCI agreed that the

¹²⁴⁶ Recognising and giving effect to international obligations such as the UDHR and the ICESCR, the directions in articles 38, 39, 46 of the Constitution of India, the Housing Scheme for allotment to poorer people was made.

¹²⁴⁷ See *Minerva Mills Ltd v Union of India* (1980) 2 SCC 625 para 702 where the court recognised that the Directive Principles which embody a commitment to SERs are reflective of human rights norms, just as the fundamental rights embody human rights of a civil and political nature.

¹²⁴⁸ Robinson N 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Wash. U. Global Stud. L. Rev.* 42.

¹²⁴⁹ Also see Chandrachud D Y 'Constitutional and Administrative Law in India' (2008) 36 *Int'l J. Legal Info* 337.

¹²⁵⁰ Consists of a chief justice and thirty justices that sit in bench panels of two or three judges in most cases, and in panels of five or more judges in constitutional benches. Also see Neuborne B 'The Supreme Court of India' (2003) 1 *Int'l J. Const. L.* 476.

¹²⁵¹ 1967 SCR (2) 762. The Court declared that from this date (27 February 1967) Parliament has no power to amend any provisions of Part III of the Constitution in removing or curtailing the fundamental rights therein. This was a property rights case in which the Court declared that property, as a fundamental constitutional right, was immune from any amendment process.

¹²⁵² See Constitution of India art 368 Power of Parliament to amend the Constitution and procedure therefore.

¹²⁵³ The Emergency regime passed several constitutional amendments seeking to restore parliamentary sovereignty. The most controversial was the 42nd Amendment which fortified the powers of the central

constitutional rights of imprisoned persons were to be curtailed by unrestricted powers of detention. This compromised the basic-structure doctrine of the Constitution in that Parliament had amended fundamental rights. This doctrine forms the basis of power of the Indian judiciary to review and strike down amendments to the Constitution of India. This basic structure of the Constitution is inviolable and cannot be amended through legislation enacted by Parliament that conflicts or seeks to alter this doctrine.

The basic structure doctrine is outlined in the landmark decision of the SCI in *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala and Anr.*¹²⁵⁵ Protecting the basic structure of a constitution may very well be the best way for the judiciary to protect fundamental rights.¹²⁵⁶ Issacharoff describes the work of the SCI as the best jurisprudential account of striking down constitutional amendments that threaten the basic underpinnings of fundamental rights.¹²⁵⁷ In South Africa the limitation clause in the Constitution¹²⁵⁸ allows for amendments to any provision including the BoR.¹²⁵⁹

The proactive approach of the SCI is seen by some as replacing the doctrine of separation of powers with a form of judicial supremacy which emphasises the judiciary as final protector of the Constitution.¹²⁶⁰ However, the Indian judiciary has rather interpreted the checks-and-balances duty more widely by arguing that there is no real difference between judicial review

government by authorising government to dissolve the state governments; attacked judicial powers by barring judicial review of the 1971 election. For more on the emergency period see Rudolph L I & Hoerber R S 'To the Brink and Back: Representation and the State in India' (1978) 18 *Asian Survey* 379.

¹²⁵⁴*Additional District Magistrate of Jabalpur v. Shiv Kant Shukla* (1976) SCR 172 popularly known as the *Habeas Corpus case*, during the Emergency, the SCI had to decide if the Court could entertain a writ of habeas corpus filed by a person challenging his detention. The High Courts had already confirmed this in the affirmative. But the SCI went against the unanimous decision of the High Court and upheld the right of Indira Gandhi's government to suspend all fundamental rights during the Emergency including suspending Article 21 the right to life, which precluded the Court from considering the constitutional validity of any preventive detention laws.

¹²⁵⁵(1973) 4 SCC 225. Also see *I.R.Coelho (Dead) By Lrs v State Of Tamil Nadu & Ors* AIR 2007 SC 861 where it was found that any law infringing on fundamental rights is found to be violating the basic structure doctrine and should be invalidated by the court; Mate M 'State Constitutions and the Basic Structure Doctrine' (2014) 45 *Columbia Human Rights Law Review* 442; The basic structure doctrine used in India can be traced to the German Constitutional traditions where the Constitutional Court could invalidate constitutional amendments that altered or changed the basic law.

¹²⁵⁶See Seervai H M 'Fundamental Rights Case at the Cross Road' (1973) 75 *Bom.L.R. J.* 47; Mehta P B 'The Inner Conflict of Constitutionalism: Judicial Review and the Basic Structure' in Hasan Z et al (eds) *India's Living Constitution: Ideas, Practices, Controversies* (2002).

¹²⁵⁷Issacharoff S 'The Democratic Risk to Democratic Transitions' 2014 *Constitutional Review* 18.

¹²⁵⁸Section 36.

¹²⁵⁹See Constitution s74 for procedures to amend.

¹²⁶⁰The Indian Constitution can be amended by a simple majority. See Somnath C 'Separation of Powers and Judicial Activism in India' (2007) 35 *Indian Advocate* 1.

of normal legislation and judicial review of a constitutional amendment.¹²⁶¹ Thus the basic-structure doctrine acts as a manifestation of the checks and balances which are central to India's interpretation of the separation of powers. Although the CC¹²⁶² in 1996 argued that there was no absolute separation between the different spheres of government, the judiciary in South Africa has a less liberal interpretation of separation of powers which prompts the judiciary in favour of deference to the executive when dealing with SERs matters.¹²⁶³

Following the state of emergency the SCI redeemed itself, after the unfortunate judgement, in *Habeas Corpus*, by taking a SAL approach to the enforcement of fundamental rights. The SCI was in search of a new kind of constitutional litigation and it transformed public interest litigation (PIL) to the more appropriate SAL to give effect to the Directive Principles.¹²⁶⁴ The judiciary adopted an activist approach by giving legal force to several SERs in Part IV of the Constitution, that were previously thought to be unenforceable, by bringing them within the sphere of Fundamental Rights.¹²⁶⁵

Although PIL has its origins in US, since its inception in India it has undergone significant developments and has now acquired legitimacy. Singh highlights that this unconventional way of making judicial services available to the vast number of people in the country, is thanks to primarily a few enlightened judges of the SCI.¹²⁶⁶ They developed 'traditional individualism' to the 'community orientation' of PIL which relaxed the technical and procedural formalities of the judicial process. Therefore SAL is accompanied by procedural innovations, such as letters to judges which are treated as petitions and commissioners are judicially appointed to verify facts.¹²⁶⁷ Unlike South Africa where the President traditionally

¹²⁶¹See Van Schalkwyk C 'The Basic Structure Doctrine: A Basis for Application in South Africa, or a Violation of the Separation of Powers?' *Litnet* 17 July 2015 available at <http://www.litnet.co.za/the-basic-structure-doctrine-a-basis-for-application-in-south-africa-or-a-violation-of-the-separation-of-powers/> (accessed on 28 August 2015).

¹²⁶²*Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa: in re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) - the *First Certification* judgment.

¹²⁶³See chapter 4 for discussion on the judiciary.

¹²⁶⁴Baxi U 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) *Third World Legal Studies* 116. Some scholars prefer the term 'social action litigation' to 'public interest litigation' in the Indian context as the former includes 'many attributes of a social movement, such as mobilising community activists and the press as well as courts' see Munger F 'Inquiry and Activism in Law and Society' (2001) 35 *Law and Society Review* 12.

¹²⁶⁵Singh G 'Group Actions and the Law: A Case Study of Social Action Litigation and Consumer Protection' (1995) 18 *India Journal of Consumer Policy* 26.

¹²⁶⁶Singh G (1995) 26. This was during the tenure of Chief Justices Ray and Beg after 1973.

¹²⁶⁷See Sathe S *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (2002) for a detailed description of the procedures for PIL.

appoints commissions of inquiry. In following this approach, in the 1980s the SCI witnessed a dramatic increase in the number of public-interest claims that were filed.¹²⁶⁸

Members of SAL can be NGOs, institutions or any public spirited individual including a journalist. Justices of the Supreme Court, notably Iyer and Bhagwati, began converting much of constitutional litigation into SAL through a variety of techniques of juristic activism.¹²⁶⁹ The SCI also suo motu introduced SAL to the Court instead of relying on an aggrieved party or another third party. In other words the initiative to institute litigation also came from the judiciary. The judiciary took advantage of the Constitution¹²⁷⁰ of India that proffers to protect and deliver prompt social justice with the help of the law and directly links the public with the judiciary. Through SAL, the court seeks to ascertain the underlying principles of the Constitution and to give effect to them through a non-traditional approach.

The court initiated the idea of socio-legal commissions of inquiry whereby the court engages social activists, teachers and researchers to visit particular locations for fact finding on violation of fundamental rights and to submit quick but complete reports containing suggestions and proposals.¹²⁷¹ These commissions operate under court orders and are financed by the state.¹²⁷² The SCI has also used the services of its own officials or those of the high court to engage in these socio-legal enquiries and asked judges to not merely ascertain the facts but to also monitor the implementation of the various directions given by the court.¹²⁷³ Thus SAL promotes the supervision of court orders as part and parcel of judicial oversight. Judicial oversight was not an option that the CC adopted in the *Grootboom* case in South Africa. The result of which is that housing the most desperate in South Africa remains a serious challenge because the executive has not fulfilled the Court's recommendations. In essence the minister of Human Settlements feels no obligation to implement the CC's recommendation.

¹²⁶⁸The Supreme Court Registrar officially started tracking the total number of letter and writ SAL petitions in 1985. In that year, the Court received over 24,000 letter petitions, and an average of over 17,000 letter petitions between 1985 and 2007. Since 1985, the Court has logged an average of 159 SAL writ petitions per year. Also see 'Guidelines for Letters/Petitions in Public Action Interest Litigation' 29 September 2003 available at <http://supremecourtindia.nic.in/circular/guidelines/pilguidelines.pdf> (accessed on 17 September 2015).

¹²⁶⁹Baxi U (1985)115. Also activist judges such as Chinnappa Reddy, D.A. Desai, and R.S. Pathak, handed down many of the landmark decisions.

¹²⁷⁰Articles 32, 39A.

¹²⁷¹Baxi U (1985) 125 Justice Bhagwati has initiated the idea of socio-legal commissions of inquiry.

¹²⁷²Baxi U (1985) 125.

¹²⁷³Baxi U (1985) 125.

In its liberal approach, the SCI in collaboration with public spirited lawyers, community action groups, social workers and journalists, initiated or participated in judicial activism strategies to litigate on behalf of the poor, illiterate, exploited and oppressed.¹²⁷⁴ This gave rise to justices of the SCI converting much of constitutional litigation into SAL, through a variety of techniques of juristic activism including relaxing locus standi rules. The SCI found that the traditional Anglo-Saxon strategies were woefully inadequate in their effective realisation of collective social rights.¹²⁷⁵ India, plagued by poverty, illiteracy, housing-, health- and other grave injustices, prompted the judicial protection of human rights taking on a desperate urgency. By facilitating popular access to the court for the indigent the SCI fulfils the constitutional aspirations of the downtrodden by abandoning technical and conservative procedural rules of locus standi. This is done by expanding the conventional boundaries of standing to empower the disadvantaged and underprivileged to access the court, through ordinary letters instead of formal writ petitions. Effectively, this led to the expansion of the frontiers of fundamental rights and natural justice.¹²⁷⁶

The Constitution¹²⁷⁷ of South Africa promotes access to court for everyone, but this access is underpinned by several barriers when it comes to standing. Therefore the judiciary in this jurisdiction is criticised for not being sufficiently transformed to give credence to the transformative constitution. In South Africa the impression is created that the judiciary does not want to be ‘stepping on the executive’s toes’ insofar as delivering on social ideals which are majorly still lacking in the country and this is symptomatic of the untransformed nature of the judiciary.

It was in the landmark SAL *S. P. Gupta v Union of India*¹²⁷⁸ where the Court said that the traditional rule regarding locus standi, where judicial redress was available only to the person who has suffered legal injury due to violation of legal rights, had its origins in an ‘ancient

¹²⁷⁴ Also see the following important cases: *Azad Rickshaw Pullers v Punjab* 1 S.C.R. 366 (1981); *Fertilizer Corp. Kamgar Union Sindri v Union of India* 2 S.C.R. 52 (1981); *Municipal Council Ratlam v Vardichand* 1 S.C.R. 47 (1981); *R.K. Gargy v Union of India* A.I.R. S.C. 2138 (1981).

¹²⁷⁵ Bhagwati P N ‘Social Action Litigation: The Indian Experience’ in Tiruchelvan N & Coomaraswamy R (eds) *Judiciary in Plural Societies* (1987) 2.

¹²⁷⁶ Baxi U (1985) 129.

¹²⁷⁷ Section 35.

¹²⁷⁸ AIR 1982 SC (149) 185. Proceedings for PIL are all in terms of article 32 which are writ proceedings for the enforcement of fundamental rights. For more literature on PIL in India see Bhagwati P N ‘Judicial Activism and Public Interest Litigation’ (1985) 23 *Colum J. Transnt’l L.* 561; Peiris G I ‘Public Interest Litigation in the Indian Subcontinent: Current Dimensions’ (1991) 40 *Int’l & CoMP. L.Q.* 66; Sorabjee S ‘Protection and Promotion of Fundamental Rights by Public’ (1993) 31 *Rev. Int’l. Comm’n of Jurists* 5.

vintage' period which preceded public law. The SCI believed if breach of public duties was 'allowed to go un-redressed by courts on the ground of standing, it would promote disrespect for the rule of law and furthermore lead to corruption and encourage inefficiency'.¹²⁷⁹ In addition such a breach might create possibilities for the 'political machinery' itself becoming 'a participant in the misuse or abuse of power'.¹²⁸⁰ This kind of abuse of public power visited the shores of South Africa through the misuse of public funds by no lesser person than the President of the country.¹²⁸¹

It was in the spirit of providing judicial redress to a vast number of people that the SCI started to invite letters and telegrams from complainants and conscientious individuals. Thereby, it relaxed all procedural technicalities and developed equitable and remedial powers and procedures that enabled new monitoring oversight and policy-making functions.¹²⁸² The judiciary invited members of the public to bring notice of violations of basic human rights as embodied in the Constitution for suitable judicial action and thereby extended the scope of the law of locus standi in constitutional litigation. Members of the public in South Africa are not at liberty to approach the CC by bending locus standi rules. This perpetuates the contention that the judiciary is aloof and needs to adopt a more transformed approach by finding new ways to accommodate the impoverished in holding government to account on its slow delivery of housing the most desperate.

In India these procedural developments took place alongside the 'right to life' in article 21 of the Constitution which was interpreted by the court to include SERs guarantees.¹²⁸³ Activist judges of the SCI imposed a positive obligation on the state to take steps in ensuring to the individual a better enjoyment of life and dignity. Thus the Indian judiciary is willing to protect and promote the realisation of SERs through judicial action that is judge-induced and judge-led through would-be unorthodox remedies. Perhaps this is the judicial transformation that the South African people expect to accelerate the realisation of their right to housing in sync with the promises of the transformation envisaged by the Constitution of South Africa.

¹²⁷⁹ Baxi U (1985) 119.

¹²⁸⁰ Baxi U (1985) 119.

¹²⁸¹ See chapter 4 for discussion on this abuse and its affect on the available resources

¹²⁸² Singh G (1995) 27.

¹²⁸³ .See paragraph 6.3.2 for case law on this.

Bhagwati elucidates that for helpless victims of an exploitative society who have no access to justice, the SCI will not insist on regular writ petition by the public spirited individual seeking relief for such victims.¹²⁸⁴ Initially SAL focussed primarily on 'state repression, governmental lawlessness, administrative deviance and exploitation of disadvantaged groups including slum-dwellers and pavement dwellers.'¹²⁸⁵ However in essence much of SAL focuses on an exposure of repression by the agencies of the state so as to ensure that authorities of the state fulfil the obligations of law under which they exist and function.¹²⁸⁶

According to Baxi what is distinctive in the contemporary position of SAL is that the SCI is empowered and some would say rather obligated to duly consider such action.¹²⁸⁷ The author maintains that SAL compels judges and lawyers to take human suffering seriously and therefore 'taking rights seriously'.¹²⁸⁸ Thereby the SCI is taking a proactive stance on how the state reacts, by prompting it in the direction of its duty towards realising SERs. This will be a useful approach in South Africa if the judiciary shed their cloak of passivity by relaxing standing and inviting beleaguered citizens to approach the CC with their housing anguish.

The SCI basically reignited judicial activism after the passivity that followed its deference to the executive during the Emergency period. It morphed from being an institution serving the executive to being an institution which serves its solemn constitutional responsibility with zeal.¹²⁸⁹ Mate argues that the SCI, through its activism and assertiveness, has emerged as the most powerful court in matters of governance and policy-making.¹²⁹⁰

6.3.1 Is judicial activism key in accessing socio-economic rights?

Justice Bhagwati states:

¹²⁸⁴ *S. P. Gupta v. Union of India* AIR 1982 SC (149) para 189.

¹²⁸⁵ Bhagwati P N (1985) 569.

¹²⁸⁶ Baxi U (1985) 119.

¹²⁸⁷ Baxi U (1985) 119.

¹²⁸⁸ Baxi U (1985) 120.

¹²⁸⁹ See Krishnan J 'Scholarly Discourse, Public Perceptions and the Cementing of Norms: the Case of the Indian Supreme Court and a Plea for Research' (2007) *William Mitchell Legal Studies Research Paper Series Working Paper* No. 77 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003811 (accessed on 30 August 2015).

¹²⁹⁰ Mate M 'Rise of Judicial Governance in the Supreme Court of India' (2015) 33 *B.U. Int'l L.J* 171.

‘The law which we are now administering is the . . . law of a social welfare state which is moving in the direction of socialism, law which is designed to serve the interest of the weaker sections of the community including peasants and workers.’¹²⁹¹

The justice maintains that judicial activism was motivated by the desire to uplift the poor by expanding the public interest jurisdiction of the SCI.¹²⁹² Moreover, the entire culture of the judicial process in India is geared to social justice in line with the Constitution, irrespective of whether politicians fulfil this objective or not.¹²⁹³ In other words where the politicians may fail to implement social justice objectives the courts are obligated to step in. This underscores the notion that social justice is derived from the social economic imperative which characterises the Indian Constitution. The quest of the SCI to uplift the poor and not tolerate political tardiness in this regard elevates judicial oversight to another level.

The transformation that impoverished South Africans envisaged was a judiciary that would not hesitate to call government to account insofar as its duties to the realisation of housing are concerned. Hence it was expected that the judiciary would call government to account on its time-frames of housing the most desperate as they ordered in *Grootboom*, more than 16 years ago. However, this situation prevails in South Africa due to the fact that the judiciary does not mero motu venture into the terrain of holding the government to account but instead adopts a wait and see approach which leads to deference to the executive. By contrast in India, the SCI’s assertiveness in certain domains of government reflects the judiciary’s intellectual worldviews, policy values and development, post 1990.¹²⁹⁴ That is, this judiciary puts the plight of the impoverished, the vulnerable and the desperate ahead of due process, since experience has shown that the latter tends to stunt the progression of realising SERs to these groups.

The SCI is lauded as being innovative and far-reaching, but there was mixed reaction to the activist approach of the court and the legacy of SAL.¹²⁹⁵ The contention was that the SCI’s approach to SERs adjudication was marred by inconsistency, and that there were few formal

¹²⁹¹ Desai D A *Role of Law and Judiciary in Transformation of Society: India-GDR Experiments 4* (1984) 27.

¹²⁹² Mate M (2015) 214.

¹²⁹³ Desai D A (1984) 31.

¹²⁹⁴ Mate M (2015) 217. Also see Shankar S & Mehta P ‘Courts and Socioeconomic rights in India’ in Gauri V & Brink D (eds) *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008) 146.

¹²⁹⁵ Deva S ‘Public Interest Litigation in India: A Critical Review’ (2009) 28 *Civil Justice Quarterly* 19.

checks on the manner in which judges fulfilled their constitutional obligations. Even the more successful examples of judicial involvement in widening access to SERs, such as the right-to-food campaign, were plagued by the time-consuming, costly nature of litigation in Indian courts and the non-implementation of court orders.¹²⁹⁶

Furthermore the SCI has come under criticism by government regarding the law of evidence in that the cases that SAL activists petition, in which they themselves are not victims but public citizens, rely upon what is stated in the press.¹²⁹⁷ Baxi defends the relaxation on evidence in which media reports are used and he supports the view that the press is a fertile setting for drawing attention to what is often regarded as ‘petty instances of injustice’.¹²⁹⁸ Relaxing the rules of evidence in South Africa’s courts, would require a herculean effort to convince the courts to intervene on their own initiative by accommodating the efforts of investigative journalists to acquire locus standi. In 2014 the CC did adopt a more nuanced stance when it overturned the SCA on what the latter considered frivolous and petty ‘irregularities’ in the public procurement process for social security.¹²⁹⁹

Further positive strides in India are that the SCI by accommodating SAL became more of an assembly of individual judges and ceased to be merely an institution.¹³⁰⁰ However, how a court should make any state fully liable for deprivations or denials of fundamental rights is a moot point but it remains true that in the case of India the task of the SAL petitioners is to ensure that SERs shortcomings are addressed to accomplish the desired results.

The positive influence of judicial activism serves to outstrip the cynics. Khosla argues that the SCI takes a conditional social-rights approach which exhibits a rare private law model of public law adjudication, instead of a systemic one such as is the case in South Africa.¹³⁰¹ The Indian approach focuses on the implementation of social rights instead of relying upon time-frames adopted by the state. In doing so the SCI could step in when the government fails to

¹²⁹⁶ Krishnan J (2007).

¹²⁹⁷ Baxi U (1985) 129. Also see Agarwala S K *Public Interest Litigation in India: A Critique* (1985); Desai A and Muralidhar S ‘Public Interest Litigation: Potential and Problems’ in Kirpal B et al (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (2000) 159.

¹²⁹⁸ Baxi U (1985) 117.

¹²⁹⁹ See chapter 4 for discussion on this case.

¹³⁰⁰ See Baxi U *The Future of Human Rights* (2002).

¹³⁰¹ Khosla M ‘Making Social Rights Conditional: Lessons from India’ (2010) 8 *Int’l J. Const. L* 742. For an elaborate clarification of the distinction between a systemic social right and a conditional social right see the celebrated Indian case *Olga Tellis*, dealing with eviction.

perform in its duties towards SERs. Whereas in South Africa the systemic approach merely inquires into the nature of government action and defers to the executive for implementation.¹³⁰² To this extent the CC has shown how SERs can be made justiciable but without providing for an individualised remedy or content to, the right to housing.

In the meantime the SCI rules through interim directions and orders and thereby, it seeks to improve the public administration by making it more responsive than it had been before to constitutional ethics and law. To this effect Protective Homes for Women began to steadily improve through interim administrative orders.¹³⁰³ Moreover, locus standi expansion has been attained. This gave rise to the whittling down of access to the range of documents which government may claim as privileged. These documents are relevant to determine the violation of fundamental rights and/or inhibition for potential recurrence of rights-violations.¹³⁰⁴

Khosla posits that constitutional lawyers both in India and elsewhere have failed to notice the distinctive fashion in which the Indian judiciary has made social rights attainable when the state fails in its duty.¹³⁰⁵ The author commends the Indian judiciary for its unique approach in that it informs our views on the varied ways in which justiciability operates. The SCI thus recognises its social obligations more acutely than occurs in other jurisdictions.¹³⁰⁶ Given that the CC in South Africa has the powers to initiate investigations by commissioning organised civil society to report on findings, but it does not. It is all the more lamentable that it does not use these powers in accelerating the realisation of SERs. In short, acting in such a way as to benefit society at large and not merely cater when called upon to do so by entities that have the funds and/or locus standi to engage in litigation. In India the enactment of these powers, namely to initiate litigation has in no way diminished the separation of powers.

The SCI can pass judgement on the state's performance by directing the executive in pointing out the ever increasing costs of non-performance.¹³⁰⁷ This approach helps to ensure that social justice unfolds timeously and does not fall into the trap of the ad infinitum approach which prevails in the South African jurisdiction. Through its judicial activism the rhetoric of

¹³⁰²Also see Sunstein *C R* 'Social and Economic Rights? Lessons from South Africa' in *Designing Democracy: What Constitutions do ...* (2001) 17 *SAJHR* 226.

¹³⁰³ Baxi U (1985)122.

¹³⁰⁴ Baxi U (1985)123.

¹³⁰⁵ Khosla M (2010)742.

¹³⁰⁶ Khosla M (2010) 742.

¹³⁰⁷ Khosla M (2010) 762.

the SCI shames the Indian state by illustrating struggles concerning the relative power of institutions and their claims to democratic legitimacy.¹³⁰⁸ This is made easier through the SCI being a court of first instance under article 32 of the Constitution of India. This provision makes the SCI perhaps the most accessible Supreme Court in the world.¹³⁰⁹ People can approach the Court directly to address failures on behalf of the state even though they themselves may have suffered no violation of a legal right. Thus, as distinct from South Africa, in India the petitioner is typically not required to establish any relationship between herself/himself and the person's whose right has been violated. By allowing petitioners direct access to the SCI, the matter receives immediate attention which makes it subject to public scrutiny and this facilitates the supervisory role that the Court observes.¹³¹⁰

Green argues that, until the other arms of India's government become more responsive, judicial activism is likely to remain an important weapon in the progressive movement's armoury.¹³¹¹ To some degree, this perceived wisdom of SAL continues to exert a strong influence on perceptions of Indian constitutional law today.¹³¹² Constitutional lawyers at home and abroad see the SCI as a fiercely independent guardian of constitutional principles against governmental misuse. In this regard the SCI grants supervisory relief on the basis of declared guidelines and the execution and enforcement are left to the executive. The Court has evolved certain innovative tools by way of constant monitoring so as to ensure that its guidelines in terms of SERs are fulfilled. The South African apex Court eschews constant monitoring for fear of transgressing the separation of powers doctrine. Therefore the court blithely defers to the executive in the hope that the latter will do the right thing and fulfil its obligations in terms of social justice.

¹³⁰⁸ Khosla M (2010) 763.

¹³⁰⁹ Epp C R *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (1998) 81.

¹³¹⁰ Cunningham C D 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience' (1987) 29 *J. Indian Law Inst.* 501.

¹³¹¹ Green D 'How Change Happens in India – Via the Supreme Court and Judicial Activism' Oxfamblogs (2012) available at <http://oxfamblogs.org/fp2p/how-change-happens-in-india-via-the-supreme-court-and-judicial-activism/> (accessed on 15 August 2015) blogs that 'the Supreme Court is the most effective arm of government on social policy. I'd been talking to government for years on homelessness without result. I wrote a letter to the Supreme Court saying people were dying in the Delhi winter, and there was result.'

¹³¹² See, for example, Meer S 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: a lesson for South Africa' (1993) 9 *SAJHR* 358; Subramanian G 'Contribution of Indian Judiciary to Social Justice Principles Underlying the Universal Declaration of Human Rights' (2008) 50(4) *J. Indian Law Inst.* 593; These authors are not uncritical of the Supreme Court's record but they are overwhelmingly positive about the court's independence and creativity.

Ahmadi contends that the SCI's activism is not a case of over-reach, but rather a natural by-product of citizens raising important constitutional and policy issues, not addressed by the central government.¹³¹³ Whilst it is not customary for the Court to assert itself in executive and legislative matters, the judiciary felt it necessary to intervene to fill a lacuna in responsible governance by engaging in judicial activism. Verma confirms that by and large the judicial decisions in India have influenced the judicial trends of neighbouring countries and other common law jurisdictions.¹³¹⁴ This is indicative that India is on the right path and there is reason to hope for its continuity under the vigilant public eye.¹³¹⁵

Furthermore the social rights adjudication in India plays a vitally expressive role and pushes the state towards delivering social services.¹³¹⁶ Vijayashri agrees that the SCI must continue to remain at the forefront of enforcing human rights.¹³¹⁷ This Court deserves to be richly commended in characterising the right to life in harmony with the raw realities of the Indian socio-economic environment.¹³¹⁸ Judicial activism has been used as an instrument for securing socio-economic justice for the underprivileged and has become one of the outstanding developments in the contemporary Indian legal world.¹³¹⁹ This judge-led revolution has resulted in a profound transformation for social justice by peaceful means which has come to stay and has acquired deep roots in the Indian legal system since its inception in the 1970s.

6.3.2 Social action litigation case law on SERs: the right to life encompasses the right to housing

We are familiar with judicial review as the most powerful remedy against state arbitrariness and protection of fundamental rights. For about three decades prior to the 1970s the SCI had

¹³¹³Ahmadi A Husain Z 'Memorial Lecture on the Problems and Prospects of Indian Democracy: An Evaluation of its Working for Designing the Processes of Change for Peaceful Transformation (1996) 2 *S.C.C. Journal* 1 available at <http://www.ebc-india.com/lawyer/articles/96v2a1.htm> (accessed on 8 September 2015)

¹³¹⁴Verma J S 'Recent Judicial Trends in Enforcement of Freedoms - The Indian Experience' (2001) 27 *Commw. L. Bull* 581.

¹³¹⁵Verma J S (2001) 581.

¹³¹⁶Khosla (2010) 765.

¹³¹⁷Vijayashri S 'Human Rights in India – Fifty Years after Independence' (1997) 26 *Denv. J. Int'l L. & Pol'y* 94.

¹³¹⁸Vijayashri S (1997) 118.

¹³¹⁹Singh G (1995) 29.

not been willing to consider that the Directive Principles were enforceable.¹³²⁰ The Court was reluctant to read the Fundamental Rights and the Principles together although article 37 espoused that these Principles are ‘fundamental in the governance of the country’.¹³²¹

Eventually in 1981 the SCI adopted an expansive interpretation of the right to life under article 21 of the Indian Constitution.¹³²² This right was extended to include under fundamental rights, the right to a basic education, housing, livelihood and health. The change came when the SCI found a new meaning for the word ‘life’ in *Francis Coralie Mullin v Union Territory of Delhi*¹³²³ where Bhagwati stated:

‘We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head...’

In 1985 *Olga Tellis v Bombay Municipal Corporation*¹³²⁴ was one of the first and most prominent housing-rights cases to go to the SCI. This case, for the first time, extended the right to life in article 21 to include the right to livelihood and shelter. This SAL was filed by a concerned journalist, Tellis, acting on behalf of the pavement dwellers of Bombay city, in the Bombay High Court.¹³²⁵ In her affidavit Tellis said that ‘government has not put to the best use the finances and resources available to it.’¹³²⁶

The Petitioners argued that they could not be evicted from their shacks on the pavement without being offered alternative accommodation.¹³²⁷ They argued that eviction would result

¹³²⁰See Kothari J ‘Right of Housing: Constitutional Perspective on India and South Africa’ (2001) *Lawyers Collective* 1.

¹³²¹These obligations are similar under the ICESCR art. 2(1), see chapter 2. Also see Constitution of India art 38(1): ‘The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice, social, economic and political, shall inform all institutions of the national life.’

¹³²²‘No one shall be deprived of their right to life or personal liberty except according to procedure established by law.’ Also see Constitution of South Africa s11; International Covenant art 6 and UDHR art 3 embody the right to life - the most venerable human right.

¹³²³AIR 1981 SC 746 para753. This case did not deal with a social right. It focused on the rights of a person detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974 and is what one may consider a classic civil liberties case.

¹³²⁴(1985) 3 SCC 545 (hereafter *Olga Tellis*).

¹³²⁵The case was brought by 11 residents, the Peoples Union for Civil Liberties, Committee for the Protection of Democratic Rights, and two journalists, one of whom was Olga Tellis.

¹³²⁶*Olga Tellis* paras 79 F-H, 80 A-B.

¹³²⁷Pavements and slums in the city of Bombay accommodate nearly half the population of the city.

in depriving them of their livelihood because they lived near their place of work. In true SAL fashion, the Bombay High Court appointed an official to hear and investigate the findings of the Municipal Commissioner to the effect that pavement dwellers constituted an obstruction to traffic on the road. The SCI ordered that no demolition of their homes may be made without this investigation. By expanding the right to life to include shelter near access to livelihood, the pavement dwellers were allowed to stay until alternative accommodation was found, and which do not interfere with their livelihood.¹³²⁸ It is significant to note that the Court did not confirm resettlement, but rather said the eviction had be delayed until after the Monsoon rains and those with census cards may be resettled.¹³²⁹

This was the first time that article 21 was interpreted to include the right to livelihood. *Olga Tellis* has come to be regarded by some as a ground-breaking judicial confirmation that the right to life includes the right to a livelihood as part of a right to shelter. However, the Court was quite clear that there was no positive obligation on the state to provide people with shelter or an adequate means of livelihood.¹³³⁰ Nonetheless, this case must be seen in terms of the procedure prescribed by law for depriving a person of a fundamental right and unfair and unjust procedure would attract unreasonableness which vitiated the prescribed procedure.¹³³¹ In essence, that which alone makes it possible to live must be deemed as an integral component of the right to life.¹³³²

Although the state was not compelled to provide adequate means of livelihood to citizens, anybody deprived of the right to livelihood through a process that is not just and fair could challenge the deprivation as offending the right to life as conferred under article 21.¹³³³ Moreover, rights were taken to mean not only to benefit individuals, but to secure the largest interests of the community.¹³³⁴ The SCI clarified that the eviction of the pavement dwellers would lead to deprivation of their livelihood and consequently the deprivation of life.¹³³⁵ This case has been criticised for its failure to provide for the right to resettlement in that it

¹³²⁸ See Constitution of India art 38(a) Right to adequate means of livelihood.

¹³²⁹ *Olga Tellis* paras 79 F-H, 80 A-B. A most interesting fact is, due to the strong activism and pressure from the NGO's and the pavement dwellers themselves, most of them have still not been evicted by 2015

¹³³⁰ See Jheelan N 'The Enforceability of Socio-economic Rights' (2007) 2 *European Human Rights Law Review* 146.

¹³³¹ *Olga Tellis* paras 77 F-H, 78 A-B.

¹³³² *Olga Tellis* paras 79 F-H, 80 A-B.

¹³³³ *Olga Tellis* paras 80 G-H, 81 A.

¹³³⁴ *Olga Tellis* paras 77 F-H, 78 A-B.

¹³³⁵ *Olga Tellis* paras 82 D, 83 B-D There was no order as to costs.

provided the obligation to provide natural justice before eviction, but it did not provide an automatic right to resettlement under the Indian Constitution. The SCI¹³³⁶ raised an interesting fact in that ‘common sense, which is a cluster of life experience can often, be more dependable than the rival facts presented by warring litigants. This points to the fact that common sense should be observed without being arbitrary when considering the right to housing and livelihood as being essential to life. The complacency prevailing in the South African legal system has a deleterious effect on the delivery of SERs.

The right to shelter was further guaranteed through *Shantistar Builders v Narayan K Totame*,¹³³⁷ and *Chameli Singh v State of UP & Anr.*¹³³⁸ In these cases the SCI declared that the right to shelter should be deemed to have been guaranteed as a fundamental right and extended the same right to include reasonable accommodation which informs the right to dignity and equality all of which was deemed a necessity in the development of man into a cultured being. The SCI suo motu placed extensive reliance on the ICESCR in elaborating on the right to housing. In *Ahmedabad Municipal Corporation v Nawab Khan Gulba Khan & Ors*¹³³⁹ the Court pointed the state to its constitutional duty to provide shelter and thus to make the right to life meaningful.

There have been some judgements which attracted public outcry and were regarded as setbacks in contrast to the progressive approach of the above judgements. In *Narmada Bachao Andolan v Union of India*,¹³⁴⁰ the issue was the construction of the Sardar Sarovar Project dam and its significant impact on both the environment and the displacement of thousands of tribal people.¹³⁴¹ The government’s resettlement and rehabilitation programmes for these people were proven to be inadequate. Regardless of this, the Court turned its back on all the jurisprudence in the area of housing rights and its prior decisions by displaying a complete disregard for both fundamental human rights and India's obligations under the ICESCR by allowing the displacement under these circumstances to take place. This,

¹³³⁶ *Mum v Illinois* [1877] 94 US 113 and *Kbarak Singh v. The State of U.P* [1964] 1 S.C.R. 332 referred to in *Re: Sant Ram* (1960) 3 S.C.R. 499. The Court said that ‘the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in arts 19(1)(e), 19(1)(g) and 21 of the Constitution

¹³³⁷ (1990) 1 SCC 520.

¹³³⁸ (1996) 2 SCC 549. In this case the definition of shelter was further elaborated on. These cases concern allotment of land or flats for disadvantaged sections of the community.

¹³³⁹ (1997) 11 SCC 121.

¹³⁴⁰ (1999) 8 SCC 308. Same month as *Grootboom*.

¹³⁴¹ According to official figures, the Sardar Sarovar Project will displace 40,827 families mostly from tribal communities. The unofficial total is estimated to be as high as half a million.

notwithstanding the court's previous rulings, namely that the upholding of the right to shelter related to the right to life.¹³⁴²

In contradiction of the right to housing and livelihood in *Olga Tellis*, the Bombay High Court heard a petition filed in 1995 by the Bombay Environmental Action Group to 'remove forthwith' informal settlement dwellers (as 'encroachers') adjacent to the Sanjay Gandhi National Park in order to protect 'the environment and all its aspects'. The Court directed the authorities to evict the people, thereby depriving them of their homes and livelihood.¹³⁴³ Evidently this action by the Court retrogresses from the *Olga Tellis* decision, namely that evicting people must be underpinned by reasonable procedure and fairness. This Sanjay Gandhi National Park ruling left vulnerable and marginalised groups in India exposed to arbitrary resettlement which obviously negates the right to life and to live near their place of livelihood.

Whilst there may have been controversy over SAL, it has done more good than harm, especially in the areas of human rights and corruption without usurping executive authority but instead safeguarding civil liberties.¹³⁴⁴ Without the Court's sensitivity to the harsh realities of Indian society the landscape of human rights would have been all the poorer. In its contribution as social auditor, the SCI took 'suffering seriously' and thereby contributed to the meaningful protection of human rights in India.¹³⁴⁵ All in all, due to the proactive stance of the judiciary, the right to life was been interpreted by the courts to be broad enough to encompass all those facets that make life meaningful. Needless to say, SAL is made effective through judicial precedent, thus there should be no reason why the SCI should forsake its activism and revert to a restrained and passive role. The progressive stance of the SCI has proliferated into SAL that inquires into the progress on corruption investigations of public officials including politicians, which in turn directly affects the available resources for SERs.¹³⁴⁶

¹³⁴²This right was also upheld by the Narmada Water Disputes Tribunal.

¹³⁴³Also see Kothari M 'Report of the Special Reporter on the Right to Adequate Housing' (2000) submitted pursuant to the Commission Resolution UN Doc 2000/9. E/CN.4/2001/51.

¹³⁴⁴Vijayashri S (1997)125.

¹³⁴⁵Vijayashri S (1997)125. Also see *Fertilizer Corp. Kamgar Union v. Union of India* A.I.R. 1981 S.C. 344.

¹³⁴⁶See para 6.5 for this discussion.

6.4 The South African experience in public interest actions

Essentially the CC acts on relatively restrictive rules of locus standi. Generally, those that have standing are the party seeking relief from harm suffered, to a right in the BoR. The Constitution through section 38 proffers locus standi for anyone acting in the public interest in alleged violation of such a right. In *Ferreira v Levin NO; Vryenhoek v Powell NO*¹³⁴⁷ the CC confirmed that the category of persons empowered to bring a constitutional matter to a competent court of law is broader.¹³⁴⁸ Accordingly there is opportunity to act on behalf of an unidentifiable class of people to enforce their rights.¹³⁴⁹

According to the South African Law Commission (SALC) public interest actions are part of the worldwide movement to make access to justice a reality.¹³⁵⁰ In 1998 the SALC recommended to the minister of justice to review the law in terms of public interest actions and class actions by introducing legislation and procedures to rules of the courts. The Commission proposed the following definition:

‘Public interest action means an action instituted by a representative in the interest of the public generally, or in the interest of a section of the public, but not necessarily in that representative’s own interest. Judgment of the court in respect of a public interest action shall not be binding (res judicata) on the persons in whose interest the action is brought.’

To date, although Public Interest Actions (PIA) is given expressed recognition in the Constitution, nothing has been done to regulate it. The courts thus address the issue in the exercise of its inherent power to protect and regulate its own process and to develop the common law in the interest of justice. Significantly, the recommendation by the SALC

¹³⁴⁷1996 1 SA 984 (CC) paras 162- 167, this case was on standing in terms of s7 (4) (b) (v) of the Constitution 1993 to challenge the constitutionality of the particular section in the Companies Act of 1973 in the public interest. Also see the standing principles laid down by O’Regan in *Ferreira* were applied in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC) In that matter the first applicant was Lawyers for Human Rights, a juristic person which acted in the public interest in terms of section 38(d) of the Constitution 1996.

¹³⁴⁸Both the Interim Constitution 1993 s7(4)(b) and final Constitutions 1996 s38 permit the bringing of representative or class actions in circumstances where a right in the Bill of Rights has been infringed or threatened.

¹³⁴⁹In *Kruger v President of the Republic of South Africa & Others* 2009 (1) SA 417 (CC) para 22 the CC confirmed that s38 offers a radical departure from the common law relating to standing.

¹³⁵⁰SALC Report (1998) 2.

regarding public interest action does not make any reference to the benefit of this action in realising SERs.

In *Ngxuza and Others v Permanent Secretary, Department of Welfare, Eastern Cape, And Another*¹³⁵¹ the Court found that there can be no proper justification for a restrictive approach to locus standi in public law litigation. The aim was to make it easier for the poor and vulnerable to approach the court, to ensure that the public administration adhered to the constitutional principle of legality and that the exercise of public power had the requisite beneficial effect on the development of democracy in South Africa.¹³⁵² In *Port Elizabeth Municipality v Prut NO*¹³⁵³ the HC allowed standing for the applicant because it was acting in the public interest. The Court reiterated that courts should be slow to refuse to exercise jurisdiction where public interest questions are decided and may put an end to similar disputes.¹³⁵⁴ It must be noted that the CC in 2016 did not deem it to be in the interest of justice to hear a public challenge on the multi-billion rand arms deal.¹³⁵⁵ This is despite the allegations of massive fraud perpetrated in the procurement of the arms deal which was widely publicised in the media and received massive outcry by the public. Several court challenges to standing in the public interest could have been avoided if Parliament had taken the recommendation of the SALC to enact legislation to define the process.

The CC depends on NGOs and human rights activists to approach the Court on behalf of others for alleged impairment of SERs. Despite this the CC does not adopt the relaxation of rules as does the SCI. This has limited the scope of substantive constitutional development and thereby confined the CCs role in the development of fundamental rights. A richer

¹³⁵¹2001 (2) SA 609 (E) (hereafter *Ngxuza*) These applicants were a group of persons receiving social grants under social legislation. The grants were suspended or cancelled by the respondents. The applicants sought a declaration that the cancellation or suspension of their grants had been unlawful and claimed that the grants should be reinstated retrospectively.

¹³⁵²*Ngxuza* para 629.

¹³⁵³1996 (4) SA 318 (ECD) paras 325 J – 326 A (hereafter *Port Elizabeth Municipality*). This application was to seek clarity on whether the municipality's decision to write off more than R 62 million discriminates unfairly against other service-charge debtors or ratepayers.

¹³⁵⁴*Port Elizabeth Municipality* para 325 J.

¹³⁵⁵See 'Crawford Browne loses ConCourt bid to set aside arms deal commission finding' Daily Maverick 16 November 2016 available at

http://www.dailymaverick.co.za/article/2016-11-16-crawford-browne-loses-concourt-bid-to-set-aside-arms-deal-commission-finding/#.WDF_1DWXU2I (accessed on 20 November 2016).

constitutional development for SERs could have been developed through a more active judiciary raising such matters *mero motu*.

The historic deprivation in terms of housing in South Africa, calls upon the CC to take a more aggressive approach in holding government to its promises of delivery. Taking the Indian approach the judiciary could inquire through the SAHRC¹³⁵⁶ on the status of housing the most desperate, at least. For example in a situation such as Blikkiesdorp in Cape Town¹³⁵⁷ where impoverished people were moved to a temporary location area (transit camp) with the promise of more permanent housing soon. This was supposed to be a short-term housing solution but eight years later the residents still lived under undignified conditions and the local government had again asked them to move due to development of the airport in Cape Town. The residents have again been assured of permanent housing, soon. There have been numerous reports by the media on the ungodly conditions these vulnerable and impoverished people are enduring.¹³⁵⁸ It is this kind of media attention that in the Indian context would have been found useful to assist in the quest of good spirited individuals seeking relief through SAL on rights that are infringed. Thus in order to pronounce on what is in front of them, the CC does not need to sit and wait for a person with proper *locus standi* to approach the Court. The CC can be pro-active as custodian of the Constitution and move out of its comfort zone to inquire as to the status of at least the desperate and those living in intolerable conditions. It is because of the deferent stance of the CC, that the right to housing continues to be undermined by the tardiness and indifference of government thus delaying access to people such as those living in Blikkiesdorp. This action does not gel with reasonableness or with progressive realisation and even less with security of tenure.

¹³⁵⁶Section 184 (2) 'The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power-

(a) to investigate and to report on the observance of human rights;

(b) to take steps to secure appropriate redress where human rights have been violated;

(3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care food, water, social security, education and the environment.'

¹³⁵⁷Blikkiesdorp was built in 2008 for an estimated R32m (£2.9m) to provide 'emergency housing' for about 650 people who had been illegally occupying buildings. Residents claim there are about 15,000 people struggling to live in about 3,000 of the wood and iron structures, with more arriving all the time. City officials claim these figures are inaccurate and maintain that the site was designed to cater for 1,667 families in total, see The Guardian 'Life in Tin Can Town' 01 April 2010 available at

<http://www.theguardian.com/world/2010/apr/01/south-africa-world-cup-> (accessed on 19 September 2015).

¹³⁵⁸See Van Minnen B 'This is the Blikkiesdorp Situation' *Politicsweb* 10 June 2015 available at

<http://www.politicsweb.co.za/politics/this-is-the-blikkiesdorp-situation--cape-town/>; Gerbi G 'Blikkiesdorp residents long for dignity' *Western Cape Anti-eviction Campaign* 22 March 2011 available at

<https://westerncapeantieviction.wordpress.com/tag/delft/> (all accessed on 19 September 2015).

In *Joe Slovo* the CC ordered relocation of the residents without considering how this would affect their livelihood.¹³⁵⁹ However, the Court issued a supervisory order stipulating feedback on implementation be given, meaning that the parties were obliged to make presentations to court at intervals.¹³⁶⁰ Through the supervisory order the CC could monitor the progress of government and when this did not materialise the Court ordered the suspension of the eviction order until further notice.¹³⁶¹ This active involvement on the part of the judiciary proved to be the best way of keeping a sluggish government to its time-frames. Thankfully, the Indian jurisprudence in *Olga Tellis* was emulated in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd*¹³⁶² where the CC read the importance of location in relation to employment, into the right to housing.¹³⁶³ Of importance is that the earlier *Joe Slovo* ruling did not take into account proximity to employment as important to the right to housing.

The CC was also pro-active in *TAC*¹³⁶⁴ where it stated that, ‘when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation’. In *Fose v Minister of Safety and Security*,¹³⁶⁵ the CC pronounced that courts must order relief that ensures the rights enshrined in the Constitution is protected and enforced. To this end the Constitution urges the judiciary to make any order that is just and equitable.¹³⁶⁶ Thus there are various indications that the CC can be more pro-active and less deferent when dealing with PIA.

Therefore the Court’s reluctance to exercise continued oversight over cases on the delivery of SERs, is regrettable. In *Blue Moonlight*¹³⁶⁷ the Court’s reluctance to adopt a supervisory role

¹³⁵⁹ More than 20 000 people were to be displaced.

¹³⁶⁰ Paragraph 16.

¹³⁶¹ On 24 August 2009 the Constitutional Court quietly issued an order suspending the evictions until further notice.

¹³⁶² 2012 (2) SA 104 (CC) (hereafter *Blue Moonlighting*) this was an application brought by 86 desperately poor people living in a disused industrial property Johannesburg. The CC ordered the City of Johannesburg to provide alternative accommodation through meaningful engagement with the residents. The City ignored this order and had to be compelled through another court order two years later. See chapter 4 for elaboration on this case. Also see *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC); Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 424 for an analysis of the power and potential of supervisory interdicts.

¹³⁶³ See CESCR General Comment No 4 The Right to Adequate Housing (1991) para 8.

¹³⁶⁴ Paragraph 113.

¹³⁶⁵ 1997 (3) SA 786 (CC) para 19.

¹³⁶⁶ Section 172(1) (b).

¹³⁶⁷ See chapter 4 for elaboration on this case

and its refusal to provide any substantive content to the right to housing left, the residents with problematic choices of accommodation that infringed on fundamental rights such as dignity and privacy. In its deferent approach the Court elected to trust that the municipality would do the right thing, but the order of alternative accommodation and meaningful engagement was ignored by the local government which forced the applicants to approach the court again to compel the City to implement the Court's orders. For example if the CC ordered a continuous mandamus as adopted in SAL in India, to monitor the City's implementation of the court order, the protracted litigation could have been avoided.¹³⁶⁸

Reluctance by the CC to provide long-term oversight or structural interdicts means that litigants cannot rely on the CC to enforce or vary its own orders. Dugard recommends that the CC along with other courts adopt a new approach to structural interdicts and reconsider its stance on the content of SERs.¹³⁶⁹ Budlender et al maintain that from 2000 to 2010 there was a major shift in the nature of PIA with greater focus on SERs but this was not sufficient given the critical importance these rights play in addressing the persistent concerns of the poor.¹³⁷⁰ This is due to, insufficient monitoring, awareness-raising and advocacy initiatives.¹³⁷¹ In this regard a more progressive approach is found in the Indian jurisprudence where the judiciary does not hesitate to mandate its own commission of inquiry where the right to housing is threatened as in *Olga Tellis*. The CC's oversight could eliminate the manifestation of non-compliance by government to execute court orders which is a problem that the judiciary grapples with in South Africa.¹³⁷²

The Indian judiciary is followed by the Colombian Constitutional Court which has embraced the substance of SERs in an explicitly public way. Young argues that the Colombian Court has redrawn the government's list of health entitlements to award claimant's access to health treatments which had previously been denied to them.¹³⁷³ It has dictated which aspects of health care must be supported in the government's scheme. Moreover this Court has also

¹³⁶⁸This case appeared three times before the CC due to government's reluctance in executing the court orders.

¹³⁶⁹Dugard J (2014) 278.

¹³⁷⁰Budlender S Marcus G & Ferreira N 'Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons' *The Atlantic Philanthropies* (2014) 9 available at <http://www.atlanticphilanthropies.org/sites/default/files/uploads/Public-interest-litigation-and-social-change-in-South-Africa.pdf> (accessed on 20 September 2015).

¹³⁷¹Budlender S et al (2014) 9.

¹³⁷²See chapter 4 for a discussion on this.

¹³⁷³See Young K & Lemaitre J 'The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa' (2013) 26 *Harvard Human Rights Law Journal* 179.

gathered information, prepared large-scale public hearings, dictated policy and managed resources.¹³⁷⁴ Thus the Columbian Court has not shied away from pronouncing on how the executive must use resources. The allocation of resources was a contention that the CC did not want to deal with in *Grootboom* because the Court felt this was best left to the executive. Instead the CC could have ordered and not just asked, in passing, the SAHRC to inquire and report back, into the cost to have the dignity of the applicants restored through temporary and eventually permanent social housing.

As Budlender et al put it, to ensure that litigation leads to maximum social change the most significant aspect is follow-up, ie requiring government to report back to litigants or to the court as to the steps taken in fulfilment of an order.¹³⁷⁵ The author believes that surprisingly the court is beginning to shed their reluctance to grant such orders, as demonstrated by the CC in 2014, by granting a supervisory order in context of a tender dispute which had the potential to affect millions of people living on social grants.¹³⁷⁶ Declaratory orders have failed to produce adequate social change. Therefore for South Africa to be forward looking there must be greater implementation of broad rules of standing, relaxation of evidentiary rules and opportunities for interventions by *amicus curiae*.¹³⁷⁷

Grootboom shows that excessive deference by the court gives rise to orders that do not compel the state to act and address the unconstitutionality the court points out and thereby render its orders less effective, if effective at all. Despite having one of the most progressive constitutions in the world, South Africa continues to face massive inequality characterised by large scale poverty which by its very nature suspends the right to adequate housing. The idea is to broaden standing by making it possible for person not having a direct interest in the relief claimed, to institute an action in the public interest with less rigid procedures.¹³⁷⁸ Moreover PIA assists in enhancing judicial decision in two ways: listening to interveners which in turn exposes the judges to the plight of people and also lends urgency to the need to

¹³⁷⁴See Cepeda-Espinoza M J 'Transcript: Social' and Economic Rights and the Colombian Constitutional Court' (2011) 89 *Texas Law Review* 1699.

¹³⁷⁵Budlender S et al (2014) 47.

¹³⁷⁶*Allpay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others* (No. 2) 2014 (6) BCLR 641 (CC).

¹³⁷⁷See for example: Kameshni Pillay K 'Implementing *Grootboom*: Supervision needed (2002) 3 *ESR Review* 16.

¹³⁷⁸SALC Report (1998) 25.

preserve human dignity and self-respect.¹³⁷⁹ De Vos argues if the locus standi barrier were to disappear there would be no other real obstacles to approach a court in SERs litigation.¹³⁸⁰

The PIA proposed by the SALC is not as liberal as the SAL that the Indian judiciary engages. The SALC recommendation for PIA is that it should include civil action that does not only include a right in issue. The approach of SAL is aimed at expanding on SERs and holding government to account in the manner in which it delivers on the rights by engaging a less formalistic approach to the rules of evidence relating to alleged hardship in the realm of social rights.¹³⁸¹

The manner, in which the SCI has approached the protection of SERs by giving easier access to the court in developing these rights, could prove vital for South Africa. One of the ways in which the implementation of these rights is monitored, is by means of the SAHRC annual Economic and Social Rights Reports. These reports have been presented to a non responsive Parliament as shown to be the case in *Grootboom* where the executive remained unmoved by the court's orders. The aim is for the CC to assess these SAHRC reports in order to establish the degree to which the Reports contribute to good governance in the delivery of SERs in South Africa.¹³⁸² The CC did not retain jurisdiction over the *Grootboom* order therefore the use of the SAHRC was ineffective because it was not required by a court order to report back.¹³⁸³

The CC practises a form of PIA, but nowhere as liberally and progressively as the SAL with which the SCI engages. In India the judges are proactive in bringing cases to court instead of waiting for NGOs and human rights activists to do so. In South Africa, judges must do more than merely applying the law; they must develop it and thereby shadow action by government

¹³⁷⁹ SALC Report (1998) 23.

¹³⁸⁰ De Vos W 'Reflections on the Introduction of a Class Action in South Africa' 1996 (4) *Journal of South African Law* 642.

¹³⁸¹ Epp C R (1998) 205 submits that despite the activist judiciary and generous Constitution, the ideal environment for a rights revolution has not happened in India.

¹³⁸² General Comment No 10 of 1998 states that national human rights institutions have, according to the CESCR, a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights and attention is to be given to SERs in all of the relevant activities of these institutions.

¹³⁸³ *Grootboom* CC para 97 The report filed by the SAHRC mentions that there was no attempt by any of the three spheres of government to coordinate efforts and reach consensus on what the *Grootboom* order required, nor on the manner in which it had to be implemented to ensure housing policies' and programmes' consistency with the requirements of section 26, see SAHRC 14 November 2001, Letter addressed to the CC in the matter of *Grootboom*.

to ensure that the progressive realisation of housing does not mean that there are no time-frames to house the most desperate.

This study highlights that the only time court attention is given to SERs is when victims of violations of these rights are able to access the court through human rights lawyers assisting them. The pertinent provision in the Constitution of SA for PIA has not necessarily led to a more liberal approach to standing in SERs litigation. The time is more than ripe for the CC to take an aggressive approach in holding government to reasonable time-frames in the realisation of housing by relaxing standing rules and let social spirited people assist the court. This is a way to access social justice for the poor and vulnerable, by the court adjudicating and enforcing SERs through developing PIA to the point where it is as effective as SAL.

In South Africa since 2011 there has been an annual gathering of PIA practitioners and social movement leaders focusing on networking and sharing knowledge on the topic. However the desired transformation has not occurred.¹³⁸⁴ Greater judicial transformation in line with the Constitution would lead to a higher success rate in cases relating to SERs.¹³⁸⁵ Therefore the Constitution must be used and interpreted to bring about the enduring amelioration of social conditions and that is the privilege of the judiciary.¹³⁸⁶ This can only be done through CBOs or NGOs actively collaborating with the judiciary in fighting for the realisation of SERs. This is the most effective way for the indigent to be heard.

6.5 The Supreme Court of India holding the state accountable on enforcing anti-corruption measures

Vijayashri argues that although the SCI is not the sole agency to safeguard the advancement of human rights, it is nonetheless a crucial agency in the light of a corrupt and errant government.¹³⁸⁷ To further the quest to a better life for the indigent, the SCI also took initiative in pursuing alleged political corruption. The Court felt that equality would remain unattainable, if accountability were not enforced by dealing with corruption in public life,

¹³⁸⁴ See PILG available at <https://publicinterestlawgathering.wordpress.com/> (accessed on 20 August 2015).

¹³⁸⁵ See Davis D M 'Adjudicating the Socio-Economic Rights in the South African Constitution: Towards Deference Lite' (2006) 22 *SAJHR* 314.

¹³⁸⁶ Epp C R (1998) 205.

¹³⁸⁷ Vijayashri S (1997)136. See chapter 4 on the role of the South African judiciary in combating corruption.

effectively.¹³⁸⁸ The SCI reinterpreted article 32 of the Indian Constitution to expand the standing doctrine for SAL claims against the illegal conduct of the government and its failures. The Court also relaxed its formal pleading and filing requirements and developed equitable and remedial powers and procedures that enabled it to assert new monitoring, oversight, and policy-making functions. Thereby it asserted an expanded oversight and accountability functions, through which it would subsequently expand its power in reviewing the power of the elected branches of the central government.

The Constitution of SA allows for judicial oversight but supervisory orders are rarely included in their rulings. This is criticised because it smacks of ‘deference to the executive’ and it does not meet the transformation goals of the Constitution.¹³⁸⁹ More importantly, the CC has still to make a proactive link between the delay of SERs and corruption.¹³⁹⁰ Due to the fact that this challenge has not been brought in application to the CC it has not been asked to make such a connection.

In India the Court was concerned with good governance and protecting the rule of law, therefore it addressed mal-governance in state governments, local governments and bureaucratic agencies. This was aimed at addressing critical governance failures in particular corruption, accountability and human rights.¹³⁹¹ Thus, recourse was sought for the poor and disadvantaged through the judiciary. This process was aided by the national media and civil society groups playing a key role in exposing corruption in the central government. According to Baxi, the news media played a critical role in focusing national attention on government’s flouting of the law and the repression of human rights.¹³⁹² Although the media in South Africa is robust in reporting on corruption in government, this does not necessarily serve as credible evidence in public corruption. As noted previously the media exposed irregularities in the security upgrades at Nkandla the President’s private home, but this had no

¹³⁸⁸Verma J S (2001) 578. Also see Khosla M ‘Addressing Judicial Activism in the Indian Supreme Court: Towards and Evolving Debate’ (2009) 32 *Hastings Int’l & Comparative Law Review* 55.

¹³⁸⁹ See chapter 4 for discussion on the transformative Constitution.

¹³⁹⁰ See chapter 1 for discussion on the link between corruption and the deprivation of enjoying human rights.

¹³⁹¹ Also see Chadda M ‘India Between Majesty and Modernity’ in Johnson R A (ed) *The Struggle against Corruption: A Comparative Study* (2004).

¹³⁹² Baxi U (1985) 114.

effect until a complaint was brought to the PP.¹³⁹³ Moreover Parliament also failed miserably in holding the executive to account in this regard.¹³⁹⁴

In India one of the main stream SAL in public housing was the uncovering of the Adarsh Housing Society scam.¹³⁹⁵ This petition was filed by a journalist seeking court direction for the CBI, to produce a final investigation report on the steps taken to prosecute the ex-housing minister, who was forced to resign amidst the uncovering of the said corruption.¹³⁹⁶ This petition arose out of the slow pace of the investigation over two years. This led to the minister being charged together with other politicians and bureaucrats and when the CBI petitioned the Bombay High Court, it refused to drop the charges leaving the case pending under the Prevention of Corruption Act.¹³⁹⁷

The closest example to this action in South Africa is in *Glenister*¹³⁹⁸ where the CC was petitioned by a private individual in question of whether the national anti-corruption body, the Hawks was sufficiently independent.¹³⁹⁹ The distinction is that in India the action was petitioned through SAL which relaxes standing and evidentiary rules, and the SCI does not shy away from entering the arena. In retrospect, if the *Glenister* application had not being raised by a private individual, the CC would not have raised this question pertaining to the national anti-corruption body. This is despite the wide media attention the case received due to the Hawks' doubtful independence from political influence. The omnipresence of corruption in government begs for the building of strong independent anti-corruption institutions to control, prevent and pre-empt corruption in the public service. The CC can do

¹³⁹³See chapter 4 for discussion on the CC compelling the President to repay abused available resources spent on Nkandla.

¹³⁹⁴See chapter 4 discussing how parliamentary oversight failed in the *Nkandla* matter.

¹³⁹⁵Land allotted by the chief minister of Maharashtra in 2002 for the construction of a cooperative society called the Adarsh Housing Society. This is a posh, 31 storey building constructed on prime real estate in Colaba, Mumbai, for the welfare of war widows and personnel of India's Ministry of Defence. Over a period of several years, politicians, bureaucrats and military officers allegedly conspired to bend several rules concerning land ownership, zoning, floor space index and membership get themselves flats allotted in this cooperative society at below-market rates. The scam was unearthed in November 2010 available at http://research.omicsgroup.org/index.php/Adarsh_Housing_Society_scam accessed (accessed on 3 October 2015)

¹³⁹⁶Chavan resigned as the Chief Minister in 2010 in the wake of revelations that two of his family members owned flats in the building. The CBI filed a charge sheet in the case which named him and 12 others.

¹³⁹⁷See Bas B 'Adarsh Housing Society Case: Court Refuses Relief to Former Maharashtra CM Ashok Chavan' *Indian Business Times* 14 March 2015 available at <http://www.ibtimes.co.in/adarsh-housing-society-case-court-refuses-relief-former-maharashtra-cm-ashok-chavan-625223> (accessed on 3 October 2015).

¹³⁹⁸See chapter 5 for discussion on this case.

¹³⁹⁹Kende M S 'Corruption Cases and Separation of Powers in the South African Courts and U.S. Supreme Court' (2015-2016) 60 *N.Y. L. Sch. L. Rev* 185.

more than waiting for a social spirited individual to raise concern as to the government's commitment to root out and stymie corruption which inevitably affects the budgets due for realising SERs. The approach of the Indian judiciary shows how the CC can enforce oversight over political corruption and SERs without compromising the separation of powers.

In 1993 the SCI was petitioned in *Vineet Narain v. Union of India*¹⁴⁰⁰ to further investigate cases of corruption in government where nothing had been done, to command performance of the duty under law to properly investigate an accusation of corruption in the public sector. The primary issue here was '(w) ether it is within the domain of judicial review and if it could be an effective instrument for activating the investigative process which is under the control of the executive?'¹⁴⁰¹ The Court responded in the affirmative by invoking the Indian Constitution which allows the Court to depart from the traditional adversarial proceedings for the enforcement of fundamental rights.¹⁴⁰² In this regard the Court accepted a writ petition by a journalist who filed a SAL on corruption, exposing the 'Hawala scandal'.¹⁴⁰³ This was termed as the biggest political scandal in the world involving politicians and bureaucrats of the Indian government in bribery and corruption.

This petition alleged that government agencies such as the CBI had failed to perform their duties and legal obligations to properly investigate matters arising out of seized documents.¹⁴⁰⁴ The SCI was not concerned with the merits of the accusations but with the performance of the legal duty by the government agencies to fairly and thoroughly investigate the accusations against the individuals in order to take final action according to law. The Court was asked to compel the CBI to duly perform their legal obligations and proceed against all persons involved, irrespective of the office the person held. The Court

¹⁴⁰⁰(1998) 1 S.C.C. 226 (also known as the *Hawala* case). Also see *Subramanian Swamy v. Union of India* (2012) 3 S.C.C. 1 (court cancelling 122 telecom licenses); *Manohar Lal Sharma v. Principle Secretary* (2014) 9 S.C.C. 516 (India) (court cancelling approximately 200 licenses for coal blocks for mining granted since 1993).

¹⁴⁰¹ Sondhi S (2000) 47.

¹⁴⁰² Article 32; Also see art 142 right of the Supreme Court to issue orders enforceable throughout the country for 'doing complete justice'.

¹⁴⁰³ It was a US\$18 million bribery scandal that implicated some of the country's leading politicians. Hawala Scam was bigger than Watergate, Iran-gate, Bofors, Harshad Mehta, Tehelka and Lockheed scams. See van de Bunt H 'A Case Study on the Misuse of Hawala Banking' (2008) 35 *International Journal of Social Economics* 691 – 702; Kapoor S *Bad Money, Bad Politics: The Untold Hawala Story* (1996); Desai A V 'The Economics and Politics of Transition to an Open Market Economy: India' *OECD Working Paper 155* (1999) available at <http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj7bg1.pdf?expires=1440162081&id=id&accname=guest&checksum=8E86766C75ACDB17889B24DD2CA35DAD> (accessed on 20 August 2015).

¹⁴⁰⁴ The raid led to the discovery of financial support to politicians, bureaucrats and criminals, by clandestine and illegal means, using tainted funds obtained through 'Hawala'.

directed the CBI to charge those who had prima facie evidence against them. In addition the CBI was ordered to report to the Court from time to time on the progress of the investigation until the charge-sheets were filed in the appropriate courts. It is clear that the Indian example illustrates how effective the court can be in dealing with corruption without encroaching on the executive's terrain. This approach in the South African setting would see the CC inquiring from the SIU as to its progress on finalising its investigation into malfeasance in the delivery of social housing. This inquiry by the court could initiate the prosecutions of those found to be in contravention of the law. In effect, what is happening in South Africa is that the CC and by extension the judicial system has rendered itself rather toothless as regards SERs.

The SCI took over governance and policy-making functions that were once in the exclusive domain of the central government bureaucracy, the executive (Prime Minister and Council of Ministers), and Parliament. Thereby it assumed supervisory responsibility over the CBI's investigation by issuing directives to make the CBI more autonomous by having severed its links to the political establishment.¹⁴⁰⁵ The Court asserted the power of continuous mandamus which provided continued jurisdiction to monitor the CBI. In addition, it ordered that the CVC be given a supervisory role over the CBI, ordering them to report to the Court on the progress of the investigation into the politicians involved in the '*Hawala*' case.¹⁴⁰⁶ The Court insulated the investigation from extraneous influences including the controlling executive. This intervention by the Court into the CBI investigations resulted in the filing of charge-sheets against 54 persons including leading cabinet ministers and other government officials.¹⁴⁰⁷ Nothing of this magnitude can be attributed to South Africa's judiciary.

Further investigations into state housing fraud saw the CBI arresting the housing finance chief executive and seven others from the public sector Life Insurance Corporation and state owned

¹⁴⁰⁵The Court relied again on arts 32 and 142 of the Indian Constitution.

¹⁴⁰⁶*Hawala* case paras 246-51. In compliance with the SCI's directives the government enacted the new The Central Vigilance Commission Act 45 of 2003 (India) that confers statutory status on the CVC.

¹⁴⁰⁷*Hawala* case paras 226, 230-31. Despite the Court's vigilance and progressive approach, after many years the case was closed without any convictions due to lack of evidence.

banks for taking bribes to secure loans.¹⁴⁰⁸ The CBI investigations into the Commonwealth Games scam have seen the secretary of a political party, forced to resign.¹⁴⁰⁹ The SCI also invalidated the single directive protocol which required the CBI to receive prior ministerial authorisation before investigating high-ranking government officials.¹⁴¹⁰ Where the executive and Parliament have failed to satisfy their constitutional obligations the SCI became more assertive in safeguarding and protecting the rule of law. The Court opined that it was the duty of the executive to fill the vacuum by executive orders and where there is inaction by the executive the judiciary must step in to exercise its constitutional obligations.¹⁴¹¹ The wait-and-see approach of the South African CC has left the executive and Parliament to its own time-frames in investigating corruption. In its observance of the separation of powers the judiciary (like the citizens) in South Africa remain passive bystanders witnessing the flagrant abuse of state resources which delays the realisation of housing and various other deliverables in SERs. This is demonstrated by the conclusive uncovering of corruption by the SIU which rests on paper and thereby leaving those public officials found errant, to continue to hold positions in public office. This is an example of where the court should have stepped in because the other two branches of government have proved to be unaccountable and complicit in the presence of malfeasance.

The SCI's activism was not a case of over-reach but rather a natural by-product of citizen's raising important constitutional and policy issues that were not being addressed by central government. The *Hawala* case created judicial precedent which elbowed the anti-corruption agencies into action where they lacked enthusiasm to investigate senior public officials. The judiciary in India has proven that without infringing on the separation of powers, the court can be pro-active when government does not act or dallied when required to act against errant high-ranking public officials. Indecisiveness by the executive and Parliament in South Africa,

¹⁴⁰⁸Housing scam: CBI arrests top officials of PSU banks, financial institutions *Economic Times* 24 November 2010 available at

http://articles.economictimes.indiatimes.com/2010-11-24/news/27590728_1_arrests-maninder-singh-johar-corporate-loans (accessed on 13 October 2015). Roa M 'CBI arrests CEO of LIC Housing Finance and 7 others in Mumbai, unearths housing finance racket' available at

<http://www.dnaindia.com/mumbai/report-cbi-arrests-ceo-of-lic-housing-finance-and-7-others-in-mumbai-unearths-housing-finance-racket-1471443> (accessed on 13 October 2015).

¹⁴⁰⁹'Delhi Commonwealth Games organiser arrested in corruption investigation' *The Guardian* 25 April 2011 available at

<http://www.theguardian.com/world/2011/apr/25/delhi-commonwealth-games-organiser-arrested> (accessed on 10 October 2015). The Fraud Watch: Commonwealth Games scam January 2011 available at

<http://www.ey.com/IN/en/Services/Assurance/Fraud-Investigation---Dispute-Services/Fraud-Watch---Commonwealth-Games-scam> (accessed on 10 October 2015).

¹⁴¹⁰*Hawala* case para 239.

¹⁴¹¹*Hawala* case paras 226, 227.

saw the President succeeding with abusing millions of rands of the available resources of the state.¹⁴¹²

Through judicial activism the SCI brought to book a number of cases involving corruption in public office.¹⁴¹³ The apex Court has upheld cases against political and administrative functionaries at the highest levels which illustrates the rescue of the rule of law against those custodians of the law themselves.¹⁴¹⁴ The SCI performed an unprecedented action in 2006 when it directed a sitting minister to be jailed for one month for contempt of court.¹⁴¹⁵ This action is unheard of in South Africa where court orders are often ignored by state officials without any repercussion from the court that issued such orders.¹⁴¹⁶

Although there have been several reports on corruption in the social housing programme in South Africa, no sitting minister has claimed responsibility, neither has any senior accounting officer under whose watch these corrupt activities happened. The corruption of public housing funds has delayed the right to housing to those for whom the housing is earmarked. This means progressive realisation failed due to malfeasance by public officials. The historical and contemporary hardship still suffered by the homeless dictates for an active judiciary. This will be a judiciary that *mero motu* raises the issue of passivity in finalisation of investigations into corruption and compels the SIU to complete its investigations and recommend that the guilty parties be charged and trialled. By adopting this approach the CC would be placing a legal focus on how the government should perform in curbing corruption in the state and moreover, how government is faring in its duties to realise public housing.

¹⁴¹²See chapter 4 for discussion on the abuse of state funds by the President.

¹⁴¹³Bangaru Laxman a minister, resigned in disgrace. He was convicted by a special CBI Court on 27 April 2012 for taking bribe under the Prevention of Corruption Act 1988 s9. This is also the first time in Indian history that a senior politician has been convicted for corruption based on evidence gathered in a sting operation conducted by a media organisation; Prasad Yadav was forced to resign his office pending major corruption inquiries into what is known as the fodder scam see *Dr. Jagannath Mishra, Lalu Prasad v The State Of Bihar* 1999 (1) BLJR 347. Minister Satish Sharma was forced to resign for a similar patronage exercise in 1995 following severe constraints passed by the Supreme Court see Tummala K K 'Combating Corruption: Lessons Out of India' (2009) 10 *Int'l Pub. MGMT. Rev.* 34, 42.

¹⁴¹⁴Sondhi S (2000) 20. The former chairperson of the Delhi Electricity Board was suspended and charged with amassing assets almost a hundred times more than his known resources of income. India's telecommunications minister resigned after he was found to have committed fraud see *India's 2G Telecom Scandal Spans the Spectrum of Abuse* 2010 Knowledge @ Wharton available at <http://knowledge.wharton.upenn.edu/article/indias-2g-telecom-scandal-spans-the-spectrum-of-abuse/> (accessed on 20 September 2015).

¹⁴¹⁵The Supreme Court awarded one-month jail term to Maharashtra Transport Minister Swarup Singh Nayak and Additional Chief Secretary Ashok Khot for giving licence to six sawmills in 2004 despite a ban on the same. See *The Hindu* 11 May 2006 available at <http://www.thehindu.com/todays-paper/article3131665.ece> (accessed on 20 September 2015).

¹⁴¹⁶See Chapter 4 for discussion on contempt of court by the South African government.

Through this action a link would be created between malfeasance in the state and the delay in delivery of public housing.

The current state of affairs proves that South Africa will only succeed in tackling corruption when the anti-corruption agencies are insulated from political interference and when the politically powerful are held accountable.¹⁴¹⁷ A case in point is the handling of the *Nkandla* matter that saw Parliament failing in its oversight duty by finding the President's abusive behaviour of state funds acceptable.¹⁴¹⁸ This is despite the fact that the PP found that the President had abused the available resources of the state whilst there was a desperate need for resources to deliver on social housing. The executive and Parliament ignored that the PP's action was binding, until the CC compelled these branches of government to accept the remedial action and recommending the reimbursement of the abused funds to the fiscus.

The Indian judiciary has linked corruption with the retardation of SERs, and thereby awakened inquiry into the corrective action against public officials found to be corrupt. Vijayashri states that 'constitutional law appropriately exists for those situations where the representative government cannot be trusted'.¹⁴¹⁹ The SCI's liberal approach in holding the politicians accountable should be seen as a breakthrough in the pursuit of clean governance.

The judiciary in South Africa would be well served to soften the adversarial rules in favour of enforcing fundamental rights. This is particularly important where the executive and Parliament are found to be derelict in their constitutional duties and obligations, in curbing the scourge of corruption. Therefore the judiciary should direct the safeguarding and protection of the rule of law. To assist in this the CC can employ any of the anti-corruption agencies¹⁴²⁰ and the SAHRC in continuous oversight and report on how the realisation of housing is protected from corruption of the budgets that must realise the right. This would constitute be the makings of a judiciary that does not tolerate regression through corruption insofar as the right to housing is concerned. This would not amount to a judiciary crossing the

¹⁴¹⁷Tamukamoyo H 'Is South Africa Really Complying with the Anti-Corruption Protocols it has Ratified? 9 July 2013 *ISS* available at <https://www.issafrica.org/iss-today/is-south-africa-really-complying-with-the-anti-corruption-protocols-it-has-ratified> (accessed on 29 September 2015).

¹⁴¹⁸ See chapter 4 for discussion on this matter.

¹⁴¹⁹Vijayashri S (1997) 26. Also see Das C V 'Judicial Checks On Government' President, Commonwealth Lawyers Association, Paper presented at a Workshop on 'Accountability, Scrutiny and Oversight' organised by the Commonwealth Secretariat and held in Canberra, Australia, from 23 to 25 May 2001 *Commonwealth Law Bulletin* 583.

¹⁴²⁰ See chapter 5 for discussion on the various anti-corruption agencies.

lines in separation of powers, but rather a case of enforcing fundamental rights as behoves its constitutional duty.

6.6 The deferent stance of the South African judiciary- does it assist in addressing political corruption?

Bilchitz critiques that the CC uses a variety of ‘avoidance techniques’ which often place emphasis on ‘political enforcement’ by trying to give effect to SERs through existing legislation and executive action.¹⁴²¹ This technique gives expression to a vision of ‘inter-branch’ comity which is a formalistic approach that privileges procedure over substance.¹⁴²² This procedure-over-substance approach is what the Indian judiciary tries to avoid through the relaxation of standing and evidentiary rules in SAL.

Ackerman has termed the CCs approach as ‘constrained democracy’ where the court attempts to justify its decisions with the text of the Constitution in order to protect its institutional independence by deferring to the government.¹⁴²³ Through SAL this deferent stance can be developed into an oversight that holds Parliament and the executive to account on not only the progressive realisation of housing but also on how the anti-corruption agencies fare in protecting the resources for housing against malfeasance. In essence the judiciary should not separate its oversight of the state’s obligations insofar as realising the right to housing from how the available resources so earmarked are protected against malfeasance. Without this said oversight the executive in effect has complete control over how successful its anti-corruption measures are and indeed the losses suffered due to errant behaviour has been amply demonstrated by the executive’s disregard of the SIU reports. A situation whereby the executive is its own arbiter has shown to be a breeding ground for malfeasance. The assistance of the court in enforcing its oversight on state obligations insofar as curbing corruption, in particular cases such as the SIU investigations, becomes essential in protecting the limited available resources for housing, against malfeasance.

¹⁴²¹David Bilchitz D ‘Avoidance Remains Avoidance: Is it Desirable in Socio-Economic Rights Cases?’ (2014) *Constitutional Review* 297.

¹⁴²²Bilchitz D (2014) 298.

¹⁴²³Ackerman B ‘Meritocracy v Democracy’ *London Review of Books* (8 March 2007) available at <http://www.lrb.co.uk/v29/n05/bruce-ackerman/meritocracy-v-democracy> (accessed on 9 September 2015)

The court's deferent approach is serving the doctrine of separation of powers but this should not be at the expense of keeping government in check on abuse of state power. A 'highlight' of the CC's efforts to combat corruption was in *Glenister* where the Court found that the Constitution of SA contained an implied governmental obligation to establish an effective, sufficiently independent anti-corruption unit. According to Kende, *Glenister* shed light on how the judiciary had policed corruption. The author maintains that higher courts have been brave and that judicial credibility does not yet seem too fragile to confront corruption in South Africa.¹⁴²⁴ Moreover, the author argues that the judiciary in South Africa supersedes the US in having created greater judicial authority by adjudicating cases opposed to labelling them as political question or dismissing on standing grounds.¹⁴²⁵ Furthermore Kende maintains that the CC's reliance on international law bolstered the judicial battle against corruption in *Glenister* and showed that SA courts were taking significant risk.¹⁴²⁶

Although Kende lauds the judiciary in *Glenister* as an example of how influential international law is and for bemoaning the negative influence of corruption on this jurisdiction, the case does not necessarily show that South African courts are taking any risks at all in exposing political corruption. It should be noted that the CC would not have inquired into the independence of the Hawks if a public spirited individual had not shown initiative in approaching the CC. The *Nkandla* matter has suffered the same fate of the court's wait-and-see approach, despite a frenzy of media reports. Enquiring into political corruption is not an easy task and the judiciary can be labelled as overstepping the boundaries of separation of powers. However, where such corruption affects fundamental rights, the judiciary is within its right to do such inquiry at the behest of the Constitution it serves.

In its attempt to address corruption, the Chief Justice in South Africa highlighted steps that departments and bodies in the criminal and civil justice systems had taken to consolidate efforts to fight corruption.¹⁴²⁷ In this regard the judiciary formed the National Efficiency Enhancement Committee in 2012 to enhance efficiency and effectiveness in the broader justice system and thereby contribute to the eradication of corruption and crime. Justice Kruger submitted that the prosecution of corruption cases is problematic because of the

¹⁴²⁴ Kende M S (2015-2016) 185.

¹⁴²⁵ Kende M S (2015-2016) 195.

¹⁴²⁶ Kende M S (2015-2016) 195.

¹⁴²⁷ 'Judges address corruption' *DeRebus* 32 March 2013:7-8 available at <http://www.saflii.org/za/journals/DEREBUS/2013/32.html> (accessed on 15 May 2016).

reluctance to report and testify on corruption matters.¹⁴²⁸ Criticism has been levelled against the judiciary for not being overtly transformative in a bid to complement the Constitution of SA.¹⁴²⁹ Reflective of this is the CCs wait-and-see approach whilst witnessing the distressed calls of the citizenry against corruption in housing which was left to the PP to investigate (Nkandla) and that this office might perhaps brings it to the court's attention.

The CC is the best hope for reform against corruption, but its jurisprudence on combating public corruption does not reflect broadly. In order to widen its approach the CC needs to embrace new monitoring and oversight functions and act with less deference to the executive. This action would reveal a judiciary willing to transform and prod the government in its duty to realise housing and eschew corruption which bedevils the realisation of SERs.

6.7 Civil society: a key player in containing corruption in the public sector in India

The combating of corruption is not just a matter of making anti-corruption laws and creating institutions. There is a definite role for civil society to play in raising awareness of public corruption and thereby acting as a watchdog in alerting society to what the government is doing to stem this scourge.¹⁴³⁰ Civil society organisations have a vested interest in the realisation of housing and the minimising of corruption. These organisations play a key role in creating pressure for policy reform, improved governance and monitoring the state's action in fighting corruption and maladministration. Through this action civil society put pressure on the will of the state to operate in an accountable, transparent and responsive manner.

Sondhi maintains that civil society is to be considered as the realm of association between the household and the state.¹⁴³¹ Therefore the role of NGOs, CBOs and particularly the media should not be underestimated in containing corruption by reporting allegations of corruption and thereby keeping government in check. These kinds of associations fulfil functions that are essential for aggregating and expressing societal interests and promoting democratic values.¹⁴³² Moreover, these associations have been pivotal in the SAL approach that the Indian judiciary promotes in combating corruption and realising housing.

¹⁴²⁸ 'Judges address corruption' DeRebus 32 March 2013:7-8.

¹⁴²⁹ See chapter 4 for discussion on transformative judiciary.

¹⁴³⁰ See chapter 1 for discussion on civil society's role in general in promoting SERs and combating corruption.

¹⁴³¹ Sondhi S (2000) 22.

¹⁴³² Sondhi S (2000) 22.

The vibrancy of civil society in India is no surprise. Organised civilisation has existed in India since at least 2500 B.C.¹⁴³³ The 1990s example of India brought about a renewed interest in civil society as an important vehicle to cover increasing gaps in social services in developing countries.¹⁴³⁴ In this jurisdiction civil society has evolved for the joint pursuit of shared interests in that the Chambers of Commerce, professional association and various forms of NGOs have become players to monitor government in its delivery of sound governance. In a study on protest movements Singh found that civil society activism has renewed and revitalised democracy in India by mobilising groups of people uninvolved in politics.¹⁴³⁵ The rising popularity of CBOs is largely in response to the widespread disillusionment with the performance of the public sector in developing countries.¹⁴³⁶ These shifts by civil society are demanding a need to revisit and rethink how we engage with politics, social action, and the very meaning of democracy.¹⁴³⁷

These activist movements do not want to tear down an authoritarian regime but rather bring issues of neglect and inadequate representation, into the political arena. This is pretty much what the aspirations of civil society organisations in South Africa are. By following the Indian example of SAL civil society organisations in South Africa could acquire a more zealous approach, within rules that are relaxed in bringing matters to the CC, as collaborators with the judiciary in seeking relief for the poor in housing. Civil society could thus be reinvigorated because the SAL approach holds more promise of success than does the current PIA approach.

¹⁴³³Carothers T (1999).

¹⁴³⁴India has an estimated 2 million NGOs; this is just over 1 NGO per 600 Indians available at <http://scroll.in/article/657281/cbi-estimates-that-india-has-one-ngo-for-every-600-people-the-number-could-be-even-higher> (accessed on 14 October 2015).

¹⁴³⁵Singh R 'New Citizens' Activism in India: Moments, Movements, and Mobilisation an Exploratory Study' 2014 *Centre for Democracy and Social Action* available at <https://www.boell.de/sites/default/files/study-new-citizens-activism-in-india.pdf> (accessed on 1 October 2015). There has been a wave of global citizen's activism unfolding since 2010 These have been—the Arab Spring that brought down dictatorial regimes, to protests in London, Chile, Spain, Russia, food riots in Brazil, protests for access to housing in Tel Aviv, the 'Occupy' movement in US and beyond.

¹⁴³⁶Ghaus-Pasha A 'The Role of Civil Society Organisations in Governance' 6th *Global Forum on Reinventing Government towards Participatory and Transparent Governance* (24 – 27 May 2005) 9 available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan019594.pdf> (accessed on 4 October 2015).

¹⁴³⁷Singh R (2014) 3. The anti-corruption movement was a non-violent movement, which used the fast-unto-death stratagem (popularised by Gandhi, and often used as a method of protest in the Indian context) as its key method.

The traditional uneasy imbalance of the omnipotent state that towered over civil society has been diluted by civil society advancing as a relevant player in India's political landscape.¹⁴³⁸ Aiding and abetting this progressive stance is the mainstream media and social media, in highlighting the issues under scrutiny by civil society. India against Corruption (IAC) brought the issue of corruption to the fore and compelled government to a joint parliamentary session to acknowledge corruption.¹⁴³⁹ This redefined the citizen-civil society-state relations whereby civil society fills in the democratic vacuum in the state.¹⁴⁴⁰ These activists want to bring social change by 'any means' and 'in any direction'.¹⁴⁴¹ This is done through active citizenry movements that break with the status quo by changing the rules of engagement as in the SAL approach, in the quest to protect and promote SERs. More citizen action is noted through non-violent protests arranged by Transparency International (India) against political corruption and in favour of honest and efficient governance.¹⁴⁴² This organisation also organises 24 hour relay fasting (hunger-strike), concurrently with the sessions of the Parliament to remind government of their failure in their duty to the country, to take effective steps in eliminating corruption in their ranks.

The NGO, Common Cause in Delhi has engaged in SAL which dragged corrupt officials to the courts.¹⁴⁴³ Complementing this is the Mazdoor Kisan Shakti Sangathan in Rajasthan which has exposed instances of bureaucratic corruption.¹⁴⁴⁴ The Report Card methodology developed by the Public Affairs Centre in Bangalore in collaboration with civil society is an innovative instrument that tracks down and exposes corruption in the public services. This innovative process has proven successful in raising awareness of corruption through periodic application of its evaluation of local government by the citizenry. This has given rise to the government of India integrating public policies with public participation.

In May 1997 the Department of Administrative Reforms and Public Service used the reaction from civil society at large, through officials, experts, voluntary agencies, citizen's groups and

¹⁴³⁸Singh R (2014) 3.

¹⁴³⁹Singh R (2014) 30. A number of initiatives had been launched by the IAC available at <http://www.indiaagainstcorruption.com/> (accessed on 3 October 2015).

¹⁴⁴⁰Singh R (2014) 30.

¹⁴⁴¹Singh R (2014) 3

¹⁴⁴²Established in 1997, the Transparency International-India has been playing a significant role in fighting corruption through Gandhian methods of non-violent mass mobilisation.

¹⁴⁴³See Guhan S & Paul S (eds) *Corruption in India: Agenda for Action* (1997).

¹⁴⁴⁴Sondhi S (2000) 24.

the media to evolve an 'Action Plan on Effective and Responsive Administration'.¹⁴⁴⁵ This was strengthened by a core group that formulated and monitored the Citizen's Charter on the performance of ministers.

Since January 2000 the CVC uses an interactive website in keeping civil society informed and involved in the framing and implementation of anti-corruption strategies. Through active citizenry the CVC is pursuing a proactive three-point operational strategy to fight corruption in India. The three points are: simplification of rules and procedures, greater transparency and empowerment of the public through participation and effective punishment.¹⁴⁴⁶ Sondhi is positive that the overwhelming civil society participation in fighting corruption is set to reap positive results in combating corruption in India.¹⁴⁴⁷ Public participation promotes a better balance between prevention and enforcement measures in addressing corruption, particularly insofar as the limitations on the rule of law are concerned.¹⁴⁴⁸ Furthermore, empowering of the public on anti-corruption strategies is a more nuanced approach to gain public confidence.

Good governance has recently been accorded a central place in the discourse on development.¹⁴⁴⁹ Civil society is ultimately the stakeholder and the ultimate affected party of corruption and therefore must be engaged constructively to influence the necessary reforms. Countries that are supportive of civil society bodies through hearing arrangements have enabled organic evolution of policies.¹⁴⁵⁰ Thereby the necessary policies and institutional changes become viable and sustainable. Without engaging civil society government will remain opaque. Ghaus-Pasha sees civil society as an increasingly important agent for promoting good governance such as transparency, effectiveness, openness, responsiveness and accountability.¹⁴⁵¹ Their role can further good governance by policy analysis and monitoring state performance and behaviour of public officials.

There is a robust civil society in the South African arena, but engagement by government has not reaped the desired results because often government does not take such engagement

¹⁴⁴⁵See Subhash C K (ed) *Crime and Corruption to Good Governance* (1997).

¹⁴⁴⁶Vittal N 'Applying Zero Tolerance to Corruption' available at <http://cvc.gov.in/vscvc/note.html> (accessed on 13 September 2015).

¹⁴⁴⁷Sondhi S (2000) 26.

¹⁴⁴⁸Sondhi S (2000) 27.

¹⁴⁴⁹Ghaus-Pasha A (2005) 28.

¹⁴⁵⁰Sondhi S (2000) 23.

¹⁴⁵¹Ghaus-Pasha A (2005) 28. Also see Desai V *Community Participation and Slum Housing - a Study of Mumbai* Sage Publications New Delhi (1995).

seriously and does not dispatch senior public officials to such meetings.¹⁴⁵² As noted above there have been PIA in this jurisdiction whereby CBOs have represented the poor in SERs matters, but in South Africa there has been no relaxation of locus standi and evidentiary rules. Whereas in the example of the Indian judiciary access to a wider base of public spirited individuals to represent the poor has been aided by the relaxation of standing and evidentiary rules.

Horsten argues that oversight in South Africa could be embellished by greater participation of civil society and NGO's collaborating in the drafting of the SERs reports by the SAHRC thereby ensuring the maximum degree of public participation which is one of the cornerstones of good governance.¹⁴⁵³ Kothari agrees that the process of enforcement of all human rights is the legitimate concern of the Human Rights Commissions.¹⁴⁵⁴ Thus the SAHRC could also be more proactive in keeping government in check on its anticipated time frames in delivering housing. In India the SCI used the better capacity of the National Human Right Commission (NHRC) to directly monitor performance of institutions to aid its function of issuing directions in appropriate cases.¹⁴⁵⁵ Gowda argues that 'The way scams are exposed suggests that there are enough self-correcting features in the Indian system, even if they work in a less predictable manner, there is hope yet.'¹⁴⁵⁶ Moreover, the most crucial element in combating corruption is the social attitude towards reporting corruption because legislative measures will not change attitudes in government whilst society remains tolerant. Therefore civil society, including a vibrant media plays a central role in combating corruption, which should be recognised, encouraged and intensified.¹⁴⁵⁷ In order to get their plight heard on corruption, civil society in India hungered for an ombudsman, discussed next.

¹⁴⁵²See The Community Law Centre, Black Sash and various other NGOs have been engaging with government regarding ratification of the ICESCR since 1994 and government only ratified the Covenant in January 2015. In the engagement process government would often make last minute changes to their representative which often is junior staff unable to take the discussion any further available at Community Law centre available at <http://dullahomarinate.org.za/> (accessed on 30 August 2015).

¹⁴⁵³Horsten D 'The Role Played by the South African Human Rights Commission's Economic and Social Rights Reports in Good Governance in South Africa' (2006)2 PER 14.

¹⁴⁵⁴Kothari J (June 2001) 10.

¹⁴⁵⁵The NHRC also engaged in SAL activism in *National Human Rights Commission v State Of Arunachal Pradesh & Another* 1996 AIR 1234 SCC (1) 742 in protection of refugees. Also see Singh D K *Stateless in South Asia: The Chakmas between Bangladesh and India* 2010.

¹⁴⁵⁶Capital Plight: What Drives Corruption in India? available at <http://knowledge.wharton.upenn.edu/article/capital-plight-what-drives-corruption-in-india/> (accessed on 14 October 2015).

¹⁴⁵⁷ECOSOC 'Corruption and its impact on the full enjoyment of human rights, in particular, economic, social and cultural rights Progress report submitted by the Special Rapporteur, Christy Mbonu available at <file:///C:/Users/Soraya/Downloads/Economic%20Social%20and%20Cultural%20Rights%20-%20Corruption%20and%20its%20impact%20on%20HRs%20Progress%20report.pdf> (accessed on 14 October 2015)

6.7.1 The Lokpal Act: civil society's demand for an anti-graft ombudsman

At the heart of the anti-corruption movement in India was the demand by civil society for anti-corruption legislation creating an ombudsman.¹⁴⁵⁸ The result of which was the Lokpal and Lokayuktas Act 2013¹⁴⁵⁹ which created the office of an anti-graft ombudsman with powers to investigate and prosecute corruption at any level against public officials including the prime minister, ministers and members of parliament. The Lokpal have suo motu powers to initiate action or receive complaints of corruption from the general public under the Prevention of Corruption Act.¹⁴⁶⁰ Similarly to the judiciary and the Elections Commission, the Lokpal staff is supposed to work independently, and be devoid of influence from politicians and bureaucrats. Moreover the orders of this ombudsman are recognised as court orders and bear the same consequences for contempt of orders. Thus if the Lokpal ombudsman's orders are not implemented, public officials so responsible would face arrest in contempt of court. Thus unlike the PP in South Africa, there is no need for the Lokpal ombudsman to ask the court to confirm its orders.

The concept of a constitutional anti-corruption ombudsman was first proposed in the early 1960s;¹⁴⁶¹ the Lokpal¹⁴⁶² was coined as far back as 1963 and the first Jan Lokpal Bill was proposed in 1968.¹⁴⁶³ This is an anti-corruption bill drafted by civil society activists in India seeking an independent body to investigate corruption in the public domain.¹⁴⁶⁴ Some 52 years later after its first introduction, the Bill was enacted on 18 December 2013. It aims to effectively deter corruption and compensate citizen grievances. Exemplary of this Act is that corruption cases must be investigated swiftly, within one year and corrupt public officials

¹⁴⁵⁸See Nigam A 'Anti Corruption Phenomenon: Its implication for Democracy, Civil Society and Policy Making' 13 September 2011 available at <https://www.boell.de/sites/.../study-new-citizens-activism-in-india.pdf> (accessed on 20 July 2015)

¹⁴⁵⁹Assented by the President on 1 January 2014 and came into force from 16 January 2014. Developed on the model of the Ombudsman of Sweden. Also referred to as the Citizen's Ombudsman Bill.

¹⁴⁶⁰For any act of corruption, the punishment shall not be less than six months of rigorous imprisonment and may extend up to imprisonment for life see Chapter XII, Clause 23. Also see Sharma R & Shrivastava A 'Jan Lokpal Bill: Combating against Corruption (2012)1 *International Journal of Social Sciences & Interdisciplinary Research* 1-9.

¹⁴⁶¹by Law Minister Ashok Kumar Sen in the early 1960s

¹⁴⁶²The word Lokpal is derived from the Sanskrit word 'lok' meaning people and 'pal' meaning protector or caretaker.

¹⁴⁶³'Lokpal Bills' were introduced in 1971, 1977, 1985, again by Ashok Kumar Sen, while serving as Law Minister in the Rajiv Gandhi cabinet and again in 1989, 1996, 1998, 2001, 2005 and in 2008, but they were never passed.

¹⁴⁶⁴See Kozlowski M T 'A Monsoon in Delhi Anna Hazare, the Lokpal Bill, and the Future of India (2011) 8 *Pitt Political Review* for an in depth discussion on the various activist activities engaged by Anne Hazare to get the bill tabled.

shall face jail within two years, with the loss caused to the fiscus, recovered at the time of conviction.

This ombudsman is similar to the PP in South Africa whose office has been very active in unearthing corruption in the public service.¹⁴⁶⁵ However, although the PP's findings are binding its recommendations are often ignored by government which makes this office less effective than if it had powers to prosecute and sanction errant public officials.¹⁴⁶⁶ Perhaps it is time that South Africa considers an independent anti-corruption ombudsman with powers akin to the Lokpal to see corruption cases investigated and corrupt official facing jail time within a specified time, and losses such as those enumerated in the SIU Report, recovered to the fiscus. The Corruption Act should be the main legislation under which such an independent anti-corruption ombudsman in South Africa labours.

6.8 Conclusion

Realising the right to housing is as important as keeping the funds to realise those rights safe from malfeasance. A corruption-free society may seem like an illusion, but minimising the scourge to protect the realisation of housing and other SERs can be a reality. The SCI has demonstrated that the poor and desperate need the constant eye of the judiciary to oversee government's progress in delivery of social housing and SERs at large. This caretaker approach by the court includes oversight on how the anti-corruption agencies are faring in the investigations of alleged abuse of state funds.

Some would argue that the judiciary is not the monitor of the working of democracy, but it is the only forum that can order or compel government to fulfil its duties insofar as SERs are concerned and can impose criminal sanction on a recalcitrant government. Moreover, the CC should be more proactive in holding government to account on its progress on housing by issuing supervisory interdicts which compel government to report back to the court on how it is faring. This practice of supervision has enabled the SCI to hold the Indian government to account in its arbitrariness towards the right to housing and its inaction to investigate

¹⁴⁶⁵See chapter 4 discussing the landmark *Nkandla* case on the abuse of the state's economic resources by the President, which was investigated by PP.

¹⁴⁶⁶The Lokpal has sweeping powers to investigate and punish corruption, including the dismissal of government workers; to blacklist firms; to issue search warrants; to subpoena witnesses; and to imprison the convicted for terms ranging from seven years to life imprisonment.

corruption. Despite India's challenges in providing housing¹⁴⁶⁷ and dealing with corruption, its judiciary is exemplary of action that can advance access to court, to litigate on alleged violations of SERs and encourage government to be more accountable in its approach to delivery.

Looking through the prism of human rights, the judiciary and anti-corruption agencies have a responsibility to protect the realisation of housing against government complacency and arbitrariness on the one hand and graft in the state on the other. It is insufficient for the South African courts to merely confine itself to being a watchdog, merely waiting for civil society to access the court to litigate on infringements in SERs. As it is, with its reasonableness approach the CC mistakenly expects that government is applying the economic resources in the manner it should, but government does not.

Currently in South Africa the courts are in the unenviable position of having to practise constraint in their discretion in order to uphold the doctrine of separation of powers. This is a balancing act where the court has to vindicate rights and thereby need to defer to other branches of government regarding political and policy decisions. However, we should guard against judicial passivity, as this does not blend with enforcement of SERs in a country dealing with the legacy of deprivation and insidious corruption. It is the history on deprivation of SERs that should caution South Africa's apex Court to be more pro-active in its quest to match the transformation promised by the Constitution. Therefore the CC could adopt a less constrained form of access. To give effect to this, the judiciary should shed its formalistic legal approach and adopt a more socially engaged and aware approach that relaxes standing and evidentiary rules to increase access and thereby keep check on government's progress in realising basic housing.

This will be best served through supervisory orders which include the SAHRC monitoring government's progress (or not), in order to report back to the Court, much like the approach that the judiciary in India employs. The idea is that the existence of a socially engaged

¹⁴⁶⁷See Kothari J (June 2001) 1 who maintains that millions of people are still living in sub-human conditions on pavements, in squatter settlements, basties, jhuggies or unauthorized slums and are in constant threat of being evicted.

judiciary would encourage government to keep better time in delivering the basics of SERs and thereby prove to be more cautious in protection of the economic resources that must realise these deliverables.

The relative failure of the anti-corruption agencies to stem corruption in the public service in South Africa places an unreasonable onus on civil society to be more proactive in holding government to account. Taking a SAL approach the SAHRC could approach the court to inquire from government on the outcome of the SIU reports and on the steps to be taken in dealing with the public officials found to be corrupt. This kind of synergy between the SCI and the NHRC has made institutions more effective in the enforcement of SERs in India. Notwithstanding this Parliament in South Africa could also flex its oversight muscle and call the executive to account on its progress in housing and the way in which it deals with corruption.

Citizen action is crucial in holding government to account and corruption in check. Therefore the role of NGO's, CBOs and the media should not be underestimated in containing corruption. Civil society interaction together with an active judiciary such as is the case in India, could hopefully lead to the realisation of housing at a more urgent pace for the most desperate. South Africa needs a venerable government set on realising the right to housing and thereby should cleanse itself of public officials that sully the government with corruption. This should become a focus collective of civil society, the judiciary and the SAHRC in order to speed up the housing of the poor. Complementing this should be honourable and ethical governance by all spheres and branches of government to deliver housing and other SERs effectively.

Chapter 7

Conclusion and Recommendations

7.1 Available resources

It is precisely the inclusion of the right to housing in the Constitution that excited the impoverished in South Africa. This was amplified by political promises of providing homes for those thus deprived during apartheid. It is the realisation of this promise that those in continuous desperate situations, deprived of basic shelter, are still yearning for.

The history pages of the UN underscore the importance of available resources to the realisation of the right to housing. As agreed upon in the ICESCR and other Human Rights Conventions, states have the duty to devote the 'maximum available resources' to ensure the realisation of SERs. These treaty obligations demand that the branches of government pay closer attention to the implementation of international obligations in their own jurisdiction. The government of South Africa provides complex reasons for not having fulfilled the right to housing. The lack of funds is the most favourite escape hatch that the government uses when questioned on the slow pace of delivering houses to the poor. However, the optimal use of available resources for the realisation of social housing is compromised in many cases due to the absence of proper oversight and accountability in government. The AG in his 2015/2016 Audit Report berated the government for its reprehensible oversight over the state's financial resources that have been grossly abused to the tune of billions.

This dereliction of oversight of the financial resource has perpetuated the paucity of basic shelter for the homeless and the most desperate and thereby deprived enjoyment to the right-holders. Contributing to the plight of these vulnerable groups is the fact that the three branches of government do not display any compassion when it comes to the observation of minimum core which encompasses the minimum basic shelter.

7.2 Progressive realisation and minimum core obligations

Progressive realisation is underpinned by the minimum delivery of core SERs over the shortest period of time. A housing programme underscored by the minimum core will be a

reasonable programme. The fact that there are still shack-dwellings without the basic services provided as on the outskirts of South Africa's major cities, dating back to before constitutional democracy, is an indication of an unfulfilled duty by government insofar as progressive realisation of the minimum of adequate housing is concerned. In this regard government is not fulfilling core obligation as per the ICESCR and General Comment 3.

Although progressive realisation has no particular time-frame, the prescripts of treaty laws place an obligation on jurisdictions to implement SERs as rapidly as possible. In keeping with treaty obligations South Africa could and should have made far more progress to house people adequately. Instead the broad mass of society is condemned to live in squalor, deprived of even a humble home. This is an indictment of the South African government which has at its disposal a progressive Constitution but which instead has allowed itself to regress in its duties towards the delivery of basic housing. This again is in breach of its treaty obligations and makes a lie of its claim to strive towards progression in the delivery of housing. The plethora of legislative guidelines on how to achieve the constitutional imperatives shows that legislation is on track but realisation remains woefully protracted.

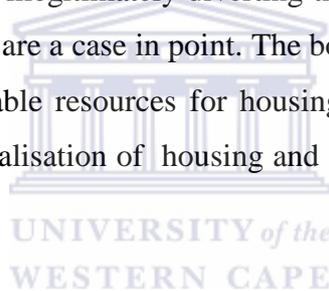
7.3 Corruption

The unfortunate link between corruption and the realisation of human rights should have alerted the government to institute effective oversight of the measures to curb corruption at source. Despite having signed the UNCAC and the implementation of South Africa's own domestic anti-corruption measures, the country remains saddled with a government in crisis in the dealing with corruption. Moreover corruption is bedevilling the timeous realisation of social housing and puts blight on South Africa's hard-earned constitutional democracy.

There is a flagrant disregard for the preservation and prudent use of available resources for housing. This is evident in the fact that the highest office, the President, has shown blatant abuse of the state's fiscal resources and that the usage of the maximum of the available resources for housing is not a priority. In this regard the President is tainted by having transgressed procurement regulations through having being a recipient of undue benefits in the upgrade of his private home, Nkandla. Hence, the self indulgence by the President has seen the available resources squandered to aid an opulent life style. Thus the very custodian that swore allegiance to the Constitution and assented to anti-corruption legislation, notably

the Corruption Act, has been found to be impervious to the need to be compliant with the relevant legislation.

The acts of corruption in the procurement of housing fall squarely in the frame of the Corruption Act which resonates with the UNCAC. The public procurement laws, regulations and the PFMA are deliberately ignored, for personal gain and to acquire undue benefits. The fact that the President also abused available resources of the state for personal gain, places irregular activities at the highest office in government. Following this trend are the public officials who flagrantly disregard compliance of procurement measures in the public housing programme, as reported by the SIU. The irregular dissipation of funds through corrupt activities has grievously undermined the enjoyment and the full realisation of the right to housing. The most desperate bear the brunt of this deprivation. The executive, particularly the minister of Human Settlements has the responsibility to take decisive steps in good faith to deal with officials found to be illegitimately diverting the available resources for housing. The recommendations of the SIU are a case in point. The bottom line is that acts of corruption by public officials see the available resources for housing diverted for personal gain. This behaviour delays or stunts the realisation of housing and thereby deprives the rights-holder of fulfilment of this right.



A state that cannot protect its economic resources against malfeasance by errant public officials is a state failing in its constitutional imperatives of oversight, accountability and ethical governance. The tripartite typology of respect, protect and fulfil requires government to stymie acts that deprive individuals of their rights under the Constitution and the ICESCR. To fulfil this obligation, states should observe a fiduciary duty over the economic resources for SERs to ensure core deliverables, which in turn benefit the most vulnerable and desperate in society. To turn the corner on successful development of SERs, would depend on the government's willingness to recognition the link between corruption and the implementation of human rights and to take cognisance of the devastating scourge corruption causes to the realisation of SERs. At the heart of the problem is that ethically challenged public officials are testing the public service and no amount of anti-corruption measures will cure this negative behaviour which stunts the development of SERs. To put it more plainly public officials are taking the public service for a 'ride' and see their positions primarily as an office for gain as argued by Aristotle and see the delivery (if at all) of SERs as purely incidental.

Ethically inflexible, is the kind of public official that will best serve the people of South Africa, with the Constitution as their moral compass. This is what the public service should strive for, namely accountability in the application of the available resources by public officials who feel duty bound to have the best interests of the rights-holder at heart. Thus the safe-guarding of the available resources should be uppermost in the mind of the public official entrusted to oversee public fund for social housing. Precarious and selective prosecutions will not remedy dishonest behaviour, nor act as a deterrent. Moreover, the most efficient way to hold states accountable is through proper enforcement- and monitoring-mechanisms which function as a collective effort between the branches of government in order to promote universally applicable standards.

7.4 The branches of government

It is trite that the realisation of housing requires the collective effort of all three branches of government. In this regard the executive has perhaps delivered on legislative and other measures but failed to realise the spirit of these measures. A good starting point would be to revisit the *Grootboom* order. The CC ordered that the most desperate should be seen to first, but government has not relieved the plight of those living in intolerable conditions at least in Cape Town where the community of *Grootboom* lived. To do this, government must ring-fence housing budgets in such a way that it is applied to bring the most desperate on an equal footing with those who enjoy adequate shelter. Moreover, Parliament is to exert its oversight function and call a tardy executive to order on its non-delivery of court orders such as *Grootboom* where the most desperate begged for help and do not receive it.

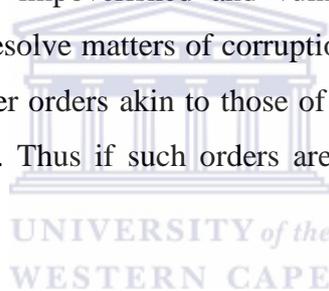
The time and resources spent on the SIU investigations into social housing corruption, is a let-down in that there has been no action against perpetrators despite the stark findings of corruption in the Report. It is a matter of justice delayed is justice denied. The overdue finalisation of the SIU Report and the lack of implementation of its recommendations is a travesty of justice. This can be remedied through parliamentary oversight, in that Parliament should inquire to the SIU as to the completion of the investigations. This should be succeeded with an inquiry into the progress of the recommendations of the SIU. That is, government should be compelled to implement the disciplinary hearings and the NPA should be asked to report on its progress in prosecutions. This is what is expected of a parliament that fulfils its constitutional obligations of oversight and which implements the mandate of the people.

Moreover, the judiciary cannot stand idly by and watch the other two branches of government being ineffective in their duties. The judiciary cannot continue to be a nigh passive bystander to the unnecessarily prolonged plight of the desperate and vulnerable in accessing housing. The long awaited and promised transformation has to be at the heart of the inquiry when the judiciary is faced with government's slow pace of implementation and negligence towards its duty to fulfil the realisation of housing. The abuse of state resources earmarked to deliver housing should not be tolerated and the judiciary needs to play a more active role in the protection of these resources. The liberal approach of the Indian judiciary comes to mind. That is to say, the judiciary could inquire from the SAHRC as to the progress of investigations of corruption into housing. A more transformed judiciary should aspire to fulfil its obligations as interpreter of the Constitution and voice of the poor and thereby place itself under pressure to adopt a more progressive response to government and its retrogression in the delivering of housing. The judiciary should take cognisance of the social realities that prevail in South Africa and not shield itself under the guise of the separation of powers doctrine. Seeking refuge in legal niceties is not an option for the judiciary given the urgency of the need for social emancipation. The different approach of the Indian judiciary through SAL is an avenue that could be explored. Sufficiently progressive transformation by the judiciary requires a break from the norm that did not produce the required results over the past 20 years, insofar as SERs. To complement the Constitution the judiciary must move out of its 'wait-and-see' approach and adopt a different approach, perhaps the Indian approach, in raising issues of SERs, meru motu. This thesis would argue that transformation in the lower courts is dependent upon transformation of the higher courts particularly the CC in it has the final say when faced with an appeal from the lower courts. Therefore the apex Court should be leading transformation in order to fulfil the constitutional endeavours.

For the judiciary to remain with the same jurisprudence of the reasonableness test is akin to running on a treadmill. That has been the fate of South Africa over the past two decades, namely a government that seems to deliver pockets of success in housing but has to spend as much money to rectify poor delivery or non delivery arising out of the lack of proper oversight which in turn allows corruption to flourish. The envisaged transformation of the Constitution begs for an approach that would bring about dignity and prosperity for the impoverished.

The reasonableness test is not a defence against the tardiness of government in the delivery of housing, when there is evidence of pervasive malfeasance in the programme. What should pass as 'reasonable' is minimum core deliverables within the 'maximum available resources' allocated for the delivery of housing. In other words the interpretation of the word reasonable should be 'revisited'.

The resilience of the law in South Africa, particular insofar as the Nkandla matter is concerned, is comforting. The action of the CC against the President confirms, at least notionally that even the highest office cannot do as it pleases with the available resources of the state. Moreover, it underscores the idea that there should be consequences for behaviour that flouts constitutional obligations. The more effort government puts in obeying alternative dispute-resolution measures, such as the PP, the less pressure there would be on the judiciary to compel compliance. Alternative dispute measures are put in place precisely to relieve the court and afford access for the impoverished and vulnerable. Thus these measures are important for quicker access to resolve matters of corruption and housing fraud. Perhaps it is time to empower the PP to deliver orders akin to those of the court similar to the powers of the Lokpal ombudsman in India. Thus if such orders are ignored criminal sanction would ensue.



Regrettably the executive, the President and Parliament are found to not adhere to their own legislative measures, including the Constitution. These two branches of government should refrain from second guessing legitimate remedial measures. This behaviour by government leaves the CC as last option to enforce the will of the people and act against a recalcitrant government. The realisation of the right to housing needs no less than, obedience to court orders, no irregular or abuse of expenditure and no undue benefits in government. These are the attributes of sound corporate governance in a government befitting a constitutional democracy and South Africa should heed this call.

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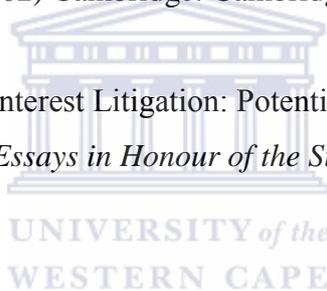
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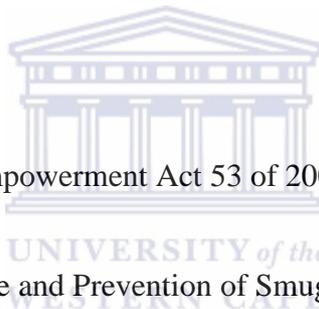
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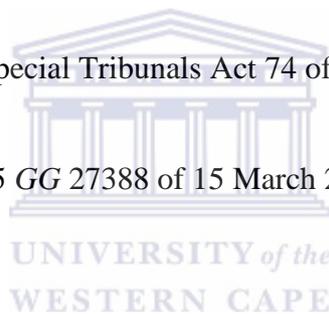
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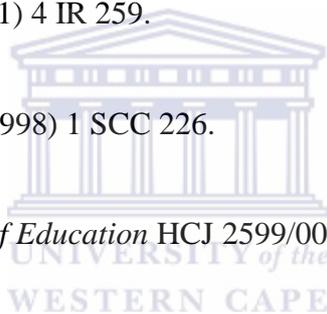
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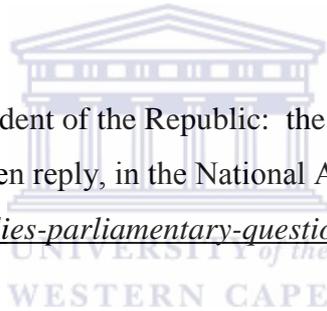
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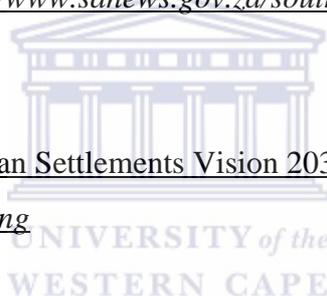
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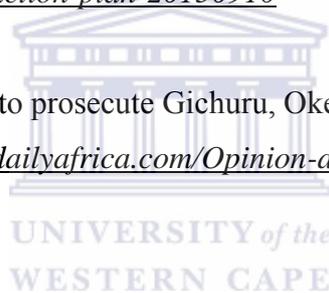
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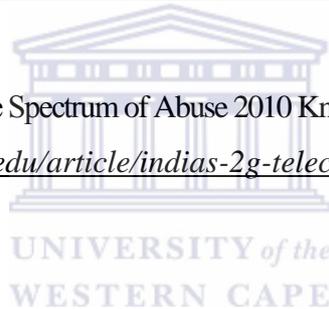
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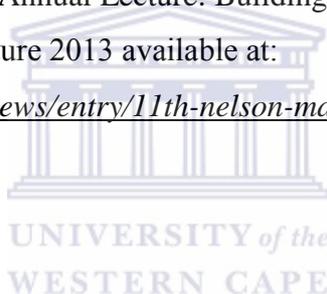
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