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Ismail, Mohamed Iqbal Ebrahim

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THE INTEGRATION OF HOUSING RIGHTS INTO THE INFORMAL SETTLEMENT INTERVENTION PROCESS: AN INTERNATIONAL REVIEW

Mohamed Iqbal Ebrahim Ismail

A research report submitted to the Faculty of Engineering and the Built Environment, University of the Witwatersrand, Johannesburg, in partial fulfillment of the requirements for the degree of Master of Science in Building in the Field of Housing.

Johannesburg, 2005

DECLARATION

I declare that this research report is my own, unaided work. It is submitted for the Degree of Master of Science in Building in the field of Housing in the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in any other University.

_____

Signature of Candidate

_____ day of _____ (year) _____

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I am eternally grateful to my wife Saleha for assisting me with the typing and proofreading. In particular, her constant encouragement and belief in me certainly merits my appreciation and acknowledgement.

DEDICATION

To my wife Saleha, my children Muhammad Salmaan, Aasif Ahmed, Aadil Ahmed, Saajidah and my family.

ABSTRACT

The failure of governments to promote efficient housing policies coupled with increasing speculation in land markets has resulted in scarcity of serviced land, leading to a lack of adequate housing for the majority of the urban population. This has resulted in illegal land use and development and the eventual situation of informal settlements developing at a rapid rate. However most governments in the developing world, including South Africa have failed to acknowledge that most new urban informal settlements are developed by an illegal process as informal settlement residents willingly or unwittingly contravene planning regulations, contravene laws out of ignorance of the legal requirements, coupled with the inability to conform to the high standards set. Consequently, States respond to this illegality in the form of eviction as it threatens the economic, social and political stability of the urban environment.

Concepts promoted internationally and identified in international literature recognize that the solution to informality lies in appropriate protection of rights which should ensure access to secure shelter leading to access to other benefits such as livelihood opportunities, public services and credits. That flowing from International Laws and Covenants, Human Rights Law needs to be looked at as a system of law that creates legally binding obligations for states with the aim of protecting, respecting and promoting housing rights for informal settlement residents. In the context of rights, Fernandes goes further in emphasising the legal constitutional perspective of the urban phenomenon where law is used as a vehicle for urban development and social change as well as encouraging state action and its attempts at socio-political legitimization in the context of informal settlement intervention.

LIST OF ACRONYMS

ADP	Areas for Priority Development (Philippines)
AKO	Adhikain at Kilusan ng Ordinaryong Tao (Political Party Philippines)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CISFA	Comprehensive Integrated Shelter and Finance Act 1994 (Philippines)
CLUPs	Comprehensive Land Use Plans (Philippines)
CRC	Convention on the Rights of the Child
DILG	Department of Interior and Local Government (Philippines)
DRC	Declaration on the Right of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ESC	European Social Charter
GSS	Global Shelter Strategy
HIGC	Home Insurance Guaranty Corporation (Philippines)
HLURB	Housing and Land Use Regulatory Board (Philippines)
HRC	Human Rights Committee
HUDCC	Housing and Urban Development Coordinating Council (Philippines)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IMF	International Monetary Fund
LAMP	Lapian ng Masang Pilipino (political party – Philippines)
LGUs	Local Government Units (Philippines)
NGO	Non-Governmental Organisation
NHA	National Housing Authority (Philippines)
NSP	National Shelter Programme (Philippines)
PCUP	Presidential Commission for the Urban Poor (Philippines)
UDHA	Urban Development and Housing Act (Philippines)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCESCR	UN Committee on Economic, Social and Cultural Rights.
UNGA	United Nations General Assembly
ZEIS	Special Zones of Social Interest (Brazil)
ZHIS	Zones of Social Interest (Brazil)

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CHAPTER ONE: INTRODUCTION

1.1. INTRODUCTION: BACKGROUND STUDY

The term informal settlements refer to settlements on government and / or private property where the urban poor occupy without the knowledge or wishes of the lawful owners (Santiago, 1998: 104). The occupants of these areas, very often, willingly or unwittingly contravene planning regulations, with the result that their occupation is considered illegal. In most cases informal settlement residents contravene laws out of ignorance of the legal requirements, coupled with their inability to conform to the high standards set.

Most Governments in the developing world, including South Africa, have failed to acknowledge that most new urban settlements are developed by an illegal process (Hardoy and Sattertwaite, 2002: 45). The result is a variation of indifference to intolerance, and even non-acceptance of these settlements, leading in some cases to repression where illegal settlements are demolished.

Consequently very few Governments have attempted to allow poorer households to find legal alternatives to these settlements (Hardoy and Sattertwaite, 2002: 45). This is due to the fact that they have failed to acknowledge that these settlement inhabitants and their community organizations are an effective mechanism in the Third World for a more efficient and democratic process of urban development. That they, as informal settlement residents, certainly have

innovative methods of developing their settlements and organizing the construction of their housing, even though Government regards them as illegal. Their plans, designs and their building materials are often better suited to local needs, local resources and local climatic conditions than official legal standards set down by Governments. This is due to official Government standards being based on Western models, bearing little or no relevance to local circumstances.

Government agencies also view illegal settlements as disorganized or unplanned and this motivates them to demolish the settlements to construct a planned development. In many developing countries, including South Africa, Governments fail to realize that informal settlements have a method to their development in terms of location, site planning and networking, which exposes the deficiencies of bureaucratic methods and that an approach is needed that takes into account the inhabitants' needs and priorities.

The failure of City Governments to provide affordable, legal land has resulted in illegal settlements developing at a rapid rate. This problem is compounded by the fact that the urban land market through exorbitant price structures and unsatisfactory government decisions prevents land allocation for the poor to cater

for their housing needs. Lack of tenure legalisation for illegal settlement dwellers also does not ease the problem.

The “inviolability [secure from infringement / unassailable / untouchable] of private property found in most legal systems, contributes to the inappropriate and biased urban land policies prevalent throughout the world” (Leckie, 1992: 47). Even though governments have the legal avenue of expropriating land for the benefit of the landless and informal settlement dwellers, who do not have the financial capacity to acquire it themselves, political considerations influenced by the powerful elite and landowners dictate otherwise. There is thus lack of initiative on the part of public authorities to exercise this legal option based on a legal and moral responsibility.

The failure of Governments to promote efficient housing policies coupled with increasing speculation in land markets has resulted in scarcity of serviced land at affordable prices, which in turn results in lack of adequate housing for the majority of the urban population. This has resulted in various forms of illegal land use and development and the formation of illegal settlements has become more and more prevalent. Security of tenure is virtually non-existent for the poor and the urban population in the main cities mainly have no alternative to illegal access to urban land and housing opportunities.

Due to increasing urban poverty, the number of people affected by illegal access to urban land and housing opportunities is likely to increase. This scale of illegality reflects the level to which socio-economic and legal / political rights have been denied (Fernandes, 2002:209). It is a case of informal settlement residents not being fully recognized as legal residents because they lack security of tenure, which makes them financially vulnerable and politically insecure. In the final analysis it is clear that affordable, adequate and serviced housing for the lower income groups by State agencies has been insufficient. Informal settlements, consequently are the main alternative available to the urban poor. This is because irrespective of the consequences, the residents of informal settlements view these settlements as an inevitable solution to their housing needs, because both private developers and the Government have failed to provide adequate alternatives.

1.2. ILLEGAL SETTLEMENTS: JUSTIFICATION FOR THE INTERVENTION PROCESS

Most authorities respond to this form of illegality without understanding its complexity. Draconian responses to informal settlement development do not solve the problem of enabling the residents to obtain access to secure land where they can live a somewhat normal life and make a positive contribution to society. The result is the lack of formal rights of informal settlement dwellers and

the lack of or protection against infringement of such rights by the State in particular.

The State's response to illegality/informality is usually in the form of eviction. Authoritarian Governments usually justify evictions on the following basis: Firstly, to improve or beautify the urban environment without any dialogue with citizens and their organizations. There is usually no consultation with the citizens. Secondly, evictions are justified by propagating the idea that informal settlements are centres of crime and breed criminals which eventually would threaten the economic, social and political stability of the urban environment. Linked to this issue is that health problems and fire hazards are evident in informal settlements which would justify eviction of its inhabitants, since "they challenge the status of the Government as the source of law and order, and threaten the economic, social and political stability of the city" (Hardoy and Sattertwaite, 2002 :46). A third justification for evictions is redevelopment.

In South Africa the perceived "threat of informal settlements to privileged property rights, as well as their threat to the security, health and well-being of the privileged class has justified heavy handed intervention enforced through relocation, associated with enforcement of law and order" (Huchzermeyer,

2001:3). In South Africa, National Government seems to have been just as draconian in many of its responses to informal settlement development.

The result is that most inhabitants of informal settlements have a negative perception of the law. They feel that they cannot rely on the law as a source of empowerment, but rather that it is a mechanism of oppression and that because of law they are victims of unequal and unfair social development denying them the basic needs leading to impoverishment. They also view law as rendering them politically powerless. This perception is strengthened when one has insight into municipal laws, which deprive the poor and marginalized of important resources and opportunities. Very often, municipal laws are utilized to justify forced evictions.

Accordingly, those that live under 'illegal' conditions do not see the positive side of law. That law can be a vehicle that confers and protects individual rights as well as housing rights. These informal settlement dwellers are not convinced that law can serve an empowering role when it comes to the question of housing rights. This results in flagrant disregard of laws by the 'illegal' residents of settlements who live by their own rules and values. "They are consistently confronted with their societal status as 'illegal' dwellers and it has been stated that frequently their entire life is one of long illegality" (McAuslan, 1985: 114).

This in turn results in a hardened attitude by government towards those adversely affected by the law.

1.3. AIM

In dealing with informality and illegality my aim in this research report will be to consider concepts promoted internationally and identified in international literature, that recognize that a solution to informality can only be found if appropriate protection of rights is ensured. This protection of rights, as argued by Payne, should ensure access to secure shelter, which would allow access to other benefits such as livelihood opportunities, public services and credit. It is thus clear that tenure security forms a foundation for improving the conditions of the poor (Payne, 2002:13).

This study aims to look at Human Rights Law as a system of law that creates legally binding obligations with the aim of protecting, respecting and promoting housing rights for informal settlement residents. In order to understand human rights law in the context of housing rights for informal settlement residents, one would need to establish according to Leckie (1992: 6-8); (a) the sources of human rights; (b) where human rights law is applicable; (c) the beneficiaries of human rights; (d) the holder of obligations to fulfil human rights; (e) mechanisms to ensure compliance with international legal obligations.

Further, consideration needs to be given to looking at possible institutional mechanisms to deal with violations of these rights. Due to rapid urbanization, the demand for secure serviced land is ever increasing in developing countries. Also greater pressure is placed on existing tenure systems which will require Governments to design policies that take into account efficient land use and accessibility to it for the urban poor (Payne, 2002:12).

Because of the serious social, political and environmental implications of this illegality, the problem needs to be addressed urgently. I aim to deal with the role of law and legal institutions in dealing with the nature of State intervention in urban development in relation to economic policies, effective social and housing policies, and efficient urban planning. Thus the main point that will need to be dealt with is one of legal recognition of property rights, in the informal settlement context.

1.4. RATIONALE / PROBLEM STATEMENT

It is evident that because of links between secure land tenure, economic capacity and social mobility in many countries, the level of urban illegality reveals the extent to which most people have been denied full socio-economic and legal political citizenship rights (Fernandes, 2003: 236). Residents of informal settlements are confronted with many problems in that they have no or little

access to basic services and they have no security of tenure. This renders their situation precarious in that they belong to the poorest sector of the urban population which exposes them to forced evictions, especially if they are located on private land in prime urban areas. The most serious is the social and economic segregation that follows, limiting the potential of informal settlement inhabitants.

The result is that living under illegal conditions has serious disadvantages: Firstly, Hardoy and Satterthwaite (2002:47) describe the situation of illegality as leading to "benign tolerance", which exposes illegal settlement dwellers to exploitation as no laws can be used in their defence, because they are living under illegal conditions. Then there is the problem of lack of public services as well as police and emergency services, which impacts on health and crime, rendering the dwellers vulnerable to abuse and susceptible to drug lords. Thirdly, the inhabitants, because of their illegality, are not well located and are subject to higher cost of infrastructure and services and very often illegal settlements are built on swampy land which is subject to land slides or sites ill-suited for human habitation.

1.5. RESEARCH QUESTION AND POSITION

The research question focuses on how housing rights can be integrated into the informal settlement intervention process. By analysing International Literature

one will be able to ascertain how these challenges can be dealt with, especially in the context of State sovereignty. The ultimate challenge will be to deal with overcoming the perception that International law and Covenants are worthless and consequently, unenforceable. In essence, enforcement of these norms becomes crucial.

In respect of the actual integration of housing rights into the informal settlement intervention process, I focus on the development of International legal systems and covenants in a positive direction leading to housing rights enforcement that would be beneficial to all. Accordingly, I focus on 'levels of obligations'. At this juncture I briefly discuss issues of obligations assumed by the Brazilian and Philippines Governments. I do this as they add substantially to the argument on levels of obligations and mention that these two countries' case studies are discussed in greater detail in chapters 3 and 4 that follow.

As far as Brazil is concerned, housing rights are regarded as an integral part of social rights leading to positive State action by the placing of obligations on the State to execute effective public policies relating to urban and housing policies. This would entail firstly, the prevention of the regression of housing rights, ie. preventing measures that hinder the exercise of housing rights. Secondly, the obligation to intervene in regulating private sector activities by regulating the use

and access to urban property and regulation of land in informal settlements to ensure social and territorial integration.

In the Philippines the Constitution sought to ensure a continuing programme of urban land reform where socio-economic and political underpinnings of the Constitution recognized the right to adequate housing. Further there was recognition that suitable land and basic services, coupled with employment opportunities for informal settlement residents constituted an integral part of this right to adequate housing. Further, a just and humane approach to evictions and demolitions was also considered part of State obligations.

1.6. REVIEW OF INTERNATIONAL LITERATURE

International Human Rights Law embraces the right to housing. To some extent, every government has both international and legal obligations to respect, protect and fulfil housing rights. The Human right to adequate housing has been legally recognized internationally in the Universal Declaration of Human Rights in 1948. However, this notion that equality of access to affordable, secure, safe and healthy housing constitutes a fundamental human right was not accepted as the norm.

Governments throughout the world have failed to adopt the policies and legislation necessary to recognize this human right. While this right is firmly

entrenched within the legal regimes of almost all countries, the level to which it is violated daily by most countries is alarming (Leckie, 1992:1).

There are many international human rights instruments that deal with housing rights. These instruments are dealt with in greater detail in the chapter that follows. Some of the important instruments that need mention are the UN Global Shelter Strategy to the year 2000, the 'International Covenant on Economic, Social and Cultural Rights' as well as the 'Istanbul Declaration' and 'Habitat Agenda', and 'Global Plan of Action' adopted in 1996. Many critics view these as " 'soft' International Law giving rise to quasi (seemingly) – legal obligations which cannot be enforced by any International Law Enforcement Agency" (McAuslan, 2002:23). Nevertheless, all Governments that agreed to these documents represented at that particular summit put themselves under an obligation – "part legal, part moral – to begin the process of reviewing their policies, laws and practices in line with the principles enshrined in the Declaration and Agenda" (McAuslan, 2002:23). South Africa has also become a signatory to creating an environment which facilitates the provision of housing to its citizens, although it has not ratified the International Covenant on Economic, Social and Cultural Rights.

Concerning the Global Plan of Action (GPA), the aim is to ensure that Governments commit themselves to a strategy of "enablement, transparency and

participation, which will in turn assist Governments to establish, *inter alia,* legislative frameworks to enable the achievement of adequate shelter for all. A range of actions are proposed for ensuring access to land and security of tenure" (McAuslan, 2002: 24).

At this juncture I briefly mention some innovative mechanisms adopted in various countries to ensure that housing rights are protected. I mention these briefly to illustrate that there are many forms of approaches adopted in various countries for the protection of the rights of informal settlement residents. Even though these countries' case studies are brief, they should be considered in the context of my two detailed case studies of Brazil and Philippines as a comparison.

Dealing with these examples, in Francophone sub-Saharan African countries of Benin, Burkina Faso and Senegal popular reinterpretation or adaptation of customary practices allow the urban poor to acquire *de facto* and eventually, *de jure* tenure rights (Durand-Lasserve, 2002:114). In India, examples of New Delhi and Ahmedabad show to what extent that country has achieved providing tenure security to the urban poor. In Ahmedabad the slum networking programme granted residents of illegal settlements ten-year licences to their land, allowing them to improve both their houses and their local environment (Kundu, 2002:136). In Botswana, certificates of rights were adopted in the 1970's in order to provide a measure of tenure security to households unable to afford formal

shelter, and to encourage them to maintain and improve their houses when, and as they could afford to. The system could be upgraded to more formal Fixed Period State Grant tenure even though this system is on hold due to the alternatives provided by the Tribal Land Boards (Yahya, 2002:194). For Brazil Fernandes (2002:209) reviews the concession of the Real Right to Use (CRRU) of land, which has been adopted in several Brazilian cities, notably Porte Alegre and Recife. Here, the main thrust was the regularization of *favelas* (irregular acquisition of plots), based on the notion that public land does not have to be privatised in order to recognize housing rights. This CRRU, because it is a recognized right to land, provides legal security of tenure and provides protection against eviction. I discuss this in greater detail in chapter three.

The challenge facing Governments in any developing country is in addressing the concept of legal recognition of property rights, in particular urban real property rights. For it is the private ownership of land in urban areas that has been the most difficult to deal with given “the limits of State intervention to impose socially oriented conditions to the economic exploitation of property being determined by prevailing classical liberal legal ideologies” (Fernandes, 2003:238). This commodification of property has been detrimental to the concept of property as a social function. Thus the challenge will be to have urban planning and land use and environmental control laws to increase the scope for State intervention relating to individual property rights. A further challenge is to

ensure that effective legislation is enacted at all levels of Government to ensure democratisation of land acquisition or some form of access to urban land by the poor, as well as economic restructuring. This will allow affordable access to land and housing for the urban population.

Moving on from here, for the right to housing to have legal and social efficacy, positive State action in relation to effective urban housing policies is needed. The housing policy would need to establish programmes, agencies and most importantly, legislation to guarantee this right for all its citizens. Firstly, there should be securing of tenure policies, which encourage social and spatial integration of urban areas, and tenure policies should be linked to livelihoods. Providing of infrastructure and services should also become a priority. While this right to housing does not require Government to provide a residence for each citizen, its obligations would have to extend to ensuring that there are adequate measures in place to allow citizens to exercise the right to housing; ie. the policy does not hinder access to housing rights.

Secondly, Government needs to promote and protect this right by intervening and regulating private sector activities. Finally it should be borne in mind that human rights to adequate conditions of housing and all that this right entails should be a legal as well as a *de facto* guarantee which receives the consistent attention of Governments, NGO's lawyers and other concerned parties.

Housing rights are universally protected and implemented. States which possess obligations vis-à-vis this right in legal terms must not shy away from their duty to assist in the creation of conditions conducive to the realization of housing rights in both a passive and an active sense. Included in the group for protection are informal settlement dwellers. I expand on these concepts in greater detail in chapter 2.

1.7. CONCEPTUAL FRAMEWORK

In the context of state obligations flowing from International Laws and Covenants, Fernandes, (2003) in his chapter on "Illegal housing law, property rights and urban space" discusses three main paradigms reflecting different approaches to the nature of the urban development process, of state action and of the relation between both the urban development process and of state action. He argues that these have a different view on the central issue of property rights and describes the three paradigms as follows: (i) civil Law ; (ii) public law; (iii) socio-legal studies (Fernandes, 2003:232).

It would be useful to consider a comparison of these three paradigms which reflect upon the different approaches to the urban development process and of state action. This comparison allows an understanding of why I consider a

particular paradigm appropriate and most suitable to urban development in the context of housing rights.

Fernandes states that in many developing countries the civil law paradigm has been characterized by the liberal and individualistic approach, where state intervention is minimal regarding use and development of urban land. Here, law essentially governs relations between individuals and administrative restrictions or approvals to ensure social welfare. In general, unregulated market forces are permitted to control urban development (Fernandes, 2003:233).

In some countries the Public Law Approach to property rights is more prevalent. This approach emphasizes the social function of property with that of public interest to allow the State to be involved in land use and development through various legal instruments such as zoning laws. Linked to this will be a “critical assessment of the politico-economic dynamic of the urbanization process” (Fernandes, 2003:233).

The third paradigm according to Fernandes assesses the “relation between law and the urbanization process, as well as the relation between the official legal system and the proliferation of informal rules and popular mechanisms for the distribution of justice” (Fernandes, 2003:233).

I will use this paradigm as a conceptual framework and in the context of housing rights in particular, I will reflect upon the right to development to consider the nature of state action, and its attempts at socio-political legitimisation in the context of informal settlement intervention. “The conceptual framework would look at concepts that use rights as a basis to propose building a ‘conceptual bridge between the ‘official’ and the ‘illegal’ cities or to identify a general analytical framework to explain the socio-economic as well as politico-ideological roles of law in the overall urbanization process in developing countries” (Fernandes, 2003:233).

Such a study (of the role of law and housing rights in the context of urban reform) would allow us to better understand the extent to which “urban law can be one of the instruments of a progressive strategy aimed at the democratic administration of cities” in the informal settlement context (Fernandes, 2003: 233).

Thus, the conceptual framework will be based on the idea that greater emphasis should be placed on the legal constitutional perspective of the urban phenomenon in relation to informal settlement dwellers. Theoretical consideration needs to be given to the importance of law as a vehicle for urban development and social change. At the end of the day it is about legal social relations in urban areas relating to the use of land.

This has to be seen in the context of the legal paradigm of socio-legal studies that Fernandes (2003:232) refers to, where the relation between law and the urbanization process as well as the official legal system and the "proliferation of informal rules and popular mechanisms for the distribution of justice" are considered. That law can be used as a creative force of empowerment, ie the legal dimension of the urbanization process needs to be considered with a critical reflection of law in the context of housing rights and its relevance to informal settlement intervention.

1.8. METHODOLOGY

The philosophy of the research process is to include assumptions and values that serve as a rationale for the research. The standards or criteria that I use for interpreting data and reaching conclusions is to synthesise, analyse and offer suitable solutions and recommendations.

The method of research is exploratory in nature where the data collection technique was to rely on International legal instruments such as International laws, treaties and conventions, protocols, decrees, charters and covenants. Since I was stimulated by the ideas and the research of others, I referred to South African, and more particularly, International literature on the subject, which generated International case studies of Brazil and Philippines. Reliance was also

placed on journal publications from human rights organisations. Use was also made of electronic searches.

The advantage of this method was that I was able to do case studies on countries that I would not have had unlimited access to, and where the data - collection method itself does not change the data being collected. Also it is well-suited to study over a long period of time and also allows a larger sample to be used. However the greatest advantage is that such literature is written by skilled social commentators. To this end interviews with professionals in the housing field as well as lecturers provided a great source of ranging views on both the housing situation and possible intervention measures in the context of informal housing settlements.

Accordingly this data constitutes the theoretical background to the study. An important contribution to my research were the direct observations coupled with interviews on the field study tour to Sao Paulo, Brazil. Such observations served as yet another source of evidence in a case study.

The method of analysis adopted was to evaluate the case studies against criteria developed from the theory base. In this way possible intervention policies and approaches could be extracted and presented as possible solutions to the integration of housing rights in the informal settlement process.

The authors Leckie and Fernandes have been relied upon extensively as they have produced extensive material in this area. In particular, Leckie has worked extensively on the issues of housing rights. The international case studies of Brazil and the Philippines were selected as these two countries , in my view, have made great strides in informal settlement intervention.

The two case studies complement each other in that equal emphasis is placed by these two countries on the International normative and procedural dimensions of human rights as well as human rights at the national level. In the area of economic, social and cultural rights, especially, the actual implementation and application of international standards of these rights at the local level, great strides have been made with a renewed emphasis being given to these rights within the context of international law. This certainly has had an impact in their respective countries on the recognition, and in some cases the enjoyment of housing rights.

However, it was necessary to do two case studies because there are contrasts: The Philippines did not consciously reflect international commitments in local housing policy. The government simply reacted to civil society pressure (Mendoza, 2003:71). Thus, the main policy motivation for the enactment of its main housing act “was not so much an acknowledgement of the universal right to housing, but rather a political necessity to respond to the burgeoning informal

urban population which was able to form mass organisations and have their presence felt" (Mendoza, 2003:70). Mendoza (2003: 70) thus concludes that the legal and policy infrastructure for housing rights derived no mandate from the international covenants, and in many individual cases, detracted from these principles and objectives. He refers to examples of laws concerning property rights as being laws passed down from the Spanish and American Colonial Era that do not consider the social function of land.

The result is that there is lack of detail for the implementation of an urban land reform programme as conceived in the Philippines' Constitution. This case study of the Philippines' becomes an interesting one in that even though the Philippines' is a party to the International Convention of Economic, Social and Cultural Rights (ICESR), how it has responded to the demand for the recognition of the right to housing, considering its founding of the right in its statutes, laws and governmental policies and methods of operation with civil society influence.

Brazil, on the other hand, is a state party to various international human rights treaties. Further, housing rights are expressly and consciously, unlike the Philippines, foreseen in the Brazilian Constitution dealing with social rights. This compels the state to execute positive public policies related to urban and housing policies. Also there is an obligation to promote and protect housing rights by intervening and regulating private sector activities relating to housing policy, to

ensure that housing fulfils its social function. Greater emphasis is also thus placed on territorial integration of communities living in poverty in informal settlements by effective land regulation.

This research report is part of a study constituting part one of an NRF project funded for 2003 and 2004. My topic will be contextualised for the South African situation as part 2 of the NRF project in a separate research report restricted to the South African context.

1.9. LIMITATIONS OF THE STUDY

As far as Brazil is concerned, not much literature in English could be accessed and it is for this reason that a great reliance was placed on Fernandes. In the Philippines context a limited amount of literature could be sourced on this topic. In fact when it came to the specific issue of housing rights I found that only Leckie deals with this subject adequately.

1.10. INTERNATIONAL APPROACHES TO INFORMAL SETTLEMENT INTERVENTION

In this research report, examples of innovative approaches to informal settlement intervention from international examples that have been researched will be identified and reviewed. As far as Brazil is concerned I have participated in a ten-day field trip to Sao` Paulo in November 2003 with a view to researching

appropriate informal settlement intervention policies undertaken by the Municipality of Sao` Paulo; Diadema, Santo Andre and other Brazilian institutions. In Brazil, I have been fortunate to interact and have discussions with Brazilian academics like Renato Cymbalista, Nelson Saule Jnr, Ellade Imperato; Ivor Imperato; Rosanna Denaldi. I was also privileged to participate and interact in a discussion session with Edesio Fernandes on his visit to South Africa in 2003. My discussions with these Brazilian scholars and practitioners assisted in understanding the concept of housing rights, and more particularly, the informal settlement intervention process in Brazil as emphasized in Chapter 3. Renato Cymbalista was particularly helpful in explaining the practical workings of the 'Statute of the City' which I deal with in great detail under my Brazil case study.

While it is not claimed that the examples from the two countries give a definitive list of innovative methods of informal settlement intervention processes, it is felt that they may encourage healthy debate around the issue of appropriate intervention processes for South Africa. The comparable case studies will also, in my view, allow the strong and weak points of each case study to be highlighted, especially for part 2 of the NRF research project to be undertaken in the South African context.

CHAPTER TWO

ILLEGALITY AND THE CONCEPT OF HOUSING RIGHTS INTERNATIONALLY

2.1. INTRODUCTION

In many cities in Asia, Africa and Latin America the urban poor access land and housing through illegal methods. This formation of illegal settlements needs to be understood in the context of rights and what solution can be found to deal with this aspect of illegality. More specifically, the legal dimension of the urbanisation process needs to be considered with a critical reflection on law in the context of housing rights and its relevance to informal settlement intervention.

One needs to look to human rights law as a system of law that creates legally binding obligations with a view to protecting; respecting and promoting housing rights.

2.2 CONCEPTS:

In order to place human rights law in its proper perspective, one would need to ascertain, according to Leckie (1992: 6-8), four concepts, namely:

- the source of human rights;

- where human rights law is applicable;
- the beneficiaries of human rights;
- the holder of obligations to fulfil human rights norms.

I review them under separate headings hereunder:

- **THE SOURCE OF HUMAN RIGHTS**

At international level treaties or charters, covenants, conventions, protocols and other instruments give substance to rights. The result is that under certain circumstances they place legal obligations on states. Although other international obligations exist for states within human rights law, these agreements between states create the greatest legal obligations. Declarations also create a source of rights. However, these are more in the form of commitments by states to implement certain policies. They do not create legal obligations unless they become part of customary law through consistent utilisation by states of these policies (Leckie, 1992: 7).

- **WHERE HUMAN RIGHTS LAW IS APPLICABLE**

For the abovementioned instruments to become a source of law, they have to be ratified by a quorum of states to become binding. Further, states can also sign instruments indicating the intention of ratification. These governments then are known as *"state parties"* or "*contracting states".* States that have not ratified the

instruments, are only bound by instruments that have status of customary international status (Leckie, 1992:7).

- **THE BENEFICIARIES OF HUMAN RIGHTS**

A ratified treaty places upon governments legal obligations as to the treatment of individuals over whom they exercise state power (Sieghart in Leckie, 1992:7). Accordingly "beneficiaries of human rights are individuals or groups composed of individuals" (Leckie, 1992:7). Included in this category would be informal settlement residents.

This accent upon the individual now impacts upon how states treat their subjects in terms of international law. Also, a mutually agreed international standard monitors and assesses domestic laws and "*behaviour"* of sovereign states in terms of policies and actions, "in the exercise of their internal jurisdictions, and which may, therefore, be regarded as ranking in the hierarchy of laws above even national constitutions" (Leckie, 1992:7).

Accordingly, if consideration is given to the right to housing, "it is clear that this is an individual (or family, being comprised of individuals) right, which many of the world's states are legally obliged to fulfil" (Leckie, 1997:7).

- **GOVERNMENT OBLIGATIONS TO FULFIL HUMAN RIGHTS NORMS**

The particular human rights instrument will determine the extent and nature of state obligations to guarantee the full realisation of human rights. In the present context of housing rights, it has to be established whether the state has to implement a right immediately or what Leckie (1992:8) refers to as "progressively over time" as derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, what is clear is that the corresponding duties of rights rests with states and their public authorities.

2.3. THE CONCEPT OF HOUSING RIGHTS

Housing rights certainly make up an essential part of human rights law. Since they embody various rights they are inextricably linked to employment, access to services, health, security, self-identity and self-respect and dignity. In recent times, it has become clear that housing rights can be defined and consequently are enforceable and that State obligations and legal clarity has given new impetus to this right. This has been strengthened or reinforced by the legal recognition of various international legislation.

A further positive factor is that there is national government recognition of this legal principal in countries around the world, where governments in terms of their national constitutions, including South Africa, recognise this right to adequate

housing. This has improved the prospects for implementation, enforcement and eventual realisation of this right, especially for informal settlements.

2.4. INTERNATIONAL TREATIES AND CONVENTIONS

A number of United Nations resolutions have reaffirmed housing as a fundamental human right which seems to provide a catalyst for State action and intervention. I deal with some of them briefly in chronological order to illustrate the development of housing rights over the years.

(i) UN CHARTER AND THE UNIVERSAL DECLARATION ON HUMAN RIGHTS (1948)

Firstly, the UN Charter and the Universal Declaration on Human Rights (UDHR) adopted in 1948 is one of the first international proclamations of the right to housing. The relevant article for informal settlements is 25(1) which provides that "everyone has a right to a standard of living adequate for the health and well being of his family, including food, clothing, housing and medical care, and the necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other circumstances beyond his control" (Universal Declaration on Human Rights, adopted and proclaimed by United Nations General Assembly resolution 217A(III) on 10 December 1948).

(ii) INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966) (ICESR)

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966 expounds the legal concept of the right to housing placing an obligation on States to respect, protect and comply with the provisions of the abovementioned articles (International Covenant on Economic, Social and Cultural Rights(1966), adopted by United Nations General Assembly (UNGA) resolution 2200A(XXI)). This compliance would entail States recognising the right to an adequate standard of living for individuals and their families, which would include adequate food, clothing and housing and to the continuous improvement of living conditions. In effect States need to take the necessary steps to ensure the realisation of this right.

- **PROGRESSIVE REALISATION OF THE RIGHT TO HOUSING**

Under the 1966 Covenant there is a general obligation on a State to take legislative and other steps to the "maximum of its available resources" in order to achieve "progressively" the full realisation of the rights as described in the Covenant (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights). In this regard it is important to realise that states or governments that have inadequate resources need to at least attempt to provide the enjoyment of the aforementioned rights in the Covenant. This has to be done by showing that as a prioritisation measure, every conceivable effort has been

made to utilise available resources at the State's disposal with a view to complying with the minimum obligation in terms of this Covenant.

Following from this, the "progressive realisation" clause, requires of state's to speedily and effectively attempt to allow the right to housing to materialise. In essence there is an obligation on governments to implement progressive measures with the resources available to them in order to achieve its goal of realising fully, the right to housing. Any retrogressive policies and consequent measures would have to be weighed up against the state's maximum available resources and also has to be viewed with the requirement of utilising the effective and equitable use of combined resources. At this juncture, the Grootboom decision in South Africa (Government of the Republic of South Africa v Grootboom 2000(11) BCLR 1169 (CC), 2001 (1) SA 46 (CC)) becomes relevant. Here the Constitutional Court held that Section 26(1) of the South African Constitution requires the State to devise and implement a comprehensive programme aimed at realising the right of access to adequate housing. It also requires that the State has to implement a programme to provide relief for those in desperate need with the emphasis being placed on priority setting.

Crucial to the realisation of this right is that there should be no discrimination of whatever kind in the allocation of resources and in particular in the implementation of policies and measures. From this it is clear that all States,

irrespective of their economic capabilities, have a basic obligation to comply with essential aspects of the rights as contained in the legal text to the Covenant. The resultant conclusion that would be drawn is that in countries where the majority of the population lacks basic shelter and housing, that State is failing in its obligations under the Covenant and in effect is in violation of this Covenant.

(iii)**INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1966)**

Everyone lawfully within the territory of the State has freedom of movement and freedom to choose his residence. Further, this instrument states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, nor to unlawful attacks on his honour and reputation (1966, Adopted by UNGA Resolution 2200A (XXI), 16 December 1966).

(iv) THE 1968 PROCLAMATION OF TEHRAN

The 1968 Proclamation of Tehran states: “Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible” (The 1968 Proclamation of Tehran, adopted at the International Conference on Human Rights of the UN in 1968).

(v) THE VANCOUVER DECLARATION (1976)

The Vancouver Declaration on Human Settlements is an important declaration which provides guidance to states to improve housing conditions for their respective countries, especially in the context of informal settlements. This guidance would include governments assuming responsibility for developing human settlement policies which lead to a progressive improvement in not only the living conditions of people, but their general well being.

(vi) UN HABITAT 1988 – GLOBAL SHELTER STRATEGY TO THE YEAR 2000

The UN Global Shelter Strategy to the year 2000 (GSS) adopted in 1988 aims to provide adequate shelter for all and implicit in its aims and objectives is a human rights dimension of housing. The crux of this strategy is based on the idea that all nations have an obligation in some way to provide shelter and security of tenure, whether it be in the form of setting up appropriate housing agencies or ministries; allocation of funds for housing; devising appropriate housing policies and programmes or projects (U.N. Global Strategy for Shelter to the Year 2000(1988).

(vii) ISTANBUL DECLARATION AND HABITAT AGENDA (1996)

In the 1996 Habitat Agenda, the importance of urban law was emphasised resulting in the law being elevated to a critical position regarding urban development. In line with this vision the Istanbul Declaration and Habitat Agenda and a Global Plan of Action adopted at the City Summit in June 1996 provide an international policy and legal framework for policies, laws and practices related to urban land tenure.

While many international lawyers view these documents as giving rise to quasi-legal obligations which cannot be enforced by international law enforcement agencies "nevertheless by agreeing to these documents, all governments represented at that summit put themselves under an obligation – part legal – part moral – to be in the process of reviewing the policies, laws and practices, to bring them into line with the principles enshrined in the declaration and the agenda" (McAuslan, 2002: 283).

Summarising these documents, firstly the Istanbul Declaration sets out two principles: A commitment to the full and progressive realisation of the right to adequate housing as provided for in international instruments by ensuring legal security of tenure, protection from discrimination and equal access to affordable and adequate housing for all persons and their families. Secondly, expanding the supply of affordable housing by enabling markets to perform efficiently and in

a socially and environmentally responsible manner, and enhancing access to land and credit and assisting those who are unable to participate in housing markets (UN HABITAT, 1996).

The Habitat Agenda aims to firstly provide legal security of tenure and equal access to land to all people, including women and those living in poverty and also ensuring transparent, comprehensive and accessible systems in transferring land rights and legal security of tenure; protecting all people from forced evictions that are contrary to law, taking human rights into consideration. Furthermore where evictions are unavoidable providing suitable alternative solutions.

The Global Plan of Action, which is a third leg of the Habitat Agenda, is based on a strategy of "enablement, transparency and participation, which will in turn assist governments to establish *inter alia* legislative frameworks to enable the achievement of adequate shelter for all" (McAuslan, 1998:24). The result is that by ensuring access to land and security of tenure, strategic aspects regarding adequate shelter provision are being facilitated and results in the development of sustainable human settlements. Most importantly, the Habitat Agenda stresses that "a legal framework must be developed that accommodates the needs of the urban poor; leaving them out

and continuing the dual city – the legal and illegal – is not an option" (McAuslan, 2002: 26).

(viii) OBLIGATIONS BY INDIVIDUALS

Article 29(1) of the UDHR (1948) states that *"*everyone has duties to the community in which alone the free and full development of his personality is possible*"*. While obligations of individuals, as far as the right to housing is concerned are open to debate, Leckie (1992:32) argues that in terms of international human rights law, the individual does, according to the covenant, have a duty to strive for the promotion and observance of the right to housing, which is owed both to other individuals and to the community to which he or she belongs.

These obligations, he states, would include the duty not to posses unutilised land, property or housing units that have housing potential, in cases where large sections of the population are unhoused. Further, it would include the duty not to cause land to remain vacant with a speculative motive in order to wait for an increase in value; and the general duty not to speculate.

In my view, this duty should not be underestimated when it comes to the issue of housing rights, and this duty also should be given meaning through influencing government policies as far as informal settlements are concerned. Individual participation would lead to community mobilisation, leading to transparency and accountability to catalyse efforts of different collaborating sectors. The result will be that Government and Civil Society will see the holistic perspective and will

develop strategies leading to more market – based, culture – appropriate, participatory and gender – sensitive schemes in line with the right to housing.

(ix) DUTIES OF THE INTERNATIONAL COMMUNITY

The international community is also under an obligation to promote and observe housing rights, "although these are less clearly defined" (Leckie, 1992:32). The international community in this context would include the United Nations and in particular, UN Habitat, international finance entities/bodies such as the IMF and World Bank, as well as multinational-corporations.

The legal obligations of these bodies relevant to housing would relate to activities, policy decision and loan agreements being enforced in the context of human rights. Further, these bodies must also refrain from complicity in the violation or non-compliance with the right to adequate housing. For example, international finance entities, together with governments promoting the concept of inviolability of private property leading to excessive land speculation. This would lead to informal settlement residents being unable to access land.

2.5. "PERMEABILITY OF RIGHTS"

At international level, the right to housing possesses inherent aspects that link it to many other existing rights, such as those relating to privacy and family life, development, health, work, assembly and association, the rights of the child, the

rights of women, freedom of movement, the right to property or land, the right to an adequate standard of life and the right to environmental hygiene. This legal inter-relationship resulting in the realisation of the right to housing is referred to by Leckie (1992: 41) as the "permeability of rights".

With this permeability, the consequences is that this right to housing *"*due to its very nature is closely tied to these other rights; some of which are of a more civil and political nature, and others of an economic, social and cultural nature" (Leckie, 1992:41).

It is important to realise that in the context of permeability of rights, some of these sets of rights have a direct link to housing as they have been codified as such, while others have an indirect link to housing issues. Accordingly, they are useful in ensuring a comprehensive approach to human settlement policies. So, clearly governments that place emphasis on the right to housing are more likely to respect rights directly related to this right.

Also the permeability of rights aspect would greatly enhance the compliance of obligations placed by the right to housing, by the utilisation of related rights. Inherent in this approach would have to be a global approach to the definition to the right to housing by either the government or international community

concerned, and clarity on and certainty on the obligations of governments with a wide or judicial definition of housing rights being applied.

The set of rights linked to the right to housing are dealt with in greater detail below:

- **THE RIGHT TO FAMILY LIFE AND PRIVACY AS PER THE UDHR AND ECHR**

There is an obvious link of these rights with the right to housing, which will consequently enable one to use this right to justify a right to housing or elements that form the basis of this right. Leckie (1992: 42) states that the most important legal interpretation of these rights is to be found in the European Convention on Human Rights and Fundamental Freedoms ((1950) in Article 8(1), adopted in Rome on 4 November 1950).

In this context, three categories become relevant, namely evictions, the provision of homes, discrimination with regard to housing. As far as providing a home is concerned, Leckie (1992: 43) argues that while the state is under no obligation to

provide housing, it has an obligation to ensure that public authorities do not impose intolerable living conditions on a person or his family according to the commission.

The right to privacy would be relevant to informal settlements, according to Leckie (1992: 43), to include protection against evictions. As far as discrimination is concerned, the only relevance to informal settlements would be indirectly in the area of allocation of resources.

- **THE RIGHTS OF A CHILD**

Principle 4 of the UN Convention on the Rights of the Child and the UN Declaration on the Rights of the Child of 1959 provide amongst others that "the child shall have the right to adequate nutrition, housing, recreation and medical services". Article 27 of the convention, wherein the general right to housing and its component elements has been included, states *inter alia* "the states party to the present convention recognise the right of every child to a standard of living adequate for the child's physical, spiritual, moral and social development. The parent or others responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development …".

The ESC also enshrines rights pertaining to the children and the general consensus of the European Committee of Experts is that "homeless children should be provided with the nearest possible approximation to a normal home environment" (Leckie, 1992:44).

The articles and instruments referred to regarding the rights of the child show the legal nexus between housing and the child. Very often children are victims of inadequate shelter conditions and more importantly others (parents and those responsible for children having the primary responsibility to secure these rights for children) could rely upon this international legislation for the fulfilment of the right to housing for all. This aspect becomes crucial in an informal settlement intervention process (Government of the Republic of South Africa v Grootboom 2000(11) BCLR 1169 (CC), 2001 (1) SA 46 (CC)).

- **THE RIGHT TO FREEDOM OF MOVEMENT**

Article 13(1) of the UDHR provides that "everyone has the right to freedom of movement and residence within the borders of each state". The aspect of this article is important as a right in dealing with mass forced evictions. However, it should not be construed that such a right places an obligation on the state to provide housing, but rather the state must not conduct itself in such a way as to prevent persons from having the option of choosing where to reside. Clearly a group falling in this category would include "illegal" squatters or informal settlement dwellers (Leckie, 1992:44).

At this juncture, it would not be inappropriate to refer to the Bombay pavement dwellers case (Olga Tellis & Ors v Bombay Municipal Corporation & Ors & NOS. 5068-5068 of 1981), where the argument was based on the point that forcible

eviction would *inter alia* amount to a violation of their rights to freedom of movement. To a certain extent this argument was successful (Leckie, 1992: 45).

In general terms, however, legal reliance on this aspect of forcible evictions, would either prevent evictions or one can obtain government assurances that they will be carried out in a certain manner (Leckie, 1992: 46). Further, if removals are unreasonable under the circumstances, in terms of location or distance, for example, then clearly, in my opinion there would be a valid argument that this right of freedom of movement has been violated.

- THE RIGHTS OF WOMEN

Article 14(2)(h) of the CEDAW refers to equality of women enjoying adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, as well as transport and communications. Article 3 refers in general terms to taking appropriate measures to ensure full development of women to guarantee the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Leckie (1992: 48) argues that in the context of permeability of rights the CEDAW provisions provide strong substantiation for a link to housing rights and their components. The Brazil example of granting title to women is a clear example of how permeability has impacted on housing rights.

- **THE RIGHT TO WORK**

The CESCR, the ESC, and many texts of the ILO which set out to protect economic, social and cultural rights, enshrine the right to work. This concept links up with the rights to housing in a variety of forms.

Firstly, the deprivation of this right would mean that a beneficiary would be unable to afford to adequately house him/herself. Secondly, relating to the aspect of employment being in close proximity to a housing option. In the informal settlement context, it will mean that if employment opportunities are not close by, the residents are effectively denied work because they will not be able to afford high transportation costs involved.

The Bombay pavement dwellers case to a certain extent relied upon this right to work. In essence, they based their argument on the point that the right to livelihood would be violated if they were removed from their settlements to some remote area and to a certain extent, were successful with this argument.

- **THE RIGHT TO HEALTH**

Services such as potable or piped water, proper disposal of waste and sewers and structural elements relevant to health would cover the definition to a right to adequate shelter are vital in asserting the right to housing. Fortunately many

instruments refer to the right to health in the context to housing and any deterioration in health standards would be construed as a violation of this right.

This right also would link up to the right of the child to an environment that is conducive to physical and mental health, in order to prevent illness and death, especially amongst children. Diseases that would be relevant would be aspects of acute respiratory nature, tuberculoses, diarrhoea and cholera.

Thus there would be a strong argument in the context of this right relating to informal settlements, for governments to implement an enabling strategy to improve living conditions where health problems exist. In this way there would be a two-pronged approach of dealing with the right to housing, and at the same time the right to health, resulting in elements of the right to adequate housing being realised (Leckie, 1992:46).

- **THE RIGHT TO ENVIRONMENTAL HYGIENE/QUALITY**

This right, which is inextricably linked to the right to housing and the right to health, if complied with, would result in adequate housing conditions in human settlements. Leckie (1992:50) argues that "in legal terms, although the human right to environmental hygiene/quality does exist to some degree, this right remains under-developed".

Many of these interventions which would also be inherent elements of the right to housing, such as service and infrastructure delivery, clearly show that if a right to housing is addressed, environmental problems directly related to housing and shelter conditions would be automatically resolved.

- **THE RIGHT TO BE FREE FROM ANY FORM OF DISCRIMINATION**

Article 11(1) and the right to housing covers broadly the prohibition of discrimination within ICESCR. However, the International Convention on CERD bears a direct relevance to housing which stipulates that no discrimination should take place with regard to housing. In the context of informal settlements the non-discriminatory obligations of states under the ICESCR, the Vancouver Declaration and others stipulates that there should be no discrimination in the distribution or allocation of housing resources.

2.6. RELEVANCE OF HOUSING RIGHTS TO INFORMAL SETTLEMENTS

Fortunately the Committee on Economic, Social and Cultural Rights (CESCR) has given Governments guidelines regarding its legal obligations under the Covenant to comply with housing rights. The Committee has indicated for instance the importance of realising that the right to housing and housing rights should not be construed simply as being shelter as a commodity, but rather the right to live somewhere in security, peace and dignity. Implicit in this would be the appreciation of the vulnerability of informal settlement residents to violation of

housing rights. Accordingly, greater emphasis needs to be placed on the social component of housing rights (CESCR).

Further it has to be comprehended that the legal nature of housing rights extends to providing access to and control over basic resources, such as land, building materials, water, fuel, finance and technology (Leckie, 1994:34).

An important aspect included in this category would be the promulgation of appropriate legislation for the furtherance of this right. Thus, the right to housing goes beyond survival to the issue of culture and social freedom; social and community relationships and social linkages to one another and the surroundings (Leckie, 1994:38).

2.7. CONCLUSION:

In the light of the fact that the rights to housing as set out at the international level and to some extent at a national level have been unpacked, it will become necessary in subsequent chapters to consider how these rights can be implemented and respected. More importantly, consideration will have to be given as to how these rights can serve as a catalyst for the intervention process in informal settlements.

The above discussion traces the struggle for housing rights and against evictions, that has in many ways been at the forefront of efforts internationally to give meaning and substance to internationally recognised human rights. However, the other dimension of human rights, in the context of housing rights, relates to the challenge of linking theory and practice in the implementation of housing rights in the informal settlement context.

What becomes clear from these covenants and treaties is that all nations have some form of obligation in the context of housing rights by the creation of ministries or housing agencies, or allocation of funds, and by relevant policies, projects and programmes. Citizens of states, irrespective of their status in society, have a right to expect their governments to be concerned about their shelter needs and having the fundamental obligation to protect and improve their living conditions, where they can live in security, peace and dignity.

It thus becomes clear that housing rights are premised on some key arguments: That the 'right to adequate housing' at international law should exist as an independent right, and that the inclusion of housing rights within the system of human rights would strengthen and reinforce all human rights. The result is that the non-material aspects of housing rights become important for informal settlement residents as far as intervention is concerned. This argument is strengthened by referring to the duties of states to ensure effective remedies

where there are violations. Also the obligations to respect the rule of law and giving priority to protecting human rights in formulating policies and laws.

The ultimate challenge in strengthening the prospect for housing rights, in particular in the informal settlement context, would have to be the eventual acceptance by nations of the legal obligation to intervene in such a manner as to strike a balance in protecting the rights of those that have access to housing and facilitating access to informal settlement residents that are ill-housed. The Courts would need to be receptive to using International Human Rights Provisions in statutory interpretation and development of the common law. This would result in law development in closer alignment with the international right to adequate housing.

“Despite of, or perhaps because of, the world-wide prominence or influence of globalisation in recent years, the international legal promise of housing rights have made immense strides forward” (Leckie, 2003:7). It is thus clear that the progressive development of housing rights from a legal, conceptual and practical point of view has certainly improved the prospects for the effective intervention for informal settlement residents in terms of their housing and living conditions.

The advent of International legal instruments on housing rights and the concomitant permeability of rights gaining recognition, has resulted in greater

legal responsibility with governments, improving the prospects for enforceability at municipal and national levels. It is clear that informal settlement residents have legally recognised housing rights, which would allow them access to adequate housing where they can live in security, peace and dignity.

However, the aim should be to take housing rights to the next level by continuously strengthening housing rights standards and making housing rights more enforceable. More importantly, it is necessary to enlighten informal settlement residents of their legitimate rights and how to assert and demand them resulting in a coordinated global effort for the assertion of housing rights by informal settlement residents.

Domestic policy and legislation would have to be consistent with International Covenants and Decrees. This would indicate a desire on the part of governments at all levels to giving content and effect to the right to housing. For it is the explicit recognition of the right to adequate housing in domestic law of any state that would direct policy towards an unprecedented commitment to the most critical aspects of a strategy to ensure access to adequate housing and proper security of tenure. Thus it is important that states do not adopt a dualist concept of Domestic and International Law in order to allow the adequate housing to automatically become part of domestic law in a particular state.

CHAPTER THREE

BRAZIL- HOW THE LAW AFFECTED URBAN CHANGE

3.1. INTRODUCTION AND BACKGROUND

The largest and most populous country in South America is Brazil which has an estimated population of 170 million people, with 80% living in the Metropolitan urban areas. (Brazilian Demographic Census for 2000. Source: Brazilian Institute of Geography and Statistics). The Brazilian Institute of Geography and Statistics estimates that *favelas* which are concentrated areas of precarious housing on public or private land, invaded by individuals or groups, have increased by 22% from 1991 to the year 2002.

The Federal Republic of Brazil comprises the Union, the States, the Federal District and the Municipalities, all of them autonomous. This facilitates the rights and fundamental guarantees through implementation of public policies to promote social justice, eradicate poverty and reduce social inequality (Saule, 2004:5).

A significant number of national constitutions contain either the right to housing or constituent elements of this right. Further as discussed in the previous chapter, the right to housing is recognised as a human right in various international human rights declarations and treaties. Brazil is a signatory to a number of these. The result is that recognition of this right to housing is

incorporated in Brazilian law and legal procedure in terms of the 1988 Brazilian Constitution. This has also resulted in various municipal laws, statutes, administrative laws and executive decrees containing elements of the right to housing.

Article 5, paragraph 2 of the Brazilian Constitution specifically states that "the rights and guarantees expressed in this constitution do not exclude others that stem from its regime and from the principles that it adopts, or from international treaties in which the Federal Republic of Brazil is part" (Federal Government of Brazil, 1988). What this means is that the list of rights as set out in the constitution are illustrative and not binding in that based on the existing government and principles adopted in the constitution new rights can be established. The implications are that based on International treaties and conventions, further intervention mechanisms can be built into the Brazilian Constitution. The further significance is that rights, including the rights to housing, recognised and protected by the international treaties of which Brazil is a signatory, are then incorporated into Brazilian law (Saule Jnr, 2002:139).

3.2. STATE OBLIGATIONS IN TERMS OF THE CONSTITUTION (1988)

One can accordingly safely conclude that taking into account this constitutional norm, the right to housing is one of the fundamental rights of the Brazilian legal system. It would then follow that for this right to have any legal and social

efficacy, the State would have to play an important role via the execution of public policies and promotion of effective housing and urban policies. It would mean that the State in assuming its obligation in terms of international treaties would have to prevent any regression in housing law by prohibiting measures and actions that make it difficult to exercise the right to housing.

3.3. POSITION BEFORE 1988

It has to be realised that before 1988 in Brazil the prevailing political situation and constitutional principles constrained local government in terms of finance and proper political representation. Furthermore, urban policies were dictated to by property developers and civil society had no voice (Fernandes & Rolnik, 1998: 141). This situation resulted in illegal settlements springing up on the peripheries of Brazilian cities.

It is apparent, from what is stated above, that before the coming into effect of the 1988 Brazilian Constitution private property rights were firmly endorsed with little or no State control of the use and development of urban property. Thus urban policies were dogged by legal controversies and institutional conflicts between the federal, State and local administrations (Fernandes & Rolnik, 1998:141).

3.4. THE CONSTITUTION OF 1988

The establishment of the Constitutional Congress in 1986, which eventually led to the enactment of the 1988 Constitution, was crucial to the urbanisation process in Brazil. This congress was tasked with dealing with legal pluralism in Brazilian society in the sense of recognising the legitimacy of practices falling outside official legislation (Fernandes & Rolnik, 1998:146).

It was thus vital for the new Constitution to identify the concept of social property, which would result in recognition, regularisation and upgrading of illegal settlements. Inherent in this would be a democratic approach to urban land access and curbing of property speculation, leading to democratic and inclusive participation in urban management.

(i) BENEFITS OF THE CONSTITUTION IN BRAZILIAN CITIES- SOME EXAMPLES

With the enactment of the 1988 Constitution, it is useful to consider case studies in a few cities in Brazil to realise the benefits that the Constitution brought as far as housing rights were concerned.

Firstly, the *Favela Bairro* Programme implemented in Rio De Janeiro is a classic example of the acceptance of the existence of Favelas as an urban social reality and the need to deal with them by the officialdom. The aim of the programme

was to change Favelas into neighbourhoods in order to integrate them into the city (Rabello De Castro, 2002:156). This programme is a classic example of urban planning which incorporates social goals for the regularisation of land ownership. It entailed urbanisation, land regulation and registration of the areas occupied by the *Favelas* and low income population without the removal of residents unless required due to physical constraints and environmental risk. The aim was to provide Favelas with entire infrastructure and all the services typical of neighbourhoods and also providing accessibility to main and secondary roads, provision of water and sewerage, the availability of electricity, public areas for leisure and sports, public works to contain erosion, as well as environmental projects as reforestation. Linked to the urban planning projects is the introduction of important social development programmes, which include sports, leisure and culture, as well as health care and job training and educational programmes, with the aim of creating diversity and sustainability (Rabello de Castro, 2002:156).

Further innovative examples relate to Porto Alegre and Recife, based on the idea that social housing rights do not have to include the privatisation of public land, especially since land is a scarce commodity. Accordingly, the *usucapiao* (which relates to adverse possession or what is known as prescription in South Africa and explained in greater detail later) approach to upgrading tenure and legalisation of settlements on private area was the preferred option. The aim was to ensure that tenure rights promote legal security of tenure, have a minimal

impact on the land market and promote social and spatial integration of the communities. A further innovative approach to tenure rights in urban areas was the utilisation of 'concession of the real right to use' (CRRU) (a legal instrument for land regulation of public lands and which is also explained in greater detail later) with the aim of recognising security of tenure in line with municipal objectives of legalisation and upgrading of *favelas* (informal settlements). The CRRU, while not leading to full ownership, provides legal security of tenure in the form of land regulation to the beneficiaries and can be registered at the deeds office with a view to pre-empting or preventing eviction.

In Recife, areas earmarked for regularisation were classified as ZEIS (Special Zones of Social Interest) where specific urban planning regulations were to apply (Fernandes, 2002:222). This classification aims to ensure legal recognition of areas destined as dwellings for social groups that live in informal settlements.

(ii) THE STATUTE OF THE CITY

The enactment of the 1988 Constitution resulted in the Constitutional Congress approving an entire chapter dealing with urban policy. This led to the Federal Government and Municipal Government, together with the civil society coalition ratifying the Federal Law on Urban Development or 'Statute of the City' in 2001. This was an innovation in a participatory processes enforcing progressive legalisation, for intervention in informal settlements. The City Statute pre-empted

changes in the urban legal order resulting in the recognition of the legality of informal settlements. This recognition in itself was a groundbreaking development as far as housing rights are concerned (Saule & Rodriguez, 2003:7).

The objects of the Statute were to:

- Prevent forced evictions of informal settlement residents due to their status of illegality;
- Recognise the right of informal consolidated settlement residents to formal deeds of the urban area he/she resides in and also to decent housing with the necessary urban infrastructure and public services.
- Place obligations on the State to improve urban living conditions.

(Saule and Rodriguez, 2003:182).

The Statute of the city was enacted on 10 July 2001 with a view to developing social control over urban development and reaffirming the social function of urban space and property. The idea was to bring it in line with the United Nations Human Settlements Programme (UN-Habitat) in promoting urban policy and urban law reform with a view to achieving improved urban governance. The aim of the statute is to regulate the chapter on Urban Policy found in the 1988 Constitution. It takes into consideration the urban, social and political dimensions of Brazilian cities (Fernandes, 2001:11).

Thus the new law sets out to provide continuous legal and financial support to those municipalities that are willing and committed to dealing with the serious urban, social and environmental programmes affecting some 82% of Brazilians living in the cities, in terms of daily living conditions (Fernandes, 2001:34). It has to be noted that in terms of the Brazilian Constitution, the municipality bears the onus to plan and implement urban policy. So what the statute did was simply to reaffirm and extend the important legal-political role of municipalities as far as the formulation of guidelines for urban planning, urban development and management are concerned. Secondly, cities with more than 20 000 inhabitants are obliged to pass a master plan which is an important policy document for urban development (Polis, et al., 2001 :13-14).

(a) DIMENSIONS OF THE CITY STATUTE

The City's statute constitutes four dimensions which, I might add, all impact on informal settlement intervention: Firstly, it is made up of a conceptual dimension which facilitates mechanisms for the interpretation of the constitutional principle of the social function of urban property and the city. Secondly, it regulates new instruments for the construction of a different urban order by the municipalities. Thirdly, it identifies processes for the democratic management of cities, and lastly it identifies legal instruments for comprehensive regularisation of informal settlements in public and private urban areas (Polis et al., 2001:27). I deal with these four dimensions in greater detail in the ensuing paragraphs.

- **CONCEPTUAL DIMENSION:**

In a conceptual sense, the city statute established a foundation for a new legal political paradigm for urban land use and development control. This ensures the right to urban property if municipal urban legislation fulfils a social function. This would imply that municipal government needs to formulate land use policies to ensure a balance between the individual interest of landowners and social, cultural and environmental interests of other groups.

Inherent in striking this balance would be to concentrate on sustainable development in cities in the sense of the right to urban land, housing, environmental sanitation, urban infrastructure, transportation and public services, to work and leisure for present and future generations. Also there would need to be democratic administration of the cities where citizen participation and representative organisations are included in the formulation; execution and monitoring of urban development projects and programmes (Polis et al., 2001:28).

Bearing in mind the social interest aspect, cooperation between the different levels of government, the private sector and other sectors of society such as non-governmental organisations (NGO's) becomes vital. The supply of adequate transportation and public services to cater for the needs of the local population becomes a relevant issue. The conceptual dimension also aims to control land

use by monitoring: the improper use of urban land in relation to sub-division, construction and infrastructure, speculation of urban land which could result in under-utilisation or non-utilisation, the deterioration of urban areas including pollution and environmental degradation.

Urban policies also focus on achieving regularisation of land ownership and urbanisation of low- income areas with emphasis on simplification of legislation on sub-division, land use, occupation and building regulations with the aim of cost reduction and accessibility (Polis et al., 2001:29).

- **REGULATION OF NEW INSTRUMENTS**

Article 3 of the Statute tasks federal government with establishing legislation concerning urban law standards. This facilitates standards and norms for cooperation between different levels of government, in particular municipalities for general development on a national level. This cooperation would ensure improvement of housing conditions and sanitation, and at the same time establish guidelines for urban development and execution of national and regional plans for social development (Polis et al., 2001:29).

In order to ensure that the city statute achieves its aims and broadens municipal involvement, the statute regulates the legal instruments created by the 1988 Constitution and at the same time itself establishes new instruments. Such

instruments need to be used in tandem to regulate land use and development, but more importantly “to interpret it according to a ‘concept of the city’ to be expressed through the local master plan” (Fernandes, 2001:15).

As far as new instruments are concerned, provision is made for urban legislation influencing property prices with a view to discouraging speculation. Thus the statute aims to ensure that vacant or under-utilised land that falls in areas with infrastructure will be levied urban building and land taxes as well as being subject to compulsory building and sub-division regulations in accordance with a vision for the area in terms of the master plan. This instrument deals with counteracting unlimited horizontal expansion and thus avoids a major portion of the population being condemned to permanent precariousness (Polis et al., 2001:29).

The statute is also dedicated to the concept of Created Land through the institutionalisation of the Right to the Surface and the Award of Costs with the right to build. Here an urban property owner allows another party the use of the surface of their land for either a specified or unspecified time. This occurs through public deeds registered in the deeds office. The surface rights are either free or for a nominal fee. The incentive to the owner is that the recipient of the surface rights will be responsible for fees and taxes on the surface of the land (Polis et al., 2001:29-30).

- **PROCESS FOR DEMOCRATIC MANAGEMENT OF CITIES**

Moving on, another important dimension of the city's statute relates to urban planning; legislation; fiscal policy and management integration. This is with a view to democratic decision-making on the local level in relation to aspects of land planning to budget preparation. This process greatly lends credibility to the concept of a socially orientated urban-legal order (Polis et al., 2001:30). This is achieved through public hearings, consultations, creation of councils, environmental and neighbourhood impact studies, popular initiatives for the proposal of urban laws and more importantly through the participatory budget process.

- **LEGAL INSTRUMENTS FOR ACCESS TO SHELTER**

Crucial to informal settlements, the City Statute recognises legal instruments for municipalities, with the aim of promoting tenure regularisation programmes in order to facilitate access to private and public urban land and housing. Included in this development are instruments that regulate the constitutional right to adverse possession *(usucapaio)* and a form of leaseholding known as concession of the real right to use.

The first instrument that I deal with is *usucapaio* .

(i)ADVERSE POSSESSION (Called 'prescription' in South Africa)

The purpose of adverse possession is twofold:

- As an instrument of land regularisation, to guarantee the housing rights of millions of Brazilian families that due to social necessity, find themselves living in slums tenements and other informal settlements.
- To guarantee the realisation of the social function of property through land regulation

(Polis et al., 2001:31).

Usucapiao is applicable to private land. It relates to a case where person/s are in possession of an urban area or building of up to 250 square metres for five years peacefully and undisturbed and uses it for their residence or that of their family, is entitled to ownership. The proviso is that no other urban land or property is owned. The title of ownership is conferred whether one is married or single, thus allowing women to have title (Polis et al., 2001: 32)

An innovative and groundbreaking section in the City Statute, in relation to informal settlement intervention is recognition of the concept of collective *usucapiao*. In this instance urban areas of up to 250 square metres that is occupied by low income population for housing purposes, for five years

uninterruptedly and without opposition are eligible for collective *usucapiao* entitling them to collective ownership. The proviso, however, is that it is not possible to identify the land occupied by each possessor and the possessors are not owning other property, be it urban or rural. Article 10(1) states that for purposes of continuity of the period set out by article 183, the possessor may add his possession to that of his predecessor, provided both possessors are continuous (Saule & Rodriguez, 2003:188). This *usucapiao* right is important in the programme for regularisation of favelas in particular, as it would apply to more than half the existing favelas and can be construed as an important step towards their recognition as citizens (Fernandes & Rolnik, 1998: 147).

(ii) CONCESSION OF SPECIAL USE FOR HOUSING

A section in the City Statute created a further instrument, namely the concession of special use for housing purposes. This instrument recognises a subjective right of those occupying public land as at 30 June 2001 as his/her own for five years without interruption or opposition, of up to 250m², to be granted a concession of special use for housing purposes, as long as he is not the owner of any other property (Saule & Rodriguez, 2003:191).

Where it is not possible to identify lots occupied by each individual possessor owner/grantee of other property, collective concession of special use for housing is granted. Here the idea is not to grant concession of special use in areas of

risk, or areas to be used for other purposes, such as building dams or protecting ecosystems.

This article allows land regulation of public land informally occupied by low income urban dwellers. This is an alternative to ownership, because in the case of public land, regulation of ownership is much more difficult. This concession of special use for purposes of housing, must be declared by administrative or judicial means, i.e. in the first instance by a public administrative body and, in a case where such body refuses, then by a judicial process. In the case of a judgment granting a concession of special use, such concession may be registered as a deed at the office of the Register of Deeds (Saule and Rodriguez, 2003:193). It needs to be mentioned that municipalities are obliged to provide free technical aid services and legal aid even at the Register of Deeds Office (Saule and Rodriguez, 2003:190).

(iii) SPECIAL ZONES OF SOCIAL INTEREST

Urban areas primarily earmarked for social interest housing are known as Special Zones of Social Interest. This instrument will apply to specific areas of informal settlements, slums and empty or underused urban areas. The declaration of Special Zones of Social Interest is an effective mechanism by local authorities to avoid forced evictions. The approach is to ensure legal recognition and legal protection of poor social groups that reside in informal settlements

where there is likely to be conflict over possession of land leading to forced eviction. This instrument can be utilised to compel the courts to grant positive rulings in favour of social groups threatened with forced eviction or removal of families occupying public or private land (Saule and Rodriguez, 2003:193).

Special Zones of Social Interest also allow for a negotiation mechanism between the landowner, residents and public authority with a view to legalising the community's position. In this way, urbanisation programmes are easily undertaken with the aim of improving the urban conditions for the affected residents. Many Brazilian Municipalities such as those of Recife, Diadema, Port Alegre and Santo André have adopted this land regularisation instrument to counteract intended forced evictions (Saule and Rodriguez, 2003:194-195).

(iv) PROTECTION OF SECURITY OF TENURE:

In order to counteract the effect of the deterioration of urban areas the new law on the parcelling out of urban land was passed on 29 January 1999. This law creates instruments geared for the protection of housing rights by ensuring security of tenure for the informal urban settlement residents. The first step is legalisation of dwellings that fall within areas expropriated by public authorities by utilisation of an instrument known as assignment of possession and the public registration of this possession.

Article 1 of the Federal Law of Expropriation in the public interest specifies that no other use shall be given to the property expropriated other than for popular dwelling in line with maintaining urban areas for this purpose. Article 2 allows legalising the registration of the provisional writ of entry and assignment of possession. This makes it possible to ensure "registration of the popular parcelling out of the expropriated area, without need for title deed on condition that the public authority already has judicial possession of the property" (Saule and Rodriguez, 2003:195).

Thus the provisional writ of entry and assignment of possession in cases of expropriation in the social interest also needs to be registered. This would be applicable to ensure maintenance of squatters on urban lands, "where with the owner's express or tacit tolerance, the occupiers have built their houses, forming residential nuclei of more than ten families or for building popular housing" (Article 2, subparagraph iv, v, Law no. 4.132/62).

Article 3 creates dwelling zones of social interest (ZHIS) for land regulation purposes, with the initial step involving a municipal law determining these zones. Another instrument to deal with housing rights is that of the zone of specific urbanisation for purposes of parcelling out of urban land. In this instance the zone also has to be defined by municipal law or the master plan (Saule and Rodriguez, 2003:196).

Another important intervention measure is the recognition of popular settlements as something in the public interest. Article 53 of this law stipulates that land allocations relating to housing programmes initiated by municipalities or recognised public authorities in particular, in the context of regulation of land settlements, are to be construed as being in the public interest.

Saule and Rodriguez (2003:196) state that since the municipalities in Brazil are responsible for promoting an effective urban policy, these instruments of land regularisation of informal settlements to reduce social inequality and exclusion become paramount.

3.5. FREE TECHNICAL AND LEGAL AID – THE ROLE OF THE MUNICIPALITY

Most informal settlement residents in the urban area are unable to protect or ensure defence of their rights due to ignorance of their rights as citizens and lack of access to legal assistance, for example, in cases of evictions. Unfortunately the provision of free legal services was very precarious in Brazil (Saule and Rodriguez, 2003:182).

Article 12(2) of the City Statute, provides plaintiffs access to justice by placing obligation on the municipality to provide free legal aid, including before the Registrar of Deeds. With development in the City Statute, “the public defender is accepted as an important institution for providing legal assistance and defence of

rights at all levels and at the same time exercising a jurisdictional function of the State" (Saule and Rodriguez, 2003:190).

Further, article 12(2) of the City Statute requires the State to guarantee free legal aid to the indigent and low-income population in their quest for asserting the urban *usucapiao* right and in this respect right up to the Register of Deeds stage. At this level this access to legal aid extends to free registration of title of ownership in terms of the judgment in *usucapiao* cases.

3.6. DISCUSSION OF THE MERITS AND LIMITATIONS OF THE BRAZILIAN CASE STUDY

- **MERITS**

In Brazil's domestic law there is a clear recognition of the right to adequate housing as an enforceable right and policy commitment from Government in human rights legislation and housing legislation at all levels of Government. It is clear that Brazil has made great strides within its legal system and development of its urban policy to entrench this important right to adequate housing in line with the reaffirmation at the International level of this important right. A classic example of this is the City Statute.

Even more encouraging is the fact that this right to adequate housing, which is entrenched in the Brazilian Constitution, has a 'rights / entitlement' aspect

underlying statutory regulations of informal settlements rather than a 'needs / beneficiary' concept. This greatly enhances the capacity of individuals in informal settlements in Brazil to enforce the right to housing. More importantly, on the practical level, Brazil has accepted the obligation to recognise the right of informal settlement residents to an adequate standard of living, including adequate housing, and the continuous improvement of their living conditions. Thus civil rights are considered in tandem with economic and social rights.

A further development is that the Brazilian Government has adopted a 'substantive' approach in the sense of including positive obligations to provide resources necessary for disadvantaged groups such as informal settlement residents, to enjoy the equal benefit of State programmes and to ensure the protection of issues related to dignity.

In line with the International Covenant on Economic, Social and Cultural Rights (ICESCR) great progress has been made in alleviating social and economic deprivation among informal settlement residents by the regularisation and upgrading programmes and the provision of basic amenities. This action has avoided economic marginality and unlawful evictions resulting in the affirmation of many aspects of security of tenure. This action would lead to a strong land and resource base for informal settlements to achieve a sustainable economy and cultural base. It needs to be mentioned that great strides have been made as

far as women's rights are concerned, especially as regards women sharing equally in property and having property registered in their names.

It is clear that the provision of adequate housing for families is a matter of concern for the Brazilian Government. This is evidenced by the legal enactments such as the *usucapiao* principal, that interferes with the rights of private property to ensure that informal settlement residents can aspire to acquire some form of shelter. The idea, it would seem, is for the State to intervene to correct a situation of imbalance without having any qualms about preserving the absolute rights of private property and discouraging land speculation. It is clear that public requirements and social needs take precedence over private property.

A further positive development is that the individual titling system is not the only regime for the legal recognition to occupy or use land. The result is that protection is afforded to informal settlement residents even where they do not have title deeds. In this regard, the concession of real right to use is but one of the innovative methods that guarantees protection to informal settlement residents without title deeds. This is done with a view to enhancing security of tenure for the poor and protects the poor from harsh and illegal evictions. For it is clear that an individual titling system places land squarely in the market place and very often results in creating landlessness for informal settlement residents as there is a temptation to sell their land to land speculators.

- **LIMITATIONS**

One of the limitations that I recognise in the Brazilian case study is that I have not seen evidence of an information providing mechanism to the International Covenant on Economic Cultural and Social Rights for the identification of measures that the Brazilian State has undertaken to fulfil its legal obligations under this treaty. Further, what I found lacking was that there are no laws that directly or indirectly affect housing rights relating to Brazilians being entitled to live in a clean and healthy environment. Neither has the State put in place the necessary institutional framework to enforce Acts related to these aspects. Further there appear to be no Acts that provide for local authorities to ensure clean and sanitary living conditions.

There is no National legislation concerned with all the aspects of protection and implementation of housing rights. However, in defence of the Brazilian State, there are relevant national, state and municipal laws with specific provisos on protection of housing rights with the aim of making the right to housing a practical reality.

Still on the issues of limitations, land conflict tribunals are presided over by judges that do not apply principles that are in line with the 'social function of property'. In fact, most judges are not aware of such principle and its relevance for the administration of social justice (Saule, 2004:40).

I need to point out that my detailed analysis of Brazilian literature has not revealed the existence of a Constitutional Law Advisory Committee that would exercise a function of preview in relation to Government Bills and other matters under consideration by Parliament as to their compatibility with the Constitution and International Human rights Treaties. The benefit of such a committee would be for quality assessment of new legislation that is based on Constitutional and Human Rights provisions, including those on Economic and Social Rights. Also, there has been no mention of a Parliamentary Ombudsman to monitor Constitutional and Human Rights. More particularly, in the context of informal settlements the ombudsman's role would be to ensure, amongst others that public authorities and persons acting in a public capacity comply with the law relating to housing rights. The ombudsman would also be relevant in advising Government with a view to developing appropriate policies.

- **CHALLENGES**

The practical implementation by the private sector and government regarding property ownership creating a social function becomes a huge challenge as "the concentration of land in the hands of a small minority of Brazilians is amongst the highest in the world" (Saule, 2004:47). Creation of urban and rural land access policies aiming at the full implementation of social function of property becomes vital.

Socially conscious and well intentioned programmes need to make the necessary impact, especially with municipal governments working to improve informal settlements by making these areas more habitable and improving the standard of living. Having said that, the greatest challenge remains that of guaranteeing that the limited resources will be adequately and shrewdly applied at all levels of government, in spite of regional and social inequalities. This challenge would extend to generating resources for informal settlement upgrading programmes, land regularisation being applied in a very simplified and expeditious manner, and proper integration of informal settlements with the aim of eradication of poverty and substandard living conditions.

3.7. CONCLUSION

However, despite some of the criticisms, it is clear that with the Brazilian Government's increasing willingness to utilise International Human Rights Instruments and International Covenants for Statutory Interpretation and development of the Common Law means that individual rights and Government obligations in the Informal Settlement Intervention Process are likely to be recognised. Effective policies become law because there is adequate private sector involvement, community participation and clear urban management and planning policies coupled with the necessary political will.

CHAPTER FOUR

PHILIPPINES – RECOGNITION OF THE RIGHT TO HOUSING

4.1. INTRODUCTION AND BACKGROUND

The Philippines is made up of land area consisting of 300 000 square kilometres. The population had reached 66 million by the mid 1990's and is growing at 2.2% each year. The urban population rose from 24% in 1948 to 42% in 1989, and is expected to reach 48% of the total by the year 2000 (Santiago, 1998:105). As at 2002, the population of the Philippines had reached 79, 50 million with an annual growth rate of 1,9 million per year expected (Statistical Year Book for Asia and the Pacific, 2003). Most of the poor urban reside in the Metropolitan Manila area and the others in highly urbanised areas. The most visible urban poverty is in the informal settlements and, as at 1991, in major cities there were over 10 million informal settlement residents (Santiago, 1998:107).

The Philippines is a very legalistic society where socio-economic and cultural life is governed by statutes or some form of regulation. The source of legal directives is the Constitution as the highest law of the land with executive and administrative orders and national statutes ranking below the Constitution (Santiago, 1998:107).

The International Covenant on Economic, Social and Cultural Rights (ICESR) provides for, *inter alia*, the recognition of the right to adequate housing of which

the Philippines is a party. However, according to Mendoza (2003:71), the Philippines, even though not consciously attempting to reflect international legal covenants into local policy, nevertheless find themselves in that situation due to civil society mobilisation and pressure.

Since the Philippine State has ratified the International Convention on Economic, Social and Cultural Rights, it has to a great extent responded to the demand for the recognition of the right in the formulation of appropriate governmental policies, statutes and laws for implementation (Mendoza, 2003:71). Accordingly, I considered it appropriate to include this case study in my research.

This case study will discuss the manner in which the Philippines has recognised this right to housing, leading to the incorporation of the right into its legislation and subsequently into governmental policies and eventual implementation for informal settlements.

It would seem that the Philippines policy formulation and implementation of laws affecting urban development, in particular relating to informal settlements, was a result of the legal, political and socio-economic changes affecting the country. The positive aspect was that legislation promoting urban development was prioritised, resulting in government agencies taking up the challenge of translating legislation for implementation (Santiago, 1998:104).

4.2 DEVELOPMENTS IN HOUSING RIGHTS

In the late twentieth century there was enormous property development internationally, resulting in a property-led development in the Philippines, “leading to the rise of a speculative land market and a highly regressive spatial allocation” (Sajor, 2003:106). This state of affairs had to change.

Consequently, the 1987 Philippine Constitution was a product of the “People Power Revolution of 1986 that swept a dictator out of government amidst cries for socio-economic reform and respect for human rights”. (Mendoza, 2003:65).

The Philippine society is governed by statutes and other forms of legislation. The Constitution is regarded as the highest law of the land with other legal measures such as National Statutes; Executive and Administrative Orders; Memorandum Orders or Circulars and Local Ordinances coming below the Constitution in that order of hierarchy. The Philippines’ revised Civil Code stipulates that judicial decisions that interpret laws or the Constitution are part of the legal system as precedents. Consequently, many Constitutional provisions provide a platform for legislation regarding low-income urban settlements. The principle basis of these Constitutional provisions is freeing people from poverty by implementing policies that provide adequate social services and improve the quality of life for its citizens. Further, there is legislation that protects and promotes the right to human dignity and reduces social, economic and political inequalities. The

Constitution further confers protection on poor communities by empowering the Commission on Human Rights to provide assistance and legal aid (Santiago, 1998:107-108).

Accordingly, sections 9 and 10 of Article XIII of the Constitution, on social justice and human rights, becomes relevant to the recognition of the right to housing. Section 9 of the Constitution places an obligation on the State to engage in an continuing urban land reform and housing programmes and access to employment opportunities for underprivileged and homeless citizens (Section 9, Art. XIII). Since the Constitution has strong socio-economic and political undertones, the recognition of the right to housing, taken together with other recognised rights such as the rights of women, the right to suitable land and basic services were accepted. The idea was to embrace a continuing programme of urban land reform (Karaos et al, 2003 : 66).

Section 10 obliges government to engage in adequate consultations with informal settlement residents as a prerequisite to the determination of the 'just and humane' manner of the conduct of any eviction and demolition (Section 10, Art. XIII).

As far as informal settlements are concerned, protection against illegal evictions and demolitions was included in the Constitution premised on the idea that

'squatters', whether illegally or legally on the land, are to be treated as human beings (Mendoza, 2003:66). As far as the Philippines is concerned, as in the case of Brazil, it significantly expands the protection given to informal settlers against eviction and even goes further than most previous policies in setting out what governments need to do to preclude forced evictions and by inference to prevent violation of human rights. It emphasises that the law is to be enforced against agents or third parties who carry out forced evictions. However, the Philippines goes further in that it compels state parties to explore 'all feasible alternatives' prior to carrying out any forced evictions with a view to avoiding or minimising the use of force or avoiding the eviction altogether. The emphasis being on ensuring that individuals are not rendered homeless or vulnerable to the violation of human rights. In this regard, the Philippines government is compelled to ensure that people who are evicted, whether legally, or illegally, are to be given some form of alternative accommodation.

4.3 CONSTITUTIONAL RECOGNITION OF THE RIGHT TO HOUSING

The civil society movement in the Philippines influenced the new constitution which contains many liberal provisions, including the right to housing. Many groups that constitute this movement had played a major role in the promulgation of enabling legislation with the aim of transforming urban land reform into something more substantial, such as forms of ownership and security of tenure.

In order to ensure that the constitutional principles are applied on a more practical level, the urban poor through civil society movements have become members of government bodies and entered into a working relationship with business, Church and local governments (Mendoza, 2003:67). In the Philippines the Homeless Peoples Federation was formed to bring together low income community organisations with a view to negotiating with Government with clearly defined proposals reflecting upon how much communities can do for themselves (Anon – Vincentian Missionaries Social Development Project, 2001). This has similarities to the Homeless Peoples Federation in South Africa, which was also formed to mobilise to fight for the rights of the homeless.

4.4 HOUSING RIGHTS IN NATIONAL LEGISLATION

(i) URBAN DEVELOPMENT AND HOUSING ACT

The coordination and activism through organisations such as the Homeless Peoples Federation, resulted in the Urban Development and Housing Act (UDHA) being passed in 1992. This was enabling legislation to provide mechanisms for the implementation of the constitutional guarantee to housing. This legislation emphasises 'continuing urban land reform' and included in this emphasis is just and humane manner of eviction and demolition in accordance with the substantive and procedural requirements of the law.

The result is that section 28 of the UDHA comes close to a national government complying with the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) imposed obligations on state parties. This can be concluded from the fact that in terms of this Act the stipulation is that eviction and demolitions should only be considered as a last resort.

In cases, however, where evictions are unavoidable, government is under an obligation to *inter alia* give a 30 day notice period, sufficient consultation with the families affected and the receiving communities, and adopt a satisfactory and adequate relocation programme irrespective of whether it is permanent or temporary in nature. Important to this obligation is the requirement that government officials need to be present during this relocation programme.

(ii) INTEGRATED SHELTER AND FINANCE ACT

The Comprehensive Integrated Shelter and Finance Act of 1994 (CISFA) developed the National Shelter Programme (NSP) with the aim of creating a government financing mechanism for re-settlement programmes. Regarding this aspect, the UN Committee on the Committee on Economic, Social and Cultural Rights (CESCR) upon considering the Philippine report, recommended that a greater portion of national budget be directed towards some slum upgrading, as these benefit the poorer people (Mendoza; 2003:70-CESCR consideration of

reports submitted by state parties under Articles 16 and 17 of the Covenant, concluding observations to the Philippine report).

(iii) IMPACT OF THESE ACTS ON THE RIGHT TO HOUSING

Mendoza (2003:70) argues that the policy motivation for the UDHA was not so much the recognition to the right to housing, but rather due to political pressure from the informal urban population. This was due to the fact that they had effectively organised and mobilised themselves. The support given by the CESCR also played a part.

Be that as it may, Mendoza (2003;71) is of the view that Court rulings on interpretations of humane evictions and demolitions, as enshrined in the 1987 Charter and the UDHA are restrictive and reflect a biased leaning toward traditional property rights. Also, he highlights presidential decrees 772 and 1818, which still criminalize squatting and prohibit courts to issue interdicts against government infrastructure projects.

However, on the positive side, various judicial decisions and jurisprudential rulings have recognised the need to integrate housing rights to benefit the poor. These have had a positive impact on the informal settlement residents. In this regard, the Supreme Court of Philippines in the case of Sumulong v Gurrero, 154 SCRA 461 quoted the 1987 Constitution, Article 11, section 9:

- "*The state shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rise in standard of living and an improved quality of life for all"* (Constitution, Article 11 : Section 9 in Mendoza, 2003:71).

The Supreme Court went on further to add:

- *"Housing is a basic human need. A shortage in housing is a matter of state concern since it directly and significantly affects public health, safety, the environment and in some cases, the general welfare … the General Assembly is seriously concerned that, despite the efforts of governments at the national and local levels and of international organisations, the living conditions of the majority of the people in slums and squatter areas and rural settlements, especially in developing countries continue to deteriorate in both relative and absolute terms."*

Mendoza (2003:72) argues that even though this ruling may be positive, the doctrine of *stare decisis* (doctrine or policy decided on a particular issue) limits the principle of this case to expropriation cases. However, I am still confident of the more wide- ranging effects of this judgment beyond expropriation cases. As Hahlo and Kahn (1973:214) state: "In the legal process, as in all human affairs

there is a natural inclination to regard the decisions of the past as a guide to the actions of the future."

It is clear as Hahlo and Kahn (1973:214) state that in the case of individuals, social organisations, and even governments, "there is a wish to profit from the distal wisdom of the past, the yearning for certainty and antipathy to analysing problems afresh, of the desire to do justice."

It appears that in future the sentiments expressed in this case regarding housing rights certainly will carry weight even if the courts are not specifically dealing with an expropriation matter.

(iv) POLITICAL ACTIVISM FOR ACHIEVEMENT OF HOUSING RIGHTS

The Lapianng Masang Pilipino (LAMP), a political party of former President Estrada, recognised that housing is essential to eradicate poverty and it accordingly placed emphasis on shelter security (Mendoza, 2003:75).

In 1986, then President Aquino in line with her National Shelter Programme established the housing and urban development co-ordinating Council (HUDCC). The aim of this Council was to establish a national framework for housing and urban development, formulation of strategies and influencing new legislation that will allow the housing and urban development initiative to be realised. Further, it

set out parameters for government housing agencies in the National Housing Programme and served as a monitoring body for these agencies in exercising their functions (Mendoza, 2003:76).

Through the HUDCC, the LAMP Political Party adopted an eight point policy plan with three of them of being relevant for informal settlements and which are accordingly set out below:

- Firstly, improving slum upgrading projects like the community mortgage programme and the resettlement programme;
- Secondly, development of 58 re-settlement sites in cities outside the national capital region and
- thirdly, development of re-settlement projects for families affected by the government's flood control programme. (Mendoza, 2003:75).

The AKO party list is a political wing of the urban land reform task force which has to be credited with espousing housing rights for the poor and tackling oppressive legislation (Mendoza, 2003:75). Its achievements include influencing the passing of amongst others, the Urban Development and Housing Act of 1992 and the repeal of the anti-squatting law. The aim of this movement is to improve living conditions of the poor by creating conditions to facilitate access to decent shelter, livelihood opportunities and basic social services.

Strongly supported by the AKO is the Magna Carta for the urban poor. The aim of this bill is to espouse the rights of the urban poor, particularly in the context of adequate housing. Inherent in this aim would be the right to legal security of tenure, and livelihood opportunities. In essence, the bill caters for the urban poor "by meeting the minimum basic standards laid down in international human rights instruments concerning the right to adequate housing (Mendoza, 2003:76).

The HUDCC's enabling law also delineated the functions of the National Government Housing Agencies. The result was that the national housing authority was given the responsibility of providing housing assistance to the lowest 30% of urban income earners through slum upgrading, squatter relocation and development of site and services. In 1994 funding was given to the NHA resettlement programmes (Mendoza, 2003:77).

In 1986 the Presidential Commission for the Urban Poor (PCUP) was set up with the aim of coordinating government and NGO programmes for the urban poor and also including urban poor organisations in the policy formulation and consultation process. This commission was also tasked with receiving and influencing legislation and policy by making recommendations. In the finance sector, the commission facilitated the funding of informal settlement programmes and projects in the context of its mandate to assist the urban poor.

Furthermore, the HUDCC and Department of Interior and Local Government (DILG) were given the responsibility of promulgating rules and regulations for ensuring the observance of proper and humane eviction procedures. Inherent in this would be relocation resettlement procedures to be as mandated by the UDHA of 1992. In this process the PCUP role is extended to include ensuring that demolition operations comply with the promulgated procedures.

In 1999 the National Urban Development and housing framework was released by the HUDCC with the aim of steering urban development over a five year period (Choguill, 2001:1). Its objective on housing policies amongst others was to give priority to informal settlements firstly in the upgrading process. In cases where relocation cannot be avoided, the resettlement area needs to be located within the same city where the informal settlement exists and obviously re-settlement must be carried out in terms of UDHA approved resettlement guidelines.

Some local government structures have put in place legal measures to set up local housing boards within their areas of jurisdiction. These boards serve the function of participatory governance and ensuring representation at all levels in dealing with shelter provision and evictions at local level.

4.5. DISCUSSION ON THE STRENGTHS AND WEAKNESSES OF THE PHILIPPINES CASE STUDY

- **STRENGTHS**

In the Philippines, as is the case in Brazil, there is a willingness to utilise International Human Rights Instruments as well as International Covenants for statutory interpretation and development of the Common Law whether consciously or as a result of what Mendoza (2003:70-71) refers to as political necessity and reaction to civil society advocacy and pressure. Thus there is a clear recognition of the right to adequate housing as an enforceable right and policy commitment from the Philippines Government. Having said that, an important consequence of this recognition is that rights recognised in International Treaties ratified by the Philippines and incorporated into the Constitution are directly enforceable by Domestic Courts without the need for ratification by Parliament or the Legislature. This means that Claimants can directly invoke Article 11 of the International Convention on Economic, Social and Cultural Rights (ICESCR) as a justiciable right, as can be seen from the various decisions referred to earlier (Mendoza, 2003:72).

An important development as far as informal settlements are concerned, is the recognition by Government of urban informal settlements as inhabited areas. This recognition ensures that land cannot simply be alienated by Government for commercial development or to satisfy the whims of the political elite. Recognition

also ensures that urban infrastructure services are of the highest standard. The result is that notwithstanding the deplorable living conditions at least the critical issue of security of tenure facing urban informal settlements is being addressed. This removes the fear of forced evictions and demolitions by the State and private individuals other than in a legal and humane manner with the necessary consultation.

Since the state policy encourages effective peoples' participation in the process of urban development, civil society participation in governments seems to enhance the quality of input for effective urban policies, auguring well for the process of urban development. This is evident from Local Government Unit (LGU) level participation to implement the Urban Development and Housing Act (UDHA). Local housing boards are also an effective mechanism for the urban poor to participate in the local UDHA compliance framework. Collaborative efforts with NGO's and their involvement in research would lead to practical and innovative policy initiatives eventually developing into practical and sustainable projects for informal settlements in line with the right to housing. Thus adequate private sector involvement, community participation and clear urban management and planning policies, are likely to ensure that effective policies become law.

The participatory process also encompasses private sector involvement such as providing resettlement sites in partnership with civil society and government. It would thus include assistance in planning and design and facilitating innovative schemes for making resources available to informal settlement residents.

Recently, there has been greater sensitivity to the gender issue, especially in relation to housing. This is evident from the enactment of a law for the protection of women's rights and a national development plan for women. This is likely to have an impact for women on urban development and, consequently, informal settlements (Santiago, 1998:120).

- **LIMITATIONS**

In the Philippines an increasing portion of the national budget needs to be devoted to slum upgrading measures as the present allocation is insufficient (CESCR Consideration of Reports submitted by State Parties under Articles 16 and 17of the Covenant). This can obviously hamper long-term urban planning.

A further shortcoming with the Philippines, and as was the case with Brazil, is that there are no laws that directly or indirectly affect housing rights relating to citizens being entitled to live in a clean and healthy environment. Neither has the State put in place the necessary Institutional Framework to deal with this type of situation nor have any Acts been promulgated to compel Local Authorities to

ensure clean and sanitary living conditions for its citizens. Such an Act certainly would have been an important intervention mechanism for informal settlement residents. Considering the great percentage of the urban population living in informal settlements, tighter measures are called for and greater obligations need to be placed on the State.

A further criticism that can be leveled at the Philippines, which was also leveled at Brazil, is the absence of a Constitutional Law Advisory Committee and a Parliamentary Ombudsman to monitor Constitutional and Human Rights. Clearly there is no monitoring process of how resources are allocated and how the most vulnerable groups such as informal settlement residents are given priority in line with international human rights instruments. Absent this monitoring process, there is unlikely to be any policy debates within specific States to develop effective remedies for violations of Housing Rights.

4.6. CONCLUSION

By placing the right to housing within the Constitution offers a means of empowerment to those that have traditionally been excluded from the dominant housing market and at the same time offer a new paradigm with which to assess housing rights and policy, and counter the view of housing purely as a commodity. This development then automatically introduces a human rights dimension into the many aspects that relate to legal theory and practice.

Urban change has occurred due to a number of laws and statutes impacting on planning and development as well as provision of services and amenities. While there is abundance of legislation aimed at addressing the difficulties of informal settlement residents, in the context of facilitating access to land and security of tenure, “the weak and unresponsive legislation, poor or inadequate implementation, absence of sustained political will to carry out programmes and inadequate human and financial resources, have not brought about the intended results” (Santiago, 1998:118).

Having said that, while developing various laws is important, enforcing these laws and proper implementation of programmes and policies developed from these laws becomes crucial. Those aspects that hinder implementation need to be addressed. Proper consultation with the beneficiaries is very important.

In considering recommendations to improve the situation of informal settlement residents, would involve not only socio-economic issues but also political and human rights issues. In this regard, tackling poverty by looking at the overall economic development of the Philippines (Santiago,1998:119).

Santiago (1998:119) suggests that an effort should be made to reduce the growth of areas of illegal settlements in the Philippines. This can only be done if informal settlement residents are brought within the parameters of the law. His recommendations are that there should be more realistic health and safety standards and a relaxation of those that simply have aesthetic value.

Taking into account what Santiago describes as peculiar to the Philippines, at the end of the day, however, informal settlements cannot be viewed purely from a legal perspective. Protection should be initiated to improve economic and urban planning in formulating laws. There should be a comprehensive approach to legislation by taking into account the socio-cultural and economic characteristics of the informal settlement residents as intended beneficiaries.

CHAPTER FIVE

HOUSING RIGHTS AND THE ACTUAL INTERVENTION PROCESS FOR INFORMAL SETTLEMENTS

5.1. INTRODUCTION

If one examines the levels of state duty regarding the right to housing, one can determine the obligations necessary for the realisation of the right to housing. In this way, one can use them as a measure to extract possible intervention mechanisms when it comes to informal settlements. I now deal with proposed intervention mechanisms for informal settlements. In this regard I draw substantially on the previous chapters, including the Brazil and Philippines case studies.

5.2.RECOGNITION AND RATIFICATION OF THE RIGHT TO HOUSING

The first approach to intervention in the informal settlement context will have to be the recognition of the right to housing. Ratification is the first step any government can take in expressing the serious intent or commitment of legally addressing housing needs. Furthermore, ratification would ensure that instruments from which housing rights are derived are then implemented. This in turn will result in ratification of and adherence to the various human rights instruments that encapsulate the right to housing, and even go further in the context of permeability of rights. It may be noted, for instance, that South Africa,

though a signatory to the International Covenant on Economic, Social and Cultural Rights, has not ratified the Covenant as such. This would then mean that there may be laxity in ensuring that instruments from which housing rights are derived are then implemented.

To illustrate: the right of access to adequate housing and to protection from forced or arbitrary evictions is well entrenched in South African domestic law, in particular, at National and Provincial policy level. One can thus conclude that South African housing law and policy is largely compliant with the ICESCR, but non-ratification has meant that there are policy and programmatic gaps that inhibit compliance with Covenant requirements (Cohre Report, 2005:39). The Johannesburg Municipality's Informal Settlement strategy bears testament to this fact. While emphasis is on rapidly securing urban land tenure, the Johannesburg Municipal Informal Settlement Strategy example of relocation as a tool of informal settlement development and management is defective in many respects and in some cases, even amounts to violation of housing rights (Cohre Report, 2005: 77). Firstly, the municipality resorts too quickly to relocation of informal settlements even where obstacles to in-situ upgrading can be overcome. Secondly, relocations to peripheral areas affect livelihood strategies. Thirdly, there is insufficient consultation at the time of relocations, which result in 'voluntary' relocations becoming forced evictions. Fourthly, the failure of

Municipalities to coordinate their relocation activities with other State organs has a negative impact on social delivery (Cohre Report, 2005:77).

The Philippines case study is a good example of the effects of ratification. Since the Philippines is a party to the International Covenant (ICESCR) it has to a certain extent, responded to a demand for the recognition of the right to housing. This has resulted in the Constitution being framed with socio-economic reform and respect for human rights in mind. This becomes important in the context of the State being compelled to, by law, for the common good undertaking a continuing programme of urban land reform and ensuring adequate housing and basic services to informal settlement residents.

Ratification also compels States to promote adequate employment opportunities to such informal residents. Further, it would ensure that informal settlement residents shall not be evicted, nor their dwellings demolished, except in accordance with law and in a just and humane manner. In line with human rights, further, no resettlement of informal settlement dwellers will be undertaken without adequate consultation with them and the communities where they are to be relocated.

Brazil is a party to various international human rights treaties, including the ICESCR which promotes the recognition of housing rights as human rights (Saule & Rodriguez, 2003:176). Consequently, the Brazilian example illustrates how the State creates laws and legal instruments with the aim of prioritising the promotion of social and territorial integration of the population in the city living in informal settlements. Secondly, implementing reform to ensure democratisation of the State structures in order to ensure popular participation in the city's administration and the Constitution of structures to dissolve collective conflicts.

The Brazilian State, through positive action, would promote housing and urban policies that are legally and socially effective with the immediate aim of preventing the regression of housing rights. Secondly, to intervene by regulating private sector activities so that property fulfils a social function. In this regard, land regulation and programmes for the urbanisation and regularisation of land in informal settlements to ensure social and territorial integration becomes relevant. In general, the Brazilian Constitution has recognised housing rights as a fundamental right, leading to the development of the City Statute.

5.3. PRINCIPLES FOR ADEQUATE HOUSING IN TERMS OF THE ICESCR

- Firstly, in respect of informal settlement intervention, one aspect becomes relevant, namely the providing of legal security of tenure. It is essential that a certain level of security of tenure is guaranteed, which gives legal

protection against forced eviction, harassment or other threats. Consequently the immediate aim of governments should be the conferring of legal security of tenure to such households that are without such protection. As will be discussed later, there are various methods of achieving this, but in any given situation consultation and cooperation from the affected persons and groups is vital.

- Secondly, the beneficiaries of the right to housing are entitled to sustainable access to natural and common resources, including potable drinking water, energy for cooking, heating and lighting, sanitation, food storage and washing facilities. Also refuse disposal, drainage and access to emergency services are important.

- Thirdly, affordability of personal or household costs associated with housing is important to ensure that other basic needs are attainable. The state has a responsibility of ensuring that basic building materials are made available.

- The next important principle relates to the concept of ensuring that housing, to be construed as habitable, needs to provide adequate space and protection from the elements. Inherent in this concept is physical safety and health protection of the inhabitants.

- The fifth principle which follows, embraces the concept of accessibility in the context of those entitled to it. Entitlement would refer to include disadvantaged groups such as elderly, children, physically challenged, HIV positive individuals and importantly, people living in disaster prone areas. These people are entitled to prioritisation as far as housing needs are concerned.

- The sixth principle relates to ensuring the location of housing, allowing access to employment opportunities; health care; schools and other social facilities. The principle of adequate location includes the notion of avoiding polluted sites.

- The last principle relates to ensuring that adequate housing is in line with cultural aspects and dimensions.

(Leckie, 1997:8-10).

These principles become relevant in providing governments with guidelines and standards to measure housing rights, obligations and consequently guide the formulation of national housing policy; practices and legislation in the informal settlement intervention process. In the final analysis it allows governments to

focus on the obligation to respect, promote and fulfil the right to adequate housing, as set out in the Covenant.

I deal with these principles separately in greater detail in relation to informal settlements.

(i) THE OBLIGATION TO RESPECT

This obligation to respect places a responsibility on governments to, through its various organs and agents, not to encourage a practice or policy that violates the integrity of an individual or infringes upon individuals' "freedom to use those material or other available resources available to them … to satisfy individual, family, household or community housing needs" (Leckie, 1994:40).

Respect would also extend to creating a situation that would facilitate self-help initiatives by the beneficiaries of housing rights, including the right to freely organise, associate and assemble (Leckie, 1994:40). This, in the context of dignity and recognition of self-esteem and worth. Linked to this is the notion that States should desist from policies that encourage the practice of forced or arbitrary evictions of any persons or groups; or arbitrary demolitions.

(ii) OBLIGATION TO PROTECT

The obligation to 'protect' compels governments to ensure that if legislation exists which is impeding the promotion of this right or there is actual violation, governments need to reflect upon this and consider reviewing such legislation and policies that arise out of the current draconian legislation. The obligation to 'promote' also places a duty on States to be pro-active by developing effective legal and policy measures with a rights basis such as national and/or local legislation with a view to realising housing rights (General Comment no. 4 on the right to adequate housing). For this to be achieved there should be broad based participation, including the homeless and their representatives.

The obligation to 'protect' in the right to housing entails an obligation on the State and its agents to act with a view to prevent the violation of any individuals right to housing by other individuals or groups not linked to the State. This would include protection against harassment or abuse. Furthermore, it would include effective facilitating measures being put in place to guarantee the right to security of tenure and protection from any form of discrimination, harassment, withdrawal of services, in the context of informal settlements.

If one locates examples from the Brazilian case study regarding the obligation to protect and respect, it is its duty to intervene and regulate private sector activities relating to housing policy. This would impact on the regulation of the use and

access to urban property to ensure that it fulfils a social function. Further to regulate the land market to promote urbanisation and regularisation programmes of land in informal settlements and to promote social and territorial integration of the poor communities residing in these settlements. It would also extend to the Brazilian State adopting policies that would effectively implement the right to housing, especially benefiting the poverty-stricken and destitute in informal settlements. One of the methods adopted would be security and legal protection for informal settlement residents. Further, the Brazilian State has undertaken to avoid any norms or policies that result in discrimination, which would hinder the exercise of housing rights. In the Brazilian case study, a classical example of complying with the obligation to protect and respect is the City Statute which has as its aim promoting social justice, eradicating poverty, reducing social inequalities and guaranteeing civil rights and dignity of the individual.

As far as the Philippines is concerned, it deals with the abovementioned obligations by ensuring that state policy encourages more effective peoples participation in the urban development process. Civil society plays a bigger role with its participation in governance and NGOs have greater input for the improvement of policy and project initiatives. An example of this is the local housing board being seen as a structure to provide the urban poor with a right to participate in the local Urban Development and Housing Act compliance

framework. This encourages peoples participation, transparency and accountability and brings together the efforts of different collaborating sectors.

(iii) OBLIGATION TO FULFIL:

The State's obligation to fulfil the right to adequate housing relates to appropriate and more importantly, responsible decisions regarding amongst others public expenditure, State regulations of land markets, provision of basic services and related infrastructure. Government needs to facilitate access to entitlements of housing rights, which are attainable by individuals in their personal capacity.

When it comes to the obligation to respect the right to housing, governments need to ensure that they do not act in a way that would violate those rights. Regarding informal settlements, governments are to ensure that they do not forcibly evict informal settlement residents without just cause, and without providing alternative and acceptable accommodation. Implicit in this obligation is the requirement of adequate and timeous warning, access to the court process and in appropriate circumstances, adequate compensation. In the Philippines, Section 10 of the Constitution provides for the State to undertake adequate consultations with informal settlement residents prior to the determination of the just and humane manner of conducting evictions and demolitions.

Here, the emphasis is on the right to housing and extends to utilisation of related rights in the context of permeability of rights. In Brazil, for example, the emphasis in the Constitution in creating a new legal order aims to legalise and urbanise urban areas with housing rights as an essential element which includes the right to the means of subsistence, to housing, to health, to food, to work, to education and to public transportation. It also includes the right to organise and the right to an environmentally sustainable urban environment. Accordingly, related rights that would become relevant here are dealt with below.

5.4 THE RIGHT TO FAMILY AND PRIVACY, AND TO BE FREE FROM DISCRIMINATION

In this context, while the state is under no obligation to provide housing, it has an obligation to ensure that public authorities do not impose intolerable living conditions on a person or his / her family according to the Committee on Economic, Social and Cultural Rights. On Human Rights, the right to privacy would be relevant as far as informal settlements are concerned in the sense that they include protection against evictions and as far as discrimination is concerned, it specifies that there should be no discrimination in the allocation of housing resources.

In Brazil, for example, in terms of the Constitution an effective housing policy has as its aim the promotion of housing programmes and the improvement of housing conditions and basic sanitation. This places an obligation on states through their municipalities to assist marginalized social groups and those excluded from the housing market to ensure social interest programmes such as land regularisation and informal settlement urbanisation.

5.5. THE RIGHTS OF THE CHILD

Here the legal link between housing and the child are clear as pointed out earlier. This is due to the fact that very often children are victims of inadequate shelter conditions and more importantly others such as parents and those responsible for children having the primary responsibilities to secure these rights for children could rely upon this international legislation for the fulfilment of the right to housing for all.

Reference to the Case of Government to the Republic of South Africa v Grootboom ((2001)(1) South African Law Reports 46(CC)) would be appropriate. Here, the Cape High Court held that Section 28(1) (c) of the Constitution conferred on the children an unqualified right to shelter and in addition Section 28(1)(b) should be read to include these children's parents in respect of an order compelling the State to provide shelter to the children and their accompanying parents, until the parents were able to provide shelter for the children

themselves. This is an example of the right of the child permeating into housing rights.

5.6. THE RIGHT TO FREEDOM OF MOVEMENT

In the context of informal settlements, the State needs to conduct itself in such a manner as not to prevent persons from having the option of choosing where to reside.

At this juncture I refer to the Bombay Pavement Dwellers case of Olga Tellis and Ors v Bombay Municipal Corporation and Ors (1985,3 SCC 545 in Leckie, 2003:27) where the argument was along the lines that forcible eviction would *inter alia* amount to a violation of the residents' rights to freedom of movement. This argument was partially successful in preventing removal to another site. It needs to be pointed out that this case is authority for a number of other principles as many other arguments were presented including the right to life provision.

5.7. THE RIGHT TO ASSEMBLY AND ASSOCIATION

As mentioned previously, these two rights can be found in various texts of international human rights law, including the Universal Declaration of Human Rights (UDHR). Since they relate to housing rights in the context of the collective right of individuals to form community based organisations and other groups in order to assert their rights to housing and enforce enabling policies aimed

towards this right, it would link up with this intervention mechanism to prevent evictions. Here participatory upgrading and participatory decision making would become relevant.

The Brazil case study is an excellent example of the Constitution promoting the right to the freedom to organise with a view to creating a new legal urban order in the context of housing rights. Here, the emphasis is on guaranteeing access to information, participation and social control in the decision-making process at the different levels leading to empowerment of residents, in particular informal settlement residents.

5.8. THE RIGHT TO WORK AND THE RIGHT TO LIFE

This aspect is relevant relating to aspects of employment being in close proximity to a housing option. In the informal settlement context, it will mean that if employment opportunities are not close by, the residents are effectively denied work, because they will not be able to afford high transportation costs involved. This aspect of livelihood opportunities or what is termed the right to life provisions merits discussion.

In the 1985 case of Olga Tellis v Bombay Municipal Corporation (1985, 3 SCC 545 in Leckie, 2003:27) the constitutional bench of the Supreme Court declared that the eviction of the applicants from their dwellings would result in the

deprivation of their livelihood. The Court concluded that Article 21 of the Constitution includes livelihood, and therefore the deprivation of livelihood, has to be effected by a reasonable procedure established by law, otherwise it would lead to a violation of this article.

5.9. THE RIGHT TO HEALTH / THE RIGHT TO ENVIROMENTAL HYGIENE/ QUALITY

In the context of informal settlements, this right relates to governments implementing a strategy to improve living conditions where health problems exist. In this way, there would be a two pronged approach of dealing with the right to housing, and at the same time, the right to health, service and infrastructure delivery resulting in elements of the right to adequate housing being realised.

In Brazil, the concept of the right to sustainable cities is understood to mean the right to health, and at the same time, the right to subsistence and to housing and also environmentally sustainable urban development.

5.10. APPROPRIATE LEGAL AND POLICY FORMULATION AS AN INTERVENTION MECHANISM

In the informal settlement context governments shall opt for legislation that is directed towards equal access to resources for adequate housing, equitable distribution of land and tenure legalisation. Here the emphasis shifts from a legal

point of view towards component rights such as health, privacy, of women and so forth. States would also need to repeal oppressive legislation and amend legislation which is not in line with the right to housing. In this regard, for example, speculation should be discouraged by the enactment of appropriate legislation to deal with an unregulated land market which is causing a violation of many components of housing rights and regression and degeneration of shelter conditions. The example of Brazil regulating private sector activities by discouraging speculation by using instruments such as *Usucapiao* is an excellent intervention mechanism.

As far as policy considerations are concerned, the right to housing would have to be linked to development initiatives. This in turn will result in the formulation of a housing policy geared towards providing housing for all. In the context of informal settlements, with the aim of achieving the 'progressive realisation of this right to housing', there is likely to be an initiative for informal settlement upgrading and site and service schemes based on properly structured enabling strategies.

In essence, there will be a commitment to increasing the capacity and improving the standards of human settlements. Inherent in the policy would be the aim of eradicating homelessness. The Philippines certainly leads the way in this regard. The establishment of the various urban development councils and housing authorities formulate the national framework for housing and urban development

and designs broad strategies for the accomplishment of objective and recommends new legislations with housing rights in mind. Further, it assumes obligations of providing housing assistance to the lowest urban income earners through slum upgrading, squatter relocation and development of sites and services. The Presidential Commission also coordinates Government and NGO programmes which serve as a consultative mechanism to address the needs of informal settlement residents.

5.11. PROMOTING AND MONITORING COMPLIANCE WITH THE RIGHT TO HOUSING

Here there is a duty on the State to avoid actions which deprive its people of adequate housing. Thus the state needs to monitor and prohibit acts which prevent the actualisation of housing rights. This duty further places an obligation on the State to put in place structures to ensure compliance with the obligations undertaken. Included in this would be housing ministries.

This policy mechanism for the supervision of obligations for the realisation of the right to housing is an important intervention mechanism in informal settlements. This becomes clear when one considers the discussion below regarding international structures established for the enforcement and implementation of housing rights:

The body known as the Committee on Economic, Social and Cultural Rights (CESR) is tasked with monitoring State parties' compliance with their obligations under the ICESCR.

The Committee also needs to increase its effectiveness by identifying standards to enable states to gauge whether they have complied with their obligations regarding housing rights. The Committee also serves as an international implementation system by ensuring that States do not ignore their treaty obligations (Leckie, 1992:56).

The Committee also needs to encourage states to include in their reports, aspects and impediments to the fulfilment of their obligations as contained in the covenant. This allows the various impediments to be addressed.

5.12. SPECIALISED AGENCIES

Articles 18 to 22 of the covenant provide for the creation of specialised agencies, as well as the Commission on Human Rights to attempt ensuring adherence to the covenants. These Agencies are dealt with in the paragraphs that follow:

- **THE UN COMMISSION ON HUMAN SETTLEMENTS**

The UN Commission on Human Settlements through the ILO (International Labour Organisation) by strengthening its monitoring procedures would be able

to protect informal settlement residents. In fact the ILO, through its committee of experts on the application of conventions, and recommendations and through other bodies, would submit reports regarding the implementation of the covenant relating to their mandate (Leckie, 1992:58).

- **THE COMMISSION ON HUMAN RIGHTS AND THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)**

The Commission on Human Rights in terms of its monitoring process of the CESCR is relevant to informal settlements. The Commission which is responsible for socio-economic rights would transmit state's reports to the Committee for study and general recommendations. In this way the Commission plays an important role in implementing the covenant, by taking into account economic, social and cultural rights and with the assistance of specialists expertise, monitor such rights. Both these bodies would play an important role in the clarification of the right to housing. More importantly, these bodies are important in the intervention process as they have been mandated to receive individual and group complaints regarding violations of their rights.

5.12. THE ROLE OF NGO'S AND COMMUNITY BASED ORGANISATIONS

The potential involvement of community based organisations and NGO's in the fulfilment and attainment of this right to adequate housing, in particular to

informal settlement intervention should not be underestimated. It is this role which is analysed in greater detail.

Undoubtedly, NGO's and community based organisations are best suited to urging governments to fulfil their legal obligations regarding the right to housing. Internationally oriented NGO's would need to concentrate on research and studies of housing rights with a view to setting the parameters of obligations. One of the internationally oriented NGOs that comes to mind is COHRE which focuses on the right to adequate housing.

COHRE has official consultative status with the Economic and Social Council of the United Nations, the Organisation of American States, the African Union and the Council of Europe (COHRE Report, 2005:5). This will ensure that NGO's are more effective at the international level and community based organisations assume the responsibility of housing rights at the national and local levels. Where such obligations do not exist, the role of the NGO's and community based organisations would be to pressurise governments to adopt such legislation. Their further role would be to monitor whether actualisation of housing rights are being hindered. For example, in cases of mass forced evictions; demolition of existing settlements; imposing of unreasonable housing and land regulation; non enforcement of environmental laws leading to pollution at or near informal settlements; allowing land to remain vacant for speculative purposes where there

is a dire need for such land; and not utilising funds for settlement upgrading and improvement.

If one analyses the Brazil and Philippines case studies, it becomes clear that the NGO's and community organisations are made up of urban poor organisations which have formed alliances and coalitions. These groups have buttressed their struggle for in situ development and against demolitions. Further, they have developed the ability to articulate their evolving demands to push for higher recognition of their rights. They have managed to influence enabling legislation and broadened their strategic approaches to form alliances with different sectors as well as local government.

5.13. MUNICIPALITIES AND THE ROLE OF LAWYERS

One needs to consider role of lawyers in alliance with community based organisations and NGO's. This would entail not only the provision of legal aid to the poor, but also building up community knowledge and capacity to use the law as a vehicle of empowerment.

Lawyers, thus, in conjunction with NGOs and municipalities would have a critical role in the context of campaigning for changes in legislation and state structures that are not consistent with the rights to housing, and in this way, playing the role

of law reformers, developing new jurisprudential concepts with the aim of realising the right to housing (Leckie, 1992:69).

5.14. THE COURTS

The judiciary is an important mechanism for enforcement of human rights by interpreting bills of rights and national legislation dealing with human rights. The courts can provide a remedy when a right is violated. “Thus, while the violation is addressed retrospectively, however the jurisprudence of the court also lays down standards for future conduct” (Gomez, 1995:156).

The Philippines case study is an excellent illustration of how judicial pronouncements provide a fertile source to giving effect and meaning to various human rights norms. The courts also have a great role to play in the area of socio-economic rights. The Brazilian example illustrates how social and economic rights, along with political rights, have been incorporated into the constitution and have become justiciable rights.

5.15. THE OMBUDSMAN FOR HOUSING RIGHTS

The office of the ombudsman would be an important intervention mechanism for informal settlement residents in the context of dealing with human rights violations. Unlike the courts, the ombudsman uses mediation or other dispute resolution mechanisms in addressing issues. The advantage of this lies in the

flexibility and accessibility of this office in resolving conflict. The ombudsman also has an important role to play as far as the giving of legal assistance or advice for those intending to enforce fundamental housing rights through the courts. This office's powers also could also extend to investigating abuses regarding housing rights.

5.16. CONCLUSION

Based on the discussion in this chapter on the various intervention mechanisms it becomes clear that the general perception of the law by informal settlement residents as being negative, is likely to change once the abovementioned intervention measures have been implemented. Those that are forced by circumstances to live under illegal conditions due to an inadequate housing situation, working outside of legal regulation, are likely to appreciate the positive impact that the law offers. They should realise that law is something that provides and protects individual rights and at the same time is a vehicle for improving housing conditions.

It is, however, vital that there is a reconciliation of government's view of the law and how it is perceived by those affected by it. Further, state parties would need to undertake a comprehensive review of national legislation, administrative law and procedures to guarantee full conformity with the Covenants and Decrees. There also needs to be encouragement of state parties to monitor regularly the

situation regarding the various rights, in order to allow an assessment of the extent to which the various rights are being enjoyed by State subjects. Also public scrutiny of government policies regarding the implementation of International Instruments becomes important.

In conclusion, there needs to be clarification on the nature, scope and contents of specific rights enumerated in the International Instruments. This would allow states to understand their obligations and at the same time enlighten informal settlement residents about their rights and entitlements.

CHAPTER SIX: CONCLUDING CHAPTER

6.1 INTRODUCTION

In terms of the processes of globalisation, presently, emphasis is being placed by various states on globalisation of the economy and the effect it has on states in the context of international and national development. "There is however another form of globalisation which could and should also have a fundamental impact on states. That is the globalisation of human rights" (Mandela, 2004: XVII). Having said that, in the context of human rights, the intervention should not be limited to civil and political rights, but should extend to include social and economic rights to attend to the basic needs of all people. This concept permeates through the right to housing in the context of human rights as everyone needs a place to live in security, dignity and protection. Thus, the right to housing goes beyond protection of arbitrary or forced eviction to compelling states to take effective action to enable its subjects to meet their need for a safe and secure home where they can live with dignity. Since human rights are interdependent and indivisible, social and economic and cultural rights should be protected and promoted with the same vigour (Gomez, 1995: 113)

6.2 INTERNATIONAL LEGAL INSTRUMENTS & GLOBAL SOCIO-ECONOMIC RIGHTS

If one analyses the Brazil and Philippines case studies, one realises that for a housing rights strategy to be effective in the informal settlement, one needs to utilise all available instruments and not just utilising one instrument in isolated

form. This would ensure that international legal instruments are utilised in tandem with pro-active action, advocacy and grass roots mobilisation to ensure municipal and international involvement. For it has to be realised that:

> "removing the threat of summary eviction makes possible economic and social transformations of informal slum settlements, giving residents entitlements and responsibilities that change their relationships with formal institutions and with each other" (Alston, 2004: XX).

Since all subjects of states have a right to expect their governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve their living conditions, the question that needs to be dealt with is what specific actions would improve the enjoyment of housing rights and where can efforts be undertaken to remove obstacles and violations of housing rights? This study is premised on the position that sufficient emphasis needs to be placed on the international legal normative and procedural aspects of human rights, which would include socio-economic rights to ensure effective application at the national level. At the end of the day it is international law that would affect the domestic legal dimension in the context of supporting of housing rights.

Besides constitutional recognition of housing rights, it is important that many national governments adopt or promulgate legislation based on international legal advances to ensure compliance with their obligations on international law.

The Philippines being a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) facilitates the recognition of right to adequate housing. The relevance of that means that the Constitution framed with socio economic reform and respect for human rights in mind, elaborates the right to housing by recognising and appreciating the plight of the urban poor. This ensures that the state would undertake a continuing programme of urban land reform and housing by making available at affordable costs, decent housing and basic services to the underprivileged and homeless in resettlement areas and also promoting adequate employment opportunities to such citizens. Further, provision is made for ensuring that the poor shall not be evicted, nor their dwellings demolished except in accordance with law and in a just and humane manner. Further, no resettlement of informal settlement residents shall be undertaken without adequate consultation with them and the communities where they are to be located.

6.3 ENTRENCHING THE RIGHT TO HOUSING

The re-affirmation at international level of the importance of the right to housing needs to be entrenched as an important right within the legal system of various states. If countries adopt a Bill of Rights, in particular at state level, automatically that particular state would have a constitutional right to adequate housing. This would then lead to a rights/entitlement concept, which would underlie statutory aspects of housing, enabling subjects of particular states to have the capacity to enforce a right to adequate housing. This would lead to the judicial system of the

respective states being more receptive to utilising international human rights provisions and instruments in its statutory interpretation and in particular, development of the common law. This would then facilitate a process of the development of the law that would bring it closer to enforcement of the international right to adequate housing. However, it is important to realise that a drastic change and mindset is required in the legal and political arena, which would need to impact on individuals' rights and governments obligations in this area.

6.4 RATIFICATION AND ACCEPTANCE OF THE OBLIGATION TO RECOGNISE THE RIGHT TO HOUSING

Where states accept an obligation to recognise the right of all persons within that country to an adequate standard of living, including adequate housing, and the continuous improvement of living conditions, they would be moving closer to complying with their obligation to satisfy the right to housing. This situation would normally occur where a particular state has ratified the ICESCR as a result of the obligation that is embodied in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights. This, with a view to progressively achieving the full realisation of the right to adequate housing. Brazil and Philippines highlight this aspect of the effects of ratification. Furthermore, ratification would ensure that Article 2 of the ICESCR, more specifically Article 2 of the International Covenant on Civil and Political Rights and the provisions of the Convention on the elimination of all forms of racial discrimination and the

convention on elimination of all forms of discrimination against women would reflect a commitment to guaranteeing that a right to housing is exercised in the context of the abovementioned instruments.

Ratification of the Convention on the Rights of the Child (CRC) would ensure the states undertaking and additional obligation to assist parents to provide children with a standard of living adequate for the children's physical, mental, spiritual, moral and social development. Furthermore, if there are any regional human rights agreements, they would certainly strengthen a particular states international obligations in the housing arena, in particular, relating to informal settlements.

It is thus vital that states adopt a single concept of international law in its legal system so that international legal obligations, such as the right to adequate housing automatically become part of domestic law. This will allow subjects of that particular state to be able to pursue actions founded on the right to housing in the event of there being any breach of international obligations.

6.5 COURTS RECOGNISING INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

It would become very useful if the Courts recognised that international law is a valid tool for use in the interpretation of legislation regarding housing rights. In

essence, the Courts would be accepting that parliament in the respective state did not intend to abrogate international law resulting in legislation being read as being consistent with international law unless a contrary intention appears from the face of it. In Australia for example, it has been accepted that international law can be used to clarify ambiguity in legislation in situations where legislation expressly or implicitly implements international law obligations (Devereux, 2003: 102). In these situations, Devereux (2003: 102) states that courts have resorted to what she terms 'soft' sources of international law to elucidate the meaning of the international law provision. That where the right to adequate housing was being advanced to give certain interpretation to a legislative provision, reliance could be placed on such documents as the CESCR's general comment No. 4 on the right to adequate housing (1991) and general comment No. 7 on forced evictions (1997).

International instruments such as the right to adequate housing could also be used to transform the common law in light of the fact that international law declares the existence of universal human rights. This aspect could be taken a step further where international human rights standards could be utilised in the interpretation of constitutions of respective states. The effect of this would be that contemporary sources of law would play a role in developing constitutional interpretation for human rights provisions in the context of housing rights.

Another aspect in which the Courts need to be progressive in is to be prepared to use international human rights standards in the field of administrative law in the context of decision making by government administrative bodies. This would then place an obligation on decision making bodies to give applicants a hearing should the decision maker be proposing to make a decision contrary to an international instrument or obligation.

In the final analysis it is vital that extensive use of economic rights to influence statutory interpretation and transformation of the common law is ensured. This would then ensure the promotion of the legislative instruments as embodied in the ICESCR, leading to intervention as far as the informal settlement process is concerned. It is vital that the economic rights issue is strongly motivated as it will then ensure that the resource implications for state's argument is not used as justification for non-compliance with its international obligations.

As mentioned previously, it becomes vital to ensure that the traditional divisions between civil and political rights and social and economic rights need to be done away with in order to address poverty and homelessness as potential violations of rights in the international covenant on civil and political rights (ICCPR). This will then ensure that there is not a failure by governments to address homelessness and the right to life as protected in article 6 of the International Covenant on Civil and Political Rights. Also, governments will not be able to shy

away from their obligations to deny disadvantaged groups what is necessary for access to adequate housing.

Further the critical issue will be the extent to which states have a positive obligation to address homelessness and inadequate housing as found in the components of the right to "life, liberty and security of the person, as well as equality" as found in most constitutions. For it is clear that poverty and homelessness directly engage rights in the ICCPR. In this context, an issue that needs to be addressed is the high poverty rate amongst single mothers which exposes their children without protection to which they are entitled under the covenant.

Thus there should be a strong commitment by governments to address these inequalities by developing appropriate programmes to protect women and disadvantaged groups. For a failure to do this would mean that there will be non-compliance with article 24 of the ICCPR which guarantees to every child, without discrimination "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state (HRC, Concluding Observations, 1999: 18). It is here to be noted that a failure to address the growing problem of homelessness in any given state is a potential violation of the right to life under article 6 of the ICCPR in that homelessness leads to serious health problems and even to death.

Therefore it is necessary that state parties take positive measures as required by article 6 of the ICCPR to address this serious problem.

Porter (2003: 136) argues that the degrees to which Canada has been reviewed by the CESCR and HRC reflects the critical issues of poverty and homelessness not only to Canada, but to the international community, and shows that the right to adequate housing is not simply a discrete right within the ICECSR, but rather a fundamental right which is inextricably linked to the right to dignity and security at the heart of international human rights law, including civil and political rights.

6.6 Conclusion

While governments need to address the deplorable living conditions and inadequate housing as far as urban informal settlements are concerned, a starting point would be for government policy to recognise urban informal settlements as inhabited areas. This would ensure that public land on which the poor reside cannot simply be alienated at any time to political elites and private individuals for commercial development. This will ensure that a large number of citizens of any given country are not living as refugees in their country and are not rendered landless, homeless and denied even their most basic human rights and dignity (Bodewes & Kwinga, 2003: 222). It is clear that housing rights involve not merely the securing of governmental accountability, but are becoming more of a process of social and economic transformation.

It is important that governments in line with international instruments regarding the right to housing, develop strategies and plans to improve the lives of informal settlement residents. Central to this policy would be a moratorium on all demolitions, and the formal recognition of all existing settlements and an immediate halt on allocations for speculative purposes on public land upon which residents have already settled.

Finally, the state should also recognise the official existence and tenure right of those residents currently living in the informal settlements. If states can provide security of tenure, the residents themselves will create new avenues for investment and improvement of their housing conditions. Also there needs to be development of appropriate mechanisms and instruments such as those under the Brazilian city statute.

In conclusion it may be stated that a development of a rights based approach would certainly empower groups and individuals that are not adequately housed both individually and collectively. There would further be a comparison on an international level of the processes employed by states to implement these rights. This would lead to the incorporation of socio-economic rights in particular state leading to a more human side to housing law and policy, a right that is denied informal settlement residence in most countries at present.

A student that takes this aspect of rights further for the South African situation would need to focus upon the importance of South Africa ratifying the ICECSR. This would allow South Africa to move away from the pre-apartheid mentality on focussing on contravention of laws, towards empowerment of informal settlement residents. This would occur through recognising that informal settlements are an urban reality, and in dealing with informality to acknowledge that based on various international Treaties and Conventions, informal settlers have enforceable rights.

These rights would then have to be translated at the National and Local level. Alston states (2003: XIX) that the International Treaties and UN General Comments adopted by the CESCR have proven to be powerful tools in advocacy at the National level and in constitutional litigation, as the South African case study demonstrates most effectively. This certainly is very encouraging and any rights based study for South Africa would need to concentrate on the reversal of economic and social exclusion, as the Brazil study has amply demonstrated.

At the end of the day it is about human dignity and for South Africa to move to the paradigm of complying with international legal commitments on housing rights, the problems of slums, discrimination against women as far as housing is concerned, practice of arbitrary forced evictions, effective remedies in the event of violation of housing rights, respecting the rule of law and prioritising the

perfection of human rights in the policy and law-making processes need to be transformed into areas of legal responsibility.

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