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JUSTICIABILITY OF RIGHT TO SHELTER AND HOUSING IN INDIA VIS-À-VIS ILLEGAL EVICTIONS

Aishwarya Karan

Abstract

Though the right to shelter in Indian jurisprudence was brought by the Supreme Court through an expansive interpretation of the right to life under Article 21 following a dignity-based approach, its treatment has been that of a conditional right contingent on state action for its enforceability. Tracing the judicial discourse in Delhi High Court in the past two decades, the research underscores the systemic destruction of the substantive meaning of the social right in violation of principles of natural justice and procedural fairness accompanied by a consistent denial of the equal treatment principle. Through a kind of nuisance-making of slums for passing demolition orders based on complaints by private parties, the court expanded the juridical interpretation of public nuisance shifting the illegality from encroachment to the encroacher - an entire class of people and their personhood, thereby, assuming a neoliberal governmentality that views evictions as public interest. Drawing inferences from Delhi High Court's judgments in Ajay Maken and Sudama Singh case reflecting upon South African Constitutional Court's treatment of the right to resettlement guided by a 'meaningful engagement' approach in consonance with international safeguards, the research implores the necessity for a move towards a systemic and substantive review of the social right.

I INTRODUCTION

The discourse on the right to shelter has become a vigourous source of debate in Indian jurisprudence and across the globe with cities impinging upon the rights of marginalized persons through an eviction-based urban transformation aimed at making cities world-class. For a long time, the right has remained ill-defined and under-researched with regard to its meaning, content, and scope raising complex questions about its existence; the larger question of the debate centered on whether or not socio-economic rights ought to be constitutionally entrenched and carrying judicial enforceability has given way to the emergence of a broad consensus that socio-economic rights are 'real rights' coming out of the shadow of their more justiciable human rights dimension and thus, are no more secondary to but equally justiciable as human rights and civil and political rights.[1]

[1] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* 1 (Hart Publishing, London, 2013); Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* 1-2 (Cambridge University Press, 2009).

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Various instruments document that informal settlements of the poor emerge due to displacement, disasters, migration, conflicts, poverty, development projects, etc. ICESCR identifies some principal issues on the right to adequate housing and declares that the right to shelter must not be seen as a commodity but as the right to live somewhere in security, peace, and dignity.[2] The use of the term 'forced evictions' has itself been problematized as the phrase aims to convey a sense of illegality and arbitrariness to eviction whereas any reference to the term 'forced evictions' should be seen as a tautology, evictions intrinsically characterizing a form of coercion and use of force. Likewise, the term 'illegal evictions' is criticized given that it assumes that the law in question spelling out the procedure automatically provides adequate protection to the right or conforms with the Covenant,[3] which is not the legislative reality in most jurisdictions.

With increasing urbanization, a wide demographic in India remains without access to adequate housing and basic amenities. As per the 2011 census, more than sixty-five lakh or twenty-two % of the urban demographic is compelled to reside in slums.[4] Insecurity of tenure forces slum residents to live in constant fear of eviction and demolition. Homelessness has been addressed in the first, third and eleventh Sustainable Development Goals aiming at 'eradicating poverty in all its form', ensuring 'healthy lives and promoting well-being for all at all ages', and 'making cities and human settlements inclusive, safe, resilient and sustainable,[5] respectively. Notably, there exists a general recognition[6] that enforceability of conventions is hindered as domestic laws continue to neglect ratified treaties and like international norms, even as international legal scholarship calls for greater binding 'soft law' to make states accountable for their international legal obligations. This includes the highly relevant but not legally binding instruments like the General Comments to the CESCR serving as a crucial interpretive tool providing expert pronouncements on the Covenant.

Right to adequate housing is accepted as part of basic human rights in various instruments including the Universal Declaration of Human Right, 1948 recognizing the right of shelter as part of a holistic well-being and necessary social services in Article 25,[7] the International Covenant on Economic and Social and Cultural Rights which guarantees under Article 11 (1) right to adequate housing and General Comment No. 4, 7 and 20 provide substantive guidance for interpreting the Article[8], the International Covenant on Civil and Political Rights guarantees protection against unlawful interference or attacks to the right to privacy and

[2] UN Office of the High Commissioner for Human Rights, *CESCR General Comment No. 4: The Right to Adequate Housing Note 7 (Art.11.1)*, E/1992/23, (13 December, 1997).
[3] UN Office of the High Commissioner of Human Rights, *CESCR General Comment No. 7: The Right to Adequate Housing Art. 11,* UN Doc E/1992/23, (December 13, 1991).
[4] Census 2011, India, available at: https://www.censusindia.gov.in/2011-Documents/Slum-26-09-13.pdf (last visited on April 11, 2022).
[5] UN High Commissioner for Refugees, *The Sustainable Development Goals and Addressing Statelessness*, March 2017.
[6] "The Justiciability of Economic and Social Rights in South Africa, India and the United States | IHEID," *available at*: https://www.graduateinstitute.ch/communications/news/justiciability-economic-and-social-rights-south-africa-india-and-united-states (last visited April 17, 2022).
[7] The Universal Declaration of Human Rights, 1948, art. 25.
[8] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 11.

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family under Article 17,[9] the Convention on Elimination of All Forms Of Discrimination Against Women wherein Article 14.2(h) deals with women's right to adequate living conditions, housing, and sanitation,[10] the Convention on The Rights Of The Child, 1989 wherein under Article 16.1 and Article 27.3 signatory nation-states are obliged to guarantee minor's right to privacy, and to provide material support to guardians for the housing of the child to the extent possible,[11] Convention on The Elimination of All Forms of Racial Discrimination, 1965 obliges parties to guarantee the right to equality of law for the enjoyment of the right to housing under Article 5 (e) (iii),[12] and the International Convention on The Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 protects the migrant worker's right of housing under Article 43(d) that ensures access to housing, including social housing schemes, and protection against exploitation in respect of rents.[13] Barring the last one, India is a signatory to the above-mentioned instruments.

II ACCESS TO MATERIAL RESOURCES FOR A DIGNIFIED LIFE AS ACCESS TO JUSTICE

Access to adequate housing under CESCR invokes the states to make their law and policy accountable for ensuring accessibility to disadvantaged groups with special needs such as the elderly, children, the physically disabled or mentally ill, HIV-positive persons, or persons with persistent medical problems, the terminally ill, victims of natural disasters, those living in disaster-prone areas, other groups requiring some degree of priority consideration and entitles them to sustainable access to adequate housing resources. States parties are engendered with the task of advancing access to land rights to landless or impoverished sections of society by constituting a central policy. Clear obligations on part of government require them to evolve and substantiate the 'right of all to a secure place to live in peace and dignity, including access to land as an entitlement'.[14] On part of the civil society, as asserted by Gautam Bhan in his extensive research on the 'right to the city' of the urban poor taking into account their social location, structural inequality in housing market and policy and social protection, there is a pressing necessity to reassert the rights of the poor as tax-payers, voters, and workers within the imagination of the city,[15] thereby, demanding the Indian state to assume its role as an equalizing force in order to meet its constitutional obligations.

As per the mandates of Directive Principles in Part IV of the Constitution of India, the Constitution makers enshrined the state as a trustee of the country's common resources and wealth to bridge the vast disparity and mitigate the material and social conflict between the haves and have-nots. Article 37 casts upon the Indian state a moral obligation as it holds the

[9] The International Covenant on Civil and Political Rights, 1966, art. 17.
[10] The Convention on Elimination of All Forms Of Discrimination Against Women, art. 14.2(h).
[11] The Convention on The Rights Of The Child, 1989 arts 16.1, 27.3.
[12] The Convention on The Elimination of All Forms of Racial Discrimination, 1965, art.5 (e) (iii).
[13] The Protection of the Rights of All Migrant Workers and Members of their Families, 1990, art 43(d).
[14] Supra 3, Note 8(e).
[15] Kalpana Sharma, "Evictions of Urban Poor" 29 *Economic and Political Weekly*, Issue No. 32, Vol. 51 (2016).

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courts as not responsible or even competent for enforceability of the principles in Part IV declaring that it "it shall be the duty of the state" to legislate and breathe life into these principles fundamental in the governance of the nation while Article 38 and 38(2) promote the "welfare of the people, socially and economically, for the preservation of social order" and direct the state to "minimize the inequities in income, to eliminate inequalities in status, facilities, and opportunities among not just individuals but groups of people residing in different regions or engaged in different vocations".[16] Article 39 envisages equitable access to material resources of the national community. Article 39(a), (b), (c), (e), (f) gives guidelines to the state "to secure through legislative policies to all its citizens the right to an adequate means of livelihood; to ensure distribution, ownership and control of the material resources of the nation in such manner that common good is subserved"; that "economic operation does not lead to 'concentration of wealth and means of production to the common detriment"; and that children be given "equal opportunities and facilities to healthy development securing conditions of freedom, dignity, and protection against exploitation, moral and material abandonment".[17] Article 41, and 43 of the Constitution protect the "right to work, provide just and humane conditions of work, and ensuring a decent standard of life," respectively.[18] The state has a duty under Article 47 to "improve the standard of living and public health". Furthermore, Article 51A(e) and (h) place a duty on citizens "to promote harmony and the spirit of common brotherhood; humanism and the spirit of inquiry and reform", respectively. Directive principles form the fundamental laws underpinning any interpretation of socio-economic rights by the judiciary to make justiciable their enforceability by the executive,[19] thereby, putting the onus on state, including its three organs, to ensure equity in distribution as a trustee of the country's wealth and material resources. Likewise, there is a necessity to comprehend the indeterminable and abstract social rights in the context of the directive principles and ideals enshrined in the Preamble in harmony with Article 14 to ensure equality before law,[20] equal access to the right, and a just negotiation with the right-holders.

However, a multitude of research suggests that the policy framework suffers from many ills and remains on paper. Policy expert Renita D'Souza argues that the wide gap in policy and enforcement remains unaddressed due to an ineffective comprehension of policymakers on the issue of housing poverty. Housing programmes have been consistently myopic indicating a failure to plan and design housing schemes with a broader vision to mitigate poverty and homelessness.[21] For instance, the goal of *Pradhan Mantri Awas Yojna* to deliver 20 million homes by the year 2022 is an object which implicitly assumes that if this goal is achieved, the crisis of urban housing would be mitigated, and the affordable housing markets cease to have

[16] The Constitution of India, art. 37, 38.
[17] The Constitution of India, art 39.
[18] The Constitution of India, arts. 41, 43.
[19] The Constitution of India, arts. 47, 51A.
[20] The Constitution of India, art. 14.
[21] Renita D'souza, "Housing poverty in urban India: The failures of past and current strategies and the need for a new blueprint" *ORFavailable at*: https://www.orfonline.org/research/housing-poverty-in-urban-india-the-failures-of-past-and-current-strategies-and-the-need-for-a-new-blueprint-48665/ (last visited April 8, 2022).

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major distortions and slum creation would stop. It is argued that rather than such impractical assumptions, the need is for housing schemes to synchronize with urbanization and affordability. Additionally, to make growth and development inclusive, policies must not neglect adequate accommodation to the interests of seasonal migrant workers and job seekers. The majority of policies since 1951 have failed due to either lack of community engagement and empathy that results in a tokenism providing only ill-facilitated sites without basic amenities like electricity, sanitation, water, food, etc in remote relocation sites, thus, in most cases found unlivable by evictees, issues of affordability, loan-averse banking systems discouraging low-income unorganized workers considered as high risk or low-credit assets, or when temporary migrants resort to living in slums.

III INDIAN JURISPRUDENTIAL DEVELOPMENT OF THE RIGHT TO SHELTER

Recently, Allahabad High Court in *Rajesh Yadav*[22] case held that the 'right to shelter is a fundamental right and the State has a constitutional duty to provide housing sites to the poor'. The PIL sought to evict some persons who had allegedly encroached upon public land. Justice Kesarwani dismissed the PIL observing that these were poor and landless agricultural labourers who depended on and resided at the residential lease of very small plots granted to them in 1995 by the competent authority where they raised their houses and are still residing therein'. The court relying on Justice Y. V. Chandrachud's statement in Olga Tellis held that 'slums that are in existence from a long time, say over twenty years, and which have been developed and improved, shall not be removed unless the land on which they stand, is needed for any public purpose, and in that event, alternative habitation will be provided to them'. The Court while holding the petitioner's PIL as an attempt to abrogate fundamental rights of the landless persons dismissed the petition imposing costs. In consonance with Directive Principles of State Policy, the court observed that the State is under an obligation to construct houses at a reasonable cost and make them easily accessible to the poor. Prof. Upendra Baxi commended the High Court of Allahabad for reiterating the 'expansion of new horizons for the right to shelter for the realization of the fullest human flourishing'[23] under the wide mandate of Articles 19 and 21 of the Indian Constitution.

Quoting Justice Field from *Munn v Illinois*[24], right to life was interpreted as 'something more than mere animal existence' in *Kharak Singh*[25] in 1964 and in *Olga Telis*[26] in 1985. In *Chameli Singh v State of UP* [27], the Supreme Court held that for a human being, shelter not only includes the 'protection of life and limb' but also provides a home, a space providing a person with access to opportunities to grow physically, intellectually, mentally, and

[22] *Rajesh Yadav v. State of U.P.*, (2019) 6 All LJ 644.
[23] Upendra Baxi, "Housing for the Impoverished: A Basic Human Right", India Legal, (July 28, 2019).
[24] *Munn v Illinois*, (1876) 94 U.S. 113.
[25] *Kharak Singh v State of U.P.*, (1964) 1 SCR 332.
[26] *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.
[27] *Chameli Singh v State of UP,* (1996) 2 SCC 549.

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spiritually; that in order to bring migrants, dalits and tribes into the mainstream of national life, providing these facilities and opportunities fundamental to their basic human and constitutional rights is the duty of the State, and that there could be no individual liberty without a minimum of property. In a similar line of reasoning as seen in *Olga Telis* and *Ahmedabad Municipal Corporation case*, the court further held that:

> "The right to shelter is an essential requisite to the right to live and should be deemed to have been guaranteed as a fundamental right, as enshrined in the directive principles which the State must secure for its citizens, subject to its economic budget."

Notably, post *Olga Telis* case, the jurisprudence around the right to shelter did develop in the context of the invoking the land acquisition acts to provide alternative accommodation to the displaced weaker sections of the society but still was not much concerned on the right to adequate housing *in situ* where the slum dwellers already reside or even in the context of right against 'forced eviction'.[28]

IV CONDITIONAL APPROACH: JURISPRUDENTIAL TREATMENT OF RIGHT TO SHELTER IN OLGA TELIS CASE

In *Olga Telis* case, the petitioners resided on pavement and slums in deplorable conditions in the city of Bombay. Attempts by the municipal corporation to remove the petitioners were unsuccessful as they returned and rebuilt their homes needing to be close to their places of work.[29] Supreme Court held the right to shelter as integral to the right to life under Article-21 having a direct bearing on the right to livelihood read along with Article 19(e) protecting the right to reside and settle in any parts of the Indian territory. The case despite being a torchbearer for jurisprudential development on the right to shelter and housing in India, could not afford large protection to the pavement dwellers' right to shelter and resettlement. Though it is regarded as a groundbreaking judicial recognition,[30] the court's remedy was far more constrained by procedural formalism and the brutality of forced eviction was sought to be pacified by requiring the authorities' compliance with the principles of natural justice before the eviction drive. The right discussed was specific only to the case of multi-generational slum settlements possessing a long-standing right or those who were provided census cards and whose dwellings were numbered during the 1976 census whereas those who were unfortunate as to not possess the same faced eviction order without remedial

[28] *Ajay Maken v Union of India*, Writ Petition Civil, 11616 of 2015, para 12.
[29] Anashri Pillay, "Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint," 63 *The International and Comparative Law Quarterly* 389 (2014).
[30] Id., at 390.

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resettlement.[31] Hence, the forcible eviction was carried on despite a discussion on right to shelter in consonance with the right to livelihood based on the procedure established by law.

This approach by Supreme Court may be considered a conditional approach as it upheld eviction if it is within 'procedure established by law' and is 'just, fair and reasonable' making the right contingent upon the procedure even when such an approach came through an arbitrary rationale; an unlawful intelligible differentia was ascertained founded on the fallible idea of the right dependent upon social location and access to property of the inhabitants. The case enjoys both the status of a magnum opus on the right to rehabilitation of slum residents offering a sense of promise and engendering a long-awaited socio-political discourse on the right and at once, becomes perilous in its approach to the treatment of the right to shelter and right-holders as it bestows vast powers to the municipal agencies across the country. Though Justice Chandrachud observed in the judgment that 'the rough edges of justice ought to be softened by human compassion'[32] ordering that eviction be only started a month past monsoon to minimize hardship in eviction, it is the mechanical view of the rule of law and procedural formalism that is seen to be impeding justice making the case testimony to the tussle between the have-nots' right to a minimum dignity contested on the ground of right to life and livelihood and the right of haves' and their collective social interest contested on grounds of sanitation, right of way, right against nuisance, etc.[33]

V SYSTEMIC APPROACH TO SOCIAL RIGHTS ADJUDICATION VERSUS THE CONDITIONAL APPROACH

The Conditional approach entails that the adjudication of the right to shelter is constrained by its contingency upon state action such that if there exists a housing policy promulgated by parliament that is not being implemented, the court shall enforce it. However, it excludes the existence of any systemic right to shelter and housing,[34] as exemplified in *Olga Telis*, the court through its eviction order was satisfied to give effect to government's undertakings for eviction with no discussion of the content and scope of the right.[35]

The court's 'ad-hoc approach' to economic and social rights adjudication or the 'conditional approach' as elucidated by Madhav Khosla suggests that such a model of adjudication of the right is conditional upon whether the state has taken action to implement the rights, similar to adjudication of contract or tort cases in private law, thereby, limiting the scope of review and remedy of the substantive right. It is seen as a unique approach evolved by the Supreme Court wherein the court will deliver a remedy when the state has breached an undertaking to take certain action (to provide shelter to slum dwellers, for instance) or when the state has

[31] Supra 26, para 57.
[32] Id., at para 46.
[33] Id., at para 14.
[34] Madhav Khosla, "Making social rights conditional: Lessons from India," 8 *International Journal of Constitutional Law* 739–765 (2010).
[35] Supra 29, at 401.

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been negligent, for instance, if it is not maintaining a hospital it chose to build.[36] The systemic rights adjudicatory model includes the minimum core and the reasonableness standard. A court's review in minimum core approach would be geared towards ascertaining an 'individualized' remedy,[37] the inquiry would be to ascertain if every person has access to adequate housing and to what extent whereas in the reasonableness test, a court would attempt to determine the inherent nature of measures already taken by the state to make a right justiciable. The 'minimum core' also called the general limitation clause or proportionality principle approach ensures delivery of at least a 'minimum essential level of rights' the state is mandated to ensure and to establish a minimum legal content for the famously inconclusive claims of socio-economic rights whereas the 'reasonableness' standard allows for an assessment of the reasonableness of the measures taken by the government to realize social and economic rights within its available resource.[38] The reasonableness approach comes with an inherent limitation clause within the constitutional text for deciding upon the reasonableness of policy measures taken by the government to realize socio-economic rights within the resources available. Varun Gauri empirically assesses Indian Supreme Court cases, noting that the judicial trend is to "look less favourably on claims contested on behalf of the poor and marginalized persons of society" and a corresponding rise in successful judgments for more advantaged members indicates that the court is usually less disposed to come to the assistance of people living in poverty. Additionally, judicial deference is witnessed in cases requiring interpretation and adjudication of social rights by Supreme Court judges who often increasingly cite "policy considerations as justification for minimal or no scrutiny of government action".[39]

VI ABSENCE OF PROCEDURAL FAIRNESS AND UNJUST ANALYTICAL REASONING IN THE JUDICIAL DISCOURSE

The Delhi High Court using illegality and social location of the slum residents in public interest litigation cases successfully ran a parallel administration on the excuse of government failure, at the same time, shifted the judicial concern from systemic issues faced in the justiciability of the right to the encroachment and finally, the encroacher who was to be seen as a criminal. Thus, it unapologetically and consistently put on a pedestal the middle-class neighbourhoods' collective right to sanitation and aesthetics vis-à-vis slum residents' right to shelter and livelihood; this has been chronicled by sociologist Asher Ghertner's anthropological survey of informal settlements in Delhi. He exposes the deep prejudice insidiously manifesting itself in the judicial interpretations of a kind of rule of law that criminalizes both slums and its inhabitants. This peculiar violence dormant in the legal language came alive in two significant changes in the early phase of slum demolition cases in

[36] Id.
[37] Id.
[38] Katharine G. Young. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" 33 *Yale International Law Journal* 131 (2008)
[39] Supra 29, at 400.

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the 1990s - the language in petitions and judgments marking a shift in the understanding of nuisance law as applied by judges and the basing of decisions on aesthetics i.e. the 'unsightly conditions of a slum making them appear illegal' with judgments being passed with photographs as the sole evidence for ordering demolition.

Nuisances can be either private or public. A public nuisance is an 'unreasonable conduct' offensive to the public when it causes discomfort, hurt or inconvenience, annoying or endangering the security of the general public. The reasonableness of the conduct is determined by the courts through interpretation of municipal statutes or by the nature of the act itself. In contrast, a private nuisance is a violation of an individual's peaceful enjoyment of land. To be adjudicated as a nuisance, the interference needs to 'rise above the aesthetic' if it is part of everyday life or activities.[40] However, in the application of nuisance law in slum demolition cases in India, nuisance is generally considered as 'an offense to the senses of sight, smell, or hearing' outrightly linked with aesthetical norms even as a term of juridical category.[41]

A. Legal Scrutiny of Shift in the Application of Nuisance Law and Deviations to order Slum Demolition

Identifying two kinds of nuisance in the Indian law, private nuisance as the "substantial and unreasonable interference with the use or enjoyment of land" and public nuisance as an "unreasonable interference with a right common to the general public", Ghertner argues that slums being settlements on public land, slum-related nuisances have been dealt by public nuisance procedures. In contrast, the definition of public nuisance earlier used to include particular 'objects possessed or actions performed' by individuals or groups that interfered with a public right, however, now it has been expanded to refer to specific groups of people. Likewise, the betterment of municipal services or penalizing individuals for non-performance or breach of duties is not seen as the answer to annoying, aesthetically displeasing, or dangerous acts or objects but the clearance of slums is. Before 2000, nuisance-causing activities such as unhygienic living conditions and open defecation were not cited as sufficient evidence for ordering slum demolitions. From 1980 to 2000, public nuisances were seen as faults of municipal authorities, and slums were considered dirty due to the inability of the state in providing basic services as witnessed in decisions such as *Ratlam Municipal Council*[42] and *K. C. Malhotra*.[43] Ghertner identifies two shifts witnessed in court's interpretation of public nuisance beginning from the 2000s:

[40] William Blakeney & Dan Hartrell, "What is a Nuisance, Municipal Liability for Sewer Backup" 3 *Institute for Catastrophic Loss Reduction* (2012).
[41] David Asher Ghertner, *Rule by Aesthetics: World-Class City Making in Delhi* 287 (University of California, Berkeley, 2010).
[42] *Ratlam Municipal Council v Vardichand*, AIR 1980 SCC 1622.
[43] *K. C. Malhotra v State of M.P.*, CA 1019 of 1992, M.P. High Court.

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(i) the first shift transpired when courts started 'accepting petitions under public interest litigation from private parties' such as RWAs, hotels, and commercial enterprises with claims of interference with their quality of life and security by neighboring slums;

(ii) a second shift is seen in the interpretation of public nuisance when the basis of demolitions became the visual appearance of filth which became synonymous with slums and slum residents, per se.

In 2002 before the Delhi High Court in *Okhla Factory Owners' Association*[44] case which distinguished between "those who have scant respect for law and unauthorizedly squat on public land" and "citizens who have paid for the land", the Court explicitly elevated concerns of the 'haves'- the propertied residents by blurring the line between public and private nuisance. Such rationale in adjudication by the court established 'land-ownership as the basis of citizenship' while making the sanctity of private property a public priority by remoulding the nuisance law. This was done by simplifying the 'legal and calculative basis' required for ordering slum demolition such as taking evidence through site maps, ownership records, master plans, etc. Hence, procedures required for removing nuisance were no more penalties and fines on the municipality and civic bodies in charge of sanitation rather horrifically the displacement of entire groups of people. Bhuwania analyses the analytical reasoning followed by the court problematizing the use of public interest litigation as a judicial apparatus to deal with the 'illegality' of slums and turned itself into a kind of leviathan providing for a slum clearance. He explicates the abuse of PIL, which was originally intended to protect the fundamental rights of the marginalized living in acute deprivation, due to the power it gave the judges to act on their biases often based on aesthetics, anti-poor sentiments, etc. As witnessed in the infamous case of *Almitra Patel*,[45] such was the level of prejudice that a specific unaesthetic slum settlement might not even appear in any case before the court, it was still *suo moto* invoked in a PIL making it an object of judicial concern.

A further novel innovation was that the executive's failure in providing minimum facilities like public toilets in slums and the consequential nuisance caused by public defecation was being solved by clearance of the slum itself[46], and not by making the executive provide the facilities which they were obligated to. In the late 1990s, courts started taking cognizance of the "dismal and gloomy picture of such *jhuggi-jhopries* coming up regularly".[47] In 1993, in the case of *Lawyers' Cooperative Group Housing Society*,[48] Justice B.N. Kirpal presiding as a judge in Delhi High Court deplored the existence of relocation policy in Delhi in the form of the Slum Clearance Act which also has rehabilitation and redevelopment as its integral

[44] *Okhla Factory Owners' Association v GNCTD,* 108 (2002) DLT 517 at para 22.
[45] Anuj Bhuwania, Courting the People: Public Interest Litigation in Post-Emergency India 83 (Cambridge University Press, United Kingdom, 2017).
[46] *Id.,* at para 87.
[47] *Supra 45,* note 9 at 283.
[48] *Lawyers' Cooperative Group Housing Society v Union of India*, CWP 267 of 1993 and CM 464 of 1993 Delhi High Court, para 13 and 14.

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part[49] in consonance with the state's commitment to Directive Principles and international safeguards ratified by India. It was remarked that provisions for alternate accommodation are an "unnecessary burden on the public exchequer" as the "*jhuggi* dwellers are trespassers on public land", thereby, discounting the state from its constitutional duty to secure shelter and affordable housing for all citizens alike. Additionally, the court directed that the rehabilitated persons should not be given the land on a lease-hold basis as per common practice but on the basis of license so that they do not acquire a right to part with possession of the land and to prohibit resettled slum dwellers any property rights.[50]

In 2000, Justice Kirpal presided as a judge in the highly criticized three-judge bench case *Almitra Patel,*[51] having no direct connection to slums at all. It was a PIL filed by an engineer against the problem of municipal agency's garbage disposal practices in 300 of India's largest cities, acting on which the court appointed a committee to formulate Municipal Solid Waste (Management and Handling) Rules, which were then notified but once this apparatus was put into motion, the petitioner was found "unable to steer the course of the petition" and the presiding judge made it about the unrelated issue of slums in Delhi. Not only did the Court turn the case originally against the poor solid waste management by MCD as against the slum dwellers through an incongruent jump in logic blaming them for solid waste issue but also the treated slums as a problem created by vested interests and not as a consequence of the scarcity of housing for a class of citizens. In addition, Justice Kirpal lamented "rewarding those who encroach on public land with a free alternate site" comparing it with "rewarding a pickpocket".[52] *Almitra Patel* case, therefore, marks the inception of an approach in which the Courts took to a kind of nuisance-making treating right to shelter as a commodity, and not as a 'right to live in security, peace, and dignity' while pronouncing slum residents as 'trespassers', 'pick-pockets' encroaching on public land and right to resettle as a 'burden on the public exchequer' resulting in contravention to 1979 ratification of CESCR[53] by Indian parliament . The implication of this 'rewarding the pickpocket' analogy, as discussed by Bhuwani exposed the "contempt for any humane attempt towards resettlement by the Supreme Court" and the court's complaint remained limited to the issue of encroachment of public land. These comments laid the "groundwork for a brutal campaign slum clearance or demolition of *jhuggies*/informal settlements on pavements in the early 2000s by the Delhi High Court" indicating dangerous connotations being delivered under the sanctity of democratic processes than it was during the emergency characteristic of a dystopian phase scarred with wide-scale misuse of law and forcible demolitions of slums.

Subsequently, by 2002 cases filed by Resident Welfare Associations across Delhi had reached such an extent that a High Court bench had to be constituted to hear 63 combined petitions under the leading petition of *Pitampura Sudhar Samiti*[54]. The judgment

[49] *Supra 45,* note 8 at 84.
[50] *Supra 45,* at 107.
[51] *Almitra H. Patel v Union of India*, (2000) SCC 2 679.
[52] *Id*., at para 14.
[53] *Supra* 3.
[54] *Supra 45*, note 14.

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summarized similar positions in petitions received, as 'RWA allegations of encroachment on public land' against *jhuggi-jhopri* clusters "that have been illegally erected and are causing nuisance of various kinds for the residents of areas nearby".[55] Court observed that "a welfare state is expected to care for its citizens from cradle to grave but this concept has to change", and stated that in current times, "State's function is one of a regulator to foster an environment of growth and equal opportunity" and thereafter, it is "for each to prosper or perish". This kind of judicial reasoning is barbarous for a Court to uphold in a democratic polity and must be condemned in clear terms for what it is - an inhumane attempt at stomping fundamental rights, equity and inclusion of the marginalized to the leviathan of social Darwinism. Kalpana Sharma challenges this view as it is always "the poor who perish in such a vision" and implores as to "where does this welfare state even exist where it caters to citizens from cradle to grave"; she describes this trend of making cities '*garib-mukt* as those who plan, govern, and judge intend' as practically welcoming a demolition of democratic principles.[56] The two judgments of Delhi High Court i.e. *Pitampura Sudhar Samiti* and *Okhla Factory Owner* were the last cases to even partly reflect constitutional questions concerning slum demolitions for the next seven years, as in ensuing years courts delivered orders and not judgments such that they did not carry any reasoned justifications rather were passed 'pure assertions of power'. Such orders carried the force of law but lacked legitimacy as orders without proper reasoning have been time and again held unconstitutional by the Supreme Court. These instances demonstrate how procedural violations were utilized by the court evolving a mechanism that eventually erected a 'slum demolition machinery'.[57]

In a similar fashion as Justice Kirpal, in 2002 case of *Okhla Factory Owners' Association*,[58] Justice S.K. Kaul complained about the right to resettlement, stating stated that "272 years would be needed to resettle the slum dwellers with existing procedures and that the acquisition cost of land and development would be Rs. 420 crores or US $ 100 million", that slum residents squat on areas near propertied residents causing them inconvenience by creating "unhygienic conditions, pollution, and ecological problems" resulting in "almost a collapse of Municipal services".[59] Similarly, in the case of *Kalyan Sansthan*[60], the Delhi High Court ordered the clearance of slums without any legal basis of slums' contribution to pollution in the *nallah* complained of or any records of settlement's size, location, history merely on the basis of photographs in an annexure depicting filth at the drain's site with a caption underneath disclosing that there existed a slum nearby wherein *jhuggi* dwellers defecated. As discussed before, the problem of defecation was earlier seen as a cause for nuisance on account of municipal authorities' non-compliance with their duties to provide basic amenities. While a majority of slums have access to necessities like water and electricity in some form, thirty-three % of the households in India lack a toilet within their

[55] *Pitampura Sudhar Samiti v Government of India*, Civil Writ Petition, 4215 of 1995 at para 1.
[56] Supra 41.
[57] Supra 45, at 82.
[58] *Okhla Factory Owners' Association v GNCTD*, (2003) 8 DLT 517, para 44.
[59] *Id*. at para 22.
[60] *Kalyan Sansthan v GNCTD*, CWP 4582 of 2003.

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premises.[61]

The procedural departures made by Delhi High Court exercising PIL jurisdiction in these RWA petitions were also seen in a similar petition filed in Ahmedabad[62] complaining of nuisance to a neighbourhood due to "smoke, urine passing on a public lane by hutment dwellers residing the area", the Gujarat High Court dismissed the petition not on grounds of poverty of slum residents or inconvenience of affluent propertied owners nearby but on two basic procedural grounds. One, the court held that whether there is encroachment or not is a question of fact and is difficult to determine under Article 226 as to who caused it without allowing parties to adduce evidence, a course the High Court usually does not adopt under Art 226; two, the persons who are alleged as encroachers and alleged to be residing in hutments were not made a party to the case, and therefore, no order was passed by the court that could adversely affect the slum residents in violation of *audi alteram partem*.

In yet another case of large scale evictions in *Yamuna Pushta* (embankments) transpired as a consequence of Delhi High Court's March 2003 order passed by Justice Vijendar Jain in two petitions specific only to Wazirpur and Okhla but as seen earlier, the court again deviated its concern to an altogether new site in old Delhi- Yamuna riverbank or the *Yamuna Pushta* which housed around 1,50,000 people in 30, 000 households in all the colonies; the order which gave no reasoning for such bizarre move was carried on as if resettlement policy was no longer needed. Remarkably, High Court went beyond the ambit of the petitions in *Okhla Factory Owners, Pitampura Sudhar Samiti and Wazirpur Bartan Nirmata Sangh* case and held in November 2002 that all those who had settled in slums anywhere in the city of Delhi after 1990 should be evicted and not given any free land for resettlement. Furthermore, the object of the court's intervention - the demolition of Delhi's largest slum in *Yamuna Pushta* was not even referred to by its name in the demolition order.[63] The subsequent demolitions were reported to have been carried out employing brutal use of force accompanied by arrests, detentions, and maltreatment of the slum residents with two children getting trapped under debris in the *Kanchanpuri* demolition on 23 March, a child and a forty-year-old burnt to death due to a fire that started during the demolition in *Indira Basti* on March 13, 2003.[64] These petitions mainly filed by private parties like factory owners and RWAs adjacent to slums demanding clearance of slums overlooked that the slums were erected to house those labourers who worked in nearby industrial areas without making any provision of housing facilities by employing industries.

In 2019 in *Ajay Maken*, a case concerning the legality of the demolition of *Shakur Basti* in western Delhi wherein the court held that no demolition should be ordered unannounced and carried out with the brute force of the authorities and police without consultation with those subject to eviction, it came to the notice of the court that Commissioner, Delhi Police filed an

[61] Mathew Idiculla, "A Right to the Indian City? Legal and Political Claims over Housing and Urban Space in India" 16 *Socio-Legal Review* 1 (2020).
[62] *Supra* 45, at 85.
[63] *Id*, at 90.
[64] Habitat International Coalition, "Over 300,000 people to be forcefully evicted from Yamuna Pushta", (10 May, 2004).

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affidavit stating that the Railways had sent them a request for providing sufficient police force to keep law and order in control during the encroachment clearance drive, affidavit being silent on whether any advance intimation was given to the *jhuggi* dwellers. According to the Delhi Police, two troops of male and female forces each along with anti-riot equipment were ensured. Further, Court noted the disclosure by Delhi Police in its order contains the information that though the demolition was planned to be carried out at 11 a.m. under the supervision of the Station House Officer, Punjabi Bagh, a call was received at 10.30 am from West District Control Room that the *jhuggis* were being demolished during which one infant of six months had died and help was required. It also refers to the post-mortem report indicating the cause of death as "shock as a result of the chest and head injury due to blunt force impact".[65]

VII BRIEF ANALYSIS OF INDIAN AND SOUTH AFRICAN CONSTITUTIONAL APPROACH TO THE RIGHT TO RESETTLEMENT AND 'MEANINGFUL ENGAGEMENT' MODEL

Research indicates that resettlement policies that reduce poverty possess three characteristics: (a) preparation of site before relocation; (b) proximity to employment opportunities; and (c) voluntary participation of people involved.[66] The Indian jurisprudence on right to rehabilitation of the evictees evolved first in 2010 in the case of *Sudama Singh*[67], a decision that came as a result of the city beautification programmes in preparation for the Commonwealth Games, Delhi High Court clarified the position of law on the question of resettlement of slum residents in case of demolition as the Delhi government had decided in 1990 to resettle the inhabitants of *jhuggies* wherein the state's policy provided that slums would be relocated only from project sites where specific requests had been received from the land-owning agencies and no largescale removal should be resorted to without any specific use in terms of the master plan for Delhi. The Court held the Delhi government's view that the inhabitants 'were on the right of way and not entitled to relocation' as unconstitutional. In response to the question that arose if existing schemes for rehabilitation and resettlement excluded persons living on the right of way and whether such a policy would be unconstitutional, Court found that there is no such policy and if such a policy existed, it would in contempt of right to shelter under Article 21. *Sudama Singh's* case referred to *Ahmedabad Municipal Corporation*[68] case, in which court held that those pavement dwellers who had resided there for a long time qualified for land allocation for resettling, and the state agencies must ensure basic civic amenities consistent with the right to life and dignity at the relocation site in line with *Shantistar Builders*[69] verdict upholding reasonable accommodation. Further, Court while holding that where the occupants of the *jhuggies* were

[65] Supra 28 at para 17.
[66] UN-Habitat, "Participatory monitoring and evaluation of the impacts of project CMB/00/003: Phnom Penh urban poverty reduction project".
[67] *Sudama Singh v Government of Delhi*, MANU/DE/0353/2010.
[68] *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, (1997) 11 SCC 121.
[69] *Shantistar Builders v. Narayan K Totame*, (1990) 1 SCC 520.

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evicted and relocated, such an occupant was not worse off and cited the South African Constitutional Court's decision in *Occupiers of 51 Olivia Road* in support and *Residents of Joe Slovo Community, Western Cape*[70] to conclude that the state should 'engage meaningfully with those sought to be evicted'.

Post *Sudama Singh*, the 'meaningful engagement' approach again found recognition in 2019 in *Ajay Maken*[71] case before the Delhi High Court. Relief was sought concerning the forced eviction of around 5000 dwellers at *Shakur Basti*; authored by Justice Murlidhar and Justice Bakhru, the judgment held that as per the DUSIB (Delhi Urban Shelter Improvement Board) Act, 2015 and the ruling in *Sudama Singh*, it is necessary to first finish a survey and engage with the *basti* residents, and that there is no imminent possibility of eviction of the dwellers of the Shakur Basti again in 2019. The court also employed continuing mandamus for three years to ensure the administration of surveys, development of Draft Protocols, and administration of relief and rehabilitation wherein the court acted in a supervisory and monitoring capacity. The verdict also cited the relevant Note 13 to General Comment No 7 to reason that if no *in situ* relocation is possible, in that case, whenever respondents will be eligible, only then slum dwellers will be rehabilitated after adequate time to make arrangements to move to the relocation site. Notably, measures to ensure due process before eviction as pronounced in General Comment No. 7 of CESCR [72] were elaborated at length in the progressive adjudication in *Ajay Maken*[73] case to hold unconstitutional demolitions in contravention of principles of natural justice:

> "States parties shall ensure, before carrying out an eviction, and especially clearance of large groups that all possible alternatives are examined by consulting the aggrieved persons to avoid or at the least minimize the requirement of using force.
> (i) Those affected by the eviction order must be provided legal remedies or procedures for their aid.
> (ii) States Parties should also ensure that all the persons affected possess a right to adequate compensation for personal and real property that is affected."

General Comment No. 4 underscores the need to take appropriate procedural safeguards, ensuring due process as an essential aspect of all human rights[74] , and outlines procedural protections to be applied in case of an eviction:

> "(a) an occasion to consult genuinely those affected;
> (b) reasonable and adequate notice before the scheduled date of eviction for all affected persons;

[70] *Joe Slovo Community, Western Cape v Thubelisha Home*, (2008) ZACC 1.
[71] *Supra* 28 at para 144.
[72] *Supra* 3, General Comment No. 7, note 13, CESCR.
[73] *Supra* 27 at para 66 and 67.
[74] *Supra* 2 Note 15.

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(c) make available information within reasonable time on evictions proposed and the alternative purpose for which the land or housing is to be used;
(d) presence of government officials or representatives during eviction if large groups are involved,
(e) proper identification of all persons carrying out the eviction;
(f) to not undertake evictions in bad weather or at night unless with the consent of the affected;
(g) make available legal remedies; and
(h) provision of legal aid to persons in need to seek redressal from courts
Stressing that evictions must not result in rendering homeless or vulnerable the affected persons, State parties are urged to undertake appropriate steps as far as possible, to the maximum extent of available resources."[75]

The 1996 South African Constitution is considered a successful example of a transformative constitution particularly due to the inclusion of justiciable socio-economic rights which have enabled the Constitutional Court to expand the enforceability of these rights. In 2000, in an eviction proceeding in the *Grootboom*[76] case, the magistrate while ordering evictions ordered the authorities to look for alternate rehabilitation for the squatters. They were forcibly evicted by the municipality; their homes were bulldozed and possessions destroyed. Respondent squatters then erected temporary shelters on an athletic field in the original settlement. In the South African Constitutional Court's hearing, the appellants including the national, provincial, and municipal governments assured to ameliorate the crisis the respondents were living in. The offer was accepted but after four months appellants did not comply with their offer. Finally, Court found that the eviction was carried out in a manner that breached the obligation under Section 26(1) and ordered that the state should meet its obligations under Section 26(2) by devising, funding, implementing, and supervising measures to provide relief for the squatters. Constitutional Court observed that Section 26(1) confers a general right of access to adequate housing; Section 26 (2) has three elements: (a) the state is obligated to take reasonable and other measures, (b) within its available resources, (c) for achieving the progressive realization of the right, and Section 26 (3) prohibits arbitrary evictions. Considering the minimum core obligation for the "progressive realization of the right to housing to be too complex and time-consuming for which it lacked adequate data", the Court identified "the real question" as "whether the measures taken by the state to realize the right given under Section 26 are reasonable". Therefore, constraining its adjudicatory approach to the reasonableness standard of social rights, the South African Constitutional Court limited the remedy it could offer given the strong foundation of the right to adequate housing under Section 26 afforded by the adoption of a 'transformational constitution' as a result of the post-apartheid struggle of the nation.

[75] *Id.,* Note 16.
[76] *Republic of South Africa v Grootboom*, 2000 11 BCLR 1169.

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Significantly in 2004 in the *Port Elizabeth Municipality*[77] case, Justice Sachs stated that the Prevention of Illegal Eviction and Unlawful Occupation of Land Act is an instance of a "new legislation that synergized elements of grace and compassion into the formal structures of the law by upholding the spirit of *ubuntu*" combining "individual rights with a communitarian philosophy as a feature of the new society."[78] In this case, Municipality sought to evict 68 people including 23 children who erected 29 shacks on private land under it in response to a petition signed by the owners of the property and 1600 people in the neighbourhood. When they were offered alternative land, they refused it as they were apprehensive that they would lose the security of occupation if relocated. In a remarkable decision, South African Constitutional Court dismissed the appeal as it was not just and equitable to evict the occupiers in a unanimous decision considering that they had been living on the land for long, that no mediation took place before the eviction was attempted, and the land in question was not being utilized for any productive use by Municipality or the owners. The principle of negotiation among parties in good faith as well as treating each other on equal terms that were earlier developed in *Grootboom* and later in *Occupiers of 51 Olivia Road* decisions, was not followed in *Port Elizabeth* case, and hence, on this ground alone eviction was prohibited in appeal.[79] In *Occupiers of 51 Olivia Road*[80] in 2008, around 400 petitioners of purportedly unsafe buildings prayed that they not be evicted, an interim order passed by Justice Yacoob ordered the authorities to enter meaningful negotiations with the evictees "who landed in such position as a consequence of city regeneration scheme such that the city may be allowed to complete their scheduled work". Upon consultation, it was agreed that the buildings would only be refurbished and not demolished and the Court referred to the *Grootboom* case underpinning the 'constitutional value of human dignity in judicial practice'. Thus, the Constitutional court, through a reasonableness approach was successful in providing limited substantiveness to the remedy by prescribing to the executive the responsibility of holding a meaningful consultative process thereby mitigating the severe power imbalance between both parties and mandating the municipal authorities to ensure the suitability of the proposed relocation site in order to be eligible for carrying out evictions, yet the review of the court nonetheless, remained constrained in its potential to view the right as a systemic right.

VIII CONCLUSION

With *Olga Tellis* case, the Indian jurisprudence evolved a unique interpretation of the right to shelter and the accompanying right to resettlement as a protection against forced evictions by reading the right in consonance with the right to dignified life and livelihood by relying on Articles 21, 39(a), and 42. However, it is accompanied by a caveat which substantially erodes the justiciability of the right by making the right contingent upon procedure

[77] *Port Elizabeth Municipality v Various Occupier,* 2004 (12) BCLR 1268 (CC).
[78] *Id*. at para 3.
[79] Oscar Vilhena, Upendra Baxi, et al. (eds), *Transformative Constitutionalism: Comparing the Apex Courts Of Brazil, India And South Africa* 451 (Pretoria University Law Press, 2013).
[80] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg*, 2008 (3) SA 208 (CC).

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established by law if it is 'just, fair and reasonable'. The journey of judicial discourse on the

right to shelter and resettlement, from 'eviction' to 'resettlement' partially succeeds in its attempt to humanize and dignify the lives of slum residents but in praxis fails to curtail the inherent brutality in eviction procedures. This is because despite borrowing from international safeguards and South African jurisprudence as witnessed in *Sudama Singh* and *Ajay Maken*, the discourse remains exposed to judicial inconsistencies and arbitrariness as a consequence of the conditional approach adopted by the Supreme Court doing little to afford a substantial meaningful protection. A *posteriori*, justice remains contingent upon state's action of offering crumbs through far flung relocation sites from the city and opportunities of livelihood with little to no access to basic amenities for human sustenance like sanitation, electricity, potable water, etc. In contrast to an individualized remedy as a mandate under a minimum core approach, it is seen that state action under conditional approach is withdrawn prematurely as partially restorative justice. There is enough evidence to show that the executive can go on sublimating procedural safeguards as pleased by acting in contravention to the settled principles of law, mandates of the Constitution, norms under international Conventions that India is party to because it does not perceive the sanction of law until challenged before the court and even then, the court may shy away from holding it accountable neglecting its own jurisdiction as the ultimate custodian and interpreter of the constitution and the Directive Principles of State Policy enshrined. This complex predicament, when on one hand courts lean towards judicial deference due to policy implications and on the other state's inaction and arbitrariness predestines the justiciability of the social right suspended between the two pillars of democracy – the judiciary and the executive, renders the substantial and meaningful realization of the right to the marginalized infructuous and impracticable.

Research reveals the need to engender a robust political dialogue on the right to shelter and presents a promising area employing sociological methodology to further investigate abuse of power by litigants enjoying higher degrees of judicial concern due to their social location, resulting in even courts that label the marginalized as nuisance and criminals. A revamping of policy framework in sync with and not in ignorance of rapid urbanization, the reality of seasonal migrants and a shift in perception of residents in informal residents as equal right holders in the resources of the nation and not as beneficiaries becomes a necessity in order to give any real meaning to their claims of the right to the city. Simultaneously, an assertion by civil society organizations keeping in check their own privileged social status, socially conscious researchers and social rights litigants need to further the social right by acknowledging their indispensable contribution that keeps the city functioning and through strong culture of protests defending the right in face of illegal evictions. Though extensive literature exists on the right's interpretations and adjudicatory approach followed by courts, it demonstrates acute limitations of the conditional approach in justiciability of the right unearthing the need for exploring a systemic rights approach both in research and praxis for a larger protection. Meanwhile, a constructive use of continuing mandamus or structural interdicts relying on supervisory jurisdiction of court characterized by close engagement and

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timely dialogue with the evictee community, and litigants, the executive must supplement the conditional model tying up the government with courts and as seen in *Ajay Maken* case, require the preparation of a priority-based timelines to report back with suggestions and surveys constantly evolving and rectifying plans to meet constitutional responsibilities of the state.